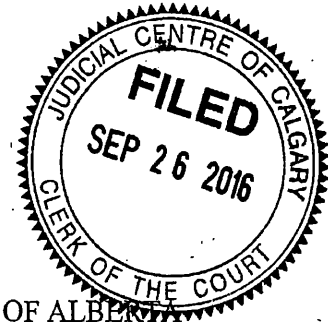


# TAB 1



Clerk's stamp:

COURT FILE NUMBER:

1601-12571

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

I hereby certify this to be a true copy of  
the original Order

IN THE MATTER OF THE COMPANIES'  
CREDITORS ARRANGEMENT ACT, RSC 1985, c  
C-36, as amended

Dated this 26 day of Sept, 2016

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

for Clerk of the Court

APPLICANTS:

LIGHTSTREAM RESOURCES LTD, 1863359  
ALBERTA LTD AND 1863360 ALBERTA LTD

PARTIES IN INTEREST:

LTS RESOURCES PARTNERSHIP AND  
BAKKEN RESOURCES PARTNERSHIP

DOCUMENT:

**CCA INITIAL ORDER**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF PARTY  
FILING THIS DOCUMENT

**BLAKE, CASSELS & GRAYDON LLP**  
Barristers and Solicitors  
3500 Bankers Hall East  
855 - 2<sup>nd</sup> Street SW  
Solicitor: Kelly Bourassa / Milly Chow  
Telephone: 403-260-9697 / 416-863-2594  
Facsimile: 403-260-9700  
Email: [kelly.bourassa@blakes.com](mailto:kelly.bourassa@blakes.com) /  
[milly.chow@blakes.com](mailto:milly.chow@blakes.com)  
File Number: 89691/8

DATE ON WHICH ORDER WAS PRONOUNCED: September 26, 2016

NAME OF JUDGE WHO MADE THIS ORDER: Honourable Mr. Justice A.D.  
Macleod

LOCATION OF HEARING: Calgary Courts Centre

UPON the application of Lightstream Resources Ltd. ("LTS"), 1863359 Alberta Ltd. and 1863360 Alberta Ltd. (collectively with LTS, the "**Applicants**"); AND UPON having read the Originating Application, the Affidavit of Peter D. Scott, sworn September 21, 2016, filed (the "**Scott Affidavit**"), the Supplemental Affidavit of Peter D. Scott, sworn September 23, 2016, filed and the Affidavits of Service of Serene Hawkins, sworn September 22, 2016, and September 26, 2016, each filed; AND UPON reading the consent of FTI Consulting Canada Inc. to act as monitor (the "**Monitor**"); AND UPON noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; AND UPON hearing counsel for the Applicants, counsel for the agent (the "**Agent**") and certain other financial institutions, as lenders (together with the Agent, the "**First Lien Lenders**") under a third amended and restated credit agreement, as amended from time to time, dated as of May 29, 2015 (the "**Credit Agreement**"), counsel for an *ad hoc* committee of certain holders (the "**Ad Hoc Committee**") of 9.875% second lien secured notes due June 15, 2019 pursuant to a note indenture dated July 2, 2015, counsel for certain holders (the "**Unsecured Noteholders**") of 8.625% senior unsecured notes due February 1, 2020 pursuant to a note indenture dated January 30, 2012, and counsel for other interested parties; **IT IS HEREBY ORDERED AND DECLARED THAT:**

#### **SERVICE**

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

#### **APPLICATION**

2. The Applicants are companies to which the CCAA applies and, although not Applicants, LTS Resources Partnership and Bakken Resources Partnership (collectively, the "**CCAA Parties**") are necessary parties and shall receive the benefit of the relief granted in this Order.

### PLAN OF ARRANGEMENT

3. The Applicants and the CCAA Parties shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "**Plan**").
4. The First Lien Lenders shall be treated as unaffected in any Plan filed by the Applicants and the CCAA Parties under the CCAA, or any proposal filed by the Applicants and the CCAA Parties under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), with respect to any obligations of the Applicants and the CCAA Parties under the Credit Agreement or the Loan Documents, including the Swap Documents (each as defined in the Credit Agreement). The Applicants and the CCAA Parties are hereby authorized and, to the extent within the control of the Applicants and the CCAA Parties, directed to fulfil their obligations under the Second Forbearance Agreement dated September 15, 2016, between the Applicants, the CCAA Parties, the Agent and the First Lien Lenders (the "**Forbearance Agreement**").

### POSSESSION OF PROPERTY AND OPERATIONS

5. The Applicants and the CCAA Parties shall:
  - (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");
  - (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;
  - (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order;
  - (d) subject to the terms of the Forbearance Agreement, continue to have access to their cash accounts with The Toronto-Dominion Bank;

- (e) be entitled to continue to utilize the corporate credit cards in place with HSBC Bank Canada (the "**Credit Cards**"). HSBC Bank Canada is hereby granted a charge (the "**Credit Card Charge**") on the Property to secure all obligations owed to it by the Applicants or the CCAA Parties relating to the Credit Cards, including without limitation principal interest and fees, to a maximum amount of \$105,000. The Credit Card Charge shall have the priority set out in paragraphs 35 and 37 hereof;
  - (f) be entitled to continue to utilize the centralized Cash Management System currently in place as described at paragraph 39 of the Scott Affidavit, and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined herein) other than the Applicants and the CCAA Parties; and
  - (g) be authorized to make inter-company transfers and advances to pay costs, expenses and amounts otherwise authorized in these proceedings.
6. To the extent permitted by law, the Applicants and the CCAA Parties shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:
- (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and
  - (b) the fees and disbursements of any Assistants retained or employed by the Applicants and the CCAA Parties in respect of these proceedings, at their standard rates and charges.

7. The engagement letter entered into between TD Securities Inc., ("**TD Securities**") and LTS dated May 26, 2016, the engagement letter entered into between Evercore Capital L.L.C. ("**Evercore**") and LTS dated May 1, 2016, the engagement letter entered into between RBC Dominion Securities Inc. ("**RBC**") and LTS dated June 1, 2016, as amended on July 14, 2016, and the engagement letter entered into among BMO Nesbitt Burns Inc. ("**BMO**"), LTS, Goodmans LLP and the members of the *Ad Hoc* Committee and dated May 17, 2016 (the "**Financial Advisors' Engagement Letters**") attached as Exhibits "16", "17", "18" and "21" to the Scott Affidavit, are hereby approved and LTS is authorized and directed to continue the engagement of TD Securities, Evercore and RBC as Assistants thereunder and to comply with all of its obligations thereunder (TD Securities, Evercore, RBC and BMO in its capacity as financial advisor to the *Ad Hoc* Committee; are hereinafter collectively referred to as the "**Financial Advisors**"). The Financial Advisors are hereby granted a single charge in the maximum aggregate amount of \$19,410,000 (collectively, the "**Financial Advisors' Charge**") on the Property to secure all obligations under the Financial Advisors' Engagement Letters. The Financial Advisors' Charge shall have the priority set out in paragraphs 35 and 37 hereof. The claims of the Financial Advisors under the Financial Advisors' Engagement Letters shall be treated as unaffected in any Plan filed by the Applicants and the CCAA Parties under the CCAA, or any proposal filed by the Applicants and the CCAA Parties under the BIA.
8. Except as otherwise provided to the contrary herein, the Applicants and the CCAA Parties shall be entitled but not required to pay all reasonable expenses incurred by the Applicants or the CCAA Parties in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
  - (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;
  - (b) payment for goods or services actually supplied to the Applicants or the CCAA Parties following the date of this Order;

- (c) payments in respect of the Credit Cards required by paragraph 5(e) hereof; and
- (d) subject to the cash flow forecast attached as Exhibit "22" to the Scott Affidavit (the "**Cash Flow Forecast**"), payment of certain pre-filing amounts or honouring cheques issued prior to the date of filing that, in consultation with the Monitor, are necessary to facilitate the Applicants' and the CCAA Parties' ongoing operations.

9. The Applicants and the CCAA Parties shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

- (i) employment insurance,
- (ii) Canada Pension Plan, and
- (iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants or the CCAA Parties in connection with the sale of goods and services by the Applicants or the CCAA Parties, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

- (c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants and the CCAA Parties.

10. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants and the CCAA Parties may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants or the CCAA Parties from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.
11. Except as specifically permitted in this Order, the Applicants and the CCAA Parties are hereby directed, until further order of this Court:
  - (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants or the CCAA Parties to any of their creditors as of the date of this Order other than interest payments under the Credit Agreement and other Loan Documents (as defined in the Credit Agreement);
  - (b) to grant no security interests, trusts, liens, charges or encumbrances upon or in respect of any of their Property; and
  - (c) not to grant credit or incur liabilities except in the ordinary course of the Business.

## **RESTRUCTURING**

12. The Applicants and the CCAA Parties shall, subject to such requirements as are imposed by the CCAA and the terms and conditions of the Amended and Restated Support Agreement entered into among the Applicants, the CCAA Parties and the members of the Ad Hoc Committee (the "**Support Agreement**"), have the right to:
  - (a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding \$3,000,000 in any one transaction or \$12,500,000 in the aggregate, with proceeds paid to the Agent in permanent reduction of any obligations under the Credit Agreement and the Loan Documents (as defined in the Credit Agreement), provided that any sale that is either (i) in excess of the above thresholds, or (ii) in



favour of a person related to the Applicants and the CCAA Parties (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants or the CCAA Parties and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and
- (c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants and the CCAA Parties to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. The Applicants and the CCAA Parties shall provide each of the relevant landlords with notice of the Applicants' or the CCAA Parties' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' or the CCAA Parties' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants or the CCAA Parties, as applicable, or by further order of this Court upon application by the Applicants and the CCAA Parties on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants or the CCAA Parties disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' or the CCAA Parties' claim to the fixtures in dispute.

14. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:
- (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants, the CCAA Parties and the Monitor 24 hours' prior written notice; and
  - (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants or the CCAA Parties, as applicable, in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants or the CCAA Parties, as applicable, of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE APPLICANTS, THE CCAA PARTIES OR THE PROPERTY**

15. Until and including October 26, 2016, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants, the CCAA Parties or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or the CCAA Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

16. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory

or non-statutory against or in respect of the Applicants, the CCAA Parties or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

- (a) empower the Applicants and the CCAA Parties to carry on any business which the Applicants and the CCAA Parties are not lawfully entitled to carry on;
- (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;
- (c) prevent the filing of any registration to preserve or perfect a security interest; or
- (d) prevent the registration of a claim for lien.

17. Nothing in this Order shall prevent any party from taking an action against the Applicants or the CCAA Parties where such an action must be taken in order to comply with statutory time limitations in order to preserve its rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

#### **NO INTERFERENCE WITH RIGHTS**

18. During the Stay Period, no person (other than the First Lien Lenders, in respect of any rights of termination under the Forbearance Agreement, and the *Ad Hoc* Committee, in respect of any rights of termination under the Support Agreement) shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants or the CCAA Parties, including, without limitation, any rights or remedies or provision that purports to effect or cause a cessation of operatorship, in any agreement, construction, ownership and operating agreement, joint venture agreement or any such similar agreements to which any of the Applicants or CCAA Parties is a party as a result of the occurrence of any default or non-performance by or the insolvency of any of the Applicants or the CCAA Parties, the making or filing of these proceedings or any

allegation, admission or evidence in these proceedings and under no circumstances shall any of the Applicants or the CCAA Parties be replaced as operator pursuant to any such agreements, except with the written consent of the Applicants or the CCAA Parties, as applicable, and the Monitor, or leave of this Court.

#### **CONTINUATION OF SERVICES**

19. During the Stay Period, all persons having:

- (a) statutory or regulatory mandates for the supply of goods and/or services; or
- (b) oral or written agreements or arrangements with the Applicants or the CCAA Parties, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business, the Applicants or the CCAA Parties,

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or the CCAA Parties or exercising any other remedy provided under such agreements or arrangements. The Applicants and the CCAA Parties shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants and the CCAA Parties in accordance with the payment practices of the Applicants and the CCAA Parties, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants, the CCAA Parties, and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

#### **NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT**

20. Notwithstanding anything else contained in this Order, no creditor of the Applicants or the CCAA Parties shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants or the CCAA Parties.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 17 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants or the CCAA Parties whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants and the CCAA Parties, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants and the CCAA Parties or this Court.

#### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

22. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
23. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of \$2,500,000, as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 35 and 37 herein.

24. Notwithstanding any language in any applicable insurance policy to the contrary:
- (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and
  - (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 22 of this Order.

#### **APPOINTMENT OF MONITOR**

25. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs of the Applicants and the CCAA Parties with the powers and obligations set out in the CCAA or set forth herein and that the Applicants, the CCAA Parties and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants or the CCAA Parties pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.
26. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- (a) monitor the Applicants' and the CCAA Parties' receipts and disbursements, Business and dealings with the Property;
  - (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants and the CCAA Parties;
  - (c) advise the Applicants and the CCAA Parties in their development of the Plan and any amendments to the Plan;

- (d) advise the Applicants and the CCAA Parties, to the extent required by them, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
  - (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants and the CCAA Parties to the extent that is necessary to adequately assess the Applicants' and the CCAA Parties' Property, Business and financial affairs or to perform its duties arising under this Order;
  - (f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
  - (g) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants or the CCAA Parties and any other Person; and
  - (h) perform such other duties as are required by this Order or by this Court from time to time.
27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

28. The Monitor shall provide any creditor of the Applicants or the CCAA Parties with information provided by the Applicants or the CCAA Parties in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants or the CCAA Parties is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants or the CCAA Parties, as applicable, may agree.
29. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.
30. The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PricewaterhouseCoopers Inc. ("PwC"), in its capacity as financial advisor to the First Lien Lenders, counsel to the *Ad Hoc* Committee and BMO (on account of BMO's monthly work fee) shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements) in each case at their standard rates and charges, by the Applicants and the CCAA Parties as part of the costs of these proceedings. The Applicants and the CCAA Parties are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and the CCAA Parties, counsel for the First Lien Lenders, PwC and counsel for the *Ad Hoc* Committee on a bi-weekly basis and the accounts of BMO on a monthly basis, in addition, the Applicants and the CCAA Parties are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants and the CCAA Parties, retainers in the respective amounts of \$100,000, \$100,000 and \$250,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.
31. The Monitor and its legal counsel shall pass their accounts from time to time.



32. The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PwC, counsel to the *Ad Hoc* Committee and BMO (on account of BMO's monthly work fee), as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$2,000,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor, PwC, and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 35 and 37 hereof.

#### **KEY EMPLOYEE RETENTION AND INCENTIVE PLANS**

33. The Key Employee Retention Plan and the Key Employee Incentive Plan described in the Scott Affidavit (the "**KERP**" and "**KEIP**", respectively), are hereby authorized and approved and the Applicants and the CCAA Parties are authorized and directed to make the payments contemplated in the KERP and the KEIP. The directors and officers of the Applicants shall have no liability for the payments contemplated in the KERP or the KEIP (and for certainty, any and all claims under the KERP or the KEIP shall be secured solely by the KERP Charge or the KEIP Charge (each as defined below), as applicable, and shall not be secured, directly or indirectly, by the Directors' Charge).
34. The beneficiaries of the KERP are hereby granted a charge (the "**KERP Charge**") on the Property to secure all obligations under the KERP, up to the maximum amount of \$4,115,250. The beneficiaries of the KEIP are hereby granted a charge (the "**KEIP Charge**") on the Property to secure all obligations under the KEIP, up to the amount of \$5,007,417. The KERP Charge and the KEIP Charge shall have the priority set out in paragraphs 35 and 37 hereof.

## VALIDITY AND PRIORITY OF CHARGES

35. The priorities of the Administration Charge, the Credit Card Charge, the Directors' Charge, the KERP Charge, the KEIP Charge and the Financial Advisors' Charge, as among them, shall be as follows:
- First – Administration Charge (to the maximum amount of \$2,000,000);
  - Second – Credit Card Charge (to the maximum amount of \$105,000);
  - Third – Directors' Charge (to the maximum amount of \$2,500,000);
  - Fourth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) KERP Charge (to the maximum amount of \$4,115,250);
  - Fifth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) KEIP Charge (to the maximum amount of \$5,007,417); and
  - Sixth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) Financial Advisors' Charge (to the maximum amount of \$19,410,000),
- (all of which are, collectively, the "**Charges**").
36. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
37. The Charges (all as constituted and defined herein) shall constitute a charge on the Property and, subject always to section 34(11) of the CCAA, such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except as otherwise set out herein.
38. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants and the CCAA Parties shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the

Applicants and the CCAA Parties also obtain the prior written consent of the Monitor, and the other beneficiaries of the Charges, or further order of this Court.

39. The Charges, shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the thereunder shall not otherwise be limited or impaired in any way by:
- (a) the pendency of these proceedings and the declarations of insolvency made in this Order;
  - (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;
  - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
  - (d) the provisions of any federal or provincial statutes; or
  - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants or the CCAA Parties, and notwithstanding any provision to the contrary in any Agreement:
    - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants or the CCAA Parties of any Agreement to which it is a party;
    - (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
    - (iii) the payments made by the Applicants and the CCAA Parties pursuant to this order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive

conduct or other challengeable or voidable transactions under any applicable law.

#### **ALLOCATION**

40. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges, amongst the various assets comprising the Property.

#### **SALE PROCEDURES**

41. The sale procedures (the "**Sale Procedures**") attached as Appendix "A" to this Order be and are hereby approved, and TD Securities, the Monitor, the Applicants and the CCAA Parties are authorized and directed to perform each of their obligations thereunder and to do all things reasonably necessary to perform their obligations thereunder.
42. Each of the Monitor and TD Securities, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the Sale Procedures, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor or TD Securities, as applicable, in performing its obligations under the Sale Procedures (as determined by this Court).
43. In connection with the Sale Procedures and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act (Canada)*, the Applicants, the CCAA Parties, TD Securities and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sale transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicants, the CCAA Parties, TD Securities or the Monitor, as

applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants and the CCAA Parties, and shall return all other personal information to the Applicants, the CCAA Parties, TD Securities or the Monitor, as applicable, or ensure that all other personal information is destroyed.

#### **SEALING**

44. The Confidential KERP/KEIP Summary marked as Exhibit "20" of the Scott Affidavit shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Confidential KERP/KEIP Summary shall be kept confidential and shall not form part of the public record. The Confidential KERP/KEIP Summary shall be placed, separate and apart from all contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

#### **SERVICE AND NOTICE**

45. The Monitor shall (i) without delay, publish in the Calgary Herald, Daily Oil Bulletin, and Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants or the CCAA Parties of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.
46. The Applicants, the CCAA Parties, and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence,

by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' and the CCAA Parties' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and the CCAA Parties and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at [cfcanada.fticonsulting.com/Lightstream](http://cfcanada.fticonsulting.com/Lightstream) and shall post there as soon as practicable:

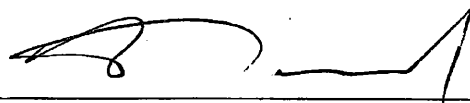
- (a) all materials prescribed by statute or regulation to be made publically available; and
- (b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

#### **GENERAL**

- 47. The Applicants, the CCAA Parties or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
- 48. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.
- 49. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the CCAA Parties, the Business or the Property.
- 50. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory

and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, the CCAA Parties and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants, the CCAA Parties and the Monitor and their respective agents in carrying out the terms of this Order.

51. Each of the Applicants, the CCAA Parties and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
52. Any interested party (including the Applicants, the CCAA Parties and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.
53. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.



---

Justice of the Court of Queen's Bench of Alberta

## Appendix "A"

### LIGHTSTREAM

#### Sale Procedures

Pursuant to an initial order (as it may be amended, restated or supplemented from time to time, the "Initial Order") of the Court of Queen's Bench of Alberta (the "Court") dated September 26, 2016, Lightstream Resources Ltd. ("LTS") and its wholly owned direct and indirect subsidiaries, 1863359 Alberta Ltd. and 1863360 Alberta Ltd., LTS Resources Partnership and Bakken Resources Partnership (collectively, "Lightstream" or the "Company", and each individually, a "Lightstream Entity") obtained protection from their creditors pursuant to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA") bearing Court File No. 1601-12571 (the "CCAA Proceedings").

Pursuant to the Initial Order, the Court approved sale procedures to be continued in respect of the Company to seek a Successful Bid, in accordance with the terms and conditions set forth herein (as such process may be amended, restated or supplemented pursuant to the terms herein, the "Sale Procedures").

#### Defined Terms; Interpretation

1. All capitalized terms used herein shall have the meanings given to them in **Appendix "A"** hereto.

#### Sale Process

2. These Sale Procedures describe, among other things (collectively, the "Sale Process"):
  - (a) the manner and timelines in which any interested party (each, a "Prospective Bidder") may gain access to or continue to have access to due diligence materials concerning the Lightstream Property and the Lightstream Business;
  - (b) the manner and timelines in which Prospective Bidders may submit an Indication of Interest for all or substantially all of the Lightstream Property or any of the Parcels, and the required content of any Indication of Interest;
  - (c) the manner and timelines in which Qualified Phase I Bidders may submit a Qualified Indication of Interest and the required content of a Qualified Indication of Interest;
  - (d) the manner and timelines in which Qualified Phase II Bidders may submit a Qualified Bid and the required content of a Qualified Bid;
  - (e) the process and criteria for the ultimate selection of one or more Successful Bids; and
  - (f) the process for obtaining approval of one or more Successful Bids by the Court.



### **Conduct of the Sale Procedures**

3. The Sale Process will be carried out by the Company in accordance with these Sale Procedures, with the assistance of, and in consultation with, the Sale Advisor and the Monitor. The Company, the Sale Advisor and the Monitor are fully and exclusively authorized, empowered and directed to take any and all actions and steps pursuant to these Sale Procedures. In the event that there is a disagreement as to the interpretation or application of these Sale Procedures, the Court will have the jurisdiction to hear and resolve such dispute.
4. In addition to the disclosure covenants in the Support Agreement with the *Ad Hoc* Committee of Second Lien Noteholders and the Second Forbearance Agreement with the First Lien Lenders, the Company shall provide the *Ad Hoc* Committee of Second Lien Noteholders, the First Lien Agent and their respective legal and financial advisors, on a confidential basis, with such additional information and disclosures regarding the Sale Process (Indications of Interest and Qualified Phase 1 Bidders, Qualified Bids and Qualified Phase II Bidders, Successful Bids and Successful Bidders) as they may request.

### **Sale Opportunity**

5. The Sale Advisor, in consultation with the Company, the Monitor and their respective advisors, shall prepare a list of persons who may constitute Prospective Bidders and shall distribute to each such person, (a) the Process Letter, (b) a teaser (the "**Teaser**") describing the opportunity to acquire the Lightstream Property or any of the Parcels, (c) a copy of the Initial Order (including the Sale Procedures), and (d) the form of required Confidentiality Agreement. Any offer for a Parcel will be considered in combination with other offers, if any, received for other Parcels.

### **"As Is, Where Is"**

6. Any Sale will be on an "as is, where is" and "without recourse" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by the Company, Sale Advisor, Monitor or any of their Representatives, except to the extent set forth in a Definitive Agreement with a Successful Bidder.

### **Free of Any and All Claims and Interests**

7. Except to the extent otherwise set forth in the relevant definitive purchase and sale agreement (a "**Definitive Sale Agreement**") with a Successful Bidder, in the event of a Sale, all of the rights, title and interests of the Company in and to the Lightstream Property or any of the Parcels to be acquired pursuant to an approval and vesting Order of the Court will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon.

### **Participation Requirements**

8. Unless otherwise provided for herein, ordered by the Court, or agreed by the Company, in order to participate in the Sale Procedures and be considered for qualification as a Qualified Phase I Bidder, a Prospective Bidder must deliver to the Company in the

manner and at the address specified in **Schedule "A"** hereto, and prior to the distribution of any confidential information by the Company to a Prospective Bidder:

- (a) an executed Confidentiality Agreement, which shall enure to the benefit of any Successful Bidder of the Lightstream Property or any of the Parcels on the closing of the Successful Bid;
  - (b) a specific indication of the anticipated sources of capital for such Prospective Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit support or enhancement that will allow the Company and its Representatives, including the Sale Advisor, to make, in their reasonable business or professional judgment, a determination as to the Prospective Bidder's financial and other capabilities to consummate the proposed Sale.
  - (c) a letter setting forth the identity of the Prospective Bidder, the contact information for such Prospective Bidder, full disclosure of the direct and indirect owners of the Prospective Bidder and their principals; and
  - (d) a written acknowledgement of receipt of a copy of the Initial Order approving these Sale Procedures and agreeing to accept and be bound by the provisions contained therein.
9. A Prospective Bidder that has satisfied all of the requirements described in section 8 above and who the Company, in consultation with the Sale Advisor and the Monitor, determines has a reasonable prospect of completing a transaction contemplated herein, will be deemed a "**Qualified Phase I Bidder**" and will be promptly notified of such classification by the Company. Notwithstanding these requirements, the Company may, in consultation with the Sale Advisor and the Monitor, designate any Prospective Bidder as a Qualified Phase I Bidder in its sole discretion.

#### **Due Diligence**

10. The Company or Sale Advisor shall provide any person deemed to be a Qualified Phase I Bidder with access to the Data Room and the Company shall provide to the Qualified Phase I Bidders further access to such due diligence materials and information relating to (i) the Lightstream Property available for Sale (including the Parcels); and (ii) the debt and equity interests of the Company as the Company deems appropriate, including, as appropriate, access to further information in the Data Room, and management presentations, where appropriate and only to the extent that such management presentations do not cause unreasonable disruption to the Company's management and/or the Lightstream Business operations.
11. The Company and its Representatives (including the Sale Advisor) and the Monitor do not make any representations or warranties whatsoever, and shall have no liability of any kind whatsoever, as to the information or the materials provided through the due diligence process or otherwise made available to any Prospective Bidder, Qualified Phase I Bidder, Qualified Phase II Bidder, Qualified Bidder, Qualified Parcel Bidder, or Successful Bidder, with respect to the Lightstream Property or any of the Parcels, Lightstream or the Lightstream Business, including any information contained in the

Process Letter, Teaser, or Data Room and provided or made in any management presentations.

12. The Company reserves the right to limit any Prospective Bidder's or Qualified Phase I Bidder's access to any confidential information (including any information in the Data Room), where, in the Company's discretion, such access could negatively impact the Sale Procedures, the ability to maintain the confidentiality of confidential information, or the value of the Lightstream Property. Requests for additional information are to be made to the Sale Advisor.

### Phase I

#### ***Seeking Indications of Interest from Qualified Phase I Bidders***

13. From the Filing Date until the Phase I Bid Deadline, the Company and the Sale Advisor will continue to identify and qualify Qualified Phase I Bidders, and will solicit non-binding indications of interest from Qualified Phase I Bidders to acquire all of the Lightstream Property or any of the Parcels (each an "**Indication of Interest**").
14. In order to continue to participate in these Sale Procedures, a Qualified Phase I Bidder must deliver an Indication of Interest to the Company in the manner and at the address specified in **Schedule "A"** hereto so as to be received not later than 5:00 p.m. (Mountain Time) on Friday, October 21, 2016 or such later date or time as the Company may determine appropriate in consultation with the First Lien Agent, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor, or as the Court may order (as it may be extended, as described in this section 14, the "**Phase I Bid Deadline**").

#### ***Indications of Interest by Qualified Phase I Bidders***

15. Subject to Section 16, unless otherwise ordered by the Court, an Indication of Interest will be considered a "**Qualified Indication of Interest**" only if:
  - (a) it is submitted by a Qualified Phase I Bidder, received on or before the Phase I Bid Deadline;
  - (b) contains an indication of whether the Qualified Phase I Bidder is making an offer to acquire all of the Lightstream Property or any of the Parcels (a "**Sale Proposal**"), which identifies:
    - (i) the Lightstream Property or Parcels to be included in the Sale Proposal and a detailed listing of any of the assets to be excluded from the Sale Proposal;
    - (ii) the proposed purchase price for such Sale Proposal, and an explanation of proposed adjustments, if any, to the final purchase price payable at closing;
    - (iii) details as to the form of consideration for the Sale Proposal, including, if non-cash consideration is being offered, supporting rationale for the value being ascribed to such consideration;

- (iv) a description of any liabilities to be assumed by the Qualified Phase I Bidder and the Qualified Phase I Bidder's estimated value of such assumed liabilities;
- (v) a specific indication of sources of capital for the Qualified Phase I Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit-quality support or enhancement, including contact information for capital/financing sources, that will allow the Company to make a reasonable business judgement as to the Qualified Phase I Bidder's financial or other capabilities to consummate the contemplated transaction;
- (vi) an acknowledgement that the contemplated Sale will be made on an "as is, where is" and "without recourse" basis;
- (vii) a description of approvals (including approvals from the board of directors, management, or investment committee, as applicable) received to date authorizing submission of the Sale Proposal and any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;
- (viii) specific statements concerning the treatment of employees and plans for the ongoing involvement and roles of the Company's employees;
- (ix) a timeline to closing with critical milestones and a statement with respect to the Qualified Phase I Bidder's ability to consummate the contemplated transaction by the Outside Closing Date;
- (x) a detailed description of any additional due diligence required or desired to be conducted prior to the Phase II Bid Deadline, if any, and an estimated timeline for the completion of such due diligence (including with respect to any specific technical diligence matters relating to petroleum and natural gas rights or wells owned by the Company or any environmental due diligence);
- (xi) all material conditions to closing that the Qualified Phase I Bidder may wish to impose;
- (xii) an indication as to whether the Qualified Phase I Bidder is intending to effect the Sale Proposal through a special purpose vehicle;
- (xiii) any other terms and conditions which the Qualified Phase I Bidder believes are material to the transaction;
- (xiv) contact information for any business, financial or legal advisors retained or to be retained in connection with the contemplated transaction; and
- (xv) such other information reasonably requested by the Lightstream Group.

16. For greater certainty, the Company shall be entitled, either prior to or following the Phase I Bid Deadline, to seek to clarify the terms of an Indication of Interest or with respect to any of the other requirements of section 15 above, and the Company, in consultation with the Monitor, may accept a revised, clarified Indication of Interest, provided that the initial Indication of Interest was received prior to the Phase I Bid Deadline. The Company, in consultation with the Sale Advisor and the Monitor, may waive compliance with any one or more of the requirements specified in Sections 15, and deem any non-compliant Indication of Interest to be a Qualified Indication of Interest.

**Assessment of Qualified Indications of Interest**

17. Promptly following the Phase I Bid Deadline, the Company will, in consultation with the Sale Advisor and the Monitor, assess Qualified Indications of Interest received during Phase I, if any, and will determine whether there is a reasonable prospect of obtaining a Qualified Bid. For the purpose of such consultations and evaluations, the Company, the Sale Advisor and the Monitor may request clarification of the terms of any Qualified Indication of Interest.
18. In assessing a Qualified Indication of Interest, the Company, following consultation with the Monitor, will consider, among other things, the following:
- (a) whether the form and amount of consideration being offered will satisfy at closing the Qualified Consideration Requirement;
  - (b) whether the cash consideration being offered, will be sufficient at closing to satisfy the Secured Debt Repayment Requirement;
  - (c) the nature and amount of debt and other liabilities to be assumed by the Qualified Phase I Bidder;
  - (d) the assets to be included in or excluded from the Sale Proposal and the transaction costs and risks associated with closing multiple transactions versus a single sale transaction for all, or substantially all, of the Lightstream Property;
  - (e) the demonstrated financial capability of the Qualified Phase I Bidder to consummate the proposed transaction;
  - (f) the transition services required from the Company post-closing and any related costs;
  - (g) the proposed treatment of stakeholders, including the shareholders, First Lien Lenders, Second Lien Noteholders, Unsecured Noteholders, employees and other creditors;
  - (h) the conditions to closing of the proposed transaction; and
  - (i) other factors affecting the speed, certainty and value of the Sale Proposal (including any remaining due diligence, regulatory approvals and others conditions required to close on or before the Outside Closing Date and whether,

in the Company's reasonable business judgment, it is reasonably likely to close on or before the Outside Closing Date.

19. If the Company, in consultation with the Sale Advisor and the Monitor, determine that there are or will be no Qualified Indication of Interest that would be sufficient to satisfy the Qualified Consideration Requirement and the Secured Debt Repayment Requirement at closing, the Credit Bid shall be deemed to be the "**Successful Bid**" and the Credit Bid Party shall be the "**Successful Bidder**" and the Company may forthwith terminate these Sale Procedures and seek to implement the Credit Bid.
20. If the Company, in consultation with the Monitor, determines that (i) one or more Qualified Indications of Interest (other than the Credit Bid) were received that would be sufficient to satisfy the Qualified Consideration Requirement and the Secured Debt Repayment Requirement at closing, and (ii) proceeding with these Sale Procedures is in the best interests of the Company and its stakeholders, these Sale Procedures will continue and each Qualified Phase I Bidder who has submitted a Qualified Indication of Interest that is determined by the Company likely to be able to be consummated, shall be deemed to be, and notified by the Company that it is, a "**Qualified Phase II Bidder**".

## Phase II

### ***Seeking Qualified Bids by Qualified Phase II Bidders***

21. In order to continue to participate in these Sale Procedures, a Qualified Phase II Bidder must deliver a Qualified Bid to the Company and such bid must be received by the Company no later than 5:00 p.m. (Mountain Time) on Monday, November 21, 2016 or such later date or time as the Company may determine appropriate in consultation with the First Lien Lenders, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor (the "**Phase II Bid Deadline**").

### ***Qualified Bids***

22. A Sale Proposal submitted by a Qualified Phase II Bidder will be considered a "**Qualified Bid**" only if the Sale Proposal complies with all of the following:
  - (a) it is received by no later than the Phase II Bid Deadline;
  - (b) it includes a letter stating that the Sale Proposal is irrevocable until the earlier of (i) 11:59 p.m. on the Business Day following the closing of a transaction with a Successful Bidder in respect of the Lightstream Property or the same Parcel thereof, and (ii) thirty (30) Business Days following the Phase II Bid Deadline; provided, however, that if such Sale Proposal is selected as a Successful Bid, it shall remain irrevocable until 11:59 p.m. (Mountain Time) on the Business Day following the closing of the Successful Bid or Successful Bids, as the case may be;
  - (c) it includes a duly authorized and executed Definitive Agreement based on the Form of Purchase Agreement and accompanied by a mark-up (in the form of a blackline) of the Form of Purchase Agreement showing proposed amendments and modifications made thereto, specifying the consideration, and such ancillary agreements as may be required by the Qualified Phase II Bidder with all exhibits

and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements) and the proposed Orders to approve such Sale by the Court;

- (d) it does not include any request or entitlement to any break-fee, expense reimbursement or similar type of payment;
- (e) it provides for consideration at closing sufficient to satisfy the Qualified Consideration Requirement;
- (f) it provides for cash consideration at closing sufficient to satisfy the Secured Debt Repayment Requirement;
- (g) it includes evidence sufficient to allow the Company, in consultation with the Monitor, to make a reasonable determination as to the bidder's (and its direct and indirect owners' and their principals') financial and other capabilities to consummate the transaction contemplated by the Sale Proposal, which evidence could include but is not limited to evidence of a firm, irrevocable commitment for all required funding and/or financing from a creditworthy bank or financial institution;
- (h) it is not conditioned on (i) the outcome of unperformed due diligence by the Qualified Phase II Bidder and/or (ii) obtaining any financing capital and includes an acknowledgement and representation that the Qualified Phase II Bidder has had an opportunity to conduct any and all required due diligence prior to making its Sale Proposal;
- (i) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Sale Proposal, including the identification of the Qualified Phase II Bidder's direct and indirect owners and their principals, and the complete terms of any such participation;
- (j) it includes an acknowledgement and representation that the Qualified Phase II Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its Sale Proposal; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, including by the Company, Sale Advisor or Monitor or any of their Representatives, except as expressly stated in the Definitive Sale Agreement submitted by it; (iii) is a sophisticated party capable of making its own assessments in respect of making its Sale Proposal; and (iv) has had the benefit of independent legal advice in connection with its Sale Proposal;
- (k) it includes evidence, in form and substance reasonably satisfactory to the Company, in consultation with the Monitor, of authorization and approval from the Qualified Phase II Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the Sale Proposal;

- (l) except in the case of a Credit Bid, it is accompanied by a refundable deposit (the "Deposit") in the form of a wire transfer delivered to the Monitor (to a trust account specified by the Monitor); or such other form acceptable to the Monitor, in trust, in an amount equal to two and a half percent (2.5%) of the proposed gross Purchase Price, to be held and dealt with in accordance with these Sale Procedures;
- (m) it provides for closing of a Qualified Bid by no later than the Outside Closing Date;
- (n) if the Qualified Phase II Bidder is an entity newly formed for the purpose of the transaction, the bid shall contain an equity or debt commitment letter from the parent entity or sponsor, which is satisfactory to the Company, that names the Company as a third party beneficiary of any such commitment letter with recourse against such parent entity or sponsor;
- (o) it includes evidence, in form and substance reasonably satisfactory to the Company, in consultation with the Monitor, of compliance or anticipated compliance with any and all applicable Canadian and any foreign regulatory approvals (including, if applicable, anti-trust regulatory approval and any approvals with respect to the grant or transfer of any permits or licenses), the anticipated time frame for such compliance and any anticipated impediments for obtaining such approvals;
- (p) it includes specific statements concerning the proposed treatment of employees and plans for the ongoing involvement and roles of the Company's employees;
- (q) it identifies the particular contracts and leases the Qualified Phase II Bidder wishes to assume and reject, contains full details of the Qualified Phase II Bidder's proposal for the treatment of related cure costs (and provides adequate assurance of future performance thereunder) and it identifies any particular executory contract or unexpired lease the assumption and assignment of which is a condition to closing; and
- (r) it contains other information reasonably requested by the Company, in consultation with the Sale Advisor and the Monitor.

#### Qualified Bids

- 23. Each bidder who has submitted a Qualified Bid shall hereinafter be referred to as a "Qualified Bidder".
- 24. For greater certainty, a Sale Proposal may be in respect of only one or more Parcels and in such case, such Sale Proposal shall constitute a "Qualified Parcel Bid" if it satisfies the requirements in section 22 hereof, as applicable, and in such case, the bidder shall constitute a "Qualified Parcel Bidder". Each Qualified Parcel Bid shall be deemed to be a Qualified Bid, and each Qualified Parcel Bidder shall be deemed to be a Qualified Bidder for all purposes of the Sale Procedures.
- 25. The Credit Bid shall be deemed to be a Qualified Bid and the Credit Bid Party shall be deemed to be a Qualified Bidder for the purposes of these Sale Procedures.



26. For greater certainty, the Company shall be entitled, either prior to or following the Phase II Bid Deadline, to seek to clarify the terms of any Sale Proposal submitted by a Qualified Phase II Bidder, and the Company, in consultation with the Monitor, may accept a revised and/or clarified Sale Proposal, provided that the initial Sale Proposal by the Qualified Phase II Bidder was received prior to the Phase II Bid Deadline.
27. Notwithstanding section 22 hereof, the Company, in consultation with the Monitor, may waive compliance with any one or more of the Qualified Bid requirements specified herein, and deem such non-compliant bids to be Qualified Purchase Bids; provided, however, that the Company shall not be entitled to waive the Qualified Consideration Requirement and Secured Debt Repayment Requirement nor deem any Sale Proposal that fails to satisfy such requirements to be a Qualified Bid.

#### **Credit Bid**

28. The Credit Bid Party will be submitting the Credit Bid, which Credit Bid when submitted shall, as set out above, be deemed to be a Qualified Indication of Interest and Qualified Bid for the purpose of these Sale Procedures and in the event that the Credit Bid is deemed to be the Successful Bid (as a result of no other Qualified Indications of Interest having been received that satisfies the Qualified Consideration Requirement and the Secured Debt Repayment Requirement or no Qualified Bid received (other than the Credit Bid)), the Company may forthwith terminate these Sale Procedures and proceed to seek implementation of the Credit Bid.
29. The Credit Bid Party shall not be entitled to increase the consideration of its Credit Bid. No members of the *Ad Hoc* Committee of Second Lien Noteholders or any of their Affiliates (other than the Credit Bid Party) shall be permitted to submit a Sale Proposal. For greater certainty, nothing in this Section 29 shall restrict the ability of the Credit Bid Party to, as agreed to by the Company, make amendments to the assets to be acquired and/or liabilities to be assumed pursuant to the Credit Bid.
30. If the Credit Bid is terminated at any time during the Sale Process, and there is no Sale Proposal received that satisfies the Qualified Consideration Requirement and the Secured Debt Repayment Requirement, the Company shall apply to the Court to seek advice and directions as to the continuation, modification or termination of the Sale Process.

#### **Assessment of Qualified Bids**

31. The Company, in consultation with the Sale Advisor and the Monitor, will assess Qualified Bids received (other than the Credit Bid), if any, and will determine whether it is likely that the transactions contemplated by such Qualified Bids are likely to be able to be consummated and whether proceeding with these Sale Procedures is in the best interests of the Company and its stakeholders. Such assessments will be made as promptly as practicable after the Phase II Bid Deadline.
32. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that (i) no Qualified Bid has been received (other than the Credit Bid); and (ii) there is no reasonable prospect of obtaining a Qualified Bid (other than the Credit Bid), the Credit Bid shall be deemed to be the "**Successful Bid**"

and the Credit Bid Party shall be the **"Successful Bidder"** and the Company may forthwith terminate these Sale Procedures and seek to implement the Credit Bid.

33. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that only one Qualified Bid was received (other than the Credit Bid) (which could be a combination of non-overlapping Qualified Parcel Bids), such Qualified Bid shall be a **"Successful Bid"**, and the Qualified Bidder(s) making the Successful Bid shall be a **"Successful Bidder"** or **"Successful Bidders"**, as the case may be) and Company may take such steps as are necessary to finalize, complete and seek Court approval of the Successful Bid. For greater certainty, the Company may accept a combination of non-overlapping Qualified Parcel Bids which commit to provide consideration of no less than the Qualified Consideration at closing (collectively, an **"Aggregated Qualified Bid"**) to create one **"Successful Bid"** and in such case, the applicable Qualified Parcel Bidders will become **"Successful Bidders"**.
34. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that more than one Qualified Bid (and/or more than one Aggregated Qualified Bid, in each case other than the Credit Bid) was received with respect to one or more Parcels by the Phase II Bid Deadline, then these Sale Procedures will not be terminated and the Company may, in consultation with the Monitor and the Sale Advisor, choose (i) in consultation with the Sale Advisor, to continue negotiations with a select number of Qualified Bidders, with a view to selecting one or more non-overlapping Qualified Bids (which could be new or amended Qualified Bids, including a combination of new or amended non-overlapping Qualified Parcel Bids) as the **"Successful Bid"** and the Qualified Bidder(s) making the Successful Bid shall be a **"Successful Bidder"** or **"Successful Bidders"**, as the case may be, and (ii) to take such steps as are necessary to finalize, seek Court approval of the Successful Bid.

#### Selection Criteria

35. In selecting the Successful Bid(s), the Company, in consultation with the Sale Advisor and the Monitor, will review each Qualified Bid:
36. Evaluation criteria with a Sale Proposal may include, but are not limited to items such as: (i) the proposed purchase price and new value (including assumed liabilities and other obligations to be performed by the bidder) and the form of such new value; (ii) the firm, irrevocable commitment for financing the proposed transaction; (iii) the claims likely to be created by such bid in relation to other bids; (iv) the counterparties to the proposed transaction; (v) the terms of proposed transaction documents; (vi) other factors affecting the speed, certainty and value of the proposed transaction (including regulatory approvals required to close the proposed transaction); (vii) proposed treatment of stakeholders; (viii) the assets proposed to be included and excluded from the bid; (ix) proposed treatment of employees; (x) any transition services required from Lightstream post-closing and related restructuring costs; and (xi) the likelihood and timing of consummating the proposed transaction.

#### Definitive Agreements

37. The Company and/or any Lightstream Entity, as applicable, will finalize Definitive Agreements in respect of any Successful Bidder, conditional upon approval of the Court, by no later than 5:00 p.m. (Mountain Time) on Friday, December 2, 2016 or such later

date or time as the Company may determine appropriate in consultation with the First Lien Lenders, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor.

#### **Approval Hearing**

38. As soon as reasonably possible after the execution of a Definitive Agreement by the Company and the Successful Bidder, the Company shall apply to the Court (the "**Approval Hearing**") for: (i) an Order approving each Successful Bid(s) and authorizing the Company and/or any Lightstream Entity, as applicable, to enter into any and all necessary agreements with respect to a Successful Bidder; and (ii) any Order that may be required vesting title to Lightstream Property or any of the Parcels in the name of any Successful Bidder(s).
39. The Approval Hearing will be held on a date to be scheduled by the Court upon application by the Company, and in any event, not later than Thursday, December 15, 2016 or such later date as the Company, in consultation with the First Lien Agent, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor, and the Successful Bidder may agree.
40. All Qualified Bids (other than any Successful Bid(s)) shall be deemed rejected on and as of the date of closing of the Successful Bid or date upon which all Successful Bids have closed, as the case may be.

#### **Deposits**

41. All Deposits shall be retained by the Monitor and deposited in a non-interest bearing trust account. If there is/are Successful Bid(s), the Deposit paid by a Successful Bidder whose bid is approved at the Approval Hearing shall be applied to the Purchase Price to be paid by that Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits of Qualified Bidders not selected as a Successful Bidder shall be returned to such bidders within five (5) Business Days after the date on which their Qualified Bid is no longer irrevocable in accordance with section 22(b), as applicable. If there is no Successful Bid, all Deposits shall be returned to the bidders within five (5) Business Days of the date upon which these Sale Procedures are terminated.
42. If (i) a Successful Bidder breaches any of its obligations under any Definitive Agreements, or (ii) a Qualified Bidder breaches its obligations under the terms of the Sale Procedures or fails to complete the transaction contemplated by its Qualified Bid if required by any Lightstream Entity to complete such transaction, then, in each case, such Qualified Bidder's Deposit will be forfeited to the applicable Lightstream Entity as liquidated damages and not as a penalty. The Company shall apply and use their share of any forfeited Deposit in a manner agreed upon by the Company and the Monitor.

#### **Approvals**

43. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

**No Amendment**

44. There will be no amendments to the Sale Procedures without the approval of the Court on notice to the Service List in the CCAA Proceedings, subject to such non-material amendments as may be agreed to by the Company and the Monitor.

**General**

45. The Initial Order, the Sale Procedures, and any other Orders of the Court made in the CCAA Proceedings relating to the Sale Procedures shall exclusively govern the process for soliciting and selecting bids for the Sale of all of the Lightstream Property or any of the Parcels.
46. These Sale Procedures do not, and will not be interpreted to create any contractual or other legal relationship between any Lightstream Entity and any Qualified Bidder, other than as specifically set forth in any Definitive Agreements that may be signed with Lightstream or any Lightstream Entity.
47. Unless otherwise indicated herein, any event that occurs on a day that is not a Business Day shall be deemed to occur on the next Business Day.
48. All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.
49. Each Qualified Phase I Bidder, upon being declared as such under the Sale Procedures, shall be deemed to have irrevocably and unconditionally attorned and submitted to the jurisdiction of the Court in respect of any action, proceeding or dispute in relation to the conduct or any aspect of the Sale Procedures and the Sale Process.
50. At any time during these Sale Procedures, the Company, Sale Advisor or Monitor may apply to the Court for advice and directions with respect to their obligations and duties herein.

*[Remainder of page intentionally left blank]*

## APPENDIX "A"

### Defined Terms

"**Ad Hoc Committee of Second Lien Noteholders**" means an *ad hoc* committee of Second Lien Noteholders representing approximately 91.5 percent of the total outstanding principal amount of Second Lien Notes.

"**Aggregated Qualified Bid**" has the meaning set out in section 33.

"**Alberta/BC Lightstream Business Unit**" means the portion of the Lightstream Business related to British Columbia and Alberta (excluding the Cardium Lightstream Business Unit).

"**Approval Hearing**" has the meaning set out in section 38.

"**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are open for business in the City of Calgary.

"**Cardium Lightstream Business Unit**" means the portion of the Lightstream Business related to central Alberta.

"**CCAA**" has the meaning given to it in the recitals to these Sale Procedures.

"**CCAA Proceedings**" has the meaning given to it in the recitals to these Sale Procedures.

"**Company**" has the meaning given to it in the recitals to these Sale Procedures.

"**Confidentiality Agreement**" means a confidentiality agreement in favour of the Company executed by a Prospective Bidder, in form and substance satisfactory to the Company, which shall enure to the benefit of any Successful Bidder.

"**Court**" has the meaning given to it in the recitals to these Sale Procedures.

"**Credit Agreement**" means the Third Amended and Restated Credit Agreement dated May 29, 2012, as amended by a consent and first amending agreement made as of July 2, 2015, and as further amended by a second amending agreement made as of December 2, 2015, as amended, restated, supplemented, replaced or otherwise modified from time to time.

"**Credit Bid**" means any offer to acquire the Lightstream Property submitted by the Credit Bid Party in the form of a Sale Proposal, pursuant to which the consideration offered includes an exchange for, and in full and final satisfaction of, all of the Second Lien Notes Debt, as it may be amended or supplemented from time to time, subject to section 29.

"**Credit Bid Party**" means, the Second Lien Notes Trustee, acting on the direction of the Majority Noteholders under the Second Lien Indenture, or its agent.

"**Data Room**" means a confidential virtual data room which contains documents furnished by the Company and a physical data room providing access to relevant technical information.

"**Definitive Agreements**" means all Definitive Sale Agreements.

**"Definitive Sale Agreement"** has the meaning set out in section 7.

**"Deposit"** has the meaning set out in section 22(i).

**"Filing Date"** means the date the Company obtained protection from its creditors under the CCAA, being September 26, 2016.

**"First Lien Agent"** means The Toronto-Dominion Bank, as administrative agent for the First Lien Lenders.

**"First Lien Debt"** means, as at closing, all amounts owing by Lightstream to the First Lien Lenders under the Credit Agreement, including, without limitation, the aggregate outstanding principal amount (which, as at the date hereof is \$370,920,485), together with all swap indebtedness, outstanding letters of credit and all accrued interest, fees, costs, expenses and other charges.

**"First Lien Lenders"** means the syndicate of lenders under the Credit Agreement.

**"Form of Purchase Agreement "** means the form of purchase and sale agreement to be developed by the Company in consultation with the Monitor, the Sale Advisor, the First Lien Lenders and the *Ad Hoc* Committee of Second Lien Noteholders and provided to those Qualified Phase II Bidders that submitted a Qualified Indication of Interest.

**"Indication of Interest"** has the meaning set out in section 13.

**"Initial Order"** has the meaning given to it in the recitals to these Sale Procedures.

**"Lightstream"** has the meaning given to it in the recitals to these Sale Procedures.

**"Lightstream Business"** means the business of the Company.

**"Lightstream Entity"** has the meaning given to it in the recitals to these Sale Procedures.

**"Lightstream Property"** means all property, assets and undertakings of the Company, including, without limitation, all of the Parcels.

**"LTS"** has the meaning given to it in the recitals to these Sale Procedures.

**"Majority Noteholders"** means Second Lien Noteholders holding more than fifty percent (50%) of the total outstanding principal amount of the aggregate Second Lien Notes.

**"Monitor"** means FTI Consulting Canada Inc., in its capacity as monitor in the CCAA Proceedings and not in its personal or corporate capacity.

**"Outside Closing Date"** means December 31, 2016.

**"Parcels"** means any one or more of the (i) property, assets and undertakings of the Company related to the Saskatchewan Lightstream Business Unit, (ii) the property, assets and undertakings of the Company related to the Cardium Lightstream Business Unit, or (iii) the property, assets and undertakings of the Company related to the Alberta/BC Lightstream Business Unit.

"**Phase I Bid Deadline**" has the meaning set out in section 14.

"**Phase II Bid Deadline**" has the meaning set out in section 21.

"**Process Letter**" means a letter from the Sale Advisor to Qualified Phase I Bidders outlining, among other things, the Sale Process and the Sale Procedures timelines.

"**Prospective Bidders**" has the meaning set out in section 2(a).

"**Purchase Price**" has the meaning set out in section 15(b)(i).

"**Qualified Bid**" and "**Qualified Bids**" have the meaning set out in section 23.

"**Qualified Bidder**" has the meaning set out in section 23 and for greater certainty, includes all Qualified Parcel Bidders and "**Qualified Bidders**" means more than one of them.

"**Qualified Consideration**" means consideration sufficient to repay immediately on closing (a) in full and in cash (A) the First Lien Debt and (B) so long as the Credit Bid has not been terminated in accordance with its terms, the Second Lien Notes Debt, and (b) in full and in cash or through an assumption of liabilities (i) any claims ranking senior in priority thereto that are or would be payable in the CCAA Proceedings, and (ii) any amounts owing by the Company in respect of goods and services provided to the Company on or after the Filing Date and prior to closing of the Successful Bid, and (c) any other amounts incurred by the Company in compliance with the Initial Order or any other Orders granted in the CCAA Proceedings.

"**Qualified Consideration Requirement**" means the requirement that any Sale, whether on its own, or in combination with one or more non-overlapping Sale Proposal for different Parcels, provides for consideration of at least the Qualified Consideration.

"**Qualified Indication of Interest**" has the meaning set out in section 15.

"**Qualified Phase I Bidder**" has the meaning set out in section 9 and "**Qualified Phase I Bidders**" means all of them.

"**Qualified Phase II Bidder**" has the meaning set out in section 20, and "**Qualified Phase II Bidders**" means all of them.

"**Qualified Parcel Bid**" means a Qualified Bid for Parcel, and "**Qualified Parcel Bid**" means more than one of them.

"**Qualified Parcel Bidder**" has the meaning set out in section 24.

"**Qualified Purchase Bid**" has the meaning set out in section 22.

"**Representative**" means, with respect to a particular person, any director, officer, employee, agent, consultant, advisor or other representative of such person, including legal counsel, accountants and financial advisors.

"**Sale**" means the acquisition of all of the Lightstream Property or any of the Parcels.

"**Sale Advisor**" means means TD Securities Inc., in its capacity as sale advisor to the Company.

"**Sale Proposal**" has the meaning set out in section 15(b).

"**Saskatchewan Lightstream Business Unit**" means the portion of the Lightstream Business related to Saskatchewan.

"**Second Forbearance Agreement**" means the Second Forbearance Agreement dated as of September 15, 2016, between each Lightstream Entity and the First Lien Lenders.

"**Second Lien Note Indenture**" means that indenture dated as of July 2, 2015 among LTS, as issuer, and 1863359 Alberta Ltd., 1863360 Alberta Ltd., Bakken Resources Partnership and LTS Resources Partnership, as guarantors, and the Second Lien Notes Trustee.

"**Second Lien Noteholders**" means holders of Second Lien Notes.

"**Second Lien Notes Debt**" means all amounts owed under the Second Lien Notes, including all outstanding principal, accrued and unpaid interest, premiums, make-whole, fees, costs and expenses (which, for clarity, shall be in an amount not less than U.S.\$650 million in respect of principal, U.S.\$48.2 million in respect of the make-whole, and all other accrued interest, fees, costs, expenses and other amounts owing in respect of the Second Lien Notes), as valued by the Company, in consultation with the Monitor, or the Court on or before the Phase 1 Bid Deadline.

"**Second Lien Notes Trustee**" means the trustee under the indenture dated as of July 2, 2015 pursuant to which the Second Lien Notes were issued by Lightstream.

"**Second Lien Notes**" means the 9.875% second lien secured notes due June 15, 2019 and issued by Lightstream pursuant to an indenture dated as of July 2, 2015.

"**Secured Debt**" means, collectively, (i) the First Lien Debt and (ii) so long as the Credit Bid has not been terminated in accordance with its terms, the Second Lien Notes Debt.

"**Secured Debt Repayment Requirement**" means the requirement that any Sale, whether on its own, or in combination with one or more non-overlapping Sale Proposal for different Parcels, provides for cash consideration sufficient to repay to the First Lien Lenders, and if the Credit Bid has not been terminated in accordance with its terms, the Second Lien Noteholders, in full and in cash and immediately on closing, the Secured Debt.

"**Sale Procedures**" has the meaning given to it in the recitals to these Sale Procedures.

"**Sale Process**" has the meaning set out in section 2.

"**Successful Bid(s)**" has the meaning set out in section 19, section 32, section 33 and section 34.

"**Successful Bidder**" has the meaning set out in section 19, section 32, section 33 and section 34.

"**Support Agreement**" means the amended and restated restructuring support agreement between the Company and members of the *Ad Hoc* Committee of Second Lien Noteholders dated August 26, 2016, as may be further amended from time to time.



"**Teaser**" has the meaning given to it section 5.

"**Unsecured Noteholders**" means holders of Unsecured Notes.

"**Unsecured Notes**" means the 8.625% unsecured notes due February 1, 2020 and issued by Lightstream pursuant to an indenture dated as of January 30, 2012 as supplemented by the supplemental indenture dated as of February 25, 2015.

**SCHEDULE "A"**

TO THE COMPANY:

**Lightstream Resources Ltd.**  
2800-525 8<sup>th</sup> Avenue SW  
Calgary, Alberta T2P 1G1  
Canada

Attention: Peter Scott and Annie Belecki

Telephone: (403) 775-9771/(403) 234-4169  
Fax: (403) 218-6075  
Email: [pscott@lightstreamres.com](mailto:pscott@lightstreamres.com) / [abelecki@lightstreamres.com](mailto:abelecki@lightstreamres.com)

TO THE SALE ADVISOR:

**TD Securities Inc.**  
36<sup>th</sup> Floor, 421-7<sup>th</sup> Avenue S.W.  
Calgary, Alberta T2P 4K9  
Canada

Attention: Ruben Contreras and Michael Charron  
Telephone: (403) 503-4853 / (403) 299-8505  
Email: [Ruben.Contreras@tdsecurities.com](mailto:Ruben.Contreras@tdsecurities.com) / [Michael.Charron@tdsecurities.com](mailto:Michael.Charron@tdsecurities.com)

WITH COPY TO:

**Blake, Cassels & Graydon LLP**  
3500-855 2<sup>nd</sup> Street SW  
Calgary, Alberta T2P 4J8  
Canada

Attention: Kelly Bourassa and Milly Chow

Telephone: (403) 260-9697/(416)-863-2594  
Fax: (403) 260-9700/416-863-2653  
Email: [kelly.bourassa@blakes.com](mailto:kelly.bourassa@blakes.com) / [milly.chow@blakes.com](mailto:milly.chow@blakes.com)

WITH A COPY TO:

**FTI Consulting Canada Inc.**

in its capacity as Court-Appointed Monitor of Lightstream Resources Inc., et al.

Ernst & Young Tower

440 2nd Avenue SW, Suite 720

Calgary, Alberta T2P 5E9

Canada

Attention: Deryck Helkaa, Senior Managing Director

Telephone: (403) 545-6031

Facsimile: (403) 444-6699

Email: [Deryck.Helkaa@fticonsulting.com](mailto:Deryck.Helkaa@fticonsulting.com)

# TAB 2

Clerk's stamp:

---

QUESTIONING OF PETER D. SCOTT

BY C. SIMARD

AFFIDAVIT SWORN SEPTEMBER 21, 2016

HELD OCTOBER 3, 2016

---

COURT FILE NUMBER                      1601-12571

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE                      CALGARY

IN THE MATTER OF THE  
COMPANIES' CREDITORS  
ARRANGEMENT ACT, RSC 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



1 FOR MUDRICK CAPITAL MANAGEMENT AND FRONTFOUR CAPITAL

2 GROUP:

3 C. Simard

4 Bennett Jones LLP

5 4500, 855-2 Street SW

6 Calgary, Alberta

7 403-298-3100

8

9 FOR THE LENDING SYNDICATE:

10 L. Cassey (via videoconference)

11 Torys LLP

12 3000, 79 Wellington Street West

13 Toronto, Ontario

14 416-865-0040

15

16 FOR THE AD HOC COMMITTEE OF SECURED NOTEHOLDERS:

17 B. O'Neill (via videoconference)

18 Goodmans LLP

19 3400, 333 Bay Street

20 Toronto, Ontario

21 416-979-2211

22

23

24

25

26

27

1 FOR THE MONITOR:

2 W. MacLeod

3 McCarthy Tétrault LLP

4 4000, 421-7 Avenue SW

5 Calgary, Alberta

6 403-260-3500

7

8 OFFICIAL COURT REPORTER:

9 Heather Bowie, CSR(A)

10 Dicta Court Reporting Inc.

11 760, 1015-4 Street SW

12 Calgary, Alberta

13 403-531-0590

14

---

15

16

17

18

19

20

21

22

23

24

25

26

27



1 (PROCEEDINGS COMMENCED AT 10:04 AM)

2 PETER D. SCOTT, Sworn, Examined by Mr. Simard

3 Q MR. SIMARD: Good morning, Mr. Scott.

4 Sir, you just gave an oath on the Bible. Can you  
5 confirm for me that that oath is binding on your  
6 conscience such that you do feel compelled to tell the  
7 truth in this questioning?

8 A Yes.

9 Q And you will tell the truth in this questioning?

10 A Yes, I will.

11 Q Okay. Just in terms of a couple of formalities that I'd  
12 like to try to have you and I will try to observe as well  
13 is please try to wait for the end of my question. You  
14 will see Madam Court Reporter is taking a verbatim  
15 transcript. So if you can wait until I am done before  
16 you speak; I will try to do the same.

17 And, also, if you're going to answer a question  
18 affirmatively, try to say "yes" as opposed to "mm-hmm" or  
19 something like that; similarly, for a negative response.  
20 I will try to help you with that as well.

21 A Okay.

22 Q And if you don't understand any of my questions, by all  
23 means, ask me to rephrase. We will be getting into some  
24 areas on which you are very expert and I am not expert so  
25 I will ask you to educate me as we go through some of the  
26 stuff. But, by all means, if it's not clear or you want  
27 to get a better understanding, let me know.

1           Sir, you swore an affidavit on September 21st, 2016,  
2           in Lightstream's CCAA proceedings?

3    A   Yes, I did.

4    Q   And I take it, sir, you read that affidavit before you  
5           swore it.

6    A   Yes, I did.

7    Q   And, to the best of your knowledge at the time,  
8           everything in that affidavit was accurate?

9    A   Yes, it was.

10   Q   Okay. Sir, I understand you're the CFO of Lightstream.

11   A   Yes, that's correct.

12   Q   How long have you held that position?

13   A   Since January 2010.

14   Q   Okay. And just at a very high level --

15   A   No. Sorry. Excuse me.

16   Q   Sure.

17   A   I joined in January of 2010. I was appointed CFO in May  
18           of 2010.

19   Q   Okay. And what was your position between January and  
20           May?

21   A   I was the vice president, finance.

22   Q   Okay. Can you just, at a very high level, let me know  
23           what your responsibilities include as CFO of Lightstream?

24   A   My responsibilities include overall financial management  
25           of the company, managing the accounting, tax, investor  
26           relations, and legal areas of the company.

27   Q   As part of the overall financial management of the

1 company, you would have oversight with respect to  
2 financial reporting?

3 A Correct.

4 Q And you would have input with respect to the preparation  
5 of financial statements on behalf of the company?

6 A Correct.

7 Q And as part of that, I take it you play a role -- we'll  
8 get into this a bit later -- but you take a role in the  
9 process by which the company commissions reserve reports  
10 from Sproule and then reports the results received from  
11 Sproule?

12 A I take a role in that, yes.

13 Q And in terms of strategy, sir, at the company,  
14 specifically with respect to capital expenditure and  
15 business planning, you play a role in those areas?

16 A That's correct.

17 Q I don't need a huge background here, but can you tell me  
18 briefly what formal training or degrees or designations  
19 you have that would be relevant to your role of CFO of  
20 Lightstream?

21 A I have a commerce degree from the University of Alberta  
22 and an MBA from the University of Calgary, and I have  
23 been CFO of companies since March 1997.

24 Q And since you have been playing CFO roles or similar  
25 roles since March 1997, have those all been with  
26 exploration and production companies?

27 A All but three years.

1 Q Okay. So other than three years between March of 1997  
2 and now, so roughly 17 years, you have played CFO or  
3 similar roles with oil and gas exploration/production  
4 companies?

5 A Correct.

6 Q Okay. Sir, I just want to -- and you might want to refer  
7 to paragraphs 21 and following of your affidavit. I just  
8 want to ask you a few questions about the company's wells  
9 and undeveloped locations.

10 A 21, you say?

11 Q Sure. Yeah, paragraph 21 and then -- paragraph 20 and  
12 the following paragraphs where you discuss the different  
13 business units.

14 So I see from pages 7 through 9 of your affidavit a  
15 description of the three business units in the company,  
16 and I see there also a description of identified drilling  
17 locations. I assume those are locations that have been  
18 identified as prospective locations by the company but  
19 have not yet been drilled.

20 A Correct.

21 Q And my rough math is that there are about 1,500 or so  
22 such undeveloped locations in the three business units.

23 A That would be correct.

24 Q And then what about drilled wells, either producing or  
25 nonproducing? I didn't get a clear number when I looked  
26 through some of the financial statements. Can you give  
27 me an approximate number of drilled wells in the

1 company's portfolio, whether producing or nonproducing?

2 A I believe that is listed in the affidavit as paragraph 32  
3 under "Operatorship," approximately 2,600 wells in which  
4 we have a working interest in.

5 Q Okay. And that's the gross number of wells. Presumably  
6 the net number would be lower because in some wells you  
7 have partners.

8 A Correct.

9 Q So at a high level, approximately -- the company has  
10 approximately 1,500 undeveloped locations and 2,500 or so  
11 gross natural gas or oil wells.

12 A Yes.

13 Q Sir, if you could look at paragraph 78 of your affidavit.  
14 And we're getting into an area where I will need you to  
15 help educate me, but obviously there are some statements  
16 in your affidavit and some other evidence in this case  
17 about the value of the company's assets, and so I want to  
18 go through that a little bit with you and ask you to help  
19 me understand how the company's assets are valued. And  
20 so I will start with some general statements.

21 Am I correct in understanding, sir, that exploration  
22 and production companies like Lightstream, their oil and  
23 gas assets are valued, at least in part, on the basis of  
24 reserve reports?

25 A I would suggest that would be one metric that would be  
26 used.

27 Q And that's one metric that is used by Lightstream and

1 reported to the public in its financial statements?

2 A It's a requirement to report that; so we report that  
3 information.

4 Q Okay. And, sir, again, keeping it at a general level,  
5 first of all, reserve reports -- well, I will give you my  
6 understanding and you can put it in your own words. But  
7 reserve reports are an assessment of the net present  
8 value of the current and future revenue stream based on a  
9 company's oil and gas assets. Is that a fair statement?

10 A In part. It's based on the rules prescribed by  
11 NI 51-101, which is the security commission rules about  
12 how to value those reserves and what can be included in  
13 the valuation of those reserves and then obviously what  
14 price deck is ascribed by our independent valuator of  
15 those reserves.

16 Q Sure. And we'll get into some of those components. But  
17 at a high level, it's an assessment, both based on the  
18 requirements of NI 51-101 and also, I think, in the case  
19 of Sproule and all third-party valuers in Calgary, the  
20 COGE Handbook as well. That's another input or another  
21 set of rules or guidelines that's used?

22 A Yeah, my under -- I am not an engineer. My understanding  
23 is 51-101 incorporates the COGE Handbook.

24 MR. SIMARD: Just off the record.

25 (DISCUSSION OFF THE RECORD)

26 Q MR. SIMARD: Okay. So moving into a little  
27 more detail, again staying with the concept of reserve

1 reports, my understanding is that there are a number of  
2 components that go into what ends up being a reserve  
3 report. One would be an estimate of the recoverable oil  
4 and gas in place, in the company's portfolio. You would  
5 agree that's one component?

6 A Correct. Yes.

7 Q Another would be an assessment of what production is  
8 expected from those reserves?

9 A Yes, that's correct, by the independent valuator.

10 Q Yes, of course.

11 And another one would be, building on that, the  
12 future revenue stream expected from that production?

13 A Yes, using their price deck and assessment of royalties  
14 and costs.

15 Q That's right.

16 And so in coming to that future revenue stream, the  
17 independent engineering firm -- in this case, Sproule for  
18 Lightstream -- uses some kind of estimate of future  
19 commodity prices as one input.

20 A Yes, that's correct.

21 Q And Sproule publishes their price decks on their website,  
22 and they're available to --

23 A Yes, that's right.

24 Q And obviously as part of that assessment of the revenue  
25 stream, as you said, it's not only an assessment of  
26 revenue based on future commodity prices but also the  
27 costs that will have to be spent by the company to obtain

1       that revenue.

2    A   Correct.

3    Q   So other than those high-level components -- and I know  
4       there are a lot of subcomponents, but I just want to  
5       identify the general components. Are there any others  
6       that you would say go into the reserve report creation  
7       process other than the estimate of recoverable oil and  
8       gas reserves, the assessment of the production attainable  
9       from those reserves, an estimate of future revenue based  
10      on forward commodity pricing, and an estimate of the  
11      costs that the company will bear to generate that revenue  
12      stream? Are there any other major components that you  
13      would include in what goes into a reserve report  
14      assessment?

15   MS. BOURASSA:                    So Mr. Scott has indicated he  
16      is not an engineer. So I assume your question is from  
17      his information as CFO, the information that he  
18      understands goes in.

19   MR. SIMARD:                      Absolutely. I am not asking  
20      him for an expert opinion because he is not an engineer,  
21      but just with his knowledge and experience as a CFO of  
22      oil and gas companies.

23   Q   MR. SIMARD:                    Are there any other major  
24      inputs into that assessment?

25   A   Well, the other assessment that Sproule, in this case,  
26      would do would be looking at undeveloped locations and  
27      classifying them as either approved undeveloped locations



1 or probable undeveloped locations and the reasonable  
2 capital plan and capital costs around that as to when  
3 those could be developed and the time frame.

4 Q Okay.

5 A So that would be the other input that would go in there.

6 Q Okay. So the first component I stated was an estimate of  
7 recoverable oil and gas in place. That would -- I won't  
8 get into all the different subcomponents, but that  
9 obviously includes producing, nonproducing, and  
10 undeveloped lands.

11 A Correct. And the other component they would take into  
12 account on the cost side is any abandonments associated  
13 with wells that are included in the reserve report.

14 Q Okay. So we have identified a number of components that  
15 go into a reserve report that ultimately lead to a  
16 valuation of a company's assets. You will agree with me  
17 that any change in those components will change the  
18 ultimate assessment of the company's asset value?

19 A Yes, it's a point-in-time valuation based on those  
20 assumptions.

21 Q Okay. Obviously a change in costs can have a somewhat  
22 predictable effect. If the expected costs of generating  
23 a future revenue stream go up, the netback goes down, and  
24 the asset value would go down in some form.

25 A Correct. I'd agree with that.

26 Q Okay. And we'll get into a little more detail later on  
27 the company's business plan and some other statements,

1 but, sir, just at a very high level, based on your  
2 experience, are we currently in a situation in the oil  
3 and gas industry in the Western Canadian Sedimentary  
4 Basis [sic] where costs are relatively -- based on  
5 historicals -- costs relatively affordable to carry out  
6 drilling, recompletion, workover, all the normal types of  
7 operations an E&P company would contract for?

8 A The way that I would answer that is costs have -- appear  
9 to have come down. We haven't drilled a lot. We've  
10 participated in some wells. So we're relying on, you  
11 know, information when we talk to suppliers about what's  
12 happened to costs. So costs have come down. But with  
13 respect to does that mean you can go out and continue and  
14 drill and recomplete wells also depends on the revenue  
15 side of the equation which has also come down.

16 Q Absolutely.

17 A So I would say, yes, costs have come down, but revenue  
18 has come down. So it does not mean it's necessarily an  
19 environment that leads to a lot of capital investment.

20 Q Nobody has unlimited capital if they're relying on oil  
21 and gas revenue these days obviously.

22 And obviously, again talking about how changes in  
23 those components can change a company like Lightstream's  
24 asset valuation, if the forward price curve goes up, the  
25 logical consequences that future revenue expectation goes  
26 up with the consequent increase in -- possible increase  
27 in asset value, correct?

1 A Correct, but costs can also go up in that environment as  
2 well.

3 Q That's right. That's right. Obviously that's just one  
4 component, but an increase in the forward curve could  
5 have a positive increase in asset value.

6 A Correct.

7 Q Okay. And in terms of -- as you said earlier, sir, I  
8 think you said the assessments are carried out at a  
9 particular point in time.

10 A Yes.

11 Q And obviously, in addition to what is known by somebody  
12 like Sproule at a point in time, they are looking forward  
13 and making estimates on what may happen to things like  
14 costs and future commodity prices, correct?

15 A Correct.

16 Q And is it fair to say that with respect to future  
17 commodity prices, there is a relatively dynamic market  
18 for crude oil in this case, largely with the consequence  
19 that forward commodity pricing changes somewhat  
20 dynamically in this industry?

21 A Sorry. What do you mean by "dynamically"?

22 Q Good question. What I mean is that a lot of trades  
23 happen daily in this industry, including future trades,  
24 such that news today can have an effect today or the next  
25 day on future commodity prices.

26 A Particularly short-term prices I would say, yes.

27 Q So when we saw, for example, the news last week about a

1 possible OPEC deal to cut crude oil production, that is  
2 the type of news that can lead to short-term price  
3 movements in the crude oil market.

4 A Agreed. And I think we did see a short-term price  
5 movement.

6 Q And obviously, again going back to the components that go  
7 into a reserve report and an asset valuation, if there is  
8 a change in the amount of the company's reserves,  
9 recoverable reserves, that can lead to an increase in the  
10 ultimate asset valuation.

11 A If there is an increase in those reserves, yes.

12 Q And is it fair to say that the two primary ways that a  
13 company like Lightstream increases its oil and gas  
14 reserves are either by making acquisitions of new oil and  
15 gas reserves or carrying out capital expenditures --  
16 drilling, recompletion, workovers, or the like -- to  
17 increase the reserves or upgrade the reserves in its  
18 current holdings?

19 A Yes, but with respect to wells that are undeveloped  
20 locations that are already included in the reserve report  
21 and you drill those wells, those wells are already  
22 included in that reserve report.

23 Q That's right. And, in that case, you would be  
24 increasing -- potentially increasing asset value, not  
25 necessarily by increasing the quantity of reserves but by  
26 upgrading them, by drilling them, and moving them up to a  
27 higher category of reserves. Is that a fair general

1 statement?

2 A No, I wouldn't agree with that. I would say when you  
3 drill those wells, depending on the cost of the well --  
4 because the reserve report will include a cost. So  
5 whether your cost was higher or lower will impact that  
6 value. And the result of the well, depending on what the  
7 result of the well was compared to what the Sproule  
8 estimate for the well was, in this case, will affect that  
9 value.

10 Q Okay.

11 A So it could be up or down depending on the actual  
12 results.

13 Q So the way in which a company increases its overall asset  
14 value by carrying out capital expenditures is by -- I am  
15 going to use terminology, and you can correct me if I am  
16 using the wrong terminology -- but carrying out what it  
17 hopes will be an accretive operation whereby the cost of  
18 the capital expenditure will result in greater revenue  
19 than that cost. Is that fair?

20 A Well, greater revenue and lower costs or greater reserves  
21 that were identified than what was identified in the  
22 report in that specific case. A company would also be  
23 looking to see that they were -- be able to add  
24 additional locations as a result of that drilling.

25 Q So there are a number of different ways in which the  
26 expenditure of capital on wells can increase the overall  
27 asset value of the company. Is that fair?

1 A I would say change the overall asset value, yes.

2 Q Sure. Depending on results.

3 A Yes.

4 Q Obviously when you're planning these things --

5 A You hope to be increasing.

6 Q You're looking at prospects; you're looking at locations  
7 that you hope will be accretive.

8 A Correct.

9 Q Okay. And just to explore that concept a bit more, sir,  
10 I take it that Lightstream and the other E&P companies  
11 for which you've worked in the past, they -- Lightstream  
12 does conduct analyses -- in this case, of its 1,500-plus  
13 locations -- to assess what it hopes will be accretive  
14 locations, to analyze what type of results it can achieve  
15 by making capital expenditures on particular wells and  
16 what kind of accretion to the company's value it hopes to  
17 achieve.

18 A Yeah, we assess what we would call "economic locations"  
19 so that they would have a positive value to the company.

20 Q Okay. So that's what you would call that process,  
21 "assessing economic locations for the company"?

22 A Yeah. Correct.

23 Q And, I take it, as part of that assessment of economic  
24 locations, the company prioritizes or has an  
25 understanding of the priority of what it hopes to be the  
26 most accretive locations -- the low-hanging fruit, so to  
27 speak -- but there is some assessment of the relative

1 priority of locations.

2 A That's correct.

3 Q And so for the 1,500 or so undeveloped locations that are  
4 mentioned in your affidavit, Lightstream would have  
5 assessed those locations for their economics and would  
6 have prioritized those which it believes offer the most  
7 economic potential results to develop?

8 A We would have prioritized those wells.

9 Q And can you tell me -- just tell me a little bit about  
10 how that process works in the company. Who works on  
11 that? Does that ultimately get reported up to you? Is  
12 there particular engineering groups? Just in your own  
13 words tell me briefly how that is carried out in the  
14 company.

15 A So within each business unit, they would have  
16 engineering, geological, land professionals assigned to  
17 them to work through all of those locations and  
18 considering a number of different components. So  
19 obviously, you know, the geology is important, the  
20 engineering side is important, the land component side of  
21 it is important, and so they will work through that  
22 assessment and using an estimate of costs and future  
23 revenues, et cetera, to come up with those economic  
24 locations.

25 And then with respect to the process in our company,  
26 as we're setting out a drilling budget, we will look to  
27 see, you know, what the economic environment is like, so

1        what kind of drilling budget would that support, and then  
2        individual prioritize or groups of wells will come up for  
3        a capital approval process which I would be part of.

4        Q    And so you have described the detailed work that goes  
5        into the economic assessment within each of the three  
6        business units.  And I presume that at some stage, when  
7        you're looking at the overall corporate budget, it gets  
8        reported up from the three individual business units to  
9        you or someone in your group as part of the budgeting  
10       process where decisions are made.

11       A    It's a multi-department exercise, but, yes, my group is  
12       involved.

13       Q    "Multi-department."  What departments are involved in  
14       that whole decision-making process?

15       A    So, again, the engineering side of things, the  
16       geological/geophysical side of things, and the land side  
17       of things are also involved.

18       Q    And then ultimately the financial and accounting group as  
19       well?

20       A    Yes.  Sorry.  I thought you mentioned that at the  
21       beginning so ...

22       Q    Okay.  And, I take it, sir, that when the company's  
23       expectation of future commodity prices increases, that  
24       has the effect that more locations become possibly  
25       accretive to value.  Is that fair?

26       A    When our expectation of prices increases, I would say it  
27       increases the prospect of what the near-term drilling



1 budget might look like.

2 Q And is this an assessment that is made within the company  
3 on an ongoing basis, or is it done periodically?

4 A The work is ongoing. The exercise of updating potential  
5 capital budgets and what those may look like happens on a  
6 periodic basis.

7 Q How often are potential capital budgets updated?

8 A They can be updated as frequently as quarterly or less  
9 than that depending on what is going on in the  
10 macroeconomic environment.

11 Q And what about this year? What periodic updates have  
12 occurred with respect to the company's capital  
13 expenditure budgets or budget? Do you know when the  
14 review --

15 A Well, we --

16 Q -- dates have been?

17 A We do a review every quarter of the budget, but in terms  
18 of whether it's going to be increased or decreased,  
19 depending on what the environment goes on, that doesn't  
20 happen necessarily every quarter because sometimes  
21 there's no change to it. But we do review our budgets  
22 every quarter.

23 Q And -- I'm sorry -- are you on a calendar year so that --

24 A Calendar-year basis.

25 Q So September 30th would be the end of a quarter.

26 A Correct.

27 Q Okay.

1 A And so when you think of that timeline, think of it in  
2 terms of being done in advance of our reporting  
3 requirements which obviously are not, in this case,  
4 September 30th.

5 Q Sure. So September 30th you have financial and other  
6 cutoffs, and then you're going to report your quarterly  
7 results within 45 or 60 days after September 30th?

8 A 45, correct.

9 Q 45 days. So what will happen now that we're in the post-  
10 September 30th period is that as part of that quarterly  
11 reporting there will be a capital expenditure budget  
12 review and possibly update as part of the quarter end  
13 reporting?

14 A Correct.

15 Q Okay. And obviously right now, given that you're in the  
16 middle of restructuring proceedings, there are  
17 complications that make it not like a regular vanilla  
18 year, I assume.

19 A Correct. I wouldn't anticipate any increase to capital  
20 expenditures.

21 Q Until you have a little more certainty on what's going to  
22 happen.

23 A Correct.

24 Q Understood.

25 Let me back up. We talked about Sproule and reserve  
26 reports. Can you tell me -- and this is not a memory  
27 test. So I will give you something that I think will

1 help.

2 So I have taken from the Internet Lightstream's  
3 annual information form for the year ended December 31,  
4 2015.

5 MR. SIMARD: Let's just go off for a  
6 second.

7 (DISCUSSION OFF THE RECORD)

8 Q MR. SIMARD: Sir, I have given you a copy  
9 of the company's annual information form for the year  
10 ended December 31, 2015. That document is dated  
11 March 30, 2016. I can advise you I pulled it off the  
12 Internet, off Lightstream's website. Can you confirm,  
13 sir, that that is a document that you reviewed at the  
14 time it was posted?

15 A Yes, I can.

16 Q And to the best of your knowledge, the statements in this  
17 document, subject to the qualifications and conditions  
18 set out therein, were accurate at the time?

19 A Yes, they were.

20 MR. SIMARD: Could we please mark that as  
21 the first exhibit.

22 EXHIBIT 1 - Lightstream's annual  
23 information form for the year ended  
24 December 31, 2015

25 Q MR. SIMARD: Sir, if I can ask you to turn  
26 to page 16 and just read to yourself that top paragraph  
27 on page 16. And I just draw that to your attention

1       because it's obviously something that's been published by  
2       the company.

3               And what I wanted to ask you is if you could  
4       describe for me, from your perspective as CFO of the  
5       company, the process by which the company and Sproule  
6       working together come up with the reserve report which  
7       then makes it into the company's financial reporting as  
8       we have discussed. Can you just at a high level tell me  
9       what happens, how long it takes, and what time period is  
10      involved?

11    A    So our technical teams -- when I say "technical," that  
12      would include the engineering, geological teams, land  
13      teams to a certain extent -- would exchange the  
14      information to Sproule. They would give them an update  
15      of our production performance, our lease operating  
16      statements, et cetera. Any new wells drilled, they would  
17      go through and provide them that information as well as  
18      regarding to plans. The process usually takes probably  
19      four to five months from start to finish.

20    Q    And does it start after a year end?

21    A    No, it will start in the fall.

22    Q    Okay. And the goal obviously is -- I take it that the  
23      reserve report is done in time for the company to report  
24      on asset values as part of its year-end financial  
25      statements.

26    A    Correct.

27    Q    And that is by the end of March, generally?

1 A Yes. So we -- by that time frame.

2 Q Okay.

3 A Usually before then.

4 Q So when we look at the paragraph at the top of page 16,  
5 you just told me that the technical teams provide a bunch  
6 of information to Sproule, and I take it that the  
7 statement there in the first sentence is a good, general  
8 description of the types of information provided to  
9 Sproule.

10 A Correct.

11 Q And I take it that some or maybe all of that information  
12 is information that Lightstream would consider to be  
13 proprietary and confidential.

14 A A lot of it, I would suggest, would be.

15 Q Some of it might be public but --

16 A Some of it would be available publicly, yeah.

17 Q Okay. And then Sproule obviously, as an independent  
18 engineering firm, goes away and does its work. I presume  
19 it presents a draft to the company and then there's  
20 discussion about the draft between the company and  
21 Lightstream.

22 A Correct.

23 Q And then over the course of the first couple of months of  
24 the year, you get to the point where Sproule finishes its  
25 work and publishes its independent reserve report.

26 A Correct.

27 Q And then the company takes that and builds it into its

1 year-end financial reporting.

2 A Yes.

3 Q Okay. So from start to finish, are we talking about a  
4 process of three or four months, something like that?

5 A Yeah, I said four to -- somewhere in that range. Some  
6 years -- depending on how much activity has happened,  
7 some years it's a little quicker, probably on the three  
8 side; some years it takes a little longer.

9 Q I understand from correspondence with your counsel on  
10 Friday and maybe Saturday that the data room that is  
11 currently open for Lightstream in its sale process does  
12 contain the year-end December 31st, 2015, reserve report  
13 from Sproule.

14 A That's my understanding.

15 Q Okay. There are no older reserve reports in the data  
16 room, though?

17 A Not to my knowledge.

18 Q Is that, in your experience, industry standard -- or  
19 maybe not industry standard -- but relatively common for  
20 the marketing of oil and gas assets in this market?

21 A In my experience, that's very common.

22 Q Putting in the last reserve report is the standard.

23 A The latest reserve report, yes.

24 Q And in terms of all the information that's set out in the  
25 first paragraph of page 16 in this annual information  
26 form, that proprietary, confidential information, would  
27 all of that information -- or is all of that information

1 in the data room or only a subset of that information?

2 A I can't answer that directly.

3 Q Okay. I am just going to show you again a document I  
4 acquired from Lightstream's website, and it is the annual  
5 information form for the year ended December 31, 2014.  
6 If you could just take a moment to flip through that and  
7 confirm to yourself that that is the document I have  
8 described.

9 A That looks correct.

10 Q Again, this is a document with respect to which you had  
11 input prior to it being published by Lightstream?

12 A Yes.

13 Q To the best of your knowledge and subject to the  
14 qualifications and conditions stated in the document, the  
15 information was accurate when it was published by  
16 Lightstream?

17 A Yes.

18 MR. SIMARD: Could we please mark that as  
19 Exhibit Number 2.

20 EXHIBIT 2 - Lightstream's annual  
21 information form for the year ended  
22 December 31, 2014

23 Q MR. SIMARD: And I have just shown you  
24 again another document I have acquired from Lightstream's  
25 website. It is, I believe, Lightstream's report on its  
26 second quarter results in 2016. Could you just flip  
27 through it and confirm that that is the document I have

1 identified?

2 A Yes, that seems to be the document.

3 Q Okay. And, again, that's a document that you had input  
4 into prior to its publication by Lightstream?

5 A Yes, I did.

6 Q And subject to the qualifications and conditions set out  
7 therein, to the best of your knowledge, the statements  
8 therein were correct when published?

9 A Yes.

10 Q Thank you.

11 MR. SIMARD: Let's mark that as Exhibit 3,  
12 please.

13 EXHIBIT 3 - Lightstream's report on  
14 second quarter results in 2016

15 Q MR. SIMARD: And then this document is a  
16 management presentation dated May 31st, 2016, again  
17 obtained from Lightstream's website. I think in this  
18 case the author of the document was the company's  
19 financial advisor Evercore and not Lightstream, but  
20 please have a quick flip and let me know if I have  
21 identified it correctly.

22 A That's correct.

23 Q So this is not a document that was authored by  
24 Lightstream?

25 A It was prepared by Evercore.

26 Q But you did have the ability to review it and have input  
27 on the contents prior to it being made publicly



1 available?

2 A Yes.

3 Q And to the best of your knowledge, subject to the  
4 qualifications and conditions set out therein, and  
5 obviously the fact that it is an expression of opinion in  
6 some cases, the statements in this document were accurate  
7 when published?

8 A Well, what I would say is this document is one of a  
9 number of scenarios of projections. That's all it was.

10 Q Sure. So it may not have been a statement of fact other  
11 than a projection based on some assumptions and that type  
12 of thing set out therein.

13 You're not aware, though -- subject, again, to all  
14 the qualifications and conditions herein -- about any  
15 material misstatement in that document when it was  
16 published?

17 A Again, I would just say this is a number of scenarios and  
18 projections that were prepared for the purposes of those  
19 discussions, and, no, I am not going to say there was any  
20 material misstatement or not.

21 Q Okay. That's fine.

22 A It's simply a set of projections, scenarios.

23 Q Understood.

24 MR. SIMARD: Let's mark that as Exhibit 4,  
25 if we could.

26 EXHIBIT 4 - Lightstream management  
27 presentation dated May 31, 2016

1 Q MR. SIMARD: Turning back to a topic we  
2 spoke about a few minutes ago, sir, the company's  
3 assessment of economic locations, my understanding is  
4 that those types of analyses are treated in the industry  
5 as proprietary, confidential information. Is that  
6 correct?

7 A Correct. Yeah.

8 Q So Lightstream would consider its economic assessments to  
9 be proprietary and confidential?

10 A Yes.

11 Q In your experience when you go to look at acquiring the  
12 assets of an E&P company in this market, you don't expect  
13 to see that type of information from the target company  
14 in their data room? You don't expect to have it  
15 disclosed to you?

16 A You may or may not. It depends on the situation.

17 Q You have been involved in situations where it has been  
18 disclosed?

19 A Yes.

20 Q And in situations where it has not been disclosed?

21 A In a number of cases, what happens sometimes is that the  
22 agent, the advisor, would prepare a list of locations,  
23 information that they have worked up.

24 Q Okay. And that's what would be disclosed?

25 A In those cases.

26 Q Okay. Is it generally the case that the company -- that  
27 the information prepared by the company itself is not

1 disclosed in a marketing scenario?

2 A I wouldn't say generally. It's a mix.

3 Q Okay. In the current sale process being run by  
4 Lightstream, am I correct in assuming that Lightstream's  
5 economic assessments of its locations are not being made  
6 available to bidders?

7 A My understanding, there is a listing of potential  
8 locations that could be considered for value.

9 Q But Lightstream's own economic assessment of those  
10 locations that it has worked up, as we've discussed, and  
11 its prioritization of those locations, that information  
12 is not being put into the data room?

13 A I would have to check directly to see if it was.

14 Q You're not sure?

15 A I'm not positive.

16 Q Okay. I presume that within the list of locations that  
17 Lightstream has conducted an economic assessment on,  
18 there are locations which Lightstream projects would be  
19 accretive to value to develop, even at today's commodity  
20 costs. Is that fair as a --

21 A There would --

22 Q -- general statement?

23 A -- be some.

24 Q Okay.

25 A We would suggest that today's commodity cost and  
26 assumption of what we think the capital cost for those  
27 wells would be.

1 Q So based on your assumption about commodity costs and  
2 based on your estimate of capital costs, there would be  
3 some locations that Lightstream would currently view as  
4 accretive to value.

5 A Yes. I think we've said as much. We would be interested  
6 in, absent current circumstances, in pursuing a capital  
7 program in light of that.

8 Q Following up on that, I will show you a corporate  
9 presentation from Lightstream's website from the end of  
10 Q2 in this year, 2016. Have I correctly identified that  
11 document?

12 A Yes.

13 Q And that's a document with respect to which you had input  
14 prior to its publication?

15 A Yes, I did.

16 Q Subject to the qualifications and conditions stated  
17 therein, as far as you were aware at the time, the  
18 statements in this document were accurate?

19 A Yes.

20 MR. SIMARD: Could we mark that as the next  
21 exhibit, please.

22 EXHIBIT 5 - Lightstream corporate  
23 presentation from the end of Q2 2016

24 (DISCUSSION OFF THE RECORD)

25 Q MR. SIMARD: And just on that point we were  
26 discussing, sir, if you could go to page 15. And, of  
27 course, this document, among other things, spoke about

1        what was the recapitalization plan that the company was  
2        pursuing at the end of May this year.

3                And on page 15, under the "Preserve Long-Term Value"  
4        heading there are a couple of points there. I will just  
5        read the first one to you. (as read)

6                Recapitalization plan avoids selling  
7                assets in low commodity price  
8                environment.

9                As far as you're aware, that statement was true at  
10       the time it was made; in other words, the  
11       recapitalization plan, had it succeeded or if it  
12       succeeds, would have avoided selling assets in what you  
13       viewed to be a low commodity price environment at the  
14       time? Is that fair?

15    A    Yes.

16    Q    Okay. And at that time, sir, was it your view that long-  
17       term value could be maximized by recapitalizing as  
18       opposed to selling the assets in those market conditions?

19    A    Sorry. At what time?

20    Q    As at the date of this document, May 31st, 2016.

21    A    That would be correct, but we had gone through an  
22       extensive process to see if we could maximize value other  
23       ways.

24    Q    And is that statement still true today, in today's market  
25       conditions?

26    A    I would believe it would still be true, but I think we'll  
27       find out through this process.

1 Q And you'll agree with me that under the restructuring and  
2 recapitalization plan that was being pursued in the CBCA  
3 proceedings, existing shareholders were to receive new  
4 shares and warrants in the company?

5 A Correct.

6 Q Do you understand, sir, that under the CCAA, the  
7 insolvency statute, that no CCAA plan can be made  
8 providing recovery to existing shareholders unless all  
9 creditors are paid in full? Do you understand that?

10 A Under CCAA, yes, I'm aware of that.

11 Q And, sir, just to confirm, has the company tried to  
12 negotiate a restructuring or recapitalization plan with  
13 its stakeholders since these CCAA proceedings commenced?

14 A We have not.

15 Q The company's pursuing the sales process that was  
16 approved by the Court at this time?

17 A Correct.

18 Q And it's your understanding that the company is required  
19 to pursue that sales process by virtue of the support  
20 agreement entered into with initial consenting  
21 noteholders?

22 A That would be correct.

23 Q So, then, back to page 15 on Exhibit 5. The second  
24 bullet under the heading "Preserve Long-Term Value" says:  
25 (as read)

26 Current economic conditions warrant  
27 drilling program upon completion of

1                   the recapitalization plan.

2                   And you agreed with that statement at the time it  
3                   was made, at the end of May 2016?

4    A    Sorry.   This was in August.

5    Q    Oh, I'm sorry.   Okay.   Thank you.

6                   At the time the statement was made in August, you  
7                   agreed with that statement?

8    A    Yes.   I think I just said a few minutes ago we would,  
9           absent these circumstances, be looking to have a drilling  
10           program in place.

11   Q    Yes.   And that's what I wanted to -- I wanted to bring it  
12           forward to today's date.   You still view in these current  
13           economic conditions today, October 3rd, that there are  
14           locations that warrant bringing a drilling program for  
15           the benefit of the company and its stakeholders?

16   A    Yeah, and I classify that as a modest drilling program.

17   Q    And the current exit strategy, if the credit bid is  
18           accepted and if the exit financing is put in place, I  
19           understand that, using rough numbers, what will be  
20           available to the company is approximately \$80 million of  
21           liquidity or working capital.   Is that roughly correct?

22   A    Again, depending exactly what commodity prices would do  
23           would be the qualification I would put on that statement,  
24           but there should be at least 80 million.

25   Q    Okay.   And I take it that, based on this statement and  
26           what you have told me earlier today, that if those things  
27           come to pass and the company has that liquidity available

1 to it upon the exit from these proceedings that it does  
2 have locations or prospects on which it would like to  
3 make capital expenditures.

4 MS. BOURASSA: I think you're asking about  
5 what -- if the credit bid is successful, you're asking  
6 what CreditBidCo will do.

7 MR. SIMARD: Fair enough.

8 MS. BOURASSA: And I don't know that  
9 Mr. Scott is in a position to answer that question.

10 MR. SIMARD: No. Thank you for clarifying.

11 Q MR. SIMARD: Based on the company's  
12 assessment, as we have spoken of, its economic assessment  
13 of its locations, the company has locations that you're  
14 aware of today that if you had the 80 million in exit  
15 financing today, there are locations you would execute on  
16 or recommend execution on.

17 A We would recommend a program.

18 Q Okay. And the recommended program, would that spend the  
19 full 80 million in liquidity, or do you have a  
20 recommended program that's smaller than that?

21 A Sorry. I can't give you a specific number at this point  
22 in time because as we go through this process and  
23 depending on what the circumstances are exiting this  
24 process would dictate what type of program we have  
25 because, as we've seen, commodity prices are very  
26 variable, and so we'd have to make a reassessment at that  
27 point in time.



1 Q Okay.

2 A But as of today, our recommendation would be -- the  
3 prices that we see today and the capital costs that we  
4 believe are attainable today that we would recommend a  
5 program as of today.

6 Q And what number would be on that capex expenditure  
7 program today?

8 A Sorry. I don't have a definitive number for you.

9 Q Okay. Do you have an approximation?

10 A No.

11 Q Okay. So I think I understand, though. I mean,  
12 obviously costs are dynamic, future --

13 A Right.

14 Q -- commodity prices are dynamic, and so it's really  
15 something that can be reassessed almost on a daily basis;  
16 you look at what you think will happen and what you can  
17 achieve, and that determines how many locations you view  
18 as accretive or not accretive. Fair?

19 A I think you just can't limit it to locations that are  
20 accretive. I think you have to look at the overall  
21 financial wherewithal of the company at that point in  
22 time as well and what it can go ahead and pursue.

23 (DISCUSSION OFF THE RECORD)

24 Q MR. SIMARD: So it's really difficult to  
25 assess as we sit here today what capital expenditures you  
26 would recommend at some point in the future, even a few  
27 months from now.

1 A To clarify, we would plan based on how we think prices  
2 would be -- how we see prices and where that unfolds.  
3 But before making the what I will call "final go  
4 decision" on a capital program, you want to check that  
5 assessment. You know, OPEC could meet and they could  
6 agree to increase production and all of a sudden prices  
7 are down \$10 a barrel.

8 Q Sure.

9 A I would suggest we probably are not going to recommend a  
10 program in that environment.

11 Q Understood.

12 As we sit here today, there are locations and  
13 opportunities that the company has assessed that would  
14 allow it to go forward with a capital expenditure program  
15 of somewhere 80 million or less. There are opportunities  
16 that you would view as accretive today.

17 A As we sit here today, yes.

18 Q And I take it that the economic assessment of locations  
19 and, as you have said, more broadly prospects or  
20 developments includes not only looking at whether the  
21 expenditure of this gross amount of costs will create  
22 value greater than that amount but it also looks at the  
23 real-time cash flow aspects; in other words, if we have  
24 to borrow money, there is a cost of borrowing, and you  
25 also assess whether the revenue that will be generated  
26 will be greater than that cost. Is that part of the  
27 assessment?

1 A Yes. At a high level, a couple of things that we look  
2 at -- and this is not the only things that we look at but  
3 to kind of get the concept across -- what we are looking  
4 to achieve with a capital program is payout of the  
5 capital costs of those wells within two years or less  
6 because the nature of the wells that we drill are all  
7 high-declining wells; so we're looking to get that  
8 capital reinvestment back within that period.

9 And the other thing that we like to look at is over  
10 the life of the project that we generate what's called a  
11 recycling ratio of two or more based on an operating  
12 netback and the F&D costs. So if the operating netback  
13 for the project is greater than twice of what the finding  
14 and development costs would be for the project, then we  
15 would view those as positive hurdles that we've met.

16 Q Okay. Thank you.

17 If you could look at Exhibit K to your affidavit,  
18 please. That's the third amended and restated credit  
19 agreement. And I will ask you to look actually at the  
20 very last page, which is where the individual commitment  
21 amounts of the lenders are listed.

22 A I'm sorry. I don't know if I have that.

23 MR. SIMARD: Just off.

24 (DISCUSSION OFF THE RECORD)

25 Q MR. SIMARD: So, sir -- sorry -- to  
26 clarify, we're looking at -- within Exhibit K, there is  
27 not only the third amended and restated credit agreement

1 but there is a first amending agreement and a second  
2 amending agreement. We are now looking at the last page  
3 of the second amending agreement dated December 2nd,  
4 2015. And on that page, you will see that the individual  
5 commitment amounts of the lenders are listed.

6 And so my question is, obviously the amount  
7 outstanding under the facilities is different than what  
8 we see here, but, to your knowledge, are the relative  
9 levels of the commitments of the individual lenders the  
10 same as represented here?

11 A To my knowledge, yes.

12 Q And so in the syndicated facility, Royal Bank, Bank of  
13 Nova Scotia, and Canadian Imperial Bank of Commerce are  
14 the largest three lenders, to your knowledge?

15 A In the syndicated -- the operating and the syndicated are  
16 combined. So TD would be the largest.

17 Q That's right. On the syndicated side by itself, without  
18 factoring in the operating facility, the largest three  
19 would be RBC, BNS, and CIBC?

20 A Correct.

21 Q And then when you combine -- well, first of all, the  
22 operating facility, is it still the case that TD is the  
23 sole lender on that part of the facility?

24 A Correct.

25 Q And so when you combine the two sides of the facility, TD  
26 is the largest single lender?

27 A Correct.

1 Q Okay. I know there are different interest rates that  
2 apply to different parts of the facilities. Can you tell  
3 me what the interest rates were that were being charged  
4 under the facility at the end of the second quarter in  
5 2015? Approximation will do.

6 A Sorry. I have to go back and ... I believe it would  
7 have been approximately -- and I'm not certain on this --  
8 but 4.25 percent.

9 Q Okay. And I understand obviously that with the borrowing  
10 base redetermination in the spring of --

11 A Sorry. Which time period did you say?

12 Q I was asking about the end of Q2 2015.

13 A 2015. I thought you meant 2016.

14 We would have been paying approximately three and a  
15 quarter percent.

16 Q Okay. And after the borrowing base redetermination and  
17 notice in the spring of this year, the company was in  
18 covenant default under the -- or the company is now in  
19 covenant default under the credit facility?

20 A We're not in covenant default. It's always been  
21 borrowing base shortfall.

22 Q Okay. Borrowing base shortfall.

23 And obviously there's a forbearance arrangement in  
24 place now.

25 A Correct.

26 Q What is the interest rate that's being paid currently on  
27 the credit facility?

1 A I think that's about the four and a quarter.

2 A Okay.

3 Q If you could look at paragraph 80 of your affidavit,  
4 please. So I want to ask you about the process that was  
5 commenced in December of 2014. I understand that that  
6 process involved the marketing of the Bakken business  
7 unit.

8 A Correct.

9 Q But just the Bakken.

10 A At that time, yes.

11 Q Okay. And at that time, there was no borrowing base  
12 default or other default under the credit agreement at  
13 the time the process was started in December 2014?

14 A Correct.

15 Q And so am I correct in characterizing this as not a  
16 process that was mandated or asked for by the lending  
17 syndicate but was more of a proactive step by the  
18 company?

19 A Correct.

20 Q And how long did that process carry on under which the  
21 Bakken business unit was being offered for sale?

22 A It was still ongoing right up through until our process  
23 on -- we announced on July 13th.

24 Q Okay. Obviously no acceptable offers had been received  
25 by Lightstream which led to a purchase and sale  
26 transaction for all of the Bakken unit.

27 A There was no purchase and sale transaction.

1 Q Were there some small sales of assets from the Bakken  
2 unit --

3 A No.

4 Q -- coming out of this process?

5 So there were no sales.

6 A No.

7 Q Were any offers received?

8 MS. BOURASSA: Just before we get too far  
9 into this, we have had a bit of back and forth over the  
10 weekend about the fact that your clients have indicated  
11 in court materials that they intend to bid, and so I  
12 think we have to be very careful discussing both the pre-  
13 CCAA and post-CCAA sale process to not give information  
14 that isn't available to other bidders. So I was fine  
15 with your questions about a sale being concluded. I  
16 think on the offer front, that goes into the territory of  
17 other bidders don't have that information.

18 (OBJECTION)

19 MR. SIMARD: Well, understood. I  
20 understand the sensitivity. I have a series of questions  
21 that I will put on the record.

22 With respect to other bidders having access to them,  
23 if they are answered, they will become part of the public  
24 record and everyone will have access to them.

25 But let me put my record -- my questions on the  
26 record, Ms. Bourassa, and you can determine whether you  
27 think he should answer or whether they're objectionable

1 for that or any other reason. So let's do that first.

2 So the questions I would have in addition to that  
3 first one:

4 Were any offers received from bidders for the  
5 purchase of some or all of the Bakken assets?

6 Were any single offer or combination of offers  
7 received which would have exceeded the current amount of  
8 the bank debt, that is, approximately 371 million?

9 Those were the two questions.

10 MS. BOURASSA: Then I will put my objection  
11 to both of them, and maybe we can move on.

12 (OBJECTION)

13 MR. SIMARD: Okay.

14 Q MR. SIMARD: Sir, you mentioned in your  
15 affidavit the secured notes exchange or issuance  
16 transaction that occurred in 2015.

17 And, again, I'll just ask you. And if you need to  
18 refer to your affidavit, you can, but I think these will  
19 be simple questions.

20 I understand that the amount of that transaction was  
21 for a total of US \$650 million.

22 MS. BOURASSA: So before we go down this  
23 path, we've had this discussion as well. I understand  
24 that your clients object to certain of the relief granted  
25 in the initial order. Your clients had also brought a  
26 cross-application for a trial of an issue; and in respect  
27 of that, the Court determined that a threshold question



1 be framed and threshold determination be made. And so to  
2 the extent we're doing questioning on affidavit right  
3 now, going into the litigation is outside of the scope of  
4 the comeback application.

5 MR. SIMARD: And I won't -- I think you  
6 will see -- as we go through a brief series of questions  
7 on that transaction, you will see that none of it relates  
8 to the issues that are live in the oppression action.  
9 It's merely background questions for the purpose of the  
10 comeback hearing.

11 MS. BOURASSA: Okay. Continue.

12 Q MR. SIMARD: So the first question, sir,  
13 which I think you did answer, was that the face amount of  
14 that transaction US \$650 million?

15 A Ultimately US 650 million.

16 Q And I --

17 A Second lien notes were issued.

18 Q Yes.

19 And I understand that one part of the transaction,  
20 one part of that total amount, was the issuance of US  
21 \$450 million of new secured lien notes in exchange for  
22 546 million, again US, of unsecured notes.

23 A 450 million US was what was issued in exchange. Sorry.  
24 I can't remember the total amount of what was exchanged.

25 MR. SIMARD: Let's just go off for a  
26 second.

27 (DISCUSSION OFF THE RECORD)

1 Q MR. SIMARD: Sir, we have had a discussion  
2 off the record, and you have had a look at your  
3 affidavit, and you agree that that exchange was for US  
4 450 million of new secured lien notes, for US 546 million  
5 of unsecured notes?

6 A Correct.

7 Q And then the balance of the proceeds of that transaction  
8 US \$200 million were used to pay down the amount  
9 outstanding under Lightstream's credit facility with its  
10 lending syndicate?

11 A Correct.

12 Q And so none of the proceeds of the secured note exchange  
13 transaction went to working capital of the company?

14 A Well, at that time, when our facility was revolving, we  
15 were using all excess cash to pay down the revolving  
16 facility; and then as we needed working capital, we would  
17 draw it up. So that's why it was done in that fashion.

18 Q So paying down the credit facility had the effect of  
19 freeing up working capital.

20 A Correct.

21 Q The interest rate on the new secured notes is  
22 9.875 percent per annum?

23 A Correct.

24 Q The interest rate on the unsecured notes for which those  
25 were partially exchanged was 8.625 percent per annum?

26 A Correct.

27 Q The sales process that was commenced --

1 MR. SIMARD: I am mindful of your warnings,  
2 Ms. Bourassa, but I think these questions will be -- some  
3 of them will be unobjectionable.

4 Q MR. SIMARD: The sale process that was  
5 commenced in July of this year was not only for the  
6 Bakken business unit but also for the Cardium business  
7 unit and the Alberta/BC business unit?

8 A Correct, corporate sale.

9 Q And that's the first time Lightstream had offered all of  
10 its business units for sale in the process?

11 A Correct.

12 Q If you could look at paragraphs 85 to 87 of your  
13 affidavit. Just read those to yourself for a moment.

14 (DISCUSSION OFF THE RECORD)

15 (ADJOURNMENT)

16 Q MR. SIMARD: So, sir, before we broke, I  
17 asked you to read paragraphs 85 to 87 of your affidavit,  
18 and I wanted to ask you some questions about the current  
19 process that was commenced on July 13th, 2016. I  
20 understand that the deadline that parties were notified  
21 of for indicative nonbinding bids was the week of  
22 October 7th.

23 A That's correct. Under the CBCA process, yes.

24 Q Yes, the CBCA process. Thank you.

25 MR. SIMARD: And so, yes, Ms. Bourassa,  
26 there are some questions you may object to which I think  
27 are proper, but I will give you warning at this time.

1 Q MR. SIMARD: Were any indicative nonbinding  
2 bids received by the company?

3 MS. BOURASSA: So we'll object to that on the  
4 same basis as earlier.

5 (OBJECTION)

6 Q MR. SIMARD: Did the company make any  
7 management presentations to bidders as part of that CBCA  
8 sale process?

9 MS. BOURASSA: Same objection.

10 (OBJECTION)

11 Q MR. SIMARD: To your knowledge, sir, did  
12 any bidders go to the extent of retaining reservoir  
13 engineers to conduct reserves analyses of the company's  
14 assets?

15 MS. BOURASSA: Same objection.

16 (OBJECTION)

17 Q MR. SIMARD: To your knowledge, did any  
18 bidders go to the extent of having financial advisors  
19 retained to model revenue projections?

20 MS. BOURASSA: Objection.

21 (OBJECTION)

22 Q MR. SIMARD: Did the company as part of  
23 that CBCA sale process receive any requests for site  
24 visits?

25 MS. BOURASSA: Objection.

26 (OBJECTION)

27 Q MR. SIMARD: As part of the CBCA sale

1 process, did the party receive any requests for  
2 additional environmental reviews or reports?

3 MS. BOURASSA: Objection.

4 (OBJECTION)

5 MR. SIMARD: Those are all my questions on  
6 that sales process.

7 Q MR. SIMARD: If I could ask you, sir, to  
8 look at Exhibit 3. Sorry. Wrong document. I will skip  
9 that for now.

10 If we could refer to paragraph 112 of your  
11 affidavit, please. Read that to yourself.

12 So I wanted to ask you about the APA with  
13 CreditBidCo. Have drafts of that document been  
14 exchanged?

15 A Yes.

16 Q Has that document been finalized?

17 A No.

18 Q It hasn't been executed obviously.

19 A No.

20 Q Okay. So if you could look at Exhibit 3, page 39. This  
21 is a discussion under the "Impairment" heading. So at  
22 the top of page 39, there is discussion there of, I  
23 guess, two methods of valuation which were considered in  
24 terms of assessing the company's impairment at the end of  
25 the second quarter for this reporting.

26 There is mention there of an external analyst. Can  
27 you tell me who that external analyst was?

1 A TD.

2 Q Not TD the lender bank but TD --

3 A TD is our --

4 Q -- the financial advisor.

5 A TD is our financial advisor.

6 Q And the external analyst valuation, was that a document  
7 that TD produced and provided to the company?

8 A Yes.

9 Q Okay. Wait for your counsel before you answer this  
10 question: Can you tell me what TD's -- what the number  
11 was in TD's asset valuation of the company?

12 MS. BOURASSA: Object.

13 (OBJECTION)

14 Q MR. SIMARD: And can you undertake to  
15 provide a copy of that document? Which I think would be  
16 acceptable if it was provided on a confidential basis to  
17 the Court.

18 MS. BOURASSA: We'll take that under  
19 advisement.

20 MR. SIMARD: Okay.

21 UNDERTAKING 1 - To provide a copy of the  
22 external analyst valuation TD produced  
23 and provided to the company (Taken Under  
24 Advisement)

25 Q MR. SIMARD: So if you could look at  
26 paragraph 113 of your affidavit. Recognizing that we do  
27 not yet have an APA that's finalized or executed, is it

1       your understanding and expectation that the credit bid  
2       will pay the first lien lenders, the lending syndicate,  
3       in full?

4   A   Yes, through the exit financing.

5   Q   And is it also your understanding of the credit bid that  
6       the secured noteholders making the credit bid will  
7       exchange -- will receive the ownership of all the assets  
8       of the company in exchange for all their outstanding  
9       secured notes?

10  A   Correct.

11  Q   Is it also your expectation and understanding that  
12       CreditBidCo, if its bid is accepted via the credit bid,  
13       will assume all debt owed to trade creditors of  
14       Lightstream?

15  A   Yes.

16  Q   And that includes unsecured trade debt predating the CCAA  
17       proceedings?

18  A   Correct.

19  Q   Is it the case that under that credit bid scenario, the  
20       only creditor group that will not be repaid if the credit  
21       bid is accepted is the unsecured noteholders?

22  A   That would be my understanding.

23  Q   And there were -- I just noticed in one of the financial  
24       statements there were convertible debentures that were  
25       outstanding and were repaid by the company in February  
26       2016.

27  A   Correct.

1 Q Were those unsecured debentures?

2 A Yes, they were.

3 Q Again recognizing we don't have a finalized APA but we do  
4 have commentary on the credit bid in the sales process  
5 that was approved by the Court, the price of the credit  
6 bid, I understand, was set based on the amount of debt  
7 outstanding to the lending syndicate and then the amount  
8 of the debt outstanding to the secured noteholders. Is  
9 that fair?

10 A Yes.

11 Q Okay. The price wasn't negotiated with the secured  
12 noteholders. It was fixed based on the debt levels.

13 A It was based on what they were offering up as what they  
14 would put in as a credit bid.

15 Q Okay. And you understand that what they were offering up  
16 to put in as a credit bid was based on the amount of debt  
17 owed to them and the amount of debt owed to priority  
18 creditors.

19 A Correct.

20 Q Ms. Bourassa provided at my request this weekend a copy  
21 of the exit financing commitment letter, and we had a  
22 discussion about how we would deal with that document.

23 MR. SIMARD: I understand, Ms. Bourassa,  
24 that I can put this to Mr. Scott, we can mark it as an  
25 exhibit, but that exhibit will be put before the Court  
26 only on a confidential basis. Is that acceptable?

27 MS. BOURASSA: That's correct.



1 MR. SIMARD: Can I give a copy to the  
2 monitor?

3 MS. BOURASSA: Yes, I don't see an issue with  
4 the monitor.

5 MR. SIMARD: Okay.

6 Q MR. SIMARD: So, sir, I have given you a  
7 document, as I said, that was provided in response to my  
8 request. Can you just confirm for me that that document  
9 is the exit financing commitment letter?

10 A That's correct.

11 Q Okay.

12 MS. BOURASSA: Mr. Simard, I think in my  
13 email to you over the weekend I had indicated some  
14 matters in the exit financing which are on the public  
15 record but also, of course, indicated that the actual  
16 commitment letter, we view, is confidential. So to the  
17 extent your questions relate to those matters that are  
18 already referenced on the record, then I have no issue;  
19 but, otherwise, we should mark part of the transcript as  
20 confidential.

21 MR. SIMARD: Sure. Let's deal with that as  
22 we come to the questions.

23 MS. BOURASSA: Sure.

24 MR. SIMARD: But for present purposes,  
25 let's mark this as a confidential exhibit on the  
26 understanding that the only thing I will do with it in  
27 advance of next week is provide it to the Court but

1        indicating that it's confidential, and obviously we won't  
2        file it and we won't provide it to any other parties.  
3        So should we call it "Confidential Exhibit Number 1" or  
4        "Confidential Exhibit Number 6"?

5                Let's just go off.

6        (DISCUSSION OFF THE RECORD)

7                        CONFIDENTIAL EXHIBIT 6 - Exit financing  
8                        commitment letter

9    Q    MR. SIMARD:                        Sir, to your knowledge, have  
10        any other agreements been entered into or negotiated with  
11        the exit facility lenders regarding the exit financing  
12        besides this commitment letter?

13    A    No.

14    Q    So I understand that what is intended as part of the exit  
15        financing is a \$400 million lending facility.

16    A    Correct.

17    Q    Of that \$400 million, one use will be to repay the  
18        current lending facility with the first lien lenders?

19    A    Correct.

20    Q    And then the balance of the funds, loaned to CreditBidCo  
21        in this case, will be available for -- be available as  
22        working capital; is that correct?

23    A    Correct.

24    Q    And it is contemplated in some of the documents, I  
25        believe the support agreement and maybe even the  
26        forbearance agreement, that CreditBidCo, subject to the  
27        circumstances that exist at the time, will carry out a

1 capital expenditure program.

2 A Well, again, going back to our previous discussion, there  
3 would be perhaps a recommendation for a program if we  
4 found ourselves in the same type of economic environment.

5 Q Sure. So it's subject to everything that you would  
6 normally assess at that time, but the plan is that  
7 CreditBidCo will have up to \$80 million in liquidity  
8 available to potentially carry out a capital expenditure  
9 program.

10 A Again, subject to board approvals, et cetera.

11 Q Since the CCAA proceedings started, sir, has the company  
12 sought out or explored any alternative sources, and that  
13 is the company now Lightstream, any alternative sources  
14 for \$80 million to carry out the capital expenditure  
15 program that is potentially being considered for  
16 CreditBidCo?

17 A No.

18 Q So I take it, sir, that the company hasn't explored  
19 whether those funds might be available in the form of a  
20 DIP loan which would not be tied to the credit bid or the  
21 exit facility.

22 A We have not.

23 Q Is it fair to say, sir, that the company would consider  
24 such alternatives if it determined that that alternative  
25 was in the best interests of the company and its  
26 stakeholders?

27 A If I am not mistaken, I think a DIP loan concept is dealt

1 with under the forbearance agreement.

2 Q So subject to the whatever legal obligations the company  
3 might be under in the forbearance agreement or the  
4 support agreement, I take it that the company would  
5 consider any alternative if it determined that that  
6 alternative was in the best interests of the company and  
7 its stakeholders.

8 A We would consider looking at something.

9 Q I want to show you a letter sent by my partner Mr. Zweig  
10 to the monitor but a copy of which was sent to  
11 Ms. Bourassa on Friday, September 30th. Have you seen  
12 that letter?

13 A Yes, I have.

14 MR. SIMARD: Can we mark that as the next  
15 exhibit? Exhibit 7.

16 EXHIBIT 7 - Letter sent by Mr. Zweig to  
17 the monitor with a copy of which sent to  
18 Ms. Bourassa on Friday, September 30,  
19 2016

20 Q MR. SIMARD: Sir, I take it that the  
21 company's goal in these CCAA proceedings is to maximize  
22 value for the benefit of all its stakeholders.

23 A Correct.

24 Q You'll see in paragraph 1 of this letter that there is a  
25 request made to the monitor to prepare a report to  
26 consider and report on all restructuring alternatives  
27 available to the company and the circumstances.

1           I take it, sir, that there is no reason you're aware  
2           of that the company would not facilitate such an effort  
3           by the monitor.

4   A   We would have to discuss that with the monitor.

5   Q   Is there any reason you're aware of today why the  
6           company -- subject to and leaving aside whatever legal  
7           obligations it has under the support agreement and the  
8           forbearance agreement, are you aware of any reason  
9           factually why the company would not participate with the  
10          monitor if such a report were to be prepared?

11   A   Again, I would like to discuss it with the monitor and  
12          their counsel. I mean, we have gone through, as you  
13          pointed out, back to as early as 2014 looking at a number  
14          of different initiatives all around various alternatives  
15          so ...

16   Q   You would agree with my statement that the company in  
17          these CCAA proceedings, which are about a week old now,  
18          is prepared to consider all alternatives that are in the  
19          best interests of the company and its stakeholders?

20   A   Yes.

21   Q   In response to this letter, we received a memorandum from  
22          the monitor. It's dated September 30th, 2016. I think  
23          it may have been sent on October 1st, 2016.

24   MR. SIMARD:                   And this is another document,  
25          Ms. Bourassa, that we agreed use could be made of but  
26          only by maintaining confidentiality. So I would propose  
27          that we mark this as Confidential Exhibit Number 8.

1                   CONFIDENTIAL EXHIBIT 8 - Memorandum from  
2                   the monitor dated September 30, 2016

3       MR. SIMARD:                   I don't have any questions  
4       about that document; but just so we have it clearly on  
5       the record, I will provide it to the Court advising the  
6       Court that it is confidential but will not provide it to  
7       any other parties; and then, as we discussed, this and  
8       any other confidential documents, if anyone wishes to  
9       make reference to them at the comeback hearing, it will  
10      be done on the general basis we always do for those types  
11      of things.

12    Q   MR. SIMARD:                   Sir, the support agreement  
13      with the initial consenting noteholders is an exhibit to  
14      your affidavit, Exhibit 10 to your September 21st  
15      affidavit. There are references in that document to  
16      something called a "disclosure letter." I don't believe  
17      the disclosure letter is in evidence.

18      MR. SIMARD:                   Or is it, Ms. Bourassa?

19      MS. BOURASSA:                  I don't believe it is. Can  
20      you give me the reference to that? I know what you're  
21      talking about. I just have to find it in the document.

22      MR. SIMARD:                   It's defined on page 3 of  
23      Schedule A to the support agreement.

24      MS. BOURASSA:                  I don't believe that's on the  
25      record.

26    Q   MR. SIMARD:                   I am just asking if you can  
27      undertake to produce that, Mr. Scott.

1 MS. BOURASSA: We'll take that under  
2 advisement.

3 UNDERTAKING 2 - To produce the  
4 disclosure letter as defined on page 3  
5 of Schedule A to the support agreement  
6 (Taken Under Advisement)

7 MR. SIMARD: Reference is also made in this  
8 agreement to a backstop agreement. And, again, I do not  
9 believe the backstop agreement is in evidence.

10 MS. BOURASSA: I'm not sure. If we can just  
11 go off for a minute.

12 MR. SIMARD: Sure.

13 (DISCUSSION OFF THE RECORD)

14 Q MR. SIMARD: So I would ask you to give me  
15 an undertaking to provide that backstop agreement so it  
16 is --

17 MS. BOURASSA: We'll take that --

18 Q MR. SIMARD: -- before the Court.

19 MS. BOURASSA: -- under advisement as well.

20 MR. SIMARD: Thank you.

21 UNDERTAKING 3 - To provide the backstop  
22 agreement referenced in the support  
23 agreement (Taken Under Advisement)

24 Q MR. SIMARD: Sir, if you could turn to the  
25 term sheet that is Exhibit B to the support agreement and  
26 specifically page 9. On page 9, there is a reference  
27 just above the "Corporate Governance" heading to:

1 (as read)

2 A maximum of 8 million new common  
3 shares or stock options shall be  
4 reserved for issuance pursuant to the  
5 new employee incentive plan at the  
6 discretion of the post-  
7 recapitalization board of directors.

8 I take it, sir, that the 8 million -- up to  
9 8 million in new common shares are being reserved for  
10 employees, directors, or officers, not by virtue of their  
11 debt holdings or status as existing shareholders but by  
12 virtue of their positions as employees, directors, or  
13 officers.

14 A Correct. It's part of a -- it would be part of the  
15 standard compensation program for public companies.

16 Q And has any further agreement been negotiated or entered  
17 into with respect to what that incentive or compensation  
18 package would look like for directors, officers, and  
19 employees of CreditBidCo?

20 A Not at this time, other than what's been described as ...  
21 Sorry. No, not at this time other than the concept of  
22 keeping on the employees and the same management team of  
23 the company.

24 Q Sure. So that's been discussed. The contemplation is if  
25 the credit bid goes ahead, that all of the current  
26 employees and officers of the company would carry on with  
27 CreditBidCo.



1 A Correct.

2 Q Okay.

3 A To our understanding.

4 Q To your understanding.

5           And then obviously we see the board is subject to  
6 what is planned here in the "Corporate Governance"  
7 heading. To your knowledge, has the population of the  
8 board of CreditBidCo been finalized?

9 A No.

10 Q That is something that will be the subject of a future  
11 discussion, if necessary, between the secured noteholders  
12 and the company.

13 A Well, I think it will be a discussion by the -- if  
14 CreditBidCo wins, they will be the shareholders and can  
15 decide which board to put in.

16 Q That's right.

17           Sir, have there been any other agreements negotiated  
18 or finalized that provide additional consideration to  
19 directors or officers of Lightstream in connection with  
20 this support agreement or the credit bid or the sale  
21 process?

22 A No.

23 Q So no indemnities, releases, or any consideration of that  
24 nature has been offered to the current directors or  
25 officers?

26 A Sorry. We're still negotiating the credit bid, the APA,  
27 so ...

1 Q Other than --

2 A Subject to the finalization of that negotiation.

3 Q Okay. There is no side letter, other agreement that's  
4 been negotiated that provides any additional  
5 consideration to --

6 A No.

7 Q -- directors or officers?

8 Turning to some CCAA issues, sir, the administration  
9 charge, as I understand it, the parties included who have  
10 the benefit of the administration charge are the  
11 company's counsel; the monitor; the monitor's counsel;  
12 the first lien lenders' counsel, which is Torys; the  
13 first lien lenders' financial advisor, which is  
14 PricewaterhouseCoopers Inc.; counsel to the secured  
15 noteholders, or at least the initial consenting  
16 noteholders, Goodmans; and the financial advisor to  
17 the -- I guess the ad hoc committee of secured  
18 noteholders, which is BMO.

19 Are there any other parties, to your knowledge, who  
20 currently benefit from the administration charge?

21 A No.

22 MS. BOURASSA: I would say they're as listed  
23 in the initial order.

24 MR. SIMARD: Okay.

25 MS. BOURASSA: One point of clarification is,  
26 as set out in the initial order, BMO's coverage is to the  
27 extent of their monthly work fee.

1 MR. SIMARD: Thank you.

2 Q MR. SIMARD: We have seen, sir -- and you  
3 can look at it again, if you want -- the list of lenders  
4 under the first lien note which was Schedule B to the  
5 second amended credit agreement. That is the last page  
6 in your Exhibit K.

7 A Got it.

8 Q And so there you see the list of first lien lenders. To  
9 your knowledge, all those parties are still in the  
10 syndicated credit facility?

11 A To my knowledge.

12 Q To your knowledge, sir, I take it you would agree with me  
13 you're not aware of any of those parties being insolvent.

14 A To my knowledge, I don't believe so.

15 Q You're not aware of any of those parties having an  
16 inability to pay their legal or financial advisors?

17 A I don't believe so but ...

18 Q And then with respect to the parties who have signed on  
19 as initial consenting noteholders to the support  
20 agreement, the identity of those parties is confidential  
21 in these proceedings, but I take it you have seen the  
22 list of who has signed on.

23 MS. BOURASSA: Can we go off for a minute?

24 MR. SIMARD: Yeah.

25 (DISCUSSION OFF THE RECORD)

26 Q MR. SIMARD: So, sir, with respect to the  
27 parties -- the secured noteholders who have signed the

1 support agreement, I take it, as well, that you're not  
2 aware of any of those parties being insolvent.

3 A I am not aware of that.

4 Q And you're not aware of any of those parties having an  
5 inability to pay their own lawyers or financial advisors?

6 A I am not aware of that.

7 Q So I take it, sir, the parties who are beneficiaries of  
8 the administration charge, as Ms. Bourassa said, listed  
9 in the initial order granted last week, those parties  
10 have been rendering bills and Lightstream has been paying  
11 their bills on a current basis --

12 A Correct.

13 Q -- thus far.

14 Can you undertake to provide for me, sir, the amount  
15 of each of those parties' invoices that have been billed  
16 to the company and paid to date?

17 MS. BOURASSA: We'll take that under  
18 advisement.

19 And, to be clear, you're referring to Torys, PwC,  
20 Goodmans, BMO?

21 MR. SIMARD: All the parties subject to  
22 the --

23 THE WITNESS: The charge.

24 MS. BOURASSA: So you want --

25 MR. SIMARD: Oh, no. Okay. That's fair.  
26 I can limit that undertaking to the parties retained,  
27 directly retained, by stakeholders other than the

1 company. So not the monitor, not company counsel, not  
2 the monitor's counsel.

3 MS. BOURASSA: And presumably --

4 MR. SIMARD: The other parties.

5 MS. BOURASSA: -- you would include D&O  
6 counsel as --

7 MR. SIMARD: Yes.

8 MS. BOURASSA: Which side? Sorry. What does  
9 "yes" mean?

10 MR. SIMARD: Are they beneficiaries of the  
11 admin charge?

12 MS. BOURASSA: They are.

13 MR. SIMARD: Okay. So they would be  
14 included in the undertaking request.

15 MS. BOURASSA: Okay. So I will take under  
16 advisement providing the amounts paid to those five  
17 firms, I think we've covered now.

18 MR. O'NEILL: Sorry. Chris, for what  
19 period are you asking?

20 MR. SIMARD: Let's cover the period from --  
21 let's cover all of 2016 because I don't know when the  
22 work commenced that led to the CBCA filings and support  
23 agreement, but I can limit it to calendar 2016.

24 UNDERTAKING 4 - To provide the amounts  
25 paid to parties directly retained by  
26 stakeholders other than the company --  
27 Torys, PwC, Goodmans, BMO, and D&O

1                   counsel -- in calendar 2016 (Taken Under  
2                   Advisement)

3   Q   MR. SIMARD:                    Sir, you understand that my  
4       firm and our co-counsel, Cassels Brock, act for an ad hoc  
5       group of unsecured noteholders?

6   A   I understand you act for two unsecured noteholders.

7   Q   Sure.

8                   And am I correct in understanding that the company  
9       paid the portion of the legal fees of those unsecured  
10      noteholders for a certain period of time this summer?

11   A   Correct.

12   Q   Okay. And I understand -- am I correct in understanding  
13      that the fees paid were capped at \$100,000 but that  
14      amount was paid?

15   A   Correct.

16   Q   That was something that the company agreed to pay?

17   A   The two noteholders asked us to do that, and we agreed to  
18      pay that.

19   Q   And that was something that the secured noteholder  
20      parties to the support agreement and the lending  
21      syndicate either agreed with or allowed?

22   A   They would have been aware of it.

23   Q   Okay. As I understand it, the agreement to pay the fees  
24      of our client was, when the agreement was made or  
25      committed to by the company, it was limited to \$100,000.

26   A   I believe at their suggestion.

27   Q   But since the payment of that amount, there has been no

1 further payment by the company with respect to my  
2 clients' legal fees.

3 A Correct.

4 Q So the current contemplation, if the credit bid is  
5 approved and closed -- we have already talked about all  
6 the creditor/stakeholder groups that will be paid. There  
7 would also be some other payments that I just want to run  
8 through with you.

9 The financial advisors, to the extent they have  
10 success fees, would also be paid?

11 A Correct. My understanding, yes.

12 Q The beneficiaries of the -- K-E-I-P -- the KEIP and the  
13 KERP, they will not be paid in the event of a successful  
14 credit bid subject to some conditions, but generally  
15 they're paid if the credit bid does not go ahead --

16 A Correct.

17 Q -- under the KERP and the KEIP programs.

18 A Correct.

19 Q Obviously directors and officers, their expenses and fees  
20 will be paid if the credit bid transaction goes ahead.

21 A Sorry. Normal course expenses? I am not sure what  
22 you're getting at.

23 Q Their legal advisor's fees.

24 A Oh, yes.

25 Q I take it you will agree with me, sir, that, as we sit  
26 here today, no one yet knows if a bid will be received  
27 that is superior to the credit bid.

1 A Correct.

2 Q And so we don't know as we sit here today if unsecured  
3 noteholders will receive any recovery from this process?

4 A Correct.

5 Q Since the commencement of the CCAA proceedings, sir, am I  
6 correct in assuming that the company has not held  
7 discussions with its creditor groups about a  
8 restructuring plan to be implemented under the CCAA?

9 A That's correct.

10 Q I take it there is nothing you're aware of that would  
11 mean --

12 A So -- sorry -- prior to that we did have discussions.

13 Q Yes. Sure. I am talking about since the CCAA started.

14 A There was active discussion prior to.

15 Q Yes. Until the end of the CBCA process.

16 A Correct.

17 Q I take it, sir, there is no reason you're aware of why  
18 the company would not be willing to hold discussions with  
19 creditor groups about a CCAA restructuring plan if the  
20 company determined that was in the best interests of the  
21 company and its stakeholders.

22 A As I mentioned before, we look -- we can consider it.

23 Q With respect to TD, so Toronto-Dominion Bank obviously  
24 is, as we have seen, a lender in the syndicated facility  
25 and also a lender in the operating facility.

26 A Correct.

27 Q It's the agent in the lending syndicate?



1 A Yes.

2 Q And it is proposed to be one of the lenders in the exit  
3 financing?

4 A Correct.

5 Q It's also proposed to be the agent of the syndicate in  
6 the exit facility?

7 A That's my understanding, yeah.

8 Q And I take it that the current contemplation is that if  
9 the credit bid is accepted and that transaction closes,  
10 the lenders who have committed to the exit facility in  
11 that circumstance will be committed to make the exit  
12 financing available.

13 A Correct.

14 Q But if a different bid is accepted and closes in the sale  
15 process, the lenders in the exit facility are not  
16 necessarily obligated to still provide the exit financing  
17 in that scenario.

18 A Different bid. Not involving the second lien holders?

19 Q Yes.

20 A Correct.

21 MS. BOURASSA: If we can just pause for a  
22 minute.

23 MR. SIMARD: Yes.

24 MS. BOURASSA: For you guys in Toronto, I see  
25 we have lost our connection. Like I said, this is old  
26 technology. I assume you can still hear us, though.

27 MR. O'NEILL: Yeah, the sound is fine. It's

1 no problem.

2 MS. BOURASSA: Okay. So we'll just keep  
3 going.

4 MR. O'NEILL: Yes. Thank you.

5 Q MR. SIMARD: Sir, am I correct in  
6 understanding that TD, Toronto-Dominion Bank, was a  
7 holder of unsecured notes issued by Lightstream?

8 A I am not aware of that.

9 Q Other than TD's participation in the credit facility, are  
10 you aware in 2015 if TD was a holder of any other  
11 securities, debt or equity securities, of the company?

12 A I am not aware what ...

13 Q Your understanding is that they didn't have any other  
14 holdings or, if they did, you weren't aware of them.

15 A I wasn't aware. TD's a big organization.

16 Q Okay. And the same question for not Toronto-Dominion  
17 Bank but any affiliates of Toronto-Dominion Bank. Are  
18 your answers the same?

19 A They are the same.

20 Q Okay. So you're not aware of TD as a holder of unsecured  
21 notes having those notes repurchased by the company in  
22 2015?

23 A No.

24 Q With respect to the KERP, sir, it's my understanding from  
25 the publicly filed court materials that the proposal is  
26 that 193 employees will be covered by the KERP.

27 A Correct.

1 Q And, in your view, are all of those employees essential  
2 to the company's operations?

3 A So the company has been through several layoffs. We  
4 reduced staff. As we've talked about through the reserve  
5 report, it's a complex business requiring lots of  
6 professionals. So our view is, for the value protection  
7 of the company, it's important to retain as many of that  
8 staff as possible, and this type of program does that,  
9 and so that's why there was 193 included.

10 Q And for each of those 193, did the company go through a  
11 process of considering whether those people had  
12 alternative job prospects in Calgary offering an equal or  
13 higher salary, was that part of the assessment, on an  
14 individual basis?

15 A As we went through, obviously it doesn't include every  
16 employee in the company. There are certain employees  
17 that are in the field that are, what we say, closer to  
18 the asset. So if there is a transaction that was to  
19 occur, those employees, more than likely, would be  
20 retained by the purchasing company and move with the  
21 asset; and so on that basis, they weren't included in the  
22 KERP program. And so as we looked at the prospects of  
23 the remaining staff, we considered it under the basis  
24 that the likelihood of them obtaining additional  
25 employment was probably low.

26 Q If I could ask you to look at the management presentation  
27 that we marked as Exhibit 4, please, and specifically if

1       you could turn to page 3, the executive summary.

2               And so when I asked you earlier about this document,  
3       you had said these were projections, these were forward-  
4       looking statements, for lack of a better term, based on a  
5       number of assumptions.

6   A   Not forward-looking statements.

7   Q   Sorry. I shouldn't use a term of art with you. Okay.

8       These were projections based on --

9   A   Scenarios.

10   Q   -- scenarios based on a number of assumptions about the  
11       future. Fair?

12   A   Correct.

13   Q   Okay. So we see mention on this page 3 in the third  
14       square bullet of a three-year base case business plan.  
15       So I assume that that was at least one of the possible  
16       projected business plans that was discussed by the  
17       company and its advisor Evercore.

18   A   Correct.

19   Q   And it says in the very first line that that three-year  
20       base case business plan was developed at strip pricing  
21       and flat production. So I assume the reference to strip  
22       pricing was the then-existing strip pricing as at May  
23       2016 when this document was created.

24   A   Yeah. Correct. I don't know the exact date of the  
25       pricing but around that time.

26   Q   Has strip pricing changed materially from that day to the  
27       current date?

1 A I guess it would depend how you define "material"; but  
2 compared to where prices used to be, I would say it's  
3 probably largely in line.

4 Q And as we go down under that same third bullet, you see  
5 the three subparagraphs, and I am reading the second one.  
6 It says: (as read)

7 Notably, neither the base case nor  
8 the upside case require an investment  
9 of new money into the company beyond  
10 a new cash flow revolver to finance  
11 the existing RBL and the downside  
12 case requires minimal new money  
13 investment through 2018.

14 And then the final subparagraph: (as read)  
15 The base case, upside case, and  
16 downside case assume equitization of  
17 the existing second lien and  
18 unsecured notes.

19 So I just want to understand the assumptions that  
20 went into this three-year base case business plan.

21 So obviously it was assumed in this business plan  
22 that the second lien and the unsecured notes would be  
23 gone.

24 A They would be converted to equity.

25 Q So obviously there would be no more interest payments to  
26 those creditor groups.

27 A Correct.

1 Q But does it assume that the then-existing RBL would  
2 remain in place or would be refinanced at the same debt  
3 level?

4 A It assumed that the RB -- there would be a new exit  
5 financing that would replace the existing one.

6 Q Okay. And what assumption was built into the base case  
7 business plan with respect to the size of that exit  
8 financing facility?

9 A 450 million. So higher than what actually was achieved.

10 Q And at about this time, the amount outstanding under the  
11 existing RBL facility was 350-, 360-, something like  
12 that?

13 A 371- including the letters of credit.

14 MR. SIMARD: Okay. Subject to your  
15 responses to my undertakings, those are all my questions.  
16 Thank you.

17 MS. BOURASSA: Okay. If we can just take a  
18 minute. I might have a little redirect. I just want to  
19 look at my notes.

20 MR. SIMARD: Sure.

21 (ADJOURNMENT)

22 MS. BOURASSA: Mr. Scott, I just have a  
23 couple questions by way of redirect.

24 Ms. Bourassa Re-examines the Witness

25 Q MS. BOURASSA: You said earlier: Absent  
26 current circumstances, the company may be interested in a  
27 capital program. What aspects of the current

1 circumstances impact the company not undertaking a  
2 capital program today?

3 A Well, the fact that we're in the CCAA process, we have  
4 limited funds available, making sure that we are using  
5 those limited funds in the most appropriate way possible.  
6 So to embark on an additional capital program at this  
7 time probably would not be a decision that we would think  
8 would make a lot of sense.

9 Q And I believe Mr. Simard asked you about the company's  
10 commencement of the sale process under the CCAA and the  
11 fact that it was a requirement of the support agreement.  
12 Were there other factors that dictated pursuing the sale  
13 process at the commencement of the CCAA?

14 A Well, given the fact that the CBCA process became  
15 derailed and offtrack, it seemed to us as well the only  
16 logical thing to do was to pursue the sales process to  
17 try and maximize value.

18 Q Okay. And in terms of entering into the -- in terms of  
19 entering into the support agreement which includes the  
20 credit bid concept, how was that agreement negotiated by  
21 the company?

22 A Sorry. The support agreement?

23 Q Yes.

24 A So prior to entering into the support agreement, we went  
25 through an extensive process, of which we were public  
26 about, of identifying three different avenues to preserve  
27 long-term value for the company, one being seeking out

1 additional first lien financing which was permitted under  
2 the agreements, the second was looking at the sale of  
3 partial -- of some of the assets of the company, and the  
4 third was looking at restructuring the balance sheet  
5 through equitization of certain elements of the balance  
6 sheet.

7 In going through all of those initiatives -- and we  
8 spent a lot of time going through those initiatives --  
9 our conclusion was that the most logical step and the  
10 best step to try and preserve value for Lightstream was  
11 ultimately to pursue a restructuring.

12 Q And as far as the credit bid concept in the support  
13 agreement, how did that factor into it?

14 A Well, as part of that process, we were wanting to pursue  
15 a CBCA process but recognizing that if we weren't able to  
16 reach a support under a CBCA process that then we needed  
17 a fallback position, and the fallback position being  
18 following the -- the continued sale process through CCAA.

19 Q And you mentioned -- Mr. Simard took you to the paragraph  
20 in your affidavit where you mentioned the ongoing  
21 negotiations of the credit bid APA. You noted in your  
22 questioning that that APA has not yet been signed. And  
23 what is the delay to having that APA signed?

24 A So in working with the second lien noteholders' counsel  
25 or group, we are just trying to finalize some of the  
26 terms under the APA so that we have a credit bid that the  
27 company can support through that agreement, and so there



1 are -- while the macro terms have been settled, there are  
2 some minor terms that need to be finalized.

3 Q So, put another way, would it be fair to say you're  
4 trying to negotiate --

5 MR. SIMARD: I think that --

6 Q MS. BOURASSA: -- this deal?

7 MR. SIMARD: -- will be a leading question,  
8 just hearing how you're phrasing it at the start. So if  
9 you could try to rephrase.

10 (OBJECTION)

11 Q MS. BOURASSA: So you're trying to come to  
12 conclusion on some more -- I think you said you have the  
13 macro deal and there are outstanding pieces, but how are  
14 those negotiations proceeding?

15 A Sorry. We're exchanging drafts of the credit APA and  
16 trying to finalize the wording in the APA. So the --  
17 there are drafts that are being exchanged; and as, you  
18 know, any asset purchase agreement, there's lots of  
19 clauses in there that need to make sure that they are  
20 properly finalized; and part of it relates to overall  
21 process if the credit bid was to be successful in terms  
22 of conveyancing, et cetera. So there's a number of  
23 things that are, I'd say, technical in nature that have  
24 to be signed off.

25 MS. BOURASSA: Thank you.

26 MR. SIMARD: Thank you.

27 (WHICH WAS ALL THE EVIDENCE TAKEN AT 12:13 PM)

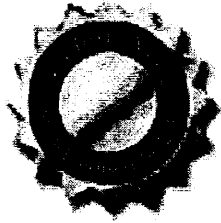
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

CERTIFICATE OF TRANSCRIPT:

I, Heather Bowie, certify that the foregoing pages are a complete and accurate transcript of the proceedings, taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Calgary, Province of Alberta, this 4th day of October 2016.

*H. Bowie*



Heather Bowie, CSR(A)  
Official Court Reporter

|    |  | PAGE NUMBER: |
|----|--|--------------|
| 1  | EXHIBITS ENTERED IN THE QUESTIONING OF               |              |
| 2  | PETER D. SCOTT                                       |              |
| 3  | OCTOBER 3, 2016                                      |              |
| 4  |  |              |
| 5  |  | PAGE NUMBER: |
| 6  |  |              |
| 7  | EXHIBIT 1 - Lightstream's annual information form    | 23           |
| 8  | for the year ended December 31, 2015                 |              |
| 9  |  |              |
| 10 | EXHIBIT 2 - Lightstream's annual information form    | 27           |
| 11 | for the year ended December 31, 2014                 |              |
| 12 |  |              |
| 13 | EXHIBIT 3 - Lightstream's report on second quarter   | 28           |
| 14 | results in 2016                                      |              |
| 15 |  |              |
| 16 | EXHIBIT 4 - Lightstream management presentation      | 29           |
| 17 | dated May 31, 2016                                   |              |
| 18 |  |              |
| 19 | EXHIBIT 5 - Lightstream corporate presentation from  | 32           |
| 20 | the end of Q2 2016                                   |              |
| 21 |  |              |
| 22 | CONFIDENTIAL EXHIBIT 6 - Exit financing commitment   | 54           |
| 23 | letter   |              |
| 24 |  |              |
| 25 | EXHIBIT 7 - Letter sent by Mr. Zweig to the monitor  | 56           |
| 26 | with a copy of which sent to Ms. Bourassa on Friday, |              |
| 27 | September 30, 2016                                   |              |

1           CONFIDENTIAL EXHIBIT 8 - Memorandum from the monitor   58  
2           dated September 30, 2016  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

OBJECTIONS ENTERED IN THE QUESTIONING OF  
PETER D. SCOTT  
OCTOBER 3, 2016

PAGE NUMBER:

|             |    |
|-------------|----|
| (OBJECTION) | 43 |
| (OBJECTION) | 44 |
| (OBJECTION) | 48 |
| (OBJECTION) | 48 |
| (OBJECTION) | 48 |
| (OBJECTION) | 48 |
| (OBJECTION) | 48 |
| (OBJECTION) | 49 |
| (OBJECTION) | 50 |
| (OBJECTION) | 77 |

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

UNDERTAKINGS GIVEN IN THE QUESTIONING OF  
PETER D. SCOTT  
OCTOBER 3, 2016

(Undertakings are inserted and indexed as a courtesy service to be utilized at the discretion of counsel. They are interpretations by the court reporter and it is requested counsel refer to the appropriate page to ensure accuracy.)

PAGE NUMBER:

- UNDERTAKING 1 - To provide a copy of the external analyst valuation TD produced and provided to the company (Taken Under Advisement) 50
- UNDERTAKING 2 - To produce the disclosure letter as defined on page 3 of Schedule A to the support agreement (Taken Under Advisement) 59
- UNDERTAKING 3 - To provide the backstop agreement referenced in the support agreement (Taken Under Advisement) 59

1           UNDERTAKING 4 - To provide the amounts paid to           65  
2           parties directly retained by stakeholders other than  
3           the company -- Torys, PwC, Goodmans, BMO, and D&O  
4           counsel -- in calendar 2016 (Taken Under Advisement)

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

# TAB 3



COURT FILE NUMBER

Clerk's Stamp

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

**AND IN THE MATTER OF POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP AND POSEIDON CONCEPTS INC.**

DOCUMENT

**CCAA INITIAL ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Norton Rose Canada LLP  
3700 Devon Tower  
400 Third Avenue SW  
Calgary, Alberta T2P 4H2  
Phone: 403-267-8222  
Fax: 403-264-5973  
Attention: Howard A. Gorman  
File No. 01024529-0001

I hereby certify this to be a true copy of the original ORDER  
Dated this 9 day of APRIL 2013  
[Signature]  
for Clerk of the Court

**DATE ON WHICH ORDER WAS PRONOUNCED:** April 9, 2013

**NAME OF JUDGE WHO MADE THIS ORDER:** The Honourable Mr. Justice K.D. Yamauchi

**LOCATION OF HEARING:** Calgary

**UPON** the application of Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership, and Poseidon Concepts Inc. (the "Applicants"); **AND UPON** having read the Originating Application and the Affidavit of Leigh Cassidy, filed; **AND UPON** reading the consent of PricewaterhouseCoopers Inc. ("PwC") to act as Monitor and upon noting

## SOLICITATION PROCESS

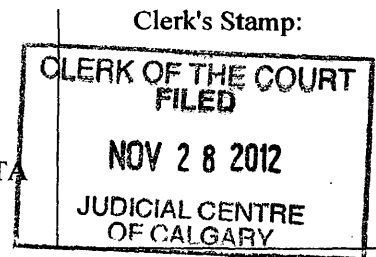
41. The entering into of the engagement letter ("Engagement Letter") with Ernst & Young Orenda Corporate Finance Inc. ("EYO") as more fully described in the Originating Application be and is hereby authorized, *nunc pro tunc*. The Applicants' are directed to carry out and perform their obligations thereunder (including payment of amounts due to be paid pursuant to the terms of the Engagement Letter) and the Engagement Letter shall be binding upon the Applicants.
42. The Applicants are authorized to undertake the Solicitation Process (as defined and more fully described in the Originating Application) to fully canvass opportunities to sell, restructure or recapitalize the Applicants' business subject to final Court approval.

## VALIDITY AND PRIORITY OF CHARGES

43. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:  
  
First - Administration Charge (to the maximum amount of \$1,000,000); and  
  
Second – Directors' Charge (to the maximum of \$1,000,000)  
  
Third – Interim Lender's Charge.
44. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the Interim Lender's Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
45. Each of the Directors' Charge, the Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Incumbrances") in favour of any Person.

# TAB 4

COURT FILE NUMBER 1201-14864  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
ACTION



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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9

AND IN THE MATTER OF SKOPE ENERGY PARTNERS, SKOPE ENERGY INC. and SKOPE ENERGY INTERNATIONAL INC.

DOCUMENT **INITIAL ORDER**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

Burnet, Duckworth & Palmer LLP  
2400, 525 – 8<sup>th</sup> Avenue SW  
Calgary, Alberta T2P 1G1  
Lawyer: Douglas S. Nishimura/Trevor Batty  
Phone Number: 403-260-0269/403-260-0263  
Fax Number: 403-260-0332  
Email Address: dsn@bdplaw.com/  
tbatty@bdplaw.com  
File No. 68768-12

DATE ON WHICH ORDER WAS PRONOUNCED: November 27, 2012  
NAME OF JUSTICE WHO MADE THIS ORDER: Mr. Justice MacLeod

**INITIAL ORDER**

UPON the application of Skope Energy Partners ("**Skope Partners**"), a partnership, and its two partners, Skope Energy Inc. ("**Skope Energy**") and Skope Energy International Inc. ("**Skope International**") (collectively, the "**Applicants**"), AND UPON having read the Originating Notice, the Affidavit of Henry Cohen, sworn November 26, 2012 (the "**Cohen Affidavit**"); AND UPON reading the consent of Ernst & Young Inc. ("**E&Y**" or the "**Monitor**") to Act as Monitor and upon noting that the

I hereby verify this to be a true copy of  
the original Order  
Dated this 28 day of NOV, 2012  
AR BONDY  
for Clerk of the Court

## RESTRUCTURING

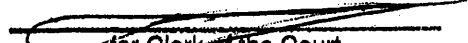
10. The Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:
  - (a) subject to Pine Cliff consenting in writing thereto, permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding \$50,000.00 in any one transaction or \$250,000.00 in the aggregate (or in excess of these amounts, by order of this Court);
  - (b) conduct a solicitation process in accordance with the terms and conditions set out in the Sale and Solicitation Procedure attached as Schedule "A" to this Initial Order; and
  - (c) terminate the employment of such of their employees or temporarily lay off such of its employees as they deem appropriate on such terms as may be agreed upon between the Applicants, as applicable, such employee, and Pine Cliff, or failing such agreement, to deal with the consequences thereof in the Plan;

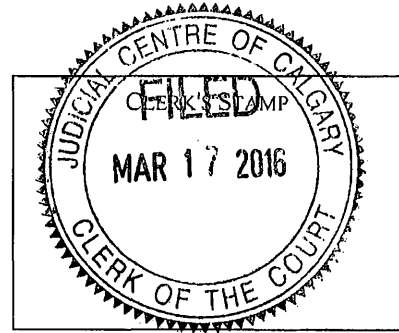
all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").
11. The Applicants, as applicable, shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants, on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they or it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.
12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

# TAB 5

I hereby certify this to be a true copy of  
the original Order

Dated this 17 day of March 2016

  
for Clerk of the Court



COURT FILE NUMBER

1601-  
~~1610-~~01675

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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  
ARRANGEMENT OF ARGENT ENERGY  
TRUST, ARGENT ENERGY (CANADA)  
HOLDINGS INC. and ARGENT ENERGY  
(US) HOLDINGS INC.

DOCUMENT

**AMENDED AND RESTATED**  
**CCAA INITIAL ORDER**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

**BENNETT JONES LLP**  
Barristers and Solicitors  
4500 Bankers Hall East  
855 – 2<sup>nd</sup> Street SW  
Calgary, Alberta T2P 4K7

Attention: Kelsey Meyer / Sean Zweig  
Telephone No.: 403.298.3323 / 416.777.6254  
Fax No.: 403.265.7219 / 416.863.1716  
Client File No.: 68859.14

**DATE ON WHICH ORDER WAS  
PRONOUNCED:**

**Wednesday, February 17, 2016, as amended  
and restated on Wednesday, March 9, 2016**

**LOCATION WHERE ORDER WAS  
PRONOUNCED:**

**Calgary**

**NAME OF JUSTICE  
WHO MADE THIS ORDER:**

**The Honourable Mr. Justice D. B. Nixon**

UPON the application of Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada"), and Argent Energy (US) Holdings Inc. ("Argent US", and

together with the Trust and Argent Canada, the "Applicants"), **AND UPON** having read the Originating Application, the Affidavit of Sean Bovingdon sworn February 16, 2016 (the "Bovingdon Affidavit"); the Bench Brief of the Applicants, the consent of FTI Consulting Canada Inc. to act as Monitor (the "Monitor"); and the pre-filing report of FTI Consulting Canada Inc., all filed; **AND UPON** noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the charges created herein; **AND UPON** having read the Initial Order of this Court dated February 17, 2016 (the "Initial Order") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "CCAA"), the Affidavit of Sean Bovingdon sworn February 29, 2016 (the "Bovingdon Affidavit No. 2"), the Affidavit of Harrison Williams sworn February 29, 2016, the First Report of the Monitor, and the Bench Briefs of each of the Applicants, the Syndicate (as defined in the Bovingdon Affidavit) who advanced funds under a credit agreement dated October 25, 2012 (as amended from time to time, the "Credit Agreement"), and the Ad Hoc Committee (as defined in the Bovingdon Affidavit No. 2), all filed; **AND UPON** hearing counsel to the Applicants, counsel to the Monitor, counsel to the Ad Hoc Committee and counsel to the Syndicate;

**IT IS HEREBY ORDERED AND DECLARED THAT:**

**SERVICE**

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

**APPLICATION**

2. The Applicants are entities to which the CCAA applies.

**PLAN OF ARRANGEMENT**

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").



## POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:
  - (a) remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");
  - (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "Business") and the Property; and
  - (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.
  
5. To the extent permitted by law, the Applicants shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:
  - (a) all outstanding and future wages, salaries, employee benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
  - (b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges; and
  - (c) payment for goods or services actually supplied to the Applicants prior to the date of this Order by those parties deemed by the Applicants (with the consent of the Monitor and the Syndicate) to be critical suppliers, provided that the total of all such payments shall not exceed USD \$315,000.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
  - (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
  - (b) payment for goods or services actually supplied to the Applicants following the date of this Order.
  
7. The Applicants shall remit, in accordance with legal requirements, or pay:
  - (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:
    - (i) employment insurance,
    - (ii) Canada Pension Plan, and
    - (iii) income taxes,but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;
  - (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or

collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("Rent"), but shall not pay any rent in arrears.
9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:
  - (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;
  - (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and
  - (c) not to grant credit or incur liabilities except in the ordinary course of the Business.
10. Notwithstanding the provisions of paragraph 9 hereof, the Applicants are authorized and directed to pay to the Syndicate any interest and other costs and expenses which may become due and owing under the terms of the Credit Agreement, including the reasonable

costs and expenses of the Syndicate's legal counsel and other advisors (the "Syndicate's Advisors") arising both before and after the making of this Order.

## RESTRUCTURING

11. The Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 34), have the right to:

- (a) with the consent of the Monitor and the Interim Lender (as hereinafter defined in paragraph 32), permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding \$100,000 in any one transaction or \$500,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;
- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and
- (c) pursue all avenues of refinancing and offers for their Business or the Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a) above),

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord

disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:
  - (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and
  - (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

#### **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**

14. Until and including March 18, 2016, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or

affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:
  - (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on;
  - (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;
  - (c) prevent the filing of any registration to preserve or perfect a security interest; or
  - (d) prevent the registration of a claim for lien.
16. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

#### **NO INTERFERENCE WITH RIGHTS**

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

### **CONTINUATION OF SERVICES**

18. During the Stay Period, all persons having:

- (a) statutory or regulatory mandates for the supply of goods and/or services; or
- (b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

### **NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT**

19. Notwithstanding anything else contained in this Order, no creditor of the Applicants shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

## **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants or of Argent Energy Limited (the "Directors and Officers") with respect to any claim against the Directors and Officers that arose before the date hereof and that relates to any obligations of the Applicants or Argent Energy Limited whereby the Directors and Officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

## **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

21. The Applicants shall indemnify the Directors and Officers against obligations and liabilities that they may incur as directors and or officers of the Applicants and Argent Energy Limited after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or willful misconduct.
22. The Directors and Officers shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$200,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 40 and 42 herein.
23. Notwithstanding any language in any applicable insurance policy to the contrary:
- (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and
  - (b) the Directors and Officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and



officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

#### **APPOINTMENT OF MONITOR**

24. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall cooperate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.
25. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- (a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;
  - (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;
  - (c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lender and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;
  - (d) advise the Applicants in the preparation of the Applicants' cash flow statements and reporting required by the Interim Lender, which information shall be

reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the Interim Lender;

- (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (f) advise the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;
- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person;
- (j) report to and respond to inquiries of the Syndicate (or its designated financial advisor) with respect to the CCAA proceedings, with or without the presence or the consent of the Applicants; however copies of any written reports provided to the Syndicate by the Monitor shall be provided to the Applicants; and
- (k) perform such other duties as are required by this Order or by this Court from time to time.

26. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain

possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

27. The Monitor shall provide any creditor of the Applicants and the Interim Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.
28. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.
29. The Monitor, counsel to the Monitor, counsel to the Applicants and the Syndicate's Advisors shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and the Syndicate's Advisors on a regular basis.
30. The Monitor and its legal counsel shall pass their accounts from time to time.

31. The Monitor, counsel to the Monitor, the Applicants' counsel, and the Syndicate's Advisors shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor, such counsel and such other advisors of the Syndicate, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 40 and 42 hereof.

#### **AD HOC COMMITTEE CHARGES**

- 31A. Counsel to the Ad Hoc Committee shall be entitled to the benefits of and is hereby granted a charge (the "Ad Hoc Committee First Charge") on the Property which charge shall not exceed the total amount of CAD \$300,000, as security for its professional fees and disbursements incurred at its normal rates and charges both before and after the granting of this Order. The Ad Hoc Committee First Charge shall have the priority set out in paragraphs 40 and 42 hereof.
- 31B. Counsel to the Ad Hoc Committee shall be entitled to the benefits of and is hereby granted a charge (the "Ad Hoc Committee Second Charge") on the Property as security for the balance of its professional fees and disbursements in excess of the Ad Hoc Committee First Charge, incurred at its normal rates and charges both before and after the granting of this Order. The Ad Hoc Committee Second Charge shall have the priority set out in paragraphs 40 and 42 hereof.

#### **INTERIM FINANCING**

32. Argent US is hereby authorized and empowered to obtain and borrow under a credit facility from the Syndicate, including The Bank of Nova Scotia, in its capacity as agent for and on behalf of the Syndicate (collectively, in such capacity, the "Interim Lender") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed \$7,300,000.00 unless permitted by further order of this Court.

33. Such credit facility shall be on the terms and subject to the conditions set forth in the Interim Financing Credit Agreement agreed between the Applicants and the Interim Lender dated as of February 17, 2016 (the "Interim Financing Credit Agreement"), as attached to the Bovington Affidavit.
34. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the Interim Financing Credit Agreement or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Interim Financing Credit Agreement and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
35. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "Interim Lender's Charge") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall have the priority set out in paragraphs 40 and 42 hereof.
36. Notwithstanding any other provision of this Order:
  - (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
  - (b) upon the occurrence of an event of default under the Interim Financing Credit Agreement, the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon three days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Interim Financing Credit Agreement, Definitive Documents and

the Interim Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Interim Financing Credit Agreement, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

- (c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

- 37. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

#### **KERP, KEIP AND THE KERP AND KEIP CHARGE**

- 38. The KERP and the KEIP (each as defined in the Bovingdon Affidavit) are hereby authorized and approved and the Applicants (and any other person that may be appointed to act on behalf of the Applicants, including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any such person) are authorized and directed to perform the obligations under the KERP and KEIP, including making all payments to the beneficiaries of the KERP and KEIP of amounts due and owing under the KERP and KEIP at the time specified and in accordance with the terms of the KERP and KEIP.
- 39. The beneficiaries of the KERP and KEIP are hereby granted a charge (the "KERP and KEIP Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$1,035,000 in respect of the KERP plus any additional amounts that become

payable under the KEIP, to secure all obligations under the KERP and KEIP. The KERP and KEIP Charge shall have the priority set out in paragraphs 40 and 42 hereof.

#### VALIDITY AND PRIORITY OF CHARGES

40. The priorities of the Directors' Charge, the Administration Charge, the Ad Hoc Committee First Charge, the Interim Lender's Charge, the KERP and KEIP Charge, and the Ad Hoc Committee Second Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of USD \$500,000) and the Ad Hoc Committee First Charge (to a maximum amount of CAD \$300,000), on a *pari passu* basis;

Second – Interim Lender's Charge;

Third – Directors' Charge (to the maximum amount of USD \$200,000);

Fourth – KERP and KEIP Charge (to the maximum amount of USD \$1,035,000 in respect of the KERP, plus any additional amounts that become payable under the KEIP); and

Fifth – the Ad Hoc Committee Second Charge, which shall rank subordinate to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including all claims of the Syndicate under the Credit Agreement (collectively, "Encumbrances") in favour of any Person.

41. The filing, registration or perfection of the Directors' Charge, the Administration Charge, the Ad Hoc Committee First Charge, the Interim Lender's Charge, the KERP and KEIP Charge, or the Ad Hoc Committee Second Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

42. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges, other than the Ad Hoc Committee Second Charge, shall rank in priority to all Encumbrances in favour of any Person.
43. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Charges, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the applicable Charges, or further order of this Court.
44. The Charges, the Interim Financing Credit Agreement and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:
  - (a) the pendency of these proceedings and the declarations of insolvency made in this Order;
  - (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
  - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
  - (d) the provisions of any federal or provincial statutes; or
  - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:
    - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including



the Interim Financing Credit Agreement or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

- (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the Applicants entering into the Interim Financing Credit Agreement, or execution, delivery or performance of the Definitive Documents; and
- (iii) the payments made by the Applicants pursuant to this order, including the Interim Financing Credit Agreement or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

#### **ALLOCATION**

- 45. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges amongst the various assets comprising the Property.

#### **SALE SOLICITATION PROCESS**

- 46. The letter agreement dated January 15, 2016 between The Oil & Gas Asset Clearinghouse, LLC ("OGAC"), Argent US and Argent Canada is hereby approved and Argent US and Argent Canada are authorized and directed to continue the engagement of OGAC as an Assistant thereunder and to comply with all of their obligations thereunder.
- 47. The sale solicitation process (the "Sale Solicitation Process") attached as Schedule "A" to this Order be and is hereby approved, and OGAC, the Monitor and the Applicants are authorized and directed to perform each of their obligations thereunder and to do all things reasonably necessary to perform their obligations thereunder.

48. Each of the Monitor and OGAC, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the Sale Solicitation Process, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor or OGAC, as applicable, in performing its obligations under the Sale Solicitation Process (as determined by this Court).
  
49. In connection with the Sale Solicitation Process and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Applicants, OGAC and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sale transactions (each, a "Transaction"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicants, OGAC or the Monitor, as applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, OGAC or the Monitor, as applicable, or ensure that all other personal information is destroyed.

#### **SERVICE AND NOTICE**

50. The Monitor shall (i) without delay, publish in the Calgary Herald and the Houston Chronicle a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than \$1,000 and (C)

prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

51. The Applicants and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at <http://cfcanada.fticonsulting.com/argent> and shall post there as soon as practicable:

- (a) all materials prescribed by statute or regulation to be made publically available; and
- (b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

## **SEALING**

52. The Confidential Summary (Exhibit "20" of the Bovingdon Affidavit) shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Confidential Summary shall be kept confidential and shall not form part of the public record, but rather shall be placed, separate and apart from all contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

**GENERAL**

53. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
54. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.
55. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.
56. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding of Argent US and Argent Canada, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.
57. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as the foreign representative of Argent US and Argent Canada in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
58. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or

parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

59. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Time on February 17, 2016.

*"D. B. Nixon"*

\_\_\_\_\_  
The Honourable Mr. Justice B. Nixon  
J.C.C.Q.B.A.

APPROVED as being the Order granted:

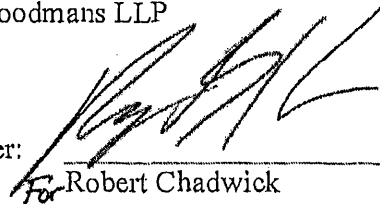
McCarthy Tétrault LLP

Goodmans LLP

Per: \_\_\_\_\_

Sean Collins / Walker Macleod  
Solicitors for FTI Consulting Canada  
Inc.

Per: \_\_\_\_\_



For Robert Chadwick  
Solicitors for the Ad Hoc Committee  
of Subordinated Debentureholders

Blake, Cassels & Graydon LLP

Per: \_\_\_\_\_

Kelly Bourassa  
Solicitors for the Syndicate

parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

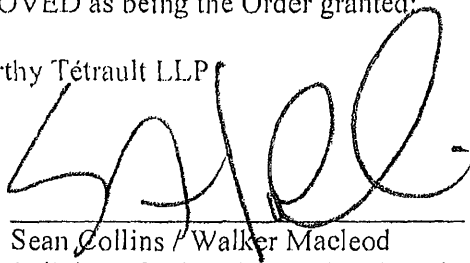
59. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Time on February 17, 2016.

\_\_\_\_\_  
The Honourable Mr. Justice B. Nixon  
J.C.C.Q.B.A.

APPROVED as being the Order granted:

McCarthy Tétrault LLP

Per:



\_\_\_\_\_  
Sean Collins / Walker Macleod  
Solicitors for FTI Consulting Canada  
Inc.

Goodmans LLP

Per:

\_\_\_\_\_  
Robert Chadwick  
Solicitors for the Ad Hoc Committee  
of Subordinated Debentureholders

Blake, Cassels & Graydon LLP

Per:

\_\_\_\_\_  
Kelly Bourassa  
Solicitors for the Syndicate

parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

59. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Time on February 17, 2016.

---

The Honourable Mr. Justice B. Nixon  
J.C.C.Q.B.A.

APPROVED as being the Order granted:

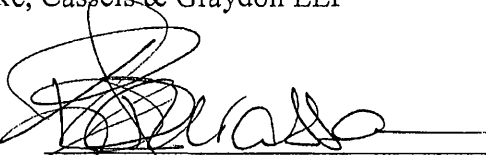
McCarthy Tétrault LLP

Goodmans LLP

Per: \_\_\_\_\_  
Sean Collins / Walker Macleod  
Solicitors for FTI Consulting Canada  
Inc.

Per: \_\_\_\_\_  
Robert Chadwick  
Solicitors for the Ad Hoc Committee  
of Subordinated Debentureholders

Blake, Cassels & Graydon LLP

Per:   
\_\_\_\_\_  
Kelly Bourassa  
Solicitors for the Syndicate

## SCHEDULE "A"

### Procedures for the Sale Solicitation Process

On February 17, 2016, Argent Energy Trust (the "**Trust**"), Argent Energy (Canada) Holdings Inc. ("**Argent Canada**") and Argent Energy (US) Holdings Inc. ("**Argent US**", and together with the Trust and Argent Canada, the "**Applicants**") obtained an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* ("**CCAA**") from the Alberta Court of Queen's Bench (the "**Court**"). The Initial Order, among other things, approved the Sale Solicitation Process (the "**Sale Solicitation Process**") set forth herein to determine whether a Successful Bid (as defined below) can be obtained. FTI Consulting Canada Inc. (the "**Monitor**"), as the foreign representative of the Applicants pursuant to the Initial Order, will take the necessary steps to have the Sale Solicitation Process and these procedures (the "**Sale Procedures**") recognized under chapter 15 of the *United States Bankruptcy Code* ("**Ch. 15**").

### DEFINED TERMS

1. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Initial Order. In addition:
  - (a) "**Business Day**" means a day, other than a Saturday or Sunday, on which banks are open for business in Calgary, Alberta and Houston, Texas.
  - (b) "**OGAC**" means The Oil & Gas Clearinghouse, LLC.
  - (c) "**Secured Creditor**" means The Bank of Nova Scotia, as Administrative Agent, pursuant to the Amended and Restated Credit Agreement dated October 25, 2012, as amended from time to time, between Argent US and the lenders thereto.
  - (d) "**Syndicate**" means the syndicate of lenders pursuant to the Amended and Restated Credit Agreement dated October 25, 2012, as amended from time to time, the Administrative Agent of which is The Bank of Nova Scotia.

### SALE SOLICITATION PROCESS

2. The Sale Procedures set forth herein describe the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning Argent US and its assets, the manner in which bidders and bids become Qualified Bidders and Qualified Bids (each as defined below), respectively, the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder(s) (as defined below) and the approval thereof by the Court. The Monitor shall supervise the Sale Solicitation Process and in particular shall supervise OGAC in connection therewith. The Applicants are required to assist and support the efforts of the Monitor and OGAC as provided for herein. In the event that there is disagreement as to the interpretation or application of these Sale Procedures, the Court will have jurisdiction to hear and resolve such dispute.
3. The Sale Solicitation Process will proceed as follows:
  - (a) As soon as reasonably practicable after the granting of the Initial Order:



- (i) the Monitor shall cause a notice of the Sale Solicitation Process contemplated by these Sale Procedures and such other relevant information which the Monitor, in consultation with OGAC and the Applicants, considers appropriate to be published in the *Daily Oil Bulletin* and the *Houston Chronicle*; and
  - (ii) in any event no later than February 19, 2016, the Trust shall issue a press release setting out the notice and such other relevant information as it may consider appropriate in form and substance satisfactory to the Monitor, following consultation with OGAC, with Canada Newswire designating dissemination in Canada and major financial centres in the United States;
- (b) OGAC shall prepare and distribute a teaser with respect to Argent US's business and assets (the "**Property**") for distribution to potential bidders by no later than February 17;
- (c) A Confidential virtual data room ("**VDR**") describing the opportunity to acquire all or a portion of the Property will be made available by OGAC to prospective purchasers that have executed a non-disclosure agreement with the Applicants. The VDR will be available by February 17;
- (d) In order to participate in the Sale Solicitation Process, each person (a "**Potential Bidder**") must deliver to OGAC at the address specified in **Appendix "A"** hereto (including by email), and prior to the distribution of any confidential information by OGAC to a Potential Bidder (including access to the VDR), an executed non-disclosure agreement in form and substance satisfactory to the Monitor, OGAC and the Applicants, which shall inure to the benefit of any purchaser of the Property;
- (e) A Potential Bidder that has executed a non-disclosure agreement, as described above, will be deemed a "**Qualified Bidder**" and will be promptly notified of such classification by OGAC;
- (f) OGAC shall provide any person deemed to be a Qualified Bidder with access to the VDR. The Monitor, OGAC and the Applicants make no representation or warranty as to the information contained in the VDR. The VDR shall contain a proposed Letter of Intent ("**LOI**") and Purchase and Sale Agreement ("**PSA**");
- (g) A Qualified Bidder, if it wishes to submit a bid, will deliver written copies of a binding proposal (a "**Qualified Bid**") in the form of an agreement for the acquisition of Argent US or its assets, business or undertaking, or any portion or combination thereof, which agreement must be in a form such that acceptance thereof by the Applicants will result in a sale proposal (a "**Sale Proposal**") to OGAC, with a copy to the Monitor, at the addresses specified in **Appendix "A"** hereto (including by email) so as to be received by them not later than 5:00 p.m. (Central Standard Time) on March 17, 2016, or such other date or time as may be agreed by OGAC, in consultation with the Monitor, the Applicants and the

Secured Creditor (the "**Bid Deadline**"). The Sale Proposal shall include a binding LOI and a form of PSA which the Qualified Bidder is willing to execute if it is the Successful Bidder and shall also include a marked version showing edits to the original form of PSA provided in the VDR. The LOI, but not the PSA, shall provide for due diligence for title and environmental defects and potential purchase price adjustments therefor subject to the terms of the LOI.

- (h) A Qualified Bid will be considered as such only if the Qualified Bid complies at a minimum with the following:
  - (i) it contains a duly executed Sale Proposal;
  - (ii) it provides written evidence of financial commitment or other evidence of the ability to consummate the sale satisfactory to OGAC, in consultation with the Monitor and the Applicants;
  - (iii) it is not conditional upon:
    - (A) the outcome of any unperformed due diligence, except the Qualified Bid may be conditional upon the Qualified Bidder completing confirmatory title and environmental due diligence provided that such condition is waived prior to the execution of a definitive agreement contemplated in Section 3(n);
    - (B) obtaining financing; and/or
    - (C) any other material conditions other than the receipt of the Approval Order and the Recognition Order (each as defined below).
  - (iv) it is received by the Bid Deadline; and
  - (v) it remains irrevocably open for acceptance until April 14, 2016.
- (i) OGAC, in consultation with the Applicants, the Monitor and the Secured Creditor, may waive compliance with any one or more of the requirements specified herein and deem such non-compliant bids to be Qualified Bids;
- (j) The Applicants, in consultation with the Monitor and OGAC, may, following the receipt of any Qualified Bid, seek clarification with respect to any of the terms or conditions of such Qualified Bid and/or request and negotiate one or more amendments to such Qualified Bid prior to determining the most favourable Qualified Bid as contemplated in Section 3(k).
- (k) The Applicants, in consultation with the Monitor, OGAC and the Secured Creditor, shall determine the most favourable Qualified Bid or Qualified Bids, as such bids may have been modified pursuant to Section 3(j) (collectively, the "**Successful Bid(s)**").

- (l) Once the Successful Bid(s) has been determined pursuant to Section 3(k), the person(s) who made the Successful Bid(s) shall be referred to hereunder as the "**Successful Bidder(s)**", and OGAC shall provide notice of the determination of the Successful Bid(s) to the Successful Bidder(s).
- (m) Upon the Successful Bidder(s) receiving notice from OGAC of the determination of the Successful Bid(s) pursuant to Section 3(l), the Successful Bidder(s) shall pay a deposit (the "**Deposit**") in the form of certified cheque or wire transfer (to a bank account specified by the Monitor), payable to the order of the Monitor, in trust, in an amount equal to 10% of the total consideration in the applicable Successful Bid, which deposit is to be held and dealt with in accordance with these Sale Procedures;
- (n) The PSA in respect to the Successful Bid(s) pursuant to Section 3(l) must be executed no later than April 14, 2016, and which shall be conditional only upon the receipt of the Approval Order and the Recognition Order and shall provide for a closing on or before May 13, 2016, or such longer period as shall be agreed to by the Monitor, in consultation with OGAC, the Secured Creditor and the Applicants. The PSA in respect to the Successful Bid(s) shall not be conditional on any unperformed due diligence.
- (o) The Applicants shall apply to the Court (the "**Approval Motion**") for an order approving the Successful Bid(s) and vesting title to the purchased property in the name of the Successful Bidder(s) (the "**Approval Order**"). The Approval Motion will be held on a date to be scheduled by the Applicants and confirmed by the Court upon application by the Applicants, who shall use their best efforts to schedule the Approval Motion on or before April 30, 2016. The Approval Motion may be adjourned or rescheduled by the Applicants without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the Service List prior to the Approval Motion. As soon as practicable after the Approval Order is granted, the Monitor, as foreign representative pursuant to the Initial Order, shall apply for an order recognizing the Approval Order or such further and other orders as may be necessary to give effect to the Approval Order in the United States (the "**Recognition Order**");
- (p) Upon such definitive agreement(s) being negotiated and settled and the Approval Order and the Recognition Order being granted, the Deposit paid in respect of the Successful Bid(s) shall become non-refundable in the event the approved transaction is not completed;
- (q) All Qualified Bids (other than the Successful Bid(s)) shall be deemed rejected on and as of the date the Recognition Order is granted.

#### DEPOSIT

#### 4. The Deposit:

- (a) shall be retained by the Monitor and invested in an interest bearing trust account;

- (b) paid by the Successful Bidder(s) whose bid(s) are subject of the Approval and Order and Recognition Order, plus accrued interest, shall be applied to the purchase price to be paid by the applicable Successful Bidder(s) upon closing of the approved transaction;
- (c) shall be non-refundable, subject only to the following exceptions:
  - (i) the Successful Bidder(s) provides notice to OGAC and the Monitor, on or before April 8, 2016, of material defects in the title and environmental due diligence in accordance with the LOI;
  - (ii) either or both of the Approval Order and the Recognition Order are not granted on or before May 17, 2016 or such later date as agreed to by the Monitor, in consultation with OGAC, the Secured Creditor and the Applicants.

#### APPROVALS

5. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA, Ch. 15 or any other statute or as otherwise required at law in order to implement a Successful Bid.

#### "AS IS, WHERE IS"

6. The sale of the Property will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, OGAC or the Applicants or any of their agents or estates, except to the extent set forth in the relevant sale agreement entered into between one or more Applicants and a Successful Bidder.

#### FREE OF ANY AND ALL CLAIMS AND INTERESTS

7. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA and section 363 of the United States *Bankruptcy Code*, such Claims and Interests to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant sale agreement with a Successful Bidder.

#### THE SECURED CREDITOR

8. The Secured Creditor and each member of the Syndicate have advised that they do not intend to participate as a Bidder in the Sale Solicitation Process, and therefore they will be entitled to have full access to the contents of all Qualified Bids, including copies thereof. No Qualified Bid that is less than an amount sufficient to fully discharge the Secured Creditor's indebtedness, together with any priority claims and security interests ranking ahead of the Secured Creditor, will be capable of becoming a Successful Bid without the prior written consent of the Secured Creditor. Giving or withholding such

consent will be in the sole, exclusive and absolute discretion of the Secured Creditor. Should, however, any Qualified Bid exceed an amount sufficient to fully discharge the Secured Creditor's indebtedness, together with any priority claims and security interests ranking ahead of the Secured Creditor, the consent of the Secured Creditor shall not be required in order for the Applicants to be able to negotiate and settle the terms of a definitive agreement in respect of the Successful Bid.

**NO OBLIGATION TO CONCLUDE A SALE**

9. The Applicants have no obligation to conclude a sale arising out of this Sale Solicitation Process, and they reserve the right and unfettered discretion to reject any offer or proposal, but shall not do so without first consulting with the Secured Creditor.

**FURTHER ORDERS**

10. At any time during the Sale Solicitation Process, the Monitor may, following consultation with OGAC and the Applicants, apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder.

**Appendix "A"****TO OGAC:**

The Oil & Gas Asset Clearinghouse  
500 N Sam Houston Pkwy W, Suite 1500  
Houston TX 77067

Attention: Patrick DaPra

Phone: 832-601-7655  
E-Mail: pdapra@ogclearinghouse.com

**TO THE MONITOR:**

FTI Consulting Canada Inc.  
720, 440 – 2<sup>nd</sup> Ave. S.W.  
Calgary AB T2P 5E9

Attention: Deryck Helkaa

Phone: 403-454-6031  
E-Mail: Deryck.Helkaa@fticonsulting.com

**WITH A COPY TO:**

McCarthy Tétrault LLP  
Suite 4000  
421 – 7th Ave. S.W.  
Calgary Alberta T2P 4K9

Attention: Sean Collins

Phone: 403-260-3531  
E-Mail: scollins@mccarthy.ca

# TAB 6

2016 ONSC 3205  
Ontario Superior Court of Justice

Essar Steel Algoma Inc., Re

2016 CarswellOnt 7809, 2016 ONSC 3205, 266 A.C.W.S. (3d) 729, 36 C.B.R. (6th) 230

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

In the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma  
Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma  
(Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Newbould J.

Heard: May 13, 2016

Judgment: May 16, 2016

Docket: 15-CV-0011169-00CL

Counsel: Ashley Taylor, Kathryn Esaw, for Applicants  
Lou Brzezinski, Alexandra Teodorescu, for USW Local 2251  
Massimo (Max) Starnino, for USW and its Local 2724  
Naomi Greckol-Herlich, for Essar Algoma retirees  
Derrick Tay, Clifton P. Prophet, Nicholas Kluge, for Monitor  
Evan Cobb, for Board of directors of Essar Algoma  
Jeremy Opolsky, for Subject Bidder  
L. Joseph Latham, for Ad Hoc Committee of Essar Algoma Noteholders  
John J. Salmas, for Wilmington Trust, National Association

Subject: Insolvency

MOTION by union for order qualifying specific bidder as Phase II Bidder, as defined in sale and solicitation process.

***Newbould J.:***

1 The United Steelworkers Local Union 2251 ("Local 2251"), supported by the USW and its Local 2724 and the retirees, applies for an order qualifying the Subject Bidder<sup>1</sup> as a Phase II Bidder, as that term is defined in the sale and solicitation process ("SISP") approved by this Court on February 10, 2016.

2 The SISP provides for a two stage bidding process. Phase I provided for bidders to deliver to Evercore Group LLC, the Financial Advisor, by April 1, 2016 a non-binding letter of interest to finance, purchase or invest in Essar Algoma's business or property. The LOI was required to meet a number of criteria.

3 If a bidder was accepted as a Qualified Phase 1 bidder, that bidder was accepted as a Phase II Bidder who after a due diligence process was entitled to make a formal offer to purchase or make an investment in Essar Algoma or its property and business. In order to be a Qualified Phase II Bid, the Phase II Bidder was required to meet a number of criteria.

4 The Subject Bidder made a Phase I Bid but was ultimately determined not to have met the conditions required to become a Phase II Bidder. The union contends that it was not properly consulted in the decision to exclude the Subject



Bidder from the Phase II process and that the only appropriate remedy is to permit the Subject Bidder to participate in the Phase II process as a Phase II Bidder.

5 The SISP was heavily negotiated by the stakeholders, including representatives of the union and the retirees. It provides for consultation on the various steps by Essar Algoma with the Chief Restructuring Advisor ("CRA"), the Financial Advisor and the Monitor. In some matters it provides for consultation with the Consultation Parties, which includes the USW and the retirees.

6 One of the criteria for a Phase I Bid to be a Qualified Phase I Bid was satisfactory evidence of a bidder's financial ability to complete a transaction. The SISP provided for Essar Algoma, the CRA, the Financial Advisor and the Monitor to determine this issue. More particularly, the SISP provided that the criteria to be met included:

(viii) Written evidence of ability to consummate the proposed transaction, that will allow the Applicants, in consultation with the CRA, the Financial Advisor and the Monitor, to make a determination as to the Phase I Bidder's financial and other capabilities to consummate the proposed transaction including, among other things, the following (the "Financial Wherewithal Information"):

...

(C) proof of any debt or equity funding commitments that are needed to close the contemplated transaction and any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Applicants, in consultation with the CRA, the Financial Advisor and the Monitor, demonstrating that such Phase I Bidder has the ability to close the contemplated transaction; and...

7 The SISP provided that The Monitor would determine what information with respect to the Phase I Bids would be provided to the Consultation Parties. It provided for the assessment of the Phase I Bids by Essar Algoma in consultation with the CRA, the Financial Advisor, the Consultation Parties (which included the USW) and the Monitor. More particularly it provided:

19. Following the Phase I Bid Deadline, the Applicants, in consultation with the CRA, the Financial Advisor, the Consultation Parties and the Monitor, will assess the Phase I Bids received by the Phase I Bid Deadline and determine whether such bids constitute Qualified Phase I Bids. The Applicants, in consultation with the CRA and the Financial Advisor, with the approval of the Monitor, may waive compliance with any one or more of the requirements specified above and deem such non-compliant bid to be a Qualified Phase I Bid.

20. The Applicants, in consultation with the CRA, the Financial Advisor and the Consultation Parties, with the approval of the Monitor, may reject any Phase I Bid if it is determined that such bid does not constitute a Qualified Phase I Bid, is otherwise inadequate or insufficient, or is otherwise contrary to the best interests of the Applicants and their creditors and other stakeholders.

8 The Subject Bidder submitted a Phase I Bid on Friday, April 1, 2016, the deadline for the Phase I Bids. A copy was provided to counsel to Local 2251 and Local 2724.

9 Between April 4 and 7 the Financial Advisor made inquiries with the Subject Bidder concerning its bid and, in particular, requested proof of the sources of funds for the debt and equity components of the bid, including information on the entity funding the equity component.

10 On Wednesday, April 6, 2016, counsel to the Applicants, the CRA and Evercore, and the Monitor and its counsel, had a call with counsel for Local 2251 and Local 2724 regarding, among others, the Subject Bidder's bid. The discussion included a review of the concerns that adequate proof of financial wherewithal had not been provided and the concerns regarding the Subject Bidder's ability to close a transaction. Local 2251 and Local 2724 were informed that Evercore had contacted the Subject Bidder seeking evidence of its financial wherewithal and its ability to effect the transaction.

11 On April 7, 2016 the Subject Bidder provided some unsupported financial information to Evercore.

12 On April 8, the Financial Advisor wrote to the Subject Bidder to advise that Essar Algoma, in consultation with the CRA and the Financial Advisor, and with the approval of the Monitor, had determined that the Subject Bid did not constitute a Qualified Phase I Bid. The letter further stated that Essar Algoma was exercising its discretion to waive the technical requirements of the SISP and to declare the Subject Bid a Qualified Phase I Bid, conditional upon the provision by the Subject Bidder of written evidence of its financial and other capabilities to consummate its proposed transaction, satisfactory to Essar Algoma in consultation with the CRA, the Financial Advisor and the Monitor, by no later than 5:00 p.m. on April 18, 2016. This was a decision open to Essar Algoma under section 19 of the SISP in consultation with the CRA and Financial Advisor and with the consent of the Monitor. The SISP did not provide for consultation with the USW on this decision.

13 On April 14, 2016 counsel for Local 2251 told the Monitor that his client would like to meet the Subject Bidder on April 19<sup>th</sup>. On the same day he was advised by counsel to the Monitor that the Subject Bidder had not cleared the hurdle of establishing financial capability to execute a deal and that until it did, it was not entitled to meet with the unions or anyone else involved in the SISP process and the Monitor could not agree to the meeting.

14 On April 18, 2016 the Subject Bidder provided to the Financial Advisor a letter and a one page spreadsheet containing a dated draft valuation of related corporations. Essar Algoma, in consultation with the CRA, the Financial Advisor and the Monitor, reviewed the documents provided on April 18 and determined that the documentation did not constitute sufficient evidence of the Subject Bidder having the financial capability necessary to consummate the proposed transaction and thus did not meet the requirements of the SISP.

15 On April 20, 2016 the Financial Advisor notified the Subject Bidder that Essar Algoma, in consultation with the CRA and the Financial Advisor, and with the consent of the Monitor, had determined that the evidence of the Subject Bidder's financial and other capabilities provided by the April 18 deadline was not satisfactory and that its Phase I Bid was rejected.

16 On a conference call on April 21, 2016 counsel for Essar Algoma advised counsel for Local 2251 that the Subject Bidder had not provided evidence of its financial wherewithal by the Phase I deadline but that this requirement had been waived on the condition that the Subject Bidder would provide this information by April 18, 2016. Local 2251 was advised that the information that had been received on April 18, 2016 from the Subject Bidder was unsatisfactory and therefore the Subject Bidder had been disqualified from the SISP.

17 While it is not its primary argument, the union says that it should have been permitted to meet with the Subject Bidder when it asked to do so on April 14. Whether that is right depends on the terms of the SISP. One of the things bargained for by the union in the negotiations leading to the SISP was the right to meet with bidders in meetings to be supervised by representatives of the Monitor. This was provided for in both the Phase I and the Phase II process.

18 The Subject Bidder was a Phase I Bidder. The SISP provided:

16. Phase I Bidders shall be advised that representatives of the USW and the Retirees are available to meet with them in respect of the formulation of their bid. Any communications between Phase I Bidders and the USW and/ or the Retirees shall be supervised by representatives of the Monitor provided that the discussions shall remain confidential and shall not be disclosed without the consent of the parties to the discussion....

19 This provision did not require that a Phase I Bidder be a qualified Phase I Bidder, with appropriate proof of the financial capability to close a transaction, in order to meet with the USW. It is said, however, that when the request was made by the union on April 14 to meet with the Subject Bidder, the SISP was in its Phase II stage and that the USW had the right to meet only Phase II Bidders as provided:

27. Phase II Bidders shall be advised that representatives of the USW and the Retirees are available to meet with them in respect of the formulation of their bid. Any communications between Phase I Bidders and the USW and/or the Retirees shall be supervised by representatives of the Monitor provided that the discussions shall remain confidential and shall not be disclosed without the consent of the parties to the discussion....

20 I think this interpretation of the SISP is unduly technical and may be wrong. Under the letter of April 8 from the Financial Advisor to the Subject Bidder, Essar Algoma was exercising its discretion to waive the technical requirements of the SISP and to declare the Subject Bid a Qualified Phase I Bid, conditional upon the provision by the Subject Bidder of written evidence of its financial and other capabilities to consummate its proposed transaction, satisfactory to Essar Algoma in consultation with the CRA, the Financial Advisor and the Monitor, by no later than April 18, 2016. Technically the Subject Bidder was still a Phase I Bidder entitled to meet with the USW.

21 More than that, however, the SISP process is of crucial importance to the USW and I do not view technical roadblocks being used to prevent the USW from meeting with the Subject Bidder at that time as being particularly helpful to the process. If the request had been made by the USW prior to the Subject Bid being submitted on April 1, the USW would have been entitled to meet with the Subject Bidder even though nothing would have been provided by the Subject Bidder at that stage about its financial ability to close any deal it intended to submit.

22 It is also said that under the order approving the SISP, it was a requirement that both the Subject Bidder and the USW execute a consent form in a form and substance acceptable to Essar Algoma and the Monitor or as directed by the Court, and that no such consent was signed by the Subject Bidder or by the USW. I view this as an *ex post facto* argument. Such a concern was not raised at the time of the request of the USW for a meeting with the Subject Bidder and it easily could have been taken care of by providing a copy of the consent to the USW and the Subject Bidder and asking for it to be signed to permit the meeting to go ahead. There was nothing remarkable in the consent form.

23 Having said that, I recognize that this entire SISP process is being driven by very tight timelines and that there have been other important matters taking the time of all concerned, not the least of which has been the Cliffs contract issue. There is many a slip between the cup and the lip and I do not at all ascribe any bad faith to the actors in this drama. It is far too easy in hindsight to pick things apart and a CCAA case with all of its hurly-burly complexity is a situation in which one should not engage in hindsight nitpicking of well-intentioned actions of the parties.

24 The main complaint of the USW is that it was not consulted and given an opportunity to provide input into the decision to disqualify the Subject Bidder at the Phase I stage. Technically the USW might be right but as a practical matter it made no difference.

25 The decision as to whether the Subject Bidder provided sufficient evidence of its financial ability to close the contemplated transaction was one for Essar Algoma to make, in consultation with the CRA, the Financial Advisor and the Monitor, under section 17 (viii) of the SISP. The USW had no role to play in that decision.

26 It is true that under section 19 of the SISP, Essar Algoma was to consult with the USW to determine whether a bid constituted a Qualified Phase I Bid. There were, however, many factors other than a bidder's financial capability that could play a part as to whether Phase I Bid was a Qualified Phase I Bid, and presumably it would be those other factors on which the USW had a right to be consulted in deciding whether a bid was a Qualified Phase I Bid. The right of the USW in section 19 of the SISP to be consulted could not have been intended to include a right to be consulted on the decision to be taken by others under section 17 (viii) of the SISP as to the financial capability of a Phase I Bidder.

27 Under section 20 of the SISP, the USW was one of the Consultation Parties to be consulted on a decision to reject a Phase I Bid. In this case, technically perhaps Essar Algoma should have consulted with the USW after the financial information from the Subject Bidder was received on April 18 and it was determined by Essar Algoma, the CRA, the Financial Advisor and the Monitor that the Subject Bidder lacked the financial ability to consummate the proposed transaction.

28 It would however have been a meaningless consultation as the USW had no role to play in the decision as to the financial capability of the Subject Bidder and it was that decision which led to the rejection of the Subject Bid. The union rightly points out that consultation is a two-sided process with the opportunity to have input and to exchange views on an issue. But in this case the union had no right to have input into the decision as to the financial capability of the Subject Bidder.

29 So far as the decision that was made that the Subject Bidder lacked the financial wherewithal to close its intended transaction, this is a decision that a CCAA court is ill equipped to second-guess. Under our corporate law, a court should be loath to interfere with the good faith exercise of the business judgment of directors and officers of a corporation. See *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461, 2004 SCC 68 (S.C.C.) at para. 67 and *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320. This reluctance to interfere with the business judgment is even the more so in this CCAA proceeding in which the parties, including the USW, have agreed in the SISP that the decision is to be made not only by Essar Algoma but also by highly qualified professionals with great experience in restructuring, being the Financial Advisor, the CRA and the Monitor.

30 In all of the circumstances, I see no grounds at all to interfere in the SISP process to declare that the Subject Bidder is a Phase II Bidder. The motion of Local 2251 is dismissed.

31 While not an issue for decision, there has been a suggestion made by certain parties that the Information Sharing Protocol that was put in place by the Monitor was done because of a concern that the independent committee of the board of directors set up at the outset of this CCAA proceeding was not in fact independent. The Information Sharing Protocol provides that during Phase I and Phase II of the SISP, the CRA will provide high-level updates to the independent committee (restructuring committee) bi-weekly or more frequently as the CRA determines to be appropriate but no substantive reporting is to be made to the board such as the nature of the bid, names or number of bidders, status of due diligence efforts, or issues raised etc.

32 The Monitor stresses that the Information Sharing Protocol was devised as a method to avoid any issue of whether the independent committee was in fact independent. The parties on this motion are agreeable to an endorsement being made that the Information Sharing Protocol was conceived and implemented by the Monitor to protect the integrity of the SISP and was not intended to be any reflection on the independence of the independent committee. That is an appropriate endorsement.

*Motion dismissed.*

#### Footnotes

- 1 In light of the confidentiality provisions of the SISP process, the identity of bidders is to be kept confidential. The name of the bidder on this motion therefore is referred to the Subject Bidder. Any bidder is not to know the terms of any other bid and therefore details of points in dispute are not disclosed in this decision.

# TAB 7

2011 ABQB 399  
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc.,  
Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings  
Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011  
Judgment: June 24, 2011  
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.  
Darren Bieganeck for Winalta Group

Subject: Insolvency

APPLICATION by monitor for approval of fees.

**J.E. Topolniski J.:**

**I. Introduction**

Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about \$9.5 million, while its liabilities exceeded \$73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for \$1,155,206.05 (Fee) and is asking for a \$275,000.00 adjustment for alleged overcharging. It complains about the following:

- (i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);
- (ii) duplication;
- (iii) a six percent administration fee charged in lieu of disbursements (\$50,000.00);
- (iv) mathematical errors (\$47,979.39); and
- (v) charges for internal quality reviews described as something "required to be independent from the engagement" (\$10,000.00).

5 The Winalta Group also seeks a \$75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeover financing.

6 Deloitte & Touche Inc. has agreed to deduct its \$10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

## **II. A Quick Look Back**

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of \$47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

- (i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;
- (ii) HSBC would be unaffected by the *CCAA* proceedings;
- (iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and
- (iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

### **III. Analysis**

#### **A. Proper Charges**

##### *1. General Principles*

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

(i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or

(ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay



under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]), Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of CCAA monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...

...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.), Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a CCAA monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

- (a) allowing the trustee a fair compensation for his services;
- (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
- (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

## 2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from \$65.89 per hour (clerical services) to \$460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of \$588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

### (a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat, Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court,

observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

**(b) Professional staff (non-partner)**

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

### *3. Duplication of work by partners*

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez (\$127,000.00) and for Mr. Keeble (\$209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

### *4. The administration charge*

58 The Winalta Group contends that the Monitor's \$50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as CCAA Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a CCAA debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

#### 5. *Mathematical errors*

65 The parties have resolved the alleged mathematical errors.

#### 6. *Internal quality reviews*

66 At the hearing of this matter, the Monitor quite properly conceded that the \$10,000.00 charged for internal quality reviews should be deducted from its Fees.

#### ***B. Breach of Fiduciary Duty/Conflict of Interest***

67 A monitor appointed under the CCAA is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the CCAA process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

- (1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriguez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it led to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.
2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.
3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:
  - (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and
  - (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

*Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation*

**(a) The monitor's fiduciary and ethical duties**

74 Section 25 of the *CCAA* provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

- (a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bkcty.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

**(b) The Monitor's legislated and court ordered duties**

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:

(d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.

[Emphasis added.]

88 Clause 30 of the Initial Order states:

The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

#### *Step 2: Assessing the Monitor's actions*

##### **(a) Principles of interpretation**

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the



commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

- (i) assume that the parties carefully drafted the terms of the order;
- (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
- (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

**(b) Interpreting the relevant provisions of the Initial Order and the CCAA**

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court-appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports

before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBC, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this

clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that the Monitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

### *Step 3*

#### **(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system**

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from \$240,000.00 to \$1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed CCAA monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

#### **(b) Ascertaining the appropriate fee reduction**

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

#### **IV. Conclusions**

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded its statutory and court-ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed CCAA monitor and a private monitor.

127 In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

• +

(v) The \$10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

*Order accordingly.*

# TAB 8



CANADA

CONSOLIDATION

CODIFICATION

## Companies' Creditors Arrangement Act

## Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to September 18, 2016

À jour au 18 septembre 2016

Last amended on February 26, 2015

Dernière modification le 26 février 2015

company or is acting or is likely to act inappropriately as a director in the circumstances.

#### Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

#### Security or charge relating to director's indemnification

**11.51 (1)** On application by a debtor company and 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 the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

#### Priority

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

#### Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

#### Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

#### Court may order security or charge to cover certain costs

**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;

agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

#### Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

#### Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

**11.51 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

#### Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

#### Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

#### Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

#### Biens grevés d'une charge ou sûreté pour couvrir certains frais

**11.52 (1)** Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit

(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.

### Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company

2005, c. 47, s. 128; 2007, c. 36, s. 66.

### Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997 c 12 s. 124.

### Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

### Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

— dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

### Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

### Lien avec la Loi sur la faillite et l'insolvabilité

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12 art. 124.

### Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

### Personnes qui ne peuvent agir à titre de contrôleur

(2) Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :



# TAB 9

2016 ONSC 5215  
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2016 CarswellOnt 14647, 2016 ONSC 5215

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE  
OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

H. Wilton-Siegel J.

Heard: August 17, 2016  
Judgment: September 12, 2016  
Docket: CV-14-10695-00CL

Counsel: Paul Steep, Elizabeth Brown, Heather Meredith, for Applicant, U.S. Steel Canada Inc.  
Robert Staley, Kevin J. Zych, for Robert Staley and Kevin J. Zych  
Ken Rosenberg, Karen Jones, for United Steel Workers International Union and United Steel Workers International Union, Local 8782  
Sharon White, for United Steel Workers International Union, Local 1005  
Andrew Hatnay, Barbara Walancik, for non-unionized active Employees and Retirees  
Jeff Galway, Kiran Patel, for United States Steel Corporation  
Patrick Riesterer, for Brookfield Capital Partners Ltd.  
Lou Brzezinski, for Bob and Sharon Milbourne  
Gale Rubenstein, for Province of Ontario

Subject: Insolvency; Public; Labour

***H. Wilton-Siegel J. :***

1 At a hearing on August 17, 2016, the Court heard two motions. In the first motion, the applicant in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), U.S. Steel Canada Inc. ("USSC"), sought approval of a proposed second key employee retention plan (the "KERP 2") (the "KERP Motion"). In the second motion, the United Steel Workers International Union (the "USW"), USW Local 1005, USW Local 8782 and Representative Counsel for the non-unionized employees and retirees ("Representative Counsel") (collectively, the "Moving Parties") jointly sought an order requiring USSC to terminate its suspension of the funding of other post-employment benefits ("OPEBs") (the "OPEB Motion").

2 On August 19, 2016, the Court advised the parties that, for written reasons to follow, it would grant the KERP Motion and deny the OPEB Motion at this time provided USSC made a one-time contribution of \$2.7 million to a transition fund established by the Province of Ontario for the benefit of the retired employees of USSC (the "Transition Fund") or to another fund to be administered on the same terms as the Transition Fund. This Endorsement sets out the Court's reasons for these determinations.

**Preliminary Matter**

3 At the outset of the hearing, Representative Counsel sought an adjournment of the OPEB Motion to permit cross-examination on the affidavit of William Aziz ("Aziz"), the chief restructuring officer of USSC (the "CRO"), sworn August 11, 2016 (the "Aziz Reply Affidavit"), and to permit further negotiations to proceed regarding a possible settlement of both motions.

4 The Aziz Reply Affidavit responds to an affidavit of Paul Bishop ("Bishop"), the financial advisor to the USW, sworn July 20, 2016 (the "Bishop Affidavit"), which was included in the motion materials of the Moving Parties on the OPEB Motion. The Aziz Reply Affidavit was served on the Moving Parties on August 11, 2016.

5 The USW, USW Local 1005 and USW Local 8782 opposed the adjournment unless the KERP Motion was also adjourned. USSC opposed any adjournment of either the KERP Motion or the OPEB Motion.

6 The KERP Motion was originally scheduled to be heard on July 27, 2016. The Moving Parties short-served the materials for the OPEB Motion for a hearing on July 27 as well. The motions were adjourned at the encouragement of the Court with a view to determining whether the parties could agree on a disposition of both motions. While such an agreement was not reached, the discussions resulted in the USSC offer to make a one-time payment to the Transition Fund referred to below.

7 There was no basis for adjourning the KERP Motion further. USSC was entitled to have the KERP Motion heard as it has already been adjourned once. Representative Counsel did not actively seek an adjournment of the KERP Motion, its principal request being an adjournment of the OPEB Motion. In addition, there is nothing in the Aziz Reply Affidavit that was relevant to the KERP Motion. There was no also legal connection between the KERP Motion and the OPEB Motion. While each of the motions involved the application of a portion of the limited cash resources of USSC, this was addressed, as a practical matter, in the negotiations between the parties.

8 The adjournment of the OPEB Motion was denied for the following reasons.

9 First, there is no demonstrable need for a cross-examination of Aziz on the Aziz Reply Affidavit. Representative Counsel has not provided any specifics of the matters on which it would seek to cross-examine Aziz. It says merely that it seeks time to assess whether it wishes to cross-examine him. Moreover, there is no evidence that a cross-examination is necessary to elucidate further the position of USSC. The matters addressed in that affidavit are largely of a financial nature based on the financial performance of USSC. This is neither new nor disputed information. The Monitor has been reporting on a monthly basis regarding the financial performance of USSC since October 2015. As a result, the Moving Parties are in a position to understand and assess the testimony of Aziz in that affidavit. Consistent with this view, the USW, USW Local 1005 and USW 8782 were prepared to argue the motion without the benefit of any cross-examination. Moreover, as the Moving Parties acknowledge, the differences between the parties do not relate to the underlying financial information but rather to the "spin" that they put on such facts, as set out in their respective arguments.

10 Second, Representative Counsel acknowledged at the hearing that the principal purpose for the adjournment request was to permit further negotiations among the parties. Representative Counsel sought a more nuanced result than either of the two polar options presented to the Court by the parties. This is a laudable purpose that I would ordinarily support. However, in this case, however willing Representative Counsel would be to find an intermediate position, it is clear that the other parties have reached the end of their negotiations and that such an agreement is not possible. The Monitor is also of the view that a further narrowing of the positions between the parties is unlikely.

11 Third, as discussed in the OPEB Motion analysis below, there is a connection between the outcome of that motion and the current negotiations among the principal stakeholders of USSC and the prospective purchasers of the business of USSC on a going-concern basis. The other parties to the OPEB Motion are of the view that it would be desirable to have this motion heard at this time for this reason.

12 Accordingly, the motion of Representative Counsel for an adjournment of the OPEB Motion was denied.

### **The KERP Motion**

13 On October 8, 2014, as amended by order dated January 21, 2015, the Court approved a key employee retention plan in respect of 29 employees in management and operational roles who it considered critical to the success of USSC's restructuring efforts and continued operations as a going concern (the "KERP 1"). KERP 1 provided for an overall maximum of \$2,570,378 to be payable to certain key employees upon the earlier of: implementation of a plan of arrangement, completion of a sale, termination of employment without cause, or June 30, 2016. Accordingly, as of June 30, 2016, all amounts owing under KERP 1 became due and were paid to these key employees.

14 USSC has now identified 34 employees in management and operational roles who it considers critical to the success of its current restructuring efforts and continued operations as a going concern. It says that it requires the services of these employees, among other things, to enable it to continue to operate as a going concern. This is essential to the completion of any going-concern transaction that may result from the sale and investor solicitation process currently being conducted by USSC (the "SISP"), and to provide transition services to any going-concern purchaser.

15 USSC has developed KERP 2 to retain such employees. KERP 2 provides for a cash retention payment equal to a percentage of each such employee's annual salary in two tiers, either 50% or 25% of annual salary. KERP 2 provides for an overall maximum amount payable under the plan of \$1,572,051. The cash payment will become payable upon the earlier of the following events: termination of employment without cause, implementation of a plan of arrangement or completion of a sale of all or substantially all of the assets of USSC, in either case as approved by the Court and resulting in a continuation of going-concern operations, the substantial completion of liquidation in the event a going concern sale cannot be completed, the date an employee's services are no longer needed for such a liquidation as determined by the Monitor, and June 30, 2017.

16 KERP 2 provides for a payment of 75% of the retention payments on the closing of a sale of all or substantially all of the assets of USSC, or on implementation of a plan of arrangement, if in either case the transaction results in a continuation of going-concern operations. The remaining 25% is payable three months after closing of any such transaction, or earlier in the event of termination without cause of an employee. If an employee covered by KERP 2 is not offered employment by a going-concern purchaser, the entire retention payment will be made upon closing of the transaction. In the event of a liquidation, the cash retention payments will be equal to 75% of the maximum amounts established in respect of the employees covered by KERP 2. As was the case with KERP 1, USSC proposes to pay the KERP 2 amount to the Monitor to be held in trust pending the occurrence of any payment condition.

17 The Court's jurisdiction to authorize KERP 2 is found in its general power under s. 11 of the CCAA to make such order as it sees fit. The following factors identified in case law support approval of KERP 2 as fair and reasonable in the present circumstances.

18 First, the evidence supports the conclusion that the continued employment of the employees to whom KERP 2 applies is important for the stability of the business and to assist in the SISP. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

19 USSC advises that the employees identified for KERP 2 have lengthy histories of employment with it and specialized knowledge that cannot be replaced. Of the 34 employees covered by KERP 2, twenty-four were key employees in KERP 1. USSC advises that the number of employees considered to be key employees has increased since KERP 1 as a result of USSC's increasing independence from United States Steel Corporation ("USS"). The evidence strongly suggests that, if the employees were to depart USSC, it would be necessary to replace them on an immediate basis but that it would be very difficult, if not impossible, to identify adequate replacements in view of USSC's current circumstances.

20 Second, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the USSC's operations, the employees to be covered by KERP 2 would likely consider other employment options if KERP 2 were not approved. USSC says that certain of the key employees could depart imminently and others are likely to depart in the longer term if they are not provided with an incentive to remain in the form of KERP 2. More generally, it would be expected that, given that the CCAA proceedings have continued for almost two years, key employees will look for more stable long-term employment. USSC advises that approximately 48 salaried staff employees have departed in the past six months, including one employee who was covered by KERP 1.

21 Third, the evidence supports the conclusion that the continued employment of the employees to whom KERP 2 applies is important for the stability of the business and to assist in the successful conclusion of a going-concern sale or plan of arrangement, if feasible. In particular, seven of the key employees perform sales functions. Their departure would cause direct harm to USSC's ability to generate revenue, given that USSC no longer performs any sales function on behalf of USSC. The sales function is also important to the business of USSC's major customers. In addition, the retention of key employees will be critical to any transition plan regarding a continuation of going-concern operations. USSC advises that at least one prospective purchaser in the SISP has indicated that a second key employee retention plan is important to it for this purpose.

22 Fourth, the KERP 2 was developed through a consultative process involving USSC's management, USSC's outside labour and employment counsel, and USSC's board of directors. USSC's board of directors, including the independent director, supports KERP 2. The business judgment of the board of directors is an important consideration in approving a proposed key employee retention plan: see *Timminco Ltd. (Re)*, 2012 ONSC 506, [2012] O J No 472 at para 73.

23 Fifth, both the Monitor and the CRO support KERP 2. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor advised in its Twenty-Ninth Report dated August 15, 2016 (the "Twenty-Ninth Report") that it is satisfied that each of the employees covered by KERP 2 occupies an important management or operational role, is a seasoned employee of USSC with deep knowledge of its business which cannot be readily replaced, and is critical to USSC's strategic direction and day-to-day operations and management as well as to completion of a successful restructuring. The Monitor also advises that it has reviewed the role and responsibility for each individual employee and the proposed quantum under KERP 2 for each employee and is satisfied that the amount and terms of the proposed KERP 2 are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings. The CRO advised that he believes it is in the best interests of USSC to make KERP 2 available to the employees covered by the plan and that the aggregate amount payable under KERP 2 is reasonable.

24 Sixth, the terms of KERP 2, as described above, are effectively payable upon completion of the restructuring process.

25 Based on the foregoing considerations, the KERP Motion is granted.

#### **The OPEB Motion**

26 By order dated October 9, 2016, the Court authorized the suspension of payments by USSC in respect of all OPEBs except for life insurance, along with the suspension of certain other payments (the "Cash Conservation Order"). On the basis of this order, USSC has suspended payments of the OPEBs, among other obligations, since that date.

27 As mentioned, this motion was originally scheduled to be heard on July 27, 2016. It was adjourned at the encouragement of the Court to permit discussions between the parties regarding a possible settlement of both the KERP Motion and the OPEB Motion. The parties did not reach an agreement. However, in connection with these discussions, each of USSC and the Moving Parties served "with prejudice" offers.

28 The USSC offer proposed a one-time payment of \$2.7 million to the Transition Fund, or to another fund to be administered on the same terms. The Moving Parties' offer provided for reinstatement of OPEBs until December 31, 2016, to be followed by a case conference to discuss whether the OPEBs should continue to be suspended after that date.

29 At the hearing of the OPEB Motion, the parties proceeded on the basis that the positions of the parties were narrowed to those reflected in their respective offers.

30 Accordingly, the Moving Parties sought an order requiring USSC to reinstate payment of OPEBs on a going-forward basis to the end of 2016, with payment thereafter to be addressed in a case conference at that time. USSC opposed this motion on the basis that its offer of a one-time payment to the Transition Fund appropriately balances the payment of the OPEBs with ensuring USSC's operational capabilities during the SISP process and furthering the prospects of the SISP.

### **The Evidence of the Parties**

31 The parties have provided affidavit evidence of their respective advisors. The following summarizes the evidence in these affidavits, which counsel for the USW and USW Local 8782 accurately notes is at least as much argument as factual evidence. In addition, I have set out the principal recommendations of the Monitor in its Twenty-Ninth Report.

#### *The USW*

32 The USW relies on the Bishop Affidavit. Bishop states that, in his opinion, reinstatement of OPEB funding would not materially diminish USSC's forecast cash balance during 2016 and should not change USSC's and the Monitor's expectation that there will be no need to draw on the "debtor-in-possession" loan currently in place (the "DIP Loan") at any time in 2016.

33 Bishop bases this conclusion largely on his view that USSC has underestimated its cash flow forecasts, or perhaps more precisely outperformed its cash flow forecasts, since the commencement of these proceedings and continues to do so. In particular, Bishop has provided charts that demonstrate in his view that, contrary to expectations at the time that payment of the OPEBs was suspended, USSC could have continued to pay OPEBs after October 9, 2015 and would still have had sufficient liquidity to continue operations through 2016 without drawing on the DIP Loan.

#### *Representative Counsel*

34 Representative Counsel relies on an affidavit of William Missen ("Missen"), a former senior officer of USSC who retired in 2004. Missen observes, as did Bishop, that the actual cash on hand at December 31, 2015 far exceeded the forecast amount at the time that payment of the OPEBs was suspended and that USSC has not drawn on the DIP Loan despite its forecast at the time.

35 Missen states that, in his opinion, USSC has sufficient cash on hand and forecasted earnings before interest, taxes, depreciation and amortization ("EBITDA") to allow reinstatement of the OPEBs without requiring a draw on the DIP Loan to fund such payments.

#### *USSC*

36 USSC relies on the Aziz Reply Affidavit. Aziz states that he believes that it is necessary, and in the best interests of achieving a successful restructuring, not to order reinstatement by USSC of the OPEBs. Aziz essentially makes six points in support of this position.

37 First, he says that actual EBITDA of USSC tracked exactly the forecast to May 31, 2016 made at the time of the Cash Conservation Order, and that it was only in June and July 2016 that actual EBITDA exceeded the forecast amount. He says these results are reflected in the fact that income from operations was positive only in June 2016. Accordingly, during the period October 1, 2015 to June 30, 2016, USSC had a cumulative negative income of \$139.7 million and a cumulative negative EBITDA of \$61 million. Further, Aziz says that the factors that resulted in increased gross margins since May 2016 — principally lower costs for key raw materials, higher steel prices, and a lower dollar — are subject to volatility, particularly steel prices which are forecast by many industry observers to decline during the rest of 2016.

On the basis of the foregoing, Aziz says that, in his opinion, the historical record over this period, including the recent performance of USSC, does not indicate a reliable upward trend of financial performance over that which was forecast in September 2015, including in particular any reliable trend in the level of anticipated cash contributed from operations as reflected in EBITDA.

38 Second, while USSC acknowledges that its cash position has improved since October 2015, Aziz says this is largely due to the conversion of working capital, principally raw material inventory, into cash and the deferral of approximately \$14 million of capital expenditures that were included in the forecast at the time of the Cash Conservation Order. Over the period October 2015 to the end of June 2016, USSC's net cash position exceeded the forecast by \$92 million while its working capital and capital expenditures was \$54 million less than forecast. Of the difference of \$38 million, \$23 million is accounted for by the EBITDA difference in June 2016 compared to the forecast at the time of the Cash Conservation Order, and \$8 million is accounted for by the absence of interest payments on the DIP Loan, which was not drawn on during the period. Aziz says that, essentially, the existing cash is "spoken for" in the form of a necessary raw material inventory buildup in anticipation of winter, necessary capital expenditures, and payment of post-filing payables to suppliers who have extended credit to USSC.

39 Third, Aziz says there are a number of benefits to the USSC restructuring process from its current cash position that must also be taken into account. These include: (1) allowing USSC to operate reliably and without interruption; (2) avoiding a draw on the DIP Loan with its attendant interest costs and pressure from priority creditors who perceive an erosion of their security; (3) providing the liquidity to make seasonal raw materials inventory purchases and necessary capital expenditures; (4) affording USSC flexibility in its negotiations with prospective purchasers in its SISP process without an artificial deadline driven by cash-flow constraints; (5) permitting better payment terms from suppliers; and (6) assuring certainty of supply to USSC's customers. He suggests that conservation of cash is necessary for these reasons, which collectively enhance the prospects of a successful going-concern restructuring process that would address the concerns of all stakeholders to the maximum extent feasible.

40 Fourth, Aziz suggests that any consideration of the resumption of payment of unsecured obligations should be taken in light of the prior ranking of secured and other priority claims. In particular, Aziz refers to the USS secured claim of U.S. \$118.7 million, post-filing payables to suppliers, which were \$95.5 million at June 30, 2016, and potential statutory liens on the USSC properties, including municipal taxes.

41 Fifth, Aziz says that reinstatement of the OPEBs may trigger an event of default under the DIP Loan. This suggestion is speculative. I have not taken it into consideration in reaching the Court's determination on this issue.

42 Lastly, Aziz says that it is difficult to predict the actual cost of OPEB coverage if OPEBs were reinstated by USSC and that the actual cost could be higher than the historical average of \$3.6 million per month due to pent up demand and a time-limited incentive if reinstatement were ordered for a limited time prior to completion of any transaction.

***The USW Reply to the Aziz Reply Affidavit***

43 In a reply affidavit sworn August 15, 2016 (the "Bishop Reply Affidavit"), Bishop makes the following statements.

44 First, Bishop says the USSC financial results reflect the cost of certain raw materials under long-term contracts which ended in February 2016. He calculates the negative impact on cash flow associated with these contracts during the period October 1, 2015 to February 28, 2016 to have been \$44 million.

45 Second, he suggests the positive EBITDA in June 2016 and the anticipated positive EBTIDA for July 2016 represents a "significant change" in USSC's financial performance.

46 Third, he says that, in the absence of a working capital "roll forward" or forecast to the end of 2016, Aziz has failed to show mathematically that USSC would not have sufficient liquidity to meet its operational needs if it funded the OPEBs.

47 Ultimately, Bishop relies on his earlier statement that USSC could have continued to pay for the OPEBs after October 9, 2016 and still have more liquidity than it forecast during the period October 1, 2015 to May 31, 2016 at the time of the Cash Conservation Order.

### *The Monitor*

48 In its Twenty-Ninth Report, the Monitor addressed the financial performance of USSC and the status of the SISP in the context of the Moving Parties' motion to require reinstatement of the OPEBs. The Monitor is of the opinion that the proposed one-time contribution by USSC to the Transition Fund, pending the outcome of the negotiations currently taking place under the SISP, "represents an appropriate balancing of the interests of USSC's operating and restructuring priorities with the interests of the OPEB [b]eneficiaries." It says such a contribution "is appropriate in light of USSC's financial position, priority claims and the on-going SISP." The Monitor recommends against reinstatement of the OPEBs, apart from the proposed payment of \$2.7 million by USSC to the Transition Fund, for the following reasons.

49 First, in the Monitor's estimation, USSC's financial position remains uncertain, notwithstanding an improvement in steel prices in the last several months. It states that the increase in USSC's cash position over the forecast at the time of the Cash Conservation Order is principally due to a reduction of working capital and the increase of post-filing trade credit.

50 Second, the Monitor says that any decision to reinstate the OPEBs should take into consideration the legal priorities of other claimants. These include post-filing payables that need to be paid to continue operations and the claims of its secured creditors, including statutory liens and construction liens that remain to be adjudicated.

51 Third, in the Monitor's view, reinstatement of the OPEBs could be detrimental to a successful SISP outcome involving a going-concern sale. It says the long-term treatment of the OPEBs is best negotiated between a going concern bidder and the affected stakeholders.

### **The Positions of the Parties**

52 The Moving Parties say essentially that, however the current cash position of USSC arose, there is sufficient cash to reinstate the OPEBs on a monthly basis without negatively affecting the operational and restructuring activities of USSC. They say that, to the extent that USSC has failed to demonstrate quantitatively that it cannot afford to reinstate the OPEBs, it has failed to satisfy the onus on it. They also suggest that the Court should draw an adverse inference from the absence of such evidence and, in particular, from the absence of a forecast of month-end working capital for the period to December 31, 2016.

53 USSC says that its current financial position is largely unchanged from its financial position at the date of the Cash Conservation Order. It says that, while it has accumulated substantial cash, its current cash position reflects factors other than a cash contribution from operations. It says that these factors do not reflect an improvement in its financial position. USSC submits that the Court should give priority to the payment of OPEBs only if the operational and restructuring activities of USSC are not materially adversely affected. USSC also submits that the Moving Parties bear the onus of proof on this motion and suggests that they have failed to satisfy that onus.

### **Analysis and Conclusions**

54 The issue of the possible resumption of the OPEBs is a matter on which the Court has considerable sympathy for the affected stakeholders. The possibility of a resumption of payments if economic circumstances permitted was contemplated in the Court's Endorsement dated October 14, 2015. The Court stated the following at para. 137:

... It is possible that the operating experience in the new environment will reveal some possible alternatives. I would encourage USSC to be alert to such possibilities as it moves forward. The restoration of the OPEBs should be a priority together with its operating and restructuring priorities.



55 However, as the passage indicates, any consideration of the resumption of payments must take into account USSC's operating and restructuring priorities. Such considerations are of particular significance at the present time given the status of the SISP. I will analyse the applicable considerations on this motion after first addressing the test implied by this passage.

### *The Legal Test*

56 The Moving Parties submit different standards for application by the Court, in each case based on the statements of the court in *Bloom Lake, g.p.l (Arrangement relatif a)*, 2015 QCCS 3064, [2015] Q.J. No. 6111, at para. 104, leave to appeal dismissed, 2015 QCCA 1351, [2015] Q.J. No. 7736 and the Court's Endorsement dated October 14, 2015.

### *The Tests Proposed by the Moving Parties*

57 Representative Counsel submits that the Court should order reinstatement of OPEB payments unless the evidence demonstrates that such payments will result in the bankruptcy of USSC. While those were the circumstances in *Bloom Lake*, I do not think that the trial court judge considered that the authority of the court was so limited, or that he purported to set out a test that was limited to such circumstances. Nor do I think that such an inflexible test is consistent with the role and authority of a court in CCAA proceedings, which are not directed toward avoiding the bankruptcy of a debtor company, but rather toward furthering a restructuring of the company as a going concern if possible. The test proposed by Representative Counsel is also not reflective of the decision of the Court in its Endorsement as is discussed further below. The USW describes the approach of this Court as making it a priority that OPEBs be reinstated unless it is demonstrated that such action will adversely affect USSC's operating priorities or will adversely affect its restructuring process. It also suggests that this is the test that was articulated in *Bloom Lake*. I also do not agree with this formulation of the applicable legal standard on this motion as is discussed below.

### *Analysis of the Court*

58 In its Endorsement, the Court contemplated a consideration of the extent to which it was feasible to reinstate some or all of the OPEBs relative to the impact of any such decision on the operating priorities of USSC at such time and the current status of its SISP. In broad terms, the Court envisaged a need to balance the competing objectives of payment of some or all of the OPEBs, maintenance of USSC's operations as a going concern consistent with its business plan, and furtherance of the SISP.

59 With respect to the reinstatement of the OPEBs, any such reconsideration could canvas a range of alternatives. In this case, the Moving Parties seek reinstatement of all of the OPEBs, whereas USSC proposes a one-time payment. With respect to the maintenance of USSC's operations, the Court's Endorsement specifically contemplated, as a practical matter, that any such decision would require a change in USSC's operating experience, by which was meant an improvement in USSC's profitability, as a condition of such an order. In other words, the existence of cash not accompanied by an improvement in the anticipated operating performance relative to the cash flow forecast at the time of the Cash Conservation Order would not be sufficient to support such relief. Such an approach implies that the onus of demonstrating such a change rests with the Moving Parties. With respect to considerations pertaining to the SISP, the Court must take into account the potential for any impact, adverse or otherwise, on the prospects for a successful outcome of the restructuring process.

60 I consider this approach to be consistent with the decision in *Bloom Lake* upon which the Moving Parties rely. Insofar as the trial judge in *Bloom Lake* applied a test, it is set out in para. 104 thereof, where he stated that "[t]he Courts have consistently recognized a jurisdiction to suspend the obligation to make special payments and OPEB payments when 'necessary to enhance the liquidity to promote the survival of a company in financial distress.'" What is "necessary to enhance the liquidity to promote the survival of a company in financial distress" in any given situation will depend on the circumstances of each case. In *Bloom Lake*, the debtor company had ceased operations. All that was necessary was funding to permit the conduct of a sales and investment process. In the present circumstances, it is necessary to fund

the continuing operations of USSC to maximize the prospects of a successful SISP that will provide the greatest possible benefit to all of the stakeholders, including in particular the Moving Parties.

61 Accordingly, I am of the view that the determination of the OPEB Motion requires a balancing of the three competing objectives set out above subject to the condition of demonstration of a material improvement in the anticipated profitability of USSC over the period of payment of the OPEBs sought by the Moving Parties.

*Analysis of the Relevant Considerations*

62 It is important to recall the circumstances in which, and the purpose for which, the Cash Conservation Order was made in October 2015. At that time, USSC was facing the prospect of a termination of its operating business unless it could adopt its business preservation plan. The purpose of USSC's business preservation plan was to conserve cash with a view to continuing to operate the USSC business for a further year or more while conducting a new sales and investor solicitation process.

63 At that time, the OPEB beneficiaries were faced with the immediate termination of their OPEB benefits if USSC ceased operations and no prospect of any reinstatement under a liquidation scenario. The only alternative was a suspension of payment of a number of obligations, including OPEB benefits, pursuant to USSC's business preservation plan in the hope that a new sale and investment process would result in a going-concern transaction which would include a resumption of OPEB payments.

64 Accordingly, the starting point for the analysis of the present motion must be whether there has been any fundamental change in the profitability of USSC from that anticipated at the date of the Cash Conservation Order which would warrant a direction of the Court to USSC to resume OPEB payments. This is consistent with the legal standard described above. Accordingly, I have proceeded on the basis that the evidence must demonstrate such a fundamental change on a balance of probabilities in order to warrant an order which would, in effect, vary the Cash Conservation Order.

*Has A Fundamental Change Occurred in USSC's Financial Performance and Prospects?*

65 While the Moving Parties argue forcefully that the financial forecasts on which the USSC business plan was based in October 2015 were significantly different from the circumstances that actually arose, I am not persuaded that this is the case. The actual performance of USSC was bound to depart from the forecast. I am not persuaded, however, that the actual performance of USSC since October 2015 has departed materially from that which was forecast at the time of the Cash Conservation Order.

66 The strongest evidence for this conclusion is the historical experience of cash contribution to earnings as evidenced by the EBITDA performance. As mentioned, for the period October 1, 2015 to May 31, 2016, actual EBITDA was essentially the amount forecast as of the time of the Cash Conservation Order. On an aggregate basis, EBITDA only exceeded the forecast amount in June and in July (for which the financial results were not available at the date of the hearing).

67 I am not persuaded on the evidence before the Court that the financial performance of USSC in May, June and July, insofar as it was known at the date of the hearing, evidences a material improvement in the profitability of USSC. The Monitor says in the Twenty-Ninth Report that caution is required in assessing the likelihood that this recent financial performance represents a fundamental improvement in USSC's operating performance because of the volatility of its business and the inherent challenges of the steel industry, including significant excess production. It indicates that USSC's recent order experience in June and July may reflect a trend of decreasing orders. In addition, the Aziz Reply Affidavit states that forward prices reflect an anticipated decline in steel prices by the end of 2016. Bishop did not contradict that evidence.

68 Bishop's evidence to the contrary was that EBITDA results reflected higher than market prices for raw materials inventory through to the end of February 2016. However, it is overly simplistic to base a conclusion regarding USSC's current level of profitability on an adjustment of one figure to a portion of USSC's historical results, rather than considering the totality of the evidence regarding the profitability of its operations. As Bishop notes in the Bishop Affidavit, at the time of the Cash Conservation Order, USSC estimated that, after implementation of its business preservation plan, its cash resources would be depleted by \$6 to \$8 million per month. While Bishop says that this has clearly not been the case, the actual average monthly reduction in cash from operations, as reflected in the EBITDA performance to June 30, 2016 of a cumulative negative \$61 million, was approximately \$7 million.

69 Given the legal standard set out above, and the Court's determination that the evidence does not support a finding that there has been a fundamental improvement in the profitability of USSC's business, there is no basis for the relief sought by the Moving Parties on the OPEB motion. The remainder of the Endorsement sets out the Court's views on three other considerations that also support the Court's determination in the event it were held that a finding of a fundamental improvement in the profitability of USSC should not be a condition of any order requiring a reinstatement of the OPEBs.

#### **Does USSC Hold Excess Cash?**

70 The alternative, and principal, argument of the Moving Parties is that, even if the Court finds that there has been no material improvement in USSC's profitability over that forecast at the time of the Cash Conservation Order, the cash position of USSC has departed from that forecast to such an extent that USSC could resume the payment of the OPEBs without materially adversely affecting its operational or restructuring priorities over the foreseeable payment horizon for the OPEBs. They say that the Court should therefore order a resumption of the OPEBs based on the level of cash that USSC currently holds.

71 I have the following observations and findings on this submission.

72 First, the principal argument in the Bishop Affidavit is, as mentioned, that USSC has underestimated its cash flow forecasts, or perhaps more precisely outperformed its cash flow forecasts, since the commencement of these proceedings and continues to do so. In particular, the Moving Parties have chosen to place great emphasis on the difference between the amount of cash on hand at December 31, 2015 and the amount forecast at the time of the Cash Conservation Order.

73 The decision to pick one date in time, particularly a date that is now more than seven months from the date of the hearing of this motion, is not only misleading but indicative of the argumentative nature of the alleged evidence in the Bishop Affidavit and therefore reason to approach such evidence with caution. Further, the fact that USSC has underestimated its cash position since the date of the Cash Conservation Order is no predictor of its cash position, or financial performance, in the future. Moreover, the current cash position is not by itself a basis for a resumption of payment of the OPEBs if USSC requires such cash for its operations. This is addressed below.

74 Second, for its part, USSC points to significant benefits to USSC from its current cash position that it says must be considered in connection with any resumption of payments of unsecured liabilities, including the OPEBs.

75 From an operational perspective, the existence of an adequate cash position is necessary to provide assurance to USSC's customers of continued supply of product. In addition, the current cash position has contributed to favourable credit terms from suppliers and removed the need for a draw, and consequential interest payments, on the DIP Loan. These factors contribute to an increased likelihood that USSC will be able to continue to operate on an independent basis until an agreement may be reached with a purchaser for a going-concern transaction.

76 Most importantly from USSC's perspective, the existing cash position allows USSC to conduct the SISP in an orderly manner in two respects. First, it allows negotiations with prospective purchasers to proceed without artificially imposed deadlines pertaining to USSC's financial performance. Such circumstances maximize the prospects for a successful going-concern restructuring which, as a practical matter, is the best if not the only course of action that

would envisage a resumption of OPEB payments on a longer-term basis. In addition, by removing the possibility of erosion of the security position of its priority creditors, USSC is able to pursue the orderly conduct of the SISP without the distraction of creditor-initiated proceedings.

77 However, the issue before the Court is not the benefit of liquidity in the abstract, which is not disputed. Bishop agrees that "holding sufficient liquidity is essential."

78 Third, the issue on this motion is more narrowly focused on the extent to which USSC requires liquidity in the present circumstances and whether its current position would permit a resumption of payment of the OPEBs without detrimentally affecting its operational and restructuring priorities.

79 The Moving Parties say, in effect, that USSC has built the need for excess cash into its forecasts or, alternatively, it has, and will continue to, regularly exceed the very conservative cash flow forecasts that it has prepared with the result that there is a cash "cushion" in its financial condition, present and future. The Moving Parties say that USSC has the onus of demonstrating that this is not the case and that all of the cash that it currently has on hand will be required in its operations. They say that USSC has failed to satisfy this onus and, accordingly, the Court should order reinstatement of the OPEBs as a priority matter.

80 For its part, USSC says that it has based its position on its going-forward analysis of its working capital requirements. Essentially, it says all of the current cash will be applied in its operations through to the year-end, other than cash requirements to provide a reasonable cushion for unanticipated events in a volatile market. USSC argues that the extent of the liquidity that it requires is a matter of business judgment. Accordingly, it says that the Court should respect the considered judgment of USSC management and its board of directors absent evidence of negligence or other improper behaviour.

81 These positions raise four issues that I will address in turn.

82 First, it is incorrect and misleading to limit the focus of the inquiry to the present cash position and the existence of any cash "cushion." The issue for the Court must be the anticipated future operating performance of USSC over the rest of 2016 viewed as a totality. This requires an understanding of the anticipated use of all of USSC's current assets, including but not limited to its cash, raw materials, and inventory, and the adequacy of such assets over this period. Such an understanding is informed in part, but not entirely, by the historical experience, including the source of the current cash position and the explanation for the difference between USSC's forecast and actual cash position.

83 In this regard, as the Aziz Reply Affidavit sets out, and the Monitor confirms, it is significant that the increase in USSC's cash position is not the result of an improved financial performance except in respect of the most recent operating experience. In para. 41 of the Twenty-Ninth Report, the Monitor analysed the actual cash flow of USSC for the period from October 1, 2015 to June 30, 2016 against the forecast cash flow at the time of the Cash Conservation Order. Of the \$92 million difference, only \$23 million was due to an improvement in cash contributed from operations, being the favourable experience in June 2016. The balance represented primarily the reduction of working capital assets, the negotiation of credit terms from suppliers post-filing, the deferral of capital expenditures, and the absence of interest on the DIP Loan.

84 These factors are, in large measure, both short-term and interrelated. The absence of interest payments on the DIP Loan is primarily the result of the conversion of working capital into cash and the deferral of capital expenditures rather than a consequence of an improvement in the operating experience of USSC, as discussed above. During the remainder of 2016, the reduction of working capital assets will reverse as raw materials inventory will build up again. The favourable credit terms from suppliers are only possible with a favourable cash position. The deferral of capital expenditures cannot last indefinitely and, in the event an agreement is reached in the SISP on a going-concern transaction, may be required as a condition of closing.

85 Second, while the Court has been provided with a cash flow projection to the end of 2016, it has not been provided with a working capital forecast over the same period. It is understood, however, that such forecasts are available to the Moving Parties on a monthly basis. I am therefore not prepared to draw an adverse interest from the absence of such financial forecasts in the record before the Court. However, the information before the Court does require a close scrutiny of the anticipated cash requirements of USSC over this period.

86 Third, while I acknowledge that the considered assessment of USSC management and its board of directors is an important consideration for the Court, I do not accept that the business judgment rule governs the present circumstances in an unqualified manner. Under the CCAA, a court has an obligation and a mandate to scrutinize the decisions of a debtor company through the prism of the rights of the affected stakeholders.

87 On the other hand, the issues on this motion involve an understanding and assessment of USSC's business plan for the remainder of 2016. The specific question of the capacity of USSC to resume payment of the OPEBs, given its expectations for this period as incorporated into its business plan and cash flow forecasts, is necessarily a matter of judgment rather than simple mathematics, as Bishop suggests. In these circumstances, in assessing the appropriateness of USSC's business decisions, the Court must necessarily rely heavily on the assessment and recommendations of the Monitor regarding financial matters, including the necessary level of liquidity to be incorporated into USSC's business plan. The Court cannot be its own financial advisor. In this regard, it must also rely heavily on the Monitor's assessment of the extent to which that business plan has the capacity to absorb additional obligations, such as a resumption of payment of the OPEBs.

88 The Monitor advises in the Twenty-Ninth Report, and confirms the evidence of USSC, that USSC sustained EBITDA losses through May 31, 2016 in line with the forecast at the time of the Cash Conservation Order and that, despite positive cash flow performance in June and July relative to the forecasted cash flow, the financial position of USSC remains uncertain. In addition, the Monitor confirmed, and set out in detail in its Report, that although USSC's cash position at the end of June 2016 was greater than projected at the time of the Cash Conservation Order, this is principally due to the factors described above and is not indicative of a material beneficial change in the financial condition and prospects of USSC at the present time.

89 The Monitor also states that the post-filing payables as of June 30, 2016 were \$95.5 million, principally representing trade credit owed to suppliers and accrued employee obligations. These payables will ultimately need to be paid out of the cash on hand, which was \$131.4 million as of June 30, 2016. This amount is before any reduction in cash that will occur in connection with additional raw materials inventory purchases ahead of the winter season. The Monitor also notes that payment of the post-filing payables and secured claims of USSC, including certain construction lien claims that have not yet been adjudicated, would result in a significant cash deficiency. Payment of the OPEBs to the end of the year would conservatively add approximately \$20 million to such obligations.

90 Having reviewed both the historical performance of USSC and its forecast working capital requirements, the Monitor recommends against reinstatement of the OPEBs, among other reasons, based on USSC's working capital requirements for the remainder of 2016. This is an important consideration for the Court. In effect, the Monitor concludes that there is a significant possibility that resumption of payment of the OPEBs would materially adversely affect USSC's operational performance given its current level of profitability.

91 Based on the foregoing analysis, I see no basis for rejecting this conclusion which the Court therefore adopts.

#### **Additional Considerations Relative the SISP**

92 It is also important to recognize two other considerations that relate to the context in which this motion is brought forward.

93 First, the timing of this motion relative to the SISP, and the circumstances that would exist depending upon the outcome of that process, are important factors to be taken into account. In general terms, USSC and the principal stakeholders, including the USW and to a lesser extent Representative Counsel, are holding discussions with prospective purchasers. It is currently expected that the outcome of these negotiations will be known within 4-6 weeks.

94 If the SISP process results in a going-concern transaction, it is anticipated that the agreement with the successful bidder will, among other things, address the future of the OPEBs. The most appropriate outcome of the present motion would, under such circumstances, be an order that is consistent with the agreement reached between the stakeholders, including the Moving Parties and the proposed purchaser, regarding OPEBs. Moreover, as the Monitor has indicated in its recommendations, the present motion should not constrain the current discussions between the stakeholders and the prospective bidders. In this regard, it is also important to note the Monitor's assessment that, in this context, an order reinstating the OPEBs "could be detrimental to a successful SISP outcome."

95 Conversely, if the SISP process does not result in a going-concern transaction, USSC will have to address alternative transactions, which would include an orderly liquidation of its assets. In this context, it would be necessary to address the status of the claims of the OPEB beneficiaries relative to the priority claims of other creditors before any decision on payment of those claims could be made. I recognize that it is of little consolation to the OPEB beneficiaries that, in such circumstances, they would be in the same position that they would have been in if the Cash Conservation Order had not been issued and USSC had ceased operations after October 2015. However, Representative Counsel has advised on a number of occasions of a priority claim that it intends to assert in respect of the same parties as pension beneficiaries. In addition, the Moving Parties have advised that they have conduct-related claims against USS which they may pursue in such event.

96 For its part, in such scenario, the Court would be required to address the priorities of the claims of the stakeholders as they have been determined as of that time. For this reason, as well, the Court must be mindful of the impact of any decision on the status of all stakeholder claims if this alternative scenario were to occur. Given that any such scenario would arise in the very near term, the Court cannot approve any action that would potentially adversely affect the security of priority creditors until the outcome of the SISP is known. The latitude that often exists at the outset of a restructuring process does not exist in the present circumstances given the status of the SISP. The Court cannot look to the anticipated benefits of a restructuring over the longer-term to offset the potential for adverse impacts in the short-term.

97 The second consideration is more administrative in nature but could nevertheless be material. The Moving Parties suggest that the monthly amount involved if OPEB payments were resumed would be approximately \$3.6 million. This is based on the historical experience before USSC suspended payment of the OPEBs. However, in the current environment there can be no certainty regarding the likely level of claims for several reasons. These include the fact of past claims that have been denied by the Transition Fund, as well as the natural influence of a future date for termination of OPEB claims on the timing and level of claims as that date approaches. In short, the Moving Parties ask the Court to direct USSC to assume an unquantifiable obligation. On the other hand, the USSC proposal involves a fixed amount. Further, based on its experience since it was established, the existing Transition Fund is in a better position to anticipate the level of eligible claims that would be made if eligible coverage were extended to other categories of claims. In this connection, it is useful to consider the one-time contribution proposed by USSC of \$2.7 million. On the one hand, such a payment does not satisfy the Moving Parties' request in terms of either amount or duration. On the other hand, it recognizes that USSC has recently experienced favourable economic results in June and July 2016 of which the Monitor attributes \$12.2 million to higher than anticipated gross margins in respect of the period to June 30, 2016. It is appropriate that the OPEB beneficiaries share in some of this favourable performance as have the existing employees. Such a payment will, together with the recent payment of the Province, permit a possible expansion of the coverage under the Transition Fund to address some of the coverage gaps in the Fund. Further, the amount contemplated is a material contribution toward the amount that the Moving Parties suggest is the likely cost of OPEBs during the period in which negotiations regarding the restructuring of USSC are expected to conclude. It would then be possible to assess the future status of the OPEBs based on the outcome of these negotiations.

98 The two considerations addressed in this section indicate that any payments made on account of the OPEBs that are authorized at this time should be fixed in amount and be of fixed duration. Put another way, there is a real sense in which this motion is premature and should be heard after the outcome of the SISP is known. The Moving Parties suggest that payments should be ordered to at least the end of 2016. This would obligate USSC to pay the OPEBs well beyond the date on which it is anticipated that the outcome of the SISP will be determined. The USSC offer involves a one-time payment pending the outcome of the SISP. I conclude that the two considerations addressed in this section argue against a resumption of payment of the OPEBs at the present time and in favour of the contribution to the Transition Fund proposed by USSC, given that the Court effectively has to choose between the two offers of the parties.

### **Conclusion**

99 As mentioned, the determination of this motion requires that the Court choose between the two positions of the Moving Parties and USSC on the basis of its estimation of the best balance of competing considerations. These considerations are the furtherance of USSC's operational and restructuring priorities, and payment of the OPEBs. This is not an easy decision given the impact on the OPEB beneficiaries, who are certainly entitled to the sympathy not only of the Court but of all the stakeholders. Based on the test implied by the Court's Endorsement dated October 14, 2015, however, there is no basis for ordering a resumption of payment of the OPEBs. The evidence does not support a finding that there has been a fundamental improvement in the profitability of USSC's business since the date of the Cash Conservation Order.

100 Even if such a determination were not a condition of such relief, the combination of factors discussed above weighs against such relief. In particular, the Monitor is of the view that the USSC contribution of \$2.7 million to the Transition Fund is appropriate in light of USSC's financial position, among other considerations, and recommends against reinstatement of the OPEBs. Given the considerations discussed above, I agree with that recommendation in concluding that the position of USSC best balances the competing priorities at play on this motion. Accordingly, the OPEB Motion should be denied at this time provided that USSC makes a one-time contribution of \$2.7 million to the Transition Fund or to another fund to be administered on the same terms as the Transition Fund.

---

**End of Document**

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

# **TAB 10**



2016 BCSC 107  
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc., Re

2016 CarswellBC 158, 2016 BCSC 107, [2016] B.C.W.L.D. 844,  
23 C.C.P.B. (2nd) 201, 263 A.C.W.S. (3d) 300, 33 C.B.R. (6th) 60

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as Amended

In the Matter of a Plan of Compromise or Arrangement of Walter Energy  
Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Fitzpatrick J.

Heard: January 5, 2016

Judgment: January 5, 2016

Written reasons: January 26, 2016

Docket: Vancouver S1510120

Counsel: Marc Wasserman, Mary I.A. Buttery, Tijana Gavric, Joshua Hurwitz, for Petitioners  
John Sandrelli, Tevia Jeffries, for United Mine Workers of America 1974 Pension Plan and Trust  
Matthew Nied, for Steering Committee of First Lien Creditors of Walter Energy, Inc.  
Aaron Welch, for Her Majesty the Queen in Right of the Province of British Columbia  
Kathryn Esaw, for Morgan Stanley Senior Funding, Inc.  
Peter Reardon, Wael Rostom, Caitlin Fell, for KPMG Inc., Monitor  
Neva Beckie, for Canada Revenue Agency  
Stephanie Drake, for United States Steel Workers, Local 1-424

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPLICATION by insolvent corporations for extension of stay of proceedings and other relief to lead to potential restructuring.

***Fitzpatrick J.:***

**Introduction and Background**

1 On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

2 The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

3 The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions

relating to the partnerships: *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]); *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 21.

4 The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of \$16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

5 From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

6 The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately \$22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of \$11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

7 This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US\$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

8 As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

9 The petitioners now seek relief that will set them on a path to a potential restructuring, essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

10 For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

11 The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

12 Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

13 The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US\$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

14 The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

15 It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

16 Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

17 At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

#### **The Sale and Investment Solicitation Process ("SISP")**

18 The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

19 It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

20 Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

21 Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 2840 (Ont. S.C.J. [Commercial List]) at paras. 17-19.

22 In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable,

particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

23 The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

24 No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

#### **Appointment of Financial Advisor and CRO**

25 The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

26 The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

27 In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

28 A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

29 The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

30 Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

31 In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

32 The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

33 In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *8440522 Canada Inc., Re*, 2013 ONSC 6167 (Ont. S.C.J. [Commercial List]) at para. 17). No question arises as to his extensive qualifications to fulfil this role.

34 The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

35 The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 (Sask. Q.B.) at para. 19.

36 The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

37 PJT is to receive a monthly work fee of US\$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

38 At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US\$75,000. In addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to \$1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

39 To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of \$10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

40 The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

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.

41 In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

42 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

43 I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

44 The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

45 Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

46 The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

47 Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

48 In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of \$10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

#### Key Employee Retention Plan ("KERP")

49 The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

50 The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

51 I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para. 53; *Sahlin v. Nature Trust of British Columbia Inc.*, 2010 BCCA 516 (B.C. C.A. [In Chambers]) at para. 6. A sealing order was granted on January 5, 2016.

52 The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

53 The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

54 The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

The combination of the salary increase and proposed retention bonus ... were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

55 I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

56 The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

57 As noted by the court in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

58 Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]); and *U.S. Steel Canada* at paras. 28-33.

59 I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

60 In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISF.

61 What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

#### **Cash Collateralization / Intercompany Charge**

62 Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent,



Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

63 On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately \$22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

64 The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

65 Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

66 No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

67 In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

### **Stay Extension**

68 In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

69 Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

70 As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

71 Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

72 The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

- a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code*, R.S.B.C. 1996, c. 224 (the "Code"). The Board ordered Wolverine LP to pay \$771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;
- b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the Code breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and
- c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

73 The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corp., Re*, 2015 BCSC 1961 (B.C. S.C.). There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

[26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:

- a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
- b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest (2009)*"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
- c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest (2009)* at para. 33;
- d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest (2009)* at para. 32;
- e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and
- f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest (2009)*; *Azure Dynamics* at para. 28.

74 I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

- a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the \$771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

75 In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

76 In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

77 Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

*Application granted.*

---

**End of Document**

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.