COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'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 THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC., A2A CAPITAL SERVICES CANADA INC., WINGHAM A2A DEVELOPMENTS INC., LAKE HURON SHORES A2A DEVELOPMENTS INC., and MEAFORD A2A DEVELOPMENTS INC.
DOCUMENT	**REPLY BRIEF OF THE OFFSHORE INVESTORS (STANDING)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA D. Aaron Stephenson / Daniel Stethem aaron.stephenson@nortonrosefulbright.com daniel.stethem@nortonrosefulbright.com Tel: +1 403.267.8290 Fax: +1 403.264.5973 Representative Counsel for the Offshore Investors File no.: 1001326712

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Aug 14, 2026
8:39 AM
CLERK OF THE COURT

TABLE OF CONTENTS

I. Background

1 Pursuant to an order granted by the Honorable Justice C. Feasby on November 14, 2024 (the **Initial Order**), as later amended and restated, Norton Rose Fulbright Canada LLP was appointed as representative counsel to offshore investors (**Offshore Representative Counsel** and **Offshore Investors**) in these *Companies' Creditors Arrangement Act*[1] proceedings (these **CCAA Proceedings**).

2 This Brief is submitted by Offshore Representative Counsel with respect to the lack of standing of the Texas LLCs (or Allan Lind) and the Canadian Respondents to object to the Monitor's application to extend the Administration Charge and the Interim Lender's Charge to the undivided fractional interests (**UFIs**) of Offshore Investors (the **Charge Extension Application**).

3 This Brief is supplemental to and should be read in conjunction with the Offshore Investors' Brief in response to the Charge Extension Application, filed June 19, 2026.

4 The Canadian Respondents, the Texas LLCs, and Mr. Lind do not have standing to oppose the Charge Extension Application for the following reasons:

(a) The Canadian Respondents and the Texas LLCs are under the Monitor's exclusive management and control so they cannot take positions in conflict with the Monitor; and

(b) Mr. Lind is not directly affected by the Charge Extension Application.

5 The submissions of the Texas LLCs, the Canadian Respondents and Mr. Lind in response to the Charge Extension Application must be disregarded or discounted accordingly.

II. All Debtor Companies are controlled exclusively by the Monitor

6 The Texas LLCs and the Canadian Respondents are Debtor Companies, which means they are under the Monitor's exclusive management and control by operation of the Amended and Restated Initial Order (**ARIO**). The ARIO removed all power and authority from the directors and officers of the Debtor Companies, including the Texas LLCs and the Canadian Respondents.

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [**CCAA**].

7 Appeals of the ARIO were dismissed.[2] The Texas LLCs rightly acknowledged in their June 19, 2026 Brief that issues of “corporate authority” remained contested only until May 11, 2026, on which date the appeals from the ARIO were dismissed.[3]

8 The ARIO states:[4]

> 11. **The Monitor shall exercise the management and control of the Debtor Companies and Affiliate Entities, and on behalf of the Debtor Companies and Affiliate Entities**, shall:
>
> …
>
> (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 it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.
>
> …
>
> 35. **All current and former directors and officers of the Debtor Companies shall have no further power or authority to manage or direct the Debtor Companies** including, but not limited to, the power to direct the sale, transfer or other disposition of the Property or Business on behalf of the Debtor Companies or incur any obligations on behalf of the Debtor Companies.
>
> 36. All of the current and former directors, officers, shareholders and Assistants of the Debtor Companies and all other persons acting on the instruction or behalf of any of the foregoing having notice of this Order **shall and are hereby directed to co-operate** with and provide the Monitor with reasonable access to the books and records of the Debtor Companies and Affiliate Entities.
>
> 37. A&M 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 Debtor Companies and Affiliate Entities with the powers and obligations set out in the CCAA or set forth herein and that the Debtor Companies and Affiliate Entities and, where applicable, their shareholders, officers, **directors**, and Assistants shall advise the Monitor of all material steps taken by the Debtor Companies and Affiliate Entities pursuant to this Order, and **shall co-operate fully with the Monitor** in the exercise of its powers

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[2] *A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156 (**Tab 1**).
[3] Brief of the Texas LLCs (or Allan Lind), filed June 19, 2026 at FN1 and para 98 [**Texas LLCs June 19, 2026 Brief**].
[4] Amended and Restated Initial Order, filed December 3, 2024, as subsequently amended (but not to change the quoted paragraphs) at paras 11, 35-37, 39 [**ARIO**] (**Tab 2**).

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.

…

39. Without in any way limiting the powers and duties of the Monitor otherwise set out herein or in the CCAA, **the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name of and on behalf of the Debtor Companies and the Affiliate Entities**, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in anyway limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

…

(viii) engaging and **instructing Assistants** from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

…

(x) **initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted** with respect to the Debtor Companies, the Affiliate Entities, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(xi) exercising any rights of the Debtor Companies or the Affiliate Entities;

…

(xiv) **providing instruction and direction to the Assistants** of the Debtor Companies and Affiliate Entities;

…

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers and in each case where the Monitor takes any such actions or steps, **it shall be exclusively authorized and empowered to do so**, to the exclusion of all other persons, including the Debtor

Companies and the Affiliate Entities, and without interference from any other person.

9 The Texas LLCs and the Canadian Respondents cannot oppose the Monitor in the Charge Extension Application because they are under the Monitor's exclusive management and control. Only the Monitor can direct their conduct and instruct counsel on their behalves. Any conduct (purportedly) by the Texas LLCs and the Canadian Respondents in opposition to the Charge Extension Application is necessarily unauthorized.

10 Unauthorized conduct by a corporation in litigation must be stayed (until authority is obtained) or dismissed (if authority cannot be obtained).[5]

11 Authority for the Texas LLCs and the Canadian Respondents to oppose the Charge Extension Application cannot be obtained because only the Monitor can grant it.

12 In their September 9, 2026 Supplemental Brief, the Canadian Respondents argue an entitlement to separate representation of "the residual interests of the Canadian Respondents" because these CCAA proceedings could theoretically be terminated against them in the future.[6] In effect, they argue that speculative "interests" in resuming future (post-CCAA) operations are entitled to standing and independent representation. However, those speculative "interests" do not stand apart from the entities that hold them, which are under the Monitor's exclusive management and control. The ARIO did not carve out any "interests" from the Monitor's management and control to facilitate their separate representation.

III. Mr. Lind lacks standing in his own right

A. Mr. Lind's personal involvement is a pretense

13 The Texas LLCs were forced to adopt the pretense of representing Mr. Lind personally upon the dismissal of the appeals of the ARIO, which, even the Texas LLCs admit, resolved all issues of "corporate authority".[7]

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[5] *Beaver Rock Roastery Inc. v Saso*, 2017 ONSC 740 at paras 60-63 (**Tab 3**); *Oasis Filter International Ltd v Manz*, 2025 ABKB 565 at paras 34, 70 (**Tab 4**). These cases both dealt with the bringing of unauthorized actions by corporations as plaintiffs; however, on a principled basis, the same analyses should apply to unauthorized responses by corporations to applications.

[6] Supplemental Brief of the Canadian Respondents, filed September 9, 2026 at paras 4, 10 [**Canadian Respondents Supplemental Brief**]; see also Texas LLCs June 19, 2026 Brief at para 102 and the Supplemental Brief of the Texas LLCs (or Allan Lind), filed September 9, 2026 at para 5(c) [**Texas LLCs September 9, 2026 Supplemental Brief**].

[7] Texas LLCs June 19, 2026 Brief at FN1 and para 98.

14 Mr. Lind's personal interest in the Charge Extension Application should be seen as a pretense, adopted only because the appeals of the ARIO were dismissed, given that Mr. Lind earlier testified to having retired from the A2A group more than six years ago:[8]

```
Q.   And you're not paid by any entity in the A2A Group?
A.   No.
Q.   Or by anyone at all?
A.   No.  I'm retired.
Q.   When did you retire from the A2A Group?
A.   2019.
Q.   And did you stop providing consulting services in 2019?
A.   I was an employee prior to that.
Q.   And you've been a consultant since then?
A.   I've been retired since then.
```

15 Mr. Lind's personal interest in the Charge Extension Application should also be seen as a pretense because the Texas LLCs June 19, 2026 Brief repeatedly and expressly advanced arguments for the Texas LLCs themselves: "the Texas LLCs submit…" (para 67), "[t]he Texas LLCs rely upon…" (para 82), "[t]he Texas LLCs have been recognized…" (at para 101), "[i]t is sufficient that the Texas LLCs, whose interests are directly affected by the relief sought…" (para 109), "[t]he Texas LLCs oppose…" (para 117), and "[t]he Texas LLCs respectfully request…" (para 123).[9] In this same vein, the Texas LLCs September 9, 2026 Supplemental Brief was signed by "Counsel for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC" (i.e. not by counsel for Mr. Lind).[10]

16 The Canadian Respondents did not adopt the pretense of advancing Mr. Lind's personal interests, except in the alternative if they are not recognized as having standing themselves.[11]

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[8] Transcript of the September 4, 2025 Cross-Examination of Allan Lind at Appendix E to the First Supplement to the Seventh Report of the Monitor, filed September 15, 2025 at 62:12-21 [**Lind Transcript**] (**Tab 5**).
[9] Texas LLCs June 19, 2026 Brief at paras 67, 82, 101, 109, 117, and 123.
[10] Texas LLCs September 9, 2026 Supplemental Brief after para 10.
[11] Supplemental Brief of the Canadian Respondents, filed September 9, 2026 at para 5 [**Canadian Respondents September 9, 2026 Supplemental Brief**].

B. <u>To have standing, Mr. Lind must be directly affected by the Charge Extension Application</u>

17 If Mr. Lind is opposing the Charge Extension Application himself, he must have standing to do so, which requires a "personal and direct interest in the issue being litigated."[12]

18 Indirect rights are not sufficient. Nor is it enough for Mr. Lind to have a "sense of grievance" or a yen to advance a point of principle.[13]

19 The test for standing is acknowledged in the Texas LLCs June 19, 2026 Brief, wherein they argue: "Impartiality, fair and equitable treatment, and the public interest require that persons **directly affected by the requested relief** have an opportunity to respond."[14]

20 However, Mr. Lind is not "directly affected" by the relief sought in the Charge Extension Application. Not as a director. Not otherwise.

C. <u>Mr. Lind is not affected by the Charge Extension Application</u>

21 The Texas LLCs and the Canadian Respondents cannot be shadow directed by Mr. Lind, Mr. Foo or others in opposition to the Monitor. They have "have no further power or authority" as directors or officers, *per* the ARIO.[15]

22 The ARIO is now final, given the dismissal of the appeals that resulted from it.

23 The Texas LLCs argue in their June 19, 2026 Brief that the Charge Extension Application "directly engages the rights of affected persons" and it identifies such directly affected persons as the holders of interests in the WFC Lands and Proceeds.[16]

24 Implicit in that argument by the Texas LLCs is an acknowledgment that Mr. Lind is not directly engaged by the Charge Extension Application. Interests in "the WFC Lands and Proceeds" are held by the Offshore Investors, who expressed overwhelming support for the Charge Extension Application to facilitate these CCAA proceedings.

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[12] *Carroll v Toronto-Dominion Bank*, 2021 ONCA 38 at para 33 [***Carroll***] (**<u>Tab 6</u>**); *Gencore Properties Gp Inc v Kowbel*, 2025 SKKB 171 at paras 14, 20-24 (**<u>Tab 7</u>**).
[13] *Carroll* at para 33 (**<u>Tab 6</u>**).
[14] Texas LLCs June 19, 2026 Brief at para 103 (emphasis added).
[15] ARIO at para 35 (**<u>Tab 2</u>**).
[16] Texas LLCs June 19, 2026 Brief at paras 105-106.

25 Mr. Lind is not directly affected by the Charge Extension Application, even though previous orders in these CCAA proceedings took away his power and authority as a director. The Texas LLCs argue in their June 19, 2026 Brief: "Indeed, the Orders of this Honourable Court grant specific relief against current and former directors of the Debtor Companies; clearly, they have standing."[17] The Texas LLCs similarly argue in their September 9, 2026 Supplemental Brief: "This Court has… granted specific relief against the director of the Texas LLCs."[18] However, the orders that took away Mr. Lind's power as a director were granted earlier in these CCAA proceedings, and are now final and not subject to revisitation now. The Charge Extension Application is not seeking any relief against Mr. Lind. Any standing that Mr. Lind may have had to dispute the Initial Order and the ARIO does not automatically carry through to the Charge Extension Application.

26 While the Monitor and the Investors are critical of conduct by Mr. Lind, Mr. Foo, and others,[19] their criticisms were adjudicated and found valid when the Initial Order and ARIO were granted. Mr. Lind does not gain standing in all future applications in these CCAA proceedings, nor in the Charge Extension Application, just because the Monitor and the Investors continue to cite this Court's past findings about pre-CCAA mismanagement.

27 The Texas LLCs argue that Mr. Lind should be given standing because he is uniquely knowledgeable about "the history of the WFC Projects".[20] However, the Texas LLCs' substantive arguments, as summarized at paragraph 8 of their Supplemental Brief — *res judicata*, no new evidence, the limits of ss. 11.2 and 11.52 of the CCAA, and the scope of property under the Monitor's control by operation of the ARIO[21] — do not draw upon any specialized knowledge from Mr. Lind. That assertion of special knowledge by Mr. Lind is also difficult to square with his testimony about having retired from the A2A group more than six years ago[22] and the degree to which his past evidence was hearsay passed to him by Mr. Foo.[23]

28 Mr. Lind is not directly affected by the Charge Extension Application so he does not have standing to respond to it.

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[17] Texas LLCs June 19, 2026 Brief at para 99.
[18] Texas LLCs September 9, 2026 Supplemental Brief at para 5(a).
[19] Texas LLCs June 19, 2026 Brief at para 100; Texas LLCs September 9, 2026 Supplemental Brief at para 5(b).
[20] Texas LLCs September 9, 2026 Supplemental Brief at para 7.
[21] Texas LLCs September 9, 2026 Supplemental Brief at para 8.
[22] Lind Transcript at 62:12-21.
[23] Lind Transcript at 9:20-22, 10:22-11:4, 24:12-25, 25:4-7, 27:11-13, 30:17-31:8, 36:8-12, 36:20-25, 44:5-7, 54:8-10, 55:6-10, 59:11-14, 61:19-62:21, 62:25-63:10.

IV. Conclusion

29 The ARIO should be given effect by recognizing that only the Monitor has control over the Texas LLCs and the Canadian Respondents. Those entities have no standing in the Charge Extension Application except through the Monitor. Mr. Lind has no standing at all. Their submissions in response to the Charge Extension Application should be disregarded or discounted accordingly.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of August 2026.

NORTON ROSE FULBRIGHT CANADA LLP

Per: ______________________________

D. Aaron Stephenson, Representative
Counsel for the Offshore Investors

TABLE OF AUTHORITIES

Tab	Authority
1	*A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156
2	Amended and Restated Initial Order, filed December 3, 2024, as subsequently amended
3	*Beaver Rock Roastery Inc. v Saso*, 2017 ONSC 740
4	*Oasis Filter International Ltd v Manz*, 2025 ABKB 565
5	Transcript of the September 4, 2025 Cross-Examination of Allan Lind at Appendix E to the First Supplement to the Seventh Report of the Monitor, filed September 15, 2025 (excerpts)
6	*Carroll v Toronto-Dominion Bank*, 2021 ONCA 38
7	*Gencore Properties Gp Inc v Kowbel*, 2025 SKKB 171

TAB 1

In the Court of Appeal of Alberta

Citation: Angus A2A GP Inc v Alvarez & Marsal Canada Inc, 2026 ABCA 156

Date: 20260511
Docket: 2401-0350AC;
2401-0352AC;
2501-0050AC;
2501-0053AC
Registry: Calgary

Docket: 2401-0350AC

Between:

**Angus A2A GP Inc., Angus Manor Park A2A GP Inc.,
Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc.,
Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A,
A2A Developments Inc., Serene Country Homes (Canada) Inc. and
A2A Capital Services Canada Inc.**

Appellants

\- and -

**Alvarez & Marsal Canada Inc.
in its capacity as Court-Appointed Monitor of the Appellants**

Respondent

Docket: 2401-0352AC

And Between:

**Fossil Creek A2A Developments, LLC and
Windridge A2A Developments, LLC**

Appellants

\- and -

Alvarez & Marsal Canada Inc.

Respondent
Docket: 2501-0050AC

And Between:

Fossil Creek A2A Developments, LLC and
Windridge A2A Developments, LLC

Appellants

- and -

Alvarez & Marsal Canada Inc., Michael Edwards, Paul Lauzon,
Isabelle Brousseau, Pat Wedlund, and Brian Richards, the Canadian Investors and the Offshore Investors each as defined in the Initial Order granted November 14, 2024

Respondents

Docket: 2501-0053AC

And Between:

Fossil Creek A2A GP Inc., Hills of Windridge A2A GP Inc.,
Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP,
Fossil Creek A2A Trust and Hills of Windridge A2A Trust

Appellants

- and -

Alvarez & Marsal Canada Inc., Michael Edwards, Paul Lauzon,
Isabelle Brousseau, Pat Wedlund, and Brian Richards, the Canadian Investors and the Offshore Investors each as defined in the Initial Order granted November 14, 2024

Respondents

The Court:

The Honourable Chief Justice Ritu Khullar*
The Honourable Justice William T. de Wit
The Honourable Justice Karan M. Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.D. Simard
Dated the 25th day of November, 2024
Filed on the 3rd day of December, 2024
(Docket: 2401-15969)

Appeal from the Order by
The Honourable Justice C.C.J. Feasby
Dated the 29th day of January, 2025
Filed on the 10th day of February, 2025
(2025 ABKB 51; Docket: 2401-15969)

*Chief Justice Khullar did not participate in the final disposition of the judgment.

Memorandum of Judgment

The Court:

I. OVERVIEW

[1] These are four related appeals from decisions that continued and confirmed proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*). They stem from two real estate development projects in Texas. The appellants fall into two groups. One group consists of two Texas corporations that acquired and developed the project lands and were involved in raising investment for their development (the Texas LLCs[1]). The other group consists of Canadian entities that formed part of a complex structure set up to secure investment from Canadian investors (the Canadian WFC Entities[2]).

[2] There are two groups of respondents. One group consists of the Canadian and offshore investors in the real estate projects. The other respondent is the court-appointed monitor, Alvarez & Marsal Canada Inc (the Monitor).

[3] In November 2024, five Canadian investors obtained an Initial Order under the *CCAA* on what was effectively a without notice basis. That order applied to the appellants and other entities that are not parties to these appeals.

[4] The *CCAA* proceedings commenced by the Initial Order are unusual. They were started by "equity investors" rather than by a debtor company or a creditor. One purpose of the Initial Order was to stop an imminent land sale and enable the gathering of information. The Initial Order gave the Monitor wide powers of management of the relevant entities including the appellants. The anticipated outcome of the *CCAA* proceedings is the liquidation of the entities' assets and the distribution of the proceeds to investors and creditors though a claims process, not the survival of the business in a restructured form.

[5] The Initial Order was subject to a "comeback hearing" on notice to determine whether it should have been granted. That hearing took place in two stages before two different judges.

[6] At the first stage, in November 2024, the chambers judge resolved some issues but did not finally determine whether the Initial Order should have been granted. That decision is referred to as the *ARIO Decision* and is one of the decisions under appeal. The second stage of the comeback

[1] Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC.

[2] Hills of Windridge A2A GP Inc, Fossil Creek A2A GP Inc, Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust and the Hills of Windridge A2A Trust.

hearing took place before a different chambers judge in January 2025. He confirmed the Initial Order, dismissed the application to set it aside, and continued the *CCAA* proceedings against the appellants and other entities who have not appealed: ***Angus A2A GP Inc (Re)***, 2025 ABKB 51 (*Comeback Decision*).

[7] Leave to appeal both decisions was granted: ***Angus A2A GP Inc v Alvarez & Marsal Canada Inc***, 2025 ABCA 147.

[8] These appeals raise several issues. Two overarching questions are whether the Initial Order was consistent with the purposes of the *CCAA* and whether there was a sufficient prospect of the proceedings succeeding to justify the Initial Order. Additional issues are (i) whether "equity investors" may ever commence *CCAA* proceedings; (ii) the court's authority to make orders against companies incorporated outside of Canada with no business or assets in Canada; (iii) the court's authority to make orders against entities that are not individually insolvent; and (iv) alleged procedural flaws in the decisions confirming the Initial Order.

[9] We dismiss the appeals and confirm the Initial Order. Our reasons follow.

II. FACTS

A. Real Estate Projects and the Investment Structure

[10] The *CCAA* proceedings commenced by the Initial Order apply to both the Texas LLCs and the Canadian WFC Entities. They are part of a convoluted structure created to develop real estate projects in Texas and obtain investment for that purpose. Understanding their place in the structure is important for two reasons. One is to clarify the relationship of the appellants to other entities. The decisions under appeal justified including the Texas LLCs in the *CCAA* proceedings in part because they were "inextricably intertwined" with Canadian entities involved in the real estate projects. Another is to clarify which entities are *not* subject to the *CCAA* proceedings, which bears on whether the proceedings can be justified.

[11] The Canadian WFC Entities and the Texas LLCs are direct or indirect subsidiaries of Serene Country Homes Holdings PTE Ltd, a Singaporean company controlled by Dirk Foo: *Comeback Decision* at para 21. Below Serene Country Homes Holdings PTE Ltd are three corporate structures created to acquire, develop, and secure investment for, three real estate projects: Angus Manor Park (Angus Manor) in Ontario, Hills of Windridge (Windridge), and Trails of Fossil Creek (Fossil Creek), both in Texas. The entities related to the Angus Manor project are not parties to these appeals.

[12] In what follows, we describe the corporate structures created for the Fossil Creek and Windridge projects. Diagrams representing those structures and what is known about sales of the developed land are set out in Appendix A to these reasons. The reader may find it useful to refer to those diagrams while reading the text.

Fossil Creek

[13] Fossil Creek is a 93-acre residential project in Fort Worth, Texas. Fossil Creek A2A Developments, LLC (Fossil Creek LLC), a Texas entity, purchased the project lands in 2013. It was the acquisition and development vehicle. Approximately $21 million was raised from investors to develop the project lands.

[14] In 2014, offshore investors purchased undivided fractional interests (UFIs) in the Fossil Creek lands and became co-owners of the lands. In December 2014, the offshore investors transferred their UFIs to the Fossil Creek Trust, a Texas trust. Mr. Foo is the trustee.

[15] Canadian investors invested in the Fossil Creek project indirectly through the exempt securities market. They purchased units in the Fossil Creek A2A Trust (an Alberta trust), which in turn used the proceeds to purchase units in Fossil Creek A2A Limited Partnership (an Alberta limited partnership). That entity, in turn, used the proceeds to purchase UFIs in the project lands from Fossil Creek A2A Developments, LLC (Fossil Creek LLC). In 2015, Fossil Creek A2A Limited Partnership transferred its UFIs to the Fossil Creek Trust.

[16] Parts of the Fossil Creek lands were developed and sold between 2014 and 2024. In the fall of 2024, before the *CCAA* proceedings began, the remaining Fossil Creek lands, except for one lot, were sold to a third party. To facilitate the sale, those lands were transferred to a new Texas entity: Trails of Fossil Creek Properties LP. Fossil Creek LLC was its general partner. It appears that the proceeds of the sale are held in a bank account in Texas by Trails of Fossil Creek Properties LP.

[17] The following are important points to note:

- Fossil Creek A2A Limited Partnership, the Fossil Creek A2A Trust, and Fossil Creek A2A GP Inc are Alberta entities. They are subject to the *CCAA* proceedings and are part of the Canadian WFC Entities group of appellants.
- Fossil Creek LLC is a Texas company. It is subject to the *CCAA* proceedings and is one of the Texas LLCs.
- The Fossil Creek Trust is not subject to the *CCAA* proceedings; nor is the trustee, Mr. Foo. That is an aspect of the *ARIO Decision* that is not under appeal.
- Trails of Fossil Creek Properties LP, which is believed to hold the proceeds of the 2024 sale of the Fossil Creek lands, is not subject to the *CCAA* proceedings.

Windridge

[18] Windridge is a 415-acre project in the Dallas/Fort Worth area of Texas. The corporate structure created for the development of and investment in the Windridge lands is similar to that for the Fossil Creek project.

[19] Hills of Windridge A2A Developments, LLC (Windridge LLC), a Texas entity, purchased the project lands. It was the acquisition and development vehicle. Approximately $44 million was raised from investments for development of the project lands.

[20] In 2013, offshore investors purchased UFIs in the Windridge lands, making them co-owners of the lands. In April 2014, the offshore investors voted to transfer their UFIs to Hills of Windridge Trust, a Texas trust. Mr. Foo is also the trustee of that trust.

[21] Canadian investors invested in the Windridge project indirectly in the exempt securities market. They purchased units in the Hills of Windridge A2A Trust (an Ontario trust), which, in turn, used the proceeds to purchase units of Hills of Windridge A2A LP (an Ontario LP). That entity, in turn, used the funds to purchase UFIs in the project lands from Windridge LLC in 2014. Hills of Windridge A2A LP later transferred its UFIs to the Hills of Windridge Trust. Portions of the Windridge lands were developed and sold between 2014 and 2024.

[22] In 2024, before the *CCAA* proceedings started, a small part of the Windridge lands was sold for an unknown price in response to an expropriation notice. To facilitate the sale, that parcel was transferred to a new entity, Hills of Windridge LP. Windridge LLC was its general partner. It appears that the proceeds of the sale are held in a bank account in Texas by Hills of Windridge LP.

[23] It is not clear who owns the remaining Windridge lands. The Texas LLCs say the lands are owned by the Hills of Windridge Trust. The investors say that the lands are owned by Hills of Windridge LP. The Monitor is unsure and points out that the Texas LLCs have not complied with a court order to provide information about ownership.

[24] The following are important points to note:

- Hills of Windridge A2A LP, the Hills of Windridge A2A Trust, and Hills of Windridge A2A GP Inc are Ontario entities. They are subject to the *CCAA* proceedings and part of the Canadian WFC Entities group of appellants.
- Windridge LLC is a Texas corporation. It is subject to the *CCAA* proceedings and is one of the Texas LLCs.
- The Hills of Windridge Trust, a Texas trust, is not subject to the *CCAA* proceedings; nor is the trustee, Mr. Foo. That is an aspect of the *ARIO Decision* that is not under appeal. It may hold the remaining Windridge lands.
- Hills of Windridge LP, a Texas entity, is not subject to the *CCAA* proceedings either. It holds the sale proceeds of the expropriation sale and may hold the remaining Windridge lands.

[25] The net effect is that the proceeds of the expropriation sale, and the remaining Windridge lands were outside the reach of the *CCAA* proceedings when these appeals were heard.

B. Investors' Rights

[26] As noted, Canadian investors in the Fossil Creek and the Windridge projects own units in trusts: the Fossil Creek A2A Trust and the Hills of Windridge A2A Trust. Those trusts, in turn, own units in partnerships which previously owned UFIs in the project lands but now do not.

[27] The rights of Canadian investors in trust units are set out in the relevant declarations of trust.

[28] The Fossil Creek A2A Declaration of Trust provides for distributions to beneficiaries in certain circumstances, but they are not guaranteed. Unit holders have a right to redeem their units on giving notice at a price set out in the declaration of trust. They also have a right to have their units redeemed on a proportionate basis on a winding-up, after the trust's other liabilities are satisfied. The administrator of the trust is required to call a meeting of the trust unitholders within 18 months of the declaration of trust becoming effective and at least every 15 months thereafter. Prior to each meeting, the administrator is required to provide unit holders with annual financial statements.

[29] The Hills of Windridge A2A Declaration of Trust also provides for distributions to beneficiaries in certain circumstances, but those distributions are not guaranteed. Under the Declaration, beneficiaries have the right to have their units redeemed upon giving notice and on a winding up, after the payment of the trust's other liabilities. Investors holding at least 25% of the units may call a meeting of investors. The trustees are required to provide investors with annual financial statements as required by applicable law and to prepare and maintain accounting records.

[30] Offshore investors in both the Fossil Creek and the Windridge projects owned UFIs in the project lands. The UFIs are governed by the Fossil Creek Deed of Covenant and the Windridge Deed of Covenant.

[31] Under the Fossil Creek Deed of Covenant, UFI holders do not have rights to participate in the development of the Fossil Creek lands. The Deed provides for the distribution of the net income from sale, lease, or other dealings with the property, but the distributions are not guaranteed. UFI holders have the right to vote on the sale of all or any part of the Fossil Creek lands. The facilitator[3] is required to maintain accurate books and records and make them available for inspection.

[32] The position of UFI holders under the Windridge Deed of Covenant is substantially similar.

[33] Importantly, Canadians and offshore investors hold securities, but they are not debt securities. The security issuers do not owe the investors money. The parties and the courts below

[3] Fossil Creek LLC.

described them as "equity investors". That is significant because one issue on appeal is whether the "equity investors" in this case, or in general, should be able to initiate *CCAA* proceedings.

[34] Furthermore, the trustees, facilitators, and administrators have not complied with their duties to prepare annual financial statements and maintain accounts, and the offshore investors were never informed of the 2024 sale of the remaining Fossil Creek lands or the expropriation sale of part of the Windridge lands: *Comeback Decision* at paras 37–40.

C. Procedural History

Initial Order

[35] On November 8, 2024, five individual Canadian investors in the Fossil Creek, Windridge, and Angus Manor projects filed an originating application for an initial order under the *CCAA*. They represented a very small proportion of the investors, dollarwise and numerically.

[36] The application for the Initial Order was effectively *ex parte* because the respondents were given fewer than two days' notice.

[37] The application was made on an urgent basis because the Canadian investors had found out from a Facebook post that a sale of Angus Manor land in Ontario was imminent. They had not received notice of the sale. They were concerned by a lack of communication for several years, the fact that some companies involved in the investment structure had been struck from the corporate registry, and the lack of any financial returns.

[38] The Initial Order was granted by Feasby J on November 14, 2024. It identified various entities as Debtor Companies, which include the Texas LLCs and some of the Canadian WFC Entities. It also identified various entities as Affiliate Entities integrally related to the Debtor Companies' businesses, including the other Canadian WFC Entities.[4]

[39] The Initial Order appointed the Monitor and gave it enhanced powers of management and control of the Debtor Companies and the Affiliate Entities, removing those powers from directors and officers. It granted a stay of proceedings against those entities and appointed separate representative counsel for all Canadian investors and all offshore investors. The Initial Order also scheduled a comeback hearing for November 21, 2024. That was a hearing *de novo* in which the Canadian applicants bore the burden of establishing that the Initial Order should be granted and that *CCAA* proceedings were appropriate.

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[4] The Debtor Companies include the Texas LLCs and some Canadian WFC Entities: Hills of Windridge A2A GP Inc and Fossil Creek A2A GP Inc. The Affiliated Entities include the rest of the WFC Entities (i.e., Hills of Windridge A2A LP, Hills of Windridge A2A Trust, Fossil Creek A2A Limited Partnership and Fossil Creek A2A Trust).

Amended and Restated Initial Order

[40] The comeback hearing began on November 21, 2024, with Simard J presiding. The appellants and other entities subject to the Initial Order cross-applied to have it set aside. The Monitor also applied to add the Hills of Windridge Trust and the Fossil Creek Trust to the *CCAA* proceedings.

[41] Justice Simard did not determine whether the *CCAA* proceedings were appropriate or whether the Initial Order should be set aside because he lacked sufficient information to do so. However, he decided some issues relevant to those topics and adjourned the remaining ones and the set aside application. He amended the Initial Order in various ways resulting in an Amended and Restated Initial Order (the *ARIO Decision*). He extended the stay of proceedings to enable the entities bound by it to provide specific categories of information and to enable the Monitor to provide a comprehensive report. The chambers judge also dismissed the Monitor's application to add the trusts to the *CCAA* proceedings because he lacked jurisdiction to do so.

Continuation of the Comeback Hearing

[42] The balance of the comeback hearing took place on January 17, 2025, this time before Feasby J. He concluded the Initial Order was correct and the *CCAA* proceedings were appropriate and dismissed the application to set aside the Initial Order: *Comeback Decision* at para 87.

III. DECISIONS APPEALED

A. The ARIO Decision

[43] The *ARIO Decision* resolved some of the issues relevant to whether the Initial Order should have been granted.

[44] The first issue was jurisdiction and service. The originating application for the Initial Order was made on imperfect notice to the appellants. Further, the applicant Canadian investors had "served" the originating application on the Texas LLCs in Texas without first obtaining an order permitting service outside Canada, as required by R 11.25(2)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010. By the date of the first stage of the comeback hearing, the Texas LLCs had received notice of the Initial Order (including the comeback hearing) and no issue was raised about the service of that order. The chambers judge found that, despite improper service of the originating application, the Court had jurisdiction over the Texas LLCs.

[45] The second issue was whether the Canadian investors had standing to commence *CCAA* proceedings. The chambers judge found the Canadian investors had standing to apply for an initial order under the *CCAA* because they were "persons interested" under s 11.

[46] The third issue was the threshold condition of insolvency. Under s 3(1), the *CCAA* applies "in respect of a debtor company or affiliated debtor companies" if claims against them exceed $5 million. The definition of "debtor company" specifies that the company must be insolvent. The chambers judge found that, considered collectively, the entities bound by the Initial Order were insolvent. It was appropriate to consider insolvency collectively because their businesses were "inextricably intertwined" with respect to the three real estate projects.

B. The Comeback Decision

[47] The *Comeback Decision* confirmed the Initial Order and dismissed the application to set it aside. It addressed two main issues: (1) whether the *CCAA* proceedings were appropriate; and (2) whether the Texas LLCs could be subject to them. Before addressing those issues, however, the chambers judge made some factual findings.

[48] First, he found the entities bound by the Initial Order were unable or unwilling "to conduct a realization and distribution process that is fair to all investors": *Comeback Decision* at para 43. That was based on the failure of trustees, facilitators, and administrators under the Declarations of Trust and Deeds of Covenant to comply with their duties and evidence that investors had been paid selectively and disproportionately.

[49] Second, the chambers judge found the investors had not bargained "only" for the rights set out in the Declarations of Trust and Deeds of Covenant, such that it would be unfair for them to access statutory rights through the C*CAA* proceedings: *Comeback Decision* at paras 46–47. The real issue was whether the investors satisfied the requirements under the *CCAA*, not whether their contractual arrangement barred access to *CCAA* proceedings.

[50] The chambers judge divided the appropriateness of the *CCAA* proceedings into the following sub-issues.

1. Whether the insolvency condition of the *CCAA* was satisfied.
2. Whether "equity investors" could commence *CCAA* proceedings and whether the proceedings in this case would further the objectives of the *CCAA*.
3. Whether the applicant Canadian investors represented the interests of all investors.

[51] With respect to the insolvency condition, the chambers judge noted new evidence which confirmed the *ARIO Decision* on this point: *Comeback Decision* at para 48–54.

[52] The chambers judge rejected the argument that the "equity investors" could not commence *CCAA* proceedings because they were not "creditors" in the traditional sense: *Comeback Decision* at paras 58–59. The real question was whether the applicants' use of *CCAA* proceedings in this case is consistent with the purposes of the legislation. Two relevant purposes are preserving and maximizing the value of the debtor companies' assets and ensuring the fair and equitable treatment

of investors' claims. As noted, the chambers judge found that the entities subject to the Initial Order had shown that they would do neither. The Monitor could achieve both purposes, the second by administering a fair claims process aided by the stay of proceedings.

[53] An impediment to achieving those purposes with respect to Fossil Creek and Windridge was that the Texas entities that own the remaining lands and the proceeds of sale were not subject to the *CCAA* proceedings. If the Monitor could not gain control over those assets, there would be no prospect of preserving their value or fairly meeting the claims of investors. The chambers judge concluded that was not a fatal problem. It was reasonable that the Monitor had not yet put forward a detailed plan to gain control of the remaining assets, but the chambers judge ordered the Monitor to provide a plan within 21 days.

[54] The chambers judge also considered whether the *CCAA* proceedings were appropriate given that a majority of Canadian and offshore investors were not aware of them. The concern was that the expense would be partly borne by those investors. The chambers judge found that if it had been possible to inform all investors, a strong majority would support the *CCAA* process. As such, the proceedings were fair to the investors as a whole.

[55] Having concluded that the *CCAA* proceedings were appropriate, the chambers judge found that the Texas LLCs were properly subject to them. The Texas LLCs were incorporated outside Canada, did not have any assets in Canada, and were not doing business in Canada. Nevertheless, they came within the definition of "company" in s 2(1) of the *CCAA*, interpreted flexibly. Making the Texas LLCs subject to the *CCAA* proceedings would serve the purposes of the proceedings. partly because the Monitor might use them to get control over the remaining lands and sale proceeds.

IV. ISSUES ON APPEAL

[56] The general issues in these appeals are as follows.

1. Whether the applicants, as "equity investors", had standing to commence proceedings under the *CCAA*.
2. Whether the *CCAA* proceedings were improper because:
    a. they were inconsistent with the purposes of the *CCAA*;
    b. they were bound to fail or there was no plan to achieve their purposes; or
    c. they were not fair to other investors or the issuers of investment instruments.
3. Whether the decisions under appeal were procedurally unfair or misplaced the burden of proof.

[57] Issues specific to the Texas LLCs or the Canadian WFC Entities are as follows.

1. Were the Texas LLCs "debtor companies"? If not, did the court have statutory authority under the *CCAA* or inherent jurisdiction to subject the Texas LLCs to the Initial Order?
2. Did the chambers judge err in confirming the *CCAA* proceedings against the Texas LLCs despite the lack of an order permitting service on them in Texas?
3. Were the Canadian WFC Entities individually insolvent? If not, did the court have authority to subject them to the Initial Order?

[58] The issues engage several standards of review, which are addressed below.

V. ANALYSIS — General Issues

1. Whether the applicants, as "equity investors", could commence *CCAA* proceedings

[59] The Canadian investors who applied for the Initial Order, like the other respondent investors, are not owed a debt by the appellants or other entities involved in the Windridge and Fossil Creek projects. They are not creditors of the appellants. The *Comeback Decision* characterized them as equity investors and the issue is whether equity investors can ever commence *CCAA* proceedings.[5] The appellants argue that the answer is "no". We disagree.

[60] There is no known Canadian precedent for a court granting an initial order upon application by an equity investor. This is not surprising. *CCAA* proceedings are usually commenced by the insolvent debtor company. When the debtor company does not initiate proceedings, a secured creditor typically applies.

[61] The question is one of statutory interpretation, which requires the Court to conduct a textual, contextual, and purposive analysis of the relevant *CCAA* provisions to identify a meaning that is harmonious with the *Act* as a whole: ***Canada v Alta Energy Luxembourg SARL***, 2021 SCC 49 at para 29.

[62] We begin with the text. Nothing in the *CCAA* addresses specifically whether an equity investor can commence *CCAA* proceedings. Section 11.02 deals with the power of the court to order a stay of proceedings on an initial application, but it does not say who may bring an initial application. Section 11 confers broad power on the court to make orders it considers appropriate in the circumstances "on the application of any person interested in the matter". This makes plain

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[5] The parties on appeal treat "equity investors" as synonymous with having "equity interests" or "equity claims". However, strictly speaking, the investors do not have "equity interests" (defined as shares in a company or units in a unit trust) and do not have "equity claims" (defined as a claim in respect of an "equity interest" for a dividend, return of capital, and certain other claims). The parties' characterization of the investors as having "equity interests" and "equity claims" seems to be based on analogizing the investors' rights to the (typical) rights of a shareholder in a company. To avoid inaccuracy, we adopt the phrasing used in the *Comeback Decision*.

that an interested person may apply for an order, including an initial order. The question is whether equity investors are "interested persons" or "person[s] interested"[6] under the *CCAA*.

[63] Despite the frequent use of the term within it, the *CCAA* does not define who qualifies as an "interested person". Its interpretation depends partially on the surrounding statutory context. As the parties have argued, that context includes provisions which limit the rights of "equity claimants" in *CCAA* proceedings as compared with creditors:[7]

- Sections 4 and 5 provide that shareholders cannot meet and vote on a compromise or arrangement unless an application is made by a creditor, trustee in bankruptcy, or liquidator, and the court orders a meeting of shareholders.
- Section 6(1) provides that the votes of those with "equity claims" do not count in computing the voting requirement for approving a plan unless the court has ordered a meeting under ss 4 or 5.
- Section 22.1 provides that "equity claimants" must be placed in their own separate class and cannot vote on the plan unless the court orders otherwise.
- Section 6(8) prohibits the court from sanctioning a plan that pays out "equity claimants" before other claims are fully paid.

[64] What inferences should be drawn from this context? The appellants invite the inference that Parliament did not intend for equity investors to commence *CCAA* proceedings, given they have no unconditional right to participate once proceedings have started. We find a different inference more compelling: when Parliament intended to limit the rights of equity investors in *CCAA* proceedings compared with traditional creditors, it did so expressly. However, it chose broad language — "any person interested" — to identify those who may apply for an order in *CCAA* proceedings, which does not reflect an intention to exclude equity investors.

[65] The legislative background to ss 6(8) and 22.1 also gives reason to doubt that Parliament intended to exclude equity investors from the class of "interested persons". These provisions were introduced in 2009 to clarify that "equity claimants" rank beneath non-equity claimants in the order of priority and cannot recover money in *CCAA* proceedings before creditors have been paid in full. Consistent with the priority rule, equity investors can receive payment in circumstances when an insolvent debtor company has more than enough assets to satisfy non-equity claims. Further, the restrictions on the rights of equity investors to meet and vote on a compromise or plan in ss 4, 5, 6(1), and 22.1 enable the supervising court to dispense with meetings that would serve no useful

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[6] The *CCAA* does not delineate between terms "interested person" and "person interested". For simplicity, and except as otherwise noted, we use the term "interested person" to mean both in these reasons.

[7] The parties' arguments assumed that these provisions apply by analogy to equity investors who are not strictly "equity claimants".

purpose. That can be the case when the debtor company has insufficient assets to pay out non-equity claims, so equity investors stand to gain nothing from approval of a plan. The key point is that neither the priority rule, nor the restrictions on meetings and voting requires preventing equity investors from starting *CCAA* proceedings in all circumstances.

[66] Purposive considerations also support the view that an equity investor can be an "interested person" in appropriate circumstances, some of which we outline below.

[67] The *CCAA* has various broad remedial objectives that were articulated in ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 at para 40: (1) resolving a debtor's insolvency efficiently and impartially; (2) preserving and maximizing the value of the debtor's assets; (3) treating claims against a debtor fairly and equitably; (4) protecting the public interest; and (5) balancing the costs and benefits of restructuring or liquidation. The phrases "any person interested" and "interested person" should be interpreted in a manner consistent with those objectives.

[68] Allowing a person with no financial interest in *CCAA* proceedings to commence them will rarely be an effective way to further the relevant objectives. To further the *CCAA*'s remedial objectives, the term "interested person" should, at a minimum, be read as referring to someone with a financial interest in the *outcome* of the proceedings. For an equity investor to be an "interested person", they must at least have the potential to share in the payment of funds from a successful compromise or arrangement. Whether that is so will depend on the financial situation of the debtor company.

[69] The *CCAA* only applies when a debtor company is insolvent. There are various tests for insolvency under s 2(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, broadly divisible into "balance sheet" insolvency (where the value of total liabilities exceeds the debtor company's assets) and "cash flow" insolvency (where the debtor company is unable to meet its obligations as they fall due, but its total assets may exceed the value of non-equity claims): Roderick J Wood, *Bankruptcy and Insolvency Law*, 3rd ed (Toronto: Irwin Law, 2025) at 19–22.

[70] When a debtor company is "cash flow" insolvent at the time of the initial application — which the *Comeback Decision* called a "liquidity crisis" — equity investors may have a financial interest in the outcome of the *CCAA* proceedings because they could potentially receive payment under a compromise or arrangement, despite ranking below creditors in priority under s 6(8). As noted in the *Comeback Decision* at para 59, in a liquidity crisis, equity investors may have a significant financial interest in the debtor company. On the other hand, where the debtor company is "balance sheet" insolvent at the time of the initial application, it does not have sufficient assets to satisfy creditors' claims, and equity investors usually have no financial interest in the outcome of proceedings given their priority ranking: ***Re Canadian Airlines Corporation***, 2000 ABQB 442 at para 143.

[71] This interpretation aligns with the operation of the *CCAA* at later stages after the grant of an initial order. For example, when the court is deciding whether to approve a plan already voted

on, it must consider whether the plan is reasonable to shareholders if, at that time, the assets of the debtor company have a value greater than the claims of creditors: ***Re Stelco Inc***, [2006] OJ No 276 at para 16, 2006 CarswellOnt 406 (SC). It would be anomalous that the court must consider fairness to equity investors in *CCAA* proceedings started by a debtor company or creditor but need not consider them at all if those parties are unwilling to commence proceedings and equity investors are unable to do so: see *Comeback Decision* at para 59.

[72] It is impractical to expect an equity investor to prove a debtor company is cash flow insolvent and its assets exceed the value of the creditors' claims at the initial application stage. Applicants rarely have an exhaustive list of all the debtor company's assets and liabilities at that stage. The most that can be expected is for an equity investor to show there is a reasonable possibility that the value of the assets exceeds the value of non-equity claims.

[73] In this case, there is little information about whether the appellants were cash flow insolvent, balance sheet insolvent, or both. The Monitor's reports make clear that there are no known secured creditors, and the Monitor advised the Court during the appeal hearing that creditor claims are insubstantial. The investors describe themselves as "fulcrum" stakeholders, by which they mean that there is value in the appellant entities available to them. That is consistent with representations made by counsel at the November 14, 2024 hearing, which the appellants have not disputed. In the circumstances, we agree with the finding in the *ARIO Decision* that the applicant Canadian investors, and the investors at large, were "interested persons" who could apply for the Initial Order.

[74] In summary, equity investors can commence *CCAA* proceedings if they are "persons interested" under s 11 of the *CCAA*. That can be the case when there is a reasonable possibility at the time of the initial order that the debtor company is "cash flow" insolvent and has greater total assets than liabilities. We hasten to add that an application by an "interested person" is only a necessary condition for granting an initial order, and there are innumerable reasons why an initial order sought by an equity investor might not be appropriate in the circumstances. In this case, one important consideration was that no creditors objected to the investors' initial application.

2. Whether the *CCAA* proceedings were improper because: (a) they were inconsistent with the purposes of the *CCAA*; (b) they were bound to fail or there was no plan to achieve their purposes; or (c) they were not fair to other investors or the issuers

a. Consistency with the purposes of the *CCAA*

[75] As noted, s 11 of the *CCAA* grants broad authority to the court to make orders it considers appropriate in the circumstances. The appropriateness of an order depends on whether it would advance the underlying objectives of the *CCAA*: ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para 70.

[76] In this case, the *Comeback Decision* found that the Initial Order and the *CCAA* proceedings would further at least two objectives of the *CCAA*: preserving the value of the debtor's assets and fair treatment of investors' claims. The appellants acknowledge these were proper purposes, subject to a qualification addressed below.

[77] The *CCAA* is an insolvency statute because it applies "in respect of" insolvent debtor companies and, as such, it shares the general remedial objectives of Canada's insolvency statutes articulated in ***Callidus***: see paragraph 67 above. Historically, the distinctive objective of *CCAA* proceedings was to help an insolvent company remain in business by reaching a compromise with its creditors under judicial supervision, as opposed to liquidating its assets to satisfy creditor claims: ***Callidus*** at para 41. The preservation of the debtor company's business as a going concern typically involves a compromise of its debt and some kind of business restructuring.

[78] However, the survival of the debtor company's business is not an essential objective of the *CCAA*. The courts have recognized the legitimacy of "liquidating CCAAs" in which the debtor company's assets are sold, and the proceeds are distributed to creditors and stakeholders: ***Callidus*** at para 42. The debtor company's business might survive the liquidation process (e.g., if it is sold as a going concern), but it might not (e.g., if the assets are sold piecemeal).

[79] The *CCAA* proceedings in this case have evolved into a kind of liquidating *CCAA*.[8] The *Comeback Decision* identified its purposes as preserving the value of the remaining assets held by entities within the Fossil Creek and Windridge investment structure,[9] realizing those assets, and ensuring the fair treatment of investors' claims by distributing the assets through a claims process administered by the Monitor: *Comeback Decision* at paras 64, 68. Those objectives required the Monitor to take control of the entities involved in the Fossil Creek and Windridge projects, largely because existing management was unwilling or unable to preserve the value of the assets and to treat investors fairly. Returning money to the investors would involve the Monitor selling the remaining lands: *Comeback Decision* at para 70.

[80] The appellants argue that the original purposes of the Initial Order were *not* preserving assets and fairly returning value to investors but rather appointing the Monitor to investigate the entities subject to the Initial Order and to gather information. Both decisions under appeal noted that, initially, the Monitor's primary task was investigation: *Comeback Decision* at para 69; *ARIO Decision*, AR, 88/29. The appellants argue that the *CCAA* cannot be used for the sole purpose of investigating debtor companies although other legal mechanisms may be available for doing so, such as an investigative receivership.

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[8] At the hearing of the originating application, counsel for the applicant investors did not know whether the proceedings would be used to liquidate the entities' businesses or restructure them: AR, 117.

[9] Namely, the remaining proceeds of sale and the unsold lands.

[81] We agree that initial orders should not be granted for the sole purpose of gathering information about debtor companies: that is not among the remedial objectives of the *CCAA* identified in ***Callidus***. That is not what happened here, however. In this case, as in many others, conducting an investigation was a necessary step to achieving other legitimate objectives of *CCAA* proceedings. The purpose of authorizing the Monitor to investigate the debtor companies and affiliated entities was to determine whether they held assets that the Monitor might gain control of and distribute fairly among the investors and other stakeholders: *Comeback Decision* at para 1. Both were valid objectives under the *CCAA*.

b. Whether the *CCAA* proceedings were bound to fail or lacked a "germ of a plan"

[82] The appellants raise various issues regarding the likelihood that the *CCAA* proceedings will achieve their stated purposes — namely, preserving the value of the remaining Fossil Creek and Windridge assets and fairly distributing them to investors and other stakeholders through a fair claims process.

[83] One argument made at the comeback hearing is that the proceedings were "doomed to fail". The only Fossil Creek and Windridge assets known to remain are the unsold Windridge lands, the proceeds of the expropriation sale of part of the Windridge lands, the one remaining Fossil Creek lot, and the proceeds of the 2024 sale of the Fossil Creek lands. Those assets are held by Texas entities that are not subject to the *CCAA* proceedings: Trails of Fossil Creek Properties LP, the Hills of Windridge Trust, and Hills of Windridge LP.

[84] To achieve the objectives of asset preservation and fair distribution, the Monitor must gain control of the remaining land and proceeds in Texas. The appellants argue that it is impossible to do so because the Monitor has no powers of management or control over the Texas entities that hold those assets.

[85] This argument must fail given the applicable standard of review. In the *Comeback Decision*, the chambers judge found it was premature at the second stage of the comeback hearing to conclude the Monitor would fail to gain control of the Texas assets: *Comeback Decision* at para 67. The Monitor might be able to exercise its powers over the Texas LLCs under the Initial Order to take legal action in Texas against the Texas entities that hold the remaining assets. The Texas LLCs were involved in the 2024 sale of the Fossil Creek lands and the expropriation sale of part of the Windridge lands, and they may have legal claims to the remaining assets that the Monitor can bring on their behalf. These are factual findings and the appellants have neither argued, nor demonstrated, that they reflect palpable and overriding error. Indeed, developments since the comeback hearing have reinforced it. In March 2025, a different chambers judge approved the Monitor's plan to "repatriate" the Texas assets, which further indicates that the *CCAA* proceedings are not "doomed to fail". That decision is not under appeal.

[86] The appellants make a related but different argument about the prospect of success in this case. A line of case law originating in ***Re Inducon Development Corp***, [1992] OJ No 8 at para 14, 1991 CarswellOnt 219 (Ct J (GD)) establishes that an applicant for an initial order under the *CCAA* must have, at the very least, a "germ of a plan" for using the *CCAA* process to achieve the remedial purposes of the legislation.[10] In a typical *CCAA* proceeding, that means having a "germ of a plan" for compromising creditors' claims and perhaps restructuring the debtor companies. In this case, it means having a "germ of a plan" for preserving the value of the Texas assets and fairly distributing them to investors and stakeholders.

[87] The *Comeback Decision* concluded that the applicant investors and the Monitor did have a "germ of a plan" to achieve those objectives, namely selling the remaining land in Texas and returning the money to investors: *Comeback Decision* at para 70. The appellants argue this reflects error. They say that any "germ of a plan" to preserve and distribute the value of the Texas assets must include steps for acquiring control of those assets, which are currently outside the reach of the *CCAA* proceedings. Since the Monitor had not proposed a way of doing that, there was no "germ of a plan" at the comeback hearing. The appellants characterize this as an error of law about the meaning of the "germ of a plan" requirement. We disagree.

[88] The legal authorities do not specify the level of detail that is required for a "germ of a plan". ***Inducon*** at para 14 distinguishes between a germ of a plan, an outline of a plan, and a formalized plan. A "germ of a plan" is something less detailed than an outline of a plan. At the very least, it must identify the aims of the *CCAA* proceeding, although it will contain few details about how the proceedings will achieve them. Applicants must provide some sense of what they intend to do, so the court can assess whether there is a reasonable possibility of success: ***Azure Dynamics Corporation (Re)***, 2012 BCSC 781 at para 13.

[89] The phrase "germ of a plan" is another name for the requirement of a reasonable possibility that the *CCAA* proceedings will succeed in their purposes: ***Alberta Treasury Branches v Tallgrass Energy Corp***, 2013 ABQB 432 at para 14; ***Industrial Properties Regina Limited v Copper Sands Land Corp***, 2018 SKCA 36 at para 20. Without a reasonable possibility of success, the expense and disruption of *CCAA* proceedings are unjustifiable. What courts consider to be a reasonable possibility of success is context-dependent, and relevant context can include whether there are creditors opposed to the proceedings or whether the management of the debtor company is merely using the *CCAA* proceedings as a tactic to delay creditors: ***Tallgrass Energy*** at para 14; ***Montreal Maine & Atlantic Canada Co (Plan of arrangement) (Arrangement relatif à)***, 2015 QCCS 5896 at para 29.

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[10] Numerous cases have followed ***Inducon***, including ***Alberta Treasury Branches v Tallgrass Energy Corp***, 2013 ABQB 432 at para 14; ***Industrial Properties Regina Limited v Copper Sands Land Corp***, 2018 SKCA 36 at para 20; ***Nuance Pharma Ltd v Antibe Therapeutics Inc***, 2024 ONSC 7210 at para 96.

[90] The "germ of a plan" requirement is not onerous. The reason is obvious: it applies to initial orders. At that stage of *CCAA* proceedings, applicants often lack detailed information about the affairs of the debtor companies, which limits their ability to formulate a plan to achieve the objectives of the proceedings. That is especially true in creditor- or investor-driven *CCAA* proceedings, where the applicants rarely have access to all the debtor company's records.

[91] In this case, the finding in the *Comeback Decision* that the applicant investors had established a reasonable possibility that the proceedings would achieve their objectives was one of mixed fact and law, reviewable for palpable and overriding error. At the comeback hearing, there was relatively little information about the inner workings of the Fossil Creek and Windridge entities, partly due to the failure of some of them to meet their reporting obligations to investors. That was a relevant consideration in assessing whether there was a reasonable possibility of success. While success was dependent on the Monitor gaining control of the Texas assets, it was open to the chambers judge to find it was a possible outcome and not bound to fail.

[92] We provide a note of qualification. The fact that there was a sufficient "germ of a plan" to begin *CCAA* proceedings does not mean that it is appropriate to continue them indefinitely. If information becomes available that raises doubts about the prospects of success, an interested party can apply to terminate the proceedings.

c. Fairness to other investors and issuers

[93] The appellants argue that the *CCAA* proceedings are inappropriate because they are unfair to most investors in the Fossil Creek and Windridge projects. They also argue that enabling investors to seek relief in *CCAA* proceedings gives them rights they did not bargain for. Although the latter argument is not phrased in terms of fairness, in essence, it asserts that the *CCAA* proceedings are unfair to the entities that issued trust units to the Canadian investors and UFIs to the offshore investors.

[94] As noted, the court has authority under s 11 of the *CCAA* to make any order it considers appropriate in the circumstances, including initial orders. The finding in the *Comeback Decision* that the Initial Order was appropriate — among other things, because it was fair to the majority of investors and the issuing entities — was an exercise of discretion, owed deference absent an error of principle or a clearly wrong finding amounting to an injustice: ***Penner v Niagara (Regional Police Services Board)***, 2013 SCC 19 at para 27; ***Callidus*** at para 53; ***Atlantic Sea Cucumber Ltd v Weihai Taiwei Haiyang Aquatic Food Co Ltd***, 2024 NSCA 35 at para 34.

[95] The issue of fairness to investors arises because the large majority of investors in the Fossil Creek and Windridge projects are unaware of the *CCAA* proceedings. The costs of the proceedings — such as the Monitor's fees and representative counsel's fees — will be taken out of the assets that are liquidated before any money is returned to investors. Most investors have not agreed to that.

[96] The *Comeback Decision* concluded that the *CCAA* proceedings were fair nonetheless because, "if it was possible to contact and inform all investors, a strong majority would support the *CCAA* process": *Comeback Decision* at para 74. That was based on a further factual finding that representative counsel had done what they could to contact investors and, of those contacted, the vast majority supported the proceedings: *Comeback Decision* at paras 72–74.

[97] Those findings and inferences do not reflect any error of principle or clear error of fact. Indeed, they accord with a common sense view of the investors' predicament. Given the "general disregard" for investors' rights, the large majority of investors are unlikely to receive any returns outside the *CCAA* proceedings: *Comeback Decision* at para 43. These proceedings provide some chance of a return, even though the proceeds available for distribution will be reduced by the lawyers' and Monitor's fees, and other costs.

[98] The other fairness argument is that the investors bargained only for the limited contractual rights set out in the Deeds of Covenant, Declarations of Trust, and original offering memorandums. The appellants argue that those rights expose investors to the risk of receiving no returns on their investment and, if the Fossil Creek and Windridge entities have breached investors' contractual rights, the investors' recourse should be limited to suing for breach of contract. Allowing them access to relief under the *CCAA* would give them rights they have not paid for.

[99] The *Comeback Decision* rejected the same argument for two reasons. One was that the investors did not "bargain" for anything when they purchased the trust units and UFIs, if "bargaining" means "negotiating". The units and UFIs were offered on a "take it or leave it" basis: C*omeback Decision* at paras 46–47. The other reason was that the language of the Deeds of Covenant, Declarations of Trust, and original offering memorandums did not purport to exclude investor access to, or reliance on, proceedings under the *CCAA*: *Comeback Decision* at para 47.

[100] Both are findings of mixed fact and law, about the way the securities were marketed and the interpretation of the transaction documents. Neither reflects a palpable and overriding error. We conclude that the process by which investors purchased their investments and the transaction documents governing them do not bar investors from commencing *CCAA* proceedings.

3. Whether the decisions were procedurally defective

a. Did the original short notice application make the subsequent decisions unfair?

[101] When the Canadian investors applied for the Initial Order, they gave the appellants fewer than two days' notice, instead of the 10 days required under R 3.9 of the *Rules*. Given the volume of materials, the application was effectively made without notice (i.e., *ex parte*).

[102] There are various objections to the initial *ex parte* application, but the main one is that it rendered the Initial Order, the *ARIO Decision*, and the *Comeback Decision* procedurally unfair.

[103] Considered in isolation, the Initial Order was procedurally unfair. However, the Initial Order is not under appeal. More importantly, the fairness of the *CCAA* proceedings should not be judged based on the initial application alone. The point of the comeback hearing was to re-hear the original application on notice to the appellants at which time the applicant investors still bore the burden of proof. The appellants had notice of both stages of the comeback hearing and a fair opportunity to make submissions. Since the burden remained with the applicant investors at the comeback hearing, the *ex parte* Initial Order did not result in procedural prejudice to the appellants.

[104] In short, the *ARIO Decision* and the *Comeback Decision* were procedurally fair.

[105] The appellants also argue that the *ex parte* application for the Initial Order was unwarranted and that the order should be set aside for that reason.

[106] Debtor companies frequently obtain initial orders under the *CCAA* with little or no notice to interested stakeholders. Indeed, the template initial order commonly used in Alberta includes a provision abridging the notice period that would ordinarily apply. Section 11 of the *CCAA* contemplates applications made "on notice to any other person or without notice as it may seem fit". Of course, it does not follow that short notice or *ex parte* initial orders are always appropriate. The applicant must provide evidence of urgent circumstances requiring an immediate order and show that giving full notice to stakeholders is not possible given the urgency.

[107] There were, or appeared to be, urgent circumstances justifying the *ex parte* application for the Initial Order against entities connected to the Angus Manor project. The applicant investors had learned from Facebook that a sale of the Angus Manor land in Ontario was imminent and that conditions on the sale would be waived on November 15, 2024 (i.e., the day after the initial hearing): *Comeback Decision* at paras 7–8. However, the applicants were aware that the Fossil Creek and Windridge projects were carried out through distinct corporate structures and did not allege urgent circumstances justifying *ex parte* relief against entities related to those projects.

[108] The appellants argue that the proper response to an unwarranted *ex parte* application for an initial order under the *CCAA* is to set it aside at the comeback hearing, even if the order is justified on its merits. There is little authority to support that position, however. In two cases, courts set aside an *ex parte* initial order after a comeback hearing and noted that the original *ex parte* application was not justified by urgent circumstances: ***Marine Drive Properties Ltd (Re)***, 2009 BCSC 145; ***Encore Developments Ltd (Re)***, 2009 BCSC 13. In both, the court found that the proceedings were unlikely to succeed or had no utility in the circumstances: ***Marine Drive*** at para 32; ***Encore Developments*** at paras 7–8, 23–25. Neither case involved the court ending *CCAA* proceedings that were meritorious for the sole reason that the initial *ex parte* application was unjustified. No authority was cited, nor did we find any, for the equivalent proposition outside the *CCAA* context in general civil litigation.

[109] The rule proposed by the appellants would be a disproportionate response to unjustified *ex parte CCAA* applications. It could disincentivize justified *ex parte* applications, as well as

unjustified ones, and would require the termination of meritorious *CCAA* proceedings which may benefit multiple stakeholders and the public at large because they were started without adequate notice. In most cases, any procedural prejudice from an unwarranted *ex parte* initial application is eliminated by comeback hearings on full notice to the appellants. In some circumstances, it may be appropriate to impose cost consequences on applicants who make unwarranted *ex parte* applications.

b. Did the decisions misplace the burden of proof?

[110] At the comeback hearing, the applicant Canadian investors retained the burden of establishing the prerequisites for the *CCAA* to apply and that the Initial Order was appropriate in the circumstances.

[111] The appellants argue that the *ARIO Decision* misplaced the burden of proof. The chambers judge concluded that he did not have enough information to decide whether the *CCAA* proceedings should continue. He instructed the Monitor to include information about various topics in its next report: the rights of each class of investors, ownership of the properties, value of the properties, the marketing of the properties, and the investor approval process for any sales: AR, 94/1–17. The chambers judge extended the stay of proceedings to enable the Monitor to obtain the required information and the Initial Order remained in force, slightly amended: AR, 98/6–10.

[112] Given that the chambers judge lacked evidence necessary to determine whether the Initial Order was appropriate, the burden of proof at a comeback hearing would ordinarily have required termination of the proceedings. The issue is whether the facts engage an exception to the normal burden of proof at a comeback hearing. The investors argue that they do: some of the appellants were to blame for the missing information because they did not meet their obligations under the Deeds of Covenant and the Declarations of Trust. We agree.

[113] The Canadian investors in Fossil Creek and Windridge had a right to receive annual financial statements from the administrator[11] of the trusts before each meeting of unitholders. The administrator failed to provide that information and did not maintain financial records: *Comeback Decision* at paras 36, 39. The offshore investors had a right to inspect books and records maintained by the facilitator,[12] but no such records were kept: *Comeback Decision* at paras 37, 40. They had the right to vote on sales of the Fossil Creek and Windridge lands, but their approval was never sought.

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[11] A2A Capital Management Inc (later renamed to Serene Country Homes (Canada) Inc).

[12] Fossil Creek LLC and Windridge LLC.

[114] We infer that the applicant investors lacked financial information about the projects and, most likely, the sales and marketing of the lands due to non-compliance by some of the appellants. This comprises most of the missing information identified in the *ARIO Decision*.

[115] The allocation of the burden of proof in civil cases is not immutable and can be sensitive to considerations of fairness and the relative knowledge of the parties: ***Freyberg v Fletcher Challenge Oil and Gas Inc***, 2005 ABCA 46 at para 75. If material information was exclusively within the knowledge or control of one party, fairness may require adjusting the burden of proof that normally applies: ***Canada v Anchor Pointe Energy Ltd***, 2007 FCA 188 at para 36. That is the case here. The applicant investors lacked the information identified in the *ARIO Decision* because the information had been wrongly withheld from them. It would have been unfair to put the burden on the applicant investors to adduce evidence that was not within their knowledge or control.

VI. ANALYSIS — Specific Issues

1. Are the Texas LLCs "debtor companies"? If not, did the court have statutory authority or inherent jurisdiction to subject the Texas LLCs to the Initial Order?

a. *Factual and legal background*

[116] The Texas LLCs were incorporated in Texas and played a significant role in obtaining investment from Canadian investors for the Fossil Creek and Windridge projects in 2014 and 2015. By the date of the Initial Order, however, they were not conducting business in Canada (*Comeback Decision* at para 76), and there is no evidence that they owned any assets in Canada.

[117] Based on those facts, the Texas LLCs did not qualify as "debtor companies" under the *CCAA*. The *Comeback Decision* concluded otherwise, applying a "flexible" interpretation of the definitions of "debtor company" and "company" in s 2(1): *Comeback Decision* at para 77. However, the wording of those definitions leaves no room for flexibility on these facts. It is clear that a company incorporated outside Canada is a debtor company only if it conducts business in Canada or has assets in Canada.

[118] The issue, then, is whether the courts below had authority to subject the Texas LLCs to the Initial Order, including the provisions granting enhanced powers to the Monitor, given that they were not debtor companies.

[119] There are two potential sources of the court's authority to subject non-debtor companies to initial orders in *CCAA* proceedings. First, there is the statutory authority under s 11 of the *CCAA* to make "any order" considered appropriate:

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

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

Section 11 is complemented by the more specific authority under s 11.02 to grant a stay of proceedings on an initial application.

[120] The second source is the court's inherent jurisdiction to control its own processes: Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters, 2013) at 100. There is, however, a hierarchy between these sources of authority. Courts must look to the statute first before relying on inherent jurisdiction to ground orders made in *CCAA* proceedings: ***Century Services*** at para 65.

b. *Authority under s 11 to make initial orders against non-debtor companies*

[121] The Texas LLCs argue that courts lack statutory authority under s 11, or any other provision, to make orders against non-debtor companies. They accept that courts have inherent jurisdiction to stay proceedings against non-debtor entities in aid of the *CCAA* process, but submit that it goes no further than granting stays. We disagree. Supervising courts have statutory authority under s 11 to subject non-debtor companies to initial orders where it is appropriate in the circumstances.

[122] The starting point is s 3(1) of the *CCAA*, which states when the *Act* applies:

> 3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

The relevant feature for present purposes is that the *Act* applies "in respect of a debtor company or affiliated debtor companies".

[123] The parties advance different interpretations of s 3(1) and its relationship with s 11. The Texas LLCs argue that s 3(1) means that the *CCAA* only applies "to" debtor companies and that it limits the court's statutory authority to making orders binding debtor companies alone. The respondents argue that s 3(1) merely triggers the application of the *CCAA* without limiting the scope of the court's authority under s 11 or other provisions. In other words, once the s 3(1) threshold is met — there is a debtor company or affiliated debtor companies against which claims exceed $5 million — the *CCAA* applies and the powers under the *Act* are vested in the supervising court.

[124] In our view, the respondents' interpretation is better supported by the text of ss 3(1) and 11, the purposes of the *CCAA*, and the case law interpreting those provisions.

[125] Section 3(1) is expressed in very broad language. It states that the *CCAA* applies "in respect of a debtor company", not that it applies "to debtor companies". The words "in respect of" create the widest possible scope when connecting subject matters: ***Poonian v British Columbia (Securities Commission)***, 2024 SCC 28 at para 36. The language leaves open the possibility that the *CCAA* authorizes courts to make orders binding non-debtor companies that are appropriately connected to a debtor company.

[126] The language of s 11 is also very broad. It requires an application be made "in respect of a debtor company" before the court's authority is engaged, but there is no language that limits the orders it may make to those binding debtor companies. Rather, the court may make "any order" it considers appropriate in the circumstances.

[127] This interpretation of the relationship between ss 3(1) and 11 is more conducive to achieving the *CCAA*'s objectives. Orders binding non-debtor companies are sometimes necessary to avoid frustrating the purposes of a particular proceeding. A stay of proceedings against a non-debtor company whose business is intertwined with that of the debtor company may be necessary to give the debtor company the latitude necessary to develop a restructuring strategy. This case presents a different example: to preserve the value of debtor companies' assets and distribute them fairly to stakeholders, it is necessary to grant the Monitor power to use the Texas LLCs' causes of action to gain control of the remaining assets in Texas. No doubt, the actual words of ss 3(1) and 11 cannot be distorted to make it a more useful tool for achieving the *CCAA*'s purposes: ***R v Breault***, 2023 SCC 9 at para 26. But given the very broad language of ss 3(1) and 11, the interpretation under consideration does not raise that concern.

[128] The case law provides some support for each view of how s 3(1) operates. The view that s 3(1) limits the scope of the court's statutory authority to orders against debtor companies is reflected in ***Re Lehndorff General Partner Ltd*** (1993), 17 CBR (3d) 24 at paras 14–16, [1993] OJ No 14 (Ct J (GD)); ***Re Calpine Canada Energy Limited (Companies' Creditors Arrangements Act)***, 2006 ABQB 153 at paras 33–34; ***Canwest Publishing Inc***, 2010 ONSC 222 at paras 33–34; ***Great Basin Gold Ltd (Re)***, 2012 BCSC 1459 at para 104; ***Re Just Energy Corp***, 2021 ONSC 1793 at para 116; ***Re 4519922 Canada Inc***, 2015 ONSC 124 at para 37

[129] However, a substantial body of cases also supports the contrary view. In several cases, courts have made orders binding non-debtor companies relying on statutory authority under ss 11, 11.02, or other provisions*:* ***Arrangement relatif à Bloom Lake General***, 2021 QCCS 2946 at paras 47, 103–104; ***In Re Hudson's Bay Company***, 2025 ONSC 1530 at paras 40–48, 79–82 ***Pacific Exploration & Production Company (Re)***, 2016 ONSC 5429 at paras 26–27; ***BZAM Ltd Plan of Arrangement***, 2024 ONSC 1645 at paras 16, 42–43; ***JTI-Macdonald Corp, Re***, 2019 ONSC 1625 at para 14; ***In the Matter of a Plan of Compromise or Arrangement of Sandvine Corporation et al***, 2024 ONSC 6199 at paras 3, 37; ***Re Chalice Brands Ltd***, 2023 ONSC 3174 at paras 6, 35–36; ***Homburg Invest Inc (Arrangement relatif à)***, 2011 QCCS 4989 at paras 9, 12, 35; ***Miniso International Hong Kong Limited v Migu Investments Inc***, 2019 BCSC 1234 at paras

58–59, 62; ***1057863 BC Ltd (Re)***, 2024 BCSC 1111 at paras 33–34, 46–50. While the reasons in these cases are not extensive, the courts clearly regarded 3(1) as a trigger to the application of the *CCAA*, not as a limit on the scope of their authority under it.

[130] Adopting the Texas LLCs' interpretation of s 3(1) would require recharacterizing most of the decisions mentioned as resting on the courts' inherent jurisdiction rather than on statutory authority. Some cases, such as ***Bloom Lake*** and ***1057863 BC Ltd (Re)***, resist that kind of recharacterization because the courts went beyond granting a stay of proceedings and appointed a monitor with varying powers over non-debtor companies. On the Texas LLCs' argument, the courts would have exceeded their inherent jurisdiction — and their lawful authority — by doing so. In our view, there is no compelling reason to reinterpret the cases in this way. Their outcomes and reasoning are supported by a textually grounded interpretation of s 3(1) as a trigger, not a limit, on the courts' statutory authority. Recasting some cases as exercises of inherent jurisdiction would also conflict with the principle that courts should, where possible, ground their authority in the *CCAA* itself rather than in inherent jurisdiction. As explained above, s 11 is broad enough to authorize orders binding non-debtor companies.

c. *Authority under s 11 to appoint a "super-monitor" over non-debtor companies*

[131] The Texas LLCs also argue that courts in *CCAA* proceedings lack any authority — statutory or inherent — to grant a monitor powers of management and control (so-called "super-monitor" powers) over non-debtor companies.

[132] There are several cases in which courts have exercised statutory authority to appoint monitors with "ordinary" investigative and reporting powers in relation to non-debtor companies[13] and at least one case, ***Bloom Lake***, where the Court granted the monitor expanded powers to investigate a non-debtor company. There are, however, no reported decisions in which a court granted a monitor powers to manage a non-debtor company's business and control its assets. Nonetheless, there is no principled basis for drawing a sharp distinction between the court's authority to appoint an "ordinary" monitor and a "super-monitor" over non-debtor companies.

[133] Courts undoubtedly have statutory authority to grant monitor powers to manage and control debtor companies, and the most plausible source of that authority is s 11 of the *CCAA*: Vern W DaRe & Alfonso Nocilla, "Bestriding the Narrow World: Is It Time to Bifurcate the Role of the *CCAA* Monitor?" (2020) 18 Annual Rev Insolvency L 224 at 236–239; ***Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)***, 2020 QCCA 659 at para 68; ***Mantle Materials Group, Ltd (Re)***, 2024 ABKB 19 at para 66. As explained in the previous section, the

[13] Unreported orders include: (1) ***Re Sandvine Corporation*** (15 November 2024), ONSC CV-24-00730836-00CL (Order of Osborne J); (2) ***Re Peavy Industries General Partner Ltd*** (6 February 2024), Calgary, ABKB 2501-01350 at para 4 (Order of Johnston J); (3) ***Re Just Energy Group Inc*** (19 March 2021), ONSC CV-21-00658423-00CL (Order of Koehnen J); (4) ***Re Hudson's Bay Company ULC Compagnie de la Baie D'Hudson*** SRI (7 March 2025), ONSC CV-25-00738613-00CL at para 3 (Order of Osborne J).

courts' authority under s 11 is not limited to making orders against debtor companies, so their authority to appoint "super monitors" is not limited in that way either.

[134] The Texas LLCs rely on the Ontario Court of Appeal's decision in ***Stelco Inc (Re)***, 2005 CanLII 8671 (ONCA) [***Stelco ONCA***] to support the proposition that courts lack authority to grant a monitor powers of management and control over non-debtor companies. In our view, that decision is distinguishable. ***Stelco ONCA*** did not address the alleged difference between the courts' authority over debtor companies and non-debtor companies. Rather, the Court held that s 11 does not grant courts authority in *CCAA* proceedings to remove directors from a debtor company because the *Canada Business Corporations Act*, RSC 1985, c C-44 prescribes a process for their removal: ***Stelco ONCA*** at paras 47–50. Its core holding is that s 11 does not authorize the court to make orders where a specific statutory scheme otherwise exits: ***Stelco ONCA*** at para 48.

[135] That issue does not arise in the present appeals. Here, the Initial Order did not remove the directors of the Texas LLCs — it removed some of their powers of management and control and granted them to the Monitor, an issue not addressed by ***Stelco ONCA***. Insofar as ***Stelco ONCA*** may be read as doubting the courts' statutory authority to grant such powers to a monitor, it has been overtaken by later developments. It predates the more frequent use of use of "super-monitors" and the 2009 amendments to the *CCAA*, which expanded monitors' functions and duties.

d. *Summary*

[136] In summary, the courts below had statutory authority under s 11 of the *CCAA* to subject the Texas LLCs to the Initial Order (including provisions granting enhanced monitor powers), even though the Texas LLCs were not debtor companies at the time.

[137] The fact that the courts have authority to make orders against non-debtor companies, particularly foreign incorporated companies, does not mean that it is always appropriate to exercise it. These appeals did not raise the tricky issue of which factors or principles should structure the exercise of the court's authority.[14] At a minimum, the non-debtor company must be integrally and closely related to the debtor companies' business such that the order is necessary to achieve the purposes of the proceedings. Further obstacles arise when a court is asked to grant a monitor powers to manage a foreign incorporated company, such as the monitor's capacity to comply with the corporate law of another country. Since these issues were not raised in the appeals, we refrain from commenting on them.

[138] Finally, we note the Texas LLCs' brief argument that the courts below erred in granting a stay of proceedings against them. They submit the stay did nothing to further the purposes of these

[14] The Texas LLCs' factum argued that the courts below erred in granting the Monitor powers to manage and control their business by failing to apply the law on interim injunctions. However, counsel clarified at the hearing that the argument assumed that the courts lacked statutory authority to grant these powers to the Monitor. As we have explained in the text, the courts had the statutory authority to do so.

CCAA proceedings because the Texas LLCs have been inactive for a long time and have no assets. The *Comeback Decision* found, however, that the Texas LLCs played an active role in the 2024 sales of project lands and that their inclusion in the *CCAA* proceedings was integral to their success. These are findings of fact, or of mixed fact and law, reviewable for palpable and overriding error, and none has been shown.

2. Did the court err in confirming the *CCAA* proceedings against the Texas LLCs despite the lack of an order permitting service on them in Texas?

[139] The applicant Canadian investors served their originating application for the Initial Order on fewer than two days' notice to the respondents, including the Texas LLCs. They served the application on the Texas LLCs by courier delivery to an individual in Texas without obtaining an order under R 11.25(2) of the *Rules* permitting service of the Texas LLCs outside of Canada.

[140] Counsel for the Texas LLCs were present at the initial hearing on November 14, 2024 and, at that time, received notice of the Initial Order and the date of the comeback hearing. No issue has been raised on appeal about service of the Initial Order itself.

[141] At the first stage of the comeback hearing on November 21, 2024, the Texas LLCs contested the Alberta courts' jurisdiction and pointed out that the applicant investors had not obtained an order permitting service of the originating application *ex juris*. Despite that, the chambers judge found that the Texas LLCs had notice of the *CCAA* proceedings and that the Alberta courts had jurisdiction over them because "they [were] inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors in Canada through Alberta and Ontario corporations, limited partnerships, and trusts": *ARIO Decision*, AR, 89/8–12.

[142] The *Rules* governing service of a commencement document outside Canada have dual functions. One is to ensure that the responding party has notice of the proceeding, and the other is to ensure there is an arguable basis for the Alberta courts to exercise jurisdiction over the responding party. The test for an order permitting service of a commencement document outside Canada under R 11.25(2) has a jurisdictional component because it requires the party issuing it to show a good, arguable case of a "real and substantial connection" between Alberta and the facts on which the claim is based: ***Acciona Infrastructure Canada Inc v Posco Daewoo Corporation***, 2019 ABCA 241 at para 14.

[143] On appeal, the Texas LLCs have not challenged the chambers judge's finding that the Alberta courts have jurisdiction over them in these proceedings. That may be because they accept that the proceedings have a real and substantial connection to Alberta or that they have attorned to the jurisdiction of the Albera courts through their actions to set aside the Initial Order. Their arguments against the Initial Order have not been limited to disputing the jurisdiction of the Alberta courts but have extended to contesting its legal merits.

[144] The Texas LLCs' actual ground of appeal regarding service *ex juris* is rather different. They argue that the *ARIO Decision* erred in finding that they had notice of the *CCAA* proceedings by the date of the comeback hearing. They say that was an error because the finding of notice made the issue of service *ex juris* of the originating application moot. We disagree.

[145] First, it is a fact that the Texas LLCs had notice of the *CCAA* proceedings (i.e., the Initial Order and the comeback hearing) before the date of the comeback hearing. It cannot have been an error for the chambers judge to find that fact, even though the initial originating application had not been served as required by the *Rules*: ***Sandhu v MEG Place LP Investment Corporation***, 2012 ABCA 266 at paras 18–19.

[146] Second, the finding that the Texas LLCs had notice of the Initial Order by the date of the comeback hearing did not make the issue of service *ex juris* moot. As noted, the *Rules* governing service *ex juris* have dual functions — to provide notice and to establish an arguable basis for jurisdiction. The chambers judge's finding about notice did not take jurisdiction, or the application of the test for service outside Canada, off the table. He made a separate finding that the Alberta courts had jurisdiction over the Texas LLCs in these proceedings. It remained open to the Texas LLCs to contest that finding on appeal, whether based on the general law of jurisdiction or the absence of an order permitting service of the originating application *ex juris*. Their conduct in contesting the Initial Order may have made the jurisdiction issue a losing one, but the finding that they had notice of the *CCAA* proceedings did not make it moot.

3. Were the Canadian WFC Entities individually insolvent? If not, did the court have authority to subject them to the Initial Order?

[147] The Canadian WFC Entities argue that the Initial Order should not have applied to them because none of them was insolvent when the order was made. Their argument closely mirrors the Texas LLCs' argument addressed earlier at paragraphs 121–130.

[148] Again, the starting point is s 2(1) of the *CCAA*, which defines a "debtor company" as a company that is insolvent, among other requirements. Neither decision under appeal found that any of the Canadian WFC Entities were individually insolvent on the date of the Initial Order. On appeal, the Monitor and the investors point to evidence in the record suggesting each was insolvent; however, that evidence is equivocal,[15] and it is not this Court's role to make fresh findings of fact.

[149] Accordingly, we proceed on the footing that the Canadian WFC Entities were not individually insolvent. The question is whether, nonetheless, the court below had the authority to subject them to the Initial Order.

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[15] Some of it is not specific to the Canadian WFC Entities, and some of it assumes, without any supporting authority, that an inability to perform a non-financial obligation constitutes insolvency.

[150] The answer depends on the effect s 3(1) of the *CCAA*. As noted, it provides that the *CCAA* "applies in respect of a debtor company or affiliated debtor companies" against which claims exceed $5 million. The Canadian WFC Entities argue that the *CCAA* only applies "to" debtor companies as defined in s 2(1) and that it follows that courts lack authority under ss 11, 11.02, or any other provision, to make orders binding a solvent entity.

[151] This argument fails for much the same reasons as the similar argument made by the Texas LLCs. It conflates two distinct questions: first, when the *CCAA* applies; and second, once it applies, the scope of the court's authority under it.

[152] On an application for an initial order, the court must determine whether the *CCAA* applies at all. That depends on whether the threshold in s 3(1) is met — whether there is a debtor company, among other things. Because a "debtor company" must be insolvent, determining whether the threshold is met requires the court to make an insolvency assessment.

[153] Once the s 3(1) threshold is met, the *CCAA* applies. The court then considers whether it is appropriate to grant an initial order and, if so, which entities should be bound by it. For the reasons given at paragraphs 124–130 above, s 3(1) operates as a trigger to the application of the *Act*, not as a limit on the courts' authority under s 11 and other sections. As such, the authority under s 11 extends to making orders that bind non-debtor companies, including solvent entities. While that authority must be exercised in a way that advances the objectives of the *CCAA*, the Canadian WFC Entities raised no issue with how the courts below exercised it in this case. Accordingly, we refrain from commenting on when it is appropriate to make orders against solvent entities.

[154] That leaves the other issue: the approach to assessing insolvency for the s 3(1) threshold. The *ARIO Decision* considered the assets and liabilities of all entities named in the Initial Order together and found that, collectively, they were insolvent. It was appropriate to assess insolvency that way because their businesses were "inextricably intertwined" with respect to the real estate projects: *ARIO Decision*, AR, 90/21–23.

[155] The question is whether, for the purpose of meeting the s 3(1) threshold, insolvency must be assessed by considering a company's assets and liabilities in isolation, or whether a company *may* be treated as insolvent where it forms part of a group that is collectively insolvent.

[156] There is considerable support in the case law for a collective approach to assessing insolvency in appropriate circumstances. Several cases have considered the assets and liabilities of multiple entities together to ground a finding that a debtor company was insolvent, albeit without extensive analysis. In most cases, the entities considered were corporations: ***Miniso*** at para 44; ***Bondfield Construction Company, Re***, 2019 ONSC 2310 paras 1, 13; ***Phoena Holdings Inc***, 2023 ONSC 2118 at paras 1, 9, 12; ***Re iMarketing Solutions Group***, 2013 ONSC 2223 at paras 1, 3, 11, 15. In some cases, the assets and liabilities of non-corporate entities were included in the insolvency assessment: see ***Dondeb Inc (Re)***, 2012 ONSC 6087; ***First Leaside Wealth Management Inc (Re)***, 2012 ONSC 1299.

[157] The case law has not settled on a single principle governing when it is appropriate to assess insolvency collectively. Courts have taken a collective approach where entities are affiliated within the definition of s 3(2), where companies are "part of an intertwined whole", or where they are parts of an enterprise in which the financial health of one company depends on the others: ***First Leaside*** at para 30; **Dondeb** at para 16; ***Re Earth Boring Co Ltd***, 2025 ONSC 2422 at para 26. In this case, the *ARIO Decision* adopted the "intertwined whole" rationale.

[158] In summary, the *ARIO Decision* correctly held that the insolvency of a company for s 3(1) purposes may, in appropriate circumstances, be assessed on a collective basis. The justification given in the *ARIO Decision* for taking that approach — that the entities named in the Initial Order were intertwined in the investment structures for the development projects — fell squarely within the range of approaches recognized in the case law. Appellate intervention is not warranted.

VII. CONCLUSION

[159] Our conclusions are summarized below:

- The Canadian investors who applied for the Initial Order were equity investors, not creditors of the Debtor Companies and Affiliate Entities. They were "interested persons" who could apply for an initial order because there was a reasonable possibility that they would benefit financially from the outcome of the *CCAA* proceedings. Given the priority scheme in s 6(8) of the *CCAA*, it will often be difficult for equity investors to establish that they are "interested persons" able to commence *CCAA* proceedings.
- The *CCAA* proceedings were commenced for proper purposes underlying the legislative scheme. The applicant Canadian investors did not seek the Initial Order for the sole purpose of investigating the debtor companies' affairs.
- The court below made no reviewable error in concluding that, as of the date of the comeback hearing, the proceedings were not doomed to fail and had a reasonable possibility of success. Put another way, there was a sufficient "germ of a plan" to warrant the Initial Order. However, the requirement of a reasonable possibility of success continues to apply after the grant of an initial order and the parties may revisit it if additional evidence about the prospects of success becomes available.
- The court below made no reviewable error in concluding that the *CCAA* proceedings are fair to the majority of investors and that the transaction documents establishing investors' rights did not preclude recourse to *CCAA* proceedings.
- The short-notice application for the Initial Order with respect to the Windridge and Fossil Creek projects was not justified. However, the appellants received full notice of the comeback hearing and were able to participate fully in it. In the circumstances, it would be disproportionate to terminate an otherwise meritorious *CCAA* proceeding because it was started on inadequate notice.

- At the comeback hearing, the applicant Canadian investors had the burden of establishing that the Initial Order was appropriate. Material information was unavailable at the first stage of the comeback hearing because some appellant entities failed to satisfy their duties to provide information to investors. It was not an error to continue the stay of proceedings for a short period while the Monitor acquired the missing information.
- The applicant Canadian investors did not obtain an order allowing them to serve the originating application on the Texas LLCs in Texas. Despite that, it was not a reviewable error to continue the *CCAA* proceedings against the Texas LLCs after the comeback hearing. The Texas LLCs did not appeal the finding that the Alberta courts have jurisdiction over them. They received notice of the Initial Order and the comeback hearing, which was a *de novo* application, on November 14, 2024. They raised no issue on appeal about the adequacy of the service of the Initial Order.
- The Texas LLCs do not meet the definition of "debtor company" under the *CCAA* because they are foreign companies without assets or business in Canada. Nevertheless, the court had statutory authority to subject them to the Initial Order. For the *CCAA* to apply, s 3(1) requires there to be a "debtor company" but it does not limit the court's statutory authority to orders against debtor companies. These appeals did not raise the issue of which factors or principles should structure the exercise of authority to make orders against foreign incorporated companies and this decision does not address it.
- It has not been established that the Canadian WFC Entities were individually insolvent on the date of the comeback hearing. Nevertheless, the court had statutory authority under s 11 to include the Canadian WFC Entities in the Initial Order. Provided that the threshold conditions in s 3(1) are met, and it is appropriate in the circumstances, the court has statutory authority to make orders in *CCAA* proceedings against entities that are solvent.

VIII. DISPOSITION

[160] The appeals are dismissed.

Appeals heard on September 8, 2025

Memorandum filed at Calgary, Alberta
this 11th day of May, 2026

de Wit J.A.

Shaner J.A.

Appearances:

D. Jukes

for the Appellants Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A, A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc., Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust and Hills of Windridge A2A Trust

K.J. Meyer, KC
L.R. Rollingson (no appearance)
C.K. Brown

for the Appellants Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC

J.L. Oliver
D. Marechal (no appearance)
D. Jorgenson

for the Respondent Alvarez & Marsal Canada Inc.

R. Gurofsky
K.M.G. Wong

for the Respondents Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, Brian Richards and Canadian Investors

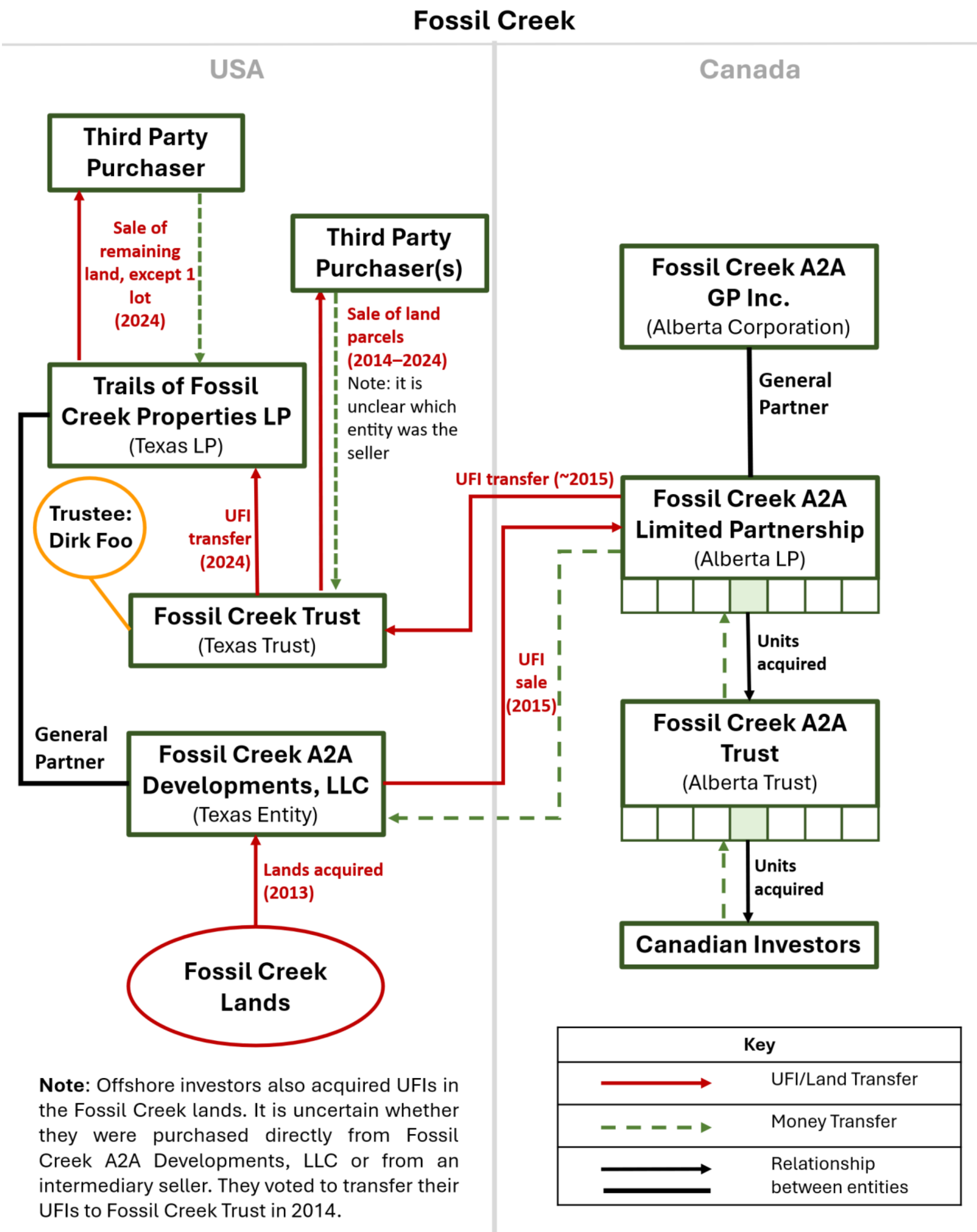
H.A. Gorman, KC (no appearance)
A. Stephenson
D.L.W. Stethem (no appearance)

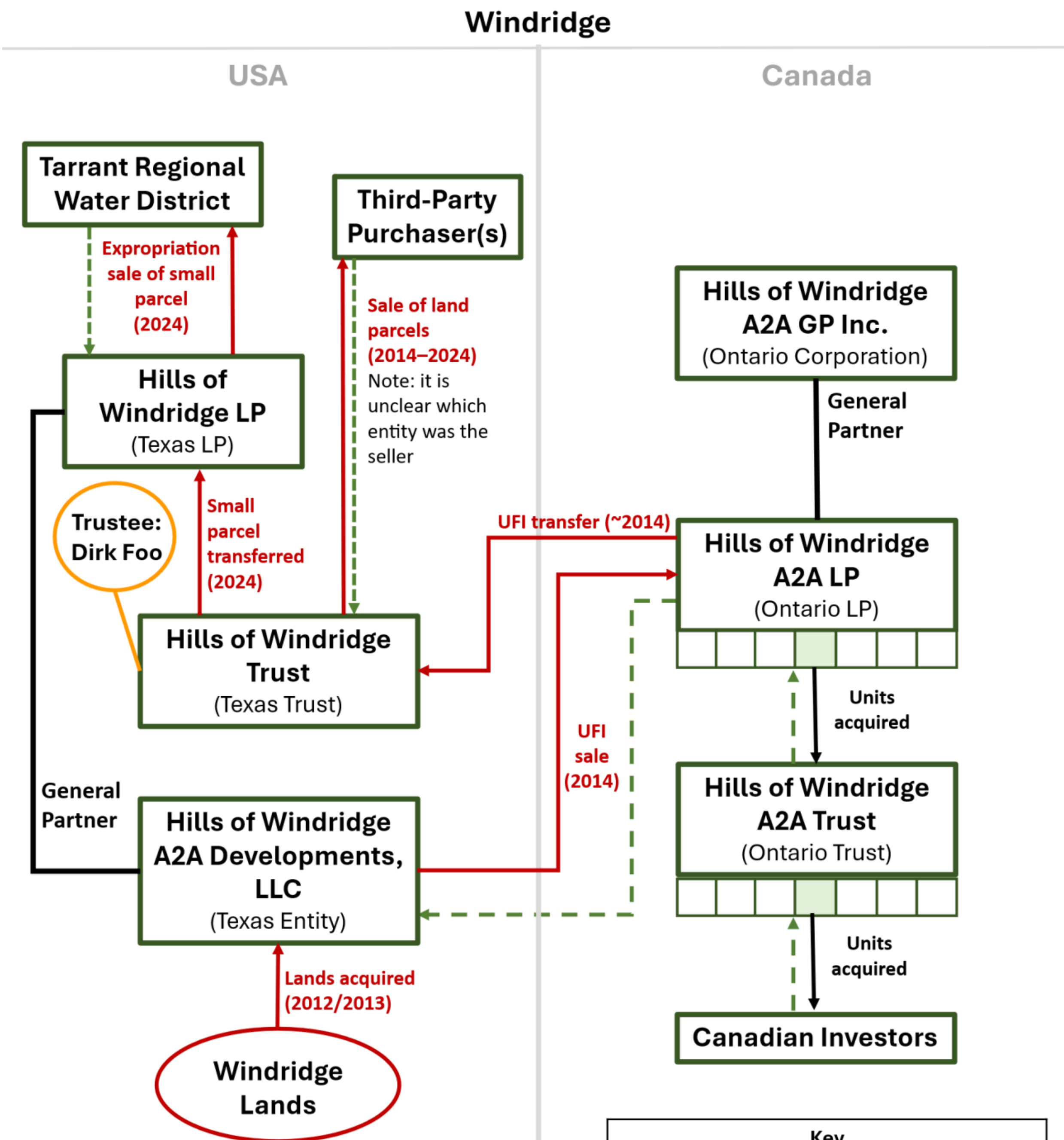
for the Respondent Offshore Investors

K. Kashuba (no appearance)

for Pillar Capital Corp, The Interim Lender

Appendix A – Corporate structures for Canadian investment





Note: Offshore investors also acquired UFIs in the Windridge lands. It is uncertain whether they were purchased directly from Hills of Windridge A2A Developments, LLC or from an intermediary seller. They voted to transfer their UFIs to Hills of Windridge Trust in 2014.

TAB 2

COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'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 THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
APPLICANT	**ALVAREZ & MARSAL CANADA INC.**, in its capacity as Court-appointed Monitor of ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
DOCUMENT	**AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Cassels Brock & Blackwell LLP Bankers Hall West 3810, 888 3rd St SW Calgary, AB T2P 5C5 E: joliver@cassels.com/ dmarechal@cassels.com P: 403 351 2920 / 403 351 2922 **Attention: Jeffrey Oliver / Danielle Marechal** File no. 57100-4

DATE ON WHICH ORDER WAS PRONOUNCED:	November 25, 2024
LOCATION WHERE ORDER WAS PRONOUNCED:	Calgary, Alberta
JUSTICE WHO MADE THIS ORDER:	The Honourable Justice Simard

UPON the application of Alvarez & Marsal Canada Inc. ("**A&M**") in its capacity as the court-appointed monitor (in such capacity, the "**Monitor**") with enhanced powers of Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of

Windridge A2A GP Inc., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc., and A2A Capital Services Canada Inc. (together, the "**Debtor Companies**") (the "**Monitor's Application**"); **AND UPON** the application of the Debtor Companies (the "**Debtor Companies' Application**", and together with the Monitor's Application, the "**Applications**"); **AND UPON** having read the Applications, the Affidavit of Michael Edwards sworn on November 12, 2024, the Affidavit of Paul Lauzon sworn on November 12, 2024, the Affidavit of Isabelle Brousseau, sworn November 8, 2024, the Affidavit of Pat Wedlund, sworn November 12, 2024, the Affidavit of Brian Richards, sworn November 12, 2024, the Affidavit of Kim Picard sworn November 12, 2024, the Affidavit of Allan Whiteford Lind sworn November 21, 2024, the Affidavit of George Woodland Chambers sworn November 20, 2024, the Affidavit of Grayson James Ambrose sworn November 21, 2024 and the Second Affidavit of Grayson James Ambrose sworn November 21, 2024; **AND UPON** having read the Pre-filing Report of the Monitor dated November 13, 2024, the First Report of the Monitor dated November 20, 2024 (the "**First Report**") , the First Supplement to the First Report of the Monitor dated November 21, 2024 and the Second Supplement to the First Report of the Monitor dated November 25, 2024; **AND UPON** reviewing the CCAA Initial Order granted by the Honourable Justice C. Feasby in these proceedings on November 14, 2024 (the "**Initial Order**") ; **AND UPON** hearing counsel for the Monitor, Representative Counsel (as defined herein), counsel for the Debtor Companies and any other party in attendance**; IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

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

APPLICATION

2. The Debtor Companies are companies to which the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") applies.

AFFILIATE ENTITIES

3. Angus A2A Limited Partnership, Angus Manor A2A Limited Partnership, Hills of Windridge A2A LP, Hills of Windridge A2A Trust, Fossil Creek A2A Limited Partnership and Fossil Creek A2A Trust (together the "**Affiliate Entities**") are are integrally related to the Debtor Companies' business and the Applicant Investors' interests, and are hereby granted and shall have the same benefit, protections and authorizations provided to the Debtor Companies in this Order, and all the property and business of the Affiliate Entities shall henceforth be deemed to be the Property and Business

(each as defined in paragraph 11 hereof) of the Debtor Companies, notwithstanding that none of these entities are a “company” pursuant to the CCAA.

NO SALE OF PROPERTY

4. Subject to further order of this Court, all Persons shall be and are hereby enjoined from taking any action to consummate any agreement for the purchase and sale of all or any portion of the Property.

CORPORATE REVIVAL

5. The Alberta Corporate Registrar is hereby directed to temporarily revive the corporate bodies of Angus A2A GP Inc., Angus Manor Park A2A GP Inc. and Fossil Creek A2A GP Inc. (together the “**Alberta Struck Corporations**”) for the limited purpose of facilitating these CCAA proceedings.

6. The Director of the federal Corporate Registrar is hereby directed to temporarily revive the corporate body of A2A Capital Services Canada Inc. (together with the Alberta Struck Corporations, the “**Struck Corporations**”) for the limited purpose of facilitating these CCAA proceedings.

7. The temporary revival of the Struck Corporations shall expire upon the termination of the within CCAA proceedings, unless otherwise ordered by this Honourable Court.

8. For the duration of the temporary revival of the Alberta Struck Corporations, the Monitor is authorized and directed to send the Alberta Corporate Registrar a yearly report regarding the status of the within CCAA proceedings.

9. The Monitor, in addition to its prescribed rights and obligations under the CCAA and this Order, is authorized and directed to execute all documents necessary for the purpose of temporarily reviving the Struck Corporations, and the Struck Corporations are hereby relieved of any obligation to file delinquent and future annual returns.

PLAN OF ARRANGEMENT

10. The Debtor Companies, under the direction of the Monitor, 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 (a "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

11. The Monitor shall exercise the management and control of the Debtor Companies and Affiliate Entities, and on behalf of the Debtor Companies and Affiliate Entities, shall:

(a) permit the Debtor Companies and Affiliate Entities to 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 its business (the "**Business**") and 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 it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

(d) be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System (i) 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 Debtor Companies, through the Monitor, of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, (ii) shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Debtor Companies, pursuant to the terms of the documentation applicable to the Cash Management System, and (iii) shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

12. To the extent permitted by law, the Monitor on behalf of the Debtor Companies and the Affiliate Entities shall, be entitled but not required to make the following advances or payments of 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 reasonable fees and disbursements of any Assistants retained or employed by the Debtor Companies, Affiliate Entities or the Monitor on behalf of the Debtor Companies or Affiliate Entities, in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

13. Except as otherwise provided to the contrary herein, the Monitor on behalf of the Debtor Companies and Affiliate Entities shall be entitled but not required to pay all reasonable expenses incurred by the Debtor Companies and Affiliate Entities in carrying out the provisions of this Order, which 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, maintenance and security services; and

(b) payment for goods or services actually supplied to the Debtor Companies or the Affiliate Entities following the date of this Order.

14. The Monitor, on behalf of the Debtor Companies and, where applicable, the Affiliate Entities 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 that 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 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 Debtor Companies or Affiliate Entities in connection with the sale of goods and services by the Debtor Companies and Affiliate Entities, 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 that are attributable to or in respect of the carrying on of the Business by the Debtor Companies or Affiliated Entities.

15. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Monitor, on behalf of the Debtor Companies and the Affiliate Entities 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 Monitor, on behalf of the Debtor Companies or the Affiliate Entities, from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay rent in arrears.

16. Except as specifically permitted in this Order, the Monitor on behalf of the Debtor Companies or Affiliate Entities is 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 Debtor Companies or the Affiliate Entities to any of its 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 their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

17. The Monitor, on behalf of the Debtor Companies and, where applicable, the Affiliate Entities shall, subject to such requirements as are imposed by the CCAA have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $1,000,000 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 any of the Debtor Companies or Affiliate Entities (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 its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Monitor, on behalf of any of the Debtor Companies or the Affiliate Entities and such employee, or failing such agreement, to deal with the consequences thereof in the Plan

(c) disclaim or resiliate, in whole or in part, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Monitor on behalf of the Debtor Companies and Affiliate Entities deems appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of its 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 Monitor, on behalf of the Debtor Companies and Affiliate Entities, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

18. The Monitor, on behalf of the Debtor Companies and Affiliate Entities, shall provide each of the relevant landlords with notice of the Debtor Companies' or Affiliate Entities' 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 Debtor Companies' or Affiliate Entities'

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 Monitor on behalf of the Debtor Companies or Affiliate Entities, or by further order of this Court upon application by the Monitor on behalf of the Debtor Companies or Affiliate Entities on at least two (2) days' notice to such landlord and any such secured creditors. If the Monitor, on behalf of the Debtor Companies or Affiliate Entities disclaims or resiliates 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 Debtor Companies' and the Affiliate Entities' claim to the fixtures in dispute.

19. If a notice of disclaimer or resiliation is delivered by the Monitor on behalf of the Debtor Companies or Affiliate Entities 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 Monitor, on behalf of the Debtor Companies or Affiliate Entities, 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 Debtor Companies or Affiliate Entities in respect of such lease or leased premises and such landlord shall be entitled to notify the Monitor, on behalf of the Debtor Companies or Affiliate Entities, 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 DEBTOR COMPANIES, AFFILIATE ENTITIES OR THE PROPERTY

20. Until and including December 18, 2024, 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 Debtor Companies, the Affiliate Entities 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 Debtor Companies or the Affiliate

Entities, or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

21. 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 Debtor Companies, the Affiliate Entities 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 Debtor Companies or Affiliate Entities to carry on any business that the Debtor Companies or Affiliate Entities 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;

(d) prevent the registration of a claim for lien; or

(e) exempt the Debtor Companies or the Affiliate Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment.

22. Nothing in this Order shall prevent any party from taking an action against the Debtor Companies or the Affiliate Entities 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

23. 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 Debtor Companies or the Affiliate Entities except with

the written consent of the Monitor on behalf of the Debtor Companies or the Affiliate Entities, or leave of this Court.

CONTINUATION OF SERVICES

24. 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 Debtor Companies or the Affiliate Entities, 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 Debtor Companies or the Affiliate Entities;

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 Debtor Companies or Affiliate Entities or exercising any other remedy provided under such agreements or arrangements. The Debtor Companies and Affiliate Entities 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 each Debtor Companies or Affiliate Entities in accordance with the payment practices of such Debtor Company or Affiliate Entity, or such other practices as may be agreed upon by the supplier or service provider and the Monitor on behalf of each of the Debtor Companies and the Affiliate Entities, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

25. 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, nor shall any person, other than the Interim Lender where applicable, 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 Debtor Companies or Affiliate Entities.

REPRESENTATIVE COUNSEL

26. Fasken Martineau DuMoulin LLP ("**Canadian Rep Counsel**") is hereby appointed as counsel for

all Canadian investors in the Business and Property of the Debtor Companies and the Affiliate Entities, including without limitation, the Applicant Investors (the "**Canadian Investors**") in these proceedings, any proceedings under the CCAA or the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "BIA") or in any other proceeding respecting the insolvency of the Debtor Companies or Affiliate Entities that may be brought before this Court (collectively, the "**Insolvency Proceedings**"), for any issue affecting the Canadian Investors. Nothing in this Order shall prohibit a Canadian Investor from retaining their own counsel in the within proceeding.

27. Canadian Rep Counsel shall represent the interests of the Canadian Investors, and is entitled (but not required) to consult with or seek instructions from individual Canadian Investors. Canadian Rep Counsel shall further be entitled but not required to commence the process of identifying no more than five (5) Canadian Investors to be nominated as Court-appointed representatives (the "**Canadian Representatives**") pursuant to a further Order of this Honourable Court, as soon as practicable. The Canadian Representatives, once appointed, shall represent the Canadian Investors in the Insolvency Proceedings, including without limitation, for the purpose of settling or compromising claims by the Canadian Investors in the within CCAA proceedings.

28. Norton Rose Fulbright Canada LLP ("**Offshore Rep Counsel**" and together with Canadian Rep Counsel, "**Representative Counsel**") is hereby appointed as counsel for all non-Canadian investors in in the Business and Property of the Debtor Companies and Affiliate Entities (the "**Offshore Investors**" and together with the Canadian Investors, the "**A2A Investors**") in the Insolvency Proceedings, for any issue affecting the Offshore Investors. Notwithstanding the foregoing, nothing in this Order shall prohibit an Offshore Investor from retaining their own counsel in the within proceeding.

29. Offshore Rep Counsel shall represent the interests of the Offshore Investors, and is entitled (but not required) to consult with or seek instructions from individual Offshore Investors. Offshore Rep Counsel shall further be entitled but not required to commence the process of identifying no more than five (5) Offshore Investors to be nominated as Court-appointed representatives (the "**Offshore Representatives**" and together with the Canadian representatives, the "**Investor Representatives**") pursuant to a further Order of this Honourable Court, as soon as practicable. The Offshore Representatives, once appointed, shall represent the Offshore Investors in the Insolvency Proceedings, including without limitation, for the purpose of settling or compromising claims by the Offshore Investors in the within CCAA proceedings.

30. Subject to further Order of the Court, Representative Counsel have standing make any application in these CCAA proceedings on behalf of the A2A Investors or other investors that they deem fit,

including but not limited to applications to add further respondents to these CCAA Proceedings.

31. Representative Counsel is authorized to take all steps necessary or desirable to carry out the terms of this Order including dealing with any Court, regulatory body or other government ministry, department or agency to take all such steps as are necessary or incidental thereto, provided however, that until and including the Continuation Date (as defined herein) Representative Counsel is directed to take only those actions absolutely necessary to carry out the terms of this Order.

32. Representative Counsel shall be entitled to the protection of the Administration Charge in relation to their fees and disbursements as further particularized in paragraphs 47 to 49 hereof.

33. Representative Counsel shall have no liability as a result of their appointment nor the fulfillment of their duties in carrying out this Order or any further Order of the Court in these CCAA proceedings, save and except for any gross negligence or willful misconduct on their part.

34. Notice of the appointment of Representative Counsel shall be provided by the completion of the Notice Protocol defined and outlined in paragraphs 63 to 66 hereof.

DIRECTORS AND OFFICERS

35. All current and former directors and officers of the Debtor Companies shall have no further power or authority to manage or direct the Debtor Companies including, but not limited to, the power to direct the sale, transfer or other disposition of the Property or Business on behalf of the Debtor Companies or incur any obligations on behalf of the Debtor Companies.

36. All of the current and former directors, officers, shareholders and Assistants of the Debtor Companies and all other persons acting on the instruction or behalf of any of the foregoing having notice of this Order shall and are hereby directed to co-operate with and provide the Monitor with reasonable access to the books and records of the Debtor Companies and Affiliate Entities.

APPOINTMENT OF MONITOR

37. A&M 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 Debtor Companies and Affiliate Entities with the powers and obligations set out in the CCAA or set forth herein and that the Debtor Companies and Affiliate Entities and, where applicable, their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Debtor Companies and Affiliate Entities

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.

38. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Debtor Companies' and the Affiliate Entities' 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 any Debtor Company or Affiliate Entity;

(c) 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 Debtor Companies and Affiliate Entities to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Debtor Companies and Affiliate Entities, or to perform its duties arising under this Order;

(d) be at liberty to engage independent legal counsel (in both Canada and the United States) 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;

(e) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Debtor Companies, Affiliate Entities and any other Person; and

(f) perform such other duties as are required by this Order or by this Court from time to time.

39. Without in any way limiting the powers and duties of the Monitor otherwise set out herein or in the CCAA, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name of and on behalf of the Debtor Companies and the Affiliate Entities, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(ii) any and all steps of the Debtor Companies or Affiliate Entities authorized by this Order and any other Order made in these proceedings, including making distributions or payments;

(iii) permanently or temporarily ceasing, downsizing or shutting down any of the Debtor Companies or Affiliate Entities operations;

(iv) terminating the employment of or temporarily laying off employees of the Debtor Companies or the Affiliate Entities;

(v) preparing a Plan on behalf of the Debtor Companies and Affiliate Entities;

(vi) entering into any agreements;

(vii) settling, extending or compromising any indebtedness owing to or by the Debtor Companies and Affiliate Entities;

(viii) engaging and instructing Assistants from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(ix) purchasing or leasing machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof;

(x) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Debtor Companies, the Affiliate Entities, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(xi) exercising any rights of the Debtor Companies or the Affiliate Entities;

(xii) applying for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Debtor Companies and Affiliate Entities;

(xiii) taking any and all corporate governance actions for any Debtor Company or Affiliate Entity; and

(xiv) providing instruction and direction to the Assistants of the Debtor Companies and Affiliate Entities;

(b) preserve, protect and exercise control over the Property, or any parts thereof, including, without in any way limiting the generality of the foregoing to:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Debtor Companies and Affiliate Entities, including any proceeds of the sale of any of the Property;

(ii) exercise all remedies of the Debtor Companies and Affiliate Entities in collecting monies owed or hereafter owing to the Debtor Companies or the Affiliate Entities and to enforce any security held by the Debtor Companies or the Affiliate Entities;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property for any purpose pursuant to this Order;

(iv) market, sell, convey, transfer, lease or assign the Property or any part of parts of the Property out of the ordinary course of business, including running a sales solicitation process without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $1,000,000 in the aggregate and with the approval of this Court in respect of any other transaction; and

(v) to register a copy of this Order and any other Order granted in the within CCAA proceedings in respect of the Property against title to any of the Property;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Debtor Companies and Affiliate Entities in these proceedings, including cash flow statements;

(e) conduct investigations from time to time, including, without limitation, to determine whether any additional entities should be added to the within proceedings, and to make any application to add a respondent to these CCAA proceeding and amend the style of cause accordingly; and

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Debtor Companies and the Affiliate Entities, and without interference from any other person.

40. The Monitor is not and shall not, for any purposes, be deemed to be a principal, director, officer, or employee of the Debtor Companies.

41. Nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Debtor Companies or Affiliate Entities within the meaning of any relevant legislation, regulation, common law, or rule of law or equity. For greater clarity, any distribution to creditors of any of the Debtor Companies or Affiliate Entities administered by the Monitor on behalf of any of the Debtor Companies or Affiliate Entities will be deemed to have been made by Debtor Companies or Affiliate Entities, themselves.

42. The Monitor is not and shall not for the purposes of the *Income Tax Act* (Canada) ("**ITA**") be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

43. The Monitor is not, and shall not be deemed, to be the owner of the Property for any purpose and nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might be 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 of waste or other contamination including, without limitation, the Canadian Environmental Protection Act or any other provincial or federal regulations

in Canada or internationally ("**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation.

44. The Monitor shall provide any creditor of the Debtor Companies or Affiliate Entities, including the Interim Lender, with information provided by the Debtor Companies or Affiliate Entities 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 Debtor Companies or Affiliate Entities 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 Debtor Companies or Affiliate Entities may agree.

45. 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, in its personal or corporate capacity, 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. For greater certainty, the Monitor is not and shall not be deemed to incur liability for any act or omission of the Debtor Companies or Affiliate Entities, including, without limitation, in relation to the payment of and/or accounting for any taxes (including, without limitation, any taxes, duties, fees, premiums, assessment, imposts, levies and other similar charges taxes imposed under the ITA, the *Excise Tax Act*, RSC 1985. C E-15, or any similar legislation and owing to the Receiver General, the Canada Revenue Agency or any governmental authority in a jurisdiction outside of Canada) on revenues earned or any indebtedness or obligations whatsoever or howsoever incurred by the Debtor Companies or Affiliate Entities.

46. The enhancement of the Monitor's powers as set forth in this Order, the exercise by the Monitor of any of its powers, the performance by the Monitor of any of its duties, or the employment by the Monitor of any person in connection with its appointment and the performance of its powers and duties shall not constitute the Monitor as an employer, successor employer, or related employer of the employees of the Debtor Companies of Affiliate Entities or any employee caused to be hired by the Debtor Companies or Affiliate Entities by the Monitor within the meaning of any provincial, federal or municipal legislation, other relevant legislation, regulation, common law, or rule of law or equity governing employment, pensions, or labour standards for any purpose whatsoever or

expose the Monitor to any liability to any individual arising from or relating to their employment or previous employment. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitations, wages, severance pay, termination pay, vacation pay and pension or benefit amounts.

47. The Monitor, counsel to the Monitor in Canada and the United States (collectively, "**Monitor's Counsel**"), the Monitor's Assistants and Representative Counsel shall each be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Debtor Companies and Affiliate Entities as part of the costs of these proceedings. The Debtor Companies and Affiliate Entities are hereby authorized and directed to pay the accounts of the Monitor, Monitor's Counsel, and Representative Counsel on a bi-weekly basis unless otherwise agreed by the parties and the Monitor, on behalf of the Debtor Companies and Affiliate Entities, are hereby authorized to pay the Monitor, Monitor's Counsel and Representative Counsel's retainers, to be held by them as security for payment of their respective fees and disbursements outstanding form time to time.

48. The Monitor, Monitor's Counsel, and Representative Counsel shall pass their accounts from time to time.

49. The Monitor, Monitor's Counsel and Assistants, and Representative Counsel, 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 $250,000 as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor 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 57 and 59 hereof.

50. Section 10(2)(b) of the CCAA is hereby waived and the report containing the prescribed representations of the Debtor Companies and Affiliate Entities regarding the preparation of the cash flow statement is hereby dispensed with.

INTERIM FINANCING

51. The Monitor, on behalf of the Debtor Companies and the Affiliate Entities is hereby authorized and empowered to obtain and borrow under a credit facility from Pillar Capital Corp. (the "**Interim Lender**") in order to finance the Debtor Companies' and Affiliate Entities' working capital

requirement and other general corporate purposes and capital expenditures, provided that the initial principal amount of the credit facility not exceed $500,000 unless permitted by further order of this Court.

52. Such credit facility shall be on the terms and subject to the conditions set forth in the term sheet between the Monitor (in accordance with its court-ordered enhanced powers) on behalf of the Debtor Companies and the Affiliate Entities and the Interim Lender dated as of November 13, 2024 (the "**Term Sheet**").

53. The Monitor, on behalf of the Debtor Companies and Affiliate Entities is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees an other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Term Sheet or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Monitor on behalf of the Debtor Companies and Affiliate Entities is 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 Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

54. 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 Term Sheet and/or Definitive Documents incurred on or after the date of this Order which charges shall not exceed the aggregate amount advanced on or after the date of this Order under the Term Sheet and/or Definitive Documents. The DIP Lender's Charge shall not secure any obligation existing before the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 57 and 59 hereof.

55. 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 Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon **ten** days notice to the Monitor on behalf of the Debtor Companies and Affiliate Entities, may exercise any and all of its rights and remedies against the Debtor Companies, the Affiliate Entities or the Property under or pursuant to the Term Sheet, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Monitor on behalf of the Debtor Companies and the Affiliate Entities, and set off and/or consolidate any amounts owing by the Interim Lender to the Debtor Companies and Affiliate Entities against the obligations of the Debtor Companies and Affiliate Entities to the Interim Lender under the Term Sheet, 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 any Debtor Company or Affiliate Entity and for the appointment of a trustee in bankruptcy of any Debtor Company or Affiliate Entity; 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 Debtor Companies, Affiliate Entity or the Property.

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

VALIDITY AND PRIORITY OF CHARGES

57. The priorities of the Administration Charge, and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $250,000); and

Second – Interim Lender's Charge (to the maximum amount of $500,000, plus the amount of all interest, fees and expenses in respect of the principal amount advanced under the Term Sheet and/or Definitive Documents).

58. The filing, registration or perfection of the Administration Charge and 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.

59. 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 shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

60. Except as otherwise expressly provided for herein, or as may be approved by this Court, neither the Debtor Companies nor the Affiliate Entities shall grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Debtor Companies or Affiliate Entities also obtain the prior written consent of the Monitor and the beneficiaries of Charges, or further order of this Court.

61. 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 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**") that binds the Debtor Companies or Affiliate Entities, 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 Term Sheet or the Definitive Documents, shall create or be deemed to constitute a new breach by the Debtor Companies 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, the Debtor Companies execution, delivery or performance of the Term Sheet or the Definitive Documents; and

(iii) the payments made by the Debtor Companies or Affiliate Entities pursuant to this Order, including pursuant to the Term Sheet 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

62. 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, or the costs of these proceedings among any parties who have benefitted from these CCAA proceedings.

SERVICE AND NOTICE PROTOCOL

63. The Monitor shall (i) without delay, publish in the *National Post*, the *Globe and Mail* (National Edition), the *Dallas Morning News*, and subject to the Monitor's discretion, *The Straits Times, Philippine Daily Inquirer, Star Media Group Berhad* and the *South China Morning Post* a notice containing the information prescribed under the CCAA as well as particulars of the Comeback Hearing and the potential expansion of the Interim Lender's Charge to attach to the interest of the Offshore Investors; (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 Debtor Companies or Affiliate Entities 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.

64. The Monitor shall establish a case website in respect of the within proceedings at *www.alvarezandmarsal.com/a2a* (the "**Monitor's Website**").

65. The Monitor, on its own behalf and on behalf of the Debtor Companies and Affiliate Entities, is at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence to all investors, by posting notice of these proceedings, the Monitor's Website and contact information for Representative Counsel on the "Concerned A2A Investors"

Facebook page at *https://www.facebook.com/groups/265791773886300/*, and where the Monitor deems appropriate, on LinkedIn and Reddit.

66. Any person that wishes to be served with any application and other materials in these proceedings by ordinary mail, courier, or electronic transmission must deliver to the Monitor by way of ordinary mail, courier, or electronic transmission, a request to be added to the service list (the "**Service List**") to be maintained by the Monitor.

67. Where the Monitor takes the steps referenced in paragraphs 63 to 66 hereof in addition to effecting service on the Service List (together, the "**Notice Protocol**"), such notice shall deemed good and sufficient service thereof for the purposes of any subsequent hearings scheduled in these proceedings.

REGISTRATION ON TITLE

68. The Monitor is hereby expressly empowered and authorized to register a copy of this Order and any other Orders in respect of the lands legally described as:

(a) PT LT 28 CON 5 ESSA TWP AS IN RO346115 SECONDLY; TOWNSHIP OF ESSA, bearing parcel identification number ("PIN") 58103-0065 (LT); and

(b) PT LT 28 CON 5 ESSA TWP; PT LT 29 CON 5 ESSA BEING PT 2 51R16117; TOWNSHIP OF ESSA, bearing PIN 58103-0059 (LT),

(collectively, the "**Angus Manor Lands**")

each in the registry office for the Land Titles Division of Simcoe (No. 51), against title to any of the Angus Manor Lands, where the Monitor considers it necessary or desirable.

69. The Land Registry Office for the Land Titles Division of Simcoe (No. 51) is hereby directed to accept this Order for registration on title to the Angus Manor Lands.

ADJOURNMENTS AND DISMISSALS

70. The portions of the Monitor's Application seeking an extension of the Charges to apply and attach to the undivided factional interests of any individual investor in any real property which is the subject of these CCAA proceedings, seeking to add Hills of Windridge Trust and Fossil Creek Trust as

Affiliate Entities, and seeking to enjoin the sale of the Texas Lands (as defined in the Monitor' Application) are hereby dismissed.

71. Notwithstanding any provision of this Order, the portion of the Monitor's Application seeking an increase to the Administration Charge and the Interim Lender's Charge is adjourned to Friday, November 29, 2024 at 9:00 am, for one hour before the Honourable Justice Simard.

72. Notwithstanding any other provision of this Order, the portion of the Monitor's Application seeking the removal of trustees and the entirety of the Debtor Companies' Application, are each adjourned to Wednesday, December 18, 2024, at 10:00 am (the "**Continuation Date**"), for one half day before the Honourable Justice Simard.

INFORMATION TO BE PROVIDED

73. By no later than 4:00 pm on Thursday, November 28, 2024, the Monitor will provide a second report of the Monitor (the "**Second Report**") to this Court and the Service List.

74. The Second Report shall report on:

(a) the expenditures and accruals to date of the Monitor, Monitor's Counsel, and Representative Counsel; and

(b) a revised cash flow statement listing all proposed expenditures of the Monitor, Monitor's Counsel, and Representative Counsel until and including the Continuation Date.

75. The Debtor Companies shall provide to the Monitor, as soon as it becomes available, the Requested Information (as defined herein), but in any event, by no later than 4:00 pm on Friday, December 6, 2024, the Debtor Companies will provide to the Monitor, for all entities listed in Schedule "A" hereto:

(a) all the requested information listed in the first section of Schedule "B" to Appendix "C" of the First Report listed as "Corporate Records";

(b) all requested information listed in the second section of Schedule "B" to Appendix "C" of the First Report listed as "Accounting Records", banking records to subsequently be updated daily until and including the Continuation Date;

(c) all requested information listed in the third section of Schedule “B” to Appendix “C” of the First Report listed as “Investor Records”:

(d) all requested information listed in the fourth section of Schedule “B” to Appendix “C” of the First Report listed as “Contracts”,

(e) all requested information listed in the fifth section of Schedule “B” to Appendix “C” of the First Report listed as “Contacts”, and

(f) all requested information listed in the final section of Schedule “B” to Appendix “C” of the First Report listed as “Other”, which shall for greater certainty henceforth include;

(i) all title documents for the Property;

(ii) all documents related to the marketing of the Property, including for greater certainty, access to any virtual data rooms and/or other due diligence materials created for the purpose of marketing the Property;

(iii) all valuation and appraisal information, in any form whatsoever, for the Property; and

(iv) all information with respect to the investor approval process conducted in connection with any sale of any Property including, without limitation, all information regarding the process for notifying investors of potential sales, the contents of any communication with investors and information regarding the process for obtaining investor approval of any sale of any Property.

(collectively, the “**Requested Information**”)

76. By no later than 4:00 pm on Friday, December 13, 2024, the Monitor will provide a third report of the Monitor, and any confidential supplements thereto (collectively the “**Third Report**”) to this Court and the Service List. The purpose of the Third Report shall be to provide the Court with a proper record to determine whether a continuation of these CCAA proceedings are appropriate after the Continuation Date.

77. The Monitor shall have leave to apply for any further relief under the CCAA or amend the existing Monitor’s Application by providing such application or amendment to this Court and the Service List

by no later than 4:00 pm on Friday, December 13, 2024. The Debtor Companies shall be entitled to provide additional affidavit evidence with respect to the Debtor Companies' Application by providing such affidavits to this Court and the Service List by no later than 4:00 pm on Friday, December 13, 2024.

78. Any interested party (including the Debtor Companies and the Monitor) may provide to this Court and Service List a brief of law with respect to any Application returnable on the Continuation Date by no later than 4:00 pm Monday, December 16, 2024.

GENERAL

79. The Monitor and Representative Counsel may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

80. 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. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

81. 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 Debtor Companies, the Affiliate Entities, the Business or the Property.

82. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Monitor on behalf of the Debtor Companies and Affiliate Entities and on its own behalf, and the Monitor's 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 Monitor on behalf of the Debtor Companies and the Affiliate Entities 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 Monitor on behalf of the Debtor Companies and the Affiliate Entities and on its own behalf, and its respective agents in carrying out the terms of this Order.

83. The Monitor is 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.

84. Subject to local law, rules and regulations:

(a) The Monitor is hereby authorized and empowered to act as the foreign representative (in such capacity, the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized and approved in a jurisdiction outside of Canada.

(b) The Foreign Representative is hereby authorized to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States Bankruptcy Court for the Northern District of Texas pursuant to Chapter 15 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

85. Any interested party (including the Debtor Companies 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.

86. 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 King's Bench of Alberta

Schedule "A'

A2A Group

1. Angus A2A GP Inc.;
2. Angus A2A Limited Partnership;
3. Angus Manor Park A2A GP Inc.,
4. Angus Manor A2A Limited Partnership;
5. Angus Manor Park A2A Capital Corp.;
6. Angus Manor Park A2A Developments Inc.;
7. Windridge A2A GP Inc.;
8. Windridge A2A LP;
9. Hills of Windridge A2A Trust;
10. Windridge A2A Developments, LLC;
11. Fossil Creek A2A GP Inc.,
12. Fossil Creek A2A Limited Partnership;
13. Fossil Creek A2A Developments, LLC;
14. Fossil Creek A2A Trust;
15. A2A Developments Inc.;
16. Serene Country Homes (Canada) Inc.;
17. A2A Capital Services Canada Inc;
18. Hills of Windridge Trust; and
19. Fossil Creek Trust.

TAB 3

CITATION: Beaver Rock Roastery Inc. v. Saso, 2017 ONSC 740
BARRIE COURT FILE NO.: CV-16-1856
DATE: 20170201

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Beaver Rock Roastery Inc. and Mark Nastasiuk	)	A. Rogerson, Counsel for the Plaintiffs
Plaintiffs	)	
– and –	)	
Daniel M. Saso, Rosalind M. Saso, and The Canadian Imperial Bank of Commerce	)	J. Camp, Counsel for the Defendants, Daniel M. Saso and Rosalind M. Saso
Defendants	)	

	)	**BARRIE COURT FILE NO.:** CV-17-0119
AND BETWEEN:	)	
Merritt Holdings Ltd., Stuart Merritt and Kevin Nastasiuk	)	L. Hansen, for the Applicants
Applicants	)	
– and –	)	
Mark Nastasiuk, Beaver Rock Roastery Inc., Daniel M. Saso and Rosalind M. Saso	)	Mark Natasiuk, Self-Represented J. Camp, Counsel for the Respondents, Daniel M. Saso and Rosalind M. Saso
Respondents	)	
	)	**HEARD:** January 24, 2017

REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] Beaver Rock Roastery Inc. (BRR) is a coffee supplier specializing in fully recyclable coffee pods or “K-cups” for use in single serve coffee machines. On December 16, 2016 BRR and its president Mark Nastasiuk filed a Notice of Action against the defendants Daniel Saso and Rosalind Saso (the Sasos) claiming damages for breach of contract and the tort of interference with economic relations. The Sasos are investors who lent money totalling $500,000 to the corporation pursuant to loan agreements dated February 11, 2016 and September 1, 2016.

[2] Also on late Friday afternoon on December 16, 2016 the plaintiffs brought an *ex parte* motion for an interlocutory injunction against the Sasos to enjoin them from “immediately calling in a loan that they arranged” with BRR and from “calling in a General Security Agreement arranged” with BRR.

[3] Quinlan J. granted the order on an interim basis and adjourned the motion to December 20, 2016, when it could be heard on notice to the defendants.

[4] The December 16, 2016 order restrained the Sasos from, *inter alia*, :

i. Calling in or seeking to enforce the terms of the loan agreement and its schedules executed between the parties on September 1, 2016;

ii. Seeking to enforce the terms of any General Security Agreement executed between the parties; and

iii. Communicating with any bank, orally or in writing, with regard to bank accounts held in the name of the plaintiff.

[5] In her reasons Quinlan J. stated:

> I am satisfied that the plaintiffs will suffer irreparable harm if the relief sought is not granted within a reasonable time… The irreparable harm in this case if the loan is called in is that the plaintiffs will be put out of business: as the plaintiff notes it would effectively force the company into bankruptcy. The balance of convenience favours the plaintiffs. The plaintiffs have provided an undertaking as to damages.

[6] When the matter returned on December 20, 2016 the defendants had insufficient time to prepare responding material and the matter was adjourned to January 17, 2017. The parties consented to an order that, *inter alia*, extended the interim injunction to January 17, 2017.

[7] The motion returned on January 17, 2017 but there was insufficient time to hear the motion because it was scheduled for only one hour. Accordingly, the matter was adjourned to a long motion on January 24, 2017, and the interim injunction was continued to that day.

[8] I heard the motion and at the end of the hearing I released a brief endorsement setting aside the interim injunction because of the plaintiffs' failure to make full and fair disclosure of all material facts when the *ex parte* motion was brought (Rules of Civil Procedure, Rule 39.01(6)). I indicated that I would provide more detailed reason at a later date, and consider and decide on the relief requested by the defendants in a cross-motion to dismiss or stay the action on the ground that it was commenced without proper corporate authority.

[9] These are those reasons and decision.

Facts

[10] BRR is a closely held corporation incorporated on May 5, 2013 "for the purpose of carrying on the business of roasting, packaging and sales of coffee and tea, together with such other business as may be conviently carried on ancillary thereto".

[11] In his affidavit dated January 12, 2017 Mr. Nastasiuk claims to be the "sole shareholder" of BRR. This is plainly incorrect. BRR currently has six shareholders: the plaintiff Mark Nastasiuk, Kevin Nastasiuk (Mark's brother), Merritt Holdings Inc. and the defendants Daniel and Rosalind Saso.

[12] The parties have produced a shareholder agreement dated December 22, 2014 that states that Mark Nastasiuk, Kevin Nastasiuk and Merritt Holdings Inc. are the beneficial owners of shares as follows:

Mark Nastasiuk, 70,000 shares

Kevin Nastasiuk, 15,000 shares

Merritt Holdings Inc., 15,000 shares

[13] On February 11, 2016 BRR, Mark Nastasiuk, Kevin Nastasiuk, and Merritt Holdings Inc. (the borrowers) entered into a loan agreement with the Sasos by which the Sasos advanced $350,000 to the borrowers. Pursuant to this agreement the borrowers provide an undertaking to issue "voting common shares" of BRR "in the amount of not less than 5% of the current issued and outstanding common voting shares".

[14] On September 1, 2016 the parties entered into a second loan agreement to permit the borrowers to borrow up to $750,000 from the Sasos. The plaintiff acknowledges that the Sasos lent $500,000 to BRR.

[15] This second loan agreement required the borrowers to issue "not less than 5,000 common voting shares representing 5% of the current issued and outstanding common voting shares of the corporation". Clause 5 of the loan agreement also provided for the following additional security to the lender:

> In addition, the Borrower will provide as additional security, a pledge of voting common shares, an amount of not less than 51% of voting control to the Lender at all times during the currency of the loan, including but not limited to any event of default. The Borrower acknowledges that the provision of ownership control, transfers those shares to the Lender to retain as ownership during the term of the loan and until full repayment including an event of default.
>
> The Borrower agrees that the Lender shall maintain both voting control, act as a signing authority on all matters, including all financial matters of the corporation until the full repayment of the loan or by release or amendment of this condition at the sole discretion of the Lender.
>
> The Borrower confirms that under the current structure, the corporation has issued and has outstanding 100,000 common voting shares and acknowledges that the pledge of shares for security purposes from the shareholder shall be as follows:
>
> Mark Nastasiuk – 35,000 common and voting shares
>
> Kevin Nastasiuk – 8,000 common and voting shares
>
> Merritt Holdings Inc. – 8,000 common and voting shares

[16] I will refer to these provisions as the "additional security" clause throughout this decision.

[17] The shareholders, including the Sasos, all met at a shareholders meeting on December 6, 2016. This meeting was the catalyst that gave rise to the motion on December 16, 2016, and the parties have presented very different narratives of what transpired.

Position of the Plaintiff's

[18] In his affidavit dated December 16, 2016 and filed in support of the motion heard that same day (the first Nastasiuk affidavit) the plaintiff states that a term of the September 1, 2016 loan agreement was that "a new shareholder agreement would be prepared in which Mr. Saso would receive a 5% stake in BRR". The plaintiff alleges that although he and the other shareholders:

> [W]ere prepared to negotiate the terms of a new shareholder agreement, Mr. Saso made no effort to facilitate the negotiation of a new agreement. Instead, on December 15, 2016 he sent an email to the shareholders calling for a meeting to be held the next day…at which meeting a new shareholder agreement would be presented.

[19] The plaintiff's affidavit states that at the December 6, 2016 shareholder meeting Saso presented the terms of the shareholder agreement "as a *fait accompli* for the other

shareholders to approve", and that "this proposed agreement would give Mr. Saso a majority of the equity in BRR and control of all business operations." The plaintiff states:

> I concluded that the proposed shareholder agreement was not in the interests of the shareholders and that Mr. Saso had demonstrated that he would likely act in an oppressive manner were he to gain control of BRR. This proposed shareholder agreement, which Mr. Saso attempted to impose unilaterally on BRR, would have provided him with controlling interest in BRR and provided no protection to the other shareholders. In effect the proposed agreement amounts to a complete takeover of the company, in which he presently has no equity stake and is a mere creditor.

[20] On December 7, 2016 the Sasos sent the shareholders of BRR a demand notice, requiring repayment in full of the loan with additional claims amounting to $533,834.35 by no later than January 6, 2017. On December 12, 2016 the Sasos sent the shareholders of BRR an accelerated demand notice requiring repayment of the loan in full by no later than December 16, 2016.

[21] Since BRR did not have sufficient liquidity to repay the loan immediately, the plaintiff brought the motion for an interlocutory injunction, arguing that the demand for repayment will result in "either bankruptcy or an agreement of the shareholders to transfer controlling interest" to Saso.

[22] The plaintiff also indicated that he required the interlocutory injunction "to allow us time to obtain alternative financing and to satisfy the terms of the loan agreement."

Failure to Make Full Disclosure

[23] What is immediately striking about the plaintiff's position with regard to the December 6, 2016 shareholders meeting and the events that followed over the next ten days is that he made no reference to the additional security clause in the September 1, 2016 loan agreement. On its face, the additional security clause appears to grant the Sasos the majority equity and control over BRR that the plaintiff was trying to forestall with the motion for an interlocutory injunction. The additional security clause is of central significance to the respective rights of the borrowers and lenders in this case.

[24] The September 1, 2016 loan agreement is 5 pages and 26 paragraphs long. The pages are not numbered, but most of the paragraphs are. Paragraph 5 ends on the bottom of the first page, and the additional security clause begins at the top of the second page of the agreement. Page five of the agreement is the signature page and has no paragraph numbers on it.

[25] The copy of the September 1, 2016 loan agreement appended as Exhibit "C" to the plaintiff's affidavit in support of the December 16, 2016 motion contains only the first page and the signature page of the agreement. Pages two to four of the agreement – which contain the additional security clause – are not part of the exhibit, but there would

be no way to know this by looking at the two pages that were provided. Accordingly, Quinlan J. did not have the benefit of seeing the entire loan agreement or the additional security clause when she issued her *ex parte* order on December 16, 2016. Nor would she have had any way of knowing that she was not provided with the whole agreement.

[26] The plaintiff does not deny that the additional security clause is material to the issues on the injunction. In a subsequent affidavit dated December 30, 2016 the plaintiff stated that the missing pages were a "clerical mistake made in the rush to get material ready and before the court".

[27] I do not believe the plaintiff. Even apart from the exhibits to his affidavit, his affidavit is silent with respect to the additional security clause. The plaintiff's failure to reference the additional security clause in his narrative of the events from December 6 to 16, 2016 was deliberate. I infer that he deliberately excluded pages two to four of the agreement from his affidavit because disclosure of the additional security clause would have undermined the position that he was taking on the motion for an interim injunction. Once he excluded page two he also had to exclude pages three and four or the paragraph numbering would make it obvious that the document was not complete.

Position of the Defendants

[28] The Sasos take the position that by virtue of the express terms of the September 1, 2016 loan agreements they hold ownership of 56 per cent of the shares of BRR, comprised of 5 per cent that they own outright and 55 per cent that they retain as security during the term of the loan and until full repayment is made. By virtue of this agreement the Sasos maintain voting control and act as signing authority on all matters, including all financial matters, until full repayment of the loan.

[29] The September 1, 2016 loan agreement required the borrowers to amend the Shareholder Agreement to include these provisions by October 1, 2016. On September 16, 2016 Daniel Saso attended with the borrowers at the BRR's bank and he was given signing authority and BRR implemented a requirement of dual signatures on all banking transactions.

[30] Saso's affidavit states that the shareholders' meeting of December 6, 2016 to deal with the revised shareholder agreement as required by the September 1, 2016 loan agreement had been postponed on several occasions as the materials were not perfected. All directors and shareholders agreed to this date. At the meeting Kevin Nastasiuk and Merritt indicated that further negotiations were not necessary and the revised shareholder agreement proposed by Saso was consistent with the provisions outlined in the September 1, 2016 loan agreement. Mark Nastasiuk refused to agree to the revised shareholder agreement. The meeting adjourned and the shareholders continued the meeting on December 7, 2016.

[31] At the December 7, 2016 shareholders meeting the Sasos issued a demand letter noting that interest payments for the months of October 2016 and November 2016 were due.

[32] On December 9, 2016 the bank invited Mark Nastasiuk, Kevin Nastasiuk and Merritt to a meeting at which the bank raised concerns that Mark Nastasiuk had attempted to sell equipment and a new product that was in development and owned by BRR, and advised Mark Nastasiuk that he could not do so without the bank's prior written consent. Mark Nastasiuk denied that he had attempted to sell these properties.

[33] The Sasos were advised of this meeting by Merritt, and were concerned that there was an elevated risk associated with Mark Nastasiuk refusing to deliver the security documents and the borrowers' default of interest on the loan. The Sasos therefore triggered the acceleration of the demand to protect their financial interests and sent out a second demand letter on December 12, 2016.

[34] The Sasos allege that the acceleration of the demand was triggered by Mark Nastasiuk's refusal to deliver the security and amend the shareholder agreement in accordance with the September 1, 2016 loan agreement. BRR was already insolvent without additional loans from the Sasos, and so Sosa was acting to avoid the potential for bankruptcy.

[35] The Sasos also allege that on or before December 8, 2016 Mark Nastasiuk locked the Sasos and all other directors and shareholders out of the BRR premises, accounting systems and e-mail system.

[36] Daniel Saso's affidavit is corroborated by the affidavit of Stuart Merritt, the owner of Merritt Holdings Inc., who is not a party to this proceeding but is a shareholder, director and employee of BRR. BRR is Merritt's principal source of income. Merritt and his wife have invested approximately $320,000 into BRR in cash payments and by permitting his credit card to be used to purchase supplies for BRR. According to Merritt, Kevin Nastasiuk has invested approximately $175,000 in BRR and has provided a personal guarantee of approximately $100,000 in respect of bank loans to purchase equipment. Mark Nastasiuk has invested approximately $27,000 in BRR.

[37] Merritt's affidavit confirms that BRR has had a chronic cash flow problem, and that the shareholders negotiated a loan of $350,000 from the Sasos in February 2016, and that following that agreement the Sasos were shareholders of BRR even though shares were never formally issued.

[38] Merritt also confirms that all of the shareholders were involved in the negotiation of the second loan agreement in September 2016, and that the Sasos advanced further funds to BRR such that their total investment was just over $500,000. Between September 2016 and December 2016 Merritt states that "there was a substantial amount of back and forth between Mark [Nastasiuk] and Mr. Saso about implementing the terms of the September loan agreement".

[39] According to Merritt, the purpose of the December 6, 2016 shareholder agreement "was to give effect to what had already been agreed to in the September loan agreement" including amending the shareholder agreement and the issuance of shares to the Sasos.

The intention was that when these obligations were fulfilled the Sasos would inject more money into BRR. Merritt states:

> All of the people at the meeting agreed with the terms of the amended agreement except for Mark, who seemed to want to renege on the September loan agreement.

[40] When the meeting reconvened on December 7, 2016 all of the people except Mark Nastasiuk were prepared to agree to the proposed amendments to the shareholder agreement.

[41] Merritt also states that Mark Nastasiuk told him that he intended to come up with the funds to pay the loan by selling equipment owned by BRR. Merritt advised Mark Nastasiuk that he could not do this because the bank held security over the corporation's assets by virtue of a General Security Agreement. This discussion led to the meeting with the bank on December 9, 2016.

[42] Merritt expresses concern over Mark Nastasiuk's "rogue actions" which he states have put the existence of BRR and his $320,000 investment in the company in jeopardy and exposed him to personal liability since the shareholders guaranteed repayment of the loan under the terms of the September 1, 2016 loan agreement.

Analysis

[43] The December 16, 2016 order was made without notice to the defendants because the plaintiff claimed that it was urgent. Rule 39.01(6) provides:

> Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

[44] As indicated above, the plaintiff failed to disclose the terms of the September 1, 2016 loan agreement, and, in particular, failed to disclose the additional security clause that was agreed to by all of the shareholders and which gave the Sasos majority equity and control over BRR months before the plaintiff brought his motion for an interlocutory injunction.

[45] In *R. A. Fox v. R.S. Fox*, 2014 ONSC 1135 the Divisional Court outlined the reason for Rule 39.01(6) (at paras. 11-13):

> The reason for requiring such disclosure is based on the recognition that the judicial officer hearing a motion has only the moving party or their counsel before him. There is usually no opponent present who can file opposing evidence and make opposing submissions. Accordingly, there is a heavy burden on a moving party to tender evidence that he might prefer not to tender so the judicial officer can obtain a reasonably

> balanced view of those facts that might reasonably affect the outcome of the motion.
>
> The burden that rests on the moving party is not to make full and fair disclosure of every fact relevant to the motion. That would be an undue burden that would require the moving party to disclose an unnecessarily large volume of facts of likely little to no probative value. The obligation to make disclosure of "all material facts" should be interpreted to mean only "all facts that might reasonably affect the outcome of the motion".
>
> If the judicial officer hearing a motion is deprived of an opportunity to know about all of the material facts known to the moving party because the moving party fails to comply with rule 39.01 (6), the same rule creates a consequence for that moving party. It provides that his failure to comply, in itself, is sufficient ground for setting aside any order made on the motion. "In itself", in this context means that the other party does not necessarily have to establish anything more than the moving party's failure to comply.

[46] In other words, the failure to fairly disclose can result in the setting aside of the order even if disclosure would not have changed the result (*Royal Bank of Canada v. Kaveh*, 2014 ONSC 2582 at para. 10).

[47] The failure to disclose the whole of the September 1, 2016 loan agreement was the most significant of the plaintiffs' failures to make full and fair disclosure. It is in itself sufficient grounds for setting aside the order made that day. The facts relating to the terms of the additional security clause were material and could have, and in my view probably would have, affected the outcome of the motion. The terms of the agreement changed the nature of the status quo that existed when the motion was brought and would have resulted in a different weighing of the balance of convenience and irreparable harm. The judge hearing the motion was entitled to be made aware of these facts. As it was, the plaintiff deliberately misrepresented the terms of the agreement.

[48] As indicated, knowing the terms of the additional security clause in the September 1, 2016 loan agreement leads me to conclude that the plaintiff will not suffer irreparable harm if the injunction is not granted. If the BRR is forced into bankruptcy it is because the plaintiff has refused to honour the terms of a loan agreement that he made three months before bringing the motion. He could have avoided this situation simply by signing the new shareholder agreement and providing the lender with the additional security as per the terms of the September 1, 2016 loan agreement. The evidence indicates that he was the sole holdout among the shareholders (another material point that was not disclosed in his motion material). Interlocutory injunctions should not be used to simply release borrowers from meeting their contractual or financial obligations.

[49] In addition, the balance of convenience now favours the defendants who lent BRR $500,000 and who stand to lose their entire investment if they are denied both the

security promised in the loan agreement (majority equity and control) and the right to enforce repayment of the loan according to its terms. The Court now has evidence and must also consider the interests of the other shareholders – Merritt and Kevin Nastasiuk – whose interests were not represented (or disclosed) when the motion was heard on December 16, 2016. They have also expressed concern that the interim injunction and the actions of the plaintiff may jeopardize their significant investments in BRR.

[50] Finally, the plaintiff sought this interim injunction on December 16, 2016 to give him time to "obtain alternative financing and to satisfy the terms of the loan agreement". While he claims that he is "actively seeking…replacement financing" there was no evidence when I heard the motion on January 24, 2017 that he had actually made any progress in this regard.

Motion to dismiss or stay the action in respect of BRR

[51] The defendants have brought a motion to dismiss the action of BRR on the ground that it was commenced without proper corporate authority. While the defendants do not dispute the authority of Mark Nastasiuk to bring this action in his personal capacity, they take the position that approval of the BRR directors was required to authorize the commencement of the claim in BRR's name. No such approval or resolution was passed to authorize this action.

[52] BRRs by-laws require both of its directors to be present to constitute a quorum for a directors' meeting. Mark Nastasiuk and Stuart Merritt are the two directors of BRR. It was not open to Mark Nastasiuk to hold a directors' meeting without Merritt.

[53] Merritt has confirmed in his affidavit that he did not authorize this action or the retainer or payment of Rogerson Law Group to act on behalf of BRR.

[54] Clause 1.2 of the Shareholder Agreement of December 22, 2014 requires written consent of both Mark Nastasiuk and Stuart Merritt in order to enter "into any transaction other than in the ordinary course of business referred to above, including entering into any contracts…not in the regular course of routine business".

[55] As indicated above, the Shareholder Agreement specifies that the business of the company is "roasting, packaging and sales of coffee and tea, together with such other business as may be conviently carried on ancillary thereto".

[56] On December 23, 2016 counsel for the Sasos delivered a Rule 15.02 request to the plaintiffs' counsel requesting "a copy of the Board Resolution authorizing the action" failing which the Sasos intended to bring a motion to have the action dismissed pursuant to Rule 15.02(4), which provides:

> If a lawyer has commenced a proceeding without the authority of his or her client, the court may, on motion, stay or dismiss the proceeding and order the lawyer to pay the costs of the proceeding.

[57] There is no evidence that the Board of Directors of BRR authorized counsel to commence this litigation. Indeed, it is clear from the evidence that no such resolution was passed.

[58] The plaintiff Mark Nastasiuk takes the position that as President/Secretary and Treasurer of BRR he has the authority to commence this litigation on behalf of BRR and retain counsel without a Board resolution because conducting this litigation is part of the ordinary course of BRR's business. He also relies on clause 1.2 of the Shareholder Agreement that authorizes him to incur BRR indebtedness or obligation up to $66,000.

[59] Pursuant to rule 15.02 an opposing party is entitled to require disclosure of whether the client authorized the solicitor to commence the proceeding and require disclosure of whether a corporate plaintiff was properly authorized to instruct counsel to commence the proceeding: see *Caribbean Cultural Committee v. Toronto (City)*, [2002] O.J. No. 2022 (S.C.J.) at para. 8 and *Curle et al v Gustafson et al*, 2014 ONSC 5865 (CanLII) at para. 57.

[60] If the law suit is not properly authorized by a resolution passed by the board of directors the action must be stayed until a resolution is properly ratified: *Mega Blow Moulding Ltd. v. Sarantos*, 2001 CanLII 28374 (ON SC) at paras. 2 and 3.

[61] I adopt the following statement form the case of *Kappa v. Chan and Sandink*, 2011 ONSC 1986 (CanLII) (at para. 46) as directly applicable in this case:

> Given the nature of the proposed litigation, the stakes and the internal strife within the Company, the application should not have been commenced unless under the authority of a properly obtained resolution of the board of directors.

[62] This internecine litigation between shareholders cannot be described as the "ordinary course" of BRR's business. While litigation involving simple collection actions or trade debts brought in the ordinary course of business do not require formal authorization (*Superior Material Handling Equipment Inc. v. Gerry Michael Erwin*, 2003 CanLII 15504 at para. 4 (ON SC)), the claims brought in this case do not fall under those categories. In the case of *Rosalee Holdings v. Mariton Holdings*, [2000] O.J. No. 2950, Master Haberman stated (at para. 43):

> Where and action is commenced by a corporation, barring the application of the indoor management rule, counsel is required to demonstrate that he has authority to act on behalf of the corporation when asked to do so. That is usually done by providing a resolution passed by the corporation's board of directors, which authorizes the litigation.

[63] As there has been no such resolution in this case, there is no authority to commence the action in the name of the corporation, and the action in respect of BRR is dismissed, although it may be continued by Mark Nastasiuk in his personal capacity.

[64] When the defendants raised the issue of Mark Nastasiuk's authority to commence this action on behalf of BRR and retain Rogerson Law Group, Mr. Rogerson agreed to keep the retainer he had been paid from BRR funds in trust until Mark Nastasiuk's authority to commence the claim on behalf of BRR and authorize payment from BRR's bank account was resolved. Mark Nastasiuk has sought an order that he be permitted to pay BRR's legal fees from BRR's bank account, that Andrew Rogerson Professional Corporation be permitted to transfer the BRR funds from its trust account to make payment for the plaintiffs' legal fees, or, in the alternative, that Mark Nastasiuk be permitted to represent BRR in lieu of Andrew Rogerson Professional Corporation. Given my conclusions above that Mark Nastasiuk had no authority to commence this action in the name of the corporation and that the action in respect of BRR is dismissed, all of these claims are also dismissed.

[65] The defendants' Notice of Motion also seeks a declaration that there is a conflict of interest between the interests of the plaintiffs Mark Nastasiuk and BRR and that Rogerson Law Group, counsel for both plaintiffs, is in a conflict of interest and that Rogerson Law Group should be removed as lawyers of record for BRR. The defendants indicated that they would adjourn this aspect of the motion. I agree that this portion of the motion should be adjourned to a later date, and can be brought back before the court if necessary.

[66] The Order of December 20, 2016 provided that the signatures of both Mark Nastasiuk and Stuart Merritt shall be required on all cheques and banking transactions and any other financial transactions. The plaintiffs' Notice of Motion seeks an order that the order of December 20, 2016 be varied to provide that Mark Nastasiuk shall be the sole signatory on the BRR bank account. The plaintiff did not serve Merritt with this motion, Merritt found out about it from counsel for the Sasos.

[67] The plaintiff indicated that he wanted to adjourn this aspect of the motion. I will adjourn this portion of the motion to a later date to be brought back before the court if necessary. If the plaintiff chooses to proceed with this aspect of the motion, Stuart Merritt must be given notice in accordance with the Rules of Civil Procedure. I note that Mr. Merritt is not a party to the action as presently constituted, and I leave to the court hearing this aspect of the motion (should it proceed) whether such relief can be claimed against a non-party to the proceeding.

Merritt Application

[68] Four days before this motion was heard Stuart Merritt, Kevin Nastasiuk and Merritt Holdings Ltd. commenced and served an application under s. 241 of the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44 against Mark Nastasiuk, BRR and the Sasos (Court File # 17-19). This Application sought various relief including a declaration that Mark Nastasiuk has exercised his powers in an oppressive and unfairly prejudicial manner. They ask that service of the Notice of Application be abridged due to the urgency of the situation.

[69] The applicants' request for relief includes a request for interim orders to ensure the ongoing viability and proper management of BRR, including orders relating to who has control of the day-to-day management of BRR and who are the signing officers. They also seek an order that Mark Nastasiuk comply with the terms of the September 1, 2016 loan agreement and provide an accounting of any and all funds received by BRR since December 7, 2016.

[70] At the commencement of these proceedings, Mr. Rogerson, who acted as counsel for Mark Nastasiuk and BRR for the purposes of the interlocutory injunction motion, advised the court that due to the uncertainty of his retainer he could not represent these parties with respect to the s. 241 application, and asked to be excused when this part of the case was argued. He also advised that due to the late service of the application record, he was not, in any event, in a position to respond to the application. I permitted Mr. Rogerson to be excused when the s. 241 application was argued.

[71] Mr. Nastasiuk took the somewhat ironic position that the applicants' request for an interim order should be adjourned to provide him with a fair opportunity to retain counsel and file a response.

[72] I reserved my decision on the Notice of Application.

[73] Given the fact that I have just dismissed Mr. Nastasiuk's motion to extend the injunction contained in the Order of December 16, 2016 (as extended on December 20, 2016), I am hopeful that the parties can negotiate some way to resolve their outstanding dispute without bankrupting the company or taking further precipitous action. Accordingly, I am not prepared to decide the complex issues and factual disputes raised in the Notice of Application on an urgent basis without giving Mr. Nastasiuk an opportunity to retain counsel and file a response.

[74] That being said, the applicants are entitled to an accounting of all funds received on behalf of or payments made by BRR since December 7, 2016 regardless of the outcome of the application, and I will make the order requested by the applicants with regard to such an accounting and ancillary information.

[75] The balance of the Application is adjourned to a day to be fixed.

Conclusion

[76] This Court orders:

[77] With respect to Court File # CV-16-1856

i. Paragraph 1 of the Order of Quinlan J. dated December 16, 2016 (interim injunction) is set aside as of January 24, 2017.

ii. Paragraphs 1, 2 and 3 of the Order of DiTomaso J. dated December 20, 2016 are continued.

iii. The action in respect of the plaintiff Beaver Rock Roastery Inc. is dismissed, although it may be continued by Mark Nastasiuk in his personal capacity.

iv. The plaintiff Mark Nastasiuk's claim to commence the claim on behalf of BRR and authorize payment of legal fees from BRR's bank account is dismissed.

v. The plaintiff Mark Nastasiuk's claim to permit Andrew Rogerson Professional Corporation to transfer the BRR funds from its trust account to make payment for the plaintiffs' legal fees, or, in the alternative, that Mark Nastasiuk be permitted to represent BRR in lieu of Andrew Rogerson Professional Corporation is dismissed.

vi. All other relief requested by the plaintiff or respondent on their motion and cross-motion is adjourned, to be scheduled by either party on ten days notice.

[78] With respect to Court File # CV-17-0119

i. The respondent Mr. Nastasiuk is to prepare and provide to the other parties by February 17, 2017:

(a) an accounting of any and all funds received on behalf of or payments made by Beaver Rock Roastery Inc. since December 7, 2016;

(b) an accounting of purchase orders issued, contracts entered into as well as existing clients contacted or approached by BRR since December 7, 2016;

(c) details of any bank accounts, including in whose name the accounts are held, into which payments directed to BRR have been deposited;

(d) a list of BRR payables in order of urgency and by due date;

(e) a list of outstanding orders and when and how they are to be filled; and

(f) the details of any proposed additional financing for BRR, including all documents relating thereto.

ii. The balance of the application is adjourned on a day to be fixed.

[79] If the parties are unable to settle the costs of this motion the defendants Daniel Saso and Rosalind Saso and the applicants Merritt Holdings Ltd., Stuart Merritt and Kevin Nastasiuk may file submissions within 20 days of the release of these reasons. The defendants and applicants submissions shall each be limited to 3 pages plus cost outline and any offers to settle. The plaintiff Mark Nastasiuk may file reply submissions within 15 days thereafter. The plaintiff's submissions are limited to 4 pages plus cost outline and any offers to settle.

Justice R.E. Charney

Released: February 1, 2017

CITATION: Beaver Rock Roastery Inc. v. Saso, 2017 ONSC 740

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Beaver Rock Roastery Inc. and Mark Nastasiuk

Plaintiffs

– and –

Daniel M. Saso, Rosalind M. Saso, and The Canadian Imperial Bank of Commerce

Defendants

AND BETWEEN:

Merritt Holdings Ltd., Stuart Merritt and Kevin Nastasiuk

Applicants

– and –

Mark Nastasiuk, Beaver Rock Roastery Inc., Daniel M. Saso and Rosalind M. Saso

Respondents

REASONS FOR DECISION

Justice R.E. Charney

Released: February 1, 2017

TAB 4

Court of King's Bench of Alberta

Citation: Oasis Filter International Ltd v Manz, 2025 ABKB 565

Date: 20250929
Docket: 1501 03082
Registry: Calgary

Between:

Oasis Filter International Ltd. and Oasis Water Filter Canada Ltd.

Plaintiffs

- and -

David Harold Manz and Manz Engineering Ltd., ISL Engineering & Land Services Ltd. and Jos Le Roux

Defendants

Reasons for Judgment
of the
Honourable Justice B.B. Johnston

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[1] The Plaintiff Oasis Filter International Ltd. ("Oasis") claims the Defendants Dr. David Manz ("Manz") and Manz Engineering Ltd. ("MEL") (collectively the "Defendants"), infringed the Canadian patent owned by or assigned to Oasis. Oasis and Oasis Water Filter Canada Ltd. ("Oasis Water") also claim that Manz breached his fiduciary duties owed them by diverting business and corporate opportunities away from them and to the benefit of Manz and MEL.

[2] Manz and MEL dispute the claims. They argue Oasis had no authority to commence the action. They assert that the Oasis patent is invalid and that the Plaintiffs have failed to prove any infringement of the patent. Finally, they assert Manz did not breach his fiduciary obligations.

[3] The Plaintiffs called Mr. Albert Tagoe and Mr. Fred Richards (“Richards”) as witnesses. Only Dr. Manz testified on behalf of the Defendants.

[4] An extensive Agreed Statement of Facts was entered.

[5] The Plaintiffs reached a settlement with ISL Engineering & Land Services Ltd. (“ISL”) and Jos Le Roux (“Le Roux”) prior to the start of trial. ISL and Le Roux therefore did not participate in the trial.

Background

[6] Manz was one of the inventors of a water filtration technology known as a low operating head polishing sand filter (“LHPF”). Manz had been consulting in water treatment since 1975 and was involved with the technology for years prior to his involvement with the Plaintiff companies.

[7] MEL was incorporated in 2006. Manz is the sole director and voting shareholder. MEL provides engineering consulting services.

[8] Manz’ efforts to commercialize the technology eventually led him to become involved with Richards and the two of them formed a company called Oasis Filter Ltd. (“Oasis Filter”). Manz and Richards were the only shareholders of Oasis Filter each holding 50%. Oasis Filter through its patent lawyers Oyen Wiggs filed a US patent application on January 3, 2007 to patent the LHPF. A Canadian patent application was filed on June 1, 2007. The Canadian patent was issued on May 15, 2012. The US patent was never issued.

[9] Manz and Richards entered into a Shareholders Agreement for Oasis Filter (“Oasis Filter USA”). It provided that Richards was to be responsible for “funding as required to obtain the patent” and Manz was to provide “technical support to enable the patent process to proceed forward.” Also relevant was that the parties agreed that “[d]ecisions shall require unanimous agreement and be in writing.”

[10] Manz and Oasis Filter subsequently assigned the technology and patent to Oasis. Oasis Filter is therefore not a party to this litigation.

[11] As with Oasis Filter, Manz and Richards were the only shareholders of Oasis with each holding 50% of the shares. Manz and Richards also entered into a Shareholder Agreement for Oasis (“Oasis USA”). Consistent with the Oasis Filter USA, the Oasis USA allocated certain responsibilities to the parties and stated that “[d]ecisions shall require unanimous agreement of the shareholders in writing.”

[12] Oasis had three directors being Manz, Richards and Heesung Kim (“Kim”). Manz resigned as a director of Oasis effective March 15, 2013.

[13] In March 2010, the directors of Oasis resolved to raise funds through the creation of a limited partnership. Oasis Water was incorporated to be the general partner of the limited partnership. Oasis Water had three directors being Manz, Richards and Gordon Ragan (“Ragan”). Oasis Water raised $317,500. The funds raised were all spent on Oasis operations whether towards the repayment of funds previously invested or payment of current operational costs including payment for Manz’ services.

[14] For part of 2010 and to the end of 2011, Manz was paid $7500 a month for the services he provided to Oasis. The payments ceased at the end of 2011.

[15] The parties continued their efforts to commercialize the LHPF in 2012 and to generate interest in and business for Oasis.

[16] The parties agree that a meeting occurred between Manz and Richards on November 18, 2012, but disagree on details of that meeting. The evidence from both sides confirms that the meeting was prompted by the poor financial position of the business and concerns identified by Manz. Manz suggested that what occurred at the meeting was that MEL would continue to provide consulting engineering services outside of Oasis; that Manz would try and build a track record for Oasis; that Richards would refocus his career on real estate because he was effectively out of the water filter business at that point; and Manz would leave Oasis’ office to allow Richards to rent the space. Richards’ evidence was that the meeting was to discuss options for the future of Oasis and that Manz offered to move out of the premises to pursue consulting work including for the benefit of Oasis; and that Manz offered to split the revenues on a project known as the Kyle project on a 50/50 basis with Oasis. Richards took notes of the meeting, but the notes do not reflect the 50/50 deal.

[17] The relationship between Richards and Manz deteriorated after the November 2012 meeting and resulted in Manz pursuing opportunities for himself and MEL.

[18] Manz’ departure and pursuit of business ventures outside of Oasis and Oasis Water prompted Richards to initiate the current lawsuit in the names of Oasis and Oasis Water against Manz and MEL.

[19] The issues in this action are set out in the Amended Amended Statement of Claim filed on July 27, 2020 and the Amended Amended Statement of Defence filed on August 21, 2020.

Issues

[20] The issues include:

1) Did the Plaintiffs have the corporate authority to commence the litigation?

2) Has Manz breached his fiduciary duties?

3) Is MEL co-extensively liable for any breaches by Manz?

4) Is the patent valid?

5) Has there been a breach of patent by the Defendants?

6) What damages, if any, are appropriate?

Analysis

Authority to Commence Litigation

[21] The Defendants argue that Richards did not have the authority to commence the action in the name of the Plaintiff corporations. Their argument can be summarized as follows:

1. Richards and Manz were equal shareholders in Oasis and Oasis Water and as such, neither enjoys a majority sufficient to control the entity and therefore neither shareholder can authorize the action to be brought;
2. Richards and Manz entered into the Oasis USA that required decisions to be made only by "unanimous agreement of the shareholders in writing" and as Manz' agreement was never sought nor received, the action was brought without Manz' authority and in contravention of the Oasis USA;
3. Richard's remedy for the alleged wrongdoing by Manz was to be brought either as an action for oppression or through a derivative action under the *Business Corporations Act*, RSA 2000, c B-9 ("*ABCA*"); and
4. It is too late for Richards to seek approval from the Court to bring this action as the limitation period has expired.

[22] The Plaintiffs concede that there was never any formal directors' resolution to commence the action from either of the Plaintiff corporations. Having the directors resolve to commence the action simply "didn't occur" to Richards. However, the Plaintiffs argue that the action was commenced with authority in that:

1. Manz' agreement was not required as it was within the implied authority of Oasis's President;
2. Manz was no longer a director of Oasis at the time the action was commenced, and the action was within the authority of the remaining Oasis directors, who agreed to bring the action even if they did not pass a formal resolution to that effect;
3. Manz would be conflicted out of any decision relating to commencing the litigation, so his consent was not necessary;
4. With respect to the Oasis USA, Manz' resignation was equivalent to a written decision to turn over the day-to-day control over operations to Richards and thereby Richards had Manz' consent to bring the action;
5. The Oasis USA is ambiguous and should be limited to require Manz' consent only for the "affairs of the corporation" (i.e. organization of the corporation and its corporate governance) and not the "business of the corporation" (i.e. enforcing its intellectual property rights); and
6. The failure to get the authority was a procedural irregularity that can be addressed by the Court by granting leave to commence the action "*nunc pro tunc*."

[23] Neither side has provided any binding authority for their positions.

[24] The Defendants rely on cases from British Columbia and Ontario that address the issue of a director's authority to commence an action absent a board resolution.

[25] In ***Beaver Rock Roastery Inc. v Saso***, 2017 ONSC 740, the Court dealt with an action related to damages for breach of contract and interference with economic relations. The Court found that there was no evidence that the board of directors authorized counsel to commence litigation. At para 60, the Court stated that if a "lawsuit is not properly authorized by a resolution

passed by the board of directors the action must be stayed until a resolution is properly ratified." The Court found that litigation brought in the ordinary course of business, such as collection actions or trade debts, does not need formal authorization. However, the internal litigation between shareholders could not be seen as being in the ordinary course of the company's business: ***Beaver Rock*** at para 62.

[26] In ***Roselee Holdings v Marlton Holdings***, [2000] OJ No 2950 (Sup Ct J), a motion to dismiss or stay the action was brought based on the purported lack of authorization to commence proceedings. A family had set up a series of corporate entities to manage their assets, including property. The litigation was triggered by debts between the parties as well as claims of misappropriation of funds. Plaintiff's counsel argued that the action was one of "simple collection" which had been brought in the ordinary course of business and that the "indoor management rule" under the *Business Corporations Act*, R.S.O. 1990 c. B.16, s.19 would apply (no formal authorization would be necessary). The Court found that the *BCA* rule could not apply because it was more than just a simple collection action including allegations of fraud. The Court concluded at para 42:

> In my view, the law appears to be clear in this area. Where an action is commenced by a corporation, barring the application of the indoor management rule, counsel is required to demonstrate that he has authority to act on behalf of the corporation when asked to do so. That is usually done by providing a resolution passed by the corporation's board of directors, which authorizes the litigation.

[27] The action was stayed pending the delivery of a proper resolution of the directors authorizing Roselee to continue the action.

[28] In ***SaNOtize Research and Development Corp. v Miller***, 2024 BCSC 741, the Defendants sought to strike a claim commenced by a shareholder on behalf of SaNOtize as a common law derivative action. The action sought the recovery of debts and damages for an alleged breach of fiduciary duties. The Court held that a shareholder is not entitled to sue in the name of the company unless authorized by the company. Because the company had been incorporated under the *BCA*, the *BCA* required the company to seek leave before bringing a derivative action: ***SaNOtize*** at paras 11-14.

[29] ***550934 British Columbia Ltd. v A.R. Thomson Group***, 2011 BCSC 279, involved an application to dismiss or stay an action because the board of directors of the Plaintiff companies did not authorize the action. A single director commenced the action without seeking the consent of the other directors. Like the arguments in this case, the director argued that he was entitled to start the action because the other directors were in a conflict of interest and not eligible to vote on the matter. The Court found that the directors were divided on what would be in the best interests of the company and that all directors likely had personal interests that could conflict with the company interests: ***550934*** at para 8. The issues included improper deprivation of interest in the partnership, not receiving profits, and oppression. The Court concluded that leave of the Court to commence a derivative action was required: ***550934*** at para 13. The Court adopted the reasoning from Markus Koehnen, Oppression and Related Remedies (Toronto: Thomson Carswell, 2004) at p.454:

> The better reason for requiring leave is that the plaintiff is assuming control over corporate decision-making and is committing corporate resources to the action.

> The decision to bring an action requires corporate actors to balance risks and apply business judgment. The strength of any claim must be balanced against the financial and management resources required to pursue the lawsuit and against other business risks that the lawsuit might entail. A corporation should not be deprived of this decision-making ability without some safeguard.

[30] The Court stayed the action until one of the directors obtained an order giving him leave to continue the action as a derivative action: ***550934*** at para 13.

[31] The Plaintiffs suggest that the decision of ***Bajwa Farms Ltd. v Bajwa***, 2022 BCSC 1056 is persuasive. ***Bajwa Farms***, dealt with a family business where one party was prohibited from attending their property due to a bail condition. Ms. Bajwa was given authority to operate the company in the ordinary course of its business under a consent order. The Court provided guidance on when actions can be brought before the Courts in the name of a corporation in British Columbia. At para 24 the Court outlined that:

> There are three ways in which litigation can be commenced in the name of a company that are relevant to the applications before me: (1) an individual may be authorized to do so by the Board of Directors or the articles of the company; (2) an individual may seek and obtain leave of the court to commence a derivative action in the name of the company; and (3) a president or the person responsible for the day-to-day operations of the company may have the implied authority to commence litigation in certain circumstances without the need for authorization.

[32] The Court made clear that the authority to commence litigation is not unlimited. Litigation can be commenced if it is related to the company's businesses or it is "specifically targeted at addressing an emergent situation." The implied authority would not include commencing litigation related to the "affairs of the company": ***Bajwa Farms*** at para 54. The Court found that Ms. Bajwa had authority to commence litigation as the action was brought in relation to the "business of the company, as opposed to its affairs." While the Court noted it was unusual that a company commenced litigation against one of its directors, but that in and of itself did not mean that the litigation related to the affairs of the company as opposed to its business: ***Bajwa Farms*** at para 68.

[33] The Court further found that "[t]he preservation and protection of Bajwa Farms' business extends to pursuing a claim against a person who owes a fiduciary duty to the company and allegedly breaches it, whether that person is the president or not": ***Bajwa Farms*** at para 69.

[34] From the authorities discussed above, there are three different scenarios where an individual may have or obtain the authority to commence litigation on behalf of a corporation:

1. An individual may be authorized by the board of directors, by the articles of the corporation, its bylaws or a unanimous shareholders agreement to bring an action;

2. An individual responsible for the day-to-day operations of the corporation may have implied authority to commence litigation in certain circumstances without the need for express board authorization; or

3. An individual may seek and obtain leave of the Court to commence a derivative action in the name of the corporation.

[35] The facts relevant to the issue of the authority to bring the action in this case, are not really in dispute. Richards and Manz came together to pursue a business opportunity as equal participants. They used corporations in pursuit of the business opportunity. Their role as equals was reflected in that each received 50% of the shares of the corporate entities. It was also reflected in the Oasis USA. Specifically, the Oasis USA provided at paragraph 7 that:

> David Manz and Fred Richards are each 50% shareholders in Oasis Filter International Ltd. Decisions shall require unanimous agreement of the shareholders in writing.

[36] There is nothing in the Oasis USA that defines "decisions" nor is there anything that confines the types of matters that will require unanimous agreement.

[37] The *ABCA* recognizes the rights of shareholders to enter into agreements that will have an impact on the operations and affairs of the corporation. Relevant portions of Section 146 of the *ABCA* state:

> **Unanimous shareholder agreement**
>
> 146(1) A unanimous shareholder agreement may provide for any or all of the following:
>
> (a) the regulation of the rights and liabilities of the shareholders, as shareholders, among themselves or between themselves and any other party to the agreement;
>
> (b) the regulation of the election of directors;
>
> (c) the management of the business and affairs of the corporation, including the restriction or abrogation, in whole or in part, of the powers of the directors;
>
> (d) any other matter that may be contained in a unanimous shareholder agreement pursuant to any other provision of this Act.
>
> ...
>
> (7) A shareholder who is a party or is deemed to be a party to a unanimous shareholder agreement has all the rights, powers and duties and incurs all the liabilities, subject to any defences available to a director of the corporation, of a director of the corporation to which the agreement relates to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the corporation, and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 119 or any other enactment, to the same extent.
>
> (8) A unanimous shareholder agreement may not be amended without the written consent of all those who are shareholders at the effective date of the amendment.

> (9) A unanimous shareholder agreement may exclude the application to the agreement of all but not part of this section.
>
> (10) Nothing in this section prevents shareholders from fettering their discretion when exercising the powers of directors under a unanimous shareholder agreement.

[38] Directors' obligations are also articulated in the *ABCA*, but the *ABCA* makes clear that unanimous shareholders agreements are paramount. For example, section 101(1) of the *ABCA* states:

> 101(1) Subject **to any unanimous shareholder agreement**, the directors shall manage or supervise the management of the business and affairs of a corporation.

[39] Section 102(1) then provides:

> 102(1) Unless the articles, bylaws or **a unanimous shareholder agreement otherwise provide**, the directors may, by resolution, make, amend or repeal any bylaws that regulate the business or affairs of the corporation.

[40] Section 103 likewise notes:

> 103(1) Unless the articles or bylaws of, or **a unanimous shareholder agreement** relating to, a corporation **otherwise provide**, the directors of a corporation may, without authorization of the shareholders.

[41] Section 109 states:

> 109(1) Subject **to** section 107(g) or **a unanimous shareholder agreement**, the shareholders of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.

[42] Section 120 of the *ABCA* deals with disclosure requirements by directors and officers in relation to contracts with the corporation. This section is expressly subject any unanimous shareholders agreement: Section 120(10) *ABCA*.

[43] Section 121further provides:

> 121 **Subject to** the articles, the bylaws or **any unanimous shareholder agreement**,
>
> (a) the directors may designate the offices of the corporation, appoint as officers individuals of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in section 115(3),
>
> (b) a director may be appointed to any office of the corporation, and
>
> (c) 2 or more offices of the corporation may be held by the same person.

[44] The duty of care of directors and officers is addressed in section 122:

> 122(1) Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties to the corporation shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation, and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) **Every director and officer of a corporation shall comply with this Act, the regulations, articles, bylaws and any unanimous shareholder agreement.**
>
> (3) Subject to section 146(7), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.
>
> (4) In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if the director is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.
>
> (Emphasis added).

[45] In this case, there is no dispute that the action was filed without the agreement of Manz.

[46] Returning to the legal principles enumerated regarding circumstance where an individual will have authority to bring an action on behalf of a corporation the conclusion seems obvious. This action was commenced without authority.

Express Authority by Board, Articles, Bylaws or USA

[47] Richards did not have the authority of the Board of either Plaintiff corporations to commence the litigation. This is something Richards admitted "didn't occur" to him. It does not assist Richards that he and his fellow directors (whether that be Kim in relation to Oasis or Ragan in relation to Oasis Water) impliedly authorized the litigation.

[48] There is no evidence that Kim authorized the action be brought on behalf of Oasis. Richards testified that he had discussions with both Kim and Ragan but there was no evidence adduced that they resolved to authorize the action be commenced. Further, while it is true that Ragan was both a director of Oasis Water and counsel that filed the action, it does not follow that there was no requirement for a Board decision to be made to authorize the lawsuit. While Manz resigned as director from Oasis, he did not resign from his role with Oasis Water. Even if he was in a conflict and not able to vote on whether an action ought to be brought, he could still participate in the discussion and express his concerns about whether the action would be in the best interests of the corporation before the other directors decided.

[49] Although the Plaintiffs admit that they did not seek or obtain the approval from the Board of directors, the Plaintiffs ask the Court to surmise that the filing of the claim had the required

support of the directors empowered to make such a decision. Had the directors put their minds to the issue of authority then they would have had to also address the impact that the Oasis USA had on their decision. The Court cannot ignore the fact that this did not happen. What is clear from the record is that the Board of Directors in both the case of Oasis and Oasis Water did not decide to bring the action. Rather, the decision was made by Richards.

[50] Further, the articles and bylaws of Oasis and Oasis Water do not confer authority upon Richards to bring the action without the authority of the Board.

[51] Moreover, the Oasis USA presented a real and obvious barrier to Richards in acting unilaterally and without Manz' agreement. Given the simplistic nature of the Oasis USA and the fact that there are only two shareholders, each holding a 50% interest, a reasonable interpretation of the Oasis USA would be that both shareholders had to approve any decision relating to the business of Oasis. In effect, each of Manz and Richards had a veto over every decision to be made moving forward.

[52] I do not agree with the Plaintiffs that the Oasis USA is ambiguous and that it ought to be interpreted narrowly to only require unanimous agreement for decisions regarding the affairs of the corporation versus business operations. Such an interpretation goes against the plain wording of the Oasis USA and a reasonable interpretation having regard to the context during which it was signed. The Oasis USA was signed when the parties were still in the early stages of building a business. Not knowing what the future would bring, it is reasonable that each shareholder would want to have at least equal control over the direction of the corporation. This is supported by the allocation of 50% shares to each shareholder (such that neither had a majority) and by the Oasis USA requirement that decisions required written approval from both shareholders.

[53] While the Plaintiffs argue that there are numerous instances where one party acted unilaterally without written consent, this does not assist in determining the proper interpretation of the Oasis USA. Not strictly complying with the express terms of the Oasis USA in the past does not render the terms inoperative for future decisions absent arguments of waiver or estoppel, which have not been advanced.

Implied Authority

[54] With respect to the Plaintiffs' argument that commencing the action was within the implied authority of the Richards as President, I disagree. The Defendants correctly point out that this action is not an ordinary collection or routine claim that a corporation's President would have authority to initiate. The action effectively asserts that the Plaintiffs' business and corporate opportunities were misappropriated, and its intellectual property infringed by a 50% shareholder. With minor exceptions, the Plaintiffs were largely out of business with the departure of Manz and this lawsuit was effectively the only business being conducted by the Plaintiffs thereafter. Given the significance of what happened, one could properly expect that the lawsuit would need to be considered and approved by the Plaintiffs' directors. This did not occur.

[55] In applying the authorities reviewed above to the facts of this case, I find the decision to commence the action was more related to the affairs of the companies rather than their business. As such, it would not be within the implied authority of Richards to commence the action without Board approval.

[56] The Oasis USA also serves to distinguish this case from other authorities cited. A fair reading of the Oasis USA dispels the notion that Richards had the implied authority to do anything on behalf of at least Oasis without the written agreement of Manz. It is reasonable that both shareholders of Oasis would want an equal right to control the business and affairs of the corporation. The shareholders did not need to enter into a shareholder agreement. They could have simply relied upon their equal ownership of shares and their roles as directors to give them control over the business. That, however, would leave them with less control and subject to the terms set out in the Articles and Bylaws of the corporation as far as authority, voting and majority control. The parties went to the effort of entering into a shareholder's agreement that provided each of them with more control. The Oasis USA gives each shareholder more control over the business. Manz did not authorize Oasis to bring this action, and I find the action is a "decision" requiring "unanimous agreement of the shareholders in writing." Therefore, the filing of the action by Oasis is contrary to the requirements of the Oasis USA.

[57] I also do not accept the Plaintiffs' argument that Manz' resignation from Oasis amounted to his written agreement to turn over the day-to-day operations to Richards which in turn impliedly authorized Richards to commence this action. Manz' role as director (which he resigned) is to be distinguished from his role as shareholder (which he never relinquished). The protection afforded Manz under the Oasis USA was given to him as a 50% shareholder. To suggest that resigning as a director of Oasis somehow impacted the protections bestowed upon him as shareholder and under the Oasis USA is not reasonable. The roles, rights, and responsibilities of directors versus shareholders ought to be viewed separately.

Authority to Commence Derivative Action

[58] In this case, it was open to Richards to bring an oppression action or to seek leave of the Court to commence a derivative action under the *ABCA*.

[59] Notwithstanding the restrictions on decisions imposed by the Oasis USA and the fact that Richards did not hold the majority of the shares in either Oasis or Oasis Water, Richards was not without recourse.

[60] In Alberta, a complainant may seek leave to commence a derivative action under section 240(1) of the *ABCA* in the name of and on behalf of a corporation. However, no leave may be granted unless the Court is satisfied that the complainant has given reasonable notice to the directors of the corporation of their intention to apply to the Court; the complainant is acting in good faith, and it appears to be in the interests of the corporation.

[61] Section 241 empowers the Court to make any order it deems fit including providing authorization and directions for the conduct of the action, and orders relating to payment of legal fees.

[62] Section 240(2)(a) of the *ABCA* requires that notice be given only to directors of the corporation. If the directors do not bring the action, then the Court may provide the authority to the complainant to do so. Given the terms of the Oasis USA, the directors of Oasis may have been prevented from bringing the action without the approval of Manz (which presumably Manz would not give). Richards as the other shareholder could then seek the Court's permission to file the action on behalf of the corporation provided, he could show that he was acting in good faith, and it appeared in the best interests of the corporation to bring the action.

[63] In this case, the Richards did not seek leave to commence a derivative action in the name of the Plaintiffs. The Plaintiffs also failed to have the action ratified once they were put on notice by the Defendants. The Plaintiffs likewise did not seek to have their actions ratified at trial. The Defendants argue they raised the issue of lack of authority to commence the litigation in 2017. I note the Amended Amended Statement of Defence filed in 2020 specifically plead that Oasis was not a proper party and that the Plaintiffs had no authority to commence the action. The Plaintiffs were on notice since at least that time. They were also put on notice again at the commencement of the trial.

[64] The Plaintiffs argue that this Court could issue an order validating the authority to bring the action *nunc pro tunc*. They cite ***291617 Alberta Ltd. v Kretschmer***, [1994] AJ No. 501 in support of the proposition that a decision can be made to have the action ratified by corporate resolution after the commencement of trial. This case is distinguishable in that the decision to ratify came during the trial and there was no limitation issue raised.

[65] In ***Resta v Thornton***, 2023 ABKB 498, the Court set out a two-part test for determining whether to grant an order *nunc pro tunc*. First, the party must seek leave prior to the expiry of the limitation period. Second, the Court should weigh the following factors:

- whether the opposing party will be prejudiced by the order;
- whether the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;
- whether the irregularity was not intentional;
- whether the order will effectively achieve the relief sought or cure the irregularity;
- whether the delay has been caused by an act of the court; and,
- whether the order would facilitate access to justice.

[66] Applying the above factors to this case, I find that a *nunc pro tunc* order is not appropriate. Significantly, the issue of Richards' authority to bring the lawsuit in the name of the Plaintiff corporations was raised by the Defendants long ago, including in the pleadings. It was also raised at the start of trial. Yet, the Plaintiffs did not take any steps to address the issue. They now ask the Court to step in and rectify the matter after the trial has closed. This is prejudicial to the Defendants. It is hard to not characterize the omission as intentional when it was made an issue well in advance of trial. The remaining factors likewise do not support granting the *nunc pro tunc* relief.

[67] In any event, the Defendants are past the limitation period. Leave to bring a derivative action is only available if it is sought prior to the expiry of the limitation period: ***Canadian Imperial Bank of Commerce v. Green***, 2015 SCC 60 at para 93.

[68] In short, leave to commence a derivative action has never been sought. In any event, the limitation period has long since expired. This prevents the Court from granting an order *nunc pro tunc* and I decline to do so.

[69] There is therefore no need to address the other issues raised.

Conclusion

[70] The Plaintiffs' action is dismissed.

[71] The parties may speak to costs within 30 days of this decision.

Heard on the 18th, 19th, 20th, 21st, 22nd, 25th, 26th, 27th and 28th days of November, the 2nd, 3rd, 4th, 5th days of December 2024 and the 5th of February, 2025 with written submission the 3rd, 24th, and 31st days of January, 2025.
Dated at the City of Calgary, Alberta this 29th day of September 2025.

B.B. Johnston
J.C.K.B.A.

Appearances:

Matthew X. James
for the Plaintiffs Oasis Filter International Ltd. and Oasis Water Filter Canada Ltd.

Ben Frenken & Alex McKay
for the Defendants David Harold Manz and Manz Engineering Ltd.

TAB 5

COURT FILE NUMBER: 2401-15969
COURT: COURT OF KING'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 ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

Transcript of Oral Questioning of
ALLAN WHITEFORD LIND
(On affidavits sworn July 25, August 29, September 4, 2025)
Held via videoconferencing
September 4, 2025

ALL PARTIES APPEARING VIA VIDEOCONFERENCING

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Q. And you go on in that paragraph to state that despite not being a director of any of the additional project entities, you are entitled to swear an affidavit on their behalf; is that correct?
A. That's correct.
Q. Who granted you that authority, sir?
A. The facilitator.
Q. And when you speak of "the facilitator" with respect to Meaford, is that Meaford A2A Developments Inc.?
A. That is Dirk Foo.
Q. That is Dirk Foo. And is your answer the same, sir, with respect to Lake Huron Shores and Wingham Creek?
A. No.
Q. Okay. Can you please elaborate.
A. Yes. Lake Huron Shores, permission was given by Mr. Dirk Foo. However, Wingham Creek, there is some dispute as to whether there is a facilitator. And Mr. Bryan Friedman of Friedman Law advised me in an email sometime ago that he believed there was no facilitator in place at the moment. So, I'm -- I'm speaking on behalf of Mr. Foo, although, I'm not certain that I'm allowed to do so. But if -- if -- sorry if that's confusing, but it's a -- it's a strange situation, Mr. Oliver. I'll do my -- I'll do my best to assist you.

Q. Thank you.
MR. JUKES: And -- sorry, Jeff -- and I'll leave it to you whether you want to redirect the witness on this, but just for clarity, you're referring to the companies themselves, not necessarily the projects; is that what the question is geared at?
MR. OLIVER: Yes.
Q. And just to confirm, sir, when you're speaking about -- or -- sorry -- when you gave your answer with respect to those entities -- or with respect to those projects, you were referencing Meaford A2A Developments Inc., Lake Huron Shores A2A Developments Inc., and Wingham Creek A2A Developments Inc., correct?
A. Yes, I was.
Q. Thank you. I believe in your affidavit, as well, sir, in paragraph 1, you say that you are a senior consultant to each of those three entities too?
A. Yes.
Q. Are you engaged under consulting agreements with those entities?
A. No.
Q. So, why do you say you're a consultant then?
A. Mr. Foo consults me in -- from time to time on those matters, and I was -- I was involved with the preparation of the documents for the co-owners and the

transfer of the lands to the co-owners from the staff of those projects. So, I'm familiar, from that point of view, about how the genesis of those projects and those entities evolved.

Q. So --

A. Is that a problem for you, Mr. Oliver?

Q. I did want to ask you is it your understanding Mr. Foo is authorized to engage you on behalf of those entities?

A. Well, he's acting as facilitator, so I believe so. But if -- if that's an issue, then I'm quite willing to step aside, Mr. Oliver.

Q. Thank you.

A. But I'll leave -- I'll leave this up to you to direct me with Mr. Jukes.

Q. Thank you. So, you state in paragraph 2 of your affidavit you've been involved with the planning of the Meaford project from day one and have remained involved in all key decision-making; is that correct?

A. I wouldn't say all key decisions. I would say most key decisions.

Q. Okay. So, when your affidavit says in paragraph 2, I have -- excuse me -- it says in the second sentence I was involved in the planning of the Meaford project from day one and I have remained involved throughout in

Q. So, you state, sir, in paragraph 31 of your affidavit that Meaford A2A Developments Inc. is indebted to other A2A companies by way of noninterest bearing loans advanced by other A2A entities; is that correct?
A. Yes.
Q. Without access to the accounting records, sir, how do you know that?
A. I know that they were -- they -- Meaford was lent funds because they had run out of concept planning funds, and so they were lent by an -- an A2A company in Asia to keep them going.
Q. And how did you come to learn of that?
A. I just was -- I heard about it, from time to time, while I was in the office in Singapore.
Q. Okay. And who in the office in Singapore told you that?
A. Mr. Foo.
Q. Okay. So, did anybody else tell you that?
A. No.
Q. So, the sole source of your knowledge --
A. I reported to Mr. Foo. I reported to Mr. Foo.
Q. Okay. So, the sole source of your knowledge about the indebtedness referenced at paragraph 31 of your affidavit is Mr. Foo?
A. Yes. Yes.

Q. Can you advise which A2A entities advanced funds to Meaford A2A Developments Inc.?
A. Not truthfully.
Q. And that's because Mr. Foo hasn't told you that information?
A. He just told me that he had to send funds. He didn't particularly expand on that.
Q. And what is the amount of the intercompany loans that you reference in paragraph 31 of your affidavit?
A. I -- I've no total in -- I don't know of any total.
Q. So, sir, earlier in your evidence, you advised that you do not have access to any accounting records and you weren't sure if Mr. Ambrose or Mr. Attrux did; is that accurate?
A. Yes.
Q. So, I'm going to put a request on the record that inquiries be made to determine the particulars of the noninterest bearing loans referenced in paragraph 31 of the July 25th affidavit, including the parties who advanced funds to Meaford A2A Developments Inc., the amounts of the funds, the dates of the advances, and any documents in support of the terms of those advances.
MR. JUKES: We'll make those inquiries.
MR. OLIVER: Thank you.

statements for Meaford A2A Developments
were produced and to produce the last
two years of financial statements for
Meaford A2A Developments Inc. to the
extent that they exist
Q. MR. OLIVER: At paragraph 32 of your affidavit, sir, you state that the intercompany loans are not repayable until after the Meaford lands are sold, correct?
A. Yes.
Q. And I take it the sole source of that knowledge was Mr. Foo giving that information to you?
A. Yes.
Q. And you're not able to provide any documentation with respect to the interest fee loans evidencing any maturity date or anything of that nature?
A. Sorry, Mr. Oliver, I don't have that --
Q. Thank you.
A. -- information.
Q. In paragraph 34 of your affidavit, sir, you discuss property taxes with respect to Meaford. Has Meaford A2A Developments Inc. ever advised the co-owners the property taxes were no longer being paid out of the concept planning fund?
A. I don't know. Sorry.

to Meaford. And if I misstated that, please correct me.
A. Yeah. The company in Asia would have lent the funds to the co-owners, and the co-owners -- the co-owners as -- as spelled out in the deed of covenant is Meaford A2A Developments Inc., so they're actually, in our mind, one and the same, Mr. Oliver. So, I -- I can understand your confusion in -- in -- in what I'm saying.
Q. So, which Asia entity lent money to the Meaford project?
A. Well, it -- it may have been any of the A2A companies in Asia. There were -- there was a company in -- I would think it would be the company in Singapore. I have no evidence of that, but I would -- I would think it would be the company in Singapore.
Q. And, sir, is the basis for your knowledge in paragraph 39 what Mr. Foo told you?
A. It would be my -- it's -- I think that paragraph 39 is actually -- as you say, it's -- it's confusing because Mr. Foo told me that the funds were lent to the co-owners, and the co-owners are Meaford A2A Developments Inc. I -- I -- I don't think I'm being very clear, but -- because I --
Q. Because you're not Mr. Foo?

A. -- I'm trying to be clear. I'm trying to be clear, but...
Q. So --
A. So, a statement by Mr. Foo would be A2A in -- in Asia has lent funds to the co-owners to progress the rezoning of the property. So, that's probably more -- probably describes what I'm trying to say more, if -- if that makes any sense to you.
Q. So, I'm going to put a request on the record that the particulars of the loan being referenced in paragraph 39 of your affidavit be produced or at least inquiries be made with respect to it, including the parties to the loan, the terms of the loan, the amount, and the date that it was advanced and any documents in support of that loan.
MR. JUKES: We can make the inquiries. This may be somewhat related to Undertaking No. 2 there, but in any event, we'll make the inquiries.
MR. OLIVER: Thank you.

UNDERTAKING NO. 4 - To make inquiries and produce the particulars of the loan being referenced in paragraph 39 of the July 25, 2025 affidavit, including the parties to the loan, the terms of the loan, the amount, and the date that it

Q. Are you a director --
A. No.
Q. -- of that entity? No?
Are you a shareholder of that entity?
A. No.
Q. Are you a consultant to that entity?
A. No.
Q. When you say in your affidavit at paragraph 46 "all materials for the AGM were distributed to the co-owners by A2A Capital Management Pte. Inc.," the basis for your knowledge is solely what Mr. Foo told you?
A. Yes.
Q. You can't independently confirm that all materials for the AGM were sent to the co-owners by A2A Capital Management Pte. Ltd.?
A. Well, Mr. Foo advised me and I -- I believe Mr. Carscallen advised that they had received all the votes from all the co-owners. So, I guess they -- they definitely received it.
Q. But you don't independently know that all of the information for the AGM were distributed to co-owners by A2A Capital Management Pte. Ltd. because you're relying on Mr. Foo, correct?
A. I'm relying on -- yeah, I'm relying on Mr. Foo's...
Q. Thank you. Sir, I'm going to ask Ms. Jorgenson to

A. Exhibit F?
Q. Yes. The document we were just looking at which was the summary of the exit offer.
A. No.
Q. Do you know who would have reviewed this before it was sent?
A. Mr. -- Mr. Foo would have reviewed it. I think Mr. Attrux would have reviewed it.
Q. Based on my review of this document, sir, it doesn't indicate anywhere in it that the take back -- or that the vendor take-back mortgage that was proposed was to be interest free. Would that surprise you?
A. That the mortgage -- that the VTB was interest free would surprise me or the document would surprise me?
Q. The fact that the document doesn't disclose that to investors.
A. Is this a complete document package, Mr. Oliver?
Q. It's your affidavit, Mr. Lind. I'll ask you that question.
A. Okay.
MR. JUKES: Well, in fairness, Mr. Oliver, you've shown him one document when, in his affidavit, he lists about four of them in different exhibits. So...
A. It does say on the top of this that there is a vendor

UNDERTAKING NO. 8 - To produce the last two years of financial statements for Wingham Creek A2A Developments Inc.

Q. MR. OLIVER: Sir, in paragraph 89 of your affidavit, you state that Wingham Creek A2A Developments Inc. is indebted to other A2A companies by way of noninterest bearing loans advanced by other A2A entities. Is the source of your information for that statement Mr. Foo?

A. Yes. That's correct, Mr. Oliver.

Q. Can you advise which other A2A entities advanced funds to Wingham Creek A2A Developments Inc.?

A. Can I?

Q. Yes.

A. Oh, sorry. No, I can't identify which companies.

MR. OLIVER: Mr. Jukes, I'll put a request on the record for the production of the same information for Wingham with respect to these loans as I did for Meaford.

MR. JUKES: Okay.

MR. OLIVER: Thank you.

UNDERTAKING NO. 9 - To make inquiries to determine the particulars of the noninterest bearing loans made to Wingham Creek A2A Developments Inc.,

including the parties who advanced
funds, the amounts of the funds, the
dates of the advances, and any
documents in support of the terms of
those advances

Q. MR. OLIVER: Sir, just to confirm again for the record, the sole source of your knowledge with respect to the intercompany loans referenced in your affidavit with respect to Wingham is Mr. Foo, correct?

A. Yes. Correct, Mr. Oliver.

Q. So, sir, earlier in your evidence, you indicated that Wingham Creek A2A Developments Inc. was removed as facilitator; is that correct?

A. Yes.

Q. So, you're aware, sir, that Wingham Creek A2A Developments Inc. entered into a listing agreement with Royal LePage with respect to the Wingham Creek lands?

A. Yes.

Q. If I can ask Ms. Jorgenson to please bring that up. Now, sir, this is contained at Exhibit C to the affidavit of George Chambers. Earlier in your evidence, you indicated you had not reviewed this affidavit prior to today. So, I'm going to show you this listing agreement and ask if you've seen this before. And take as much time as you need.

MR. JUKES: And I think the first request you made was for the CPF documents for Meaford, Wingham, and Lake Huron Shores.
MR. OLIVER: Thank you.
MR. JUKES: That's what I've got down.
MR. OLIVER: So, I have covered that.
Q. With respect to -- in paragraph 66 of your affidavit, you give evidence about Lake Huron Shores A2A Developments Inc. being indebted to other A2A companies by way of noninterest bearing loans advanced by other A2A entities. Consistent with your other evidence, sir, is it your evidence that the source of that information was solely from Mr. Foo?
A. Yes. Mr. Foo, Mr. Oliver.
Q. And you can't advise me sitting here now which A2A entities advanced funds to Lake Huron Shores A2A Developments Inc. or what the balance of those loans are?
A. Sorry, I'm not able to do that.
MR. OLIVER: Well, if I can please leave an undertaking on the record with respect to that information on the same terms as I did for the other projects, please.
MR. JUKES: Okay.
MR. OLIVER: Thank you.

turn it over to Mr. Stephenson.
Mr. Stephenson questions the witness:
Q. Hello, Mr. Lind.
A. Hello, Mr. Stephenson.
Q. My name is Aaron Stephenson. I'm with the Norton Rose Fulbright firm. We are court-appointed representative counsel to the offshore investors in the ongoing CCAA proceeding. Can you confirm for me that you are still under oath?
A. I can confirm that I'm still under oath, Mr. Stephenson.
Q. Thank you. My friend Mr. Oliver asked you some questions about your consulting relationship with the additional project entities, and I just want to return to that briefly. You advised, as I understand, that you have no consulting agreement with any of the additional project entities. Do I have that right?
A. Correct.
Q. Do you have a consulting agreement with any entities in the A2A Group?
A. No.
Q. Is there any written document that you're aware of that sets out the terms of the consulting services that you provide to the additional project entities or any of them?

A. I'm sorry, what's your question?
Q. Are you aware of any written documents that sets out the terms pursuant to which you provide consulting services to the additional project entities?
A. There is no agreements, Mr. Stephenson.
Q. But there's no document that's not an agreement that specifies what those services are?
A. Right.
Q. Are you paid for the consulting services that you provide?
A. No.
Q. And you're not paid by any entity in the A2A Group?
A. No.
Q. Or by anyone at all?
A. No. I'm retired.
Q. When did you retire from the A2A Group?
A. 2019.
Q. And did you stop providing consulting services in 2019?
A. I was an employee prior to that.
Q. And you've been a consultant since then?
A. I've been retired since then.
Q. But you say at paragraph 1 that you are a senior consultant. Is it the case that --
A. I'm -- I'm senior all right because I'm 80 years old.
Q. You continue to speak to Mr. Foo about these projects

subsequent to 2019?
A. Yes. I have lots of conversations with Mr. Foo.
Q. You continue to attend at the A2A offices in Singapore from time to time?
A. No.
Q. The services that you provide are simply provided on a voluntary basis at this point?
A. Yes.
Q. And that's been true since 2019?
A. Yes.
Q. And when you say that you've remained involved in all key decision-making on the Meaford property, was that only through to 2019?
A. No. I've been asked to attend meetings and conference calls with Mr. Foo.
Q. And you do that on a completely voluntary basis?
A. Mr. Stephenson, I'm not going to answer those questions again I've answered already.
Q. So, you're not compensated when you attend on conference calls or meetings with Mr. Foo?
A. I've answered that already, Mr. Stephenson.
Q. Is there a particular expertise that you provide to the additional project entities as the consultant?
Mr. Lind, did you hear my question?
A. I didn't hear your question.

TAB 6

Carroll v. Toronto-Dominion Bank

Ontario Reports

Ontario Court of Appeal

Tulloch, Miller and Paciocco JJ.A.

January 21, 2021

153 O.R. (3d) 385 | 2021 ONCA 38

Case Summary

Civil procedure — Parties — Standing — Compliance manager identifying and reporting regulatory infractions and trust breaches by her employer in the administration of its mutual fund products — After manager's employment terminated, she commenced application against employer to uncover and remedy employer's alleged wrongdoing — Application dismissed for lack of standing — Appeal dismissed — Motion judge did not err by failing to invoke inherent jurisdiction to supervise trusts and did not apply wrong test for standing — Facts as pleaded did not establish prima facie standing.

Courts — Jurisdiction — Compliance manager identifying and reporting regulatory infractions and trust breaches by her employer in the administration of its mutual fund products — After manager's employment terminated, she commenced application against employer to uncover and remedy employer's alleged wrongdoing — Application dismissed for lack of standing — Appeal dismissed — Motion judge did not err by failing to invoke inherent jurisdiction to supervise trusts and did not apply wrong test for standing — Those seeking to invoke inherent jurisdiction had to have an interest in the trusts sought to be enforced.

Trust and trustees — Remedies — Compliance manager identifying and reporting regulatory infractions and trust breaches by her employer in the administration of its mutual fund products — After manager's employment terminated, she commenced application against employer to uncover and remedy employer's alleged wrongdoing — Application dismissed for lack of standing — Appeal dismissed — Motion judge did not err by failing to invoke inherent jurisdiction to supervise trusts and did not apply wrong test for standing — Those seeking to invoke inherent jurisdiction had to have an interest in the trusts sought to be enforced.

The applicant was employed by the respondent as a senior compliance manager. She contended that during her employment she made persistent efforts, despite reprisals, to identify and redress regulatory infractions and trust breaches committed by the respondent in the administration of its mutual fund products. She claimed that her efforts ultimately required the respondent to self-report regulatory breaches to the Ontario Securities Commission (OSC). While the OSC investigation was ongoing, the applicant was dismissed from her employment. Two weeks later, the respondent finalized a settlement of more than $14 millions with the OSC.

The applicant maintained that the settlement agreement understated the nature and extent of the respondent's wrongdoing. She sent a whistleblower complaint letter to the respondent and followed that by sending whistleblower material to the OSC, the United States Securities and Exchange Commission, and the Office of the Superintendent of Financial Institutions. She also launched against the respondent a civil proceeding structured to uncover and remedy the wrongdoing she alleged. Her application sought various forms of relief, including a declaration of standing, leave to apply for a passing of accounts, an order compelling the respondent to pass its accounts relating to designated mutual fund trusts, a full independent investigation of the trust accounts, an order indemnifying her from liability relating to any breach of trust found through the passing of accounts, an order for an accounting, and a declaration that the respondent had been unjustly enriched. The respondent brought a motion to dismiss the application. The motion judge granted the motion, ruling that it was plain and obvious that no reasonable cause of action had been pleaded because the applicant had no standing to bring the application. The applicant appealed.

Held, the appeal should be dismissed.

The motion judge did not err by failing to invoke the court's inherent jurisdiction to supervise trusts. The applicant argued that such inherent jurisdiction made standing subordinate, and largely irrelevant, where allegations of fraudulent or improper conduct were made against a trustee. That argument misconceived the true nature of the inherent jurisdiction of courts to supervise or administer trusts and was contrary to basic trust principles. Courts accepted the inherent jurisdiction to assume the administration of trusts where a trustee would not or could not discharge their personal obligations because of refusal or incapacity. It was entirely in keeping with the role of inherent jurisdiction that those who sought to invoke it to supervise or administer trusts had an interest in the trusts they sought to enforce. And, if a beneficiary with capacity did not wish to enjoy the benefits of the personal obligation owed by the trustee, that obligation should not be enforced. The applicant's argument was also contrary to the beneficiary principle that trusts, to be valid, had to have a beneficiary capable of enforcing the trust.

The motion judge did not apply the wrong standing test. The applicant did not seek public interest standing since it was clearly unavailable in her case. However, she argued that public interest standing principles should inform whether she had private interest standing. That argument was rejected as there were good reasons why a flexible, discretionary, purposive approach applied only in public interest litigation, such as justification for use of public resources, the potential widespread effect of public interest litigation, and concerns about immunizing wrongdoing. The motion judge determined that the statutory standing provisions governing standing to pass accounts did not apply, she considered whether the applicant had a personal legal interest in the litigation to support private interest standing, and she rejected the applicant's contention that her status as a knowledgeable whistleblower gave her standing.

The motion judge did not err in finding that the applicant had not pleaded facts establishing a *prima facie* case of standing. The motion judge found that the applicant was not a unitholder in the trust and had no financial interest in the outcome of the litigation she commenced. Despite her role as a whistleblower, she lacked a direct personal interest in the litigation. The judge was correct in rejecting the applicant's contention that she could sustain a standing claim based on her potential liability as a constructive trustee. There was no foundation to support the applicant's liability as a knowing assister, and the pleadings did not suggest that she might have been a knowing receiver or trustee *de son tort*.

The motion judge did not err by failing to consider all aspects of the relief sought in determining the question of standing. The judge's decision responded to the arguments made. The fact that she did not expressly mention some of the specific relief requested did not mean that she failed to consider that relief in coming to her decision. In any event, the holding that the applicant had no statutory or private interest standing was correct so even if the motion judge had failed to consider all the relief requested, that would have made no difference to the outcome.

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APPEAL from an order dismissing an application for lack of standing.

Joseph Groia, *David Sischy* and *Dawit Debssou*, for the appellant.

Linda Fuerst and *Erika Anschuetz*, for the respondents.

The judgment of the court was delivered by
PACIOCCO J.A.: —

Overview

[1] Marion Carroll was formerly employed by the Toronto-Dominion Bank ("TD Bank") as a highly placed manager. She was responsible for the compliance of a group of TD Bank's subsidiaries with legal and regulatory obligations, and internal policies, relating to the management of mutual funds.

[2] In that capacity, Ms. Carroll claims to have exposed regulatory non-compliance and breaches of mutual fund trusts by TD Bank's subsidiaries. She contends that this misconduct unjustly enriched TD Bank as well as its subsidiaries (jointly, "TD"). She claims that TD has succeeded in suppressing the full extent of its wrongdoing and its enrichment, including by wrongfully dismissing her from her employment in 2014.

[3] Within two years of her dismissal, in 2016, Ms. Carroll launched a wrongful dismissal lawsuit which is still pending. In 2018, she began making "whistleblower" complaints to TD officials and to government regulators about the misconduct she allegedly uncovered. In September 2019, approximately five years after her dismissal, Ms. Carroll also launched the civil proceedings that are the subject of this appeal. Specifically, she issued an application seeking orders that would result in the disclosure, discovery, and redress of financial irregularities and misconduct, if any, by TD relating to its role as Trustee of designated mutual funds.

[4] The application was dismissed pursuant to rule 21.01 of the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194.* The motion judge found that Ms. Carroll's application could not possibly succeed because Ms. Carroll lacks standing to bring the application. Ms. Carroll now appeals that ruling.

[5] For reasons that follow, I would dismiss Ms. Carroll's appeal. I agree with the motion judge that Ms. Carroll required standing to bring the application, notwithstanding that the application relates to an alleged breach of trust. I also agree with the motion judge that Ms. Carroll lacks the standing required to maintain her application for any of the relief she seeks.

Material Facts

[6] Between August 8, 2011 and October 20, 2014, Ms. Carroll was employed by TD as a Senior Manager, Compliance. In this position, she carried primary responsibility for overseeing compliance by certain TD subsidiaries with their legal and regulatory obligations and internal policies relating to the management of mutual funds.

[7] She contends that during her employment she made persistent efforts, despite reprisals, to identify and redress regulatory infractions and trust breaches committed by TD in the administration of TD's mutual fund products. Most significantly, she alleges that she discovered that TD unjustly enriched itself by more than $50 million by purchasing mutual fund units that were not in the best interest of unit holders in order to maximize undisclosed internal fees. She contends that her efforts ultimately required TD to self-report regulatory breaches that it had committed to the Ontario Securities Commission ("OSC").

[8] On October 20, 2014, while the OSC investigation was ongoing, Ms. Carroll was dismissed from her employment by TD. She attributes her dismissal to her efforts to expose and remedy TD's misconduct relating to its mutual fund products.

[9] Approximately two weeks after her dismissal, TD finalized a settlement of more than $14 million with the OSC. Ms. Carroll maintains that the settlement agreement understates the nature and extent of the wrongdoing, as TD misled the OSC by failing to make full disclosure.

[10] In 2016, Ms. Carroll commenced a lawsuit for wrongful dismissal, which is unrelated to the current appeal. She has also taken steps to expose TD's alleged malfeasance. In November 2018, four years after her dismissal, she sent a "whistleblower" complaint letter to the Chair of the Audit Committee and General Counsel of TD. Then, in September 2019, she sent "whistleblower" material to three bodies carrying regulatory responsibility relating to TD's mutual fund enterprises: the OSC, the United States Securities and Exchange Commission, and the Office of the Superintendent of Financial Institutions. Finally, and of most relevance to this appeal, she launched a civil proceeding against TD, by way of application, that is structured to uncover and remedy the wrongdoing she alleges.

[11] The relief Ms. Carroll claims against TD is set out in her Fresh as Amended Application, issued on October 18, 2019. Specifically, Ms. Carroll:

-- sought standing and leave to apply for a passing of accounts pursuant to statute and the common law;

-- requested a declaration, if necessary, that she has standing to apply to compel a passing of accounts to remedy the reputational, financial, and personal harm caused to her by TD's misconduct;

-- asked for an order compelling TD to pass its accounts relating to designated mutual fund trusts, without notice to the unitholders who are the beneficiaries of those trusts;

-- sought the appointment of an independent accounting firm to conduct a full investigation of the trust accounts;

-- requested an order directing TD to disclose any breach of trust, financial irregularity or misconduct to beneficiaries and securities regulators relating to its role as trustee;

-- asked for an order indemnifying her from liability "relating to any breach of trust found through the passing of accounts";

-- sought an order for an accounting and payment to beneficiaries of the trust for amounts equal to TD's wrongful gains; and
-- requested a declaration that TD had been unjustly enriched.

[12] In response, TD brought a successful rule 21.01 motion to dismiss the application. The motion judge ruled that it was plain and obvious that no reasonable cause of action had been pleaded because Ms. Carroll did not have standing to bring the application.

The Issues

[13] Ms. Carroll does not appeal the motion judge's decision that she lacks standing to pass accounts pursuant to the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, or any of the *Rules of Civil Procedure*. Nor does she take issue with the motion judge's articulation of the test to be applied under rule 21.01, or with the propriety of dismissing an application under that rule where a proceeding is brought without standing. Her appeal is confined to the motion judge's

conclusion that Ms. Carroll clearly lacked standing. I would state the issues that Ms. Carroll raises as follows, and approach them in the following order:

(A) Did the motion judge err by failing to invoke the court's inherent jurisdiction to supervise trusts?

(B) Did the motion judge err by applying the wrong standing test?

(C) Did the motion judge err by finding that Ms. Carroll had not pleaded facts establishing a *prima facie* case of standing?

(D) Did the motion judge err by failing to consider all aspects of the relief sought when determining Ms. Carroll's standing?

[14] As I conclude that the motion judge made none of these errors, I would dismiss the appeal.

Analysis

A. *Did the motion judge err by failing to invoke the court's inherent jurisdiction to supervise trusts?*

[15] Ms. Carroll argues that the inherent jurisdiction of courts to administer trusts makes standing "subordinate, and largely irrelevant, where allegations of fraudulent or improper misconduct are made against a trustee". As I understand her argument, Ms. Carroll maintains that once a court receives allegations that a trust has been breached, the role of the courts as the guardian of trusts is triggered, regardless of who initiated the application, thereby obliging the courts to resolve the litigation. Hence, in Ms. Carroll's view, the motion judge erred in requiring her to satisfy legal standing tests.

[16] Relatedly, Ms. Carroll appears to be suggesting that the motion judge also erred by abdicating her judicial responsibility to address the alleged breaches of trust by giving weight to the fact that there are alternative means available for trust breaches to be addressed.

[17] I would firmly reject Ms. Carroll's submissions. There is no support for the claim that the inherent jurisdiction of courts to supervise or administer trusts makes standing a subordinate or largely irrelevant consideration where allegations of fraudulent or improper misconduct are made against a trustee. This claim misconceives the true nature of the inherent jurisdiction of courts to supervise or administer trusts and is contrary to basic trust principles.

[18] Courts assumed inherent jurisdiction to supervise and administer trusts so that trusts could be given legal force: Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at pp. 1165-66; Daniel Clarry, *The Supervisory Jurisdiction Over Trust Administration* (Oxford: Oxford University Press, 2019), at para. 2.11. The enforcement of trusts was not achieved by empowering courts to act as roving commissions of inquiry into their proper performance, but by empowering courts to assist those with an interest in trusts in enforcing and compelling the performance of those trusts.

[19] Initially, the inherent jurisdiction to supervise and administer trusts was recognized "primarily to protect the interest of beneficiaries": *Crociani v. Crociani*, [2014] UKPC 40, 17

ITELR 624, at para. 36. Without the assumption of jurisdiction by courts, beneficiaries would lack legal authority to enforce trusts because trustees are the legal owners of trust property, and therefore hold the bundle of enforceable legal rights that property enjoyment entails. The only way to ensure that beneficiaries can enjoy trust property they do not own is for courts to take jurisdiction and impose personal obligations on trustees to use the legal rights they hold for the benefit of the beneficiaries, according to the terms of the trust: *McLean v. Burns Philp Trustee Co. Pty. Ltd.* (1985), 2 N.S.W.L.R. 623, 9 ACLR 926 (Aus. S.C.), at p. 933 ACLR.

[20] Given that trusts are enforced by imposing personal obligations on trustees, if courts did not intervene, a trust would fail where a trustee would not or could not discharge their personal obligations because of refusal or incapacity. Courts therefore accepted the inherent jurisdiction to assume the administration of such trusts, based on the maxim of equity that no trust should fail for want of a trustee: *Clarry*, at para. 1.04.

[21] In this way, courts of equity claimed the inherent jurisdiction at the behest of beneficiaries "to supervise, and where appropriate intervene in, the administration of a trust where there is no trustee to carry it on, or where the trustee wrongfully declines to act or refuses to disclose trust accounts and supporting information or is otherwise acting improperly": *Halsbury's Laws of England*, 5th ed., Vol. 98, "*Trusts and Powers*" (London: LexisNexis, 2019), at para. 626.

[22] Given the significant obligations that courts impose on trustees and the desire to "enable practical effect to be given to a trust", courts have also recognized the inherent jurisdiction to assist trustees in the administration of trusts where such assistance is required: *MF Global UK Ltd. (In Special Administration) (Re)*, [2013] EWHC 1655, [2013] 1 W.L.R. 3874 (Ch.), at paras. 26, 32. For example, there is inherent jurisdiction to assist trustees "where difficulties have arisen which cannot be removed without the assistance of the court, or where the decision of the court on a doubtful question connected with the trust or on its proper administration is sought by the trustee": *Halsbury's,* Vol. 98, at para. 626; *Waters' Law of Trusts*, at pp. 1165-66.

[23] To be sure, on occasion access to the inherent jurisdiction of courts has been extended to others who have an interest in a trust, such as creditors or those with contingent interests, particularly where that jurisdiction is supported by statute: see *McLean v. Burns Philp; Waters' Law of Trusts*, at p. 1122. However, it can readily be seen that the inherent jurisdiction to supervise and administer trusts exists to assist the parties to the trust relationship or those who are interested in the trusts. As such, the inherent jurisdiction of courts to supervise and administer trusts is not inconsistent with the imposition of standing requirements. To the contrary, it is entirely in keeping with the role inherent jurisdiction performs to ensure that those who seek to invoke the inherent jurisdiction to supervise or administer trusts have an interest in the trusts they seek to enforce.

[24] The position advanced by Ms. Carroll during the oral hearing, that courts of equity have liberated the inherent jurisdiction from standing requirements in order to protect the interests of incapacitated beneficiaries who cannot effectively sue to enforce trust obligations, is also inaccurate.

[25] In fact, courts of equity have done the opposite. They have protected the interests of the incapacitated through the conventional means of granting standing to others to enforce trusts on their behalf, including guardians and personal representatives. There are now appointed officials who have also been given statutory authority to enforce trusts. For example, the Children's

Lawyer can enforce trusts: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 89(3). So, too, can the Public Guardian and Trustee: *Substitute Decisions Act, 1992*; *Public Guardian and Trustee Act*, R.S.O. 1990, c. P.51; and see *Waters' Law of Trusts*, at p. 133; and Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), at p. 40. There is a narrow statutory exception that dispenses with private interest standing by enabling anybody to propose an arrangement for the variation of a trust for an incapacitated beneficiary: *Variation of Trusts Act*, R.S.O. 1990, c. V.1; Gillese, at p. 99. But this exception proves the rule. Simply put, the methods used to protect incapacitated beneficiaries do not support Ms. Carroll's position. They contradict it.

[26] Not surprisingly, Ms. Carroll produced no authority to support her position that standing is subordinate and largely irrelevant in breach of trust cases. To the contrary, the authorities put before this court include illustrations of courts considering whether litigants have the standing required to raise such claims: *McLean v. Burns Philp; and see Gallant v. Gaudet*, [1996] P.E.I.J. No. 124, 149 Nfld. & P.E.I.R. 31 (S.C.T.D.), at para. 25.

[27] The position advanced by Ms. Carroll not only lacks support, it is also contrary to basic trusts principles. The logical implication of her position is that even if capacitated beneficiaries choose not to enforce the trust benefits that they are entitled to, strangers to the trust may do so. This outcome is not only unwarranted, it is contrary to the essential character of a trust, namely, an enforceable personal obligation owed by a trustee to the beneficiary, respecting property: see David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 18th ed. (London: LexisNexis Butterworths, 2010), at p. 2; Gillese, at p. 5. Simply put, if a beneficiary with capacity does not wish to enjoy the benefits of the personal obligation owed by the trustee, that obligation should not be enforced.

[28] It is also contrary to the "beneficiary principle", that, subject to exception, to be valid, trusts must have a beneficiary capable of enforcing the trust: *Morice v. Bishop of Durham* (1804), 32 E.R. 656, 9 Ves. 399 (Ch.), affd (1805), 32 E.R. 947, 10 Ves. 522 (Eng. Ch.); *Astors Settlement Trusts (Re)*, [1952] Ch. 534, [1952] 1 All E.R. 1067 (Eng. Ch.). The theory underlying the beneficiary principle is that trusts are, by definition, enforceable equitable obligations, and, without a beneficiary, there would be no-one with the standing to enforce the trust, thereby defeating the very existence of a trust: see *Astors*, at pp. 546-47, 549 Ch.; Philip H. Pettit, *Equity and the Law of Trusts*, 12th ed. (Oxford: Oxford University Press, 2012), at pp. 59-60. If non-beneficiaries could enforce trusts, the beneficiary principle would not have developed. It would also be possible to create enforceable, non-charitable, impersonal purpose trusts, something the law in fact disallows.

[29] The motion judge was therefore correct in not accepting Ms. Carroll's claim that standing is a secondary, if not irrelevant, consideration in trust litigation. Standing is required to sue for breaches of trust.

B. *Did the motion judge err by applying the wrong standing test?*

[30] Ms. Carroll argues that if standing is required, the motion judge was obliged to apply a flexible, discretionary, purposive approach to standing that asks whether there is a "real and legitimate basis for asking the court to adjudicate legal issues". Ms. Carroll contends that the motion judge erred by not applying this test, and that, had she done so, Ms. Carroll would have been found to have standing given that she is a whistleblower who has sacrificed a great deal, thereby acquiring a "genuine interest and real stake in the outcome of the proceedings".

[31] I do not agree with Ms. Carroll's conception of the test to be used in determining her standing. As I will explain, where legislation does not provide standing, there are two paths to securing standing to initiate proceedings, "private interest standing" and "public interest standing". These paths are distinct. Ms. Carroll does not seek public interest standing since it is clearly unavailable in her case. Instead, she argues that public interest standing principles should inform whether she has private interest standing. I do not agree with this proposition. Public interest standing principles do not apply where the private interest standing test governs. The motion judge would have erred had she applied the standing test Ms. Carroll proposes.

[32] I will begin by describing the tests for private interest and public interest standing.

[33] To have private interest standing, a person must have a personal and direct interest in the issue being litigated: *Campisi v. Ontario (Attorney General)*, (2018), 144 O.R. (3d) 638, [2018] O.J. No. 5825, 2018 ONCA 869, at para. 4, leave to appeal to S.C.C. refused [2019] S.C.C.A. No. 52. They must themselves be "specifically affected by the issue": *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, 2012 SCC 45, at para. 1. It is not enough that the person has a "sense of grievance" or will gain "the satisfaction of righting a wrong" or is "upholding a principle or winning a contest": *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, at para. 21, citing *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, 146 C.L.R. 493 (H.C.A.), at p. 270 A.L.R. As it is sometimes put, to have private interest standing, a person must have a "personal legal interest" in the outcome: *Landau v. Ontario (Attorney General)*, [2013] O.J. No. 4443, 2013 ONSC 6152, 293 C.R.R. (2d) 257, at para. 16. Where the party initiating the litigation has a personal legal interest in the outcome, standing exists as of right: *Landau*, at para. 21. An appeal of a private interest standing decision is therefore evaluated using a correctness standard: *Miner v. Kings (County)*, [2017] N.S.J. No. 20, 2017 NSCA 5, 60 M.P.L.R. (5th) 1, at para. 23.

[34] "*In public law cases*, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations" (emphasis added): *Downtown Eastside*, at paras. 1, 22. This more flexible approach is warranted "to ensure that legislation is not immunized from challenge": *Downtown Eastside*, at para. 33, citing *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, [1992] S.C.J. No. 5, at p. 256 S.C.R. As Cromwell J. explained in *Downtown Eastside*, at para. 37:

> *In exercising the discretion to grant public interest standing*, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing.

(Emphasis added; citations omitted)

[35] I have added emphasis to the above passages from *Downtown Eastside* to reinforce that the flexible, discretionary, purposive approach that has been adopted applies only in public

interest litigation. Similar developments have not occurred in private law proceedings. There are good reasons why this is so.

[36] First, the reasons for liberating standing requirements in public interest litigation do not apply in the same degree to private litigation. For example, there will invariably be greater justification for using public legal resources to address matters of public interest than there will be for using public legal resources to vindicate private interests that the parties affected are not seeking to vindicate.

[37] As well, public interest litigation tends to affect the interests of many, particularly where laws are being challenged. In contrast, the outcome of private litigation has a unique impact on those whose legal interests are directly affected by the litigation. They are therefore the ones who should carry out the litigation so that they can make decisions relating to the protection of their interests.

[38] Ms. Carroll's proposed action illustrates the point. She is suing for an investigation and for the passing of accounts without notice to the unitholders and has requested that unitholders be compensated. If she were to be granted standing, the private information of unitholders would be accessed for the lawsuit without their input. Further, if she were to be given standing to litigate, she would not only control the tactical choices made during litigation but would also have standing to settle the litigation. Despite her lack of personal legal interest in the outcome, she would be empowered to manage the litigation in ways that could potentially compromise the financial interests of the unitholders, who hold the personal legal interests in question.

[39] Finally, and most profoundly, the driving consideration in using flexible standing standards in public interest litigation does not apply to private litigation. Specifically, there is not the same concern that, without a flexible standing test, wrongdoing will effectively be immunized. In private law cases, if the parties with a personal legal interest that is affected by wrongdoing forego their right to sue or raise an issue, thereby immunizing the wrongdoing, this is a private matter, not one of public concern.

[40] Of course, where the private wrongdoing occurs in a regulated enterprise and contravenes the law, there will be a public interest in intervening, but that public interest is to be protected by regulatory enforcement, not through the surrogacy of civil suits initiated by strangers to the private rights at stake.

[41] Ms. Carroll has provided us with no authority applying the public interest standing principles articulated in *Downtown Eastside* to private interest standing. For the reasons I have provided, I am not persuaded that such crosspollination should start here. In my view, the refinement of the public interest standing principles in *Downtown Eastside* has not altered the law of private interest standing.

[42] If Ms. Carroll's position is the more modest one that the principles from *Downtown Eastside* should be applied exceptionally where a knowledgeable whistleblower seeks to launch a lawsuit to expose wrongdoing in a private institution, I am equally unpersuaded. I appreciate that it has long been recognized that there is a public interest in exempting whistleblowers from confidentiality obligations, so that they can expose misconduct that should be exposed in the public interest: *Initial Services Ltd. v. Putterill*, [1968] 1 Q.B. 396, [1967] 3 All E.R. 145 (C.A.). However, there is a difference between suppressing confidentiality obligations in the public interest, and empowering whistleblowers who have no legal interest in the outcome of litigation

to initiate such litigation. There is good reason for the former but no reason for the latter. A whistleblower can expose misconduct without commencing private litigation involving the legal rights of others. As TD noted before us, subject to the law of privilege, nothing prevented Ms. Carroll from sharing her inside information with regulators, and there is nothing preventing her from sharing her intelligence with unitholders, or from appearing as a witness should the unitholders choose to sue.

[43] In my view, the motion judge considered the correct standing tests in determining whether Ms. Carroll had standing. She determined that the statutory standing provisions that govern standing to pass accounts do not apply, and she considered whether Ms. Carroll had a personal legal interest in the litigation that could support private interest standing. She also considered and correctly rejected Ms. Carroll's contention that her status as a knowledgeable whistleblower gave her standing to bring the application, or that more generous standing rules apply in breach of trust cases. I would therefore reject this ground of appeal.

C. *Did the motion judge err by finding that Ms. Carroll had not pleaded facts establishing a prima facie case of standing?*

[44] The party initiating civil proceedings has the burden of establishing their standing by pleading facts that would support standing: *Polish National Catholic Church of Canada v. Polish National Catholic Church,* [2014] O.J. No. 3750, 2014 ONSC 4501, at para. 41. Ms. Carroll has not pled facts that could disclose a *prima facie* case that the application she initiated would affect her personal legal interests. I would therefore dismiss this ground of appeal.

[45] As the motion judge found, Ms. Carroll was not a unitholder in the trust and had no financial interest in the outcome of the litigation she commenced, and despite her role as a whistleblower, she lacked a direct personal interest in the litigation. She pleaded no facts that could disclose a personal legal interest in the trusts that were allegedly breached.

[46] The motion judge was also correct in rejecting Ms. Carroll's contention that she could sustain a standing claim based on her potential liability as a constructive trustee. There are three possible avenues to personal liability as a constructive trustee:

-- As a "knowing assister", who knowingly or wilfully blindly encouraged or assisted in a dishonest and fraudulent breach of trust: *Air Canada v. M & L Travel Ltd.* (1993), 15 O.R. (3d) 804, [1993] 3 S.C.R. 787, [1993] S.C.J. No. 118, at pp. 809-11 S.C.R.;

-- As a "knowing receiver", who knowingly, or wilfully blindly, or with knowledge of facts which would put an honest person on inquiry, received trust property in their own capacity in breach of trust: *Air Canada*, at pp. 810-13 S.C.R.; or
-- As a *trustee de son tort*, who assumed the role of trustee without proper appointment and then breached the trust: *Air Canada,* at pp. 808-809 S.C.R.

[47] The motion judge addressed the first avenue of potential liability, "knowing assistance", and dismissed it because there was no evidence before her that Ms. Carroll participated in any breaches of trust. Indeed, the pleadings before the motion judge maintained that Ms. Carroll made efforts to prevent and remedy any alleged wrongdoing.

[48] Ms. Carroll argues on appeal that, despite this, it is not plain and obvious that she would not be exposed to personal liability as a constructive trustee, given her role as a corporate

officer of the Trustee at the time the maladministration occurred. I disagree. The motion judge was correct in finding that there was no foundation that could support Ms. Carroll's liability as a knowing assister. There was no need for the motion judge to address knowing receiver or *trustee de son tort* liability, as neither form of liability is even hinted at in the pleadings. Absolutely no suggestion is made that Ms. Carroll received trust property, and there is no indication that she assumed the role of trustee.

[49] In these circumstances, the fact that Ms. Carroll sought indemnity in her application does not provide a path for her standing. "It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim": *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42, at para. 22. Ms. Carroll has pled no facts that could support such relief.

[50] I would therefore reject Ms. Carroll's contention that the motion judge erred in finding that she had not pleaded facts establishing a *prima facie* case of standing. That decision was correct.

D. *Did the motion judge err by failing to consider all aspects of the relief sought when determining Ms. Carroll's standing?*

[51] Ms. Carroll argues that the motion judge erred by focusing entirely on whether she had standing to pass accounts, disregarding the other relief she requested. I would not give effect to this ground of appeal, either.

[52] First, I am not persuaded that the motion judge considered only the relief related to the passing of accounts. As just described, the motion judge considered the relief Ms. Carroll claimed in relation to her potential liability as a constructive trustee. The motion judge's careful decision is responsive to the arguments made. I would not be prepared to find that because the motion judge did not expressly mention some of the specific relief requested, she must have failed to consider that relief in coming to the decision that she did.

[53] In any event, the motion judge's holding that Ms. Carroll did not have statutory or private interest standing was correct and prevents Ms. Carroll from seeking any of the relief she claims. Even had the motion judge failed to consider all the relief requested, it would have made no difference to the outcome.

Conclusion

[54] I would dismiss the appeal. If agreement is not reached as to costs, I would invite the parties to provide costs submissions of no more than three pages, accompanied by bills of costs. The respondent is to provide their costs documentation within ten business days following the release of this decision. I would require the appellant to respond within five business days.

Appeal dismissed.

TAB 7

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 171**

Date: **2025 10 07**
Docket: KBG-RG-01559-2023
Judicial Centre: Regina

BETWEEN:

GENCORE PROPERTIES GP INC., AVENS ROAD PROPERTIES LP, PATRICK BREHM, RICHARD CLAUDE and JANELLE CLAUDE

Appellants

\- and -

DEBORAH KOWBEL, 0967345 BC LTD., LORI STRAZA, ROCKY STRAZA, DAVID GOWER, CHRISTINE GOWER, 0967373 BC LTD. and HENRY SU

Respondents

Docket: KBG-RG-00547-2025
Judicial Centre: Regina

AND BETWEEN:

DEBORAH KOWBEL, 0967345 BC LTD., LORI STRAZA, ROCKY STRAZA, DAVID GOWER, CHRISTINE GOWER, 0967373 BC LTD. and HENRY SU

Applicants

\- and -

GENCORE PROPERTIES GP INC., AVENS ROAD PROPERTIES LP, PATRICK BREHM, RICHARD CLAUDE and JANELLE CLAUDE

Respondents

\- and -

OLIVE WALLER ZINKHAN & WALLER LLP

Non-party Applicant

\- and -

101229524 SASKATCHEWAN LTD., 101228401 SASKATCHEWAN LTD., 101229330 SASKATCHEWAN LTD., 101229481

SASKATCHEWAN LTD., 101229313 SASKATCHEWAN LTD., JASON CARTER, CRISTA BOEHM CARTER, 0931130 BC LTD. and DON CLAUDE

Non-parties

Counsel:

Milad Alishahi and Callie Schwartz	for the applicants, Deborah Kowbel, 0967345 BC Ltd., Lori Straza, Rocky Straza, David Gower, Christine Gower, 0967373 BC Ltd. and Henry Su
Jason Clayards	for the respondents, Gencore Properties GP Inc., Avens Road Properties LP, Patrick Brehm, Richard Claude and Janelle Claude
Virgil Thomson	for the non-party, Olive Waller Zinkhan & Waller LLP
William Langen	for the non-parties, 101229524 Saskatchewan Ltd., 101228401 Saskatchewan Ltd., 101229330 Saskatchewan Ltd., 101229481 Saskatchewan Ltd., 101229313 Saskatchewan Ltd., Jason Carter, Crista Boehm Carter, 0931130 BC Ltd. and Don Claude

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FIAT CURRIE J.
October 7, 2025

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[1] Three applications are before me in these two actions.

A. Circumstances

[2] A description of the circumstances begins with the summary of Associate Chief Justice Tochor in the first of these actions, *Gencore Properties GP Inc v Kowbel*, KBG-RG-01559-2023, reported at 2025 SKKB 121 at paras 13-16:

> [13] In 2013, a number of investors invested in the ownership of apartments in Moose Jaw, Saskatchewan, by purchasing 9 of 22 units in a limited partnership. A Limited Partnership Agreement dated April 11, 2013, [LPA] was executed by the respondents, Deborah Kowbel, 0967345 BC Ltd., Lori Straza, Rocky Straza, David Gower, Christine Gower, 0967373 BC Ltd., and Henry Siu (hereinafter collectively referred to as the [Claimants]).
>
> [14] The LPA was also executed by Gencore [the general

> partner]. The applicant, Patrick Brehm, is the president of Gencore, which has three directors: Mr. Brehm, Janelle Claude, and Richard Claude. Mr. Brehm is the father of Janelle Claude and the father-in-law of Richard Claude.
>
> [15] When disputes arose as to how Gencore was managing the affairs of the limited partnership, the Claimants filed a statement of claim against Gencore on June 17, 2018. By order of the Court on August 21, 2018, the claim was referred to arbitration in accordance with the LPA and the *Act* [*The Arbitration Act*, SS 1992, c A-24.1].
>
> [16] A lengthy arbitration hearing was conducted over many days before the Arbitrator, the Honourable Eugene A. Scheibel; and the award was delivered on June 9, 2023: *Kowbel v Gencore Properties GP Inc*. (9 June 2023) (Sask ARB) (Arbitrator Scheibel) [*Award*]. In the *Award*, the Arbitrator found Gencore liable for damages on a variety of bases and, in the Addendum to the Award delivered on September 22, 2023, the Arbitrator awarded a specific sum damages and solicitor-client costs against Gencore: *Kowbel v Gencore Properties GP Inc*. (22 September 2023) (Sask ARB) (Arbitrator Scheibel) [*Addendum*].

[3] As Associate Chief Justice Tochor described, the Applicants (Deborah Kowbel, 0967345 BC Ltd., Lori Straza, Rocky Straza, David Gower, Christine Gower, 0967373 BC Ltd. and Henry Su) originally had been limited partners in the limited partnership. They have not been limited partners since 2017, however. In that year, before they commenced their claim against Gencore Properties GP Inc. (“Gencore”) in 2018, they opted out as limited partners.

[4] This first action, *Gencore Properties GP Inc. v Kowbel,* is the action in which the Respondents (Gencore Properties GP Inc., Avens Road Properties LP, Patrick Brehm, Richard Claude and Janelle Claude) pursued an appeal from the arbitration order. Associate Chief Justice Tochor granted leave to the Respondents to appeal only with respect to pre-judgment interest, a matter of only nominal value in the context of the overall award.

[5] The second of these actions, *Kowbel v Gencore Properties GP Inc.*, KBG-RG-00547-2025, is the action in which the Applicants sought a court judgment against the Respondents, who include the general partner, Gencore, and the limited partnership itself, Avens Road Properties LP. On August 31, 2025 Justice Kuski Bassett delivered a decision in the second action. She granted judgment in favour of the Applicants against the Respondents, jointly and severally, in enforcement of the arbitration award. The amount owing under that judgment is about $1.4 million.

[6] In the summer of 2025 the law firm Olive Waller Zinkhan & Waller LLP ("Olive Waller") acted as counsel for Gencore in Gencore's sale of real property. Arising from that sale, Olive Waller holds in trust a total of about $2.6 million, being proceeds of the sale. While it had some previous involvement, Olive Waller now has no involvement in any aspect of these actions, other than holding those trust funds.

B. Applications

[7] The applications before me are these:

1. Olive Waller interpleads, asking for a direction to pay the funds into court.

2. The Applicants ask for an order requiring Olive Waller to pay to the Applicants the amount that they are owed by the Respondents under the judgment.

3 The non-parties (101229524 Saskatchewan Ltd., 101228401 Saskatchewan Ltd., 101229330 Saskatchewan Ltd., 101229481 Saskatchewan Ltd., 101229313 Saskatchewan Ltd., Jason Carter, Crista Boehm Carter, 0931130 BC Ltd. and Don Claude) assert a claim to the funds, by way of a potential claim against Gencore. They ask for a stay of the judgment pending resolution of the Olive

> Waller interpleader, and for the relief asked by Olive Waller to be granted. While it is not in their notice of application, the non-parties also ask the court to stay the judgment pending a trial, where the court would determine who gets the money that currently is being held by Olive Waller.

[8] The Respondents take no position on the Olive Waller application, but they say that one way or another the Applicants should receive payment now in satisfaction of their judgment against the Respondents.

[9] There is no reason to require Olive Waller to remain involved. Below I set out directions as to payment out of the funds by that firm, so that the firm will be extricated from these proceedings.

C. Application of the non-parties

[10] The complicating factor in all of this is the application of the non-parties. If they had not intervened, the Applicants would have received payment of the judgment amount, whether directly from Olive Waller or from the court, and Olive Waller would have paid out all of the funds, either entirely to the court or some to the Applicants and the balance to the court.

[11] The goal of the application by the non-parties is to avoid the funds being applied to the judgment, pending the trial that they propose. For four reasons, I am dismissing that application.

1. Stay pending Olive Waller application

[12] First, with reference to the relief that is specified in the notice of application, no stay is necessary pending resolution of the Olive Waller application. This is because, as I have said, in this decision I am resolving that application.

2. Notice of requested relief

[13] Second, the other relief that the non-parties ask – a stay of the judgment pending a trial – is not relief that they specified in their notice of application. I recognize that this lack of formal notice can be remedied or forgiven in some circumstances, but in light of my reasons below it is not necessary to consider doing so.

3. Standing

[14] Third, I am not persuaded that the non-parties have standing to make their application in these actions. They are not parties to these actions. They do not have a direct interest in these actions. Their interest in these actions, they say, is based on a claim that they may have, as limited partners under the limited partnership agreement, against the general partner, Gencore.

[15] Specifically, the potential claim asserted by the non-parties is based on the provisions of the limited partnership agreement. Their claim is identified in the affidavit of Ryan Massier (director and shareholder of one of the non-parties) at paras. 18, 20 and 25, in which the non-parties are referred to as "the United Limited Partners":

> 18. The United Limited Partners claim to be paid their respective share of the sale proceeds in accordance with the Agreement…
>
> …
>
> 20. Article 9 of the Agreement outlines the manner and priority in which distributions of distributable cash are to be made.
>
> …
>
> 25. The United Limited Partners maintain their claim to the net sale proceeds currently held in trust by Mr. Thomson in accordance with the terms of the Agreement …

[16] As is evident from Mr. Massier's affidavit, the non-parties disagree with

the general partner's administration of the proceeds of the sale. According to the general partner, part of the proceeds should be used to pay the judgment debt that is owed to the Applicants. The non-parties, as limited partners, say that instead the proceeds should be distributed among partners in accordance with the provisions of the limited partnership agreement. They want to pursue their claim to enforce the provisions of the limited partnership agreement, and they want to stop the sale proceeds from being paid to the Applicants in the meantime.

[17] The limited partnership agreement, however, provides in clause 18.1:

> Any disputes between the Partners in respect of any of the matters referred to in this Agreement not resolved through negotiations between the Partners shall be finally determined by arbitration pursuant to this Section 18.1…

[18] Thus, if the non-parties pursue their claim for enforcement of the limited partnership agreement, for a resolution of their dispute with the general partner as to how to administer the sale proceeds, it appears that they are bound by their contractual agreement to have the dispute resolved not by way of a trial in this court but through arbitration. The dispute would not go to the trial that is contemplated in their request.

[19] There also is no apparent basis in law for the non-parties, as limited partners in the limited partnership, to have priority to the sale proceeds over the Appellants, who are judgment creditors. Even assuming that the non-parties commence proceedings, and that they realize their interpretation of the limited partnership agreement, they have not demonstrated how or why their contractual agreement would impinge on the rights of a judgment creditor. It is not apparent how funds of the limited partnership would be distributed among partners, pursuant to their partnership agreement, before the debts of the limited partnership were paid.

[20] The law recognizes private interest standing and public interest standing. Public interest standing arises in public law cases. The matters before me are not public

law cases. They are matters of private interest.

[21] In *Imperial Oil Ltd. v Haseeb*, 2023 ONCA 364 at para 92, 483 DLR (4th) 228, Justice Copeland explained the test for determining private interest standing:

> [92] The test applied by the courts for private interest standing requires that the applicant or plaintiff have a personal and direct interest in the issue raised in the proceeding. The interest must not be too indirect, remote, or speculative. Various formulations of this requirement are used in the jurisprudence, including that the person is "specifically affected by the issue", has a "personal legal interest", or has a "personal and direct interest" in the outcome of the proceeding. This type of standing is often referred to as "direct interest" or "private" standing to distinguish it from public interest standing (the latter having different requirements): *Canada (Minister of Finance) v. Finlay*, [1986] 2 S.C.R. 607, at pp. 617-18; *Bedford v. Canada*, 2010 ONSC 4264, 102 O.R. (3d) 321, at paras. 44-47, aff'd on this point, 2012 ONCA 186, 109 O.R. (3d) 1, at para. 50, rev'd in part on other grounds, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, 153 O.R. (3d) 385, at para. 33; Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at p. 5.
>
> [Emphasis added]

[22] In *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 505, 484 DLR (4th) 486, Justice Paciocco addressed a request by limited partners for standing. He said at para. 12:

> [12] First, in *Ivandaeva* [*Ivandaeva Total Image Salon Inc. v Hlembizky*, 2003, 63 OR (3d) 769 (CA)], at para. 27, in describing the basis for standing Borins J.A. stipulated that "the order must be one that directly affects the rights of the moving party in respect of the proprietary or economic interests of the party." The Limited Partners do not have a direct economic interest in CBRE's claim. By virtue of its constating partnership agreement and the *Limited Partnership Act*, R.S.O. 1990, c. L. 16, ss. 8-12, the business of a limited partnership is managed by its general partner. This is the price limited partners pay for their limited liability: *Kucor Construction & Developments &*

> *Associates v. Canada Life Assurance Co.* (1999), 41 O.R. (3d) 577 (C.A.), at pp. 588-91. The limited partners therefore enjoy the economic benefits from the partnership through their contractual relationship with the general partner, and not through direct legal rights tenable against debtors or creditors of the partnership. As a result, the direct economic interest at stake during CBRE's appeal belonged to the partnership, an economic interest that is to be exercised by the General Partner even where the outcome of the appeal could ultimately inure to the financial benefit of the Limited Partners. Simply put, even if the general common law principles of standing relied upon by the Limited Partners do exist and are tenable in the appeal of a creditor's proof of claim arising out of the *BIA* [*Bankruptcy and Insolvency Act*, RSC 1985, c. B-3], the Limited Partners lacked the direct economic interest in the outcome of the proceedings that would be required to support their standing claim.
>
> [Emphasis added]

[23] While *Imperial Oil Ltd. v Haseeb* describes the general rule that applies on a request for private interest standing, *YG Limited Partnership* (although involving different circumstances) provides insight into the restrictions on the rights and entitlements of limited partners.

[24] When I take into consideration all of the circumstances that I have reviewed, and when I consider the law that applies to a request for private interest standing, I conclude that the interest that the non-parties assert is simply too indirect, remote and speculative to justify a grant of standing. They are denied standing.

4. Whether to grant a stay

[25] Fourth, even if the non-parties had standing I would not grant the stay. They apply under Rule 10-18(3) of *The King's Bench Rules*, which provides:

> **10-18** …
>
> (3) At or after the time of giving judgment or making an order, the Court may stay any enforcement measure until the time the Court considers fit.

[26] Historically, the court has used this power for reasons that relate to the parties to the action. Here the non-parties are not parties to either of these actions. As to whether they should be granted a stay nonetheless, I repeat my discussion in the previous section.

[27] In the end, and fundamentally, I ask why strangers to these proceedings should be permitted to step in and stop the Applicants from being paid on the judgment that they have obtained from the court in these proceedings. When I consider all of the above factors, I find no satisfactory answer. Ordering the stay would be an exception to the regular course of the legal proceedings. In order to be implemented, that exception must be justified. In these circumstances, it is not justified. Just as the potential claim of the non-parties is too indirect, remote and speculative to justify granting them standing in these actions, it is too indirect, remote and speculative to justify granting a stay.

5. Conclusion as to the application of the non-parties

[28] The application by the non-parties is dismissed.

D. Olive Waller interpleader order

[29] With my dismissal of the application of the non-parties, there is no obstacle to payment of the judgment amount being effected at this time.

[30] I am uncertain as to the authority by which I would direct the payment of the judgment amount from Olive Waller to the Applicants. I have no doubt of my authority to direct the payment of the judgment amount from funds that are being held in court. *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22, provides, in s. 114(a):

> **114** On an application of a sheriff, a receiver, a judgment creditor, a judgment debtor, a dependant of a judgment debtor or

> a person with an interest in property affected by an enforcement measure pursuant to this Act, the court may make one or more of the following orders:
>
> (a) any order that is necessary to ensure compliance with this Act or to facilitate enforcement of a judgment, including a binding declaration of a right and an order for injunctive relief;
>
> …

[31] As well, I have before me the agreement of the judgment creditor and of the judgment debtor whose funds will be in court. They agree to payment out of court of the judgment debtor's funds in satisfaction of the judgment creditor's judgment against the judgment debtor. The court often grants such an order.

[32] Accordingly, it is more appropriate for the judgment amount to be paid from the court. I direct Olive Waller to pay all of the funds that it is holding in these matters (roughly $2.6 million) into court.

E. Payment of the judgment amount to the Applicants

[33] There appears to be no dispute that the amount required to pay the judgment, as set out in the Applicants' civil chambers appearance memo, is $1,371,540.49 plus $168.04 per day after September 25, 2025.

[34] I direct the local registrar, upon receipt of the funds from Olive Waller, to pay to MLT Aikins, counsel for the Applicants, the judgment amount of $1,371,540.49 plus $168.04 per day after September 25, 2025.

[35] If there is any disagreement between the Applicants and the Respondents as to the precise amount that is to be paid to satisfy the judgment, counsel for those parties have leave to arrange with the local registar for a telephone conference with counsel and me to sort it out.

F. Costs

[36] Costs have not been sought. Each party will bear his, her or its own costs of the applications.

G. Conclusion

[37] The application of the non-parties for a stay is dismissed.

[38] The interpleader application of Olive Waller, for an order directing payment into court of the funds that it is holding in these matters, is granted.

[39] The application of the Applicants, for an order directing payment of the amount owing under the Kuski Bassett judgment, is granted on a modified basis in that payment will be made from the court rather than from Olive Waller.

[40] Each party will bear his, her or its own costs of the applications.

"G.M. Currie" J.
G.M. CURRIE