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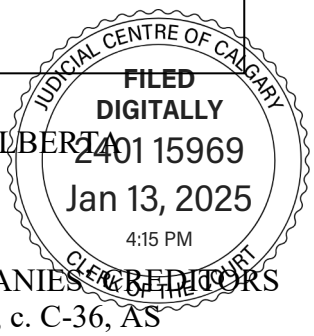

COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS 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, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
DOCUMENT	**BRIEF OF FOSSIL CREEK A2A DEVELOPMENTS, LLC AND WINDRIDGE A2A DEVELOPMENTS, LLC**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Luc Rollingson / Chyna Brown Telephone No.: 403-298-3323 Email: meyerk@bennettjones.com Fax No.: 403-265-7219 Client File No.: 98939-1

Application scheduled for January 17, 2025, commencing at 10:00 a.m.
before the Honourable Justice C. C. J. Feasby

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I. INTRODUCTION

1. The Initial Order in these *Companies' Creditors Arrangement Act*[1] ("**CCAA**") proceedings was granted November 14, 2024, essentially on an *ex parte* basis.[2] It granted expanded powers to a court-appointed monitor, and thus stripped the companies named in it, including Fossil Creek A2A Developments, LLC ("**Fossil Creek LLC**") and Windridge A2A Developments, LLC ("**Windridge LLC**" and, together with Fossil Creek LLC, the "**LLCs**") of control of their own companies.

2. The Initial Order was granted against the LLCs notwithstanding that they are incorporated outside of Canada, absent any evidence that either of them carry on business or have any assets in Canada, without an order for service *ex juris*.[3] The Initial Order was granted on at most, two days' notice, and in the face of an adjournment request, based on an assertion by the applicants of urgency due to a Facebook post of an unknown party regarding a potential sale of property unrelated to the LLCs.[4]

3. The relief was granted absent any evidence that the LLCs owe any funds to the applicants and absent any evidence that the applicants are creditors of *any* of the entities named in the Initial Order.

4. With respect, the LLCs submit they should not be subject to these CCAA proceedings, and that the criteria for the granting of an Initial Order against them were not, and are not, met.

5. The Initial Order (as based on the Alberta Court's template initial order) expressly includes a comeback clause, in recognition that CCAA proceedings often constitute real-time litigation where circumstances can change quickly. This comeback clause recognizes that as the facts and the evidence develop, the appropriateness of the Court's orders may require reconsideration.

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [***CCAA***] [**TAB 1**].
[2] First Report of the Monitor dated November 20, 2024 ("**First Report**"), Appendix "B", Transcript of proceedings before Justice C.C.J. Feasby, November 14, 2024 ("**November 14 Transcript**") [**TAB A.1**], p 4/23-27.
[3] In the circumstances where no order for service *ex juris* had been sought or granted.
[4] First Report, November 14 Transcript, pp 7/24-31, 14/17-15/36, 17/37-18/15 [**TAB A.1**].

6. This Brief is filed by the LLCs in response to the continuation of the comeback hearing that was originally before this Court on application of Alvarez & Marsal Canada Inc. (the "**Monitor**") filed November 18, 2024.

7. The LLCs submit that had this Court had the benefit of a record that included evidence from the Respondents at the hearing of the Initial Application (as it now has), the Court would not have granted the Initial Order.

8. As per the application filed on behalf of all of the respondents to these proceedings[5] (collectively, the "**CCAA Respondents**"), including the LLCs, the LLCs seek to set aside the Initial Order granted against them on November 14, 2024.[6]

9. The LLCs also oppose the applications[7] of the Monitor:

(a) to extend the stay of proceedings in these CCAA proceedings up to and including March 7, 2025;

(b) in the alternative, for a receivership order and the appointment of Alvarez & Marsal Canada Inc. as receiver and manager of the CCAA Respondents;

(c) for advice and direction of this Honourable Court with respect to what the Monitor characterizes as a failure by the CCAA Respondents to furnish the Requested Information (as defined in the ARIO) by the court-ordered timeline;

(d) to approve the Pre-Filing Report of the Monitor dated November 13, 2024 (the "**Pre-Filing Report**"), the Monitor's First Report dated November 20, 2024 (the "**First Report**"), the Monitor's Second Report dated November 28, 2024 (the "**Second Report**"), and the Monitor's Third Report dated December 13, 2024 (the "**Third Report**" and, together with the Pre-Filing Report, the First

[5] The respondents to these CCAA proceedings, referred to collectively in this Brief as the "CCAA Respondents", are defined in the Amended and Restated Initial Order filed December 3, 2024, as the "Debtor Companies" and the "Affiliate Entities", and the LLCs are included in that definition of "Debtor Companies". To be clear, the LLCs deny that they are "debtor companies" as defined in section 2(1) of the CCAA.

[6] Application of the CCAA Respondents filed November 21, 2024 ("**Set Aside Application**") [**TAB A.2**]. The CCAA Respondents' application had also sought to stay the Initial Order pending a more fulsome comeback hearing; as the comeback hearing is scheduled for January 17, 2025, that relief has become moot.

[7] Application of the Monitor filed November 18, 2024 [**TAB A.3**]; Application of the Monitor filed December 13, 2024 [**TAB A.4**]; Application of the Monitor filed January 8, 2024 [**TAB A.5**].

Report, and the Second Report, the "**Monitor's Reports**") and the conduct and activities of the Monitor; and

(e) to remove the current trustees of Hills of Windridge A2A Trust and Fossil Creek A2A Trust (collectively, the "**Canadian Trusts**") and replace them with the Monitor.[8]

II. FACTS

A. The Role of the LLCs

10. In and around 2014, the Applicant Investors invested in three real estate projects (collectively, the "**Projects**"):

(a) the Angus Manor Project, which is a 167-acre project north of Toronto;

(b) the Fossil Creek Project, a 93-acre project in Fort Worth, Texas; and

(c) the Windridge Project, a 415-acre project in the Dallas / Fort Worth area of Texas.[9]

11. The LLCs have never had any role in relation to the Angus Manor Project.

12. Fossil Creek LLC is the original owner of the 93 acres of land that constitute the Fossil Creek Project (the "**Fossil Creek Lands**"), having purchased the same in 2013.[10] In or about 2015, pursuant to a sale agreement and ancillary documents (the "**Fossil Creek UFI Sale Agreement**"),[11] Fossil Creek LLC sold undivided fractional interests ("**UFIs**") in the Fossil Creek Lands to Fossil Creek A2A Limited Partnership. The units in Fossil Creek A2A Limited Partnership were held by the Fossil Creek A2A Trust. Canadian investors purchased units in the Fossil Creek A2A Trust, which in turn used the proceeds of sale to purchase the units of

[8] The Monitor's application to remove the current trustees of Hills of Windridge Trust and of Fossil Creek Trust (collectively, the "**Offshore Trusts**") was dismissed by Justice Simard on November 25, 2024; Transcript of Proceedings, Decision of the Honourable Justice C. D. Simard, November 25, 2024 ("**November 25 Transcript**") [**TAB A.6**], p 16/3-8.
[9] Affidavit of Michael Edwards sworn November 12, 2024 ("**Edwards Affidavit**") [**TAB A.7**], Part 1, para 14; November 25 Transcript, p 3/11-13 [**TAB A.6**].
[10] Affidavit of Allan Lind sworn December 13, 2024 ("**Second Lind Affidavit**") [**TAB A.8**], para 8, Exhibit "H".
[11] Second Lind Affidavit, para 8, Exhibit "G" [**TAB A.8**].

Fossil Creek A2A Limited Partnership. Fossil Creek A2A Limited Partnership used those proceeds of sale to purchase UFIs from Fossil Creek LLC.[12]

13. Similarly, Windridge LLC is the original owner of the 415 acres of land that constitute the Windridge Project (the "**Windridge Lands**"), having purchased the same in 2012.[13] In or about 2014, pursuant to a sale agreement and ancillary documents (the "**Windridge UFI Sale Agreement**"),[14] Windridge LLC sold UFIs in the Windridge Lands to Hills of Windridge A2A LP. The units in Hills of Windridge A2A LP were held by the Windridge A2A Trust. Canadian investors purchased units in the Windridge A2A Trust, which in turn used the proceeds of sale to purchase the units of Hills of Windridge A2A LP. Hills of Windridge A2A LP used those proceeds of sale to purchase UFIs from Windridge LLC.[15]

14. The Fossil Creek UFI Sale Agreement and the Windridge UFI Sale Agreement each contemplate that the co-owners (i.e., Fossil Creek A2A Limited Partnership and Hills of Windridge A2A LP) will further transfer their interests (i.e., the UFIs) to a trustee to hold the property and develop it on their behalf.[16] The Fossil Creek Lands were transferred to the Trails of Fossil Creek Trust, and the Windridge Lands were transferred to the Hills of Windridge Trust, the trustee of each of which is Dirk Foo.[17] Neither the Trails of Fossil Creek Trust or the Hills of Windridge Trust (collectively, the "**Offshore Trusts**"), or Dirk Foo as trustee in each case, are CCAA Respondents; this Court declined an application by the Monitor to add them or to grant other relief in relation to them.[18]

15. The express purpose of the Hills of Windridge Trust and of the Fossil Creek Trust is "to receive and convey real property on behalf of the Settlors and to distribute the Net Income … from the sale of real estate to the Beneficiaries." Both the Hills of Windridge Trust and the Fossil Creek Trust give the trustee thereof broad powers and protections regarding the ownership, development and/or sale of the property. In addition to broad powers, the Hills of Windridge Trust and the Fossil Creek Trust require a majority vote of the settlors to replace

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[12] November 25 Transcript [**TAB A.6**], p 3/36-4/3; Transcript of Questioning of Allan Lind on Affidavits held January 7, 2025 ("**Lind Questioning**") [**TAB A.9**], p 26/4-20 referencing Affidavit of Allan Lind sworn November 21, 2024, Exhibit "A".
[13] Second Lind Affidavit, para 8, Exhibit "F" [**TAB A.8**].
[14] Second Lind Affidavit, para 8, Exhibit "E" [**TAB A.8**].
[15] Second Lind Affidavit, para 8, Exhibit "E" [**TAB A.8**]; Lind Questioning, pp 26/21-27/13 [**TAB A.9**], referencing Affidavit of Allan Lind sworn November 21, 2024, Exhibit "B".
[16] Second Lind Affidavit, para 12 [**TAB A.8**].
[17] Second Lind Affidavit, para 12, Exhibit "E" [**TAB A.8**]; Lind Questioning, pp 75/12-77/23 [**TAB A.9**].
[18] November 25 Transcript, pp 15/17-16/6 [**TAB A.6**].

the trustee and provides the indemnity for the trustee (including attorneys' fees) from the Hills of Windridge Trust and from Fossil Creek Trust (as applicable) to the full extent of its assets. The Hills of Windridge Trust and the Fossil Creek Trust also incorporate the method of calculation of "net income" for purposes of distribution to the beneficiaries of that trust.[19]

16. After selling the UFIs in the Fossil Creek Lands and in the Windridge Lands (collectively referred to herein as the "**Lands**") in 2015 and 2014, respectively, Fossil Creek LLC and Windridge LLC effectively became dormant until the spring of 2024.[20] In about June 2024, for expediency and convenience, Fossil Creek LLC was appointed as the general partner of Trails of Fossil Creek Properties LP, and in about May 2024, also for expediency and convenience, Windridge LLC was appointed as the general partner of Hills of Windridge LP, as a result of the following:

(a) The Fossil Creek Lands, other than one individual lot, were sold to Bloomfield Homes, L.P. ("**Bloomfield**", a large homebuilder at arm's length to the Trails of Fossil Creek Trust and the CCAA Respondents) in the fall of 2024,[21] after marketing of the same by an arm's length commercial broker, The Michael Group.[22] Solely to facilitate the closing of the sale of the Fossil Creek Lands, the Fossil Creek Lands were transferred from the Trails of Fossil Creek Trust to Trails of Fossil Creek Properties LP, a limited partnership formed pursuant to the laws of Texas in which Dirk Foo as trustee of the Trails of Fossil Creek Trust is the sole limited partner, and Fossil Creek LLC was the general partner.[23] This was necessary because the foreign-based trusts that own the Fossil Creek Lands are not "bankable", and there may have also been tax reasons. Documents relating to that sale and banking records are in the control of Dirk Foo in his capacity as the trustee of the Trails of Fossil Creek Trust.[24]

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[19] Second Lind Affidavit, para 14, Exhibit "E", p 118 of 124 [**TAB A.8**]; Affidavit of Allan Lind sworn November 21, 2024 ("**First Lind Affidavit**") [**TAB A.10**], Exhibit "C"; See also Lind Questioning, p 77/11-23 [**TAB A.9**], confirming that the document at Exhibit "D" to the Affidavit of Allan Lind sworn November 21, 2024 is in error and that the correct document is in the Second Lind Affidavit at Exhibit "E" starting at p 347.

[20] Affidavit of Allan Lind sworn December 31, 2024, filed by Bennett Jones LLP ("**Fourth Lind Affidavit**") [**TAB A.11**], para 6.

[21] Third Report of the Monitor filed December 13, 2024 ("**Third Report**") [**TAB A.12**], paras 100-102, 112, and Appendix "T".

[22] Lind Questioning, pp 32/17-22, 35/4-9, 38/4-11 [**TAB A.9**].

[23] Second Lind Affidavit, paras 46 [**TAB A.8**]; Fourth Lind Affidavit, paras 6-7 [**TAB A.11**].

[24] Second Lind Affidavit, paras 44-48 [**TAB A.8**]; Lind Questioning, p 35/12-14 [**TAB A.9**].

(b) Other than a portion of the Windridge Lands that were sold to the Tarrant Regional Water District ("**TRWD**") in or about July 2024 pursuant to a negotiated purchase in response to an expropriation notice, and five small lots with show homes plus an amenities centre, the title for which is being corrected to Dirk Foo as Trustee of the Hills of Windridge Trust, the Windridge Lands remain in the name of the Hills of Windridge Trust.[25] Solely to facilitate the closing of the sale of the portion of the Windridge Lands to TRWD, those lands were transferred to Hills of Windridge LP, a limited partnership formed pursuant to the laws of Texas in which Dirk Foo as trustee of the Hills of Windridge Trust is the sole limited partner, and Windridge LLC was the general partner,[26] and then conveyed to TRWD.[27] This was necessary because the foreign-based trusts that own the Windridge Lands are not "bankable", and there may have also been tax reasons.[28] When the balance of the Windridge Lands are ready to be sold, a further deed will be recorded showing Hills of Windridge LP as the owner, for the same reasons.[29] Documents relating to the sale to TRWD and banking records are in the control of Dirk Foo in his capacity as the trustee of the Hills of Windridge Trust.[30]

17. The LLCs do not have bank accounts or recent financial statements, and other than recently being appointed as general partners of the Trails of Fossil Creek Properties LP and Hills of Windridge LP (the "**Texas LPs**") to facilitate the sales of the Fossil Creek Lands and the portion of the Windridge Lands, both of which occurred prior to the commencement of these CCAA proceedings, the only function of the LLCs had been to hold and sell UFIs in the Fossil Creek Lands and the Windridge Lands.[31] The LLCs were appointed as general partners of the Texas LPs in each case solely so that the Texas LPs could be formed for the sole purpose of holding and transferring the Fossil Creek Lands and a portion of the Windridge Lands from the Offshore Trusts to the purchasers in each case.

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[25] Second Lind Affidavit, paras 15, 40, 43 [**TAB A.8**].
[26] Fourth Lind Affidavit, paras 6-7 [**TAB A.11**].
[27] First Supplement to the Third Report of the Monitor filed December 17, 2024, paras 31-34 and Appendix "B" [**TAB A.13**].
[28] Second Lind Affidavit, para 41 [**TAB A.8**].
[29] Second Lind Affidavit, para 15 [**TAB A.8**].
[30] Second Lind Affidavit, para 42 [**TAB A.8**].
[31] Fourth Lind Affidavit, para 6 [**TAB A.11**].

18. As a result of the recognition and enforcement of these CCAA proceedings against the LLCs by the U.S. Bankruptcy Court, by Texas statute, the LLCs have ceased to be general partners of the Texas LPs.[32]

19. The Trails of Fossil Creek Properties LP and Hills of Windridge LP (collectively, the "**Texas LPs**") are not CCAA Respondents.

20. There is no evidence before this Honourable Court that:

(a) either of the LLCs carry on business in Canada;

(b) either of the LLCs have any assets in Canada;

(c) the LLCs owe any funds to the Applicant Investors or to any other investor in the Fossil Creek Project or in the Windridge Project.

B. Commencement of CCAA Proceedings

21. These CCAA proceedings were commenced by way of an Originating Application of the Applicant Investors, as they are defined in the Initial Order granted November 14, 2024,[33] none of whom are creditors of the LLCs (or of any of the CCAA Respondents). There is no evidence that any of the Applicant Investors are owed any funds by either of the LLCs.

22. No service *ex juris* order was sought in relation to the CCAA Respondents outside of Alberta, including the LLCs,[34] which are incorporated pursuant to the laws of Texas.[35] That point was not brought to the attention of the presiding Justice, the Honourable Justice C. C. J. Feasby.[36]

23. Leaving aside that no order for service *ex juris* had been granted, the CCAA Respondents were given, at most, two days' notice of the application for the Initial Order.[37] The application was "essentially *ex parte*".[38]

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[32] Fourth Lind Affidavit, para 8 [**TAB A.11**].
[33] Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund and Brian Richards, and collectively, the "**Applicant Investors**".
[34] November 25 Transcript, p 4/23-27 [**TAB A.6**].
[35] Edwards Affidavit, Part 1, Exhibits "10" and "14" [**TAB A.7**].
[36] First Report, November 14 Transcript, p 2/32-3/23 [**TAB A.1**].
[37] First Report, November 14 Transcript, p 2/35 [**TAB A.1**]. Throughout this Brief, where referring to "two days' notice" of the application for the Initial Order, the LLCs are not in any way confirming that they were properly served with notice of the application for the Initial Order.
[38] November 25 Transcript [**TAB A.6**], p 4/23-24.

24. A two-week adjournment request by counsel (at that time) for the CCAA Respondents was not granted.[39] Counsel for the Applicant Investors objected to the adjournment request, asserting there was urgency to the application due to a post "on a Facebook page for disgruntled investors"[40] located by Azimuth, "an entity in Calgary that has previously assisted investors in exempt market offerings to obtain information and in some cases, pursue restructuring opportunities."[41] If one were to *assume* that the Facebook post (by an unidentified person) constituted credible evidence of an imminent potential sale of UFIs in property, and further, that any such sale (for consideration) constitutes "dissipation of assets", then one would also note that the Facebook post states that it relates to an offer to purchase property known as "Angus Manor Park", of approximately 167 acres located in Essa Township, Ontario. The Facebook post includes no reference whatsoever to the Windridge Project or to the Fossil Creek Project, and solicits votes on an offer on the Angus Manor Project (i.e., even with respect to the Angus Manor Project, the Facebook post did not demonstrate any urgency that a sale of the Angus Manor Project was about to close).[42] There was no evidence before the Court of any urgent circumstances in relation to the Windridge Project or the Fossil Creek Project, or in relation to the LLCs. It appears from the transcript of the hearing that the denial of the adjournment request was due to a finding of urgency based on that Facebook post.[43]

25. The Initial Order granted extensive relief beyond that in the Alberta Court's template form of initial order for CCAA proceedings, in that it stripped the powers of the directors, officers and management of the CCAA Respondents and granted, in the words of this Court, "very wide-ranging enhanced powers"[44] to the Monitor to exercise the management and control of the "Debtor Companies" as defined therein.[45]

26. This is of interest, considering that in Justice Feasby's Reasons for Decision of December 23, 2024 on a subsequent application in *Angus A2A GP Inc (Re)*, 2024 ABQB 769 at para 4, Justice Feasby stated that before granting the Initial Order, he canvassed the appropriateness of other remedies with the parties, including a receivership and injunction, and stated that "Proceeding pursuant to the *CCAA* appeared to be less intrusive than a receivership

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[39] First Report, November 14 Transcript, pp 11/17-13/30, 17/28-18/15 [**TAB A.1**].
[40] Edwards Affidavit, Part 1, para 94, Part 6, Exhibit "39" [**TAB A.7**]; First Report, November 14 Transcript, p 7/24-31 [**TAB A.1**].
[41] Edwards Affidavit, Part 1, para 94, Part 6, Exhibit "39" [**TAB A.7**].
[42] *Ibid*.
[43] First Report, November 14 Transcript, p 17/41-18/3 [**TAB A.1**].
[44] November 25 Transcript, p 7/22-24 [**TAB A.6**].
[45] Initial Order granted November 14, 2024 ("**Initial Order**") [**TAB A.14**], paras 9-14.

which would unseat management." As a result of the enhanced powers granted to the Monitor pursuant to the Initial Order, management was unseated.[46]

27. The LLCs have, through the Affidavit of Allan Lind sworn November 21, 2024[47] and December 31, 2024,[48] advised the Court and parties on the Service List for these proceedings that they do not attorn to the jurisdiction of this Court, and that they challenge this Court's jurisdiction. Notwithstanding that, as the Initial Order has been granted against them, they have had no choice but to respond to the same, without prejudice to their position.

28. The Initial Order also appointed representative counsel for all Canadian investors ("**Canadian Rep Counsel**") and for all offshore investors ("**Offshore Rep Counsel**" and, together with Canadian Rep Counsel, "**Rep Counsel**") in the business and property of the CCAA Respondents, the professional fees for whom, along with those of the Monitor, were granted a priority charge over all property of the CCAA Respondents. It also approved interim financing and an interim financing charge.[49]

29. The Applicant Investors are not secured or unsecured creditors of the CCAA Respondents. The Applicant Investors are investors in Fossil Creek A2A Trust or Windridge A2A Trust. Based on their equity investments in *those* of the CCAA Respondents,[50] they assert that they have contingent claims against the CCAA Respondents. In his decision on November 25, 2024, on the Monitor's application for an amended and restated initial order, the Honourable Justice Simard of this Court held that "The basis for this argument seems to be that the amount of money raised with respect to the Angus Manor project exceeds the current proposed purchase price. There are many assumptions built into that chain of reasoning for which there is no supporting evidence."[51] No evidence is before this Court to indicate that the Applicant Investors are creditors (secured, unsecured, contingent or otherwise) of either of the LLCs.

30. There is no indication in the transcript of the hearing for the Initial Order that the question of whether the Applicant Investors had standing to bring an application for an Initial

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[46] *Ibid*.
[47] First Lind Affidavit, para 16 [**TAB A.10**].
[48] Fourth Lind Affidavit, para 3 [**TAB A.11**].
[49] Initial Order, paras 44-49 [**TAB A.14**].
[50] In relation to the Fossil Creek Project and the Windridge Project.
[51] November 25 Transcript, p 8/36-40 [**TAB A.6**].

Order was considered by the Court (in relation to the LLCs or in relation to any of the CCAA Respondents).[52] An Initial Order commenced by a party that is neither a debtor, a creditor, or a representative of creditors (i.e., a receiver or an interim receiver) appears to be, prior to this case, unprecedented in Canadian law.[53]

C. The Set-Aside Application and the Commencement of the Comeback Hearing

31. On November 21, 2024, the CCAA Respondents filed and served affidavit evidence and an application to set aside the CCAA proceedings (the "**Set-Aside Application**").

32. On November 21, 2024, Justice Simard heard the application of the Monitor to extend the Stay Period pursuant to the Initial Order to February 28, 2025, and for an amended and restated initial order. Justice Simard extended the Stay Period until November 26, 2024, then delivered his decision on the application on November 25, 2024,[54] granting an amended and restated initial order but for a limited time (until December 18, 2024) and for a limited purpose of providing and reporting information (the "**ARIO**")[55], and adjourning other relief sought by the Monitor and by the CCAA Respondents (including the Set-Aside Application) to December 18, 2024. In his decision, Justice Simard stated:

> The CCAA is broad and remedial legislation that I must interpret in a large and liberal manner. However, there are limits to the Act's flexibility. As its name suggests, the purpose of the Act is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay may not be appropriate if the purpose of the proceedings is not to further that fundamental purpose of the Act.
>
> And the authority for that proposition is *Cliffs Over Maple Bay* 2008 BCCA 327. That decision must be read with caution because it was decided before the 2009 amendments to the Act. However, the principle it stated is still sound. The CCAA is not a statute that exists to serve the purpose of all parties who have disputes with insolvent entities.
>
> As the applicant investors advised the Court on November 14th, this is not a conventional CCAA proceeding. It was not commenced in the way the vast

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[52] First Report, November 14 Transcript [**TAB A.1**].

[53] K. Forbes, "An Exploration of Creditor-Initiated CCAA Proceedings", in Insolvency Institute of Canada, IIC-ART Vol. 13-1 [***Forbes***] [**TAB B.22**], p 2. No precedent for CCAA proceedings commenced by investors, as compared to creditors, has been located: Review of Government of Canada, CCAA records search (after 2014), online: https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/CCAA-records-search-after-2014 [***CCAA Records after 2014***] [**TAB B.23**]; Government of Canada, CCAA - Records search (2014-2009), online: https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/ccaa-records-2009-2014 [***CCAA Records 2014-2009***] [**TAB B.24**].

[54] November 25 Transcript [**TAB A.6**].

[55] Amended and Restated Initial Order granted November 25, 2024 ("**ARIO**") [**TAB A.15**].

> majority of these cases are, by an insolvent debtor entity who needs protection from its creditors to be able to put together a plan.
>
> It was also not commenced by creditors. It was commenced by investors whose rights and entitlements are unclear, based on the evidence before me presently.
>
> The applicant investors' complaints are not that they are owed debts that are not being paid; but instead, that the respondents have completely failed to communicate with them, and that their governance appears to be highly deficient. The initial order effectively supplanted management on day one of this case by giving the monitor very wide-ranging enhanced powers. Two of the three projects covered by the initial order are not in Canada, but are located in Texas.
>
> There is no hint that the applicant investors have any plan for a compromise or arrangement of the debtors, or even a process that would lead to out of the ordinary course sales. They essentially started this action to try to stop sales and to investigate the facts.
>
> I will discuss these issues in more detail later in my decision, but at this point, I want to acknowledge that the concerns raised by the respondents are legitimate, and they cannot be dismissed out of hand. It is possible that the continuation of these proceedings – while unquestionably driven by the genuine desire to protect investors' interests -- might be stretching the CCAA beyond its proper limits.[56]

33. Justice Simard noted that the Applicant Investors "collectively speak for about 0.1 percent of the total investors in the Windridge property" and "probably speak for about 0.18 percent of the total UFIs in the Fossil Creek lands", and stated as follows:

> This extremely small proportionate interest raises three important considerations – and maybe more than these three – but the three I have identified are as follows:
>
> > First, is it appropriate that a process started by these applicant investors should be allowed to continue with the risk that the potentially very large costs of the process will be borne by a much larger group of stakeholders who have not consented and are not even aware that this is happening?
> >
> > Second, in the overall context of the investments, are these applicant investors' rights being infringed? What rights did they bargain for, as extremely small fractional owners? Do they have the power to hold up sales if the majority has approved them?

[56] November 25 Transcript, pp 6/41-7/35 [**TAB A.6**].

> And third, a related question: It is one thing to say your investment is being managed poorly, and that you are not receiving any communications. There are corporate and common law remedies for that kind of wrong. It is quite another thing to say that your extremely fractional interest being ignored entitles you to freeze the totality of the investments and effectively take control of the entities out of the hands of management and directors.[57]

34. Justice Simard noted that the CCAA Respondents say that the sale of the Fossil Creek Lands and negotiations for a sale of the Windridge Lands are at arm's-length for fair market value and in accordance with the investors' rights and entitlements, and that "If they are, it may be difficult for the [Applicant Investors] to justify the continuation of these proceedings." He held he did not have enough evidence to determine these issues, and so directed the CCAA Respondents to respond to numerous requests for information (the "**Requested Information**") and for the Monitor to file a further report.[58]

35. In his November 25, 2024 decision, Justice Simard held that the Court had jurisdiction over the LLCs.[59] The LLCs have sought permission to appeal that decision.

36. Due to a judicial conflict, and to allow for cross-examinations on affidavit evidence of the CCAA Respondents, the continuation of the comeback hearing, the Set-Aside Application, and certain of the relief sought by the Monitor at the comeback hearing (as summarized in paragraph 9 hereof), was adjourned to be heard by Justice Feasby on January 17, 2025.

D. The Chapter 15 Proceedings

37. Pursuant to Chapter 15 of the U.S. Bankruptcy Code, the U.S. Bankruptcy Court granted an Order recognizing and enforcing the Initial Order and the CCAA proceedings in Texas on December 20, 2024, finding that the CCAA Respondents have their "center of main interests" in Canada.[60]

E. Responses to the Requested Information

38. The CCAA Respondents provided records and information in response to the Requested Information by the Court-ordered deadline and continued to provide further records

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[57] November 25 Transcript, pp 11/18-12/11 [**TAB A.6**].
[58] November 25 Transcript, p 12/13-40 [**TAB A.6**]; ARIO, paras 75-76 [**TAB A.15**].
[59] November 25 Transcript, p 8/3-16 [**TAB A.6**].
[60] Order Granting Recognition of Foreign Main Proceeding and Additional Relief granted by the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, December 20, 2024. [**TAB A.16**].

and information as they were able to obtain it after that date. They provided explanations and evidence when they were unable to do so.[61]

F. The Status of the Investors Represented by Rep Counsel

39. As noted above, the Applicant Investors constitute about 0.1 percent of the total investors in the Windridge Lands and about 0.18 percent of the total UFIs in the Fossil Creek Lands.

40. The Initial Order appointed Rep Counsel, entitled them to seek out representatives of Canadian and offshore investors, and approved inclusion of Rep Counsels' professional fees in the court-ordered Administration Charge against the property of the CCAA Respondents.[62]

41. As a result of information provided by the CCAA Respondents to the Monitor due to the Initial Order, Canadian Rep Counsel have identified other Canadian investors and assert that they have been contacted by 46 investors in the Windridge Project with total investments of $1,006,233, and 36 investors in the Fossil Creek Project with total investments of $809,300.[63]

42. Offshore Rep Counsel have advised they have been contacted by 169 Offshore investors; however, it is unclear how many of those investors invested in the Fossil Creek Project or the Windridge Project, or the amount they invested.[64]

43. The correspondence sent by Rep Counsel to investors asks if they are supportive of the appointment of the Monitor, but does not explain that the professional fees of the Monitor and Rep Counsel have been granted a priority charge over the Projects, to be paid out in priority to the investors, nor do Rep Counsel articulate any plan as to how they propose to increase the value of the Projects.[65]

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[61] Third Report, Appendices "B", "D" to "J", "M" to "Z" [**TAB A.12**]; Second Lind Affidavit, paras 50-54, Exhibit "O" [**TAB A.8**]; Affidavit of Allan Lind sworn December 31, 2024, filed by Miles Davison LLP ("**Third Lind Affidavit**") [**TAB A.17**], paras 3-10; Fourth Lind Affidavit, paras 4-6 [**TAB A.11**].

[62] Initial Order, paras 24-27, 42, 50, 52 [**TAB A.14**].

[63] Secretarial Affidavit No. 3 of Kim Picard sworn January 8, 2025, para 6 and Exhibit "A", "Windridge" and "Fossil Creek" [**TAB A.18**]; Second Secretarial Affidavit of Kim Picard sworn December 13, 2024 ("**Second Secretarial Picard Affidavit**"), para 4 [**TAB A.19**].

[64] Affidavit of Joanna Van Ham sworn December 13, 2024 ("**Van Ham Affidavit**") [**TAB A.20**], para 4.

[65] Van Ham Affidavit, Exhibit "A" [**TAB A.20**]; Second Secretarial Picard Affidavit, Exhibits "A" and "B" [**TAB A.19**]; Initial Order paras 42, 50, 52 [**TAB A.14**].

G. The Rights of Investors

44. The ARIO directed the Monitor to report on the process for obtaining investor approval of any sale of the Lands.[66]

1. The Fossil Creek Project

45. With respect to the Fossil Creek Project, the Monitor reported that the rights of Canadian investors in Fossil Creek A2A Trust were those pursuant to the Fossil Creek A2A Trust Declaration of Trust, dated March 17, 2014:

(a) Serene Country Homes (Canada) Inc. ("**Serene**")[67] as administrator was required to:

(i) call meetings of the investors in the Fossil Creek A2A Trust within an 18-month and then 15-month periods;[68] and

(ii) provide annual financial statements of Fossil Creek A2A Trust to the investors;[69] and

(b) the investors were entitled, at any time, to demand to redeem their units in the Fossil Creek A2A Trust; however, cash redemption can be refused by Serene as administrator if, in its sole discretion, it determines that the payment of the redemption price in cash would not be in the best interest of the Fossil Creek A2A Trust.[70]

46. Notably, the Fossil Creek A2A Trust Declaration of Trust also provides that unitholders in the Fossil Creek A2A Trust (i.e., the investors) have no interest in the legal ownership of the assets of the trust or the right to manage the investments of the trust, and no right to compel any partition, division, dividend or distribution of the trust fund or any assets of the trust.[71] It also includes a waiver of liability of the trustees or the administrator to any trust unitholder,[72]

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[66] ARIO, para 75(f)(iv) [**TAB A.15**].
[67] The Fossil Creek A2A Trust Declaration of Trust at Appendix "N" to the Third Report states that A2A Capital Management Inc. is the administrator. The Third Report confirms at para 58 that Serene Country Homes (Canada) Inc. was formerly A2A Capital Management Inc.
[68] Third Report, Appendix "N", ss 12.1(a) and (c) [**TAB A.12**].
[69] Third Report, Appendix "N", s 16.7 [**TAB A.12**].
[70] Third Report, paras 94-95, Appendix "N", s 6.4 [**TAB A.12**].
[71] Third Report, Appendix "N", s 3.5 [**TAB A.12**].
[72] Third Report, Appendix "N", ss 5.9 and 9.7 [**TAB A.12**].

and a full indemnification clause.[73] It states that the trustees have, "free from any power of control on the part of the Trust Unitholders, full, absolute and exclusive power, control and authority over the Trust Fund and over, and management of, the affairs of the Trust to the same extent as if the Trustees were the sole and absolute beneficial owner of the Trust Fund in its own right, to do all such acts and things as in its sole judgment and discretion are necessary or incidental to, or desirable for, carrying out the trust created [thereunder]."[74]

47. The Monitor reported that the rights of offshore investors in the Fossil Creek Project were to vote on certain ordinary and special resolutions, including approving the sale of all or any part of the Fossil Creek Property other than the sale of a UFI to another Fossil Creek Co-Owner, and to inspect full and adequate books of account and records, pursuant to the Fossil Creek Deed of Covenant, dated January 9, 2015.[75] However, while the Monitor's Third Report then states that "the interests of individual UFI holders were transferred to Fossil Creek Trust in anticipation of the sale of the Fossil Creek Lands",[76] it fails to mention that this occurred by agreement of the offshore investors at the time of their investment.[77] It further fails to mention that the Fossil Creek Trust Revocable Trust Agreement provides that its express purpose is "to receive and convey real property on behalf of the Settlors and to distribute the Net Income … from the sale of real estate to the Beneficiaries";[78] that it gives the trustee broad powers and protections regarding the ownership, development and/or sale of the property;[79] that it requires a majority vote of the settlors to replace the trustee;[80] and that it provides an indemnity for the trustee (including attorneys' fees) from the Fossil Creek Trust to the full extent of its assets.[81] It also incorporates the method of calculation of "net income" for purposes of distribution to

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[73] Third Report, Appendix "N", s 9.8 [**TAB A.12**].
[74] Third Report, Appendix "N", s 9.1(b) [**TAB A.12**]; See also s 9.2.
[75] Third Report, paras 96-97, Appendix "Q" [**TAB A.12**].
[76] Third Report, para 98 [**TAB A.12**].
[77] Second Lind Affidavit, para 12 and Exhibits "E" and "J" [**TAB A.8**]; First Lind Affidavit, Exhibit "C", p 16, Article One, Article Two, Article Four Section A, and Article Nine, Section A [**TAB A.10**]. The Fossil Creek Trust (Sales Trust) Revocable Trust Agreement which is at Exhibit "C" to the Affidavit of Allan Lind sworn November 21, 2024 confirms that the settlors thereto are the owners of undivided tenant-in-common interests in the Fossil Creek lands, that pursuant to the terms of the Restrictive Covenant executed by the settlors, the Fossil Creek lands may be sold upon the Facilitator's presentation of an offer and the co-owners' acceptance of the offer, that in anticipation of the sale of the Fossil Creek lands, the settlors conditionally executed special warranty deeds in favour of the trustee for the Fossil Creek lands, that the purpose of the Fossil Creek Trust (Sales Trust) Revocable Trust Agreement is to establish that trust to receive and convey real property on behalf of the settlors and to distribute the Net Income (as defined by the Restrictive Covenant) from the sale of the Fossil Creek lands to the Beneficiaries as identified therein, that the trustee of the Fossil Creek Trust is Foo Tiang Meng Dirk Robert, and that the trustee has the power to sell the Fossil Creek lands. Pursuant to the Restrictive Covenant made between Fossil Creek A2A Developments, LLC and each of the co-owners of the Trails of Fossil Creek, 97.68% of the co-owners resolved to transfer the Fossil Creek Lands to the trustee of the Fossil Creek Trust. The voting results are included at Exhibit "J" to the Second Lind Affidavit.
[78] Third Report, Appendix "R", Article One [**TAB A.12**].
[79] Third Report, Appendix "R", Article Nine [**TAB A.12**].
[80] Third Report, Appendix "R", Article Four, Section D [**TAB A.12**].
[81] Third Report, Appendix "R", Article Four, Section G [**TAB A.12**].

the beneficiaries of that trust.[82] In other words, the offshore investors agreed, at the outset of their investments,[83] to give the trustee of the Fossil Creek Trust the authority to develop, sell and convey the Fossil Creek Lands.

48. Fossil Creek LLC does not owe any obligations to the investors in the Fossil Creek Project.

2. The Windridge Project

49. The Monitor reported that the rights of Canadian investors in Hills of Windridge A2A Trust are governed by The Hills of Windridge A2A Trust Declaration of Trust dated February 13, 2013 and are as follows:

(a) Annual meetings of the investors are not required, but may be called upon written request of investors holding not less than 25% of the units in the Hills of Windridge A2A Trust; and

(b) Investors are entitled to receive from the trustee's annual financial statements and such other reports as are from time to time required by applicable law.[84]

50. Further, the trustees are responsible for preparing and maintaining adequate accounting records for the Hills of Windridge A2A Trust.[85]

51. Similarly to the Fossil Creek Project, the Monitor reported that the rights of offshore investors in the Windridge Project were to vote on certain ordinary and special resolutions, including approving the sale of all or any part of the Windridge Property other than the sale of a UFI to another Windridge Co-Owner, and to inspect full and adequate books of account and records, pursuant to the Windridge Deed of Covenant.[86] However, while the Monitor's Third Report then states that "the interest of individual UFI holders were transferred to Hills of Windridge Trust in anticipation of the sale of the Windridge Lands",[87] it fails to mention that this was done simultaneously with the offshore investors' investments in the Windridge

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[82] Second Lind Affidavit, para 14, Exhibit "E", p 118 of 124 [**TAB A.8**]; Lind Questioning, p 77/11-23 [**TAB A.9**], confirming that the document at Exhibit "D" to the Affidavit of Allan Lind sworn November 21, 2024, is in error and that the correct document is in the Affidavit of Allan Lind sworn December 13, 2024 at Exhibit "E".
[83] Third Report, Appendix "S" [**TAB A.12**].
[84] Third Report, para 137 [**TAB A.12**].
[85] *Ibid*.
[86] Third Report, paras 138-139 [**TAB A.12**].
[87] Third Report, para 140 [**TAB A.12**].

Project.[88] It further fails to mention that the Hills of Windridge Trust (Sales Trust) Revocable Trust Agreement provides that its express purpose is "to receive and convey real property on behalf of the Settlors and to distribute the Net Income … from the sale of real estate to the Beneficiaries";[89] that it gives the trustee broad powers and protections regarding the ownership, development and/or sale of the property;[90] that it requires a majority vote of the settlors to replace the trustee;[91] and that it provides an indemnity for the trustee (including attorneys' fees) from the Hills of Windridge Trust to the full extent of its assets.[92] It also incorporates the method of calculation of "net income" for purposes of distribution to the beneficiaries of that trust.[93] In other words, the offshore investors agreed, at the outset of their investments, to give the trustee of the Hills of Windridge Trust the authority to develop, sell and convey the Windridge Lands.[94]

3. Summary of Rights of Investors in the Fossil Creek Project and the Windridge Project

52. The only obligations of any of the CCAA Respondents to any of the investors represented by Rep Counsel in these proceedings are to call meetings (in the case of Canadian investors in Fossil Creek A2A Trust), to provide annual financial statements of Fossil Creek A2A Trust and Hills of Windridge A2A Trust to Canadian investors, and, in the case of Windridge A2A Trust, to provide other reports to the Canadian investors as required by applicable law.

53. It should be noted that in the circumstances of these long-term investments, in a structure where the Canadian investors own units in a trust that holds units in a limited partnership that transferred its UFI in land to a trustee, annual financial statements of the first-mentioned trust would not show any different or meaningful information from year-to-year, unless and until the land was sold and the proceeds distributed.

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[88] Second Lind Affidavit, para 12 and Exhibits "E" and "I" at p 288 [**TAB A.8**] (in this regard, see s. 15.1 on p 269, p 288, p 299 and specifically Article Six, Section A at p 305, p 338, p 347 and specifically Article Four, Section A at p 348, and Article Nine, Section A at p 350 of Exhibit "E"). The voting results are included at Exhibit "I".
[89] Third Report, Appendix "Y", Article One [**TAB A.12**].
[90] Third Report, Appendix "Y", Article Nine [**TAB A.12**].
[91] Third Report, Appendix "Y", Article Four, Section D [**TAB A.12**].
[92] Third Report, Appendix "Y", Article Four, Section G [**TAB A.12**].
[93] Second Lind Affidavit, para 14, Exhibit "E", p 118 of 124 [**TAB A.8**]; Lind Questioning, p 77/11-23 [**TAB A.9**], confirming that the document at Exhibit "D" to the Affidavit of Allan Lind sworn November 21, 2024, is in error and that the correct document is in the Affidavit of Allan Lind sworn December 13, 2024 at Exhibit "E".
[94] Third Report, Appendix "Y" [**TAB A.12**].

54. These are the only obligations that are owed to the investors by *any* of the CCAA Respondents. None of these obligations are owed by the LLCs to the investors. The agreements, voluntarily entered into by the investors, do not entitle investors to a guaranteed return on, or even *of*, their investment, nor to any other rights.

III. ISSUE

55. Should this Court set aside the Initial Order?

56. Should this Court grant an extension of the stay of proceedings in these CCAA proceedings?

57. In the alternative to extending the stay of proceedings in these CCAA proceedings, should this Court grant a receivership order against the CCAA Respondents?

58. Should this Court remove the current trustees of the Canadian Trusts and replace them with the Monitor?

59. Should this Court approve the Monitor's Reports and the activities of the Monitor?

60. What advice and direction should this Court give the Monitor with respect to what the Monitor characterizes as the failure by the CCAA Respondents to furnish the Requested Information (as defined in the ARIO) by the time specified in the ARIO?

IV. ARGUMENT

A. Onus to set aside the CCAA Proceedings

61. This Court has confirmed that the hearing on January 17, 2025 in these proceedings is a continuation of the comeback hearing.[95] Justice Feasby has confirmed that the comeback hearing is a *de novo* hearing in the sense that the onus remains on the original applicants,[96] new evidence may be adduced, and that a fresh decision will be made in respect of all issues

[95] *Angus A2A GP Inc (Re)*, 2024 ABKB 769 [***Angus Extension Decision***] at para 5 [**TAB 2**].
[96] *Angus Extension Decision* at para 22, citing *Muscletech Research and Development Inc, Re*, 2006 CanLII 1020 (ON SC), 19 CBR (5th) 54, at para 5 [**TAB 3**] and Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters, 2013) [***Rescue!***] [**TAB B.25**] at 59; See also *Target Canada Co (Re)*, 2015 ONSC 303 at para 82 [**TAB 4**].

that were before the Court on the application for the Initial Order, except those decided by Justice Simard on November 25, 2024.[97]

B. These proceedings are inconsistent with the fundamental purposes of the *Companies' Creditors Arrangement Act*

62. The purpose of the CCAA is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay may not be appropriate if the purpose of the proceedings is not to further that fundamental purpose of the CCAA.[98]

63. Notably, the purpose of assisting companies in developing and seeking compromises and arrangements with their *creditors* is reflected in the title of the statute itself – both the short version and its long title (*An Act to facilitate compromises and arrangements between companies and their creditors*), which "indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangement with their creditors."[99] The investors represented by Rep Counsel in these proceedings are not creditors.

64. In *9354-9186 Québec Inc v Callidus Capital Corp*, the Supreme Court of Canada summarized the objectives of the CCAA as:

> (a) providing for timely, efficient, and impartial resolution of a debtor's insolvency;
>
> (b) preserving and maximizing the value of a debtor's assets;
>
> (c) ensuring fair and equitable treatment of the claims against a debtor;
>
> (d) protecting the public interest; and
>
> (e) in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

65. The *CCAA* generally prioritizes the objective of avoiding the social and economic losses resulting from liquidation of an insolvent company.[100]

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[97] *Angus Extension Decision* at para 22.
[98] November 25 Transcript, pp 6/41-7/5-10 [**TAB A.6**], citing *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 [**TAB 5**].
[99] L. W. Houlden, G. B. Morawetz & J. P. Sarra, *The 2024 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2024) [***Annotated BIA***] [**TAB B.26**] at §19:4
[100] *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 [**TAB 6**] at para 40-41; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 [***Century Services***] [**TAB 7**] at paras 15, 70.

66. There cannot be timely, efficient or impartial resolution of a debtor's insolvency with respect to the LLCs because, leaving aside the lack of any evidence that they are insolvent, it will not be possible to effect a timely, efficient and impartial resolution (or any resolution) of the insolvency, absent jurisdiction over the trustee of the Offshore Trusts in these CCAA proceedings or over the lands that form the Windridge Project and the Fossil Creek Project. This Court has already determined it does not have that jurisdiction in these proceedings.[101]

67. As the Applicant Investors are a tiny percentage of the investment interests in the Windridge Project and the Fossil Creek Project, it will not be possible to ensure fair and equitable treatment of the claims in relation to those projects (nor is there any authority that the CCAA is intended to be used by investors to force recovery on investments explicitly stated to be "risky").

68. With respect to the LLCs, it is not possible for these CCAA proceedings to further the purposes and objectives of the CCAA to effect a compromise or arrangement or to otherwise restructure or monitor the real estate development projects that the Applicant Investors invested in. This is due to the fact that the Lands that are the subject of the Fossil Creek Project and the Windridge Project are located in Texas, and the entities that control the Windridge Lands, and the proceeds of sale of the Fossil Creek Lands,[102] are trusts subject to the laws of Texas, the trustee of each of which is an individual and not a "debtor company" pursuant to the CCAA. This Court has already confirmed that it cannot extend these CCAA proceedings to the Hills of Windridge Trust and the Trails of Fossil Creek Trust, nor to the trustee thereof, Mr. Dirk Foo.[103]

69. It is not possible to achieve the objectives of a CCAA proceeding – a compromise and arrangement, or even a liquidation - where the Offshore Trusts and the Lands (or the proceeds thereof) are not and cannot be subject to the CCAA proceedings.

70. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure."[104]

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[101] November 25 Transcript, p 15/17-16/1 [**TAB A.6**].
[102] Second Lind Affidavit, para 44-47 [**TAB A.8**]
[103] November 25 Transcript, p 15/17-16/1 [**TAB A.6**].
[104] *Century Services*, *supra* note 100 at para 71 [**TAB 7**].

71. In *Arrangement relatif à Servites de Marie*,[105] the Superior Court of Québec denied an application for an initial order where the application was opposed by the main creditor, the representative of a class action relating to allegations of sexual assault committed by priests against students (the class action being the only ongoing legal proceeding or recovery measure). Dumais J. held that the primary purpose of the CCAA is to allow for a restructuring and refinancing of a company, and questioned the need for protection in this case, where the creditors did not want it, and it would involve giving a priority of at least $250,000 to the monitor. Dumais J. also noted that given s 19(2) of the CCAA, unless the victims of the class action group vote in favour, the arrangement would not be enforceable against them, and thus a CCAA process was unlikely to resolve anything.

72. *Nothing* that has been done by the Monitor or by Rep Counsel to date will increase the value of the Lands – nor are the Monitor or Rep Counsel proposing to do anything that will increase the value of the Lands, or create any financial benefit for any investors. Indeed, to date, none of them have put forth any "germ of a plan" presenting *any* possibility of a restructuring or of an increase in value to the Fossil Creek Project or the Windridge Project.[106] All efforts of the Monitor and of Rep Counsel to date have reduced the value that will be available to investors. A CCAA process will not resolve anything – and has already cost hundreds of thousands of dollars, incurred by the Monitor and by Rep Counsel, to the detriment of all investors and other stakeholders in the Projects.

73. It is not in the public interest for this Court to apply the CCAA in this case, in a manner that is inconsistent with its purpose and objectives.

C. The *Companies' Creditors Arrangement Act* is not intended for *ex parte* injunctive relief against a debtor company

74. In *Port Capital Development (EV) Inc. (Re)*, Fitzpatrick J. confirmed that "CCAA proceedings do not occupy a special category of litigation where the normal rules of service and notice go by the wayside. Procedural fairness is an important aspect of any CCAA proceeding…."[107]

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[105] *Arrangement relatif à Servites de Marie*, 2021 QCCS 2212 [**TAB 8**].
[106] *Royal Bank of Canada v Canwest Aerospace Inc,* 2023 BCSC 514 [**TAB 9**] at para 15 citing *Industrial Properties Regina Limited v Copper Sands Land Corp*, 2018 SKCA 36 at para 20 [**TAB 6**].
[107] *Port Capital Development (EV) Inc (Re)*, 2022 BCSC 1655 [***Port Capital***] [**TAB 11**] at para 65.

75. It remains "important to the principles of procedural fairness and due process that everyone who is interested in a matter be given the opportunity to appear before the court."[108] Applicants cannot assume that any defects in service will or can be remedied by the language within the CCAA that dispenses service and notice to all other interested parties.[109]

76. Although efficiency and speed are significant factors in CCAA proceedings, equal importance should be given to due process, the consideration of stakeholders' interests on both sides, and the vital principle that justice must not only be done, but also be seen to be done, through the adherence to fair and recognized principles and processes.[110] Fundamental to the adversarial system is a party's ability to know the case that must be met.[111]

77. These proceedings are, effectively a "CCAA by ambush". None of the CCAA Respondents were properly served; over 2,000 pages of materials, including an Originating Application which, by its form, requires ten days' notice even if served within Alberta,[112] were provided to some of the CCAA Respondents with not more than two days' notice of the hearing.[113] This Court found that the application was essentially *ex parte*.[114] With respect to the LLCs, this Court held that service was imperfect, short, and defective.[115]

78. The Initial Order was granted November 14, 2024. It granted expanded powers to the Monitor and thus stripped the LLCs of control of their own companies,[116] which are incorporated outside of Canada, and outside of the jurisdiction of this Court,[117] in the face of an adjournment request, based on an assertion by the Applicant Investors of urgency due to the Facebook post, and absent any evidence that the LLCs owe any funds to the Applicant Investors.

79. As noted, the LLCs have made clear on the record that they do not attorn to, and challenge, the jurisdiction of this Court.[118] As a result of the existential relief granted (and

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[108] *Coromandel Properties Ltd (Re)*, 2023 BCSC 2187 at para 59 [**TAB 12**].
[109] *Ibid* at para 61[**TAB 12**].
[110] *Rescue!, supra* note 96 at 139 [**TAB B.25**].
[111] *Wiebe v Weinrich Contracting Ltd*, 2020 ABCA 396 at paras 45-49 [**TAB 13**].
[112] *Alberta Rules of Court*, Alta Reg 124/2010, r 3.9 [*AB Rules of Court*] [**TAB 13**].
[113] First Report, November 14 Transcript, p 2/35 [**TAB A.1**].
[114] November 25 Transcript, p 4/21-27 [**TAB A.6**].
[115] November 25 Transcript, p 8/3-16 [**TAB A.6**].
[116] Initial Order, paras 9-17 [**TAB A.14**].
[117] In the circumstances where no order for service *ex juris* had been sought or granted.
[118] First Lind Affidavit, para 16 [**TAB A.10**]; Fourth Lind Affidavit, para 3 [**TAB A.11**].

enforced) against them, however, they have had no choice but to respond, without prejudice to that position.

80. In his November 25, 2024 decision, Justice Simard held that the CCAA Respondents now all have substantive notice of the proceedings and are represented by counsel, and that the LLCs are proper respondents because they are 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.[119] The LLCs have sought permission to appeal that decision.

81. With respect to this comeback hearing, and the LLCs' Set-Aside Application, the LLCs submit that a finding that the LLCs now have notice of an application against them *because* they had to respond to the Initial Order that had already been granted against them, as a result of that application being granted on an effectively *ex parte* basis, means that by *granting* the Initial Order against the LLCs, this Court has rendered moot the issue of service *ex juris* of the Originating Application for the Initial Order. Such a finding is contrary to the burden of proof on this comeback hearing. The Applicant Investors have never sought an order for service *ex juris* against the LLCs, and have not established that they meet the test for such an order, nor satisfied the requirements of service in accordance with such an order.[120]

82. Further, Justice Simard's decision that the Court has jurisdiction over the LLCs was based on the incorrect information put before him that the LLCs have an active role in the management and development of the Lands. They do not, and have not since 2014 and 2015, when they transferred UFIs in the Lands to the Offshore Trusts. The Offshore Trusts are responsible for developing and managing the Fossil Creek Project and the Windridge Project.[121] The LLCs have been effectively dormant since then, other than having been appointed in the spring of 2024 as general partners over the Texas LPs which were created so that the Fossil Creek Lands and a portion of the Windridge Lands could be sold, at arm's length, in accordance with the original agreements and intent of those Projects.

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[119] November 25 Transcript, p 8/8-16 [**TAB A.6**].
[120] *AB Rules of Court*, *supra* note 112, r 11.25(2) and (3) [**TAB 13**].
[121] First Lind Affidavit, Exhibit "C", Article Nine, Section A, Exhibit "D", Article Six, Section A [**TAB A.10**]; Second Lind Affidavit, Exhibit "E", pp 347-353, Article Nine, Section A [**TAB A.8**].

83. The LLCs are aware that CCAA proceedings are usually commenced with little or no notice. However, the situation is extraordinarily different in a circumstance where a debtor company itself brings an application for an initial order pursuant to the CCAA, as compared to a secured creditor bringing an application for an initial order against a debtor company. In the latter case, the secured creditor would be required to give notice to the debtor company of its intention to enforce its security pursuant to section 244 of the *Bankruptcy and Insolvency Act* at least ten (10) days before bringing its application for an initial order (or less if the ten-day period is waived after the notice of intention is given). By contrast, in the present case, because the Applicant Investors are not creditors of any of the CCAA Respondents, no notice of intention to enforce security was given, nor required to be given.

D. The Relief Granted pursuant to the Initial Order is inconsistent with section 11.001 and with the intent of s 11.02(1) of the CCAA

84. The implications of these CCAA proceedings are existential for the LLCs. The Initial Order stripped the LLCs (and all of the CCAA Respondents) of control over their own companies and granted it to the Monitor,[122] imposed charges against title to the Angus Manor Park lands,[123] appointed Rep Counsel[124] and granted a priority charge over the assets of the CCAA Respondents securing the professional fees of the Monitor and Rep Counsel,[125] disrupted marketing efforts in relation to the Windridge Lands, and caused at least one potential purchaser to walk away from a sale of the remaining individual lot in the Fossil Creek Lands.[126] The Initial Order granted broad relief and "very wide-ranging enhanced powers"[127] well beyond the scope and intent of ss 11.001 and 11.02(1) of the CCAA[128] effectively without notice, in the absence of any actual urgency (or even alleged urgency in relation to the Windridge Project or the Fossil Creek Project). This was done notwithstanding that the Applicant Investors constitute 0.1% of the equity interests in the Windridge Project and 0.18% of the equity interests in the Fossil Creek Project,[129] and despite the fact that the investors have no entitlement to a guaranteed return on or of their investments, and no entitlement to

[122] Initial Order, para 39 [**TAB A.14**].
[123] Initial Order, para 51 [**TAB A.14**].
[124] Initial Order, paras 24-27 [**TAB A.14**].
[125] Initial Order, paras 50-54 [**TAB A.14**].
[126] Second Lind Affidavit, paras 48-49, Exhibit "N"; First Lind Affidavit, paras 6(l), (n), and 36 [**TAB A.14**].
[127] November 25 Transcript, p 7/23-24 [**TAB A.6**].
[128] *CCAA*, *supra* note 1, ss 11.001 and 11.02(1) [**TAB 1**].
[129] November 25 Transcript, p 11/18-12/11 [**TAB A.6**].

guaranteed distributions during the development of the Projects, and none of them are creditors of any of the CCAA Respondents (including the LLCs).

85. While the CCAA is a broad, flexible statute, the 2019 amendments to the CCAA expressly limited the relief that may be granted at an application for an initial order. In *Re Lydian International Limited*, Chief Justice Morawetz held that pursuant to s 11.02(1) of the CCAA, a court may make an order staying all proceedings for a period of not more than 10 days. This provision came into force at the same time as s 11.001, which specifies that relief available on an application for an initial order shall be limited to relief that is reasonably necessary for the continued operations of the debtor company during that 10-day period. Chief Justice Morawetz held that the intent of the provisions is clear: absent exceptional circumstances, the relief to be granted in the initial hearing is to be limited to relief that is reasonably necessary for continued operations of the debtor company in the ordinary course of business, and whenever possible, for the *status quo* to be maintained. He held that the practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The ten-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.[130]

86. This is particularly the case where the *only* obligations owed to the investors by *any* of the CCAA Respondents are: (i) to call meetings (in the case of Canadian investors in Fossil Creek A2A Trust); (ii) to provide annual financial statements of Fossil Creek A2A Trust and Hills of Windridge A2A Trust to Canadian investors; and (iii) in the case of Windridge A2A Trust, to provide other reports to the Canadian investors as required by applicable law. The appropriate relief for breach of such obligations is to commence litigation for breach of contract. It is not to strip the entities of their management and control and grant the extraordinary relief of an initial order pursuant to the CCAA. Notably, the LLCs do not owe any obligations to the investors.

[130] *Lydian International Limited (Re)*, 2019 ONSC 7473 at para 30, additional reasons at *Lydian International Limited (Re)*, 2020 ONSC 34 [**TAB 15**].

E. The *Companies' Creditors Arrangement Act* does not apply to the LLCs

1. Neither of the LLCs are a "company" under the *CCAA*

87. "Company" is defined in section 2 of the *CCAA* in part as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust…."[131]

88. The LLCs were each incorporated in Texas.[132] They are not extra-provincially registered in Canada. As such, in order for the *CCAA* to apply to the LLCs, each of the LLCs must have assets in Canada or do business in Canada.

89. Canadian courts have held that even the presence of a bank account held by a company in Canada is sufficient for the company to have assets in Canada, and thus for the *CCAA* to apply. The percentage or importance of the Canadian assets relative to the overall assets of the company is immaterial.[133] However, there must at least be *an* asset of the company in Canada, or the company must do business in Canada, in order to qualify as a "company" under the *CCAA.* In *Re Global Light Telecommunications Inc*, where the court held that Bermuda companies with nominal U.S. dollars held in Canadian bank accounts qualified as "companies" under the *CCAA*, the Court also held that had either company's bank accounts in Canada not been opened, or if they had been reduced to nil or closed, the companies would have ceased to qualify under the *CCAA*.[134]

90. These requirements are confirmed by section 9 of the CCAA, which requires that any application under the CCAA be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.[135]

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[131] *CCAA*, *supra* note 1, s 2(1) "company" [**TAB 1**].
[132] Edwards Affidavit, paras 27, 31, Exhibits "10" and "14" [**TAB A.7**].
[133] *Cadillac Fairview Inc, Re*, 1995 CanLII 7363 (ON SC), 30 CBR (3d) 29 [**TAB 16**] and *In the Matter of Global Light Telecommunications Inc et al*, 2004 BCSC 745 [***Global Light***] [**TAB 17**], cited in *Annotated BIA*, *supra* note 99 at §20:9 [**TAB B.26**].
[134] *Global Light*, at para 18 [**TAB 17**].
[135] *CCAA*, *supra* note 1, s 9 [**TAB 1**].

91. There is no evidence that either of the LLCs have any assets in or do business in Canada.

92. The fact that proceedings have been commenced pursuant to Chapter 15 of the U.S. Bankruptcy Code does not rectify the fact that neither of the LLCs are a "company" under the CCAA. Chapter 15 proceedings are for recognition and enforcement of foreign insolvency proceedings in the U.S. If the CCAA does not apply to the LLCs (including because neither of the LLCs are a "company" under the CCAA), then the CCAA proceedings against the LLCs cannot be recognized and enforced in the U.S.

93. The evidence before this Court with respect to the business and assets of Windridge LLC is summarized here:

(a) Windridge LLC sold UFIs in the Windridge Lands to Hills of Windridge A2A LP ("**Windridge LP**"), and part of the purchase price for the UFIs was to be contributed to a development fund held by Windridge LLC;[136]

(b) The original purchase agreement for the Windridge Lands by Windridge LLC with an effective date of June 4, 2012, the sale agreement dated March 20, 2014, and ancillary documents pursuant to which Windridge LLC sold UFIs in the Windridge Lands to Windridge LP (the "**Windridge UFI Sale Agreement**") have been provided to the Court;[137]

(c) The Amended and Restated Confidential Information Memorandum of Hills of Windridge A2A Trust dated November 13, 2013 (the "**Windridge OM**")[138] states that Windridge LLC was established for the sole purpose of acquiring the Windridge Lands and overseeing all aspects of their development;[139]

(d) The Windridge UFI Sale Agreement contemplates that the UFI holders (as co-owners of the Windridge Lands) would further transfer their interests to a trustee to hold the Windridge Lands and develop it on their behalf.[140] Pursuant

[136] Edwards Affidavit, para 71 [**TAB A.7**].
[137] Second Lind Affidavit, para 8, Exhibits "E" and "F" [**TAB A.8**].
[138] Edwards Affidavit, para 69, Exhibit "29" [**TAB A.7**].
[139] Edwards Affidavit, para 74 [**TAB A.7**].
[140] Second Lind Affidavit, para 12, Exhibit "E", s 7.1, 7.2 [**TAB A.8**].

to identical restrictive covenants executed by each UFI holder, in April 2014, the co-owners voted with over 99% approval to transfer the Windridge Lands to Dirk Foo as Trustee of the Hills of Windridge Trust, which gives the Trustee broad powers and protections regarding the ownership, development and/or sale of the Windridge Lands.[141] The Hills of Windridge Trust (Sales Trust) Revocable Trust Agreement sets out the powers of the Trustee to sell develop, operate, maintain, repair, renovate, alter or improve the Windridge Lands.[142] In other words, the investors agreed to transfer responsibility for developing and selling the Windridge Lands to the Hills of Windridge Trust;

(e) Title to the Windridge Lands, with the exception of a small piece sold to Tarrant Regional Water District ("**TRWD**") in response to an expropriation notice sent by TRWD and a few individual parcels, remains recorded in the name of Dirk Foo as Trustee of the Hills of Windridge Trust;[143]

(f) Solely to facilitate closing of the sale of the piece of the Windridge Lands sold to TRWD, that piece of the lands was transferred to a limited partnership, Hills of Windridge LP, in which Dirk Foo as the Trustee of the Hills of Windridge Trust is the sole limited partner. This was necessary because the foreign-based trusts that own the Windridge Lands are not "bankable", and there may also have been tax reasons.[144] Windridge LLC was named as the general partner of the Hills of Windridge LP in about May 2024 for expediency and convenience;[145]

(g) Other than having been appointed as the general partner of Hills of Windridge LP in about May 2024 so that a limited partnership could be formed to sell a portion of the Windridge Lands to TRWD, Windridge LLC had been effectively dormant since selling the UFIs in the Windridge Lands approximately ten years ago. Windridge LLC does not have bank accounts or any recent financial statements and until it became the general partner of Hills of Windridge LP, its

[141] Second Lind Affidavit, paras 11-12, 14, Exhibit "I" [**TAB A.8**].
[142] Second Lind Affidavit, Exhibit "E", pp 347-353, Article Nine, Section A [**TAB A.8**].
[143] Second Lind Affidavit, paras 15, 40-43 [**TAB A.8**].
[144] Second Lind Affidavit, paras 40-41 [**TAB A.8**].
[145] Fourth Lind Affidavit, para 6 [**TAB A.11**].

sole purpose had been to hold the Windridge Lands and sell the UFIs in the Windridge Lands (in 2014);[146]

(h) Windridge LLC has no ownership interest of any kind in the Windridge Project;[147]

(i) There is no evidence whatsoever that Windridge LLC has assets in or does business in Canada.

94. The evidence before this Court with respect to the business and assets of Fossil Creek LLC is summarized here:

(a) The confidential offering memorandum dated May 7, 2014, amended on November 18, 2014 (the "**FC OM**")[148] states that Fossil Creek LLC purchased the Fossil Creek Lands from an unrelated third party for $3,500,000 USD;[149]

(b) The FC OM (from 2014) states that Fossil Creek LLC sold a 95% interest in the Fossil Creek Lands through issuance of UFIs to Fossil Creek A2A Limited Partnership ("**Fossil Creek LP**");[150]

(c) The closing documents for the original purchase of the Fossil Creek Lands by Fossil Creek LLC and the sale agreement dated January 9, 2015, pursuant to which Fossil Creek LLC sold UFIs in the Fossil Creek Lands to Fossil Creek LP (the "**Fossil Creek UFI Sale Agreement**") have been provided to the Court;[151]

(d) The FC OM references a Fossil Creek Deed of Covenant "pursuant to which Fossil Creek LLC is appointed as the facilitator to carry out the instructors [*sic*] of the co-owners and set meetings of the co-owners";[152]

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[146] *Ibid*.
[147] First Lind Affidavit, para 24 [**TAB A.10**]; Second Lind Affidavit, para 22 [**TAB A.8**].
[148] Affidavit of Paul Lauzon sworn November 12, 2024 [**Lauzon Affidavit**] [**TAB A.21**], para 10, Exhibit "A".
[149] Lauzon Affidavit, para 15 [**TAB A.21**].
[150] Lauzon Affidavit, paras 15, 16(a) [**TAB A.21**].
[151] Second Lind Affidavit, para 8, Exhibits "G" and "H" [**TAB A.8**].
[152] Lauzon Affidavit, para 16(e) [**TAB A.21**].

(e) The Fossil Creek UFI Sale Agreement contemplates that the UFI holders (as co-owners of the Fossil Creek Lands) would further transfer their interests to a trustee to hold the Fossil Creek Lands and develop it on their behalf.[153] Pursuant to identical restrictive covenants executed by each UFI holder, in April 2014, the co-owners voted with over 99% approval to transfer the Fossil Creek Lands to Dirk Foo as Trustee of the Trails of Fossil Creek Trust, which gives the Trustee broad powers and protections regarding the ownership, development and/or sale of the Fossil Creek Lands.[154] The Fossil Creek Trust (Sales Trust) Revocable Trust Agreement sets out the powers of the Trustee to sell develop, operate, maintain, repair, renovate, alter or improve the Fossil Creek Lands.[155] In other words, the investors agreed to transfer responsibility for developing and selling the Fossil Creek Lands to the Fossil Creek Trust;

(f) The Fossil Creek Lands were sold to Bloomfield, a party at arm's length, on September 27, 2024;[156]

(g) Solely to facilitate the closing of the sale of the Fossil Creek Lands to Bloomfield, the Fossil Creek Lands were transferred to a limited partnership, Trails of Fossil Creek Properties LP, in which Dirk Foo as Trustee of the Trails of Fossil Creek Trust is the sole limited partner. This was necessary because the foreign-based trusts that own the Fossil Creek Lands are not "bankable", and there may also have been tax reasons.[157] Fossil Creek LLC was named as the general partner of the Trails of Fossil Creek Properties LP in about June 2024 for expediency and convenience;[158]

(h) Other than having been appointed as the general partner of Trails of Fossil Creek Properties LP in about June 2024 so that a limited partnership could be formed to sell the Fossil Creek Lands, Fossil Creek LLC had been effectively dormant since selling the UFIs in the Fossil Creek Lands approximately ten years ago. Fossil Creek LLC does not have bank accounts or any recent

[153] First Lind Affidavit, Exhibit "C", Article Nine, Section A [**TAB A.10**].
[154] Second Lind Affidavit, paras 11-12, 14, Exhibit "J" [**TAB A.8**]; First Lind Affidavit, Exhibit "C" [**TAB A.10**].
[155] First Lind Affidavit, Exhibit "C" [**TAB A.10**].
[156] First Lind Affidavit, para 35 [**TAB A.10**]; Second Lind Affidavit, paras 44, 45 [**TAB A.8**].
[157] Second Lind Affidavit, para 46 [**TAB A.8**].
[158] Fourth Lind Affidavit, para 6 [**TAB A.11**].

financial statements and until it became the general partner of Trails of Fossil Creek Properties LP, its sole purpose had been to hold the Fossil Creek Lands and sell the UFIs in the Fossil Creek Lands (in 2014);[159]

(i) Fossil Creek LLC has no ownership interest of any kind in the Fossil Creek Project;[160]

(j) there is no evidence whatsoever that Fossil Creek LLC has assets in or does business in Canada.

95. As such, there is no evidence that either of the LLCs have assets in Canada or do business in Canada. The *CCAA* does not, and cannot, apply to the LLCs.

96. The Monitor's counsel apparently takes the position that because this Court has determined that it has jurisdiction over the LLCs,[161] this Court also has jurisdiction over the Texas LPs. That is contrary to trite concepts of law regarding partnerships: a partnership is not liable for the debts and obligations of its partners. The LLCs are each distinct legal entities from the Texas LPs. Aside from the fact that the LLCs have ceased to be general partners of the Texas LPs as a result of the Chapter 15 recognition of these CCAA proceedings in the U.S.,[162] litigation against a company in its corporate capacity does not, by default, constitute litigation against other entities that the company is affiliated with (whether as a general partner or otherwise).

97. The *Texas Business Organizations Code* §153.256 expressly sets out that the only method for relying on assets of a limited partnership to satisfy a judgment or claim against a partner in a limited partnership is to attach the specific partner's rights to a distribution from the limited partnership: "A creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership."[163] If the Texas LPs were to distribute proceeds from the sale of the Windridge Lands or the Fossil Creek Lands and the general partner in each case were eligible to receive a distribution (the general partner's

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[159] *Ibid*.
[160] First Lind Affidavit, para 24 [**TAB A.10**]; Second Lind Affidavit, para 22 [**TAB A.8**].
[161] November 25 Transcript, p 8/1-16 [**TAB A.6**].
[162] Fourth Lind Affidavit, para 8 [**TAB A.11**]; TEX. BUS. ORGS. CODE §153.256 (West 2025) [*TEX. BUS. ORGS.*] [**TAB 18**].
[163] *TEX. BUS. ORGS.* § 153.256(d) and (f) [**TAB 18**].

partnership interest in each case is 0.01%),[164] a judgment creditor of the general partner could seek a court order entitling the creditor to receive the general partner's distribution in enforcement of the judgment, but the creditor has no ability to recover assets of the limited partnership.

2. Neither of the LLCs are a "Debtor Company" under the CCAA

98. Section 11.02 of the CCAA requires that an application for an initial order be "in respect of a debtor company". Further, section 3(1) states that the CCAA 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."

99. "Debtor company" is defined to mean (among other things) any company that (a) is bankrupt or insolvent; (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts.[165] As noted above, the LLCs do not fall within the definition of "company" as it is used in the definition of "debtor company". As the definition of "debtor company" thus incorporates the definition of "company", and neither of the LLCs are a "company", they cannot be a "debtor company."

100. Further, the LLCs are not bankrupt. "Insolvent" is not defined in the CCAA. The courts have interpreted this term by reference to the three tests of insolvency set out in section 2(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended. An entity is an insolvent "debtor company" under the *CCAA* if any one of the following conditions exist:

(a) the entity is for any reason unable to meet its obligations as they generally become due;

(b) the entity has ceased paying its current obligations in the ordinary course of business as they generally become due; or

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[164] Fourth Lind Affidavit, Exhibit "1", Exhibit "A" at p 42, and Exhibit "2", Exhibit "A" at p 80 [**TAB A.11**].
[165] *CCAA*, *supra* note 1, s 2 "debtor company" [**TAB 1**].

(c) the aggregate of the entity's property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all of its obligations, due and accruing due.[166]

101. In *Stelco*, Justice Farley held that "insolvent" should be given an expanded meaning under the CCAA in order to give effect to the rehabilitative goal of the CCAA, namely, if the debtor company is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[167]

102. It is unclear that there was any evidence before the Court at the application for the Initial Order that Fossil Creek LLC owes any funds to anyone, and thus, there is no evidence that it is a "debtor company" (even if it constituted a "company" under the CCAA, which it does not).

103. The Applicant Investors point to judgment against Windridge LLC as evidence of its insolvency, but there is no evidence on the record as to whether any party is attempting to enforce that judgment. It does not encumber the Windridge Lands.[168] Windridge LLC is also not a "company" and so cannot be a "debtor company" under the CCAA.

F. The Applicant Investors are not "creditors" of the LLCs, or of any of the CCAA Respondents

104. None of the Applicant Investors, as they are defined in the Initial Order,[169] are secured or unsecured creditors of *any* of the CCAA Respondents (including the LLCs), nor are they direct investors in the LLCs. In his decision on November 25, 2024, in these proceedings, Justice Simard noted that these CCAA proceedings were not commenced by creditors, but rather, "by investors whose rights and entitlements are unclear, based on the evidence before [him] presently."[170] No further evidence has been put forth by the Applicant Investors to suggest otherwise.

105. The Applicant Investors are investors in Fossil Creek A2A Trust or Windridge A2A Trust. Based on their equity investments in *those* of the CCAA Respondents, they assert that

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[166] *Stelco Inc, Re,* 2004 CanLII 24933 (ON SC), [2004] OJ No 1257 [*Stelco*] at paras 21-22, 28, leave to appeal to CA refused, [2004] OJ No 1903; leave to appeal to SCC refused, [2004] SCCA No 336 [**TAB 19**].
[167] *Stelco*, at para 25 [**TAB 19**].
[168] Second Lind Affidavit, paras 17-28 [**TAB A.8**].
[169] Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund and Brian Richards, and collectively, the "**Applicant Investors**".
[170] November 25 Transcript, p 6/41-7/35 [**TAB A.6**].

they have contingent claims against the CCAA Respondents. As noted above, in his decision on November 25, 2024, Justice Simard held that "The basis for this argument seems to be that the amount of money raised with respect to the Angus Manor project exceeds the current proposed purchase price. There are many assumptions built into that chain of reasoning for which there is no supporting evidence."[171] As noted, no evidence was put before the Court to indicate that the Applicant Investors are creditors (secured, unsecured, contingent or otherwise) of either of the LLCs.

106. Nor is there any indication that the question of whether the Applicant Investors had standing to bring an application for an initial order was considered by the Court at the application for the Initial Order (in relation to the LLCs or in relation to any of the CCAA Respondents).[172] As previously noted, an application for an initial order commenced by a party that is neither a debtor, a creditor, or a representative of creditors (i.e., a receiver or an interim receiver) appears to be, prior to this case, unprecedented in Canadian law.[173]

107. The definition of "equity claim"[174] in section 2(1) includes an "equity interest"[175] that is "a redemption or retraction obligation." In *Re All Canadian Investment Corporation*, Justice Walker held that in the context of a CCAA proceeding, a redemption claim was not indicative of a debt relationship, and redemption rights, on their own, did not create a debtor-creditor relationship.[176]

108. The FC OM for Fossil Creek A2A Trust and the Windridge OM for Hills of Windridge A2A Trust expressly state the risks associated with the investments. The FC OM includes the following statements, and essentially the same language and warnings are included in the Windridge OM:

(a) **This is a risky investment.**

(b) **The Trust is not a reporting issuer or equivalent in any jurisdiction.**

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[171] November 25 Transcript, p 8/36-40 [**TAB A.6**].
[172] First Report, November 14 Transcript [**TAB A.1**].
[173] *Forbes*, *supra* note 53, p 2 [**TAB B.22**]. No precedent for CCAA proceedings commenced by investors, as compared to creditors, has been located.
[174] *CCAA*, *supra* note 1, s 2(1), "equity claim" [**TAB 1**].
[175] *CCAA*, s 2(1), "equity interest" [**TAB 1**].
[176] *All Canadian Investment Corporation (Re)*, 2019 BCSC 1488 [**TAB 20**] at para 72.

(c) **Risk factors "Limited Control Over Fossil Creek Development":** Even in the case of a Maximum Offering, the Trust will only indirectly hold 13.05% of the UFIs. **As such, it will have limited control over the activities and decisions of Fossil Creek LP and Fossil Creek Developments, and, with respect to the Property, will be subject to the decisions of a majority of the Co-owners who will be Offshore Investors.**

(d) **Distributions Not Guaranteed**: The return on an investment in the Units is not comparable to the return on an investment in a fixed income security. Cash distributions, including a return of a Unitholder's original investment, are not guaranteed and the anticipated return on investment is based upon many performance assumptions. It is important for Subscribers to consider the particular risk factors that may affect the real estate investment markets generally and therefore the availability and stability of the distributions to Unitholders. See Item 8 - "Risk Factors" section of this Offering Memorandum for a more complete discussion of these risks and their potential consequences.

(e) **Risks involved in the land development and homebuilding industry**: The land development and home building industry is cyclical and is significantly affected by changes in general and local economic and industrial conditions…**Fossil Creek Developments may have to sell homes at a loss or hold land inventory longer than planned. Inventory carrying costs can be significant and can result in a loss in anticipated profits.**

(f) **ITEM 9 - REPORTING OBLIGATIONS**: The Trust is not, and currently has no intention of becoming, subject to continuous reporting and disclosure obligations which the securities legislation in any province or territory of Canada would require of a "reporting issuer" as defined in such legislation. **There is, therefore, no statutory requirement that the Trust make disclosure of its affairs, including, without limitation, the prompt notification of material changes by way of press releases and formal filings or the preparation of quarterly unaudited financial statements.** Pursuant to

> the Declaration of Trust, the Trust has agreed to provide annual audited financial statements.[177] [Emphasis in original]

109. In other words, the agreements the investors entered into make clear that they may not get their investments back, nor any return on their investments. The investors thus *cannot* be creditors.

G. Parliament cannot have intended that anyone could commence CCAA proceedings against a company

110. Section 11.02(1) does not give any guidance as to *who* may commence a CCAA proceeding. It states:

> 11.02(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.[178]

111. It cannot be that Parliament intended that any party, regardless of what, if any, relationship it has with a company, can be granted an initial order against that company pursuant to the CCAA.

112. Counsel for the LLCs has conducted a survey of all initial orders granted in CCAA proceedings since September 2009[179] with regard to who the applicant was, as a further

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[177] First Lind Affidavit, para 32 [**TAB A.10**]; Edwards Affidavit, Exhibits "15" and "29" [**TAB A.7**].
[178] *CCAA*, *supra* note 1, s 11.02(1) [**TAB 1**].
[179] The Office of the Superintendent of Bankruptcy's website includes this information since 2009: *CCAA Records after 2014*, online: <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/CCAA-records-search-after-2014> [**TAB B.23**]; *CCAA Records 2014-2009*, online: <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/ccaa-records-2009-2014> [**TAB B.24**].

extension of a survey conducted of initial orders between 2022 and 2024 in this regard as reported in the Journal of the Insolvency Institute of Canada.[180] All CCAA proceedings in Canada since 2009 were commenced either by the debtor company, a secured creditor, an unsecured creditor, a receiver or interim receiver.[181] Of the 561 CCAA proceedings commenced since 2009, 33 (5.9%) were commenced by parties other than debtor companies. 25 (4.5%) were commenced by secured creditors, 3 (0.5%) were commenced by unsecured creditors, 3 (0.5%) were commenced by a receiver, 1 (0.2%) was commenced by an interim receiver, and 1 (0.2%) was commenced by a liquidator/monitor along with a debtor company. The other 94.1% were commenced by debtor companies.[182] There is no precedent for an investor or equity holder being granted an Initial Order over a debtor company.

113. Here, neither of the LLCs are a "company" or a "debtor company", so regardless of who the *applicant* is, the LLCs are not subject to the CCAA.

114. Aside from that, it cannot be that an *investor* can commence CCAA proceedings. As noted above, the purpose of CCAA proceedings is to assist insolvent companies in developing and seeking compromises and arrangements *with their creditors*,[183] as is reflected in the title of the statute itself.

115. In fact, a holder of an equity interest does not necessarily have a right to meet or vote on a compromise or arrangement in CCAA proceedings, and does *not* have the right to apply to the court to request that the court order such a meeting. It is only if a court orders a meeting of shareholders (i.e., of holders of an "equity interest"),[184] on application of *the company, a secured or unsecured creditor, or a trustee in bankruptcy or liquidator of a company* that shareholders may meet to vote on a plan.[185] Even in that case, no compromise or arrangement that provides for an equity claim can be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.[186]

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[180] *Forbes*, *supra* note 53 [**TAB B.22**]
[181] *Forbes*, *supra* note 53, p 2 [**TAB B.22**]; *CCAA Records after 2014*, online: <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/CCAA-records-search-after-2014> [**TAB B.23**]; *CCAA Records 2014-2009*, online: <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/ccaa-records-2009-2014> [**TAB B.24**].
[182] *Ibid*.
[183] November 25 Transcript, p 6/41-7/5 [**TAB A.6**].
[184] *CCAA*, *supra* note 1, s 2(1), "equity interest" [**TAB 1**].
[185] *CCAA*, *supra* note 1, ss 4, 5 [**TAB 1**].
[186] *CCAA*, *supra* note 1, s 6(8) [**TAB 1**].

116. It is difficult to fathom that Parliament intended that the holder of an equity interest could *commence* CCAA proceedings, when the CCAA itself doesn't necessarily allow any relief to the holder of an equity interest, and by its express terms, *does not permit an equity holder to apply to the court for an order for a meeting of the equity interest holders to vote on a plan*.[187]

H. "Unscrambling the egg" is not relevant to whether the Initial Order should be set aside

117. The LLCs anticipate that the Monitor, Rep Counsel and the interim lender, Pillar Capital Corp. ("**Pillar**"), may make submissions that it is not possible to set aside the Initial Order vis-à-vis the professional fees of the Monitor and Rep Counsel, and interim financing advanced by Pillar, being secured by priority charges against the property of the CCAA Respondents. The LLCs acknowledge that with respect to amounts incurred (or in the case of Pillar, advanced) in accordance with Orders of this Court, the priority charges against the property of the CCAA Respondents cannot be reversed. However, by no means should that be a reason for these CCAA proceedings to continue.

I. The Monitor's application to extend the stay of proceedings

118. As the LLCs' position is that the CCAA proceedings should be set aside in their entirety, the LLCs oppose the Monitor's application to extend the stay of proceedings.

J. The Monitor's application for advice and direction regarding the alleged "failure" to provide the Requested Information

119. The CCAA Respondents have provided responses to the Requested Information. They have provided documents by the Court-ordered deadline where possible, and on an ongoing basis since, and have sworn comprehensive affidavit evidence. They have also provided affidavit evidence as to efforts they have made to obtain records, and why they have been unable to obtain and produce certain records and information. They have no ability to compel non-parties to these proceedings – including the Offshore Trusts or the trustees thereof – to produce records or information. The CCAA Respondents have appeared for cross-examinations at the request of the Monitor and Rep Counsel, and have responded to requested undertakings. In the case of Mr. Lind (including on behalf of the LLCs), he attended his cross-

[187] *CCAA*, *supra* note 1, ss 4, 5 [**TAB 1**].

examinations at 5:00 a.m. in his time zone, while on holiday, by videoconference. The CCAA Respondents have been nothing but cooperative. To suggest otherwise, or that any advice or direction from this Court is needed in relation to any alleged "failure", is not borne out by the facts.

K. The Monitor's Application for approval of the Reports and activities of the Monitor

120. Paragraphs 171 to 187 and 19(i), 74 and 11 of the Third Report extend beyond the limited purposes of the ARIO, in that the Monitor investigated, reported on, and gave opinions on projects unrelated to the Projects, and engaged appraisers to complete formal real estate appraisals over the Lands. The LLCs object to the Monitor's application for approval of those activities and those paragraphs of the Third Report.[188]

121. The ARIO was granted for a limited time and a limited purpose. In granting it, Justice Simard expressly stated that the primary task of the Monitor and its counsel will be corresponding with the CCAA Respondents and preparing the comprehensive report for the comeback hearing, stating "Other than that, the monitor should only be carrying out the tasks that it is empowered to carry out under the initial order that are necessary" (this was also ordered in relation to Rep Counsel).[189] The activities described in the above-noted paragraphs are beyond the scope of the Monitor's Court-ordered limited role and should not be approved.

L. The Monitor's Application, in the alternative, to appoint a Receiver

122. As this Court has determined it cannot take jurisdiction over Dirk Foo as Trustee of the Offshore Trusts, which hold the Windridge Lands and the proceeds of sale of the Fossil Creek Lands, this Court cannot take jurisdiction over the Lands, or the proceeds thereof.[190] In those circumstances, there is no means for this Court to take jurisdiction over the Lands, or the proceeds thereof, in a receivership, either.

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[188] Third Report, paras 171-187 [**TAB A.12**]; November 25 Transcript, p 17/6-10 [**TAB A.6**].
[189] November 25 Transcript, p 17/6-15 [**TAB A.6**].
[190] Second Lind Affidavit, para 44-47 [**TAB A.8**].

123. The Courts of this province have confirmed that "The potentially devastating effects of granting [a] receivership order must always be considered, and, if possible, a remedy short of receivership should be used."[191]

124. In *Royal Bank of Canada v Canwest Aerospace Inc*, 2023 BCSC 514, Justice Gomery considered a secured creditor's application for a receivership, and the debtors' application for an initial order under the *CCAA*. Gomery J. noted that the applicant for an initial order under the CCAA must satisfy the court that it has at least "a germ of a plan" presenting a "reasonable possibility of restructuring." He placed particular weight on two considerations: first, the order sought was only an initial order, to be followed in short order by a substantive application informed by the findings of an independent monitor. Second, the appointment of a receiver is, for all intents and purposes, an irrevocable step, removing the control of the companies from their present management and it was not obvious that a receiver would be in a better position to realize value for the benefit of all stakeholders than current management. Accordingly, he allowed the debtors' application for an initial order under the CCAA, but noted that they would need better evidence and a much more cogent account of its proposed restructuring at the time of the comeback hearing.

125. By comparison, in the present case, not only is there no "germ of a plan" nor a "reasonable possibility of restructuring" presented by the Applicant Investors or by the Monitor, but the CCAA Initial Order appointed the Monitor with enhanced powers, thus removing the control of the companies from their present management. Further, it *is* obvious that a receiver appointed by this Court will *not* be in a better position to realize value for the benefit of all stakeholders than current management, because: (1) this Court does not have jurisdiction over the lands or the proceeds thereof; and (2) even if it did, there is no evidence of nor any assertion of a proposed strategy to suggest that receivership would create *any* benefit to the investors or to any other stakeholders in the Fossil Creek Project and the Windridge Project. The Monitor's alternative application to appoint a receiver must be dismissed.

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[191] *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 73 at paras 16-17 [**TAB 21**]; *BG International Ltd v Canadian Superior Energy Inc*, [unreported, February 9, 2009] (Alta QB), cited in *Canadian Superior* in *MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB 647 [**TAB 22**] at para 9.

V. RELIEF SOUGHT

126. The LLCs seek an Order setting aside the Initial Order and dismissing the Monitor's applications.[192]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Luc Rollingson / Chyna Brown
Counsel for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC

[192] With respect to the Monitor's application for approval of the Monitor's activities and Reports, the LLCs only object to approval of paragraphs 171 to 187 and 19(i), 74 and 11 of the Third Report. They do not object to approval of the Monitor's activities as otherwise reported in the Third Report, or in the Monitor's other reports.

VI. TABLE OF AUTHORITIES

TAB

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended.
2. *Angus A2A GP Inc (Re)*, 2024 ABKB 769.
3. *Muscletech Research and Development Inc, Re*, 2006 CanLII 1020 (ON SC), 19 CBR (5th) 54.
4. *Target Canada Co (Re)*, 2015 ONSC 303.
5. *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327.
6. *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
7. *Century Services Inc v Canada (Attorney General),* 2010 SCC 60.
8. *Arrangement relatif à Servites de Marie*, 2021 QCCS 2212.
9. *Royal Bank of Canada v Canwest Aerospace Inc,* 2023 BCSC 514.
10. *Industrial Properties Regina Limited v Copper Sands Land Corp*, 2018 SKCA 36.
11. *Port Capital Development (EV) Inc, (Re)*, 2022 BCSC 1655.
12. *Coromandel Properties Ltd (Re)*, 2023 BCSC 2187.
13. *Wiebe v Weinrich Contracting Ltd*, 2020 ABCA 396.
14. *Alberta Rules of Court*, Alta Reg 124/2010.
15. *Lydian International Limited (Re)*, 2019 ONSC 7473 additional reasons *Lydian International Limited (Re)*, 2020 ONSC 34.
16. *Cadillac Fairview Inc, Re*, 1995 CanLII 7363 (ON SC), 30 CBR (3d) 29.
17. *In the Matter of Global Light Telecommunications Inc et al*, 2004 BCSC 745.

18. TEX. BUS. ORGS. CODE §153 (West 2025).

19. *Stelco Inc, Re,* 2004 CanLII 24933 (ON SC), [2004] OJ No 1257, leave to appeal to CA refused, [2004] OJ No 1903, leave to appeal to SCC refused, [2004] SCCA No 336.

20. *All Canadian Investment Corporation (Re)*, 2019 BCSC 1488.

21. *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 73.

22. *MTM Commercial Trust v Statesman Riverside Quays Ltd*, 2010 ABQB 647.

VII. COMPENDIUM OF EVIDENCE

TAB

A. Key Evidence

1. First Report of the Monitor dated November 20, 2024, Appendix "B", Transcript of proceedings before Justice C. C. J. Feasby, November 14, 2024.
2. Application of the CCAA Respondents filed November 21, 2024
3. Application of the Monitor filed November 18, 2024.
4. Application of the Monitor filed December 13, 2024.
5. Application of the Monitor filed January 8, 2024.
6. Transcript of Proceedings, Decision of the Honourable Justice C. D. Simard, November 25, 2024.
7. Affidavit of Michael Edwards sworn November 12, 2024.
8. Affidavit of Allan Lind sworn December 13, 2024.
9. Transcript of Questioning of Allan Lind on Affidavits held January 7, 2025.
10. Affidavit of Allan Lind sworn November 21, 2024.
11. Affidavit of Allan Lind sworn December 31, 2024, filed by Bennett Jones LLP.
12. Third Report of the Monitor filed December 13, 2024.
13. First Supplement to the Third Report of the Monitor filed December 17, 2024.
14. Initial Order granted November 14, 2024.
15. Amended and Restated Initial Order granted November 25, 2024.
16. Order Granting Recognition of Foreign Main Proceeding and Additional Relief granted by the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, December 20, 2024.
17. Affidavit of Allan Lind sworn December 31, 2024, filed by Miles Davison LLP.
18. Secretarial Affidavit No. 3 of Kim Picard sworn January 8, 2025.

19. Second Secretarial Affidavit of Kim Picard sworn December 13, 2024.

20. Affidavit of Joanna Van Ham sworn December 13, 2024.

21. Affidavit of Paul Lauzon sworn November 12, 2024.

B. Secondary Sources

22. K. Forbes, "An Exploration of Creditor-Initiated CCAA Proceedings", in Insolvency Institute of Canada, IIC-ART Vol. 13-1.

23. Government of Canada, CCAA records search (after 2014), online: https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/CCAA-records-search-after-2014.

24. Government of Canada, CCAA - Records search (2014-2009), online: https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/ccaa-records-2009-2014.

25. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters, 2013).

26. L. W. Houlden, G. B. Morawetz & J. P. Sarra, *The 2024 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2024).

27. Lyle Hepburn, *Limited Partnerships* (Toronto: Thomson Reuters, 2025).