COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC., A2A CAPITAL SERVICES CANADA INC., WINGHAM A2A DEVELOPMENTS INC., LAKE HURON SHORES A2A DEVELOPMENTS INC., and MEAFORD A2A DEVELOPMENTS INC.

DOCUMENT **BRIEF OF CANADIAN REP COUNSEL on behalf of CANADIAN INVESTORS (BOTH AS DEFINED IN THE AMENDED AND RESTATED INITIAL ORDER)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
3400 First Canadian centre
350 – 7th Avenue SW
Calgary, AB T2P 3N9

Attention: Robyn Gurofsky / Kaitlyn Wong
Telephone: (403)261-9469 / (403)261-7388
Email: rgurofsky@fasken.com / kwong@fasken.com

File No.: 340252.00001

BRIEF OF CANADIAN REP COUNSEL

Friday, July 10, 2026, at 2:00 p.m.

Before the Honourable Justice Jones

CONTENTS

I. INTRODUCTION

1. This Brief is submitted by Canadian Representative Counsel on behalf of Canadian Investors in support of the application of the Monitor in these proceedings to, among other things:

   (a) expand the Administration Charge and Interim Lender's Charge (together, the "**Charges**") previously granted in these proceedings over the interests of all of the Offshore Investors in the "**Original Projects**"[1] and the "**Additional Projects**"[2] (collectively, the "**Projects**"); or

   (b) in the alternative, authorize the Monitor on behalf of the Debtor Companies and Affiliate Entities (being those entities listed in Appendix "A" to the Tenth Report of the Monitor, dated May 19, 2026 (the "**Tenth Report**")) to charge the lands and sale proceeds of the Projects.

2. The Monitor's application arises from a fundamental inequity in the current cost allocation and structure of the Charges in these proceedings. Under the current structure, the Canadian Investors bear the entirety of the costs associated with these CCAA proceedings – including costs related to Additional Projects in which they hold no interest – while Offshore Investors benefit without their interests being encumbered by the Charges.

3. Despite this imbalance, both Canadian and Offshore Investors have received, and will continue to receive, significant benefits from these proceedings. These benefits include the monetization of Project lands and the distribution of sale proceeds to all A2A Investors. Importantly, these benefits would not have materialized without the initiative of Canadian Investors, who faced persistent opposition and overcame several appeals to commence and sustain these proceedings.

---

[1] Angus Manor Park ("**Angus Manor**"), The Hills of Windridge ("**Windridge**"), and The Trails of Fossil Creek ("**Fossil Creek**").

[2] Wingham Creek ("**Wingham**"), Lake Huron Shores ("**LHS**"), and Meaford Highlands Resort ("**Meaford**").

4. It is neither fair nor equitable for the Offshore Investors to continue benefitting from the efforts of the Monitor and Canadian Investors for the common good without sharing in the associated costs. These costs include the professional fees of Offshore Representative Counsel, who currently enjoys the benefit of the Administration Charge registered primarily against the Canadian Investors' interests.

5. Thus, the relief sought by the Monitor – whether by extending the Charges or otherwise encumbering Offshore Investors' interests – is necessary to correct this inequitable cost-benefit allocation. It also aligns with the underlying purposes of the CCAA by ensuring fairness amongst all A2A Investors and that one group is not left to the carry the entirety of the costs associated with the restructuring or liquidation of debtor companies.

6. This Brief focuses on the disproportionate financial burden borne by Canadian Investors and the equitable considerations that support granting the relief sought by the Monitor. The mechanisms for implementing these measures are detailed in the Tenth Report and the Bench Brief of the Monitor, filed May 20, 2026.

7. All capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Amended and Restated Initial Order granted by this Court on November 25, 2024 (the "**ARIO**").

II. BACKGROUND

i. Overview of the A2A Group

8. The A2A group of companies managed a series of real estate and land investments schemes prior to the commencement of these proceedings. Each of the Debtor Companies and Affiliate Entities played a distinct role within this complex structure, which spans numerous Projects.[3] While each Project has its own distinct corporate structure, the ultimate direct or indirect owner within the corporate web is Serene Country Homes Holdings PTE Ltd., a Singaporean entity controlled by Dirk Foo.[4]

---

[3] *Angus A2A GP Inc (Re)*, 2025 ABKB 51 at paras 22, 24-26, 28-30 [***January Reasons***] [**TAB 1**].

[4] *January Reasons*, *supra* at para 21 [**TAB 1**].

9. Beginning over a decade ago, the Debtor Companies raised funds from Canadian Investors for the Original Projects through offering memoranda issued in Canada's exempt securities market. Investors were offered either limited partnership units, bonds, or trust units, depending on the Project.[5]

10. While no Canadian Investors are known to hold interests in the Additional Projects,[6] funds were solicited from Offshore Investors, primarily in Asia, through unknown overseas markets and the Offshore Investors invested in both the Original Projects and the Additional Projects.[7]

11. The funds raised from the A2A Investors were used to purchase undivided fractional interests ("**UFIs**") in the Project lands from the development corporation established for each Project.[8] Canadian Investors purchased UFIs through trusts and limited partnerships (who are parties to these proceedings), whereas the Offshore Investors hold UFIs directly in their own names.[9] The development corporations were tasked with using these funds to develop the Project lands.[10]

12. For ease of reference, corporate organizational charts for each of the Projects are included in **Appendix "A"** to this Brief, originally included in the Third Report of the Monitor, dated December 13, 2024, and the Seventh Report of the Monitor, dated July 21, 2025.

13. The Projects span multiple jurisdictions: Angus Manor and the Additional Projects are located throughout Ontario and Fossil Creek and Windridge are each located in Texas.[11]

14. Available evidence indicates that the Debtor Companies have been insolvent since at least 2018.[12] Importantly, financial constraints led to their failure to maintain the software

---

[5] Tenth Report of the Monitor, dated May 19, 2026 at paras 37, 47, 58 [**Tenth Report**].
[6] Tenth Report at para 112.
[7] Tenth Report at paras 38, 48, 59, 68, 75, 82.
[8] Tenth Report at paras 37-38, 47-48, 58-59, 68, 75, 82.
[9] Tenth Report at paras 37-39, 47-48, 58-59, 68-69, 75-76, 82-83.
[10] *January Reasons*, *supra* at paras 22, 25, 29 [**TAB 1**].
[11] Tenth Report at para 34.
[12] See e.g., *January Reasons*, *supra* at para 52 [**TAB 1**].

subscription necessary for tracking land ownership interests, further complicating the situation in which the Monitor and Representative Counsel now try to navigate.[13]

ii. Mismanagement of the Projects

15. This Court has made several findings regarding the "extremely derelict governance"[14] of the A2A group prior to the commencement of these proceedings. These include:

    (a) an "almost total lack of communication from the A2A Group" to A2A Investors for years, including a failure to ever hold regular or any meetings of Canadian Investors as obligated for certain the Projects;[15]

    (b) the striking of several entities involved in the investment structure from their respective corporate registries;[16]

    (c) a failure to prepare annual financial statements for the Original Projects despite obligations to do so;[17]

    (d) the absence of financial records for the Projects;[18] and

    (e) a lack of document retention with records dispersed across accountants and law firms with whom former management lost contact.[19]

16. Former management also exhibited an inability to manage distributions to A2A Investors. Some Canadian Investors received small distributions and others received none despite holding the same investment instruments in the same Project.[20] Further, the distributions that were made by former management to certain Canadian Investors were not consistently proportional to the original investments amounts.[21] Offshore Investors similarly

---

[13] *January Reasons*, *supra* at para 52 [**TAB 1**].
[14] Tenth Report at Appendix "B" (P 4:34-36 thereof).
[15] Tenth Report at Appendix "B" (P 4:34-36 thereof); *January Reasons*, *supra* at para 36 [**TAB 1**].
[16] Tenth Report at Appendix "B" (P 4:36-37 thereof).
[17] *January Reasons*, *supra* at paras 33, 36, 39 [**TAB 1**].
[18] *January Reasons*, *supra* at paras 37, 40 [**TAB 1**].
[19] *January Reasons*, *supra* at para 51 [**TAB 1**].
[20] Secretarial Affidavit No 3 of Kim Picard, sworn January 8, 2024 at paras 7(c)-(e) [**Third Picard Affidavit**].
[21] Third Picard Affidavit at Exhibit "A".

experienced unequal distribution patterns.[22] Justice Feasby concluded that "the Respondents' dilatory recordkeeping and general disregard for investor rights mean that the Respondents will not be able (even if they were willing) to conduct a realization and distribution process that is fair to all investors."[23]

iii. The Commencement of the CCAA Proceedings

17. On November 14, 2024, this Court granted an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"),[24] following an application by an ad hoc group of Canadian Investors. The Initial Order applied to the Debtor Companies of the Original Projects, the Affiliate Entities of the Original Projects and three administrative entities within the A2A group, and provided for, among other things:

    (a) a stay of proceedings;

    (b) the appointment of the Monitor with enhanced powers;

    (c) the extension of the stay of proceedings and other benefits and protections of the Initial Order to the Affiliate Entities;

    (d) the appointment of both Canadian Representative Counsel and Offshore Representative Counsel;

    (e) authorization of interim financing with Pillar Capital Corp., as lender; and

    (f) approval of the Administration Charge and Interim Lender's Charge.[25]

18. While the Court subsequently granted the ARIO, Simard J. adjourned an application by former management to set aside the Initial Order. Instead, the Court directed the Debtor

---

[22] Secretarial Affidavit of Emma Lisson, sworn January 13, 2025 at para 7.

[23] *January Reasons*, *supra* at para 43 [**TAB 1**].

[24] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [**CCAA**] [**TAB 2**].

[25] Order of the Honourable Justice CCJ Feasby, granted November 14, 2024, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969.

Companies to provide the Monitor with detailed information about land holdings, investors, business, and finances to create a more robust evidentiary record for determining whether the proceedings should continue. At the time of the hearing for the ARIO, the Deeds of Covenant that govern Offshore Investors' rights in the Projects were not before this Court. The Debtor Companies only provided copies of the Deeds of Covenant for the Original Projects to the Monitor as part of the information requests directed by Simard J. and the Monitor subsequently entered them into evidence in December of 2025.

19. Investigations by the Monitor revealed further significant misconduct by former management, including unauthorized sales of Project lands in Texas during 2024. In particular, the Monitor discovered that: i) in the fall of 2024, management sold the Fossil Creek lands (with the exception of one show home lot) to Bloomfield Homes LP,[26] and ii) management sold a portion of the Windridge lands to Tarrant Regional Water District in the summer of 2024.[27] The A2A Investors were not given notice of these sales, despite the right of the Offshore Investors to vote on them.[28]

20. In order to effect these sales, former management created two new Texas limited partnerships, being Trails of Fossil Creek Properties LP and Hills of Windridge LP (together the "**Texas LPs**"), in which the A2A Investors do not hold any interests. The Texas LPs hold the remaining sale proceeds and residual lands for Fossil Creek and Windridge.[29]

21. Attached to this Brief collectively as **Appendix "B"** are:

    (a) charts depicting the investment and land holding structure for Angus Manor that was included in the relevant offering memorandum provided to certain Canadian Investors at the time of their investments (originally filed in these proceedings as Exhibits "23" and "24" to the Affidavit of Michael Edwards, sworn November 12, 2024 (the "**Edwards Affidavit**"));

[26] Third Report of the Monitor, dated December 13, 2024 at para 100 [**Third Report**]; Tenth Report at para 54.
[27] Third Report at para 144; Tenth Report at para 65.
[28] Third Report at paras 96, 138; Tenth Report at paras 54, 65; *January Reasons*, *supra* at para 37, 40 [**TAB 1**].
[29] *January Reasons*, *supra* at paras 27, 38, 41 [**TAB 1**].

(b) a chart depicting the investment and land holding structure for Fossil Creek that was included in the relevant offering memorandum provided to Canadian Investors at the time of their investments (originally filed in these proceedings as Exhibit "B" to the Affidavit of Paul Lauzon, sworn November 12, 2024) and, for comparison, a chart outlining the current investment and land holding structure following transfers by former management prepared by the Alberta Court of Appeal; and

(c) a chart depicting the investment and land holding structure for Windridge that was included in the relevant offering memorandum provided to Canadian Investors at the time of their investments (originally filed in these proceedings as Exhibit "30" to the Edwards Affidavit) and, for comparison, a chart outlining the current investment and land holding structure following transfers by former management prepared by the Alberta Court of Appeal.

22. The comeback hearing for the ARIO was heard in January of 2025 as a hearing *de novo* and Feasby J. confirmed the appropriateness and continuation of these proceedings following the Monitor's provision of a comprehensive report containing the information it was able to gather from the Debtor Companies.[30]

23. As part of the *January Reasons*, the Court ordered the Monitor to present a plan for approval for the repatriation of the Fossil Creek and Windridge assets located in Texas, being the remaining lands and sale proceeds, to the Debtor Companies involved in the original investment structure (the "**Texas Plan**").[31] The Court approved the Texas Plan in March of 2025.[32]

24. Former management filed appeals of the ARIO and *January Reasons* as they related to the Debtor Companies and Affiliate Entities of Windridge and Fossil Creek, with leave to appeal being granted (the "**Appeals**"). The Angus Manor entities withdrew their appeals after filing.

---

[30] *January Reasons*, *supra* [**TAB 1**].
[31] *January Reasons*, *supra* at para 88 [**TAB 1**].
[32] Order of the Honourable Justice Campbell, granted March 5, 2025, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969.

iv. Procedural History Post-ARIO

25. Since the ARIO, the Court has further granted several limited scope orders to extend the stay of proceedings, which stay is currently set to expire on September 18, 2026, and to increase the amount secured by and the priorities amongst the Charges. Pursuant to the order granted May 28, 2026, the current priorities are as follows:

    (a) First – Interim Lender's Charge (to the maximum amount of $1,500,000 plus the amount of all interest, fees, and expenses in respect of the principal amount advanced); and

    (b) Second – subordinated Administration Charge (up to the maximum amount of $3,500,000).[33]

26. In addition, in April of 2025, Feasby J. approved a sale and investment solicitation process ("**SISP**") for the Angus Manor lands, with similar processes approved for the Additional Projects in January of 2026 following the addition of those Projects to these proceedings.[34]

27. The SISP for Angus Manor and the Additional Projects remain ongoing at this time.[35]

v. The Appeals

28. On May 11, 2026, the Alberta Court of Appeal dismissed former management's appeals, allowing these proceedings to continue in respect of Windridge and Fossil Creek.[36]

29. The Appellate Court confirmed, among other things, that:

---

[33] Order of the Honourable Justice GS Dunlop, granted May 28, 2026, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969.

[34] Order of the Honourable Justice C Feasby, granted April 16, 2025, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969; Order of the Honourable Justice Bourque, granted October 23, 2025, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969; Order of the Honourable Justice Neilson, granted January 19, 2026, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969.

[35] Tenth Report at paras 101-108.

[36] *Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156 [***A2A Appeal***] [**TAB 3**].

(a) the Applicant Investors were "interested persons" under the CCAA and could apply for the Initial Order as there was a reasonable possibility that they would benefit financially from the outcome of these proceedings;

(b) the Applicant Investors commenced the within proceedings for a proper purpose aligned with the legislative scheme;

(c) the proceedings are fair to the majority of A2A Investors;

(d) the Court had authority to subject Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC, both Texas entities, to the Initial Order pursuant to section 3(1) of the CCAA; and

(e) the Court had the necessary authority to include all of the Canadian WFC Entities (as defined in the *A2A Appeal*) in these proceedings pursuant to section 11 as the threshold conditions under section 3(1) of the CCAA had been met and it was appropriate in the circumstances.[37]

III. ISSUES

30. The key issues for this Court's determination on this application include:

(a) *Should the Charges be extended to encumber the interests of Offshore Investors in the Projects?*

(b) *In the alternative, should the Monitor be authorized to charge the Project lands and any resulting sale proceeds?*

IV. LAW & ARGUMENT

A. The Costs of These Proceedings Should be Shared by Offshore Investors

31. The orders to date currently only encumber the Debtor Companies' interests in the Project lands and resulting sale proceeds.[38] As the relevant trusts and limited partnerships of the

[37] *A2A Appeal*, *supra* at para 159 [**TAB 3**].

[38] Tenth Report at para 110.

Original Projects hold UFIs on behalf of Canadian Investors only, it is the Canadian Investors' interests, and smaller minority interests of the Debtor Companies in the Additional Projects,[39] that are affected by the Charges.[40]

32. In contrast, Offshore Investors – who directly hold their UFIs and are therefore considered co-owners with the relevant Debtor Companies – are not subject to the Charges.[41] Of note, Offshore Investors hold the majority interests in all of the Projects.

33. As a result, Canadian Investors are bearing virtually all of the costs of these proceedings, including the professional fees associated with responding to the various Appeals, as well as costs for the Additional Projects in which they hold no interests.

34. Paragraph 62 of the ARIO provides the Monitor with authority to apply for an allocation of the Charges or the costs of these proceedings among beneficiaries:

> Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets comprising the Property, or the costs of these proceedings among any parties who have benefitted from these CCAA proceedings.

35. The relevant sections of the CCAA that provide courts with the authority to grant super-priority interim lenders' charges[42] and administration charges[43] make reference to all or a

---

[39] Wingham Creek A2A Developments Inc. holds 4 out of the 1,152 UFIs in Wingham, Lake Huron Shores A2A Developments Inc. holds 1 out of the 870 UFIs in LHS, and Meaford A2A Developments Inc. holds 49 out of the 2,280 UFIs in Meaford: Tenth Report at paras 69, 76, 83, 112.

[40] Tenth Report at paras 110, 113.

[41] Tenth Report at para 111.

[42] CCAA, *supra* at s 11.2(1) [**TAB 2**]: "On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that **all or part of the company's property is subject to a security or charge** — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement." [emphasis added]

[43] CCAA, *supra* at s 11.52(1) [**TAB 2**]: "On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring **that all or part of the property of a debtor company is subject to a security or charge** — in an amount that the court considers appropriate — in respect of the fees and expenses of (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties; (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act." [emphasis added]

portion of the debtor company's property being subject to the security or charge. Justice Simard was aware of this limiting language at the time of granting the ARIO.[44] However, as noted above, Simard J. did not have the benefit of the Deeds of Covenant at the time of his decision, which deeds provide the Monitor with a mechanism to charge the Offshore Investor's interests.[45] On this application, the Monitor and Offshore Representative Counsel have also been able to canvas Offshore Investors' positions specifically on whether they would be willing to carry a portion of the professional fees and interim financing, with the majority of responding Offshore Investors being supportive.[46]

36. These CCAA proceedings are undoubtedly novel.[47] The structures of the Projects' land holdings are complex and exact ownership is also unclear due to former management's derelict record keeping, transfers, and sustained refusal to provide the Monitor with the Offshore Investor lists.[48] At the time of their investments almost a decade ago, Canadian Investors did not contemplate that the Debtor Companies would end up in insolvency proceedings and should not now be prejudiced by the chaos created by others as they actively work to find a solution for all, particularly when the relief being sought on this application furthers the underlying purposes of the CCAA (as further discussed below). Sale processes are ongoing with the expectation that distributions will follow on a *pro rata* basis consistent with A2A Investors' interests.

i. The Charge Extensions Are Fair and Equitable and Should be Approved

37. While no party is seeking approval of a detailed cost breakdown at this time, the principles of fairness and equity that underpin traditional cost allocation applications under the CCAA remain applicable here. These principles support the Monitor's proposal to ensure all A2A Investors bear a portion of the costs of these proceedings via encumbrances of Offshore Investor interests.

---

[44] Tenth Report at Appendix "B" (P 14:4-26 thereof).

[45] Being the alternative relief being sought by the Monitor on its application.

[46] Tenth Report at paras 122-123.

[47] *A2A Appeal*, *supra* at para 60 [**TAB 3**].

[48] Tenth Report at paras 40, 53-54, 64-65, 93; Fourth Report of the Monitor, dated February 19, 2025 at paras 36-40, 45-51.

38. As the overarching theme of its analysis, the Court must determine that any proposed allocation of charges is fair and equitable based on the facts of each case.[49] As noted by this Court in *Re Hunters Trailer & Marine Ltd*:[50]

> Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to stay that equity calls for an equal allocation of costs.

39. When determining if allocation is equitable, the Court is to consider the *potential* benefits received by a party, and not actual benefits.[51] As such, while the receipt of actual distributions may be relevant, so too is the receipt of indirect benefits derived from the general steps taken in a proceeding.[52] This Court has stated that all stakeholders stand to benefit, or at least potentially benefit, from interim financing advanced and the appointment of the monitor, who acts on behalf of the Court for all interested parties, in CCAA proceedings.[53] As previously stated by the Manitoba Court of Queen's Bench (as it was then known):[54]

> While it is unfair to ignore the degree of potential benefit that each creditor may derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the ***CCAA*** make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefits analysis.
>
> [emphasis added]

---

[49] *Medican Holdings Ltd*, *Re*, 2013 ABQB 224 at para 25 [***Medican***] [**TAB 4**]; *Respec Oilfield Services Ltd, Re*, 2010 ABQB 277 at para 22 [**TAB 5**].

[50] *Hunters Trailer & Marine Ltd, Re*, 2001 ABQB 1094 at para 15 [***Hunters Trailer & Marine***] [**TAB 6**].

[51] *Medican*, *supra* at para 44 [**TAB 4**].

[52] *Medican*, *supra* at para 47 [**TAB 4**].

[53] *Hunters Trailer & Marine*, *supra* at paras 13, 23 [**TAB 6**].

[54] *Winnipeg Motor Express Inc, Re*, 2009 MBQB 204 at para 41 [***Winnipeg Motors***] [**TAB 7**].

40. The type of underlying instrument held by the affected party and the degree of the potential benefit received may also be relevant to the Court's analysis.[55] Courts may approve an allocation that is objective and uniformly applied.[56]

41. While these principles arise in more traditional CCAA proceedings dealing primarily with the interests of creditors, the underlying principles of allocation remain relevant and provide guidance to these investor-driven proceedings, which the Alberta Court of Appeal has confirmed to be appropriate.[57] Once realizations from the ongoing SISP are known, the parties may return to the Court to speak to the specific allocation of costs between the parties; however, the principles of fairness and equity underlying the distribution of costs across benefitting parties remain relevant in these circumstances of a broader stroke reallocation, and critical to addressing the current imbalance.

42. Offshore Investors stand to receive both direct and indirect benefits from these proceedings, including:

(a) the Applicant Investors initiated these proceedings, overcoming opposition on multiple occasions to establish a framework that benefits all A2A Investors, including Offshore Investors, and laying the groundwork for the Monitor's application to include the Additional Projects. Without this initiative, there would be no proceedings at all, including for the Additional Projects;

(b) through its enhanced powers, the Monitor has essentially stepped into the shoes of management to ensure the proper governance of the Debtor Companies going forward, including assumption of the Facilitator Duties (as defined in the Tenth Report);[58]

---

[55] *Hunters Trailer & Marine*, *supra* at paras 20-21 [**TAB 6**].

[56] *Winnipeg Motors*, *supra* at para 47 [**TAB 7**].

[57] *A2A Appeal*, *supra* at para 159 [**TAB 3**].

[58] Tenth Report at para 116.

(c) through its efforts, the Monitor is monetizing assets and locating remaining property and, once the time comes, will be effecting an equitable distribution of proceeds, including for the benefit of the Offshore Investors;

(d) Offshore Investors now have designated points of contact through the court appointed Monitor and Offshore Representative Counsel, providing Offshore Investors with representation and information in stark contrast with the lack of communication under former management prior to these proceedings;

(e) the Monitor's investigations unearthed land transfers and sales in Texas, of which Offshore Investors were previously unaware; and

(f) as a result of the appointment of the Monitor and the stay of proceedings, the Debtor Companies and Affiliate Entities' assets are being managed by a neutral and experienced third party while creating a forum for the insolvency of the Debtor Companies to be addressed.

43. These proceedings also allow for Offshore Investors' claims to be treated fairly and equitably in the realization and distribution processes for the subject lands, a significant potential benefit to Offshore Investors. As previously discussed, the Debtor Companies' state of affairs prior to the Applicant Investors' initial application under the CCAA demonstrate that the Debtor Companies were incapable of making distributions in a fair and equitable manner to any A2A Investor.[59] If the Offshore Investors were not participants in these proceedings, they would likely return to the status quo of severe mismanagement, with no realistic prospect of realizing anything from their investments.

44. Importantly, Offshore Investors are not being asked to pay out of pocket to fund these proceedings. Their share of the costs will be satisfied from anticipated sale proceeds, which they would not have otherwise realized absent the efforts of Canadian Investors.

45. The current allocation of the Charges is manifestly unjust. Canadian Investors stand to bear the brunt of the secured costs, eroding potential distributions to them from future sale

[59] *January Reasons*, *supra* at para 43 [**TAB 1**].

proceeds. In contrast, Offshore Investors will receive the fruits of the Canadian Investors' labours without in any way carrying a portion of these costs. The Monitor's proposed allocation of costs by way of a form of charge on Offshore Investors' UFIs held in the Projects corrects this inequity and ensures fairness.

ii. The Proposed Reallocation Furthers the Underlying Objectives of the CCAA

46. The Supreme Court of Canada sets out the underlying objectives of the CCAA in its seminal decision of *9354-9186 Québec inc v Callidus Capital Corp*:

(a) providing for the 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) balancing the costs and benefits of restructuring or liquidating the company.[60]

47. The Monitor's proposed reallocation aligns with these objectives as:

(a) clarity on cost allocation will allow stakeholders to properly assess the value of any offers received, allowing the SISP to proceed in a timely and efficient manner;

(b) spreading the costs across all interests in all of the Projects will help to maximize the net value available for distribution to A2A Investors as a whole;

(c) the sharing of costs between both the Canadian and Offshore Investors will promote fairness and equity between the groups who all have benefitted to date and will stand to receive further benefits as a result of these proceedings;

(d) it is in the public interest for the Court to reaffirm that parties benefitting from CCAA proceedings should also help to carry some of the associated costs and

[60] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 40 [**TAB 8**].

furthers the concept that insolvency proceedings are for the common good and not just to benefit one stakeholder to the detriment of others; and

(e) the allocation will balance the costs and benefits of the liquidation of the Projects between the two main stakeholder groups in these proceedings – the Canadian Investors and the Offshore Investors.

48. While the Monitor has not yet commenced a claims process, the current understanding of the Debtor Companies' structure and stakeholders points to the A2A Investors being the true economic stakeholders in these proceedings, as well as the parties to be impacted by how costs and realizations are allocated. Both Canadian and Offshore Investors are generally supportive of the cost reallocation, with the vast majority of the Offshore Investors who responded to the Monitor and Offshore Representative Counsel signalling their support.[61]

B. Treatment of Further Opposition from the Debtor Companies

49. Canadian Investors support the position taken by the Monitor in its Supplemental Bench Brief and the First Supplement to the Tenth Report of the Monitor, both filed June 15, 2026, questioning the standing of former management, primarily Allan Lind and Mr. Foo, to direct the Debtor Companies and Affiliate Entities, including by opposing these proceedings or the actions of the Monitor in their names.

50. Mr. Lind, who resides in Singapore, is a named director of certain of the Debtor Companies[62] but otherwise retired from the A2A Group in 2019.[63] He is further a self-described "senior consultant" to the three Debtor Companies involved in the Additional Projects;[64] however, there is no formal consulting agreement in place.[65] Mr. Lind has sworn a total of approximately six affidavits in these proceedings. Mr. Foo, also believed to be residing in Singapore, has not adduced any evidence in the within CCAA proceedings,

---

[61] Tenth Report at paras 122-123.

[62] *January Reasons*, *supra* at para 21 [**TAB 1**].

[63] Transcript of Oral Questioning of Allan Whitford Lind, dated September 4, 2025 at 62:16-17 [**Second Lind Transcript**].

[64] Affidavit of Allan Lind, sworn July 25, 2025 at para 1.

[65] Second Lind Transcript at 10:19-21.

notwithstanding he is the directing mind of the A2A Group, holds various director and trustee roles, and based on the testimony of Mr. Lind, is in control of all relevant information pertaining to the Debtor Companies.[66]

51. Paragraph 35 of the ARIO eliminates the power and authority of all current and former directors and officers to manage or direct the Debtor Companies.[67] Paragraph 36 of the ARIO requires former management to cooperate with the Monitor.[68] This cooperation extends to any Assistants of the Debtor Companies, which is defined in the ARIO to include consultants.[69] The Debtor Companies' appeals of the ARIO have been dismissed, reaffirming its terms.[70]

52. As such, former management can no longer direct the Debtor Companies to oppose or otherwise take steps in these proceedings as that power resides with the Monitor alone in accordance with its enhanced powers. Notably, the Applicant Investors sought broad enhanced powers for the Monitor from the outset as a result of former management's abdication of their duties.[71]

53. Any attempts by former management to take actions on behalf of or in the names of the Debtor Companies, or any one of them, constitutes a failure to comply with the terms of an order of this Court.

54. As noted by the Alberta Court of Appeal, the Debtor Companies and Affiliate Entities have not disputed that the A2A Investors appear to be the fulcrum stakeholders in these proceedings who stand to benefit financially from the outcome, with no known secured creditors and insubstantial other creditor claims.[72] In contrast, neither Mr. Foo nor Mr. Lind

---

[66] *January Reasons*, *supra* at para 21 [**TAB 1**]; Transcript of Questioning of Allan Lind, dated January 7, 2025 at 49:18-25 – 50:1-2, 52:1-6, 58:3-7 [**First Lind Transcript**].

[67] Order of the Honourable Justice Simard, granted November 25, 2024, *ITMO of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, As Amended and Angus A2A GP Inc et al*, Court of King's Bench of Alberta Court File No 2401-15969 at paras 35 [**ARIO**]. See also *A2A Appeal*, *supra* at para 39 [**TAB 3**].

[68] ARIO, *supra* at para 36.

[69] ARIO, *supra* at paras 11(c), 36.

[70] *A2A Appeal*, *supra* [**TAB 3**].

[71] Affidavit of Michael Edwards, sworn November 12, 2024 at para 109.

[72] *A2A Appeal*, *supra* at para 73 [**TAB 3**].

have produced any records to indicate that they personally hold valid claims in the Project lands or resulting sale proceeds. On cross-examination, Mr. Lind confirmed that he has not personally invested in either of Fossil Creek or Windridge.[73] Without any clear economic interest in the outcome of these proceedings, it is difficult to understand why former management would impede any realizations of assets that are for the benefit the true economic stakeholders.

55. This Court should afford minimal weight to the position of former management, whether expressed on behalf of the Debtor Companies or in their personal capacities, on this application and any future applications. To date, their continuous and duplicative opposition has unnecessarily increased the costs of these proceedings, thereby diminishing the value available to A2A Investors. Indeed, this Court has recognized former management's inconsistent cooperation with the Monitor, which has further hindered the efficient administration of these proceedings.[74]

56. Given the documented history of former management's dereliction of duties both prior to and following the issuance of the Initial Order, and the Alberta Court of Appeal's affirmation of the ARIO, any further unsuccessful opposition, including in respect of this application, should attract cost awards against former management personally, reflecting their role in exacerbating the financial and procedural burdens on the A2A Investors.

V. CONCLUSION

57. Extending the Charges over the interests of Offshore Investors in all Projects – or alternatively authorizing the Monitor to encumber these interests – is both fair and equitable. This relief is essential to correct the current imbalance, where Canadian Investors are unfairly burdened with the significant majority of the costs of these proceedings, jeopardizing their ability to realize meaningful distributions from potential sales.

58. Offshore Investors have already benefited – and will continue to benefit – from the actions

[73] First Lind Transcript at 87:5-8.

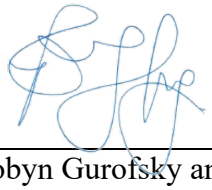
[74] See e.g., *January Reasons*, *supra* at paras 38, 41, 73 [**TAB 1**].

taken in these proceedings, including the monetization of Project lands, the protection of their investments and the governance provided by the Monitor. Just as Canadian Investors have borne the costs to create these opportunities, Offshore Investors must now contribute their fair share to uphold the principles of equity and fairness that underpin the CCAA.

59. Granting the relief sought will ensure that the costs and benefits of these proceedings are equitably shared amongst all A2A Investors, while furthering the broader objectives of the CCAA to preserve value, promote fairness and provide a balanced resolution to the Debtor Companies' insolvency.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF JUNE, 2026.

FASKEN MARTINEAU DuMOULIN LLP

Per: 

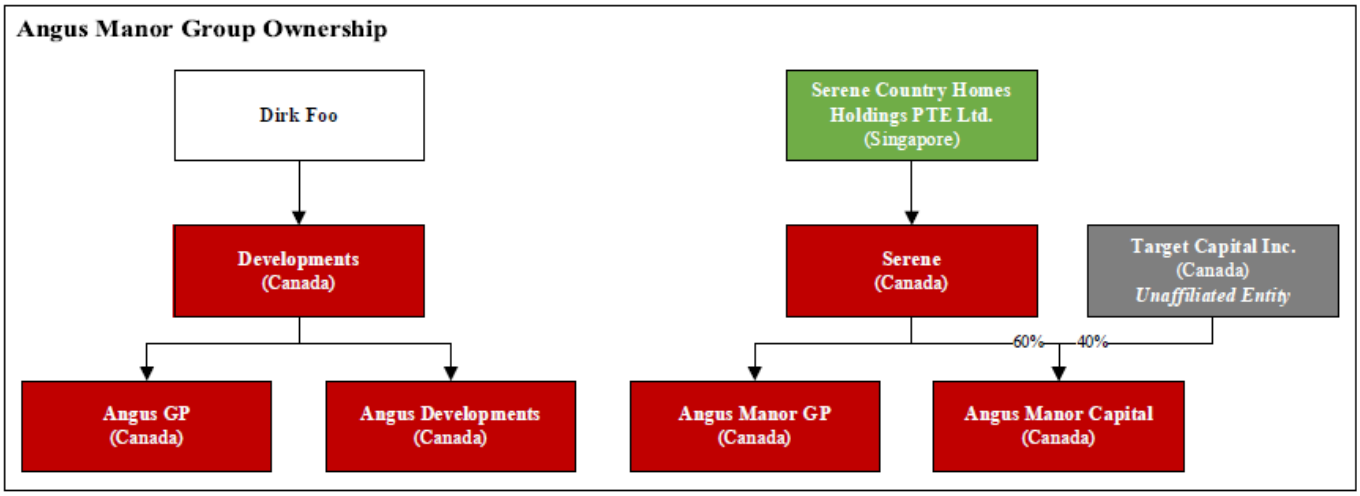
Robyn Gurofsky and Kaitlyn Wong,
Canadian Rep Counsel

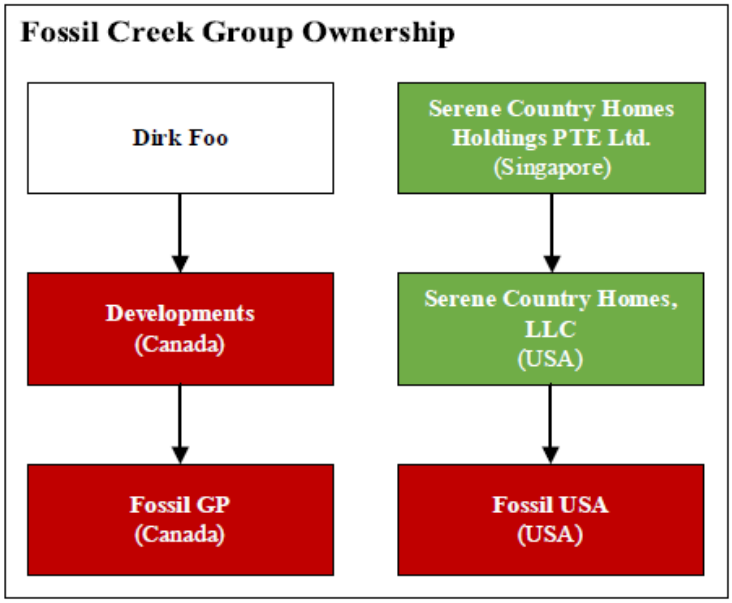
LIST OF AUTHORITIES

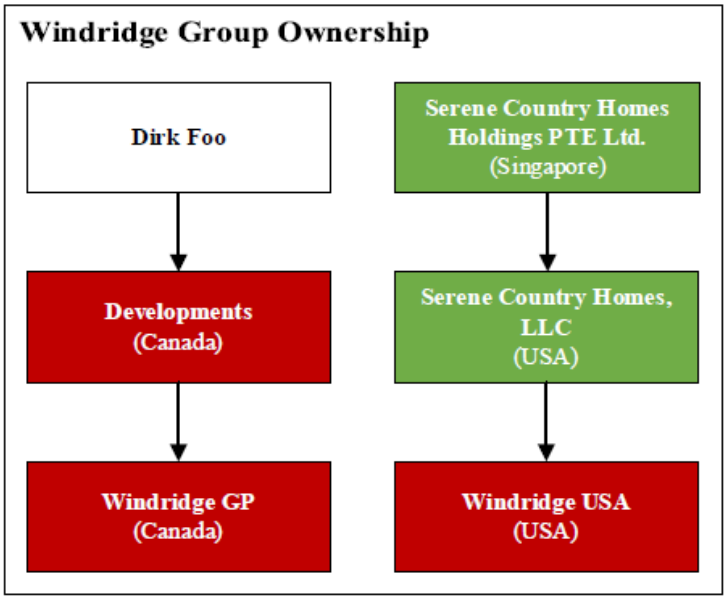
TAB	AUTHORITY
1.	*Angus A2A GP Inc (Re)*, 2025 ABKB 51
2.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
3.	*Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156
4.	*Medican Holdings Ltd*, *Re*, 2013 ABQB 224
5.	*Respec Oilfield Services Ltd, Re*, 2010 ABQB 277
6.	*Hunters Trailer & Marine Ltd, Re*, 2001 ABQB 1094
7.	*Winnipeg Motor Express Inc, Re*, 2009 MBQB 204
8.	*9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10

Appendix "A"

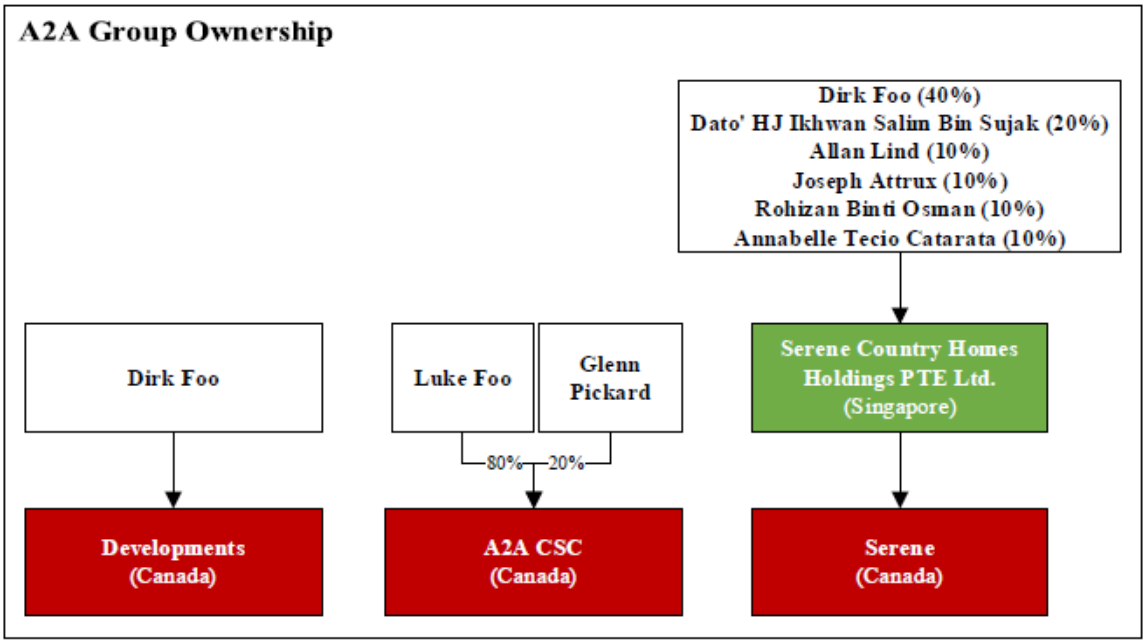
Original Projects



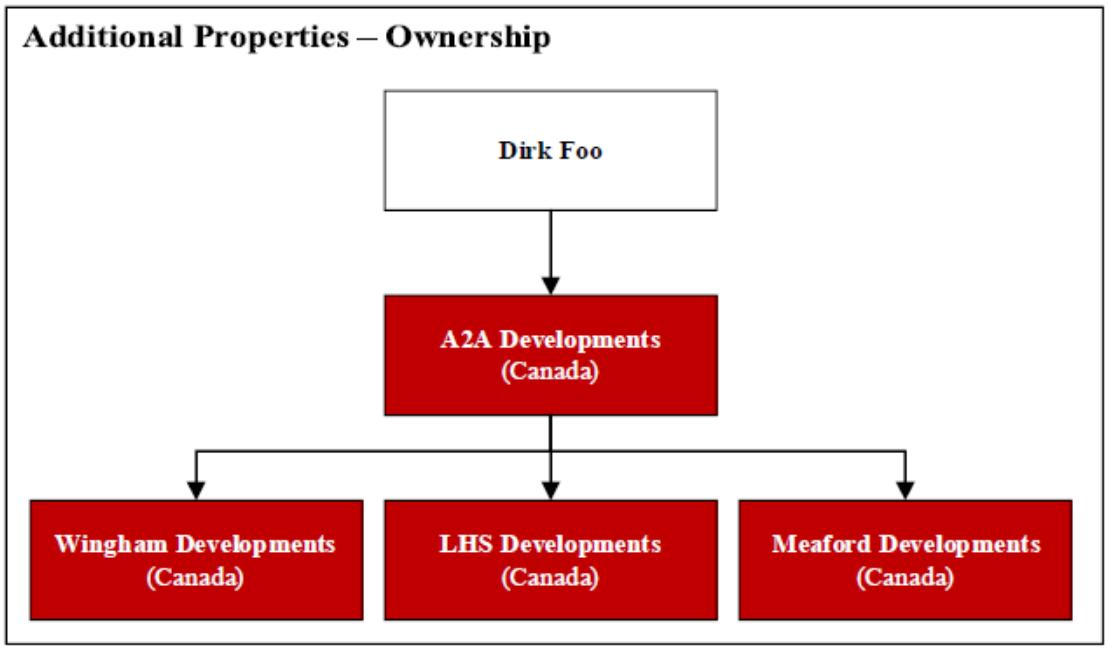




Administrative Entities

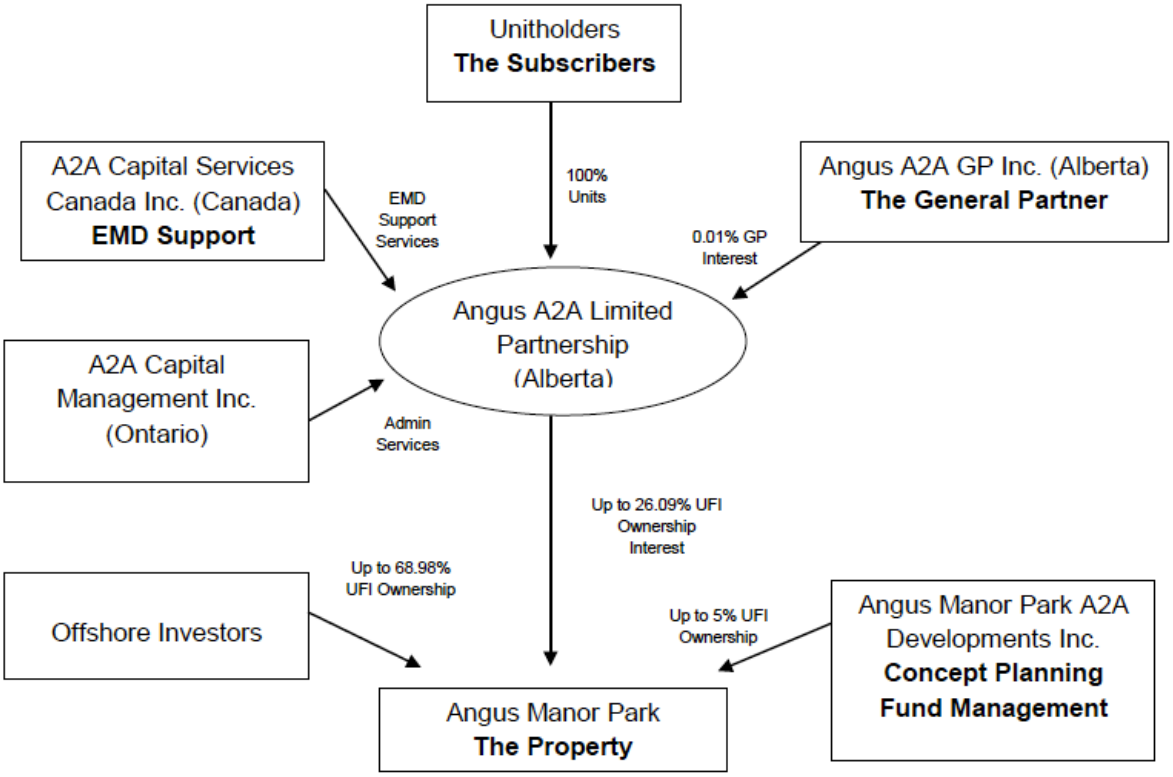


Additional Projects



Appendix "B"

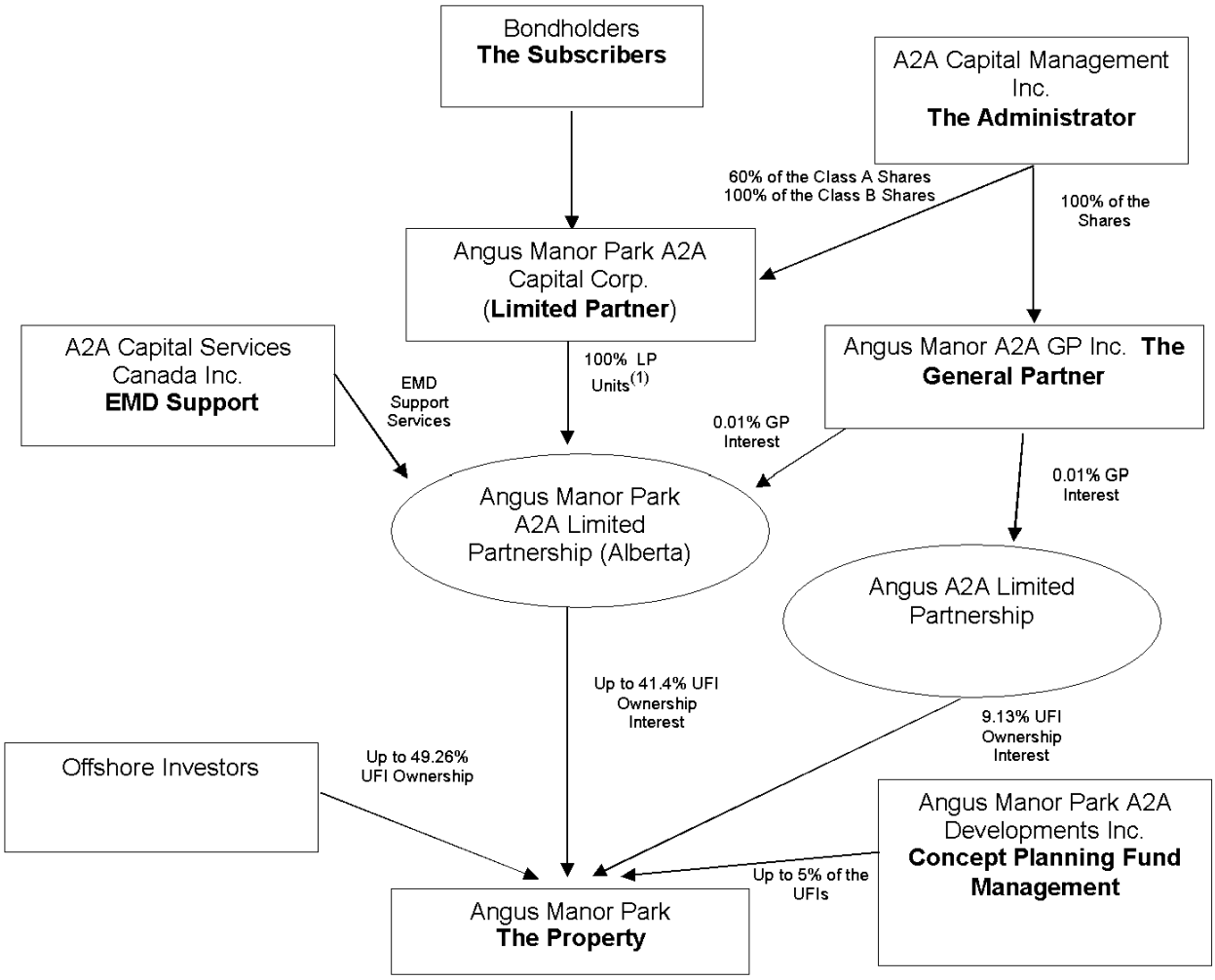
ANGUS MANOR PARK OWNERSHIP STRUCTURE FOLLOWING FIRST OM



Extracted from Angus A2A Limited Partnership Confidential Offering Memorandum dated January 6, 2015.

Note: Angus Manor investment structure per the offering memorandum provided to Canadian Investors.

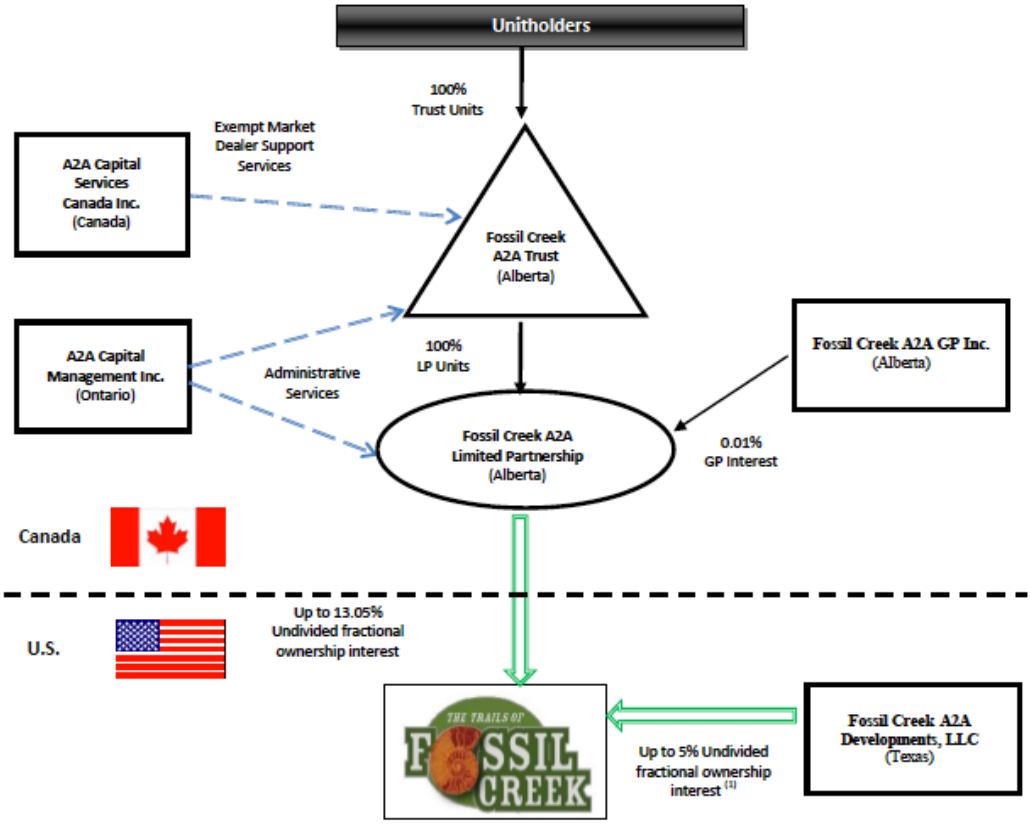
ANGUS MANOR PARK OWNERSHIP STRUCTURE FOLLOWING SECOND OM



Extracted from Angus A2A Limited Partnership Confidential Offering Memorandum dated January 6, 2015.

Note: Angus Manor investment structure per the offering memorandum provided to Canadian Investors.

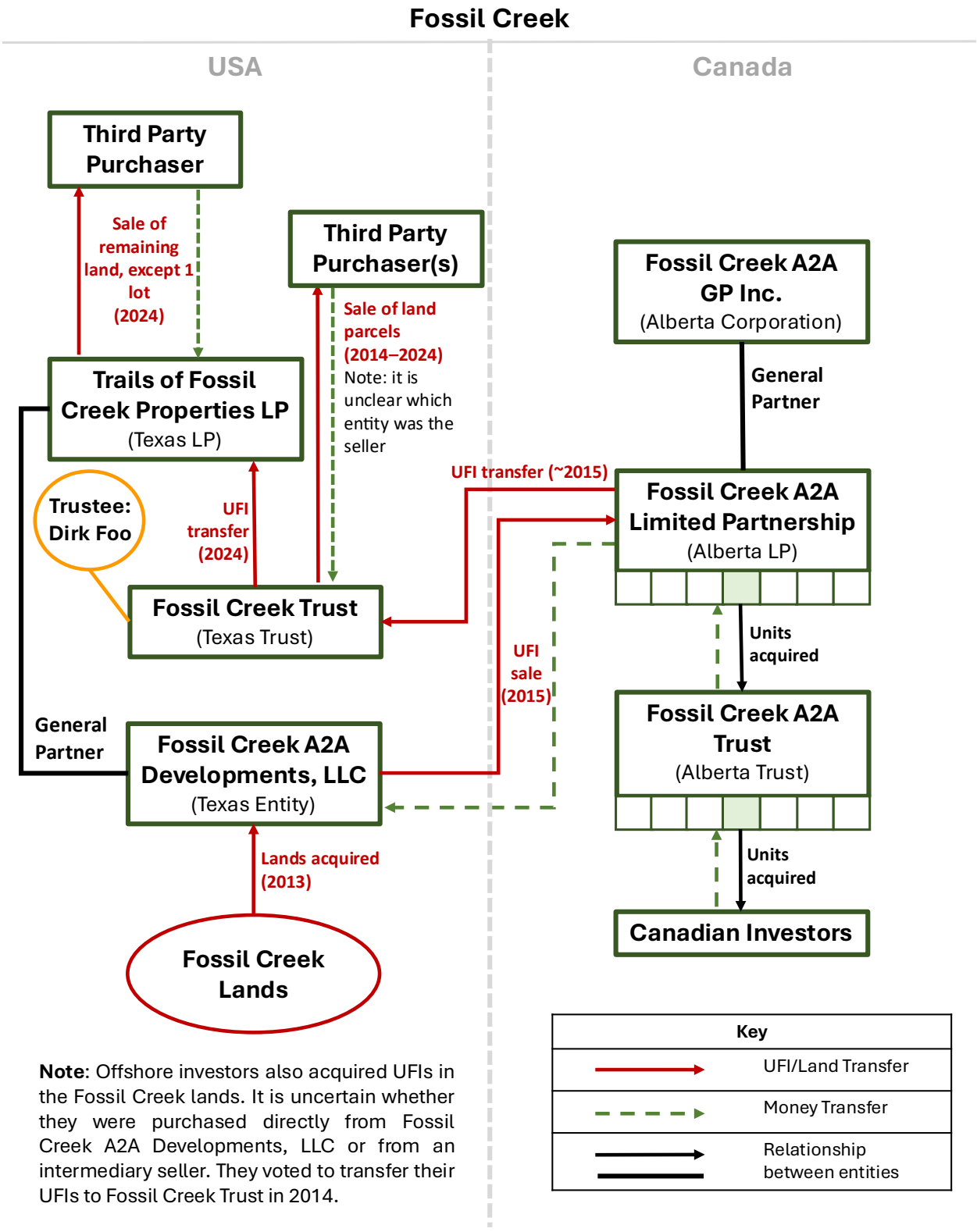
FOSSIL CREEK OWNERSHIP STRUCTURE



Extracted from the Fossil Creek Offering Memorandum dated May 7, 2014 and amended on November 18, 2014.

Note: Fossil Creek investment structure per the offering memorandum provided to Canadian Investors.

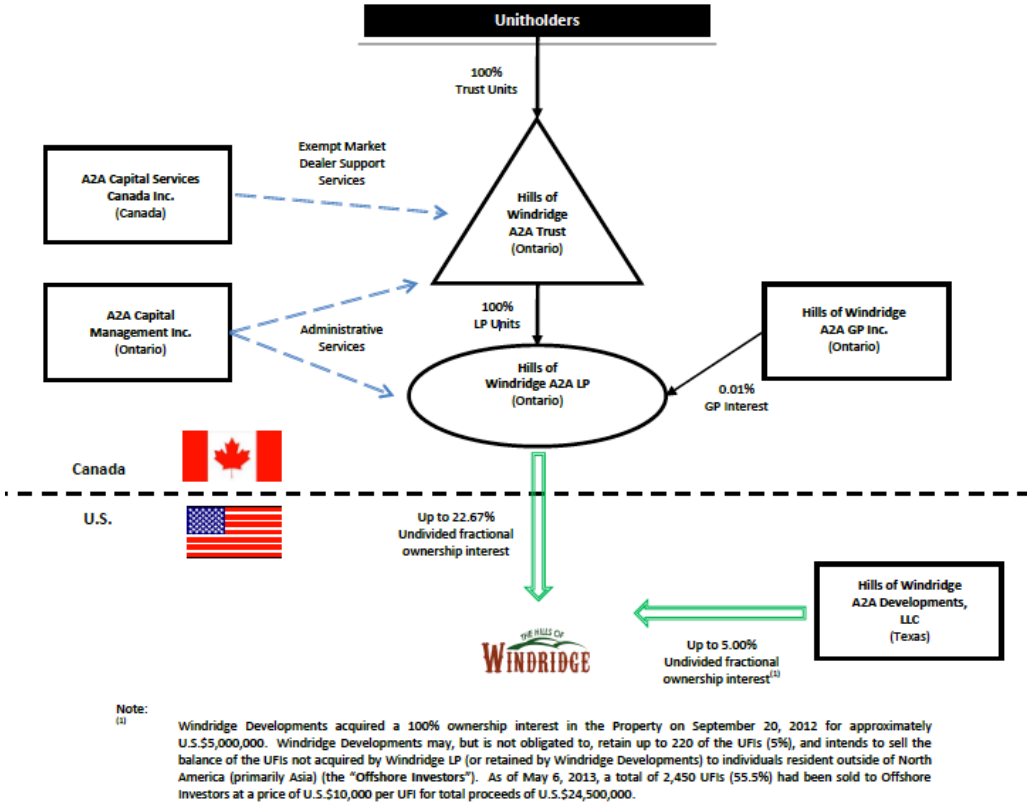
Appendix A – Corporate structures for Canadian investment



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

Note: Fossil Creek current investment structure following land transfers by former management. Chart prepared by the Alberta Court of Appeal and attached as Appendix "A" to the *A2A Appeal*.

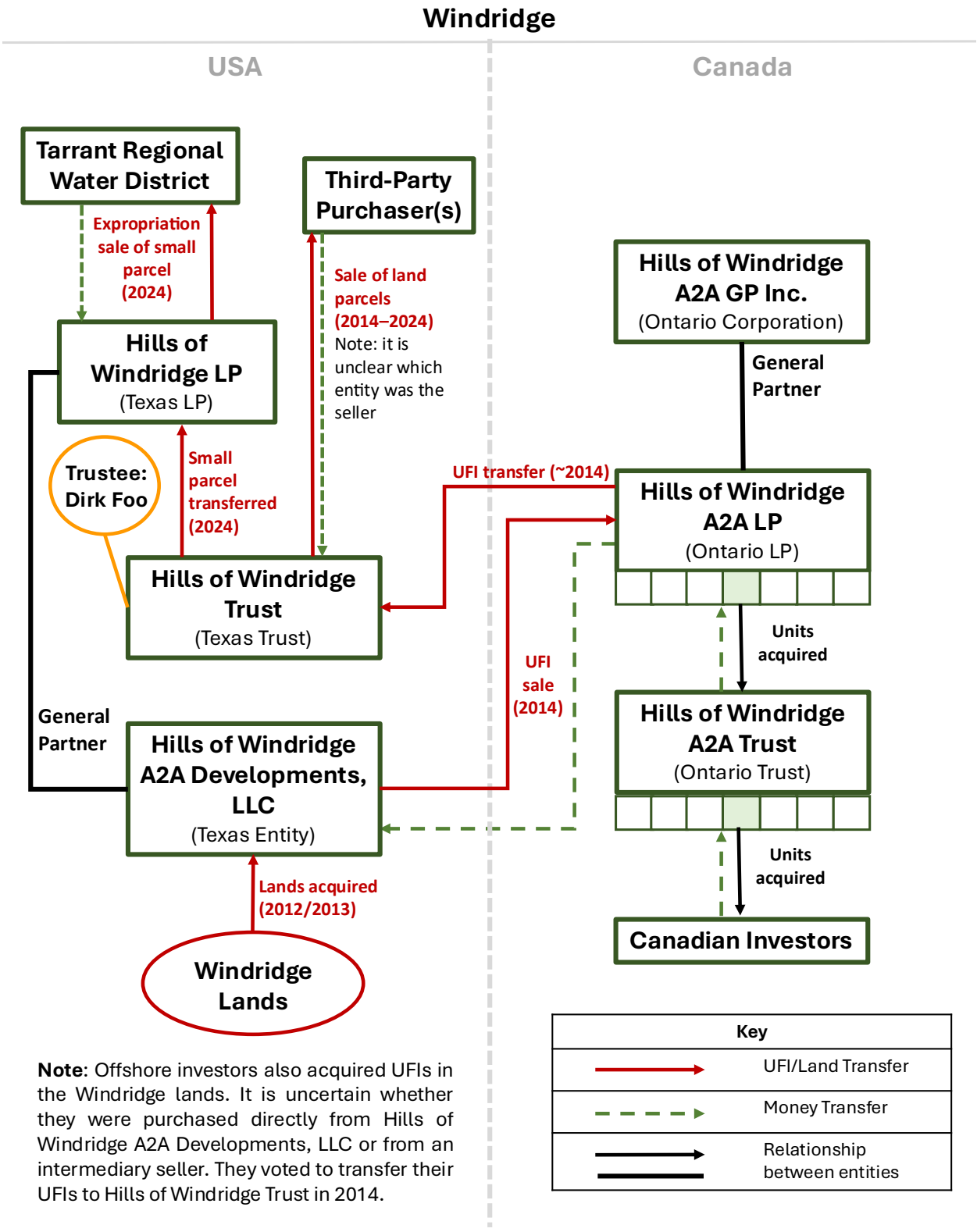
WINDRIDGE OWNERSHIP STRUCTURE



Note:
(1) Windridge Developments acquired a 100% ownership interest in the Property on September 20, 2012 for approximately U.S.$5,000,000. Windridge Developments may, but is not obligated to, retain up to 220 of the UFIs (5%), and intends to sell the balance of the UFIs not acquired by Windridge LP (or retained by Windridge Developments) to individuals resident outside of North America (primarily Asia) (the "**Offshore Investors**"). As of May 6, 2013, a total of 2,450 UFIs (55.5%) had been sold to Offshore Investors at a price of U.S.$10,000 per UFI for total proceeds of U.S.$24,500,000.

Extract from the Amended and Restated Confidential Offering Memorandum dated November 13, 2023

Note: Windridge investment structure per the offering memorandum provided to Canadian Investors.



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

Note: Windridge current investment structure following land transfers by former management. Chart prepared by the Alberta Court of Appeal and attached as Appendix "A" to the *A2A Appeal*.

TAB 1

2025 ABKB 51
Alberta Court of King's Bench

Angus A2A GP Inc (Re)

2025 CarswellAlta 164, 2025 ABKB 51, [2025] A.W.L.D. 1312, 2025 A.C.W.S. 656

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., FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

Colin C.J. Feasby J.

Heard: January 17, 2025
Judgment: January 29, 2025
Docket: Calgary 2401-15969

Counsel: Kelsey J. Meyer, Luc Rollingson, for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC
Daniel Jukes, Sammy Lee, Stephen Barbier, for Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc, Fossil Creek A2A GP Inc., A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc.
Robyn Gurofsky, Kaitlyn M. G. Wong, for Canadian Investors
Howard A. Gorman, K.C., Daniel L.W. Stethem, for Offshore Investors
Jeffrey Oliver, Danica Jorgenson, for Alvarez & Marsal Canada Inc. (the Monitor)
Kyle Kashuba, for Pillar Capital Corp. (the Interim Lender)

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Application of Act

Applicant Canadian equity investors and creditors ("Canadian Investors") were granted initial order pursuant to Companies Creditors Arrangement Act (CCAA) with respect to respondent, related entities involved in real estate ventures in Ontario and Texas — Respondents applied to set aside initial order and amended and restated initial order (ARIO) — Application dismissed — CCAA order was immediately enforceable across Canada without recognition proceedings in other provinces and could be recognized and given effect in US through proceedings under U.S. Bankruptcy Code — Where national and international coordination was required to preserve debtor's assets and maximize recovery for creditors, federal insolvency statute was preferable to provincial statute — Respondents were insolvent — Applicants represented interests of most investors — There was no secured creditor that might be prejudiced by CCAA proceedings — Decision to grant initial order was correct — CCAA proceedings were appropriate, with exception of proceeds of sale of designated lands which were out of CCAA's reach.

Proceeding

Motion/Application to Set Aside.

APPLICATION to set aside initial order and amended and restated initial order.

***Colin C.J. Feasby J.*:**

Reasons for Decision

I. Introduction

1 The matter before the Court raises important questions about the proper use of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("*CCAA*"). The *CCAA* is an insolvency statute that is typically used to restructure a debtor company's affairs. The present application was commenced by creditors and equity investors to preserve assets, unseat management, conduct an investigation, and facilitate and maximize recovery for stakeholders. The *CCAA*'s greatest attribute is its flexibility; the question in the present case is whether it is flexible enough to accommodate the proposed use.

2 A group of Canadian investors (the "Canadian Investors") applied for and were granted an Initial Order pursuant to the *CCAA* on November 14, 2024 in respect of various related entities involved in real estate development ventures in Ontario and Texas. I refer to the entities subject to the Initial Order as the Canadian Respondents and the US LLCs and when referring to them together I call them the Respondents. The Initial Order appointed counsel to represent investors from outside Canada (the "Offshore Investors"). For convenience, I refer to the Canadian Investors and Offshore Investors as the Applicants even though the Offshore Investors are not, strictly speaking, applicants because the two groups are aligned in respect of the Initial Order and ARIO.

3 The Respondents ask the Court to set aside the Initial Order and the Amended and Restated Initial Order ("ARIO") thereby terminating the *CCAA* proceedings. To decide whether the *CCAA* proceedings should continue, I must consider the purpose and reach of the *CCAA*. The Respondents submit that the Applicants are, in essence, equity investors who have misused the *CCAA* to advance what should be conventional civil claims. The Respondents further assert that management is best placed to maximize value for investors through the sale of the real estate projects. The Applicants concede that their use of the *CCAA* is novel but contend that it is consistent with the purposes of the *CCAA* and justified in the circumstances.

4 The US LLCs also assert that the *CCAA* proceedings are destined to fail in relation to the US real estate projects because the Respondents' US real estate assets and bank accounts are beyond the reach of the *CCAA* proceedings. The US LLCs also contend that the Court has no jurisdiction over them because they are not doing business in Canada and thus cannot be "debtor companies" or "affiliated companies" as defined by the *CCAA*. The Applicants respond that the business of the US LLCs is inextricably intertwined with the various Canadian entities such that they are necessary parties to the *CCAA* proceedings regardless of whether they are doing business in Canada.

5 The Applicants submit that if the Respondents are correct that the Court does not have jurisdiction under the *CCAA* or for other reasons the *CCAA* proceedings must be terminated, the Court should appoint a receiver over the Respondents. The Applicants assert that the Respondents are insolvent and have demonstrated an inability or unwillingness to manage their assets to maximize returns to investors. The Respondents submit that it would not be just or convenient to appoint a receiver because the management is in the best position to liquidate the real estate projects and the appointment of a receiver would prevent management from maximizing value.

6 The present matter is a continuation of the Comeback Hearing to confirm the appropriateness of the *CCAA* proceedings and the Respondents' application to set aside the Initial Order and ARIO. I explained in ***A2A GP Inc (Re)***, 2024 ABQB 769 at para 22 the onus remains on the Applicants to show that *CCAA* proceedings are appropriate: see also, ***Target Canada (Re)***, 2015 ONSC 303 at para 84 *per* Morawetz RSJ, as he then was.

II. Procedural Background

A. Initial Order

7 The Initial Order application was made before me on November 14, 2024. The application was presented as a matter of serious urgency because the Applicants feared that conditions on the sale of the Ontario property, Angus Manor Park ("Angus

Manor"), would be waived the following day and the sale would become firm. The Respondents were represented by their corporate counsel who had little more than one day's notice of the application. The Initial Order application was effectively made *ex parte*.

8 The Canadian Investors submitted that even though they did not have the right to vote on any sale of Angus Manor, they had the power to direct the corporate entity that serves as the general partner of the limited partnership that holds the interests in land. The Canadian Investors complained that they had not received notice or details of the pending sale. The Applicants further demonstrated that the corporate entity that was registered on the Angus Manor title had been struck from the Ontario corporate registry. The Applicants submitted that they had learned from a Facebook posting that the sale of Angus Manor was to be effected through a vendor take back (VTB) structure with a $3 million payment at closing with the balance of the $14 million purchase price to be paid in 2029.

9 The Applicants submitted that they had standing to make the application because as trust and limited partnership unitholders, bondholders, and UFI holders they were the key and perhaps only real stakeholders in the Respondent entities. They further submitted that they were creditors or contingent creditors because they had or would have claims against the Respondents.

10 The Applicants argued that the statutory requirements for a *CCAA* initial order were met because the Respondents were insolvent because they were not meeting their obligations as they became due, as evidenced by non-payment of Ontario taxes, and the debt owed by the Respondents exceeded $5 million. Among other debt, the Applicants pointed to a judgment of approximately US $3.8 million that they said was registered on title of the US properties as evidence supporting a finding that the Respondents had at least $5 million in debt.

11 The Initial Order granted the Monitor expanded powers and took control of the Respondent entities away from management. An important consideration in granting the Initial Order pursuant to the *CCAA* rather than a receivership pursuant to the *Judicature Act*, RSA 2000, c J-2 or an injunction was the efficiency in enforcing the order given the seeming urgency. A *CCAA* stay order is immediately enforceable across the country without recognition proceedings in other provinces and it may be recognized and given effect in the US through proceedings under Chapter 15 of the *US Bankruptcy Code*. Both a receivership and an injunction would have required additional proceedings in an Ontario court that may not have been possible within the time available prior to sale of Angus Manor being completed.

B. Amended and Restated Initial Order

12 The Comeback Hearing took place before Justice Simard on November 21, 2024. The Respondents brought a cross-application to set aside the Initial Order. Justice Simard reserved his decision and gave oral reasons on November 25, 2024. Simard J decided some of the issues relevant to the Comeback Hearing and adjourned others to be heard later after the Respondents had provided information to the Monitor and the Monitor had provided a comprehensive report to the Court. He also adjourned the cross-application to set aside the Initial Order.

13 Before me at the continuation of the Comeback Hearing and the set-aside application, the parties adduced new evidence and offered new arguments on some of the issues decided by Justice Simard. I cannot revisit those issues. Though I discuss some of the new evidence and new arguments in these Reasons, I do not vary Justice Simard's decision. Indeed, in my view, the new evidence and arguments reinforce his conclusions.

14 Before Justice Simard, the Respondents were represented by litigation counsel who was retained after the Initial Order was granted. The Respondents submitted that the US LLCs had not been properly served with the Initial Order application. Justice Simard found that the defects in service were excused by the urgency of the application and that all the Respondents had proper notice of the Comeback Hearing. He went on to find at page 8 of the transcript of his November 25, 2024 oral decision:

> The two Texas 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.

> Despite the deficiencies in service of the application for the initial order, I find that I have jurisdiction over all of the existing respondents, including the two Texas LLCs.

15 Simard J later held at page 9 that, "I am satisfied by the evidence that all of the respondents are affiliated, and their businesses are inextricably intertwined with respect to the three projects. The respondents did not challenge that assertion."

16 The Respondents argued that the Applicants, being equity investors, did not have standing pursuant to the *CCAA* to apply for an Initial Order. Justice Simard dismissed this argument at page 8 saying: "there is no prohibition in the *CCAA* on investors applying for an initial order." He further concluded at page 9 that the "applicant investors are persons interested, as described in Section 11.02(1) of the *Act*; and as a result, I find that the applicant investors had standing to make the initial order application."

17 The Respondents disputed that they were insolvent. After reviewing the evidence concerning the debts of the Respondents and considering the Respondents' submissions, Simard J concluded at page 10 "based on the evidence currently before me, I am satisfied that the respondents are insolvent."

18 The Applicants identified two trusts governed by Texas law that were not covered by the Initial Order (the "Texas Trusts") and requested that Justice Simard extend the ARIO to the Texas Trusts and the trustee, Dirk Foo. Justice Simard denied the Applicants' request because they had insufficient information concerning the Texas Trusts and Mr. Foo, being an individual, cannot be "treated as a debtor company under the CCAA, or an affiliate of a debtor company."

19 Justice Simard directed the Respondents to provide information and records requested by the Monitor so that the Monitor could provide a comprehensive report to the Court. The information to be provided included corporate records, accounting records, investor records, contracts, title documents, other documents related to the real property, records of communications with investors concerning the sale of real property, and other material records. The Respondents were required to produce the requested records by December 6, 2024. The Monitor was directed to provide its comprehensive report by December 13, 2024.

C. US Bankruptcy Code Chapter 15 Recognition Proceedings

20 On December 20, 2024, a US Bankruptcy Judge of the US Bankruptcy Court, Northern District of Texas, Fort Worth Division issued an "Order Granting Recognition of Foreign Main Proceeding and Additional Relief." The US Bankruptcy Judge held that the Chapter 15 proceedings were properly commenced and that the *CCAA* proceeding in the Alberta Court of King's Bench should be recognized as a foreign main proceeding and a stay should extend to the Respondents and their property within the territorial jurisdiction of the US. The US Bankruptcy Judge further held that granting relief was "in the interest of the public and international comity, consistent with the public policy of the United States, and will not cause any hardship to any party in interest that is not outweighed by the benefits of the relief granted."

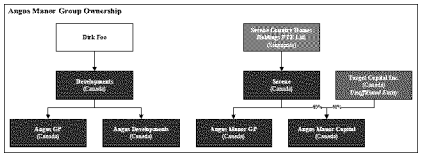
III. The Respondents' Business and the Applicants' Investments

A. The Respondents' Organizational Structure

21 All the relevant corporations are direct or indirect subsidiaries of Serene Country Homes Holdings PTE Ltd ("Serene Country"), a Singapore company, and are controlled by Dirk Foo. Below Serene Country sit three corporate groups that correspond to the three real estate development projects. One project, Angus Manor, is in Ontario and two projects, The Hills of Windridge ("Windridge") and The Trails of Fossil Creek ("Fossil Creek"), are in Texas. Several of the relevant corporations, limited partnerships, and trusts are Alberta entities. There are also Ontario, Texas, and Singapore entities that play important roles. Each of the Respondent corporate entities has different directors. The directors and trustees of the various Respondent entities include Grayson Ambrose, Dirk Foo, Allan Lind, and Joseph Attrux. Mr. Ambrose is a resident of Calgary, Mr. Foo and Mr. Lind reside in Singapore, and Mr. Attrux is identified in corporate filings as a resident of Texas. Justice Simard found, and I agree, that Alberta is an appropriate venue for these proceedings despite there being connections to other jurisdictions.

22 Angus Manor is a 167-acre residential development project located in Essa Township which is just southwest of Barrie, Ontario. The Angus Manor Group ownership is depicted on the chart below taken from the Monitor's Third Report. Angus

Manor Park A2A GP Inc, shown below as Angus GP (Canada), is an Alberta corporation that was struck from the corporate registry on September 2, 2021. Angus GP (Canada) is the general partner of the Angus Manor Park A2A Limited Partnership ("Angus Manor LP") which is an Alberta limited partnership. Angus Manor A2A Capital Corp ("Angus Manor Capital") owned 100% of the units of Angus Manor LP and issued bonds (discussed below) to finance the development of the Angus Manor project. Angus Manor Park A2A Developments Inc, shown below as Angus Developments (Canada), is an Ontario corporation. Angus Developments (Canada) was the company responsible for developing the Angus Manor real estate project.



1

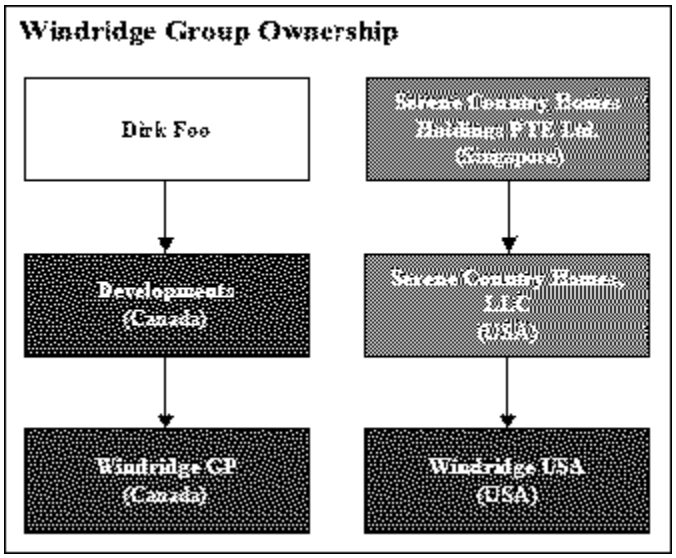
23 The Angus Manor lands were put on the market on August 15, 2024. The best offer was structured as a VTB bearing 3% interest for four years with an initial payment of $3 million and the balance of $11 million due in 2029. The Monitor concluded in its First Supplement to the Third Report that the proposed purchase price for the Angus Manor lands is fair. However, the Respondents proposed to use the whole $3 million initial payment to cover transaction fees and management fees. The Monitor expressed concern that "the VTB structure must be done in a way to protect the interest of the A2A Investors and be done so in a clear and transparent manner."

24 Windridge is a 415-acre residential development in the Dallas/Fort Worth area of Texas. The Windridge Group ownership depicted on the chart below is taken from the Monitor's Third Report. Hills of Windridge A2A GP Inc., shown below as Windridge GP (Canada), is an Ontario corporation. Windridge GP (Canada) is the general partner of Hills of Windridge A2A LP ("Windridge LP"), an Ontario limited partnership which is not shown on the chart. Investors own units in the Hills of Windridge A2A Trust ("Windridge Trust"), an Ontario trust, also not shown on the chart, which, in turn, owns the units of the Windridge LP. Windridge LP owns undivided factional interests ("UFIs") in the Windridge lands.

25 Hills of Windridge A2A Developments LLC ("Windridge LLC") referred to below as Windridge USA is a Texas entity. The Further Amended and Restated Confidential Offering Memorandum provided to investors described the role of Windridge LLC, which it called Windridge Developments, as follows:

> Windridge Developments was established for the sole purpose of acquiring and overseeing all aspects of the development of the Property. It is the vendor of the UFIs under the UFI Purchase Agreement and will have a significant amount of strategic input and operational and administrative responsibilities for the development of the Property, the sales of lots or homes thereon, pursuant to the terms of the Deed of Covenant.

26 Windridge LLC was the original owner of the Windridge lands. Windridge LLC sold UFIs in the Windridge lands to Windridge LP. The units of the Windridge LP are held by the Windridge Trust.



2

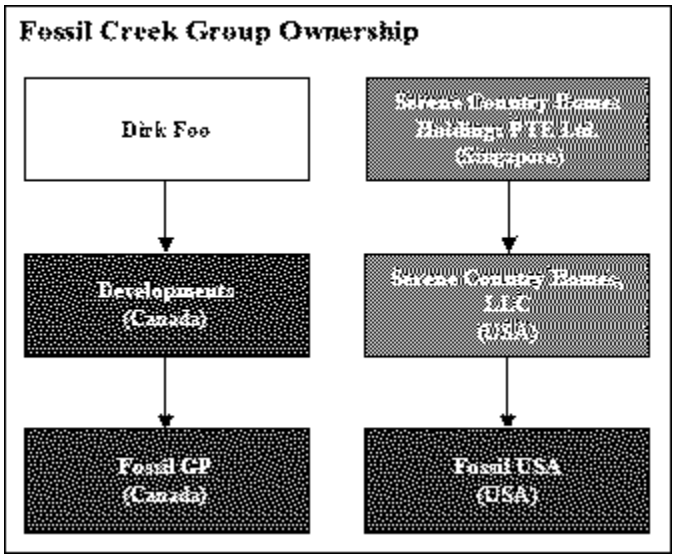
27 Records obtained by the Monitor indicate that Windridge LP transferred the UFIs to a different Windridge Trust, governed by Texas law ("Windridge Texas Trust") which now holds title to the Windridge lands. The trustee of Windridge Texas Trust is Dirk Foo. A small parcel of the Windridge lands was transferred by the Windridge Texas Trust to a new limited partnership, the general partner of which is Windridge LLC, for the purposes of effecting a sale to the Tarrant Regional Water District ("TRWD"). The small parcel was to have been expropriated if Windridge had not agreed to sell. The Monitor applied to extend the *CCAA* proceedings to the Windridge Texas Trust and Dirk Foo on the grounds that they are affiliates of the Respondents but the application was denied by Justice Simard.

28 Fossil Creek is a 93-acre residential development with 487 single detached family homes located in Fort Worth, Texas. The Fossil Creek Group ownership depicted on the chart below is taken from the Monitor's Third Report. Fossil Creek A2A GP Inc., shown below as Fossil GP (Canada), is an Alberta corporation. Fossil GP (Canada) is the general partner of Fossil Creek A2A Limited Partnership ("Fossil Creek LP") which is an Alberta limited partnership. Investors own units in the Fossil Creek A2A Trust (the "Fossil Creek Trust"), an Alberta trust, also not shown on the chart, which, in turn, owns the units of the Fossil Creek LP.

29 Fossil Creek A2A Developments, LLC ("Fossil Creek LLC"), referred to in the chart below as Fossil USA, is a Texas entity. The Amendment to the Offering Memorandum for Fossil Creek Trust units described the role of Fossil Creek LLC, which it called Fossil Creek Developments, as follows:

> Fossil Creek Developments was established for the sole purpose of acquiring and overseeing all aspects of the development of the Property. It is the vendor of the UFIs under the UFI Purchase Agreement and will have a significant amount of strategic input and operational and administrative responsibilities for the development of the Property, the sales of lots or homes thereon, pursuant to the terms of the Deed of Covenant.

30 According to the Amendment to the Offering Memorandum, Fossil Creek LLC sold UFIs in the Fossil Creek lands to Fossil Creek LP.



3

31 Records obtained by the Monitor show that Fossil Creek LP transferred its UFIs to Fossil Creek Trust, a Texas trust ("Fossil Creek Texas Trust"). The trustee of Fossil Creek Texas Trust is Dirk Foo. The Fossil Creek Texas Trust transferred its interest in the Fossil Creek Lands to a new Texas limited partnership, the general partner of which was Fossil Creek LLC, in 2024, to facilitate the sale of the Fossil Creek lands to a third party. The Monitor applied to extend the *CCAA* proceedings to the Fossil Creek Texas Trust and Dirk Foo on the grounds that they are affiliates of the Respondents but the application was denied by Justice Simard.

B. The Applicants' Interests and Rights

i. The Securities, the Rights of the Applicants, and the Obligations and Conduct of the Respondents

32 Angus Manor LP sold limited partnership units to investors in 2015. The units were priced at $100 with a minimum investment of $5,000 required. Unitholders have no right to take an active part in the business of Angus Manor LP. Counsel for the Canadian Respondents explained that Angus GP "is vested with the authority to make virtually all decisions on behalf of the investors." He further described the investors as "passive participants." The only right that investors have in relation to the governance of the Angus Manor entities and project is the right to receive an annual report containing financial statements of Angus Manor LP each year. But the Respondents never provided investors with an annual report containing financial statements.

33 Angus Manor Capital sold bonds ("Bonds") in 2016 to investors for $1 each with a minimum investment of $6,300 required. Each bond bears a 5% annual fixed rate of interest. The interest that accrued from the date of purchase to September 30, 2021 was to be paid on September 30, 2021. A2A Capital failed to pay the interest accrued to September 30, 2021 to bondholders. Any interest accrued after September 30, 2021 is to be paid within six months of the Bonds being redeemed in full. The Maturity Date of the Bonds is September 30, 2026. Angus Manor Capital was required to file annual financial statements with securities regulators and make them reasonably available to each bondholder. No financial statements for Angus Manor Capital have been provided by the Respondents to the Monitor despite the Court's direction to do so. The inference that I draw from the non-production of Angus Manor Capital financial statements is that they were never prepared.

34 The Respondents argue that the Bonds are, in effect, equity instruments because the Confidential Offering Memorandum specified that the Bonds are "entitled to share in the Net Profits or Income" of Angus Manor LP and that the Bonds rank *pari passu* with other unsecured obligations of Angus Manor Capital. The peculiar structure of the Bonds was driven by the fact that limited partnership units are not RRSP and TFSA eligible. The Angus Manor group wanted to make investing in Angus Manor RRSP and TFSA eligible so that it was more attractive. The result is an interest-bearing security that Angus Manor Capital marketed as a bond but otherwise has the characteristics of equity. As a matter of consistency and fairness, the Respondents

cannot style a security as a "bond" - a paradigm example of a debt instrument - to obtain certain attributes as a matter of tax law to assist in soliciting investment and then claim in the *CCAA* process that the same security is really equity. Be that as it may, I explain later in these Reasons, whether the bonds are debt instruments or equity is beside the point because Angus Manor Capital failed to make the September 30, 2021 interest payment making the bondholders creditors regardless of the nature of their security.

35 The Offshore Investors hold UFIs in the Angus Manor lands. Angus Manor UFI holders have the right to vote on the sale of all or any part of the Angus Manor lands. Some of the Angus Manor UFI holders were given proxies to vote on the Angus Manor transaction that was halted by the Initial Order.

36 Canadian Investors in Fossil Creek own units in the Fossil Creek Trust. The Fossil Creek A2A Trust Declaration provides that a meeting of Fossil Creek Trust investors is to be called within 18 months of the effective date of Fossil Creek A2A Trust Declaration and then a meeting is to occur at least every 15 months. 21-days prior to each meeting, the administrator of the Fossil Creek Trust is required to provide investors with annual financial statements. No financial statements for the Fossil Creek Trust (or any entities associated with the Fossil Creek project) have been provided to the Monitor despite the direction of the Court. The inference that I draw from non-production is that financial statements were never prepared.

37 Offshore Investors in Fossil Creek own UFIs which are governed by the Fossil Creek Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Fossil Creek lands but the have the right to vote on the sale of all or any part of the Fossil Creek lands. Pursuant to the Fossil Creek Deed of Covenant, Fossil Creek LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Fossil Creek LLC's office in Texas. The Fossil Creek Deed of Covenant provides that a Facilitator other than Fossil Creek LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial records for Fossil Creek were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

38 The Fossil Creek lands were sold in Fall 2024 by Trails of Fossil Creek Properties LP, a new limited partnership created to facilitate the sale. The general partner of Fossil Creek Properties LP is Fossil Creek LLC. The Monitor reports that, as of the date of the Monitor's Third Report, "no Offshore Investor has advised the Monitor or its consultants that it was asked to vote to approve the Fossil Creek Sale." Mr. Lind confirmed on cross-examination that he was unaware of approval for the sale being sought from UFI holders. According to Mr. Lind, the proceeds of the sale of the Fossil Creek lands are being held by a Texas company not party to these *CCAA* proceedings at the direction of Mr. Foo. The funds are apparently deposited at a branch of the Chase bank but Mr. Lind refused an undertaking request to disclose the location of the specific branch where the funds are deposited. The Monitor advised in its First Supplement to the Third Report that the sale of the Fossil Creek lands was made to a *bona fide* third-party purchaser at below the appraised value. The Monitor was "unable to comment on whether the sale was made improvidently."

39 The Canadian Investors in Windridge own units in the Windridge Trust. The Hills of Windridge A2A Trust Declaration provides that a meeting of Windridge Trust investors may be called by investors holding at least 25% of the units. The Windridge Trustees are required to provide investors with annual financial statements from time to time as required by applicable law and to prepare and maintain accounting records. No financial statements for the Windridge Trust (or any entities associated with the Windridge project) have been provided to the Monitor despite the direction of the Court. The inference that I draw from non-production is that financial statements were never prepared.

40 The Offshore Investors in Windridge own UFIs which are governed by the Windridge Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Windridge lands but they have the right to vote on the sale of all or any part of the Windridge lands. Pursuant to the Windridge Deed of Covenant, Windridge LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Windridge LLC's office in Texas. The Windridge Deed of Covenant provides that a Facilitator other than Windridge LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial

records for Windridge were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

41 A small parcel of the Windridge lands was sold to TRWD. The Monitor reports that the Offshore Investors were not aware of the sale and, accordingly, it may be inferred that they did not vote on the sale. The Respondents provided no information to the Monitor concerning the location of the sale proceeds. Mr. Lind refused to answer an undertaking request concerning the location of the sale proceeds.

42 The Respondents submit that the Applicants' real issue is that the Respondents failed to communicate with investors. They contend that this is something that should be dealt with through a normal civil action rather than the *CCAA* process. I will return to this question later in these Reasons, but it is important to note that the Applicants' concerns go beyond the Respondents' poor communications. The Monitor concluded from its investigation, and I accept, that the Respondents are "either incapable of or unwilling to undertake the fiduciary responsibilities to act as a 'Facilitator' or 'Trustee' in the realization and distribution process when A2A Group projects are monetized." The Monitor further concluded that the Respondents have failed to:

(a) comply with basic requirements to keep and maintain accurate books and records;

(b) comply with basic reporting requirements to which the A2A Investors are entitled;

(c) maintain corporate registrations of key entities in the A2A Group; and

(d) fully account for the source and uses of funds of the A2A Group.

43 The evidence of the Applicants, which was not available to the Monitor at the time of the Third Report, shows that the Respondents have paid some Windridge and Fossil Creek investors and not others. The discrepancies cannot be explained on the grounds that the various investors own different classes of securities. All Canadian investors in Windridge own the same class of security but some have received payments and others have not. The same is the case for Fossil Creek. And among those who have received payments, the payments vary in ways that do not appear to be proportionate to the size of investment. The evidence of the Applicants is consistent with the Monitor's conclusion that the Respondents are incapable of meeting their responsibilities to investors. I conclude that the Respondents' dilatory recordkeeping and general disregard for investor rights mean that the Respondents will not be able (even if they were willing) to conduct a realization and distribution process that is fair to all investors.

ii. The (In)significance of Investor Contractual Rights

44 The Canadian Investors are "accredited investors" as that term is used in securities law. Accredited investors are required to have income or financial resources greater than prescribed thresholds. Net worth and income are used by securities law as a proxies for investor sophistication. Because the Applicants are accredited investors, the securities sold by the Respondents were exempt from the prospectus requirements of securities laws in Canada. The securities regulatory regime that applied to the Offshore Investors is not clear to the Court. The securities purchased by the investors were limited partnership units, trust units, bonds, and UFIs, so the Applicants do not enjoy the rights afforded to shareholders in corporate law nor do they have recourse to statutory remedies in corporate or securities law. The terms of the securities and the rights of the Applicants are set out in the offering memoranda for each security and other material agreements relevant to each project.

45 A theme of the Respondents' written and oral submissions was that the Applicants have limited rights pursuant to the terms of their securities and did not bargain for the rights now afforded to them pursuant to the *CCAA*. The Respondents submit that the Applicants should be restricted to their contractual rights and nothing more. The Canadian Respondents assert that the Applicants "are effectively asking the Courts to give them rights they did not bargain for." The US LLCs submit that the "appropriate" thing for the Applicants to do is "commence litigation for breach of contract." There are several flaws in this line of reasoning.

46 The idea that the investors bargained for anything is incorrect even though Courts often speak of securityholders bargaining for rights. The word bargaining suggests that there was a negotiation between parties with the ability to engage in trade-offs. The rights that attached to the LP units, Trust units, Bonds, and UFIs in the present case were determined by the Respondents and then the securities were sold as "financial products" by agents who had no authority to vary their terms. The investors had a choice to buy the securities or not. They did not negotiate the terms of the securities. The legal rights that attach to the securities, in this sense, are no different than the terms any other standard form contract. I discuss this in greater detail in Colin Feasby, "Bondholders and Barbarians: BCE and the Supreme Court's New View on Directors' Duties" in Todd L. Archibald & Randall Scott Echlin, *The Annual Review of Civil Litigation* (Toronto: Carswell, 2009) 83 at 88-89.

47 Whether rights were bargained for or offered on a take it or leave it basis has legal significance in two ways. First, a lack of bargaining or unequal bargaining power affects the approach to contract interpretation: ***Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21** at para 28 and ***Douez v Facebook, Inc*, 2017 SCC 33** at para 173 *per* McLachlin CJC and Côté J dissenting. Second, whether a contract is negotiated or a standard form determines the standard of review of contractual interpretation on appeal: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37** at paras 28 & 46. The Respondents do not point to any language in the documents governing the securities that can be interpreted as preventing securityholders from using the *CCAA*. I reject the suggestion that there was a negotiation between the Applicants and Respondents that somehow prevents them from asserting their rights under a statute of general application like the *CCAA*. Nor does the fact that the Applicants only paid for certain contractual rights mean that statutory rights are not available to them if they satisfy the requirements of the statute.

IV. Are CCAA Proceedings Appropriate?

A. The Solvency of the Respondents

48 Justice Simard concluded that the Respondents were insolvent, but certain additional evidence that has come to light since his decision must be noted. Simard J's decision on the solvency of the Respondents turned, in part, on the fact that there was an unpaid $3.8 million judgment against the US LLCs in Texas. The Respondents submit that the Texas judgment should not be considered a liability because it is a default judgment and does not impede the Windridge and Fossil Creek projects. In addition, whether the Texas judgment can be considered turns on the status of the US LLCs as parties to this proceeding, an issue that will be dealt with in a later section of these Reasons.

49 The fact that the Texas judgment is a default judgment as opposed to a trial judgment is of no consequence. The US LLCs made a conscious decision not to defend the allegations against them. Perhaps that was because they had no money to defend the case, maybe it was because they knew the allegations to be true, or possibly there were other reasons. Whatever the reason, a default judgment is a liability in the same way as any other judgment. The US LLCs also quibbled in oral argument with the characterization of the Texas judgment as a finding of fraud. As I understand the objection, it is because the judgment specifically states that the judgment against other defendants is for fraud and misappropriation of funds but there is no similar statement regarding the US LLCs. To emphasize the fact that other defendants such as Joseph Attrux, a director of some of the Respondent entities, were expressly found liable for fraud whereas the US LLCs were only found jointly and severally liable "on all causes of action in the Plaintiffs' First Amended Petition" is to highlight a distinction without a difference.

50 The Monitor highlighted in its Third Report that Angus Manor had liabilities of $5,560,644 as of December 10, 2018 which is the most recent date for which information was provided by the Respondents. Similarly, Serene Country Homes (Canada) Inc ("Serene Canada") is shown as having $5,329,059 in liabilities as of December 4, 2018, the most recent date for which financial information was provided by the Respondents. Other Respondents are also shown by the Third Report to have liabilities, though less than Angus Manor and Serene Canada. Given that the reason given for not preparing and providing more recent financial information is that the Respondents were facing financial challenges and there is no evidence of Angus Manor or Serene Canada receiving a cash injection since 2018, I infer that the current liabilities of Angus Manor and Serene Canada are equal to or greater than that stated by the Monitor as of December 2018. So even if the Texas judgment is not considered, the Respondents have liabilities of more than $5 million as required by the *CCAA*.

51 There is also considerable evidence that the Respondents cannot meet their liabilities as they come due. Mr. Lind, director and trustee of several of the Respondent entities, explained in his December 31, 2024 affidavit that the Respondents had experienced "financial challenges." He described how these financial challenges caused the Respondents to fail to meet their contractual obligations to the Respondents:

> One impact of these financial challenges was that there were limited funds available to pay accountants, maintain offices, or continue software subscriptions that the companies had utilized. Documents ended up spread over multiple places held by different accountants or law firms that we had not maintained contact with. In some cases, financial statements simply were not prepared, as funds were tight and most of the entities involved did not have operations beyond holding assets.

52 Mr. Lind further advised on cross-examination that records concerning Windridge and Fossil Creek were lost when the Respondents were locked out of their Fort Worth office by their landlord in 2018 and not permitted to retrieve their records. I infer from this evidence that the Respondents were not paying their rent as it came due. Mr. Lind also admitted on cross-examination that the Respondents were unable to produce certain information concerning UFIs because they failed to maintain their subscription to a software service that they used to keep track of land ownership interests because of financial constraints. The failure of the Respondents, a corporate group involved in land development, to maintain a software subscription that was essential to tracking land ownership interests is a further indication of their insolvency.

53 The continuing failure of Angus Manor Capital to pay the bondholders interest that had accrued to September 30, 2021 was not addressed in submissions before Justice Simard and, accordingly, was not noted in his reasons for decision. The failure to pay interest due to bondholders is evidence of insolvency.

54 The evidence that has come to light since Justice Simard's decision or was not brought to his attention supports his conclusion that the Respondents were insolvent. If I were required to consider the question afresh based on the evidence now before me, I would conclude that the Respondents are insolvent.

B. Equity and the Purposes of the CCAA

55 Perhaps the most important question raised by the Respondents is whether the Applicants' use of the *CCAA* is appropriate. The Respondents submit that the Applicants are equity investors who enjoy minimal contractual rights. The Applicants, according to the Respondents, are using the *CCAA* to acquire rights that they did not bargain for. Further, the Respondents submit that the Applicants are using the *CCAA* to obtain injunctive relief and to conduct an investigation rather than restructure or liquidate the Respondent entities.

56 The Respondents submit that Justice Simard agreed with their position. The Respondents place great emphasis on his observation that "there are limits to the [*CCAA*'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*" [emphasis added]. Justice Simard's comments demonstrate that he recognized that the issue raised by the Respondents must be taken seriously. Indeed, he directed the Respondents to provide additional information to the Monitor so that the issue could be considered with the benefit of a more robust evidential record.

57 The Respondents conducted a survey of all *CCAA* filings since 2009. Their survey revealed that 94.1% of all *CCAA* proceedings were commenced by debtor companies, 4.5% were commenced by secured creditors, 0.5% were commenced by unsecured creditors, 0.5% were commenced by a receiver, 0.2% were commenced by an interim receiver, and 0.2% were commenced by a liquidator/monitor together with a debtor company. The Respondents submit that the absence of any *CCAA* proceedings being commenced by equity investors over the last 15 years is proof that equity investors cannot commence *CCAA* proceedings. The fact that equity investors have not commenced *CCAA* proceedings does not mean that it is impossible for them to do so, but it suggests that when presented with an application by equity investors to commence *CCAA* proceedings a Court should proceed with extra care.

58 The idea that equity investors may never commence *CCAA* proceedings sits uneasily with the fact that equity holders sometimes have significant economic interests in companies that are insolvent. This can be illustrated with the definition of insolvency typically used in the *CCAA* context which is found in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), s 2:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose 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 his obligations, due and accruing due.

59 The *BIA* s 2 definition of insolvent person is not cumulative. A person (or company) may be insolvent if any of the three criteria are satisfied. A company may be insolvent where it is unable to meet its obligations as they become due even though the value of its assets exceeds its liabilities - this is sometimes called a liquidity crisis. Where there is a liquidity crisis, it is possible that equity holders will have the most significant economic stake in a debtor company. Normally, the board and management of a debtor company - who directly or indirectly represent the interests of equity (though fiduciary obligations are owed to the corporation as a whole) - will commence *CCAA* proceedings to deal with a liquidity crisis. And, in that sense, it may be said that most *CCAA* proceedings are commenced by representatives of equity. However, it is possible to envision circumstances where a debtor company's board or management fail to act in the face of insolvency as is arguably what has happened in the present case. The strength of the *CCAA* as a statutory framework for managing insolvency problems is its malleability. In my view, it would be unwise to constrain unanticipated future uses of the *CCAA* by stating categorically that equity investors may never commence *CCAA* proceedings.

60 The Respondents, in making the submission that equity investors cannot commence *CCAA* proceedings, also appear to be making a collateral attack on Justice Simard's decision that the Applicants have standing. Justice Simard questioned whether the Applicants were contingent creditors as they claimed without deciding the issue but went on to find that they nevertheless have standing pursuant to *CCAA* s 11 because they are interested persons. The Applicants emphasized in submissions before me (though not before Simard J) that the bondholders are not just equity investors or contingent creditors, they are proper creditors. The bondholders are creditors because the interest that was due to them on September 30, 2021 was not paid and remains outstanding. If the question of standing were presented today, it would not be necessary to determine whether equity investors or contingent creditors have standing because there are actual amounts due and owing to some of the Applicants.

61 Leaving aside that it is now obvious that some of the Applicants are proper creditors, Justice Simard's determination that the Applicants, as equity investors, have standing pursuant to *CCAA* s 11 is not determinative of whether the *CCAA* is being used properly. That is clear from his reasons. The relevant question is not whether, in the abstract, equity investors have standing; rather, it is whether these Applicants are using the *CCAA* consistent with its purposes.

62 So, what are the purposes of the *CCAA*? Chief Justice Wagner and Justice Moldaver, writing for the Court, explained what they considered to be the "overarching remedial objectives" of "Canada's insolvency statutes" in ***9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10** at paras 40-41:

> (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.

63 Karakatsanis J, concurring, in ***Canada v Canada North Group Inc*, 2021 SCC 30** at para 137 held "the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies" citing ***Century Services Inc v Canada (Attorney General)*, 2010 SCC 60** at paras 15 and 59. Wagner CJC and Moldaver J observed in ***Callidus Capital*** at para 41 that "the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor in an operational state - that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation either through a receivership or under the *BIA* regime." Later at para 42 they noted that "liquidating CCAAs" are "now commonplace."

64 The Applicants submit that the use of the *CCAA* in the present case is consistent with the purposes of the *CCAA*. The Applicants contend that the Monitor is necessary to preserve and maximize any value that remains in the Respondent entities because the Respondents have demonstrated that they are unable or unwilling to do so. They further assert that the Monitor can promote the fair and equitable treatment of investors by, among other things, administering a claims process. Absent the *CCAA* stay and Monitor's involvement there is the prospect of competing investor claims in multiple jurisdictions. I agree that the proposed use of the *CCAA* is the most efficient way to move forward and is the process most likely to result in the best return for stakeholders subject to my concerns about the Monitor's ability to bring the US assets into the *CCAA* process set out below in paras 68 and 88. The safeguard of a court-appointed monitor ensures that stakeholders have a transparent and responsive interlocutor, guarantees that stakeholders will be treated fairly, and will facilitate the administration of a fair claims process.

65 The Respondents submit that the *CCAA* should not be used to obtain injunctive relief or conduct an investigation. The Respondents' submission that the *CCAA* should not be used to obtain injunctive relief is just another way of making their argument that the Applicants should be limited to their contractual rights. I have discussed this argument elsewhere in these Reasons. The contention that a *CCAA* proceeding should not have an investigatory function is incorrect. *CCAA* s 23(1)(c) provides that among the duties and functions of a Monitor is to:

> make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings [emphasis added].

66 Recent cases confirm that it is appropriate for a Monitor to undertake an investigation, especially where there is suspected fraud or where debtor companies or their principals are not forthcoming with information and records to assist the Monitor perform its functions: ***Aquino v Aquino*, 2021 ONSC** at paras 17-18; ***Aquino v Bondfield Construction Co*, 2024 SCC 31** at paras 11-12; ***Arrangement relatif à Bloom Lake General***, 2021 QCCA 2946 at paras 76-85; and ***Original Traders Energy Ltd., (Re)*, 2024 ONSC 325** at para 84.

67 The Respondents submit that the present *CCAA* proceedings cannot achieve the purposes of the *CCAA*, at least with respect to Windridge and Fossil Creek, because the Texas Trusts and the trustee, Dirk Foo, are not subject to the ARIO. According to the Respondents, the *CCAA* proceedings are destined to fail because the Windridge lands and Fossil Creek lands and the bank accounts that contain the proceeds of such of those lands that have already been sold are beyond the reach of this Court. This objection is potentially fatal for the *CCAA* proceedings concerning Windridge and Fossil Creek because without control over the US assets, there is no prospect for recovery for stakeholders through the *CCAA* proceedings. Though the assets may prove to be beyond the reach of the Monitor, in my opinion, it is premature to conclude that the Monitor will fail and the *CCAA* proceedings must be terminated in respect of Windridge and Fossil Creek. Justice Simard's decision that this Court does not have jurisdiction over the Texas Trusts does not prevent the Monitor from taking other steps in Canada or legal action in the US, whether under the rubric of Chapter 15 or otherwise, to achieve its objectives. So far, the Monitor has not articulated a plan for gaining control of the remaining Windridge lands and the bank accounts that hold the proceeds of the sales of the Fossil Creek and Windridge lands. This is a critical point that I will return to in the Conclusion of these Reasons.

68 The Respondents say that neither the Applicants nor the Monitor have put forward a "germ of a plan" and, as such, there is no reasonable possibility of successfully restructuring the debtor companies: ***Re Inducon Development Corp*, 1991 CarswellOnt 219** at para 14; more recently, see ***Industrial Properties Reginal Limited v Copper Sands Land Corp*, 2018 SKCA 36** at para 20 and ***Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657** at para 58. The Respondents are correct that the Applicants and the Monitor have not outlined a plan, but the present circumstances are unusual, and a contextual approach is warranted.

69 First, the Applicants must be held to a different standard than is normally the case when a *CCAA* process is commenced by a debtor company or a sophisticated secured creditor that possesses intimate knowledge of the debtor company. When a *CCAA* proceeding is commenced by a debtor company or sophisticated secured creditor, it follows that the Court expects there to be something of a plan even in the early stages. That cannot be the case where, as here, the Applicants had little knowledge of the inner workings of the Respondents because the Respondents were delinquent in their reporting obligations. For that reason, the Monitor's primary task in the early phase of these proceedings, as reflected in the ARIO, was to gather information from the Respondents. The Monitor was also admonished not to do more work than necessary which, it now says, caused it not to allocate resources to the development of a plan. To defeat the *CCAA* proceedings because the Applicants and the Monitor did not have enough information to articulate a plan at the Initial Order stage would reward the Respondents for their recalcitrance.

70 Second, it does not take much imagination to know what a plan in this case will look like at a high level. The debtor companies control real estate that, following their own business model, must be sold before money is returned to investors. Precisely how that is to be done and what steps must be taken prior to the sales are details that the Applicants and Monitor cannot be expected to know at this stage of the proceedings. The reality is that the Applicants' "germ of a plan" is the same as the Respondents'. The difference between the two is that the Applicants believe that the process of liquidating real estate assets and returning money to investors should be under the control of a professional, neutral, independent, competent ,and trustworthy steward (*i.e.* the Monitor, not management).

C. Do the Applicants Represent the Interests of Investors?

71 The Respondents submit that the Applicants do not represent the interests of most investors and that the *CCAA* proceedings are effectively conscripting the funds of all investors in pursuit of the interests of a minority of the investors. The Respondents are correct that, together, Fasken and Norton Rose do not have the support of the majority of investors. The Respondents ask, in effect, that the Court infer that a silent majority of investors supports management and opposes the *CCAA* proceedings. The Respondents produced many proxies supporting the Angus Manor sale transaction that was halted by the Initial Order. However, I do not consider the Angus Manor proxies to be an indication that investors oppose the *CCAA* proceedings, because they predate the Initial Order. The Respondents have adduced no evidence to show investor support after the Initial Order.

72 Fasken, counsel to the Canadian Investors, has been contacted by 120 investors who represent approximately CAD $2.85 million. Of those 120 Canadian Investors, 114 expressed support for the Monitor, two stated no opinion, and four were unsure or required more information to decide. An obvious difficulty in this case is that many of the investments were made a decade ago and there has been little communication with investors since. Some investors may have lost interest or given up and others may have changed their contact information. The response to Fasken suggests that those of the Canadian Investors who can be contacted and remain interested in their investment overwhelmingly support the *CCAA* proceedings.

73 Norton Rose, counsel to the Offshore Investors, has been contacted by 303 Offshore Investors representing US $8,910,462 and CAD $4,649,021 plus small amounts denominated in other currencies. Of those 303 Offshore Investors, 291 indicated their support for the Monitor and only five opposed the appointment of the Monitor with seven expressing no opinion. The Respondents' submission that Norton Rose does not represent the interests of most Offshore Investors is meritless. Norton Rose requested a list of the Offshore Investors that included contact information. Mr. Lind deposed that the information was controlled by a non-*CCAA* affiliate based in Singapore, not the Respondents, and could not be provided because of Singapore privacy law. Counsel for the Offshore Investors submitted, and I agree, that the Respondents could have requested their Singapore affiliate to notify Offshore Investors of the *CCAA* process and provide them with contact information for Norton Rose and the Monitor but they did not.

74 Of the investors who have made their views known, the vast majority support the *CCAA* process. To the extent that Fasken and Norton Rose are unable to contact investors to solicit their views, that is attributable one way or another to the conduct and choices of the Respondents. The inference that I draw from the facts set forth in this section is not that a silent majority opposes the *CCAA* process; to the contrary, I infer that if it was possible to contact and inform all investors, a strong majority would support the *CCAA* process.

V. Jurisdiction over US LLCs

75 Justice Simard, as noted earlier in these Reasons, concluded that this Court has jurisdiction over the US LLCs. The objection raised by the US LLCs before me is different. The US LLCs submit that because they are not doing business in Canada they do not fit within the *CCAA* s 2(1) definition of "company" and, as such, they cannot be subject to these *CCAA* proceedings. *CCAA* s 2(1) provides that:

> **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 . . . [emphasis added]

76 Are the US LLCs doing business in Canada? Counsel conceded in oral argument that the US LLCs had done business in Canada during the capital raising phase when funds were solicited from Canadian investors but submitted that they had ceased to do business in Canada upon transferring the Fossil Creek lands and Windridge lands to the Texas Trusts. I agree that the US LLCs were not doing business in Canada at the time of the Initial Order, but that does not dispose of the issue.

77 The approach taken by leading insolvency judges to the *CCAA* definition of company has been flexible, consistent with the remedial purpose of the statute. Chief Justice Morawetz, citing a long list of authorities, observed in ***Pride Holdings Group Inc*, 2024 ONSC 1830** at para 30: "This Court has found it just and reasonable to extend the protection of the stay of proceedings to non-applicant limited partnerships and non-applicant affiliates where such parties are integrally and closely interrelated to the debtor companies' business in order to ensure that the purposes of the CCAA can be achieved." Morawetz J, as he then was, in ***Priszm Income Fund (Re)*, 2011 ONSC 2061** at paras 10 & 20 extended a *CCAA* stay order to "an unincorporated, limited purpose trust" whose function was to hold limited partnership units on the basis that it could be characterized as an "income trust" which is included in the *CCAA* definition of "company." This approach is very much in evidence in the Initial Order in the present case which applies to the debtor companies and affiliated entities including various limited partnerships and trusts.

78 When a debtor corporation is the applicant, courts have been willing to take jurisdiction over non-applicant affiliated foreign entities and extend a *CCAA* stay to those entities. Justice Osborne in ***BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645** found the applicants to be debtor companies and Ontario was determined to be the proper jurisdiction for the proceedings. Osborne J then considered the extension of the *CCAA* stay to direct and indirect foreign subsidiaries of the applicants based in Germany, the Netherlands, and Delaware. "None [of the non-applicants] carry on active business" (para 43), Justice Osborne observed, and thus cannot be said to have been doing business in Canada. Osborne J explained at para 42 that "[t]he court has authority to extend the stay to non-parties pursuant to ss 11 and 11.02(1) of the CCAA, which permits the court to make an initial order on any terms imposed." He concluded at para 44: "I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions, all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants."

79 Where, as in the present case, the applicants are creditors and equity investors, a court should apply the same principles outlined for debtor corporation applicants by Osborne J in ***BZAM***. The US LLCs are analogous to the BZAM affiliates based in Europe and the US that did not conduct business in Canada. The inclusion of the US LLCs is appropriate and necessary because, as Simard J found, they are intextricably intertwined in the business of the debtor companies. Further, the inclusion of the US LLCs mitigates the risk of uncoordinated realization and enforcement and promotes the maximization and protection of value for stakeholders.

80 I cannot accept the Respondents' submission that there is no purpose in the US LLCs being subject to the *CCAA* process because they are, in effect, inactive. The assertion of inactivity is contrary to the statement in the relevant offering memoranda that the purpose of the US LLCs was "overseeing all aspects of the development of the [Windridge and Fossil Creek lands]." Further, the LLCs were used in 2024 to facilitate sales of Windridge and Fossil Creek lands. The Fossil Creek lands were sold to Bloomfield Homes LP in Fall 2024. Details are sketchy because the Respondents have provided only limited documentation concerning the sale to the Monitor. From the documentation that was provided, it is evident that Fossil Creek LLC was used to facilitate the sale of the Fossil Creek lands. Windridge LLC was also used to facilitate the sale of some of the Windridge lands to TRWD. This recent activity suggests that the Texas LLCs have ongoing relevance to the Respondents' business. Further, since the Texas LLCs are the ones that conducted business with the Texas Trusts, it is prudent to keep them under the *CCAA* umbrella so that the Monitor can use the Texas LLCs to further any legal steps that may be taken in Texas in respect of the Texas Trusts or Mr. Foo.

V. *CCAA* v Receivership

81 The Applicants' alternative remedy is the appointment of a receiver pursuant to *Judicature Act*, RSA 2000, c J-2, s 13(2). The test for the appointment of a receiver is whether it is just and convenient to do so: ***BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127** at para 17. For the same reasons that I have concluded that a *CCAA* proceeding is appropriate, I find that a receivership is just and convenient in the circumstances. The real question is which is the more appropriate procedure in the present circumstances.

82 Where a court is not satisfied that management should be displaced it may opt for *CCAA* proceedings instead of a receivership because in a typical *CCAA* proceeding management remains in control. That was obviously not a relevant consideration in choosing between a receivership and *CCAA* proceedings in the present case as I was satisfied that management should be unseated as reflected in the Initial Order. The Respondents point out that I characterized the effect of the Initial Order differently in my decision denying their request to extend time for seeking leave to appeal the Initial Order: ***A2A GP Inc (Re)*** at para 4. The sentence in my earlier decision about not unseating management was something that I meant to remove from the final version of the decision but failed to do so in my haste to get the parties a prompt answer over the last weekend before the holiday break. The error has now been corrected by way of a corrigendum.

83 Courts faced with the question of choosing between *CCAA* and receivership proceedings in the context of real estate development ventures often opt for a receivership: see, for example, ***Ashcroft Urban Developments Inc. (Re)*, 2024 ONSC 7192** and the discussion in Jeremy Opolsky, Jacob Babad, & Mike Noel, "Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis" (2020) 18 *Annual Review of Insolvency Law* 199. A Court's decision between *CCAA* and receivership proceedings often turns on a weighing of the prejudice and benefits to creditors.

84 The present case is different from the typical real estate development insolvency in an important way. There is no secured creditor that might be prejudiced by *CCAA* proceedings. The absence of a secured creditor also means that there is no party with security that provides the right to appoint a receiver and, accordingly, there is no party with standing to apply for the appointment of a receiver pursuant to the *BIA*. The only alternative in the present case is to apply pursuant to the *Judicature Act* as the Applicants have done.

85 A *BIA* receivership offers many of the same advantages as a *CCAA* proceeding. A *BIA* receiver or *CCAA* Monitor does not need to seek the assistance of courts in other provinces because the *BIA* and *CCAA* are federal statutes. Similarly, a *BIA* receiver and *CCAA* Monitor may be recognized and empowered to act in the US pursuant to Chapter 15 of the *US Bankruptcy Code*. A *Judicature Act* receiver, however, must commence proceedings in other provinces and in the US for recognition and to protect a debtor company's property. A *Judicature Act* receivership is a less efficient and effective tool than a *BIA* receivership or *CCAA* proceeding. And efficiency is an important consideration in the insolvency context where parties are seeking to preserve a diminishing pool of assets.

86 Where national and international coordination is required to preserve a debtor's assets and maximize recovery for creditors, a federal insolvency statute is usually preferable to a provincial statute like Alberta's *Judicature Act*. A *CCCA* proceeding is more appropriate in the present case than a *Judicature Act* receivership.

VI. Conclusion

87 The evidence now before the Court is significantly more robust than was available at the Initial Order application on November 14, 2024 or at the first phase of the Comeback Hearing on November 21, 2024. The additional evidence provided by both parties, together with the Monitor's investigation and analysis, reinforces my view that my decision to grant the Initial Order was correct and that *CCAA* proceedings are appropriate. The Respondents' application to set aside the Initial Order and ARIO is dismissed.

88 Though I have confirmed that the *CCAA* proceedings are appropriate, the evidence is clear that the Windridge lands, the proceeds of the small parcel of the Windridge lands sold to TRWD, and the proceeds of the sale of the Fossil Creek lands remain outside the reach of the *CCAA*. If those lands and proceeds cannot be brought under the control of the Monitor through the Chapter 15 proceedings or otherwise, then the *CCAA* proceedings are destined to fail in respect of the Windridge and Fossil Creek entities, including the US LLCs. The Monitor shall have 21 days from the date of these Reasons to provide a plan for gaining control of the Windridge lands and the proceeds of the sales of the Windridge lands and Fossil Creek lands to the Court. If a reasonable plan is not provided to the Court within 21 days, then the *CCAA* proceedings shall terminate in respect of the Windridge and Fossil Creek entities, including the US LLCs.

Application dismissed.

End of Document

TAB 2

R.S.C. 1985, c. C-36, s. 1

s 1. Short title

Currency

1.Short title
This Act may be cited as the *Companies' Creditors Arrangement Act*.

Currency
Federal English Statutes reflect amendments current to S.C. 2026, c. 2 and Gazette Vol. 160:3 (February 11, 2026)
Federal English Regulations current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11.General power of court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Judicial Consideration (6)

Currency

Federal English Statutes reflect amendments current to S.C. 2026, c. 2 and Gazette Vol. 160:3 (February 11, 2026)
Federal English Regulations current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

11.2

11.2(1)Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2)Priority — secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2(3)Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.2(5)Additional factor — initial application

When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

Judicial Consideration (9)

Currency

Federal English Statutes reflect amendments current to S.C. 2026, c. 2 and Gazette Vol. 160:3 (February 11, 2026)
Federal English Regulations current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.52

s 11.52

Currency

11.52

11.52(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Judicial Consideration (6)

Currency

Federal English Statutes reflect amendments current to S.C. 2026, c. 2 and Gazette Vol. 160:3 (February 11, 2026)
Federal English Regulations current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

TAB 3

2026 ABCA 156
Alberta Court of Appeal

Angus A2A GP Inc v. Alvarez & Marsal Canada Inc

2026 CarswellAlta 1258, 2026 ABCA 156

Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A, A2A Developments Inc., Serene Country Homes (Canada) Inc. and A2A Capital Services Canada Inc. (Appellants) and Alvarez & Marsal Canada Inc. in its capacity as Court-Appointed Monitor of the Appellants (Respondent)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Appellants) and Alvarez & Marsal Canada Inc. (Respondent)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Appellants) and Alvarez & Marsal Canada Inc., Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richards, the Canadian Investors and the Offshore Investors each as defined in the Initial Order granted November 14, 2024 (Respondents) and Fossil Creek A2A GP Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust and Hills of Windridge A2A Trust (Appellants) and Alvarez & Marsal Canada Inc., Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richards, the Canadian Investors and the Offshore Investors each as defined in the Initial Order granted November 14, 2024 (Respondents)

Ritu Khullar C.J.A. [1] , William T. de Wit J.A., Karan M. Shaner J.A.

Heard: September 8, 2025
Judgment: May 11, 2026
Docket: Calgary Appeal 2401-0350AC, 2401-0352AC, 2501-0050AC, 2501-0053AC

Proceedings: Affirmed, 2025 CarswellAlta 164, 2025 ABKB 51, [2025] A.W.L.D. 1312, 2025 A.C.W.S. 656 (Alta. K.B.)

Counsel: D. Jukes, for Appellants, Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A, A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc., Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust and Hills of Windridge A2A Trust
K.J. Meyer, K.C., L.R. Rollingson (no appearance), C.K. Brown, for Appellants, Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC
J.L. Oliver, D. Marechal (no appearance), D. Jorgenson, for Respondent, Alvarez & Marsal Canada Inc.
R. Gurofsky, K.M.G. Wong, for Respondents, Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, Brian Richards and Canadian Investors
H.A. Gorman, K.C., (no appearance), A. Stephenson, D.L.W. Stethem (no appearance), for Respondent, Offshore Investors
K. Kashuba (no appearance), for Interim Lender, Pillar Capital Corp

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency; International; Property

Headnote

Bankruptcy and insolvency

Business associations

Civil practice and procedure

Appeal from the Order by The Honourable Justice C.D. Simard Dated the 25th day of November, 2024 Filed on the 3rd day of December, 2024 (Docket: 2401-15969). Appeal from the Order by The Honourable Justice C.C.J. Feasby Dated the 29th day of January, 2025 Filed on the 10th day of February, 2025 (2025 ABKB 51, Docket: 2401-15969)

Per curiam:

Memorandum of Judgment

I. OVERVIEW

1 These are four related appeals from decisions that continued and confirmed proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*). They stem from two real estate development projects in Texas. The appellants fall into two groups. One group consists of two Texas corporations that acquired and developed the project lands and were involved in raising investment for their development (the Texas LLCs [2]). The other group consists of Canadian entities that formed part of a complex structure set up to secure investment from Canadian investors (the Canadian WFC Entities [3]).

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

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

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

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

6 At the first stage, in November 2024, the chambers judge resolved some issues but did not finally determine whether the Initial Order should have been granted. That decision is referred to as the *ARIO Decision* and is one of the decisions under appeal. The second stage of the comeback hearing took place before a different chambers judge in January 2025. He confirmed the Initial Order, dismissed the application to set it aside, and continued the *CCAA* proceedings against the appellants and other entities who have not appealed: ***Angus A2A GP Inc (Re)***, 2025 ABKB 51 (*Comeback Decision*).

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

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

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

II. FACTS

A. Real Estate Projects and the Investment Structure

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

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

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

Fossil Creek

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

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

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

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

17 The following are important points to note:

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

• Trails of Fossil Creek Properties LP, which is believed to hold the proceeds of the 2024 sale of the Fossil Creek lands, is not subject to the *CCAA* proceedings.

Windridge

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

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

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

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

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

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

24 The following are important points to note:

• Hills of Windridge A2A LP, the Hills of Windridge A2A Trust, and Hills of Windridge A2A GP Inc are Ontario entities. They are subject to the *CCAA* proceedings and part of the Canadian WFC Entities group of appellants.

• Windridge LLC is a Texas corporation. It is subject to the *CCAA* proceedings and is one of the Texas LLCs.

• The Hills of Windridge Trust, a Texas trust, is not subject to the *CCAA* proceedings; nor is the trustee, Mr. Foo. That is an aspect of the *ARIO Decision* that is not under appeal. It may hold the remaining Windridge lands.

• Hills of Windridge LP, a Texas entity, is not subject to the *CCAA* proceedings either. It holds the sale proceeds of the expropriation sale and may hold the remaining Windridge lands.

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

B. Investors' Rights

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

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

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

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

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

31 Under the Fossil Creek Deed of Covenant, UFI holders do not have rights to participate in the development of the Fossil Creek lands. The Deed provides for the distribution of the net income from sale, lease, or other dealings with the property, but the distributions are not guaranteed. UFI holders have the right to vote on the sale of all or any part of the Fossil Creek lands. The facilitator [4] is required to maintain accurate books and records and make them available for inspection.

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

33 Importantly, Canadians and offshore investors hold securities, but they are not debt securities. The security issuers do not owe the investors money. The parties and the courts below described them as "equity investors". That is significant because one issue on appeal is whether the "equity investors" in this case, or in general, should be able to initiate *CCAA* proceedings.

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

C. Procedural History

Initial Order

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

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

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

38 The Initial Order was granted by Feasby J on November 14, 2024. It identified various entities as Debtor Companies, which include the Texas LLCs and some of the Canadian WFC Entities. It also identified various entities as Affiliate Entities integrally related to the Debtor Companies' businesses, including the other Canadian WFC Entities. [5]

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

Amended and Restated Initial Order

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

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

Continuation of the Comeback Hearing

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

III. DECISIONS APPEALED

A. The ARIO Decision

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

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

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

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

B. The Comeback Decision

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

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

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

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

1. Whether the insolvency condition of the *CCAA* was satisfied.

2. Whether "equity investors" could commence *CCAA* proceedings and whether the proceedings in this case would further the objectives of the *CCAA*.

3. Whether the applicant Canadian investors represented the interests of all investors.

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

52 The chambers judge rejected the argument that the "equity investors" could not commence *CCAA* proceedings because they were not "creditors" in the traditional sense: *Comeback Decision* at paras 58-59. The real question was whether the applicants' use of *CCAA* proceedings in this case is consistent with the purposes of the legislation. Two relevant purposes are preserving and maximizing the value of the debtor companies' assets and ensuring the fair and equitable treatment of investors' claims. As noted, the chambers judge found that the entities subject to the Initial Order had shown that they would do neither. The Monitor could achieve both purposes, the second by administering a fair claims process aided by the stay of proceedings.

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

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

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

IV. ISSUES ON APPEAL

56 The general issues in these appeals are as follows.

1. Whether the applicants, as "equity investors", had standing to commence proceedings under the *CCAA*.

2. Whether the *CCAA* proceedings were improper because:

b. they were bound to fail or there was no plan to achieve their purposes; or

c. they were not fair to other investors or the issuers of investment instruments.

3. Whether the decisions under appeal were procedurally unfair or misplaced the burden of proof.

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

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

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

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

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

V. ANALYSIS — General Issues

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

59 The Canadian investors who applied for the Initial Order, like the other respondent investors, are not owed a debt by the appellants or other entities involved in the Windridge and Fossil Creek projects. They are not creditors of the appellants. The *Comeback Decision* characterized them as equity investors and the issue is whether equity investors can ever commence *CCAA* proceedings.[6] The appellants argue that the answer is "no". We disagree.

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

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

62 We begin with the text. Nothing in the *CCAA* addresses specifically whether an equity investor can commence *CCAA* proceedings. Section 11.02 deals with the power of the court to order a stay of proceedings on an initial application, but it does not say who may bring an initial application. Section 11 confers broad power on the court to make orders it considers appropriate in the circumstances "on the application of any person interested in the matter". This makes plain that an interested person may apply for an order, including an initial order. The question is whether equity investors are "interested persons" or "person[s] interested"[7] under the *CCAA*.

63 Despite the frequent use of the term within it, the *CCAA* does not define who qualifies as an "interested person". Its interpretation depends partially on the surrounding statutory context. As the parties have argued, that context includes provisions which limit the rights of "equity claimants" in *CCAA* proceedings as compared with creditors: [8]

- Sections 4 and 5 provide that shareholders cannot meet and vote on a compromise or arrangement unless an application is made by a creditor, trustee in bankruptcy, or liquidator, and the court orders a meeting of shareholders.

- Section 6(1) provides that the votes of those with "equity claims" do not count in computing the voting requirement for approving a plan unless the court has ordered a meeting under ss 4 or 5.

- Section 22.1 provides that "equity claimants" must be placed in their own separate class and cannot vote on the plan unless the court orders otherwise.

- Section 6(8) prohibits the court from sanctioning a plan that pays out "equity claimants" before other claims are fully paid.

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

65 The legislative background to ss 6(8) and 22.1 also gives reason to doubt that Parliament intended to exclude equity investors from the class of "interested persons". These provisions were introduced in 2009 to clarify that "equity claimants" rank beneath non-equity claimants in the order of priority and cannot recover money in *CCAA* proceedings before creditors have been paid in full. Consistent with the priority rule, equity investors can receive payment in circumstances when an insolvent debtor company has more than enough assets to satisfy non-equity claims. Further, the restrictions on the rights of equity investors to meet and vote on a compromise or plan in ss 4, 5, 6(1), and 22.1 enable the supervising court to dispense with meetings that would serve no useful purpose. That can be the case when the debtor company has insufficient assets to pay out non-equity claims, so equity investors stand to gain nothing from approval of a plan. The key point is that neither the priority rule, nor the restrictions on meetings and voting requires preventing equity investors from starting *CCAA* proceedings in all circumstances.

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

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

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

69 The *CCAA* only applies when a debtor company is insolvent. There are various tests for insolvency under s 2(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, broadly divisible into "balance sheet" insolvency (where the value of total liabilities exceeds the debtor company's assets) and "cash flow" insolvency (where the debtor company is unable to meet its

obligations as they fall due, but its total assets may exceed the value of non-equity claims): Roderick J Wood, *Bankruptcy and Insolvency Law*, 3rd ed (Toronto: Irwin Law, 2025) at 19-22.

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

71 This interpretation aligns with the operation of the *CCAA* at later stages after the grant of an initial order. For example, when the court is deciding whether to approve a plan already voted on, it must consider whether the plan is reasonable to shareholders if, at that time, the assets of the debtor company have a value greater than the claims of creditors: ***Re Stelco Inc***, [2006] OJ No 276 at para 16, 2006 CarswellOnt 406 (SC). It would be anomalous that the court must consider fairness to equity investors in *CCAA* proceedings started by a debtor company or creditor but need not consider them at all if those parties are unwilling to commence proceedings and equity investors are unable to do so: see *Comeback Decision* at para 59.

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

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

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

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

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

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

77 The *CCAA* is an insolvency statute because it applies "in respect of" insolvent debtor companies and, as such, it shares the general remedial objectives of Canada's insolvency statutes articulated in ***Callidus***: see paragraph 67 above. Historically, the distinctive objective of *CCAA* proceedings was to help an insolvent company remain in business by reaching a compromise

with its creditors under judicial supervision, as opposed to liquidating its assets to satisfy creditor claims: ***Callidus*** at para 41. The preservation of the debtor company's business as a going concern typically involves a compromise of its debt and some kind of business restructuring.

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

[79] The *CCAA* proceedings in this case have evolved into a kind of liquidating *CCAA*.[9] The *Comeback Decision* identified its purposes as preserving the value of the remaining assets held by entities within the Fossil Creek and Windridge investment structure,[10] realizing those assets, and ensuring the fair treatment of investors' claims by distributing the assets through a claims process administered by the Monitor: *Comeback Decision* at paras 64, 68. Those objectives required the Monitor to take control of the entities involved in the Fossil Creek and Windridge projects, largely because existing management was unwilling or unable to preserve the value of the assets and to treat investors fairly. Returning money to the investors would involve the Monitor selling the remaining lands: *Comeback Decision* at para 70.

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

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

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

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

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

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

[85] This argument must fail given the applicable standard of review. In the *Comeback Decision*, the chambers judge found it was premature at the second stage of the comeback hearing to conclude the Monitor would fail to gain control of the Texas assets: *Comeback Decision* at para 67. The Monitor might be able to exercise its powers over the Texas LLCs under the Initial Order to take legal action in Texas against the Texas entities that hold the remaining assets. The Texas LLCs

were involved in the 2024 sale of the Fossil Creek lands and the expropriation sale of part of the Windridge lands, and they may have legal claims to the remaining assets that the Monitor can bring on their behalf. These are factual findings and the appellants have neither argued, nor demonstrated, that they reflect palpable and overriding error. Indeed, developments since the comeback hearing have reinforced it. In March 2025, a different chambers judge approved the Monitor's plan to "repatriate" the Texas assets, which further indicates that the *CCAA* proceedings are not "doomed to fail". That decision is not under appeal.

[86] The appellants make a related but different argument about the prospect of success in this case. A line of case law originating in ***Re Inducon Development Corp***, [1992] OJ No 8 at para 14, 1991 CarswellOnt 219 (Ct J (GD)) establishes that an applicant for an initial order under the *CCAA* must have, at the very least, a "germ of a plan" for using the *CCAA* process to achieve the remedial purposes of the legislation. [11] In a typical *CCAA* proceeding, that means having a "germ of a plan" for compromising creditors' claims and perhaps restructuring the debtor companies. In this case, it means having a "germ of a plan" for preserving the value of the Texas assets and fairly distributing them to investors and stakeholders.

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

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

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

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

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

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

c. Fairness to other investors and issuers

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

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

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

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

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

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

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

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

3. Whether the decisions were procedurally defective

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

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

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

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

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

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

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

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

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

[109] The rule proposed by the appellants would be a disproportionate response to unjustified *ex parte CCAA* applications. It could disincentivize justified *ex parte* applications, as well as unjustified ones, and would require the termination of meritorious *CCAA* proceedings which may benefit multiple stakeholders and the public at large because they were started without adequate notice. In most cases, any procedural prejudice from an unwarranted *ex parte* initial application is

eliminated by comeback hearings on full notice to the appellants. In some circumstances, it may be appropriate to impose cost consequences on applicants who make unwarranted *ex parte* applications.

b. Did the decisions misplace the burden of proof?

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

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

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

[113] The Canadian investors in Fossil Creek and Windridge had a right to receive annual financial statements from the administrator [12] of the trusts before each meeting of unitholders. The administrator failed to provide that information and did not maintain financial records: *Comeback Decision* at paras 36, 39. The offshore investors had a right to inspect books and records maintained by the facilitator, [13] but no such records were kept: *Comeback Decision* at paras 37, 40. They had the right to vote on sales of the Fossil Creek and Windridge lands, but their approval was never sought.

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

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

VI. ANALYSIS — Specific Issues

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

a. ***Factual and legal background***

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

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

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

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

> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> Section 11 is complemented by the more specific authority under s 11.02 to grant a stay of proceedings on an initial application.

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

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

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

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

> 3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.
>
> The relevant feature for present purposes is that the *Act* applies "in respect of a debtor company or affiliated debtor companies".
>
> [123] The parties advance different interpretations of s 3(1) and its relationship with s 11. The Texas LLCs argue that s 3(1) means that the *CCAA* only applies "to" debtor companies and that it limits the court's statutory authority to making orders binding debtor companies alone. The respondents argue that s 3(1) merely triggers the application of the *CCAA* without limiting the scope of the court's authority under s 11 or other provisions. In other words, once the s 3(1) threshold is met — there is a debtor company or affiliated debtor companies against which claims exceed $5 million — the *CCAA* applies and the powers under the *Act* are vested in the supervising court.
>
> [124] In our view, the respondents' interpretation is better supported by the text of ss 3(1) and 11, the purposes of the *CCAA*, and the case law interpreting those provisions.

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

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

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

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

[129] However, a substantial body of cases also supports the contrary view. In several cases, courts have made orders binding non-debtor companies relying on statutory authority under ss 11, 11.02, or other provisions*:* ***Arrangement relatif à Bloom Lake General***, 2021 QCCS 2946 at paras 47, 103-104; ***In Re Hudson's Bay Company***, 2025 ONSC 1530 at paras 40-48, 79-82 ***Pacific Exploration & Production Company (Re)***, 2016 ONSC 5429 at paras 26-27; ***BZAM Ltd Plan of Arrangement***, 2024 ONSC 1645 at paras 16, 42-43; ***JTI-Macdonald Corp, Re***, 2019 ONSC 1625 at para 14; ***In the Matter of a Plan of Compromise or Arrangement of Sandvine Corporation et al***, 2024 ONSC 6199 at paras 3, 37; ***Re Chalice Brands Ltd***, 2023 ONSC 3174 at paras 6, 35-36; ***Homburg Invest Inc (Arrangement relatif à)***, 2011 QCCS 4989 at paras 9, 12, 35; ***Miniso International Hong Kong Limited v Migu Investments Inc***, 2019 BCSC 1234 at paras 58-59, 62; ***1057863 BC Ltd (Re)***, 2024 BCSC 1111 at paras 33-34, 46-50. While the reasons in these cases are not extensive, the courts clearly regarded 3(1) as a trigger to the application of the *CCAA*, not as a limit on the scope of their authority under it.

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

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

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

[132] There are several cases in which courts have exercised statutory authority to appoint monitors with "ordinary" investigative and reporting powers in relation to non-debtor companies [14] and at least one case, ***Bloom Lake***, where the Court granted the monitor expanded powers to investigate a non-debtor company. There are, however, no reported decisions in which a court granted a monitor powers to manage a non-debtor company's business and control its assets. Nonetheless, there is no principled basis for drawing a sharp distinction between the court's authority to appoint an "ordinary" monitor and a "super-monitor" over non-debtor companies.

[133] Courts undoubtedly have statutory authority to grant monitor powers to manage and control debtor companies, and the most plausible source of that authority is s 11 of the *CCAA*: Vern W DaRe & Alfonso Nocilla, "Bestriding the Narrow World: Is It Time to Bifurcate the Role of the *CCAA* Monitor?" (2020) 18 Annual Rev Insolvency L 224 at 236-239; ***Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)***, 2020 QCCA 659 at para 68; ***Mantle Materials Group, Ltd (Re)***, 2024 ABKB 19 at para 66. As explained in the previous section, the courts' authority under s 11 is not limited to making orders against debtor companies, so their authority to appoint "super monitors" is not limited in that way either.

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

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

d. ***Summary***

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

[137] The fact that the courts have authority to make orders against non-debtor companies, particularly foreign incorporated companies, does not mean that it is always appropriate to exercise it. These appeals did not raise the tricky issue of which factors or principles should structure the exercise of the court's authority. [15] At a minimum, the non-debtor company must be integrally and closely related to the debtor companies' business such that the order is necessary to achieve the purposes of the proceedings. Further obstacles arise when a court is asked to grant a monitor powers to manage a foreign incorporated company, such as the monitor's capacity to comply with the corporate law of another country. Since these issues were not raised in the appeals, we refrain from commenting on them.

[138] Finally, we note the Texas LLCs' brief argument that the courts below erred in granting a stay of proceedings against them. They submit the stay did nothing to further the purposes of these *CCAA* proceedings because the Texas LLCs have been inactive for a long time and have no assets. The *Comeback Decision* found, however, that the Texas LLCs played an active role in the 2024 sales of project lands and that their inclusion in the *CCAA* proceedings was integral to their success. These are findings of fact, or of mixed fact and law, reviewable for palpable and overriding error, and none has been shown.

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

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

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

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

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

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

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

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

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

general law of jurisdiction or the absence of an order permitting service of the originating application *ex juris*. Their conduct in contesting the Initial Order may have made the jurisdiction issue a losing one, but the finding that they had notice of the *CCAA* proceedings did not make it moot.

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

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

[148] Again, the starting point is s 2(1) of the *CCAA*, which defines a "debtor company" as a company that is insolvent, among other requirements. Neither decision under appeal found that any of the Canadian WFC Entities were individually insolvent on the date of the Initial Order. On appeal, the Monitor and the investors point to evidence in the record suggesting each was insolvent; however, that evidence is equivocal, [16] and it is not this Court's role to make fresh findings of fact.

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

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

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

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

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

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

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

[156] There is considerable support in the case law for a collective approach to assessing insolvency in appropriate circumstances. Several cases have considered the assets and liabilities of multiple entities together to ground a finding that a debtor company was insolvent, albeit without extensive analysis. In most cases, the entities considered were corporations: ***Miniso*** at para 44; ***Bondfield Construction Company, Re***, 2019 ONSC 2310 paras 1, 13; ***Phoena Holdings Inc***, 2023 ONSC

2118 at paras 1, 9, 12; ***Re iMarketing Solutions Group***, 2013 ONSC 2223 at paras 1, 3, 11, 15. In some cases, the assets and liabilities of non-corporate entities were included in the insolvency assessment: see ***Dondeb Inc (Re)***, 2012 ONSC 6087; ***First Leaside Wealth Management Inc (Re)***, 2012 ONSC 1299.

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

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

VII. CONCLUSION

[159] Our conclusions are summarized below:

- The Canadian investors who applied for the Initial Order were equity investors, not creditors of the Debtor Companies and Affiliate Entities. They were "interested persons" who could apply for an initial order because there was a reasonable possibility that they would benefit financially from the outcome of the *CCAA* proceedings. Given the priority scheme in s 6(8) of the *CCAA*, it will often be difficult for equity investors to establish that they are "interested persons" able to commence *CCAA* proceedings.

- The *CCAA* proceedings were commenced for proper purposes underlying the legislative scheme. The applicant Canadian investors did not seek the Initial Order for the sole purpose of investigating the debtor companies' affairs.

- The court below made no reviewable error in concluding that, as of the date of the comeback hearing, the proceedings were not doomed to fail and had a reasonable possibility of success. Put another way, there was a sufficient "germ of a plan" to warrant the Initial Order. However, the requirement of a reasonable possibility of success continues to apply after the grant of an initial order and the parties may revisit it if additional evidence about the prospects of success becomes available.

- The court below made no reviewable error in concluding that the *CCAA* proceedings are fair to the majority of investors and that the transaction documents establishing investors' rights did not preclude recourse to *CCAA* proceedings.

- The short-notice application for the Initial Order with respect to the Windridge and Fossil Creek projects was not justified. However, the appellants received full notice of the comeback hearing and were able to participate fully in it. In the circumstances, it would be disproportionate to terminate an otherwise meritorious *CCAA* proceeding because it was started on inadequate notice.

- At the comeback hearing, the applicant Canadian investors had the burden of establishing that the Initial Order was appropriate. Material information was unavailable at the first stage of the comeback hearing because some appellant entities failed to satisfy their duties to provide information to investors. It was not an error to continue the stay of proceedings for a short period while the Monitor acquired the missing information.

- The applicant Canadian investors did not obtain an order allowing them to serve the originating application on the Texas LLCs in Texas. Despite that, it was not a reviewable error to continue the *CCAA* proceedings against the Texas LLCs after the comeback hearing. The Texas LLCs did not appeal the finding that the Alberta courts have jurisdiction over them. They received notice of the Initial Order and the comeback hearing, which was a *de novo* application, on November 14, 2024. They raised no issue on appeal about the adequacy of the service of the Initial Order.

• The Texas LLCs do not meet the definition of "debtor company" under the *CCAA* because they are foreign companies without assets or business in Canada. Nevertheless, the court had statutory authority to subject them to the Initial Order. For the *CCAA* to apply, s 3(1) requires there to be a "debtor company" but it does not limit the court's statutory authority to orders against debtor companies. These appeals did not raise the issue of which factors or principles should structure the exercise of authority to make orders against foreign incorporated companies and this decision does not address it.

• It has not been established that the Canadian WFC Entities were individually insolvent on the date of the comeback hearing. Nevertheless, the court had statutory authority under s 11 to include the Canadian WFC Entities in the Initial Order. Provided that the threshold conditions in s 3(1) are met, and it is appropriate in the circumstances, the court has statutory authority to make orders in *CCAA* proceedings against entities that are solvent.

VIII. DISPOSITION

[160] The appeals are dismissed.

Appendix A - Corporate structures for Canadian investmentAppendix A - Corporate structures for Canadian investment

Footnotes

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

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

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

4 Fossil Creek LLC.

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

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

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

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

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

10 Namely, the remaining proceeds of sale and the unsold lands.

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

12 A2A Capital Management Inc (later renamed to Serene Country Homes (Canada) Inc).

13 Fossil Creek LLC and Windridge LLC.

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

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

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

End of Document

TAB 4

2013 ABQB 224
Alberta Court of Queen's Bench

Medican Holdings Ltd., Re

2013 CarswellAlta 513, 2013 ABQB 224, [2013] A.W.L.D. 2731, 16 B.L.R. (5th) 327, 229 A.C.W.S. (3d) 331

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended and The Judicature Act, R.S.A. 2000, c. J-2, as Amended

In the Matter of a Plan of Compromise or Arrangement of Medican Holdings Ltd., Medican Developments Inc., R7 Investments Ltd., Medican Construction Ltd., Medican Concrete Inc., 1090772 Alberta Ltd., 1144233 Alberta Ltd., 1344241 Alberta Ltd., 9150-3755 Quebec Inc., Axxess (Sylvan Lake) Developments Ltd., Canva (Calgary) Developmentxs Ltd., Elements (Grande Prairie) Developments Ltd., Medican (Edmonton Twrwillegar) Developments Ltd., Medican (Grande Prairie) Holdings Ltd., Medican (Kelowna Move) Developments Ltd., Medican (Lethbridge - Fairmnt Park) Developments Ltd., Medican (Red Deer - Michener Hill) Developments Ltd., Medican (Sylvan Lake) Developments Ltd., Medican (Westbank) Development Ltd., Medican (Westbank) Land Ltd., Medican Concrete Forming Ltd., Medican Les Entreprises Medican Inc., Medican Equipment Ltd., Medican Framing Ltd., Medican General Contractors Ltd., Medican General Contractors 2010 Ltd., Riverstone (Medicine Hat) Developments Ltd., Sanderson of Fish Creeek (*calgary) Developments Ltd., Sierras of Eaux Claires (Edmonton) Developments Ltd., Sonata Ridge (Kelowna) Developments Ltd. Sylvan Lake Marina Developments Ltd., the Estates of Valleydale Developments Ltd., the Legend (Winnipeg) Developments Ltd., and Watercrest (Sylvan Lake) Developments Ltd. Petitioners

K.M. Horner J.

Heard: February 21, 2013
Judgment: April 23, 2013
Docket: Calgary 1001-07852

Counsel: David W. Mann, Scott D. Kurie, for Medican Holdings Ltd. et al
Sean Collins, for MCAP
A. Aaron Stephenson, for Monitor

Subject: Insolvency; Property

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles

Creditor was senior secured lender on debtor's condominium project — After debtor obtained Companies' Creditors Arrangement Act (CCAA) order which provided that secured creditors were liable to pay certain charges, creditor obtained order permitting it to appoint receiver and market condominiums — Application by creditor for declaration that no monetary amount be allocated to it on account of charges arising under CCAA order — Application dismissed — Proposed charge levy treated creditor like other senior secured lenders and was prima facie equitable — Creditor had participated in CCAA process for 18 months and had obtained direct and potential benefits.

APPLICATION by creditor for declaration that no monetary amount be allocated to it on account of charges arising under *Companies' Creditors Arrangement Act* order.

***K.M. Horner J.*:**

Introduction

1 The applicant, MCAP Financial Corporation ("MCAP") is seeking a declaration that no monetary amount be allocated to it on account of certain charges arising under an Order made pursuant to the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 ("CCAA"). It argues that it should not have to bear any portion of the proposed allocated costs because it received no benefit from the CCAA proceedings, eventually was released from the proceedings and incurred separate fees to enforce its security. The Medican Group and the Monitor submit that MCAP should pay $397,500 in charges. For the reasons given below MCAP's application is denied.

Background

2 Medican Holdings Ltd. is the parent entity of the Medican Projects division of the Medican Group of companies. [1] The various Medican Project entities are all affiliated companies engaged in the business of residential real estate development. Both Medican (Westbank) Development Inc. ("Medican Development") and Medican (Westbank) Land Ltd. ("Medican Land") are wholly owned subsidiaries of Medican Holdings.

3 MCAP is the senior secured lender of the initial phases of a multiunit condominium project in Westbank, British Columbia, known as the Kaleido Project. The Kaleido Project was developed on lands owned by Medican Land as bare trustee on behalf of Medican Development (together the "Kaleido Companies"). MCAP held a first mortgage over the Kaleido Project.

4 In 2010 the Medican Group sought protection under the CCAA in an attempt to restructure its affairs. The Kaleido Companies were among the petitioners. The initial order which included a stay of proceedings was granted on May 26, 2010 and provided, inter alia, that secured creditors of Medican were liable to pay certain court-ordered charges in relation to the proceedings, including the suppliers' charge, a directors' and officers' indemnification charge, an administration charge, and the debtor-in-possession ("DIP") lender's charge (the "Charges"). In order to pay for the Charges proceeds from the sale of condominium units of projects over which creditors held security were deposited into a separate account (the "Charge Levy").

5 The Medican Group obtained a DIP loan from Paragon Capital Corporation Ltd. which ultimately totalled $3.5 million. It was secured as a first priority against all of the Medican Group's assets including those of the Kaleido Companies. As stated, the DIP lender's charge formed part of the Charges. On several occasions project-specific financing was arranged (known as "Mini DIPs"); however, the DIP loan was approved on the basis that it would be used to support the general funding requirements of the Medican Group.

6 As a part of the restructuring, and with the approval of MCAP, the Medican Group engaged a listing agent (Coldwell Banker) to market the unsold condo units in the Kaleido Project of which only Phase I had been completed. During the time the units were listed with Coldwell Banker none were sold. MCAP expressed dissatisfaction with the restructuring efforts.

7 On December 5, 2011 MCAP obtained an Order permitting it to apply to court in British Columbia to appoint a receiver (and ultimately a trustee in bankruptcy) over its collateral in the Kaleido Companies. This occurred following the approval of a related agreement between MCAP and the Medican Group whereby the Kaleido Companies' property and assets were released into the possession of the receiver upon consent of the Medican Group. As a part of the court approved agreement the Medican Group consented to the receivership on the basis that, *inter alia*, the Charges were to remain in existence and that nothing in the agreement "shall determine the allocation to be made against the [Kaleido] Property in respect of the Charges and the parties hereto reserve all rights and remedies in connection with the allocation to be made". The stay of proceedings was lifted for the limited purpose of allowing such receivership to proceed.

8 At the same time the Medican Group lodged a consolidated Plan of Compromise and Arrangement (the "Plan") dealing with all Medican Group entities subject to the CCAA proceedings excepting the Kaleido Companies and another Medican company. The CCAA proceedings provided that the DIP lender's charge was to be repaid by the Medican Group in part through the Charge

Levy and in part through operating cash flow. The Monitor submits that the Kaleido Companies' outstanding contribution to the Charge Levy should be $397,500. The Monitor further estimates that due to the Charge Levy surplus this amount will be reduced to approximately $279,300 following the allocation of a portion of the anticipated surplus back to the Kaleido Companies.

9 On January 11, 2012, MCAP was granted an order nisi by the British Columbia Supreme Court declaring that the outstanding balance owing to MCAP was $18,216,064. Following the appointment of a receiver MCAP advanced $2.5 million more than $1.6 million of which was used to pay strata fee arrears, fix building deficiencies, pay security deposits, and pay fees associated with the National Home Warranty Program. MCAP submits this was done in order make the condo units in the Kaleido Project marketable by the receiver. The receiver is still in the process of completing the sale of units in the Kaleido Project. MCAP submits that when the final sales figures are available it will have sustained a shortfall of approximately $10.6 million. I note that MCAP did file a proof of claim to participate in the Plan as an unsecured creditor.

10 MCAP's position through the proceedings has been that even though the Kaleido Project was subject to the CCAA proceedings this did not amount to an agreement on behalf of MCAP that it would bear any obligation for the Charge Levy. The parties disagree as to whether MCAP is obliged to contribute to the Charge Levy.

Issue

11 This court must determine whether the proposed portion of the CCAA Charge Levy allocated against the Kaleido Project should be reduced or illuminated.

Argument

12 The parties' positions on the application can be summarized as follows:

a. MCAP

13 Essentially, Counsel for MCAP submits that it would be inequitable to allocate the Charge Levy against it as though it were an affected secured creditor under the Plan. In particular, it submits that the following factors should be taken into account in determining its allocation: first, it submits that the entities under the Medican Group are distinct with each entity undertaking the development of stand-alone real estate projects such as the Kaleido Project. MCAP stresses that this is not a situation in which a group of debtors carries on a common consolidated purpose. In addition, counsel for MCAP drew attention to the fact that there was no cross-collateralization in that MCAP did not hold security over any other assets of the Medican Group for the obligations arising under the Kaleido Project.

14 Second, MCAP submits that it received no benefit in connection with the CCAA proceedings. It states that none of the DIP financing was spent on the Kaleido Project. In particular post-filing obligations were not paid during the stay and the Kaleido Project deteriorated during the course of the CCAA proceedings. For example, nothing was paid to the strata corporation, the municipal taxing authority, or to utility providers in relation to the Kaleido Project. MCAP argues that this negatively affected its security over the Project. It submits that the situation became severe enough that the strata corporation (which was stayed from enforcing its rights) approached MCAP directly for funding which it refused to provide absent the ability to appoint a receiver. During this period the National Home Warranty Program ultimately cancelled its coverage, notwithstanding the stay.

15 In addition, MCAP argues that its ability to realize on any condo unit sales was negatively impacted by the CCAA Proceedings. The initial order was granted on May 26, 2010. MCAP states that it waited approximately 18 months for the Medican Group to come up with a plan in relation to the Kaleido Project or propose some other alternative acceptable to MCAP; all the while MCAP was stayed from enforcing its remedies. During this period, the Medican Group retained Coldwell Banker to market unsold condo units in the Medican Group properties. The Monitor implemented a course of action known as the "MCAP Protocol" to market the unsold units in the Kaleido Properties with a range of proposed square footage listing prices for the units ranging from $260 to $280 depending on the unit. MCAP submits that given the deteriorating state of the Kaleido Project and deficiencies in the units the price per square foot was too high and in any event no units were sold during the CCAA

Proceedings. Subsequent to the appointment of the Receiver 46 of the 47 saleable units have been sold at an average square foot price of $186.

16 Third, MCAP argues that the case at bar can be distinguished from the authorities before this court in that the existing case law involved failed CCAA proceedings with the eventual appointment of a receiver. MCAP submits that in the present case the Medican Group's Plan sanctioned by the Court excludes the Kaleido Companies. As such, the affected creditors - other than MCAP - benefit from the Plan's pool of funds with the Monitor estimating an average payout of 10 cents on the dollar. MCAP takes the position that it should not have to pay any portion of the aggregate charges for a plan from which it was excluded. It submits that it did not want the Kaleido Project included in the CCAA proceedings from the outset and in getting the stay lifted there was an express reservation of rights.

b. The Monitor

17 The Monitor takes the position that a portion that MCAP's obligation to contribute to the Charge Levy flows from the fact that the developers of the Kaleido Project were petitioners in the CCAA proceedings whether MCAP was in favour of their inclusion or not. Monitoring the Kaleido Project was a part of the Monitor's mandate in the proceedings and therefore MCAP should bear the associated costs. It argues that although the Kaleido Project was ultimately not included in the Plan this does not detract from the fact that the Project formed part of the monitor's responsibilities throughout the CCAA proceedings prior to the lifting of the stay and the adoption of the Plan.

18 The Monitor acknowledges that during the CCAA proceedings no units in the Kaleido Project were sold. In its brief, the Monitor suggests that its marketing efforts in relation to the Kaleido Project condo units were "hand-cuffed" by the MCAP Protocol. I note that in the Monitor's "Kaleido Report" dated February 15, 2013 the Monitor states that it proposed the MCAP Protocol and it was accepted by MCAP. This is consistent with correspondence outlining the Protocol. The Monitor argues that in any event MCAP did receive a benefit from the CCAA proceedings in that the stay prevented priority claims being enforced by either the strata corporation for unpaid fees or the municipality for unpaid taxes.

19 The formula used by the Monitor to allocate contributions to the Charge Levy was to assess the sum of $8,500 from the sale of condominium units in Medican Group projects for the purposes of addressing the Charge Levy. During oral argument the Monitor submitted that although the global contribution figure was $8,500 per unit MCAP was only assessed $7,500 per unit as a result of negotiations surrounding the lifting of the stay and the appointment of the receiver. Although counsel for MCAP agrees that the assessment is $7,500 it denies that it agreed to any sort of a concession in connection for lifting the stay but reserved its right to challenge its contribution.

20 The Monitor takes the position that equity demands a contribution from MCAP. In its 15th Report it states, at paras 68-69:

> Clearly, without the Kaleido Project contribution to the CCAA Charge Levy, the CCAA Charge Levy Surplus is significantly lower, negatively impacting those Medican Group entities (and ultimately the secured creditors remaining in those entities, if there are any or no subsequent settlements reached with such secured creditors) that are to receive a refund.
>
> Unless the Kaleido Project makes a proportionate contribution to the CCAA Charge Levy, certain of the Company's secured creditors will have disproportionately funded the CCAA Charge Levy. This would appear inherently unfair given that all assets of the Medican Group were encumbered by the Priority Charges.

c. The Medican Group

21 Counsel for the Medican Group adopts a position similar to that of the Monitor. Medican submits that the DIP loan approved under the Initial Order was sought and obtained on the basis that it would be used to support general funding requirements for the whole of the Medican Group and was not contemplated to fund any particular project. Rather, project-specific financing was arranged through the establishment of "Mini Dips", which have not been included in the proposed allocation.

22 The Medican Group also raised an argument similar to that of the Monitor concerning equity; namely, that if MCAP does not contribute to the Charge Levy this will increase the cost of repayment for all of the other Medican entities. It submits that increasing the contribution of the remaining creditors to the exclusion of MCAP would be unfair.

23 In discussing the proper approach to MCAP's contribution the Medican Group asserts that the Kaleido Project was not ignored during the CCAA proceedings. It submits that an extensive memorandum including a detailed market analysis and listing proposal for completed condo units in the Kaleido Project (being the MCAP Protocol) was prepared and delivered to MCAP. The Medican Group also argues that the listing terms of the MCAP Protocol were agreed to by MCAP as opposed to it being unilaterally imposed upon MCAP. In addition, the Medican Group asserts that the saleability issues concerning the Kaleido Project, including unpaid strata fees, utilities and property taxes, as well as deficiencies in the units themselves, constituted pre-filing claims as opposed to being issues which arose solely during the stay.

The Law

24 There is a limited body of case law providing guidance on the principles of cost allocation. In arguing their positions before me, counsel referred to the following authorities: *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277, 28 Alta. L.R. (5th) 239 (Alta. Q.B.); *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.); *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204, 243 Man. R. (2d) 31 (Man. Q.B.), aff'd 2009 MBCA 110, 245 Man. R. (2d) 274 (Man. C.A. [In Chambers]); *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56 (N.L. T.D.); *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.); *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.); and, *Bank of Nova Scotia v. Norpak Manufacturing Inc.* (2003), 180 O.A.C. 40 (Ont. C.A.).

25 The parties all agree that the case law instructs that any allocation under the Charge Levy must be fair and equitable and that each case is to be decided on the facts. However, they disagree as to what amounts to an equitable allocation on the facts at bar. In particular, MCAP argues that the unique facts of this case dictate an approach that, while equitable, would not result in an equal allocation. In so doing it relies on this Court's statement in *Hunters Trailer & Marine Ltd., Re*, at para 15 that:

> Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to say that equity calls for an equal allocation of costs.

26 In *Hunters Trailer & Marine Ltd., Re* the Court examined whether super-priority DIP financing and administrative costs in relation to CCAA proceedings should be allocated equally between a number of major secured creditors. One of the creditors, UMC Financial Management, held a first and second mortgage on the debtor's real property as well as an assignment of certain life insurance proceeds. UMC argued that it would be inequitable to bear the costs on the basis proposed by the other creditors as it would be liable for a disproportionate share of the costs. UMC took the position that it was a 'passive' creditor that gave loans on the value of land as opposed to the value of the business as a going concern. It argued that as the risk of loss was greater for operating lenders these creditors should bear a larger portion of the CCAA costs.

27 In directing that UMC bear a proportion of the DIP costs, the Court held that it would be unfair to ignore differences in the type of security held by creditors and the degree of potential benefit that they might obtain from CCAA proceedings. In allocating 15 percent of the Monitors fees and 5 percent of the DIP costs to UMC the Court noted that a strict accounting on a cost-benefit basis would be impractical. Of particular note to the case at bar the Court opined at para 23 that:

> Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security, However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was of the benefit, at least the potential benefit, of all creditors.

28 *Respec Oilfield Services Ltd., Re* dealt with a number of applications to apportion CCAA costs incurred with respect to a failed attempt to reorganize. In *Respec Oilfield Services Ltd., Re*, the debtor was placed into receivership and a number of pieces of heavy equipment were sold via auction. Pursuant to a court order those creditors who wished to remove equipment subject

to their security from the auction were entitled to do so upon paying the monitor a deposit on the proportion of allocated costs it would ultimately have to pay. Certain parties (including GE and JPL) paid this deposit and removed their equipment. Two separate banks, Canadian Western and the Business Development Bank, held a first and second priority claim, respectively, over the debtor's assets excepting a considerable number of pieces of equipment which were subject to a priority Purchase Money Security Interest ("PMSI").

29 The monitor recommended that all costs associated with the auction and all DIP related costs be allocated on a *pro rata* basis amongst all secured creditors based upon actual or estimated recovery. This would result in the two banks contributing to the indirect costs on the auction notwithstanding that they were unlikely to receive any of the auction proceeds given that their security status ranked behind the PMSI holders. The court confirmed at para 22 that it was under no obligation to allocate costs on the basis of a cost-benefit analysis as to which creditor benefitted to what degree as a result of the CCAA proceedings.

30 GE opted to remove the equipment over which it held security from the auction but failed to sell it. It produced evidence that the unsold equipment was worth less than the guaranteed auction price. The court held that the *pro rata* share of the allocated costs would not be reduced based upon the reduced value of the equipment as this would reward GE for making what ended up being a poor business decision by placing the differential upon the other creditors.

31 JPL also opted to remove its equipment from the auction. However, the Court held that in this instance JPL should not be allocated any costs, as it was a "true" lessor of equipment and therefore received no benefit from the CCAA proceedings. A similar result was reached in *Western Express Air Lines Inc., Re* where the court held that the lessors of certain aircraft were not obliged to pay any portion of the charges under the CCAA proceedings as the lessors were not creditors and did not receive any benefit from a successful restructuring.

32 In *Hunjan International Inc., Re* the Court confirmed that the allocation of costs is to be analyzed on a case-by-case basis, that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not directly benefit from a proceeding before costs can be allocated against it.

33 In *Hickman Equipment (1985) Ltd., Re* the company initially sought protection by obtaining a CCAA order. The debtor went bankrupt and the court subsequently issued a receivership order covering all property of the debtor in the same manner and to the same extent as the CCAA order. The receiver developed a cost allocation plan which included a holdback of 15 percent of the proceeds of sale of assets as a contribution to the plan on the understanding that the final allocation of costs would occur upon the completion of the realization process. GMAC Leasco, a first secured creditor, brought an interlocutory application to seek payment of proceeds arising from security taken in assets which the receiver had sold. Specifically it argued that no costs/holdback should be allocated in respect to 18 vehicles which were sold solely through the effort and expense of its agent and not through any effort or expense of the receiver.

34 The receiver argued that generally speaking it did not make a distinction between the assets that the debtor had in its possession and that the costs incurred in the management of the receivership were generally incurred in relation to all property. It argued that the plan applied to numerous matters, in addition to the simple cost of realizing assets. It was unable to determine which costs and fees were directly attributable to the units eventually sold by GMAC. In finding that GMAC was entitled to a reduction in the holdback cost allocation due to the fact that the receiver did not have to expend its efforts on the sale of the equipment the court formulated the following principles, at para 17:

> (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;

> (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
>
> (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

35 *Winnipeg Motor Express Inc., Re* also dealt with a dispute over the appropriate allocation of DIP financing and administrative costs incurred since the granting of a stay. The monitor recommended that the costs be allocated among secured creditors based on *pro rata* recovery. Paccar, which had entered into a financing lease with the debtor under which it leased certain equipment opposed the monitor's proposed allocation on the grounds that it was inequitable. It argued that it received no benefit from the restructuring and that its equipment actually deteriorated during the stay. In discussing the applicable legal principles, the court held, at para 41:

> I turn, then, to the question of principles of allocation of Court Ordered Charges under the CCAA. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in Hunters Trailer & Marine Ltd., Re, 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the CCAA make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

36 In noting that the purpose of a stay under the CCAA is to provide a struggling company with the opportunity to restructure in the hopes of achieving viability, the court stated that based upon the monitor's expertise and familiarity with the events surrounding the restructuring period, the onus is on an objecting creditor to demonstrate inequity in instances where the proposal is *prima facie* fair. A number of creditors argued that they would have been better off had they realized on their security and not participated in the CCAA proceedings. In addressing this argument the court found "that may or may not have been so, but of course the point of the CCAA is that the collective good and the benefit to all stakeholders governs": para 45.

37 After reviewing the factors espoused in *Hickman Equipment (1985) Ltd., Re*, the court made the following observations in adopting the monitor's recommendations for a uniform costs application:

> 49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.
>
> 50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.
>
> [...]
>
> 52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the CCAA.

38 On appeal, Paccar reiterated its position that it never stood to gain from the CCAA proceedings and that it suffered under the stay. It further argued that the lower court erred in treating all secured lenders equally despite differences in their security and the benefit received. In denying application for leave to appeal the court of appeal noted that the trial judge had been alive to the fact that she could take into account the different nature of the securities held by, as well as the potential benefit to, creditors in determining whether a proposed allocation was equitable. She noted that that Paccar, as well as other contesting creditors, did in fact receive a benefit under the proceedings. In particular, the cost, effort, delay and risk involved in recovering their equipment had been reduced pursuant to the restructuring efforts.

Analysis

39 The law is clear that where a monitor's proposed allocation is prima facie fair the onus falls on the objecting creditor to demonstrate an inequity in the circumstances: *Hunjan International Inc., Re*, paras 58 and 73; *Winnipeg Motor Express Inc., Re*, para 48.

40 MCAP argues that the facts in this case do not demonstrate an allocation which, on the face of it, is fair and reasonable. It states that an inherent unfairness exists in that MCAP has been allocated costs on the same basis as those creditors who were included in and benefited under the Plan. In addition, it argues that the Monitor should not be able to rely on arguments in equity when its proposed allocations do not treat all creditors equally. In support of this position, MCAP submits that although the Monitor is purporting to treat senior secured lenders equally those secured lenders who did not suffer a shortfall in the realization of their security are not included in the allocation of the Charge Levy. In addition, MCAP submits that the actual calculation of the $397,500 it is being called upon to contribute does not relate to the same "per unit charge" basis that the Monitor used in calculating the amount owing by other creditors. MCAP's per unit allocation equated to $7,500 per unit while the Monitor indicated that the global per unit allocation would be $8,500 per unit. While MCAP agrees this discrepancy is favourable to it it suggests that it is nonetheless inequitable.

41 Given the above MCAP thus submits that the burden remains with the Monitor to demonstrate the fairness of the proposed allocation.

42 The Monitor takes the position that its proposal is both reasonable and fair. As an officer of the court, the Monitor's allocation is a discretionary decision and is therefore entitled to deference: *Winnipeg Motor Express Inc., Re*, para 48. While the Monitor acknowledges that there may have been a number of different approaches in this instance it asserts that its choice of method was reasonable and reflects the potential benefit to creditors under the CCAA proceedings.

43 I find that notwithstanding the distinction in the per unit charge allocated by the Monitor the Monitor's proposed Charge Levy treats MCAP like the other senior secured lenders. While the proposal may not be equal (given the $1,000 per unit charge distinction), it is *prima facie* equitable. Therefore the onus lies with MCAP to demonstrate that the allocation is unfair.

44 I do not find that MCAP has satisfied this onus. With respect, its arguments are based upon a cost-benefit analysis utilizing any actual benefits received under the CCAA proceedings. The courts have consistently rejected this approach in favour of one based upon a potential benefit analysis. Exceptions to a monitor's proposed allocations are not to be lightly granted and should only be made where the necessity for departure is reasonable articulable: *Hickman Equipment (1985) Ltd., Re*, para 17.

45 This court cannot accept MCAP's position that its suggested contribution of nothing is grounded in equity. In essence, MCAP participated in the CCAA process for 18 months in cooperation with the monitor in the hopes that the process might yield some benefit. It accepted the Medican Protocol and the sales process established under Coldwell Banker. At any point it could have applied, on appropriate notice and evidence, to have its own receiver put into place but it did not. If it had a serious concern about the sales process or pricing, it could have brought a court application to amend the Protocol; again it did not. It cannot say that it participated, but with no result, so it does not now wish to contribute. The allocation of the Charge Levy is not to be determined with the benefit of hindsight.

46 There are other factors which bear on whether MCAP's proposed allocation is equitable or not. MCAP would have been aware of the outstanding strata fees and the possible termination of utility services. In a letter from the Strata Corporation's legal counsel to MCAP dated July 26, 2010 the 'dire financial straits' of the Strata Corporation is outlined, along with a forecast that "...the resulting disarray will not enhance the value of the individual strata lots." MCAP acknowledged that it was aware that pre-funding strata fees were not being paid. It acknowledged that it had no reason to believe that the DIP funds were being used to correct these arrears. Yet it waited out the 18 month stay period. That MCAP believed it stood to possibly benefit from the CCAA proceedings and the MCAP Protocol is implicit in its choice to remain under and cooperate within the process. MCAP was aware throughout the process that the ultimate allocation was reserved for future determination.

47 It is agreed that the CCAA proceedings did not yield any direct benefits to MCAP. No DIP funding was directly allocated to the Kaleido Project and no Mini DIP was established in relation to Kaleido. However, the Charges relate to general expenses associated with the entirety of the CCAA proceeding. The MCAP Protocol was established and condo units were marketed. There was an unsuccessful attempt to sell the Kaleido Project *en bloc*. The National Home Warranty Program (for the majority of the stay period) did not cancel its coverage. The Strata Corporation was prevented from claiming unpaid fees and the municipality for unpaid taxes. The Kaleido Project fell within the scope of the CCAA proceedings and formed a part of the Monitor's responsibilities. Effort was expended in dealing with the Kaleido sales process. DIP funding allowed Medican to meet urgent financial needs during the stay. As such, while no direct benefit was obtained, MCAP acquired the above-mentioned indirect benefits (maintenance of the status quo) as well as "potential" benefits in the form of possible unit sales under the MCAP Protocol. Indeed, the degree of potential benefit to MCAP under the sales Protocol was far from negligible. The Monitor is not obliged to perform an analysis as to which creditors benefited and to what degree. Here, costs incurred as a part of the Charges were borne in the management of the CCAA proceedings and generally incurred in relation to all Medican property including that of the Kaleido Companies.

48 Moreover, it is not entirely accurate to argue that MCAP received zero benefits under the proceedings. In addition to its position as a secured creditor of the Kaleido Project, MCAP also stood as a potential unsecured creditor to Medican. In this latter position, MCAP did in fact participate in the Plan and, although there was little evidence before the court in this regard, seemingly benefitted by filing its proof of claim.

49 I note also that the stay period allowed MCAP to attempt to "wait out" what was clearly a downturn in the residential real estate market although the condominium units were eventually marketed at a reduced price per square foot. Again, MCAP cannot now advance an argument grounded in hindsight. Nor, as per *Respec Oilfield Services Ltd., Re*, should it be rewarded for what may have ultimately amounted to a poor business decision.

50 MCAP argues that its position is analogous to situations in which the courts have refused to allocate priority charges against true lessors. It relies on *Respec Oilfield Services Ltd., Re* and *Western Express Air Lines Inc., Re* in this regard. I do not find MCAP's position in the current case to be analogous to that of a true lessor. While the courts in *Respec Oilfield Services Ltd., Re* and *Western Express Air Lines Inc., Re* clearly held that a true lessor was exempt from contribution towards a cost levy, such cases can be clearly distinguished on the basis that, as property owners, a true lessor does not stand to gain a potential benefit from CCAA proceedings. As an owner of the collateral, a lessor is entitled to a return of the collateral regardless of the outcome of the restructuring attempt. There is no reason on the facts before me to liken MCAP's situation to that of a lessor.

51 MCAP held the same type of security as other secured creditors. It suffered the same fate as other secured creditors who experienced a shortfall. While it did not receive direct benefits as a result of the Charges the potential for direct benefit clearly existed. It would be inequitable to redistribute MCAP's proposed contribution upon the remainder of the secured creditors given that all assets of the Medican Group were encumbered by the Charges. There is simply no basis upon which to deviate from the Monitor's proposed Charge Levy allocation. For these reasons the Application is denied.

Application dismissed.

Footnotes

1 There are 39 applicant entities comprising the Medican Group, 36 of which filed the consolidated plan of arrangement under the CCAA (excepting the Kaleido companies and Sanderson)

TAB 5

2010 ABQB 277
Alberta Court of Queen's Bench

Respec Oilfield Services Ltd., Re

2010 CarswellAlta 830, 2010 ABQB 277, [2010] A.W.L.D. 2826, 17 P.P.S.A.C. (3d) 148, 188 A.C.W.S. (3d) 31, 28 Alta. L.R. (5th) 239, 68 C.B.R. (5th) 189

In the Matter of the Bankruptcy of Respec Oilfield Services Ltd.

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
and the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of Respec Oilfield Services Ltd.

Myra B. Bielby J.

Heard: March 25, 2010
Judgment: April 28, 2010
Docket: Edmonton BK03-115337, 0903-06823

Counsel: Richard Reeson, Q.C., Satpal Bhurjee for PricewaterhouseCoopers Inc.
Terrence Warner for National Leasing Group Inc.
Charles Russell, Q.C. for Canadian Western Bank
Kibben Jackson for Business Development Bank
Ryan Zahara, Michael O'Brien for Komatsu International (Canada) Inc.
Sean Collins, Jeffrey Whyte for GE Capital
Stephen Livingstone for Little Red River Cree Nation
Colin Brousson, Eugene Macchi for North Shore Leasing Ltd.
Paul Pidde for Ford Credit Canada
Robert Kennedy for Jim Pattison Leasing
Justice Agyemang for Bank of Nova Scotia
Ed Bresky for Great West Kenworth
Karl Driedger for K & N Contracting
Tara Hamelin for Wells Fargo Equipment Finance Company

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses

Debtor was placed into receivership — Number of pieces of equipment were sold in auction, monitor applied for approval to apportion its costs among all creditors on pro rata basis — CWB bank was secured lender that held first priority claim and BDC was secured creditor that held second priority claim over much of debtor's assets — Pursuant to court order, any lender or lessor who wished to remove equipment subject to its security from auction was permitted to do so upon paying monitor deposit on account of any portion of allocated costs it was found liable to pay — Two banks supported proposed distribution, bank CWB was likely to recover entire indebtedness whereas BDC anticipated shortfall — Monitor brought application for approval to deduct allocated costs due from each creditor from sale proceeds of equipment upon which that creditor had charge, where creditor removed equipment deposit paid to monitor would be applied to its share of allocated costs, and where deposit was inadequate to cover its share then judgment against that creditor for shortfall — Application granted — Argument that costs be allocated based on proportion of debt owed to each creditor to total debt owed by debtor was rejected as it would result in creditor who would receive least from auction bearing greatest portion of costs — Monitor granted judgment against GE

and proposes the net difference as the payment to be made to each affected creditor. Each of the two banks and a majority of the PMSI creditors support the Monitor's proposed distribution. GE, Caterpillar Financial Services Ltd. (Cat), Komatsu International (Canada) Inc. (Komatsu), Kingland Ford Sales Ltd. (Kingland), Wells Fargo, and JPL do not. I note that the proposed allocation will require the two banks to contribute to the indirect costs of the auction notwithstanding that it is highly unlikely that either will receive any of the auction proceeds given their status as second-in-priority creditors behind the PMSI holders.

14 The DIP costs represent the amount of monies Respec borrowed to keep its operations afloat during the period of the stay while it was attempting to reorganize. They total $1.368 million. That money just happened to be borrowed from a company related to GE. The DIP costs have now been repaid in their entirety including interest; the remaining issue is which parties should bear ultimate responsibility for that liability and in what proportion.

15 The two banks each advise that CWB is very likely to recover its entire indebtedness from the liquidation of its security. BDC is left in the unenviable position of anticipating a significant shortfall after the liquidation of all remaining secured property including real estate, accounts receivable and some remaining equipment. The relative security positions of the two banks have the effect of ultimately redistributing to BDC any contribution CWB makes to the allocated costs as a result of this application. It is therefore in BDC's particular interest to ensure that the PMSI creditors bear as many of those costs as possible.

16 Accompanying its application to approve payment of the allocated costs and distribution of the balance of the auction proceeds, the Monitor also seeks an order requiring GE to pay it $215,688.46 as the balance remaining from its share of the apportioned costs. Unlike other PMSI creditors which removed equipment from the auction, GE did not pay the Monitor a deposit equivalent to its estimated *pro rata* share of the allocated costs but only $30,000 which apparently represented only its share of the administration costs, which are just a portion of the allocated costs. GE argues that it should not be obliged to pay this additional sum.

17 Wells Fargo objects to the Monitor's proposed distribution because it does not directly apportion the costs of transporting the equipment from Red Earth, Alberta to the auction site, i.e. the cost of transporting each piece of equipment is not charged against that piece. Rather, the entire transportation costs are allocated *pro rata* among the creditors.

18 JPL objects to paying any portion of the allocated costs because it is not a secured creditor but rather a "true lessor" of five pieces of heavy equipment.

19 The Monitor also seeks an order increasing the priority administration charge it has on Respec's assets on account of its professional and legal expenses from the current $200,000 to $240,000.

20 It also seeks direction as on whether funds payable to principals of Respec as wages, conditional upon their providing certain information which has yet to be provided, should be accounted for in the distribution of auction proceeds or from the liquidation of other assets in the subsequent receivership.

21 When this application was argued, BDC sought and was granted an order placing Respec in bankruptcy which gives it a strategic advantage in relation to a claim by Canada Revenue Agency in relation to unpaid Goods and Services Tax ("GST").

Issues

1. Should the proposed distribution of auction proceeds be approved?

    a. should GE be required to pay a further $215,688.46 on account of its share of the allocated costs?

    b. does fairness require the two banks to bear more than their *pro rata* share of the allocated costs?

    c. should the costs allocated to Wells Fargo be reduced rather than, as proposed, attributing the direct costs of disassembling the camps upon which it held security to its share of the auction proceeds given the costs of transporting all the equipment to the Ritchie Bros. auction are attributed on a *pro rata* basis among creditors?

d. should JPL, a "true lessor" of equipment, thus be exempted from contributing to the allocated costs?

2. Should the Monitor's administration charge be increased to $240,000?

3. Should the funds payable to Respec's principals as wages be "held back" from the distribution of the auction proceeds or taken from proceeds realized in the receivership? and,

4. Should Respec be placed into bankruptcy?

Analysis

1. Should the proposed distribution of auction proceeds be approved?

22 Each application to apportion costs incurred in a failed attempt to reorganize under the CCAA must be decided on its own facts. In cases where a pre-existing Court order prescribes the apportionment method to be used, that method will be used. Where, as here, no such order yet exists, the issue will be decided based on the facts in the case. I note that I have no obligation to attempt to allocate those costs on the basis of a cost-benefit analysis as to which creditor benefited to what degree as a result of the activities of the Monitor; see *Hunjan International Inc., Re*, 2006 CarswellOnt 2718 (Ont. S.C.J.). No such analysis has been undertaken in any case either by counsel or by myself. However, it is fundamental that any allocation of Court-ordered charges be fair and equitable; see *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 (Man. Q.B.) at para. 41.

23 Hall J. set out the following principles for apportioning costs in *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.) at para. 17:

(1) the allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;

(2) the fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;

(3) there must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relate to all receivership costs whether direct sales cost or indirect cost;

(4) exceptions to a uniform application of cost to creditors ought not to be lightly granted . Noneth eless it must be recogni zed that certain activiti es of the Receiv er in managi ng the affairs of the receive rship may have been less intensi ve or less advant ageous with respect to certain groups of assets as oppose d to other groups of assets and that the extent of this intensit y or disadv antage may not be immed iately or easily determ inable.

To require the Receiv er to calcula te and determ ine an absolut ely fair value for its service s for one group of assets vis-à-vis another would likely not be cost effecti ve, would drive up the overall receive rship cost and would likely be a fool's errand in any event;

(5) exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

24 Allocating costs on a uniform percentage of the sale price received for the asset in question has been interpreted and applied to mean allocating the costs on the basis of a *pro rata* share using the total recovery as a factor in the calculation; see *Winnipeg Motor Express Inc. (Re)*, *supra*, at paras. 46 and 47. That is the approach the Monitor proposes be used here.

25 While none of the creditors challenging the Monitor's proposed cost allocation has described an alternate method of apportionment which they believe to be more equitable, the following challenges have been raised:

TAB 6

2001 ABQB 1094
Alberta Court of Queen's Bench

Hunters Trailer & Marine Ltd., Re

2001 CarswellAlta 1636, 2001 ABQB 1094, [2001] A.J. No. 1638, [2002] A.W.L.D. 61, 110 A.C.W.S. (3d) 795, 305 A.R. 175, 30 C.B.R. (4th) 206

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of the Hunters Trailer & Marine Ltd.

Wachowich C.J.Q.B.

Heard: November 20, 2001
Judgment: December 14, 2001
Docket: Edmonton 0003-19315

Counsel: *Kentigern A. Rowan*, for Canadian Western Bank
Terrence M. Warner, for CIT Financial Ltd.
Douglas H. Shell, for Deutsche Financial Services
R. Craig Steele, for Bank of America Canada Specialty Group Ltd.
Juliana E. Topolniski, *Q.C.*, for Mr. Blair Bondar
Darcy G. Readman, *Darren R. Bieganek*, for UMC Financial Management Inc.
Jeremy H. Hockin, *Deborah J. Polyn*, for Deloitte Touche Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

U Inc. held first and second mortgage on real property of H Ltd. and assignment of certain life insurance proceeds — Order granted super-priority for debtor in possession financing or administrative costs over all of H Ltd.'s property — Interim receiver brought application to determine allocation of costs, including debtor in possession financing and administrative charges in Companies' Creditors Arrangement Act proceedings, between H Inc.'s major secured creditors — U Inc. allocated 15 per cent of monitor's fees and five percent of debtor in possession financing — Equitable that all major secured creditors be liable for portion of costs — Unfair to ignore differences in type of security held by creditors and degree of potential benefit that could be derived from proceedings under Act — U Inc. was in different position than other major secured creditors — Not equitable that it be allocated same proportion of costs — Interim receiver's proposal that U Inc. be charged percentage of monitor's fees was accepted — Debtor in possession financing was granted to meet H Ltd.'s urgent needs during sorting out period which was for benefit of all creditors — Majority of financing was used for wages, some of which could be attributable to building maintenance — Some of financing was used to provide security on premises — Some of financing was applied to life insurance premiums and protecting policy was of potential benefit to U Inc. — U Inc. was to bear portion of financing costs — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

APPLICATION by interim receiver to determine allocation of costs between major secured creditors.

***Wachowich C.J.Q.B.*:**

THE APPLICATION TO DETERMINE COST ALLOCATION

1 The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in

possession" (DIP) financing and administrative charge provided for in the ***Companies' Creditors Arrangement Act*** proceedings (***CCAA*** costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

2 Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the ***CCAA*** proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The primary issue of contention is the extent to which UMC Financial Management Inc. (UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the ***CCAA*** costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of ***CCAA*** costs.

THE ARGUMENTS OF THE PARTIES

3 DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all ***CCAA*** costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the ***CCAA*** costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the ***CCAA*** proceedings to one class of creditors.

4 CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the ***CCAA*** costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

5 UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the ***CCAA*** costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

6 The Interim Receiver recommends something of a middle ground. While acknowledging that the ***Bankruptcy and InsolvencyAct*** does not apply to ***CCAA*** proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

7 The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent of the Monitor's fees and $500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

8 UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE *CCAA* COSTS

9 The ***CCAA*** does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

> 38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

10 The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), at 359:

> The purpose of the Act is not to give a benefit or an advantage to one class of creditors at the expense of other creditors. Likewise, it is the duty and responsibility of the Court not to alter the security arrangements entered into by the company and its various creditors. It is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company.

11 Chadwick J. in that case ordered that the fees of the monitor and its legal counsel should be paid out of the assets of the company prior to distribution to the creditors as the ***CCAA*** proceedings were for the benefit of all creditors. In addition, the court gave priority to funds advanced by two of the creditors so that construction projects could be completed to avoid incurring late penalties and charge-backs. The court reasoned that advancement of those funds was for the benefit of all creditors and that granting priority for payment of the funds would not change the priority of the various other creditors or jeopardize their security.

12 Like the argument raised by UMC in the present case, the secured creditors in *United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.) argued that the super-priority granted for monitor's fees was unfair given that they had no interest in preserving the active business of the debtor. Mackenzie J.A. responded at para. 28:

> The object of the ***CCAA*** is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In ***Chef Ready*** [*Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)]..., Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants ***CCAA*** relief.

13 The Monitor acts on behalf of the Court for the benefit of all parties (*Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]); *Canadian Asbestos Services Ltd. v. Bank of Montreal, supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

14 All creditors may be affected by a stay imposed in the ***CCAA*** proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the ***CCAA***. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the ***CCAA***. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the ***CCAA*** costs. That is not to say that equity calls for an equal allocation of costs.

16 The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in terms of ***CCAA*** costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

17 Six classes of creditors voted on a reorganization plan in *Keddy Motor Inns Ltd., Re* (1992), 90 D.L.R. (4th) 175 (N.S. C.A.). The appellants were some of the only creditors who were fully secured. They complained that the class of secured creditors was too broad and that they should not have been placed in a class with creditors secured by non-core properties and mechanics' lienholders. Freeman J.A., who delivered the decision of the court, acknowledged that it might have been better if secured creditors of core properties had been placed in a separate class (see also *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

> It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment - as opposed to equitable treatment - is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

18 Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in ***CCAA*** proceedings.

19 In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

> It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in ***Kowal*** [*Robert F. Kowal Investments Limited v. Deeder Electric Limited* (1975), 9 O.R. (2d) 84 (C.A.)] that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

20 I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from ***CCAA*** proceedings. The ***CCAA*** recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

21 Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of ***CCAA*** costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitors fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

22 Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

23 Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

24 Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

25 An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered ***CCAA*** costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the ***CCAA*** proceedings there could have been no certainty as to the sale price of the land or UMC's share of the ***CCAA*** costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of ***CCAA*** costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

26 I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

27 UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of ***CCAA*** costs and the principles that should be applied in such a determination. There is no need, as there was in*Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Alta. Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

CONCLUSION

28 UMC is allocated 15 percent of the Monitor's fees, $500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the ***CCAA*** costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

Order accordingly.

End of Document

TAB 7

2009 MBQB 204
Manitoba Court of Queen's Bench

Winnipeg Motor Express Inc., Re

2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242,
179 A.C.W.S. (3d) 266, 243 Man. R. (2d) 31, 56 C.B.R. (5th) 265

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the Applicants")

Suche J.

Heard: June 19, 2009
Oral reasons: June 19, 2009
Docket: Winnipeg Centre CI 08-01-56696

Counsel: David R.M. Jackson for Monitor, Ernst & Young Inc.
G. Bruce Taylor, Jennifer J. Burnell for Winnipeg Motor Express ("WME")
Harvey G. Chaiton for Heller Financial Canada Holding Company ("Heller")), GE Canada Leasing Services ("GE"))
Donald G. Douglas for Paccar Financial Services Ltd. ("Paccar"))
Douglas G. Ward, Q.C. for Alterinvest Fund L.P. (BDC)
Robert A. Dewar, Q.C. for Ramwinn Diesel Inc. ("Ramwinn"))
William G. Haight for Key Equipment Finance Canada Ltd.
E. Peter Auvinen for CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc., Stoughton Trailers Canada Corp. ("Stoughton"))
Donald R. Knight, Q.C. for Maxim Transportation Services Inc. ("Maxim"))

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Headnote

Personal property security --- Scope of legislation — True lease versus sales financing

W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges and are entitled to payment for use of property during restructuring under s. 11.3(a) of Act — Agreement between W Inc. and M Inc. was true lease, but agreement with S Corp. was financing lease or sufficiently akin to one to fall outside scope of s. 11.3(a) — Essential bargain between W Inc. and M Inc. was for use of M Inc.'s property — M Inc. undertook all risks associated with ownership of equipment — M Inc.'s agreement did not create security interest — Agreement with S Corp. provided that W Inc. bore entire risk of loss from any cause — W Inc. was required to make payments to S Corp. regardless of loss or any claim against manufacturer of equipment — S Corp. and W Inc. intended that W Inc. purchase vehicle — Ownership was retained by S Corp. solely for purpose of enforcing W Inc.'s obligation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges and are entitled to payment for use of

> 61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

34 *Smith Brothers* has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

35 I turn, then, to the two creditors in this case, Maxim and Stoughton. I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.

36 I say this because a review of Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment - it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.

37 It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

38 The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.), over that in *Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.* (2005), 18 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

39 The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a). In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

40 The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.

The Law

41 I turn, then, to the question of principles of allocation of Court Ordered Charges under the *CCAA*. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.). While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

42 In *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.), at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

(1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;

(2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;

(3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;

(4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

43 I also agree with the decision in *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682, 5 Alta. L.R. (4th) 251 (Alta. Q.B.), where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

Analysis and Decision

44 I begin with the observation that the s. 11 stay in this case has accomplished exactly what the *CCAA* intends that it do - it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

45 Having said that, good news under the *CCAA* is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the *CCAA* is that the collective good and the benefit to all stakeholders governs.

46 The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

47 In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

48 I agree with the view expressed in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

TAB 8

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing

it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras.

