Clerk's Stamp

COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC., A2A CAPITAL SERVICES CANADA INC., WINGHAM A2A DEVELOPMENTS INC., LAKE HURON SHORES A2A DEVELOPMENTS INC., and MEAFORD A2A DEVELOPMENTS INC.
DOCUMENT	**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

Wednesday, September 9, 2026, at 10:00 a.m.

Before the Honourable Justice Jones

CONTENTS

I. INTRODUCTION

1. This Brief is submitted by Canadian Representative Counsel on behalf of Canadian Investors on the threshold issue of the standing of former management of the Debtor Companies and Affiliate Entities to make submissions in response to the Monitor's application (the "**Charge Extension Application**") to charge the interests of Offshore Investors in the subject lands and related sale proceeds of the Projects.[1]

2. Former management has opposed the Charge Extension Application, giving rise to the preliminary question of what standing or interest they have in the Charge Extension Application. This opposition is brought by Mr. Allan Lind, who claims to do so in his capacity as a director of certain of the Debtor Companies, as a representative of the residual interests of the Debtor Companies, or otherwise in a personal capacity.

3. Mr. Lind's status as a stakeholder in these CCAA proceedings does not, in and of itself, confer standing to oppose the Charge Extension Application. The proposed charges over the interests of Offshore Investors do not affect his legal interests, require him to share in the associated costs, or otherwise engage any economic interest he has in the outcome of these proceedings. Any remaining interest he may have as a director of certain Debtor Companies must therefore be assessed in the context of the relief sought and appropriately weighed against the interests of the Canadian and Offshore Investors, who, in contrast, hold the economic interests affected and support the Monitor's proposed relief.

4. This Brief is supplemental to and should be read in conjunction with the Brief of Canadian Representative Counsel filed June 19, 2026 (the "**June 19 Brief**").

5. 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 Order on November 25, 2024 (the "**ARIO**").

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[1] Angus Manor Park ("**Angus Manor**"), The Hills of Windridge ("**Windridge**"), The Trails of Fossil Creek ("**Fossil Creek**" and collectively with Angus Manor and Windridge, the "**Original Projects**"), Wingham Creek ("**Wingham**"), Lake Huron Shores ("**LHS**") and Meaford Highlands Resort ("**Meaford**" and collectively with Wingham and LHS, the "**Additional Projects**").

II. BACKGROUND

6. Mr. Lind, who resides in Singapore, is a named director of certain of the Debtor Companies,[2] none of which are Angus Manor entities. He otherwise retired from the A2A Group in 2019.[3] On cross-examination, Mr. Lind could not identify with certainty which Debtor Companies he served as a director or whether certain of those entities had been struck from corporate registries.[4] He also describes himself as a "senior consultant" to the three Debtor Companies involved in the Additional Projects,[5] however, there is no formal consulting agreement.[6]

7. Mr. Lind has sworn a total of six affidavits in these proceedings but stated on cross-examination that he does not have any knowledge of, among other things, the day-to-day decision making or the financial decision making for the Projects, the distributions made to some A2A Investors from lot sales, the provisions of the relevant trust agreements, nor the negotiations surrounding the previous sales for portions of the Windridge and Fossil Creek lands.[7] This context must be considered in light of Mr. Lind's assertions that he has an interest in ensuring the Court has an accurate understanding of the Projects and is in a "unique position" to provide evidence on their history.

8. The individual that holds the majority of this pertinent information is Mr. Dirk Foo.[8] Mr. Foo, who appears to be the principal of the A2A group of companies, has not adduced any evidence in the within CCAA proceedings. Neither Bennett Jones LLP nor Miles Davison LLP represent Mr. Foo or take instructions from him.

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[2] *Angus A2A GP Inc (Re)*, 2025 ABKB 51 at para 21 [***January Reasons***] [**TAB 1**]. Mr. Lind is listed as a director of Hills of Windridge A2A GP Inc., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, and Serene Country Homes (Canada) Inc.

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

[4] Transcript of Questioning of Allan Lind, dated January 7, 2025 at 15:1-6, 21:18-20, 22:7-15, 23:16-20, 24:10-12 [**First Lind Transcript**].

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

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

[7] *January Reasons*, *supra* at para 21 [**TAB 1**]; First Lind Transcript at 23:5-7, 30:18-25 to 31:1-5, 51:20-23, 52:1-6, 53:8-13, 53:20-24, 58:3-7, 59:2-11, 60:4-6, 69:4-14, 76:22-25, 80:2-13, 83:16-19, 84:3-11.

[8] See e.g., First Lind Transcript at 16:19-21, 21:12-15, 51:20-25, 52:1-6. 58:3-7, 80:2-13.

III. ISSUES

9. The issues for this Court's determination as preliminary matters to the Charge Extension Application include:

(a) *Who do Bennett Jones LLP and Miles Davison LLP represent in these proceedings?*

(b) *Do the parties represented by Bennett Jones LLP and Miles Davison LLP have standing to make submissions in response to the Charge Extension Application?*

IV. LAW & ARGUMENT

10. The threshold issue of standing is comprised of two parts: i) *who* is opposing, and ii) *what* weight should be given to that opposition considering all the circumstances. In respect of the latter question, recent case law indicates that the nature of the relief being sought on an application and whether a party's interests are then engaged are relevant.[9]

A. Identity of the Party Opposing the Charge Extension Application

11. 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.[10] Paragraph 36 of the ARIO requires former management to cooperate with the Monitor.[11] This cooperation extends to any Assistants of the Debtor Companies, which is defined in the ARIO to include consultants.[12] The Debtor Companies' appeals of the ARIO have been dismissed, reaffirming its terms and upholding the manner in which it was obtained.[13]

12. 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. As legal counsel to Mr. Lind, Bennett Jones LLP and Miles Davison LLP are not in a position to make submissions for the Debtor

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9 *Imperial Tobacco Limited*, 2025 ONSC 1375 at para 23 [***Imperial Tobacco***] [**TAB 2**].

10 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 *Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156 at para 39 [***A2A Appeal***] [**TAB 3**].

11 ARIO, *supra* at para 36.

12 ARIO, *supra* at paras 11(c), 36.

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

Companies. Mr. Lind's assertion that the Debtor Companies hold residual interests that will be triggered *if* these CCAA proceedings are terminated is an attempt to use a hypothetical to circumvent express terms of court orders.

B. Minimal to No Weight Should be Afforded to the Position of Mr. Lind

13. Canadian courts have not provided significant commentary on the issue of standing in CCAA proceedings; however, Morawetz C. J. did consider the issue in the recent CCAA proceedings of Imperial Tobacco Limited.[14] There, the Ontario Superior Court rejected the submissions of a "social stakeholder" on an application to amend the plan of arrangement, stating that the stakeholder was neither an affected nor unaffected creditor under the plan.[15] While a party may be a stakeholder in proceedings, that status does not grant "standing to raise objections on issues that do not affect it."[16] Where a party's legal rights are not being impacted by the proposed relief being sought, it does not have standing to object.[17] In other words, recognition as a stakeholder does not equate to automatic standing in proceedings.

14. As noted by the Alberta Court of Appeal in the within proceedings, 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.[18] In contrast, Mr. Lind has not produced any records to indicate that he personally holds 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.[19] 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, particularly when this Court has found that former management, including Mr. Lind, are not themselves able to conduct a fair realization and distribution process.[20]

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[14] *Imperial Tobacco*, *supra* [**TAB 2**].
[15] *Imperial Tobacco*, *supra* at paras 21, 23, 26 [**TAB 2**].
[16] *Imperial Tobacco*, *supra* at para 23 [**TAB 2**].
[17] *Imperial Tobacco*, *supra* at para 23 [**TAB 2**].
[18] *A2A Appeal*, *supra* at para 73 [**TAB 3**].
[19] First Lind Transcript at 87:5-8.
[20] *January Reasons*, *supra* at para 43 [**TAB 1**].

15. As previously noted, Mr. Lind is not a listed director of any entities that comprise four of the six subject Projects and has no legal rights or interest in Angus Manor or the Additional Projects as a result, whether residual or otherwise. While Mr. Lind is listed as a director of Fossil Creek and Windridge, Mr. Lind has no known economic interest in those entities, leaving the Court to weigh his residual managerial interest in those two Projects against the actual economic interests of the A2A Investors. Mr. Lind's purported interest stems from his position as a director. The Court should then consider whether his opposition is consistent with a director acting in his fiduciary capacity[21] or merely with the advancement of self-interests, particularly given this Court has found that management has not historically met its fiduciary obligations to A2A Investors.[22] Canadian Investors are particularly concerned that Mr. Lind's default position appears to be that the assets in Texas cannot be returned to the original investment schemes and cannot be recovered for the benefit of A2A Investors.[23]

16. On the Charge Extension Application, the Monitor is not seeking to affect Mr. Lind's economic interests such that a response from Mr. Lind is necessary. Any residual interest that Mr. Lind holds in the Fossil Creek and Windridge Debtor Companies is not impugned by the present Charge Extension Application or, at the most, is only relevant at a peripheral and remote level.

17. Mr. Lind may respond to statements he considers inaccurate or as improperly characterizing him. That ability to correct the record, however, is distinct from standing to oppose relief that is otherwise irrelevant to him personally. Notwithstanding Mr. Lind's desire to correct the record now, it is important to note that this Court has already found – and the Alberta Court of Appeal confirmed – that removing the directors' managerial powers and granting enhanced powers to the Monitor was appropriate based on the evidentiary record, to which Mr. Lind contributed.[24] These are findings of the courts made

[21] In the *January Reasons* at para 59, Feasby J. noted that the board and management of a debtor company "directly or indirectly represent the interests of equity (though fiduciary obligations are owed to the corporation as a whole" [**TAB 1**]. Here, management is not representing equity interests as A2A Investors have Representative Counsel.

[22] *January Reasons*, *supra* at para 42 [**TAB 1**].

[23] *January Reasons*, *supra* at paras 4, 67 [**TAB 1**]. See also Brief of Director of Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC, filed August 10, 2026 at para 8(d), Tab A (paras 3-4, 102 thereof).

[24] *January Reasons*, *supra* at para 42-43 [**TAB 1**]; *A2A Appeal*, *supra* at paras 131-135 [**TAB 3**].

in light of the available evidence and are not bald assertions of the Monitor or A2A Investor groups.

18. This Court's findings, including that management has disregarded the interests of A2A Investors and engaged in poor communication with A2A Investors in the decade between taking their initial investments and the commencement of these proceedings,[25] sharply juxtaposes Mr. Lind's current argument that part of his residual interest arises from the Debtor Companies continued obligations to A2A Investors, including ensuring they are properly informed. The Court should also question Mr. Lind's ability to keep A2A Investors informed when he does not have direct access to the Offshore Investor lists[26] and management as a whole has refused to contact Offshore Investors despite the Monitor's long outstanding request to do so on its behalf post-filing.[27]

19. Mr. Lind's ongoing complaint that the Court granted enhanced powers on an *ex parte* basis has been dealt with by this Court and the Alberta Court of Appeal, based on a substantial evidentiary record contributed to by Mr. Lind, and is *res judicata*.[28]

20. The Charge Extension Application is not an "end-run" of the Court-approved plan to repatriate the lands and sale proceeds located in Texas back to the original investment structures (commonly referred to in the materials as the "**Texas Plan**"), as argued by Mr. Lind, but a step to fairly balance the costs of these proceedings between the stakeholders who stand to economically benefit from their outcome, being the Canadian and Offshore Investors. Further arguments speaking to the substantive portion of the Charge Extension Application are set out in the June 19 Brief.

21. Outside of the provisions of the Initial Order granted by the Court on November 14, 2024, and the ARIO, both of which have been upheld on appeal, no specific relief has been granted in relation to directors in these proceedings.[29] The content and viability of the

[25] *January Reasons*, *supra* at paras 42, 72 [**TAB 1**].
[26] First Lind Transcript at 49:9-22.
[27] *January Reasons*, *supra* at para 73 [**TAB 1**].
[28] *A2A Appeal*, *supra* at paras 101-109 [**TAB 3**].
[29] The order granted by the Honourable Justice Bourque on October 23, 2025, extended the provisions of the ARIO, including those pertaining to directors, to the Debtor Companies involved in the Additional Projects; however, as previously noted, Mr. Lind is not a director of these entities.

Texas Plan is not before the Court on the present Charge Extension Application. Mr. Lind's residual interest in the Debtor Companies *if* the CCAA proceedings were to terminate for Fossil Creek and Windridge is not engaged by the Charge Extension Application and does not afford him standing to object to the Charge Extension Application. Mr. Lind's continued interest in the Fossil Creek and Windridge Debtor Companies is also inconsistent with his previous repeated statements that these entities are inactive, have no significant assets or business, and are now irrelevant to the current Project structures.[30]

22. Mr. Lind also asserts standing based on his right to respond to any costs sought against him personally. While a party may make submissions when costs are sought against it, that right does not confer standing to oppose the underlying relief. The Monitor, supported by Representative Counsel, seeks costs against Mr. Lind because he continues to oppose the Charge Extension Application despite his standing being challenged and following a history of unsuccessful and repetitive opposition in the names of the Debtor Companies. Any resulting costs award is a potential consequence of that opposition; his right to address costs does not retroactively establish standing on the substantive application.

23. When assessing standing the Court must consider the specific relief being sought on the application and the nature of the party's interest in the proposed outcome and then balance those factors against the interests of the other stakeholders in the proceedings, noting that the CCAA focuses on the collective benefit of a successful restructuring or liquidation. As confirmed in *Imperial Tobacco*, a party can be a stakeholder but still have no standing on a specific application.

V. CONCLUSION

24. For all of the aforementioned reasons, this Court should afford minimal weight to the position of Mr. Lind, whether expressed on behalf of the residual interests of the Debtor Companies or in his personal capacity, on the Charge Extension Application and any future applications that do not affect him personally. To date, his continuous and duplicative opposition has unnecessarily increased the costs of these proceedings, thereby diminishing

[30] See e.g., Affidavit of Allan Whitford Lind, sworn December 31, 2024, filed by Bennett Jones LLP on January 3, 2025 at para 6.

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.[31] These are not disparaging statements of the Monitor nor any other party, but rather findings of this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF AUGUST, 2026.

FASKEN MARTINEAU DuMOULIN LLP

Per: ______________________________
Robyn Gurofsky and Kaitlyn Wong,
Canadian Representative Counsel

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

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Angus A2A GP Inc (Re)*, 2025 ABKB 51
2.	*Imperial Tobacco Limited*, 2025 ONSC 1375
3.	*Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156

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 p; 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."

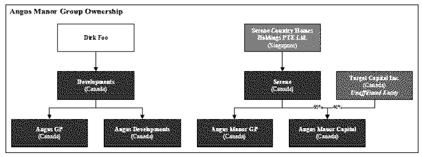
III. The Respondents' Business and the Applicants' Investments

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.



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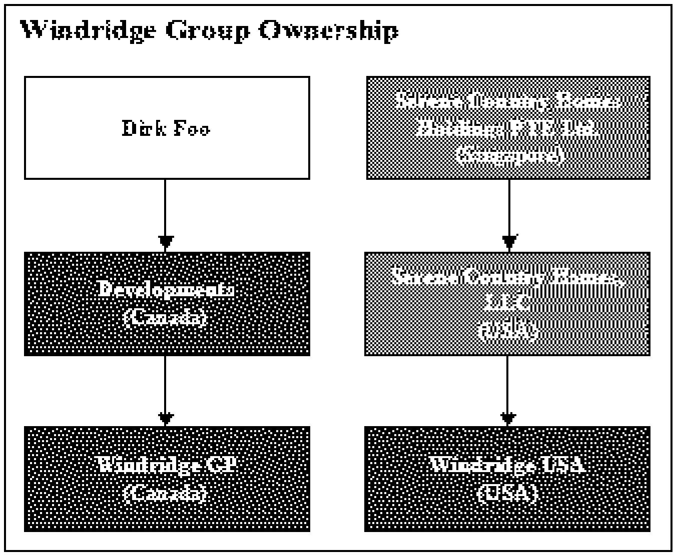
23 The Angus Manor lands were put on the market on August 15, 2024. The best offer was structured as a VTB bearing 3% interest for four years with an initial payment of $3 million and the balance of $11 million due in 2029. The Monitor concluded in its First Supplement to the Third Report that the proposed 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.



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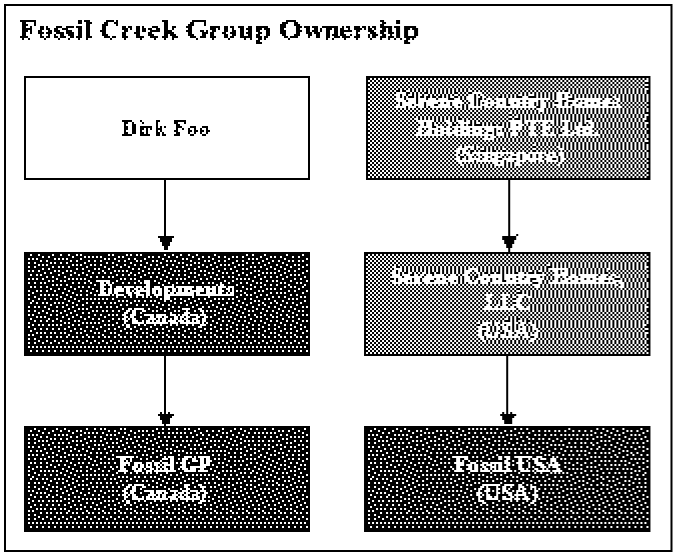
27 Records obtained by the Monitor indicate that Windridge LP transferred the UFIs to a different Windridge Trust, governed by Texas law ("Windridge Texas Trust") which now holds title to the Windridge lands. The trustee of Windridge Texas Trust is Dirk Foo. A small parcel of the Windridge lands was 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.



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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 p; 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 p; 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 <u>investigation</u> 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 p; 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, p; 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.

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TAB 2

2025 ONSC 1375
Ontario Superior Court of Justice

Imperial Tobacco Limited

2025 CarswellOnt 2597, 2025 ONSC 1375, 17 C.B.R. (7th) 217, 2025 A.C.W.S. 1136

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: March 3, 2025
Judgment: March 3, 2025
Docket: CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL

Counsel: Craig Lockwood, Deborah Glendinning, Marc Wasserman, Martino Calvaruso, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
Natasha MacParland, Chanakya Sethi, for FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
Robert Thornton, for JTI-Macdonald Corp.
Linc Rogers, for Deloitte Restructuring Inc. in its capacity as Monitor of JTI-Macdonald Corp.
Jamey Gage, Trevor Courtis, for Rothmans, Benson & Hedges Inc.
R. Shayne Kukulowicz, Monique Sassi, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.
Jacqueline Wall, for Province of Ontario
Sam Cotton, for Heart and Stroke Foundation
Jesse Mighton, Jeffrey Leon, Mike Eizenga, Preet Gill, for Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims
André I.G. Michael, for Consortium of Provinces and Territories
Brett Harrison, Guneev Bhinder, for Province of Quebec

Subject: Insolvency
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
There were ongoing Companies' Creditors Arrangement Act proceedings involving certain tobacco companies — Court-appointed monitors brought motions for orders approving proposed amendments as reflected in third amended and restated plan of compromise and arrangement in each of proceedings — Motions granted — None of amendments affected any affected creditor or unaffected creditor — Amendments only impacted allocation of working capital holdback among tobacco companies

— Only opposition to requested relief was from certain foundation — Foundation was social stakeholder in proceeding, but its status did not give it standing to raise objections on issues that did not affect it — None of amendments sought on motion affected foundation as social stakeholder — Issues raised by foundation on motion had been raised in sanction hearing, and foundation's objections would be addressed in court's decision on sanction motion — Foundation advanced arguments that had no bearing on question of whether motion to amend plan should be granted, and which challenged court's previous decision regarding status of future tobacco harms stakeholders — Foundation's submissions were ill-advised and were rejected — Evidence established that requested relief was appropriate in circumstances.

MOTIONS by court-appointed monitors for orders approving proposed amendments.

***Geoffrey B. Morawetz C.J. Ont. S.C.J.*:**

ENDORSEMENT

1 This endorsement concerns the ongoing *Companies' Creditors Arrangement Act* ("CCAA") proceedings involving JTI-Macdonald Corp. ("JTI"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively, "Imperial" and Rothmans Benson & Hedges Inc. ("RBH"). JTI, Imperial and RBH are collectively referred to as the "Tobacco Companies". This endorsement relates to all three Tobacco Companies.

2 Each of Deloitte Restructuring Inc. ("Deloitte"), in its capacity as Court-appointed Monitor of JTI, FTI Consulting Canada Inc. ("FTI"), in its capacity as Court-appointed Monitor of Imperial and Ernst & Young Inc. ("EY") in its capacity as Court-appointed Monitor of RBH brought a motion for an order (CCAA Plan Amendment Order No. 1) approving the proposed amendments as reflected in the Third Amended and Restated Plan of Compromise and Arrangement in each of the CCAA proceedings.

3 CCAA Plans were unanimously approved by voting creditors at three separate, sequential meetings of Affected Creditors of JTI, Imperial and RBH (the "Meetings") on December 12, 2024. The Monitors then brought motions for orders sanctioning the CCAA Plans and ancillary relief, which were heard from January 29 to 31, 2025 (the "Sanction Hearing").

4 The Court's decision on the Sanction Hearing is under reserve.

5 At the Sanction Hearing, the Tobacco Companies advised that the issue of allocation under the CCAA Plans remains unresolved as between them.

6 The Tobacco Companies have now reached an agreement in principle to resolve the allocation issue.

7 Pursuant to the CCAA Plans, the Tobacco Companies are to make upfront contributions on or before the Plan Implementation date equal to the aggregate of each Tobacco Companies' cash and cash equivalents generated from all sources by each Tobacco Company prior to the Plan Implementation Date, plus cash security deposits, less the sum of $750 million.

8 The allocation of the $750 million holdback to be retained by the Tobacco Companies to fund working capital (the "Working Capital Holdback") remained unresolved at the time of the Sanction Hearing. The Tobacco Companies have now agreed in principle that on the Plan Implementation Date, RBH will retain the entire Working Capital Holdback. In exchange for RBH, JTI and JTI Macdonald TM Corp. ("JTI-TM") have agreed to withdraw all of their objections to the sanctioning of the CCAA Plans.

9 Pursuant to section 20.4(a) of the CCAA Plans, the Monitors now move for CCAA Plan Amendment Orders to approve certain amendments to the CCAA Plans to implement this agreement in principle (the "Amendments").

10 As a result of the agreement in principle, the Tobacco Companies take the position that section 5.2 of the CCAA Plans is to be intentionally deleted.

11 In addition, the Tobacco Companies require that section 5.4 of the CCAA Plans be amended to: (i) provide that the Working Capital Holdback is to be retained by RBH as the "RBH Retained Amount", (ii) permit RBH to deal with the RBH

Retained Amount in its sole discretion, including to transfer or distribute such monies outside of Canada in such manner as RBH may determine; and (iii) clarify that any such transfers or distributions of the RBH Retained Amount will be deemed to be permitted transfers for the sole purpose of Article 11 of the CCAA Plans.

12 Certain administrative changes to effect the Amendments may also be required.

13 None of the amendments affect any Affected Creditor or Unaffected Creditor. The amendments only impact the allocation of the Working Capital Holdback among the Tobacco Companies.

14 No Claimants oppose the motions.

15 The only opposition to the requested relief is from the Heart and Stroke Foundation (Heart & Stroke").

16 Heart & Stroke makes its submissions as a social stakeholder. It submits that the CCAA Plan Amendment Orders should not be granted because the proposed amendments to the CCAA Plans do not cure the unfairness and unreasonableness of the CCAA Plans arising from the narrow scope of the *Cy-près* Foundation.

17 In making its submissions, Heart & Stroke relies on the Responding Factum that was referenced at the Sanction Hearing, oral arguments made at the Sanction Hearing and its written submissions for this motion. Heart & Stroke does not raise any new issues on this motion.

18 The Province of Ontario submitted that Heart & Stroke's objection to the proposed amendment to the Plan constituted an abuse of process.

19 Abuse of process is a flexible doctrine which grants the court inherent power to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute. It may be used to bar the relitigation of issues previously decided and to promote judicial economy and the integrity of the court's process: *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 37, 51.

20 Heart & Stroke previously brought a motion for leave to appoint representative counsel for "Future Tobacco Harms Stakeholders" in this proceeding. In a decision dated June 23, 2023, McEwen J. dismissed that motion, in part on the basis that any claims of the Future Tobacco Harms Stakeholders were no different in nature from the unascertained and unasserted claims of the Pan-Canadian Claimants: 2023 ONSC 2347, at para. 86.

21 As a result of McEwen J.'s decision, Future Tobacco Harms Stakeholders do not constitute a distinct class of creditors in this CCAA process. Heart & Stroke is neither an Affected Creditor nor an Unaffected Creditor. The court need not consider whether the proposed amendments to the plan are materially prejudicial to their interests.

22 Heart & Stroke opposes the amendments to the plan on the basis that they do not adequately address the needs of Future Tobacco Harms Stakeholders. If the court were to adopt this argument, the effect would be to treat Future Tobacco Harms Stakeholders as a class of creditors whose approval is required to sanction the plan. In this way, Heart & Stroke's submissions are an improper attempt to undermine McEwen J.'s decision.

23 Heart and Stroke is a social stakeholder in this proceeding, but its status does not give it standing to raise objections on issues that do not affect it. In *Parsons v. Canadian Red Cross Society*, (2001), 140 O.A.C. 348, the Court of Appeal held that, where a party has no legal rights that are impacted by a particular decision, that party has no standing to appeal that decision. By analogy, where a party's rights are not impacted by an amendment to a proposed plan of arrangement, that party has no standing to object to the amendment.

24 The proposed amendments to the plan fix the allocation of the Working Capital Holdback. None of the amendments sought on this motion affect Heart & Stroke as a social stakeholder. The proposed amendments have no impact on the scope of the *Cy-près* Foundation. The issues raised by Heart & Stroke on this motion were raised in the Sanction Hearing. The court's

decision on the motion to sanction the plan is under reserve. Heart & Stroke's objections will be addressed in the court's decision on that motion.

25 Heart & Stroke advanced arguments that had no bearing on the question of whether the motion to amend the plan should be granted, and which challenged the court's previous decision regarding the status of Future Tobacco Harms Stakeholders. For these reasons, Ontario's abuse of process concern was not without merit.

26 In my view, Heart & Stroke's submissions were ill-advised and are rejected.

27 The sole issue on these motions is whether the court should grant the CCAA Plan Amendment Orders.

28 Section 20.4(a) of the CCAA Plan requires the Monitors to notify Affected Creditors and the Tobacco Companies and obtain court approval of any amendment, restatement, modification or supplement to be made following the Meeting Orders that is not solely: (i) administrative; or (ii) error correcting.

29 The Monitors submit that the proposed amendments are substantive and not merely curative and therefore that the court approve them. They submit that the amendments do not affect and are not materially adverse to the financial or economic interests of Affected Creditors or Unaffected Creditors. The amendments only impact the allocation of the Working Capital Holdback among the Tobacco Companies. The Affected Creditors and Tobacco Companies received notice of these motions on February 27, 2025. All three Tobacco Companies, along with JTI-TM, support the amendments.

30 Sections 6 and 7 of the CCAA provide the court with authority to sanction a plan or to alter or modify its terms. When amendments are proposed after the creditors meeting, section 7 of the CCAA gives the court the discretion to sanction an amended plan without convening an additional creditors meeting if the court is satisfied that the creditors or shareholders are not adversely affected by the proposed amendments.

31 I accept the submissions of the Monitor. I am satisfied that no Affected Creditor or Unaffected Creditor will be affected by the amendments. I am also satisfied that each of the Monitors has adhered to section 20.4(a) of the CCAA Plans by providing notice to the common service list and moving for the court's approval of the amendments.

32 Each of the Monitors has filed a report recommending that the court approve the amendments and grant the CCAA Plan Amendment Order No. 1.

33 I am satisfied that the evidence establishes that the requested relief is appropriate in the circumstances. The motions of the Monitors are granted and the orders have been signed.

34 For greater certainty, the existing Stay of Proceedings remains in effect until such time as the decision on the Sanction Hearing has been released.

Motions granted.

TAB 3

2026 ABCA 156
Alberta Court of Appeal

Angus A2A GP Inc v. Alvarez p; 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 p; 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 p; Marsal Canada Inc. (Respondent)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Appellants) and Alvarez p; 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 p; 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 p; 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 p; 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 p; 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 (Ont. S.C.J. [Commercial List]) (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 p; 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 p; 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 p; 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

Appendix

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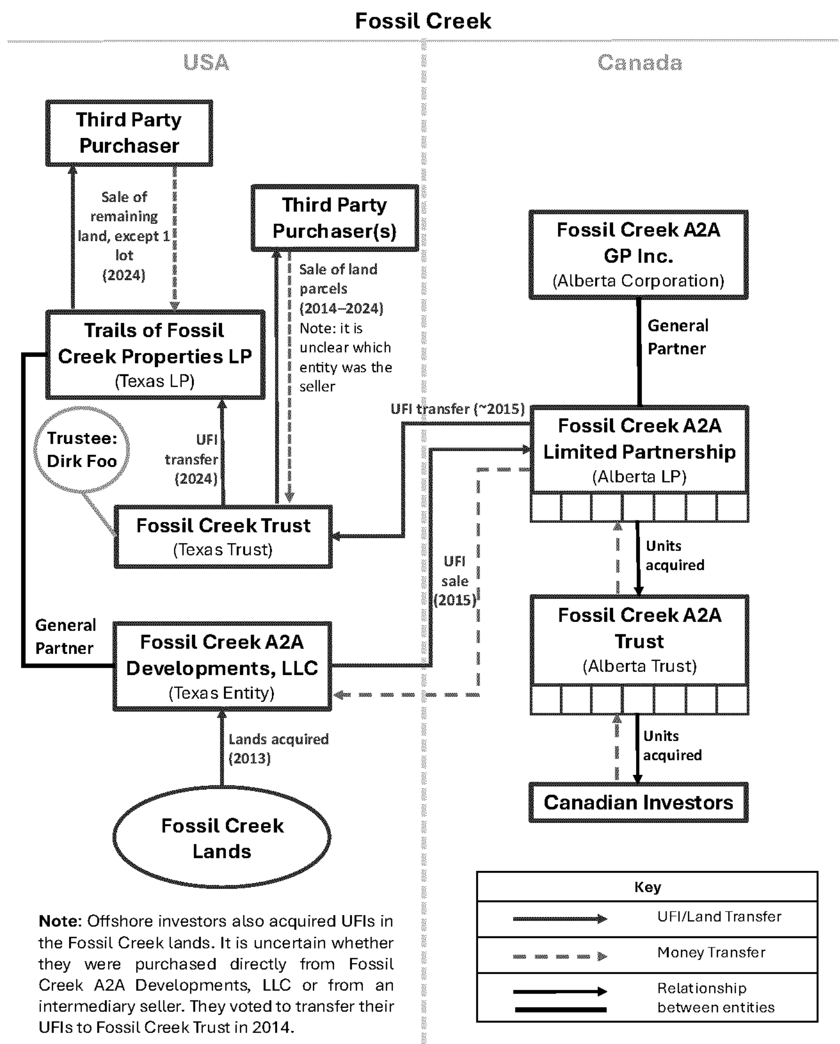

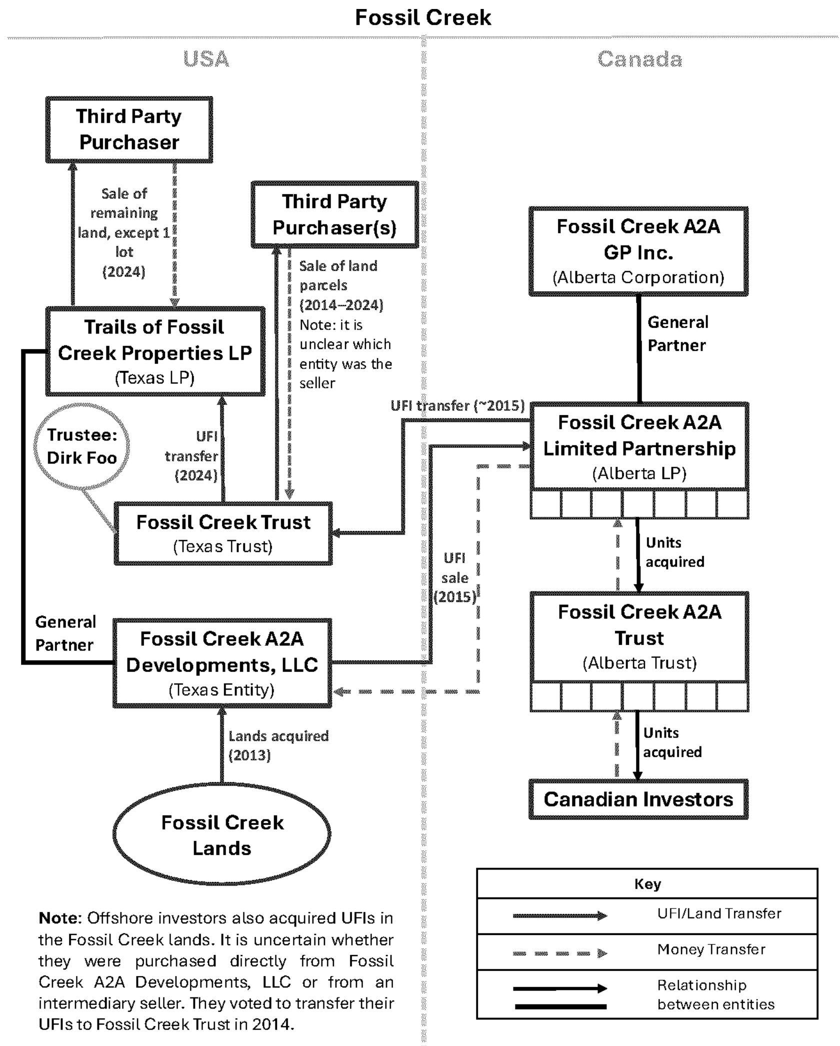

Footnotes

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.

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