CLERK'S STAMP

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

Application Scheduled for December 20, 2024, commencing at 2:00 p.m.
before the Honourable Justice C. C. J. Feasby

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I. INTRODUCTION

1. With respect, Fossil Creek A2A Developments, LLC ("**Fossil LLC**") and Windridge A2A Developments, LLC ("**Windridge LLC**" and, together with Fossil LLC, the "**LLCs**") submit they should not be subject to these *Companies' Creditors Arrangement Act*[1] ("**CCAA**") proceedings, and that the criteria for the granting of an Initial Order against them were not met.

2. The LLCs seek to extend the time to appeal the Initial Order granted against them on November 14, 2024. As set out in this Brief, the LLCs submit they meet the test to do so.

II. FACTS

3. These CCAA proceedings were commenced by application of the Applicant Investors, as they are defined in the Initial Order,[2] none of whom are creditors of or direct investors in the LLCs. The Applicant Investors invested in three real estate projects:

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

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

(c) the Windridge Project, a 415-acre project in the Dallas / Fort Worth area of Texas.[3]

4. The LLCs are incorporated pursuant to the laws of Texas.

5. Fossil LLC is the original owner of the lands that became the Fossil Creek Project; it sold undivided fractional interests ("**UFIs**") in the lands to limited partnerships, the units in which were held by the Fossil Creek A2A Trust. Canadian investors purchased units in the Fossil Creek A2A Trust, which in turn used the proceeds of sale to purchase the units of the limited partnership. The limited partnership used those proceeds of sale to purchase UFIs from Fossil LLC.[4]

6. Similarly, Windridge LLC is the original owner of the lands that became the Windridge Project. Windridge LLC sold UFIs in the lands to limited partnerships, the units in which were

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[1] RSC 1985, c C-36, as amended.
[2] Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund and Brian Richards, and collectively, the "**Applicant Investors**".
[3] Affidavit of Michael Edwards sworn November 12, 2024, Part 1, para 14; Transcript of Proceedings, Decision of the Honourable Justice C. D. Simard, November 25, 2024 [**November 25 Transcript**] [**TAB 1**], p 3/11-13.
[4] November 25 Transcript [**TAB 1**], p 3/36-4/3.

held by the Windridge A2A Trust. Canadian investors purchased units in the Windridge A2A Trust, which in turn used the proceeds of sale to purchase the units of the limited partnership. The limited partnership used those proceeds of sale to purchase UFIs from Windridge LLC.[5]

7. There is no evidence that any of the Applicant Investors are owed any funds by either of the LLCs.

8. No order for service *ex juris* was ever granted (or sought) to serve the LLCs with notice of these proceedings. This fact was not brought to the Court's attention during the application for the Initial Order.[6]

9. The LLCs have, through the Affidavit of Allan Whiteford Lind sworn November 21, 2024[7] and through correspondence from counsel, advised the Court and parties on the Service List for these proceedings that they do not attorn to the jurisdiction of this Court, and that they wish to challenge jurisdiction.

10. Leaving aside that no order for service *ex juris* had been granted, the Respondents named in the Initial Order (collectively, and including the LLCs, the "**CCAA Respondents**") were given, at most, two days' notice of the application for the Initial Order.[8] The application was "essentially *ex parte*".[9]

11. Counsel for at least some of the CCAA Respondents at the hearing of the application for the Initial Order requested an adjournment of the application.[10] Counsel for the Applicant Investors objected to the adjournment request, asserting there was urgency to the application due to a post "on a Facebook page for disgruntled investors"[11] located by Azimuth, "an entity in Calgary that has previously assisted investors in exempt market offerings to obtain information and in some cases, pursue restructuring opportunities."[12] If one were to *assume* that the Facebook post (by an unidentified person) constituted credible evidence of an

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[5] *Ibid.*
[6] First Report of the Monitor dated November 20, 2024 ("**First Report**"), Appendix "B", Transcript of proceedings before Justice C. C. J. Feasby, November 14, 2024 ("**November 14 Transcript**") [**TAB 2**], pp 2/32-3/23.
[7] Affidavit of Allan Whiteford Lind sworn November 21, 2024, para 16.
[8] First Report, November 14 Transcript [**TAB 2**], p 2/35. Throughout this Brief, where referring to "two days' notice" of the application for the Initial Order, the LLCs are not in any way confirming that they were properly served with notice of the application for the Initial Order.
[9] November 25 Transcript [**TAB 1**], p 4/23-24.
[10] First Report, November 14 Transcript [**TAB 2**], p 2/32-33, p 11/17-14/1.
[11] Affidavit of Michael Edwards sworn November 12, 2024, Part 1, para 94 and Part 6, Exhibit "39"; First Report, November 14 Transcript, p 7/24-31 [**TAB 2**].
[12] Affidavit of Michael Edwards sworn November 12, 2024, Part 1, para 94, Part 6 Exhibit "39".

imminent potential sale of undivided fractional interests UFIs in property, and further, that any such sale (for consideration) constitutes "dissipation of assets", then one would also note that the Facebook post states that it relates to an offer to purchase property known as "Angus Manor Park", of approximately 167 acres located in Essa Township, Ontario. The Facebook post includes no reference whatsoever to the Windridge Project or to the Fossil Creek Project. There was no evidence before the Court of any urgent circumstances in relation to those projects, or in relation to the LLCs.

12. The Applicant Investors are not secured or unsecured creditors of the CCAA Respondents. The Applicant Creditors are investors in Fossil Creek A2A Trust or Windridge A2A Trust. Based on their equity investments in *certain* of the CCAA Respondents, they assert that they have contingent claims against the CCAA Respondents. In his decision on November 25, 2024 on the Monitor's application for an amended and restated initial order, the Honourable Justice Simard of this Court held that "The basis for this argument seems to be that the amount of money raised with respect to the Angus Manor project exceeds the current proposed purchase price. There are many assumptions built into that chain of reasoning for which there is no supporting evidence."[13] No evidence was put before the Court to indicate that the Applicant Investors are creditors (secured, unsecured, contingent or otherwise) of either of the LLCs.

13. There is no indication in the transcript of the hearing for the Initial Order that the question of whether the Applicant Investors had standing to bring an application for an Initial Order was considered by the Court (in relation to the LLCs or in relation to any of the CCAA Respondents).[14] An Initial Order commenced by a party that is neither a debtor, a creditor, or a representative of creditors (i.e., a receiver or an interim receiver) appears to be, prior to this case, unprecedented in Canadian law.[15]

14. The Initial Order was granted November 14, 2024. It granted expanded powers to the court-appointed monitor, Alvarez & Marsal Canada Inc. (the "**Monitor**") and thus stripped the LLCs of control of their own companies, which are incorporated outside of Canada, and

[13] November 25 Transcript, p 8/36-40 [**TAB 1**].
[14] First Report, November 14 Transcript [**TAB 2**].
[15] K. Forbes, "An Exploration of Creditor-Initiated CCAA Proceedings", in Insolvency Institute of Canada, IIC-ART Vol. 13-1, p 2. [**TAB 3**] No precedent for CCAA proceedings commenced by investors, as compared to creditors, has been located.

outside of the jurisdiction of this Court,[16] on two days' notice, and in the face of an adjournment request, based on an assertion by the Applicant Investors of urgency due to a Facebook post of an unknown party regarding a potential sale of property unrelated to the LLCs, and absent any evidence that the LLCs owe any funds to the Applicant Investors.

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

16. On November 21, 2024, Justice Simard heard the application of the Monitor to extend the Stay Period pursuant to the Initial Order to February 28, 2025 and for an amended and restated Initial Order. Justice Simard extended the Stay Period until November 26, 2024, then delivered his decision on the application on November 25, 2024,[17] granting an amended and restated initial order but for a limited time (until December 18, 2024) and for a limited purpose of providing information, and adjourning other relief sought by the Monitor and by the CCAA Respondents (including the Set-Aside Application) to December 18, 2024. In his decision, Justice Simard states:

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

[16] In the circumstances where no order for service *ex juris* had been sought or granted.
[17] November 25 Transcript [**TAB 1**].

> The applicant investors' complaints are not that they are owed debts that are not being paid; but instead, that the respondents have completely failed to communicate with them, and that their governance appears to be highly deficient. The initial order effectively supplanted management on day one of this case by giving the monitor very wide-ranging enhanced powers. Two of the three projects covered by the initial order are not in Canada, but are located in Texas.
>
> There is no hint that the applicant investors have any plan for a compromise or arrangement of the debtors, or even a process that would lead to out of the ordinary course sales. They essentially started this action to try to stop sales and to investigate the facts.
>
> I will discuss these issues in more detail later in my decision, but at this point, I want to acknowledge that the concerns raised by the respondents are legitimate, and they cannot be dismissed out of hand. It is possible that the continuation of these proceedings – while unquestionably driven by the genuine desire to protect investors' interests -- might be stretching the CCAA beyond its proper limits.[18]

17. Justice Simard also directed the CCAA Respondents to respond to numerous information requests.

18. The appeal period in relation to the Initial Order expired December 5, 2024.

19. On Friday, December 13, 2024, the LLCs retained Bennett Jones LLP as legal counsel.

20. On Monday, December 16, 2024, the LLCs:

(a) delivered to the Court and served upon the Service List an unfiled application to extend the time to appeal the Initial Order (the "**Extension Application**"), along with a letter to the Honourable Justice C. C. J. Feasby seeking direction as to the manner in which the Extension Application should be addressed;

(b) filed with the Alberta Court of Appeal and served upon the Service List:

(i) an application for permission to appeal the Initial Order;

(ii) an application for permission to appeal the ARIO.

[18] November 25 Transcript, p 6/41-7/35 [**TAB 1**].

21. On December 17, 2024, Justice Feasby advised the Service List he was prepared to hear the LLC Extension Application on December 20, 2024 at 2:00 p.m. for up to one hour. Counsel for the LLCs filed and served the LLC Extension Application accordingly.

22. On Wednesday, December 18, 2024, due to a judicial conflict, Justice Simard further adjourned the matters he had adjourned pursuant to his November 25, 2024 decision (including the Set-Aside Application) to December 20, 2024, to be heard by Justice Feasby.

III. ISSUE

23. Should this Court grant the Extension Application to extend the time to appeal the Initial Order?

IV. ARGUMENT

A. The Appeal Period and the test for Extension Thereof

24. The appeal period of an order granted in CCAA proceedings is 21 days from the date of the order.[19]

25. The discretion to extend time is vested solely in the court appealed from.[20]

26. The test for an extension of time to appeal an order granted in CCAA proceedings was set out by Fitzpatrick J. in *Port Capital Development (EV) Inc. (Re)* [***Port Capital***]:[21]

(a) Was there an intention to apply for leave before the expiry of the time for doing so and did the appellant communicate the intention to the respondents?

(b) Was the delay lengthy and did the applicant act expeditiously to seek an extension of time?

(c) Is there an explanation for the delay?

(d) Is there prejudice to the respondents consequent on the delay?

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[19] CCAA, s 14(2) [**TAB 4**].
[20] *Bank of Montreal v. Cage Logistics Inc.,* 2003 ABCA 36 [***Cage Logistics***] [**TAB 5**] at para 17, cited in *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1655 [***Port Capital***] [**TAB 6**] at para 16.
[21] *Port Capital* [**TAB 6**] at para 21.

(e) Is there merit to the application for leave?

(f) Is it in the interests of justice that the extension be granted?

(collectively, the "**Extension Factors**").

27. The Applicant Investors have set out their position with respect to the Extension Factors in email correspondence to the Court and the Service List on December 16, 2024. The LLCs will respond to the same herein.

28. The Applicant Investors state that all of the Extension Factors must be met in order for an extension of time to appeal to be granted. The decision in *Port Capital*[22] cites the Extension Factors from the British Columbia Court of Appeal decision of Groberman J. in the insolvency proceedings of *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership* [*Wedgemount*],[23] which Fitzpatrick J. notes are particularly suitable for insolvency proceedings. Fitzpatrick J. also states that Groberman J. "outlined certain factors which serve as a guide to the exercise of the court's discretion on an extension application" and confirms that the Extension Factors are each a factor to be considered.[24] Groberman J. confirmed this in *Wedgemount*:

> It is important to recognize that this is not a checklist. The answers to the various questions are not added together or dealt with in some mathematical or algorithmic approach. Rather, they are simply considerations that guide the exercise of judicial discretion.[25]

B. <u>Was there an intention to apply for leave before the expiry of the time for doing so and did the appellant communicate the intention to the respondents?</u>

29. The Applicant Investors state:

> In the present circumstances, no such intention was communicated. The first notice of any intention to appeal, was in the correspondence received from Ms. Meyer's office to the Court at 3:30pm today [December 16, 2024].

30. The LLCs respond as follows:

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[22] *Port Capital* [**TAB 6**] at para 22.
[23] *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCCA 283 [***Wedgmount***] [**TAB 7**] at para 30.
[24] *Port Capital* at paras 21, 94.
[25] *Wedgemount* [**TAB 7**] at para 31.

(a) It is correct that the LLCs did not directly express an intention to appeal the Initial Order until December 16, 2024. Counsel for the LLCs was retained on Friday December 13, 2024, and the LLCs submitted the LLC Extension Application and sought this Court's direction as to how the application should be determined the next business day, on December 16, 2024.

(b) This factor should also be considered in the context that:

(i) these CCAA proceedings were commenced by way of an application for an Initial Order granted on November 14, 2024, with only two days' notice to any of the CCAA Respondents (thus not only compressing the time in which the CCAA Respondents could respond, but also effectively compressing the time in which the CCAA Respondents could determine to appeal the Initial Order);

(ii) the LLCs are incorporated in the State of Texas, and no order for service *ex juris* was sought or obtained in relation to the LLCs, nor was that fact addressed before the Court;

(iii) the LLCs have confirmed that they do not attorn to this Court's jurisdiction;[26]

(iv) it thus must be taken into account that the application for the Initial Order was brought, and granted, without adequate notice of the same;

(v) the Initial Order expressly includes a comeback clause, and thus, by its own terms, contemplates that it can be set aside;

(vi) the CCAA Respondents, including the LLCs, have very clearly communicated their intention to set aside or to stay the Initial Order, having brought the Set-Aside Application on November 21, 2024 to do so, which was originally returnable on November 21, 2024, seven days

[26] Affidavit of Allan Whiteford Lind sworn November 21, 2024, para 16.

after the Initial Order was granted (and well within the appeal period of the Initial Order);

(vii) all interested parties to these CCAA proceedings, including the Applicant Investors, and the Monitor, have known since at least November 21, 2024, if not earlier, that the CCAA Respondents, including the LLCs, intended to set aside or stay the Initial Order; the LLCs' application for permission to appeal the Initial Order is another manner of seeking to do so.

C. <u>Was the delay lengthy and did the applicant act expeditiously to seek an extension of time?</u>

31. The Applicant Investors state:

> In the present circumstances, the delay has not been lengthy, but could have been raised at each of the two subsequent appearances before the Court. In fact, the service issue with respect to the Initial Order was raised before Justice Simard and dealt with. Thus, this appeal would effectively represent yet another "kick at the can".

32. The LLCs state:

(a) As to the "service issue with respect to the Initial Order" having been raised before Justice Simard and dealt with, the LLCs have also filed an application to seek permission to appeal Justice Simard's decision, including on that basis (and no extension of time to do so is required);

(b) As already stated, counsel for the LLCs was retained one business day before the LLCs submitted their application for permission to appeal and their Extension Application;

(c) Any delay should be taken not only in that context, but also in the context that the time period between the expiry of the appeal period in relation to the Initial Order (on December 5, 2024) and the filing of the application for permission to appeal and the Extension Application (on December 16, 2024) was 11 days. The delay was not lengthy, and there can be no question that the LLCs acted expeditiously to extend the time to appeal.

D. Is there an explanation for the delay?

33. The Applicant Investors state:

> The only explanation provided is that the A2A DevCos only retained Bennett Jones on December 13, 2024. What they fail to mention is that they had been represented by no less than three Canadian legal firms prior to this and were therefore not unfamiliar with the Canadian proceedings.

34. The LLCs agree that their engagement of Bennett Jones LLP on December 13, 2024 is an explanation for the delay. It is not the "only" explanation. As is set out in the Extension Application:

(a) the LLCs, incorporated in the U.S., were unfamiliar with Canadian CCAA proceedings. Indeed, as this application by investors (rather than creditors) for an Initial Order pursuant to the CCAA is seemingly unprecedented,[27] there was no reasonable basis for the LLCs (which do not owe any funds or any obligations to the Applicant Investors, nor is there any evidence that they owe any funds to any Canadian creditor) to have any familiarity with the CCAA;

(b) the LLCs had to respond to voluminous materials on learning of the application for the Initial Order two days in advance of the hearing (notwithstanding that no order for service *ex juris* had been sought or granted);

(c) after the Initial Order was granted:

(i) the LLCs were occupied with complying with the Initial Order and further responding to the CCAA proceedings and the application for the ARIO;

(ii) the CCAA Respondents (including the LLCs) prepared the Set-Aside Application and affidavit evidence in support, including the Affidavit of Allan Lind sworn November 21, 2024, a director of each of the LLCs;[28]

[27] See note 4.
[28] Affidavit of Michael Edwards sworn November 12, 2024, Part 1, paras 27, 31, Exhibits 10 and 14.

(iii) the LLCs changed counsel, from Carscallen LLP, which appeared at the application for the Initial Order, to Miles Davison LLP (with the CCAA Respondents), and then on December 13, 2024, to Bennett Jones LLP.

(d) as set out in the Affidavit of Allan Whiteford Lind sworn November 21, 2024:

(i) he resides in Singapore (there is a 15-hour time difference between Singapore and Alberta);

(ii) he was shocked to find out about the CCAA Initial Order that was granted on November 14, 2024 on two days' notice and no opportunity for the CCAA Respondents to properly respond;[29]

(iii) it was only after the hearing for the Initial Order that he was able to properly review the Applicant Investors' materials, upon which he discovered that the application, and the granting of the Initial Order, was "based on fundamental misunderstandings and mischaracterizations about the nature and structure of the investments and various other mis-stated information to paint a picture of [the CCAA Respondents] that is entirely untrue."[30]

(iv) Under severe time restraints, his Affidavit is intended as an overview of his concerns and to demonstrate some of the key mischaracterizations or wrong information that was presented to the Court;[31]

(e) upon the granting of the ARIO, the LLCs have been attempting to respond to numerous information requests, as directed by Justice Simard;

(f) the CCAA Respondents' Set-Aside Application was originally scheduled to be heard by Justice Simard on November 21, 2024. Upon Justice Simard issuing his decision on November 25, 2024, the Set-Aside Application was adjourned to December 18, 2024, and was then put over to December 20, 2024 due to a judicial conflict. The parties have agreed to adjourn the Set-Aside Application

[29] Affidavit of Allan Whiteford Lind sworn November 21, 2024, para 2.
[30] *Ibid* para 3.
[31] *Ibid* para 4.

> to January 17, 2025, along with an extension of the CCAA proceedings solely for the limited purpose as expressed by Justice Simard in the transcript of his decision on November 25, 2024.

35. The above has been a massive undertaking by the LLCs in a tightly compressed time period, with respect to a Court Order that was granted with only 2 days' informal notice, upon American entities, without an Order for service ex juris, with relief granted that gives the Monitor enhanced powers and thus has wrested control from the LLCs. The implications of the CCAA proceedings are existential for the LLCs.

36. All of the foregoing serves as an explanation of delay of eleven days in filing an application for permission to appeal the Initial Order.

E. <u>Is there prejudice to the respondents consequent on the delay?</u>

37. The Applicant Investors state:

> The within proceedings are insolvency proceedings advanced for the benefit of individual investor stakeholders who are seeking to recover on their investments in circumstances where there is very little financial information provided by the debtor companies. It is these debtor companies that are seeking this court's indulgence for more time. Any unnecessary increase to legal costs will reduce the recoveries available to the stakeholders, potentially affecting their support for the proceedings. We submit that this is a strategy that has been employed by the A2A Group to defeat litigation in the United States, and is being employed here.

38. The LLCs state:

(a) The Applicant Investors' submissions assume that these CCAA proceedings have been properly brought. That is one of the very questions to be determined by the Court of Appeal of Alberta, if the LLCs' Extension Application and application for permission to appeal the Initial Order are granted.

(b) In *Port Capital*,[32] Fitzpatrick J. confirmed that what is being considered with respect to this factor is whether there was any prejudice that arose between the

[32] *Port Capital* [**TAB 6**] at para 38.

end of the appeal period (December 5, 2024) and the date the leave application was filed (December 16, 2024). There is none.

(c) There can be no prejudice to the Applicant Investors as respondents to this Extension Application, because the LLCs are within the time to appeal the ARIO, and have sought leave from the Court of Appeal to do so. The Applicant Investors are subject to an appeal of these CCAA proceedings either way.

(d) That being said, the LLCs submit that in the circumstances where the ARIO is already subject to potential appeal, it is appropriate that the Court of Appeal also consider an application for permission to appeal the Initial Order that gave rise to the ARIO.

(e) As noted above, the Initial Order includes a comeback clause, and thus expressly contemplates that it could be set aside, which the CCAA Respondents have sought to do through their Set-Aside Application. That application was originally returnable November 21, 2024, seven days after the Initial Order was granted. There can be no prejudice complained of by the Applicant Investors as a result of an eleven-day delay in the filing of the application for permission to appeal the Initial Order, when all interested parties to these CCAA proceedings, including the Applicant Investors, have known of the Set-Aside Application throughout that period of time, and since at least November 21, 2024, if not earlier. Extending the time for the LLCs to appeal the Initial Order does not prejudice any party.

F. Is there merit to the application for leave?

39. The Applicant Investors state:

> Justice Fitzpatrick notes in *Port Capital* that it is an odd position to be analyzing the merits of one's own decision as part of this application (at para 41). She also points out that appellate courts across Canada approach leave to appeal applications in respect of CCAA decisions with caution and will only grant leave "sparingly" with respect to discretionary decisions in the Court (at para 44).

In the circumstances, we submit that the A2A DevCo's application for leave to appeal will fail because not one of the four parts of the leave to appeal test are met (and all four must be met in order to be successful). In particular:

i) The point on appeal will not be of significance to the practice as the appeal relates to a service issue unique to this case;

ii) The point raised will not be of significance to the action itself, except to the extent that it will only unnecessarily increase the professional fees. This is because it is not determinative of the substantial issues before the Court: namely whether an extension of the stay period should be granted at the next hearing. If the court of appeal grants leave, we will simply bring an application for service ex juris on the A2A DevCos and thereafter, reapply for the same relief previously granted by both Your Honour and Justice Simard;

iii) On this basis, we submit the appeal is not prima face meritorious and instead, is frivolous, designed to cause delays and increase costs; and

iv) The appeal will unduly hinder the progress of the action, for the reasons noted above.

40. With respect to the responses of the LLCs, *Port Capital* sets out that the test for leave to appeal in CCAA proceedings involves consideration of the following factors:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.[33]

41. The test for leave to appeal is not the test for whether to extend the time to appeal. It would be an error of law to conflate the two tests.

42. In *Port Capital*, Fitzpatrick J. held that the question of merit (as part of the test as to whether to extend the time to appeal) is confined to considering whether the leave application is bound to fail because it is "vexatious, frivolous or entirely without merit. If the matter were

[33] *Port Capital* [**TAB 6**] at para 45.

to proceed to a leave application, then obviously whether leave would be granted would be in the hands of the Court of Appeal."[34]

43. As such, the question before this Court on the Extension Application with respect to the merit of the LLCs' application for leave to appeal the Initial Order is whether the LLCs' leave application is vexatious, frivolous or entirely without merit.

44. With respect, and as set out above, this Court itself has already made clear that there are issues with respect to whether the Initial Order should have been granted.[35] Clearly, this part of the test is met.

45. The issues on the merits are well beyond "a service issue unique to this case", as characterized by the Applicant Investors. The issues include:

(a) **Issue 1:** Whether the Court erred in law in granting the Initial Order against the LLCs, notwithstanding that the Applicant Investors did not apply for nor were they granted an order for service *ex juris* in relation to the LLCs, each of which are limited liability companies incorporated in Texas:

(i) The Applicant Investors state that if the Court of Appeal grants permission to appeal the Initial Order, they will just apply for an order for service *ex juris*. That ignores the other grounds for the LLCs' application for permission to appeal the Initial Order, and also, the test for an order for service *ex juris* and then actually effecting service *ex juris*.

(ii) This point on appeal is of significance to the practice and to the action itself; if a Canadian court can issue a CCAA Initial Order against a foreign entity without an order for service *ex juris* and without effecting service *ex juris* in accordance with such an order, as has been done here, that is a significant change to the practice of cross-border insolvency

[34] *Port Capital* [**TAB 6**] at para 42.
[35] November 25 Transcript [**TAB 1**], p 6/41-7/35. See para 16 of this Brief.

law. It is of significance to the action itself because it is determinative of whether the LLCs are parties to these CCAA proceedings.

(iii) The appeal on this point is *prima facie* meritorious and is not frivolous; Fitzpatrick J. confirms in *Port Capital* that "CCAA proceedings do not occupy a special category of litigation where the normal rules of service and notice go by the wayside. Procedural fairness is an important aspect of any CCAA proceeding…."[36]

(iv) An appeal will unduly hinder the progress of the action; indeed, the application for permission to appeal will be advancing at the same time as the CCAA Respondents' Set-Aside Application, and by court order, the CCAA proceedings are only continuing on a limited basis, for information gathering, in the interim.[37]

(b) **Issue 2:** Whether the Court erred in law in the application of section 11.02 of the CCAA and in granting the Initial Order by finding that Fossil Creek LLC was a "debtor company" as defined in the CCAA, notwithstanding that it is not clear that there was any evidence before the Court that Fossil Creek LLC has any liabilities, is insolvent, or has committed an act of bankruptcy:

(i) This point is of significance to the practice and to the action itself, as it relates to the scope of parties that may be subject to CCAA proceedings, and specific to these proceedings, whether Fossil Creek LLC should be a debtor in these CCAA proceedings at all.

(ii) Section 11.02 of the CCAA requires that an application for an initial order be "in respect of a debtor company".

(iii) "Debtor company" is defined to mean (among other things) any company that (a) is bankrupt or insolvent; (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") or is deemed insolvent within

[36] *Port Capital* [**TAB 6**] at para 65.
[37] November 25 Transcript [**TAB 1**], p 12/29-36.

the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts.

(iv) The LLCs are not bankrupt. "Insolvent" is not defined in the CCAA. "Insolvent person" is defined in the BIA as follows:

> 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;

(v) It is unclear that there was any evidence before the Court at the application for the Initial Order that Fossil Creek LLC is a "debtor company". Further (and not to be confused with that analysis), it is unclear that there was any evidence before the Court that Fossil Creek LLC owed at least CDN $5 Million to any party, as is a requirement of section 3(1) of the CCAA.[38]

(vi) As to whether the appeal will unduly hinder the progress of the action, where the Set-Aside Application is also extant, and the proceedings continuing for a limited purpose in the meantime, there will be no undue delay to the Action. This should be weighed with the consideration that if, on appeal, it is determined that Fossil Creek LLC is not a debtor company at all, then these proceedings will have caused considerable

[38] CCAA, s 3(1) [**TAB 4**].

destruction to it. Indeed, Fossil Creek has lost control of its own company in the circumstances where the Monitor has expanded powers.

(c) **Issue 3:** Whether the Court erred in law in the application of section 11.02 of the CCAA and in granting the Initial Order, notwithstanding that there was no evidence that either of the LLCs owed any funds to the Applicant Investors:

(i) This point is of significance to the practice and to the Action itself, as it raises questions as to whether a party that is neither a debtor or a creditor can commence CCAA proceedings – and further, whether the meaning of "debtor company" must have some connection to an applicant for an initial order, where the applicant is not, itself, a debtor company. For the LLCs, the answer to that question will determine whether they remain subject to these CCAA proceedings.

(ii) As to whether the appeal is *prima facie* meritorious, in the circumstances where the Applicant Investors have been permitted to obtain an Initial Order against the LLCs despite not being creditors of the LLCs, and despite there being no precedent for an unrelated party who is *not* a creditor being permitted to commence CCAA proceedings and put in a court-appointed monitor to take over the business and operations of the company, the leave application is not bound to fail on the basis it is vexatious, frivolous or entirely without merit.

(iii) As noted elsewhere, any such appeal will not unduly hinder the progress of the action, where there is already a Set-Aside Application, and further, where these issues are existential to the LLCs.

(d) **Issue 4:** Whether the Court erred in law in granting the Initial Order and commencing proceedings pursuant to the CCAA against the LLCs, in the circumstances where the Applicant Investors are not creditors of the Applicants, and it is not possible for the CCAA proceedings to further the purposes and objectives of the CCAA to effect a compromise or arrangement or to otherwise restructure or monitor the real estate development projects that the Applicant

Investors invested in, due to the fact that the lands that are the subject of those projects are located in Texas, and the entities that control the lands are trusts subject to the laws of Texas, the trustee of each of which is an individual and not a "debtor company" pursuant to the CCAA.

(i) This point is of significance to the practice and to the action itself, as has already been confirmed by this Court.[39]

(ii) There is *prima facie* merit to an appeal on the basis that these CCAA proceedings cannot further the purposes and objectives of the CCAA, where the Windridge Project and the Fossil Creek Project and the lands for those projects are understood to be within the control of U.S. trusts, the trustee of whom cannot be made a party to these CCAA proceedings.[40] It is not possible to achieve the objectives of a CCAA – a compromise and arrangement, or even a liquidation, where the U.S. trusts and the lands are not and cannot be subject to the CCAA proceedings.

(iii) Specifically, in *9354-9186 Québec Inc v Callidus Capital Corp*, the Supreme Court of Canada summarized the objectives of the CCAA as:

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

[39] November 25 Transcript [**TAB 1**], p 7.
[40] November 25 Transcript [**TAB 1**], p 5/17-18/1.

(iv) The *CCAA* generally prioritizes the objective of avoiding the social and economic losses resulting from liquidation of an insolvent company.[41]

(v) With respect, there are legitimate questions to be addressed by the Court of Appeal in this regard:

(a) there cannot be timely, efficient or impartial resolution of a debtor's insolvency with respect to the LLCs because, leaving aside the lack of any evidence that they *are* insolvent, it will not be possible to effect a timely, efficient and impartial resolution (or *any* resolution) of the insolvency, absent any ability for this Canadian Court to effect jurisdiction over the trustee of the U.S. Trusts in these CCAA proceedings or over the lands that form the Windridge Project and the Fossil Creek Project.

(b) it will not be possible for this Court to preserve and maximize the value of the lands, absent any jurisdiction under the CCAA to effect control over an individual as a trustee of a U.S. trust.

(c) where the Applicant Investors are a tiny percentage of the investment interests in the Windridge Project and the Fossil Creek Project, it will not be possible to ensure fair and equitable treatment of the claims against a debtor (nor is there any indication that the CCAA is intended to be used by investors to force recovery on investments);

(d) it is not in the public interest for this Court to apply the CCAA in a manner that is inconsistent with its purpose and objectives;

(e) with respect to balancing the costs and benefits of restructuring or liquidating the company in the context of a commercial insolvency, it will not be possible to actually restructure or liquidate the CCAA Respondents, absent any means of the Court having jurisdiction over the U.S. Trusts and the lands.

(vi) Again, the appeal will not unduly hinder the progress of the action, as the Initial Order is already expected to be stayed for a limited purpose until at least January 17, 2024.

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[41] *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 [**TAB 8**] at para 40.

46. Where the Court itself has raised questions about the merit of these CCAA proceedings, these questions are not vexatious, frivolous, or without merit.

G. Is it in the interests of justice that the extension be granted?

47. The Applicant Investors state:

> Based on all of the above and the evidence that is before the Court, including the evidence that is not before the Court – like the location of the sale proceeds of Fossil Creek and other information critical to the return of funds to the stakeholders, we submit that it is not in the interests of justice to grant the extension.

48. The LLCs state:

(a) This Court itself has already made clear that there are legitimate issues with respect to whether the Initial Order should have been granted.[42] When the Court itself is questioning the propriety of the Initial Order, it would be contrary to the interests of justice *not* to extend the time for the LLCs to appeal.

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

(c) While the comeback clause (and indeed, the Set-Aside Application) may raise the question of why an appeal of the Initial Order is necessary at all: (i) that does not form part of the Extension Factors; and (ii) with respect, the LLCs submit that there are questions of law that must be considered by an appellate court.

V. RELIEF SOUGHT

49. The LLCs seek an extension of time to appeal, and to seek permission to appeal, the Initial Order.

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[42] November 25 Transcript [**TAB 1**], p 7.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

Per: _____

Kelsey Meyer
Counsel for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC

VI. TABLE OF AUTHORITIES

1. Transcript of Proceedings, Decision of the Honourable Justice C. D. Simard, November 25, 2024.
2. First Report of the Monitor dated November 20, 2024, Appendix "B", Transcript of proceedings before Justice C. C. J. Feasby, November 14, 2024.
3. K. Forbes, "An Exploration of Creditor-Initiated CCAA Proceedings", in Insolvency Institute of Canada, IIC-ART Vol. 13-1.
4. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, s 3(1), 14(2).
5. *Bank of Montreal v. Cage Logistics Inc.,* 2003 ABCA 36.
6. *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1655.
7. *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCCA 283.
8. *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10

TAB 1

Action No.: 2401-15969
E-File No.: CVK24ANGUS
Appeal No.: _____

IN THE COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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

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

P R O C E E D I N G S

Calgary, Alberta
November 25, 2024

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The Honourable Justice Simard — Court of King's Bench of Alberta

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J.L. Oliver (remote appearance)	For the Court Monitor
N.E. Thompson (remote appearance)	For the Court Monitor
R. Donnelly (remote appearance)	For the Court Monitor
D. Jorgenson (remote appearance)	For the Court Monitor
H. Gorman, KC (remote appearance)	For the Offshore Investor
O. Konowalchuk (remote appearance)	For the Court Monitor
K. Kashubahuk (remote appearance)	For Piller Capital Corp.
R. Gurofskyuk (remote appearance)	For the Canadian Ambassadors
K. Wong (remote appearance)	For the Canadian Ambassadors
A. McClelland (remote appearance)	For the Canadian Ambassadors
J. Ku (remote appearance)	For the Debtor Company
E. Choi (remote appearance)	For the Debtor Company
S. Lee (remote appearance)	For the Debtor Company
I. Cyr	Court Clerk

THE COURT: I think everyone can hear me all right?

MR. JUKES: I can hear you, Sir. Dan Jukes, from Miles Davison here. My apologies, I think the delay there was my fault. I had not realized that my friends from Ontario (INDISCERNIBLE) link, so I have forwarded it to them. I see at least one of them has since logged in. I hope the others will be here in a moment.

THE COURT: Okay. Where, Madam Clerk, where is the camera that is picking me up? Is it the one at the back of the courtroom?

THE COURT CLERK: It's the forward one.

THE COURT: Okay. I will face forward, because I see counsel over here -- okay.

Decision

THE COURT: Well, you are here, Mr. Jukes, so I will start. The punch line comes at the end, so hopefully your colleague will join by then.

Any preliminary matters before I give everyone my decision from last Thursday? Hearing nothing and seeing nothing -- and I did receive, I received the supplemental affidavit of Mr. Ambrose on Friday, and then I got the monitor's second supplement to the first report this morning. So thank you for that. I did have a chance to briefly review those.

So I am going to give you -- given the urgency of these applications -- I am going to give you my decision and my reasons today orally. And at the end, there will probably be some questions about the details to go in a Court order. I will ask Mr. Oliver to draft that Court order. I know he is not here, but I see his colleague is here.

If anyone requests a transcript of this decision, obviously I reserve my rights to make any minor proof reading or clean-up changes, but I will not, obviously, change anything substantive.

So Introduction.

On November 14th, 2024, this Court granted an initial order under the CCAA against 11 debtor companies -- 4 Alberta corporations, 4 Ontario corporations, and 1 corporation incorporated under the laws of Canada, 2 limited liability corporations incorporated the Texas.

The initial order also covered certain affiliated entities: 4 limited partnerships -- 3 registered in Alberta, 1 in Ontario; and 2 trusts, one of which was established in Ontario, and the other in Alberta.

I will collectively refer to the entities, all of entities covered by the initial order as the A2A Group.

The application for the initial order was made by five individuals who had invested in the A2A Group's project. I will call them the applicant investors. On November 21st, 2024, I heard two applications: The application of Alvarez and Marsal Canada Inc. -- the Court-appointed monitor, for an extension of the stay of proceedings and other relief; and the application of the A2A Group, asking that I set aside or stay the initial order, or adjourn the hearing to allow for more fulsome evidence and argument.

Background, first, with respect to the applicant investors.

The five applicant investors personally invested $76,000 in A2A's projects. They also

gave evidence about their family members or clients who had invested a further $105,500 in the projects.

The structure of the A2A Group and the projects.

The A2A Group raised money for the purpose of purchasing real estate that has a potential for large-scale residential development. The applicant investors have invested in three A2A real estate projects that have consequently been included in the initial order. I was advised that there might be as many as eight other A2A projects.

The three projects are Angus Manor, which is a 167-acre project north of Toronto; Fossil Creek, a 93-acre project in Fort Worth, Texas; and Windridge, a 415-acre project in Texas in the Dallas/Fort Worth area. The structure of the Angus Manor project is as follows: A development corp. -- or DevCo -- originally held title to the Angus Manor lands. Undivided fractional interests -- or UFIs -- in the lands were then transferred to be held by or for investors in the following ways: In the first offering, Canadian investors purchased units in a limited partnership. The limited partnership used the proceeds of those unit sales to purchase UFIs from the DevCo, and foreign investors did not invest through the limited partnership; rather, they bought UFIs directly from the DevCo.

In the second offering, Canadian investors bought bonds issued by a capital corp.. The capital corp. used the proceeds of those bond sales to buy limited partnership units in a second limited partnership, and that second limited partnership bought UFIs in the lands from DevCo.

The title to the Angus Manor lands was in evidence. It shows 2,300 UFIs owned as follows: 893 by the DevCo, 212 held in the first limited partnership structure, 65 in the second limited partnership structure, and 1,130 by foreign UFI owners.

The applicant investors say that the numbers held by the limited partnerships for Canadian investors are lower than promised. According to the offering memoranda, the two offerings were to raise about $17 million, of which $4.2 million was used to purchase the lands, $1.15 million was to get lands to the development-ready stage, and the rest was made up of different fees and commissions.

The structure of Windridge and Fossil Creek is different than Angus Manor, but generally the same as between those two Texas projects. For each project, a Texas limited liability corporation -- a DevCo -- originally held title to the entirety of the lands. UFIs were then transferred to be held by or for investors in the following ways: Canadian investors purchased units in a trust -- those were the Windridge A2A Trust and the Fossil Creek A2A Trust respectively. The trust used the proceeds of those unit sales to purchase units

of a limited partnership. The limited partnership used those proceeds to purchase UFIs from the DevCo. And then, foreign investors did not invest through the limited partnership or trust structure; rather, they bought UFIs directly from the DevCo.

A title search of Windridge lands was put in evidence by the applicant investors, but the registered ownership picture is not clear. One of the applicant investors, Mr. Edwards, says that title to the property is split between the DevCo Dirk Foo, as trustee of another trust called the Hills of Windridge Trust, and various individual and corporate owners of specific lots.

The Hills of Windridge Trust is one of the two newly identified trusts that the monitor asks me to include in these proceedings. There's no evidence about the structure of this trust, other than the fact that Mr. Foo -- an individual -- is believed to be the trustee.

No title search of Fossil Creek lands was put in evidence, so the registered ownership picture for those lands is unknown. The Fossil Creek Trust is the other newly identified trust that the monitor asks to be included in these proceedings. Similarly, there is no evidence about the structure of that trust, other than the fact that Mr. Foo is believed to be the trustee.

So next, the November 14th application.

The applicant investors' application was heard on November 14th. It was essentially ex parte. The materials filed and relied on were about 2,000 pages long. Service was attempted on November 12th by email and courier on various members of the A2A Group, or their directors or representatives. No service ex juris order was sought for the parties outside of Alberta.

Counsel for at least some of the A2A Group appeared and requested an adjournment. The applicant investors opposed to adjournment request, mostly on the basis that there was evidence of an imminent sale of the Angus Manor pending, so that urgent relief was necessary.

The primary complaint of the investors -- which was amply established on the evidence -- is an almost total lack of communication from the A2A Group, and extremely derelict governance. A large number of the companies involved in the investments and the project have been struck from the relevant corporate registries.

The applicant investors also pointed to what they called red flags in the evidence about the misconduct of the A2A Group -- although the vast majority of that was hearsay evidence.

The urgent circumstances of the application that justified the short service was evidence that the applicant investors had discovered a Facebook post indicating that a sale of the Angus Manor property with respect to which they held limited partnership units was imminent, but that none of them had heard about this sale or asked to approve it. There was evidence that investor voting had been called for any November 12th, and were to be tabulated on November 15th. The applicant investors had not been asked to vote.

The record before me on November 21st.

By November 21st, the respondents were represented by counsel in Toronto and Calgary -- although they had only been retained earlier in the week, and were still getting up to speed. The evidence before me was comprised of the affidavits of the five applicant investors from the November 14th application; the monitor's pre-filing report, first report, and supplement to the first report; and three affidavits submitted by the respondents -- two from directors of A2A Group entities, and one from the real estate agent involved in the sale of the Angus Manor lands.

No party asked for an adjournment of the November 21st hearing to cross-examine or for any other reason, despite the fact that there are substantial factual disputes on the evidence; therefore, my ability to assess the credibility of the affiants is limited.

After the hearing, the respondents sent me, on November 22nd, a supplemental affidavit of Mr. Ambrose, in which he provides what he says are the investors' proxies approving the sale of the Angus Manor lands.

On November 25th, the monitor sent a second supplement to its first report, commenting on discrepancies in those proxies, and attaching more correspondence received from UFI owners.

I will now outline the parties' positions.

The monitor asks for an order granting an amended and restated initial order; extending the stay of proceedings to February 28th, 2025; adding the two trusts I have named to the initial order -- that is, the Hills of Windridge Trust and the Fossil Creek Trust -- I will refer to those as the two new trusts; next, the monitor asked that I authorize it to register a copy of the amended and restated initial order on title to the Angus Manor lands in Ontario; increasing the administration charge from 250,000 to 500,000; increasing the interim financing charge from 500,000 to 2 million; attaching all UFIs with those two charges; removing the trustees of the two trusts already included in the initial order and the two new trusts.

The respondents ask that I said aside or stay the initial order, or adjourn the hearing for the following reasons: They say the initial order was effectively granted ex parte, without due process; service of foreign members of A2A Group was invalid because no service ex juris order was obtained, so the Court has no jurisdiction over those parties; the evidence before the Court in the November 14th application was incorrect, misleading, and speculative, and it did not prove malfeasance by the A2A Group; they say the A2A Group is not insolvent; some members of the A2A Group are not properly included in these proceedings; the properties are being marketed and sold for fair market value in arm's length transactions, fully in accordance with the bargained-for rights of all investors, including the applicant investors; and finally, that the applicant investors lacked standing to commence these proceedings, and they represent only a tiny fraction of investors; the rights they are entitled to as investors has not been infringed upon, and their commencement of these proceedings is prejudicing a much larger group of investors who have no notice of these proceedings.

So next, the issues.

The issues I must decide are whether I should extend the initial order; if so, on what terms. And whether I should grant the respondent's application to set aside or stay or adjourn.

Next, my analysis.

I will make some initial observations at the start. First of all, with respect to real-time litigation, this is a genuine case of real-time litigation. The applicant investors brought their application because they had received information indicating that the Angus Manor property was going to be sold imminently, and they had not received prior notice.

The A2A Group's position is that they are in the midst of marketing, selling, and distributing the proceedings of the properties, all of which is being done with arm's-length parties for fair market value, and in accordance with the investors' rights and entitlements. However, they say that the existence of these proceedings is hampering those efforts, and could result in extreme prejudice to the vast majority of investors and UFI owners who did not start these proceedings, and indeed, are unaware of them.

The parties will need ongoing access to the Court to ensure that this matter proceeds in a timely way so that stakeholders' interests are protected, and unwarranted prejudice is avoided or minimized. I will ensure that that happens in the order I am granting today.

Secondly, some comments on the purpose of the CCAA. The CCAA is broad and

remedial legislation that I must interpret in a large and liberal manner. However, there are limits to the *Act*'s flexibility. As its name suggests, the purpose of the *Act* is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay may not be appropriate if the purpose of the proceedings is not to further that fundamental purpose of the *Act*.

And the authority for that proposition is *Cliffs Over Maple Bay* 2008 BCCA 327. That decision must be read with caution because it was decided before the 2009 amendments to the *Act*. However, the principle it stated is still sound. The CCAA is not a statute that exists to serve the purpose of all parties who have disputes with insolvent entities.

As the applicant investors advised the Court on November 14th, this is not a conventional CCAA proceeding. It was not commenced in the way the vast majority of these cases are, by an insolvent debtor entity who needs protection from its creditors to be able to put together a plan.

It was also not commenced by creditors. It was commenced by investors whose rights and entitlements are unclear, based on the evidence before me presently.

The applicant investors' complaints are not that they are owed debts that are not being paid; but instead, that the respondents have completely failed to communicate with them, and that their governance appears to be highly deficient. The initial order effectively supplanted management on day one of this case by giving the monitor very wide-ranging enhanced powers. Two of the three projects covered by the initial order are not in Canada, but are located in Texas.

There is no hint that the applicant investors have any plan for a compromise or arrangement of the debtors, or even a process that would lead to out of the ordinary course sales. They essentially started this action to try to stop sales and to investigate the facts.

I will discuss these issues in more detail later in my decision, but at this point, I want to acknowledge that the concerns raised by the respondents are legitimate, and they cannot be dismissed out of hand. It is possible that the continuation of these proceedings -- while unquestionably driven by the genuine desire to protect investors' interests -- might be stretching the CCAA beyond its proper limits.

Next, my analysis of the issues.

Many of the issues raised in the parties' competing applications overlap, so I will analyze them in the order that seems most logical.

First, jurisdiction and authority.

The applicant investors' service of their November 14th application for the initial order was imperfect, short, and with respect to the Texas LLCs, defective because no service ex juris order was sought. However, there was legitimate urgency to the application, as I have already described.

The respondents now all have substantive notice of these proceedings and are represented by counsel. 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, include the two Texas LLCs. I will address the two new trusts later in this decision.

The standing of the applicant investors.

Section 11 of the CCAA states, quote:

> 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.

That section is silent about who can make an application under the CCAA. Section 11.02(1), which governs applications for initial orders is also silent on who may apply for an initial order, but it repeats the same language:

> On an application in respect of a debtor company.

So there is no prohibition in the CCAA on investors applying for an initial order.

The applicant investors and the monitor have argued that the applicant investors are also creditors because they have contingent claims against the respondent. The basis for this argument seems to be that the amount of money raised with respect to the Angus Manor project exceeds the current proposed purchase price. There are many assumptions built into that chain of reasoning for which there is no supporting evidence.

Based on the evidence that is before me at this time, I am not satisfied that the applicant investors have contingent claims as creditors, but I do not have to decide that issue now.

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.

Next, insolvency.

Section 3(1) of the *Act* states that:

> 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.

There is ample case law for the proposition that affiliates that are not companies, but instead are partnerships, can be included within the group that is covered by the initial order.

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.

However, the respondents say that they are not insolvent because the approximate $12,000 tax liability owed on the Angus Manor lands has been paid, the approximate $1.3 million liability to the Angus Manor bond holders, quotes, "is not an actual liability and is not owed"; and finally, the US $3.8 million judgment was a default judgment. The respondents say that it was not challenged, as it did not pose a risk to any active A2A entities.

Mr. Lind, one of the respondent's affiants, said in his affidavit that this judgment does not effect title to the Windridge property, quote: (as read)

> And this has been confirmed by vigorous title reviews in relation to the ongoing negotiations to sell the Windridge property.

The monitor and the applicant investors agree that the $12,000 property tax bill was paid, although they note that this was only done after the interim order was granted.

The respondents' argument that the $1.3 million bond liability, quote, "Is not an actual

liability," is not supported by the evidence. The evidence they pointed to in the second Angus Manor offering memorandum does establish that the principle and interest on the bonds is not currently due and owing, and will only become owing on the maturity date, which is September 30th, 2026.

It is clear in the current negotiated purchase price for the Angus Manor lands that if that sale closes and those proceeds are brought in, the bonds will not be repaid in full. The bonds are to be repaid pari-passu with the limited partnership investments, and the purchase price from which significant fees are to be deducted, is well below the total amounts to be repaid to the LP unit owners and the bond holders. It is not possible to determine at this time what portion of the bonds would not be repaid.

Similarly, the respondents' assertion that the $3.8 million US judgment does not affect title to the Windridge property is not borne out by the evidence. Mr. Edwards, one of the applicant investors attached an August 2024 title search showing the property registered to the Windridge DevCo -- one of the debtor companies -- the judgment was registered on title as an encumbrance. The respondents do not contest the existence of the judgment, or that it remains unpaid. At the current exchange rate, this debt exceeds $5 million Canadian.

So based on the evidence currently before me, I am satisfied that the respondents are insolvent.

Extending the stay.

Pursuant to Section 11.02(3) of the CCAA, the Court may grant an extension of a stay of proceedings where:

> Circumstances exist that make the order appropriate; and
>
> The applicant satisfies the Court that it has acted and is acting in good faith and with due diligence.

The monitor is the applicant in this come-back application, and there is no question that it is acting in good faith and with due diligence. The real issue here is whether extending the day and permitting this very unusual CCAA proceeding to continue is appropriate in all the circumstances.

The following matters raised by the respondents are among the factors I must consider in deciding whether a stay extension is appropriate.

The applicant investors hold only a very small fraction of the investments in these projects. Their collective investments, including the investments of others that they've been in contact with, and that they describe in their affidavits, appear to amount to the following: First, with respect to Angus Manor, they hold 700 limited partnership units in the Angus Manor limited partnership. The title search discloses that there are 2,300 UFI interests, and the limited partnerships hold 212 -- although Mr. Edwards said this should be 424.

Based on Mr. Edwards' evidence, it seems that the applicant investors speak for about 2.2 percent of the limited partnership unit holders, and an aggregate of about 0.2 interest in the total UFIs. Although, if Mr. Edwards is correct about the miscounting, that may be twice as high, as much as 0.4 percent of the total UFIs.

With respect to Windridge, the applicant investors and those they describe hold 665 trust units in the trust. The respondents say there were 21,615 trust units sold, so the applicant investors speak collectively for about 3.1 percent of the trust beneficiaries.

The limited partnership that is owned by the trust bought 209 UFIs out of a total of 4,412, so the applicant investors speak collectively for about 0.1 percent of the total investors in the Windridge property.

With respect to Fossil Creek, the applicant investors and those they speak for bought 300 trust units in the trust. It's impossible to determine exactly what interest in the Fossil Creek lands that equates to on the evidence that I have. These 300 units likely represent between 1.8 percent of the total limited partnership units, and 1.1 percent of the limited partnership units, depending on whether the minimum or the maximum amount was raised. Mr. Lauzon's evidence suggests that depending on the amount raised, the limited partnership would hold between 209 and 349 UFIs in the land. 1,826 UFIs were sold directly to foreign investors, so it seems likely that the applicant investors probably speak for about 0.18 percent of the total UFIs in the Fossil Creek lands.

This extremely small proportionate interest raises three important considerations -- and maybe more than these three -- but the three I have identified are as follows:

> First, is it appropriate that a process started by these applicant investors should be allowed to continue with the risk that the potentially very large costs of the process will be borne by a much larger group of stakeholders who have not consented and are not even aware that this is happening?
>
> Second, in the overall context of the investments, are these applicant

> investors' rights being infringed? What rights did they bargain for, as extremely small fractional unit owners? Do they have the power to hold up sales if the majority has approved them?
>
> And third, a related question: It is one thing to say your investment is being managed poorly, and that you are not receiving any communications. There are corporate and common law remedies for that kind of wrong. It is quite another thing to say that your extremely fractional interest being ignored entitles to you freeze the totality of the investments and effectively take control of the entities out of the hands of management and directors.

The respondents' evidence is that the Fossil Creek property has been sold, the Angus Manor property is under contract for sale, and negotiations are being held to sell the Windridge property. As I have mentioned, the respondents say that all of these sales or sale processes are arm's-length for fair market value and in accordance with the investors' rights and entitlements. They might be. If they are, it may be difficult for the applicant investors to justify the continuation of these proceedings.

At this time, I do not have enough evidence to definitively decide these issues. The monitor and the applicant investors say this dearth of evidence is because the A2A Group never reported to investors, and since November 14th, have not complied with the provisions in the initial order requiring them to give information to the monitor.

The respondents say that they have not failed to comply and have corresponded with the monitor, but have had very little time to take meaningful steps, as they've been occupied with responding to the application.

I find that it is appropriate to continue the stay, considering these circumstances, but only for a limited time, and only for a limited purpose.

I extend the stay to and including December 18th, 2024. The purpose of this extension is to allow the respondents to provide the monitor with the necessary information to allow the monitor to create a comprehensive report for me and for the other stakeholders, so that we have a proper record, and I can properly decide whether continuation after that date is appropriate; and if so, on what terms.

Based on the respondents' evidence, this relatively short extension will not prejudice any of the existing sales or sale processes. It will also provide what both parties want, and what I need: Time for all of the relevant information to be brought forward.

I will not be overly prescriptive as to the contents of this comprehensive report from the monitor, but I expect that the report will provide a full picture about the following things:

> The respective rights and entitlements of each class of investors, including the investors' rights to approve property sales;
>
> The ownership of the properties;
>
> The value of the properties;
>
> The marketing processes that were conducted or are being conducted for the properties; and.
>
> The investor approval process conducted for any sales, including how investors were notified of sales, what they were told, what opportunities they were given to approve sales, and how sales were approved, including by whom, and under what authority.

I'm adjourning the respondents' application and those parts of monitor's application that I am not deciding today to 10 AM on Wednesday, December 18th , for a half-day hearing before me.

I will now outline the parts of the monitor's application that I am deciding today, because clarity on these points will help the parties decide what they need to do as this matter moves forward.

So first, the monitor's request to extend the charges to attach to the UFIs. The monitor asks that I extend the administration charge and the interim financing charge to attach to the interests of UFI owners in the three projects. As I explained earlier, it appears that the vast majority of each of the three projects is owned directly by many hundreds, or maybe even thousands of foreign purchasers of UFIs.

After the interim order was granted, the monitor implemented a communication plan to try to reach other investors, including these foreign UFI owners. By the time of the hearing on November 21st, the monitor said it had heard from 72 UFI owners. By today, November 25th, it said that had increased to 126 UFI owners.

The monitor included samples of correspondence with those parties in its first and second supplement to its first report. These communications generally raise similar concerns, as those voiced by the applicant investors. Allegations of fraud or misconduct by the A2A Group, and complaints about a lack of disclosure and reporting. However, there was

some reluctance expressed in some of the communications about the costs to the UFI owners of participating in the process.

These 126 investors who have been in touch with the monitor are still a very small fraction of the total group of UFI owners. No party provided me with any precedent authority for the proposition that I can extend charges under the CCAA to property owned by third-party. And the *Act* does not allow that.

In Section 11.2, which deals with interim financing charges, that section authorizes the Court to grant an order declaring that, quote:

> All or part of the company's property is subject to a security or charge.

Section 11.52, which covers administration charges, uses the exact same language.

While Section 11 authorizes me to make any order I see fit, my authority under that section is expressly subject to the restrictions set out in the *Act*. Section 11.2 and Section 11.52 set out very clear restrictions on the property that can be made subject to an administration charge or an interim financing charge. It is only the property of the debtor companies.

In the context of this case, that is the interests held by the debtor companies and their affiliates in each of the three properties, and any other property of those members of A2A Group.

Therefore, the monitor's request to charge the UFI owners' interests is dismissed.

I am going to ensure that it is open to the monitor or to any other party to make an application under the costs allocation provision in the interim order, of the costs of these proceedings shared by UFI owners.

So I will give you a moment, counsel, to pull up the interim order, but I am going to direct that paragraph 55 be amended. Paragraph 55 currently reads: (as read)

> Any interested person may apply to this Court on notice to any other party likely to be affected for an order to allocate the charges amongst the various assets comprising the property.

So what I am going to add at the end is, after "the property": (as read)

> Or the costs of these proceedings among any parties who have benefitted

> from these proceedings.

Is that wording clear? I see a nod, thank you.

So that will be a change in the amended and restated initial order.

As I said, I find that I do not have the power to extend the charges to the UFI owners properties, but I am not precluding anyone from arguing at any appropriate point in the future that if those parties have benefitted from these proceedings, an application can be made to share costs with them.

I am also not precluding the possibility that UFI owners may agree at some point to have their interests attached by the charges. Obviously we are at a very early stage of these proceedings potentially. And if they agree to do so, I would have the authority to make that order.

The next matter I will deal with today is adding the two new trusts to these proceedings. The monitor asks that I add the Hills of Windridge trust and the Fossil Creek trust to these proceedings as affiliates of the debtor companies. It was suggested that I have the authority to do that under Section 11, and that it would be just and convenient to extend the scope of the proceedings to these two trusts to prevent the transfer of the Texas lands, quote: (as read)

> Until such time as the monitor is able to definitively determine which entities are the registered owners.

With respect, that reasoning is backwards. A desire for an order granted because it is considered just or convenient does not create jurisdiction in the Court to grant the order.

This request would require me to order that Mr. Foo -- an individual -- should be treated as a debtor company under the CCAA, or an affiliate of a debtor company. I clearly do not have the authority to do that.

The monitor asked that in the alternative, I grant an order enjoining the sale of the Texas lands. It is equally clear that power to do that is well beyond the jurisdiction of this Court.

I note that the interests of the debtor companies and their affiliates in the properties cannot be sold under the current interim order, except by the monitor, and subject to the limitations in paragraph 15(a) of the interim order. But with respect to the request to extend the initial order to cover the two new trusts, that part of the monitor's application is

dismissed.

Next, removing the trustees from all four trusts. The monitor requested that I remove the trustees of the two trusts that are currently part of these proceedings, and the two new trusts. Obviously I will not be doing that with respect to the two new trusts, because I am not adding them. But I also find it is premature for me to do that with respect to the two trusts that are already included in these proceedings, so I adjourn that part of the monitor's application to 10 AM, on December 15th.

Here is a list of miscellaneous items from the monitor's application that I am dealing with at this time:

> So service, I will deem service of the come-back application good and sufficient.
>
> The request to approve the requested protections for representative counsel and the other requested changes in paragraphs 26 to 33 of the amended and restated initial order are granted.
>
> I do authorize the monitor to register the initial order and/or the amended and restated initial order on title to the Angus Manor lands.
>
> And I do declare that the monitor and representative counsel have the necessary standing to apply to add other debtor companies or affiliates to these proceedings.

The rest of the -- other than the extension of stay, which I am going to get into in a bit more detail now -- the rest of the monitor's application is adjourned to December 18th.

Between now and December 18th, I direct the parties to take the following steps: By 4 PM, this Thursday, November 28th, the monitor will provide a second report to the Court and to the other stakeholders. This will be a very limited purpose report, reporting on two things: The expenditures and accruals to date, broken down as between the service providers; and second, a revised cash-flow statement listing all proposed expenditures to get to and complete the December 18th hearing date, again, broken down as between the service providers. I want a description of what each professional will be doing up to and including December 18th, in keeping with the limited scope of the stay extension I am granting.

Next, we have a hearing this Friday, at 9 AM -- although we can discuss that afterwards, because it looks like the rest of my morning was cleared, which I was not anticipating. It

will be a one-hour hearing. The purpose of that hearing will be based on the second report to decide whether the charges and the limit on the interim loan should be increased for the interim stay extension period to December 18th. What I expect from the monitor is to see a very realistic and prudent cash flow.

As I will make clear, the monitors and its counsel's primary task over the next month will be corresponding with the respondents and preparing the comprehensive report I have requested for the December 18th hearing. Other than that, the monitor should only be carrying out the tasks that it is empowered to carry out under the initial order that are necessary.

Same is true for representative counsel. Obviously they will be communicating with their respective groups of investors, and all of the professionals will need to prepare for and attend the November 29th and December 18th hearings. But beyond what I have described, only absolutely necessary steps should be taken.

If I am reading the first report correctly, it appears that the interim lender has advanced $500,000, of which 378,000 has gone to the monitor. The balance are fees and an interest reserve. Professional fees to November 22nd were estimated to be $309,000. Very close scrutiny of the cash flow is necessary at this time, in my view, because I remain unconvinced that a long and comprehensive stay extension is warranted, bringing with it what would be very substantial fees, projected in the first report, that would be borne by all the investors.

My dismissal of the monitor's request to extend the charges to the UFIs will be something that the monitor will have to discuss with the interim lender between now and Thursday. The monitor will also have to do the same with its US counsel, so that it can give me, and so that it has an understanding of what steps will be necessary this a Chapter 15 proceedings, and what possibly could be delayed in those proceedings between now and December 18th.

And as I said, at the end of the decision today, I can answer any questions you have about these details, but I think the parties understand the overall gist of my direction.

I will not be approving a $2 million cash-flow on Friday, and I expect everybody to work together in good faith to help the monitor come up with the most modest and realistic cash-flow possible.

Turning to the respondents, I am specifically directing them to provide to the monitor the information that the monitor will need to prepare the comprehensive report I am expecting for December 18th. It is most efficient to describe the respondents' information

obligations with reference to Appendix C from the first report, which is the November 15th letter that Mr. Oliver sent to the respondents' former counsel, but which all the parties now have notice of, because it was included in the report. I am just going to pull that letter up.

So this information, I will get into a bit more detail, this information has, Mr. Jukes, has to be provided by the respondents by 4 PM on Friday, December 6th, at the latest. First of all, if you look at that Appendix C, that is the November 15th letter, Schedule A is the group to which the information requests relate. I am directing that the two new trusts be added to that list.

The respondents put information in evidence about those trusts. It is obvious from the scant evidence that I have that those trusts are involved at the very least in the holding of title to the Texas lands. So they will be added to this list, and they will be covered by the information requests.

I think the entity in number 9 -- which says Hills of Windridge Trust -- I think that is supposed to be Hills of Windridge A2A Trust, that is one of the two trusts currently in the proceedings. So what the respondents have to provide by the deadline I have stated is all of the corporate records -- that is the first section -- turning now to Schedule B in that letter; the accounting records in the second section.

With respect to current bank accounts, the respondents have to provide a daily update to the monitor so that the monitor can see if balances are changing in those current accounts.

The investor records in the third section have to be provided.

The contracts, all that information in the fourth section.

The contacts in the fifth section.

And then the other records in the final section.

I am adding some specific items to that other section, so take note of this, Mr. Jukes -- and they may be covered, but I am stating them in more detail, because these have to be included in the monitor's report: So all title documents for the properties; all documents related to the marketing of the properties, data rooms, or due diligence materials related to the marketing of the properties; any valuation or appraisal information for the properties in any form; and all information about the investor approval process conducted for any sales, including what I mentioned before -- how investors were notified of sales, what they were told about those sales, what opportunities they were given to approve

sales, how sales were approved, including who provided those approvals and under what authority.

So I want to be clear about what this production process will look like. I was encouraged to see in the monitor's second supplement to its first report that there has been contact, and I think the respondents appear to be that they initiated conversations to hold a meeting tomorrow. I expect this production process to be a dialogue between the respondents and the monitor that should start immediately. It should be a steady flow of information. This will not be silence until 3:59 PM, on December 6th, and then a large data dump. That will not allow the monitor to prepare its report, which will be a sizable undertaking.

The respondents' obligation is not limited to producing documents that exist. If the monitor has questions within these topics or areas I have described, it can ask them, and the respondents must respond in correspondence.

There may be legitimate disputes about the scope of what monitor is entitled to receive. I would expect any such disputes to be resolved on the side of inclusion, not exclusion. There may be legitimate disputes about whether some materials that the monitor wants are confidential. The respondents can identify as confidential any information they provide, but they cannot refuse to send it on that basis. The only basis on which they can refuse to send information is if it is privileged. What I mean is if it is covered by the topics I have outlined, they have to produce it, except for privileged information.

For any information the respondents do describe or identify as confidential, the monitor will keep it confidential, and will only include it in a confidential appendix to its report. And if there is an argument about confidentiality, we can have that on December 18th.

So I expect in this disclosure of information, and then in the subsequent report, a full picture of all the topics I have described.

All stakeholders, including the respondents, are under the express duty of good faith set out in Section 18.6 of the *Act*. And I expect the respondents to comply with this order by cooperating with the monitor fully and completely.

Serious allegations have been raised by the applicant investors and others, and the respondents now have an opportunity to demonstrate that as they have argued, everything is in order. And a failure by them to comply with this order in good faith and to provide the necessary materials would be a factor that I would consider very seriously on December 18th, especially since the stay remedy they have requested, I will note, is an equitable remedy. That will be well known to Mr. Jukes.

And finally, the monitor will provide to the Court and to the other parties what I have been calling its comprehensive report, and any confidential supplement, by 4 PM on Friday, December 13th.

The respondents, if they want to file any additional evidence for December 18th, they can do so by that same deadline -- 4 PM on Friday, December 13th.

And if parties want to file briefs in advance of the December 18th hearing, they can do that by Monday, 4 PM on Monday, December 16th.

Discussion

THE COURT: So that was a lot, and I anticipate that parties may have questions about that. So I will open the floor up to anyone who has questions. Do I see Mr. Oliver? The screen shots I am seeing are very small, but has Mr. Oliver joined us perhaps?

MR. OLIVER: I have, yes. My other hearing finished, thank you, Sir.

THE COURT: Okay. I do not know what you heard of that, or when you came in, Mr. Oliver, but there is fairly, what I hope are fairly clear directions to the monitor on the limited purpose of this extension, and then a fairly sizable undertaking to produce a comprehensive report so I have the necessary evidence.

MR. OLIVER: I think I got it all, Sir. Thank you. And if not, I think my colleagues will have as well.

THE COURT: Okay.

Any questions from anyone else?

MR. JUKES: Sir, this is more of a mundane procedural type question, but in terms of getting a transcript, I guess firstly, we would need some courtroom information to do that; but secondly, is there any way that we could get some kind of note to the transcript management to expedite here? I took as many of these notes as I could, but my hand is maybe not as quick as some on the note-taking.

THE COURT: Sure. First of all, we are in Courtroom 1003, so that is the courtroom you need to specify to order a transcript.

You know, I think what I will do is I read in pretty detailed notes. I think I can probably put together -- do not treat this as definitive, but I think it will probably be the most efficient way for everyone to work together to draft this Court order and to understand what the parties' obligations -- I will put together at least a point-form in an email. I will send it to my assistant, and she will send it out to everyone this afternoon. So you can see what I think are the directions with respect to what is going to happen next.

MR. OLIVER: Thank you, Sir.

One question I had, if I may, was for the hearing on the 18th of December, just in the interest of sort of perfecting materials correctly, would you be looking for, for example, an application for advice and direction from the monitor with this information as well, with the information that you asked for, as well as recommendations with respect to the path forward? Would that be of assistance?

THE COURT: Well, yes, the way I am viewing December 18th is an adjournment of your larger stay extension application -- other than the specific things I dealt with today -- an adjournment of that application and an adjournment of Mr. Jukes' application. If we are going to be a month forward into the future, if you think other relief is required, or you need to amend that existing application, you are certainly free to do that. The deadline for that should probably be -- well, send it out as soon as you can, but no later than that Friday afternoon deadline for your report.

MR. OLIVER: Thank you.

THE COURT: But the more notice the respondents certainly have, if you are seeking different relief or advice and directions on different matters, the earlier the better. You can make that application returnable at that time.

So yes, this Friday, I imposed hearing dates on all of you. That is just a practical reality, because looking at my schedule, there are not many days. Given the real-time nature of this, and given that the commercial list is fully booked until well into January, you are not going to get time in front of other Judges. So I am jamming you with those dates and times.

As I said, I thought I was sitting for the whole morning this coming Friday. It looks like I may not be. So if 9 AM is incredibly onerous or impossible for somebody, we could talk about moving that to later on Friday morning.

Okay, hearing nothing.

Similarly, for December 18th. That is pretty much the only time I would have a half-day open between now and the holiday break. If there is violent opposition to doing that in the morning, we could move that to 2 PM, but I think given the volume of the materials that people will have, and hopefully the amount of dialogue that will occur between now and then, I think a half-day is sufficient to argue that motion, those motions.

Okay. Assuming people have access to their calendars, and no one is screaming about 10 AM, we will do it at 10 AM on December 18th.

And, Madam Clerk, you have both of those dates. We will have a physical courtroom as well as Webex?

THE COURT CLERK: Yes.

THE COURT: Anything else arising that anyone can think of? As I said, the first thing I will do when I go upstairs is put together this email that you will get from my assistant, hopefully helping you with the process of drafting the order and understanding where this is going.

MR. LEE: My Lord, Mr. Jukes has indicated to me that he will have very limited time in December. I want to make sure he will be available on December 18th.

THE COURT: Okay.

MR. JUKES: Yes, I can make that work, yes.

MR. LEE: Great, thank you.

THE COURT: Okay. Speak now or forever hold your peace.

Okay. Thank you, all. As I say, stay tuned for that email a little later this afternoon, and then if you have trouble, obviously, if you have trouble settling the terms of the order between now and Friday, we can do it on Friday. But I think with what I have said today, and with the email I will send shortly, I think that gives everyone enough detail to know what they need to be doing in the short-term.

Thank you, all, for attending. Good afternoon.

PROCEEDINGS ADJOURNED UNTIL 9:00 AM, NOVEMBER 29, 2024

Certificate of Record

I, India Cyr, certify that this recording is the record made of the evidence in the proceedings in the Court of King's Bench, held in Courtroom 1003, at Calgary, Alberta, on the 25th day of November, 2024, and that I was the court official in charge of the sound-recording machine at all times.

Certificate of Transcript

I, J. Aubé, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

690512 NB Inc.
Order Number: TDS-1073424
Dated: December 12, 2024

TAB 2

Action No.: 2401-15969
E-File Name: CVK24ANGUS
Appeal No.: _____

IN THE COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF 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. et al

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P R O C E E D I N G S

Calgary, Alberta
November 14, 2024

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R. Gurofsky	For M. Edwards, P. Lauzon, I. Brousseau, P. Wedlund, and B. Richards
K. M. Wong	For M. Edwards, P. Lauzon, I. Brousseau, P. Wedlund, and B. Richards
N. Ramessar (remote appearance)	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., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc., and A2A Capital Services Canada Inc.
T. Adetomiwa (remote appearance)	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., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc., and A2A Capital Services Canada Inc.
J. L. Oliver	For Alvarez & Marsal Canada Inc.
C. McGiverin	Court Clerk

THE COURT: Good afternoon, everyone. Please be seated. Let me just find your materials, because I just had an application and I have a giant stack from that.

MS. GUROFSKY: Thank you.

THE COURT: All right. I think I have it.

Submissions by Ms. Gurofsky

MS. GUROFSKY: Good afternoon, Sir. For the record, it's Robyn Gurofsky from Fasken. I'm here with my associate, Ms. Wong, and we are here on behalf of the applicants, the -- we'll call them a group of Canadian investors.

THE COURT: All right.

MS. GUROFSKY: In the courtroom, as well, is Mr. Oliver. He is counsel to the proposed Monitor. Mr. Konowalchuk from A&M is here, as well. He is from the proposed Monitor's firm. And on the line is Mr. Ramessar from the Carscallen firm, and I believe he's on for the companies, but he can correct me if I'm wrong. Mr. Gorman is also on the line and he is observing today. We've proposed him as rep counsel for the offshore investors.

THE COURT: All right.

MS. GUROFSKY: And there he is. Hello, Mr. Gorman. And I see Mr. Murphy on the phone. Mr. Murphy is a consultant who was engaged to help the Canadian investors, or a group of Canadian investors, look for information pertaining to these debtor companies and their projects in the absence thereof.

There is an application before you today for an initial order under the CCAA. We've sought alternative relief by way of a receivership, but I intend to focus my submissions on the CCAA relief. We believe that is appropriate in the circumstances, given all of the underlying circumstances. It's not a conventional application by any means. We recognize that, but I would submit, Sir, this is not a set of conventional circumstances that are before you.

THE COURT: All right.

MS. GUROFSKY: I believe Mr. Ramessar will be asking for an adjournment. We oppose that adjournment. I will speak to service very briefly. The application and the five affidavits were served on the service list created this past Tuesday. So there have been 2 days of notice. We had intended on coming before the Court. We had time booked, actually, in December and then there was some information discovered, which I will get into, that made this application urgent --

THE COURT: Right.

MS. GUROFSKY: -- due to concerns about dissipation of assets.

We have an affidavit of service that was submitted for filing, an affidavit of Kim Picard. It shows that we've served notice of the application on all of the respondent companies at various addresses, including some email addresses, at registered offices.

THE COURT: M-hm.

MS. GUROFSKY: Some addresses in Singapore, some in Texas. With respect to addresses that we only had couriers for, we sent a letter advising of the application and asking them to reach out to contact us for information and materials. For all others, including email, we sent a link to the materials, given they were large. We served the Canada Revenue Agency. We served the Office of the Superintendent of Bankruptcy, as they have desired of late, including in CCAA applications. And we served the corporate registries in Ontario, Alberta, and federally, where key corporations' respondents have been struck from the record.

THE COURT: M-hm.

MS. GUROFSKY: In addition, we served the Crown in right of Ontario, because they had a PPR registration against the respondent Serene, Serene Country Homes. That registration -- that registration search was a few months old. We reviewed fresh registrations. That actually -- that interest has been discharged. We served them but they no longer have an interest. And that is set out in the proposed Monitor's report.

I just wanted to speak very briefly about the circumstances of why we're here before we get into the adjournment, if that's okay with the Court.

THE COURT: Yes.

MS. GUROFSKY: Thank you. So as I indicated, the application is being made by a handful of investors. They are Canadian investors of the A2A Group broadly, which is comprised of a number of real estate projects, three of which form the subject of this application: that is Angus Manor, which is a project in Ontario, Trails of Fossil Creek, and Windridge, each of which are in Fort Worth, Texas. And what the A2A Group --

THE COURT: Sorry, Windridge, and what was the other one?

MS. GUROFSKY: Windridge and Fossil Creek.

THE COURT: M-hm.

MS. GUROFSKY: It's Hills of Windridge and Trails of Fossil Creek, but for the purposes of today, I'll refer to them as Fossil Creek and Windridge.

THE COURT: And the Alberta connection is what?

MS. GUROFSKY: The companies are all Alberta entities.

THE COURT: Okay.

MS. GUROFSKY: The OMs appear with Alberta and Calgary addresses. There are directors who are -- have Calgary addresses. So that -- that's the connection. The intention is that if the order is granted, we would have to seek recognition in the US --

THE COURT: So a chapter 15, right?

MS. GUROFSKY: That's right.

THE COURT: Yeah.

MS. GUROFSKY: So the A2A Group operates primarily, at least with respect to these projects, in the exempt securities market. I don't know if you're familiar with that, Sir. It's --

THE COURT: Vaguely.

MS. GUROFSKY: Okay. Very broadly, the exempt market allows companies to raise money from broad groups of investors without providing prospectus-level disclosure.

THE COURT: These are the sophisticated investors?

MS. GUROFSKY: Accredited investors. That's right.

THE COURT: Accredited. Sorry.

MS. GUROFSKY: That's right.

THE COURT: Yeah.

MS. GUROFSKY: It's similar to the *Walton* model. *Walton* was before this court. We provided the initial --

THE COURT: Yes, they were.

MS. GUROFSKY: -- order. Land banking companies that raises money from investors, then has a development company owned by, let's say, the principal who buys the land and then sells interest or the land itself to the investment vehicle. In this case, the investment vehicle consists of Canadian investors buying limited partnership units or, in another case, bonds, debt instruments, or in the case of the US entities, trust units, who then in turn buy the LP units. And it's the LPs and the GPs, the GPs on behalf of the LPs, who are registered on title with what's called an undivided fractional interest of land. So they might have 60 out of 2,300 interests in the land undivided. Of -- of note, these GPs happen to be struck from the corporate registry.

THE COURT: M-hm.

MS. GUROFSKY: The -- in addition to the Canadian investors, there are a significant number of what we call offshore investors. They appear to be primarily from Asia. And those investors hold direct UFIs, so direct undivided fractional interests in the land.

THE COURT: And so those are the folks that you propose to be represented by Mr. Gorman --

MS. GUROFSKY: That's right.

THE COURT: -- and presumably that's because they have a slightly different interest, because they're offshore and they hold a slightly different instrument?

MS. GUROFSKY: That's right.

THE COURT: Okay.

MS. GUROFSKY: That's the proposal. The Canadian investors are retail investors. The Asian investors appear to be, as well, but I can speak -- I can't speak to those. I can speak to the Canadian investors. We've filed representative affidavits. For example, Isabelle Brousseau is an 85 year old retired teacher who invested in Angus Manor for $15,000. You've got Brian Richards, who was in the Royal Canadian Air Force. He's 84 years old, worked at the phone company and CBC, and he invested $10,000 in Fossil

Creek. These are the types of investors who invested in these projects. We have affidavits from each of Paul Lauzon and Michael Edwards. They were dealer representatives with an entity called Pinnacle Wealth. Pinnacle Wealth was one of the brokerages who sold the A2A projects, and they each invested their own money and caused their family to invest in Windridge and Angus Manor.

Sir, there's been a number of exempt market real estate schemes that have come through these courts, CCAA proceedings. Some have been liquidated, some have been restructured under the CCAA. The *Harvest* group of companies is an example where we restructured the debt and -- and recreated -- or created entities that were handed back to the investors. So that was -- the CCAA was used as a tool to restructure these investments. The principal of that company happens to be serving 4 years in prison in respect of one of those projects.

THE COURT: M-hm.

MS. GUROFSKY: So there's been a number of these. I would submit, Sir, in the number that I've been involved in, I have never seen this level of dereliction of duty that we -- that we have here, where there is a complete disregard for the interests of the investors. This includes investors never once having seen financial statements since the offering, developments that have floundered and not been advanced in the manner advertised. There are real questions that are set out in Mr. Edwards' affidavit by the Angus investors about whether the LPs were actually given the correct number of UFIs in the property. They appear to be less than what they should have received, based on the information on land titles and the OMs. We have exempt market dealers trying to reach out for information and are completely unsuccessful.

And I think Exhibit C of the Lauzon affidavit is worth mentioning. It's a letter from Pinnacle Wealth from March of this year, where it says -- to -- to the Windridge investors, and in that letter it says -- and Mr. Lauzon received this letter as an investor in Windridge himself, Olympia Trust Company, who holds some of these interests on behalf of investors, has written down the Windridge investment to nil. Why? Because they have not received any response to their multiple requests for information from the companies. Pinnacle also says: (as read)

> We have been trying also to reach out to management multiple times and we have not received a response. We will continue to try and do so and will let you know if anything has changed.

Here we are. We have found online references to multiple claims filed in the United States by what appear to be offshore investors in respect of the Windridge and Fossil Creek projects, including claims against Dirk Foo and Joseph Attrux, who are principals of these

companies. There's a fraud judgment in the amount of just over $5 million Canadian registered on title to the Windridge lands. There are multiple reports of fraudulent activity online, failure to advance the developments, allegations of misappropriation of funds.

One claim in the US that we've attached to Mr. Edwards' affidavit involves a request for an accounting because of concerns about misappropriation. Now, we don't know where these claims are at. We've been trying to pull different things. We don't know how many there are. We haven't done a complete search yet, but they're out there.

There is an investor alert on the Singapore Monetary Authority website that's referenced in the prefiling report of the proposed Monitor. Now, the A2A parent company is a Singapore company who are not -- not party to these proceedings, but it's the parent company. There's an investor alert on that Monetary Authority website, indicating that A2A in Singapore was making offers of investment or offers of units in an investment scheme wrongly perceived to be authorized or regulated by the Monetary Authority. It is not regulated by the Monetary Authority. So there's an alert out there.

So there's -- we have a lot of information pulled from various sources and searches online, but nothing from the companies themselves or management, which raises a lot of red flags. Except we hear from management, one member of management, on Tuesday, after being served with an application. So it took the investors the effort of having to engage consultants, legal counsel, and do the work of this application, serving it, to get a response.

So I mentioned, Sir, this is urgent. Why is it urgent? Well, recently there was a discovery by one of the consultants on a Facebook page for disgruntled investors that a notice has gone out regarding the imminent sale of the Angus Manor Park lands. That's the lands in Ontario. The notice is interesting. It says there will be a special resolution that needs to be voted on by co-owners. The Canadian investors have not received any notice of this sale. Now, they're not directly on title, but the GPs are who are struck from the corporate registry. They're on title. The limited partners presumably need to direct the GP in the vote. You would think they would know about this sale.

Mr. Ambrose called me on Tuesday when he received notice of the application. He says: (as read)

> I'm confused, because we've got pending sales actually of all three projects and payout is imminent.

Now, we have no knowledge of any pending sale in Windridge or Fossil -- or Fossil Creek. We have the notice of sale on Angus Manor.

I want to talk about this -- this idea of pending sale on Fossil Creek and Windridge, because you'll -- in the materials, in the Edwards affidavit is a claim, and according to one of these claims -- and it's an allegation, I don't know where it sits, but it's an allegation that Mr. Foo had advised investors of Fossil Creek and Windridge that a large, successful bitcoin operation was going to help take out investors. That turned out to be a scam, as well. Parties were arrested in China in connection with that scam. Mr. Foo also advised that he was selling developed lots to third parties in Windridge. So they'd build homes, sell the lots to third parties, and discharge those interests. The allegation is that ultimately the lands were -- the lots were never developed, they were sold to companies that appear to be related to Mr. Foo, and there's been no accounting of the funds.

Here's what we've been able to glean about the pending Angus sale from the Facebook page. It's a $14 million purchase price.

THE COURT: M-hm.

MS. GUROFSKY: The -- the notice of sale is at, for the record, Exhibit 39 to the Edwards affidavit. So it's a $14 million purchase price. It's some sort of VTB arrangement, although there's no details on the security that's to be taken, with about 80 percent of the purchase price being paid in 2029. There's approximately $3 million in fees that are to be taken off the sale.

THE COURT: M-hm.

MS. GUROFSKY: And interestingly enough, the deposit is $3 million. So the deposit gets paid at closing and in 2029, the rest of the money gets paid. We don't know what the security is. We also don't know who the purchaser is. And -- and so that's problematic, given these other claims that have been made in the US. So when Mr. Ambrose says, Payout is imminent, I don't -- it doesn't appear to be imminent on Angus Manor, but the sale and the transfer of the lands may be imminent.

Now, the sale notice says there is a 60 day due diligence period, but we've not seen any agreement. We don't know who this party is. And so when you receive this information in a vacuum, with everything else that going on -- everything else that's going on, the red flags are -- are waving high. This is why we're opposed to an adjournment. We're looking for a transparent process where assets can be preserved. We have concerns about the very real potential for immediate dissipation of assets and the harm that can be caused in an interim period. So yes, the representatives of the company are here now, but they haven't been for the past 6-plus years.

So I think I'll pause there.

THE COURT: Before you pause --

MS. GUROFSKY: Yes.

THE COURT: -- let me ask --

MS. GUROFSKY: Yes.

THE COURT: -- why CCAA --

MS. GUROFSKY: Okay.

THE COURT: -- and not a receivership?

MS. GUROFSKY: That's -- that's a good question. We say the CCAA is appropriate. We've -- we're seeking receivership in the alternative, but we think the CCAA is appropriate because it's broad remedial legislation. It's concerned not only with the company but its stakeholders. Here there are no secured creditors that appear to exist on -- we've done searches in Alberta and Ontario. There's no secured creditors.

THE COURT: M-hm.

MS. GUROFSKY: We have the bond debt, we have the judgment debt. There may be other unsecureds and we need to understand what Fossil Creek looks like, because we don't have insight into that yet, but in Canada, there's no secureds. What we have are bond holders and LP unit holders who are pari passu to one another, oddly enough, according to the OMs. And so this would be a circumstance where, under section 6 of the CCAA, there would -- we would anticipate if the assets are still there, would be -- there would be distributions or value to these parties who are stakeholders, and so they would participate in a vote. It would be one of those circumstances where the Court would say, Yes, these parties have standing to vote under section 6 of the CCAA. We think, like the other real estate investment schemes we've seen before, there is a restructuring opportunity. There may be a liquidation. Both things can be accomplished under the CCAA. It's broad remedial legislation that is flexible to accommodate both scenarios.

THE COURT: I mean, right now you don't know whether it's a restructuring or a liquidating CCAA.

MS. GUROFSKY: We don't know.

THE COURT: Time will tell.

MS. GUROFSKY: Time will tell. Nor do we need to know at the --

THE COURT: Yeah.

MS. GUROFSKY: -- initial application.

THE COURT: Yeah.

MS. GUROFSKY: Judicial discretion under the CCAA can be exercised in furtherance of the CCAA's objectives and purposes, which in many cases is to maximize value for stakeholders, and particularly where those businesses have ceased carrying on business, which we don't know if that's the case here. We would surmise. And -- and that's talked about in the *Aquadis* case that -- that's in our brief. We talk about the *Century Services* case and Justice Deschamps' quote from that decision where there's -- CCAA decisions are based on discretionary grants of jurisdiction, often made in - I like this - the hothouse of real-time litigation, and which has evolved to meet both business needs and social needs. And we have both here, given the investors that we're dealing with.

So we also say that the federal nature of the CCAA militates in favour of -- of using it as a tool here, because we've got lands in Ontario. You could grant a receivership order under the *Judicature Act*. It would require the additional step of going to Ontario to have that order recognized there, and then what we would likely have is the receiver applying to convert the proceedings to a CCAA to have more flexibility in outcomes anyway. And we also say the test for CCAA has been met. It's not conventional. We -- we recognize that, but we have the statutory test of the 5 million of debt. We believe the test -- the solvency test has been met because the evidence demonstrates that the companies are not meeting their obligations. We have property taxes from 2023, small amounts in Ontario. We have the judgment that has been registered on title for 4 years in the US. So we say obligations are not being met. If there have been sales of lots, certainly the investors in Canada have not received proceeds of those.

And so the strict 5 million and solvency tests are met here. We also talk about, in our brief, standing and standing to bring this application. Creditors do have standing. That's not contentious. We've cited *Miniso* and *Great Basin Holdings* (sic). That's at paragraphs 58 to 60 of our brief. We also talk about and submit that the applicants in these circumstances have standing, given they have contingent claims. I think we can make out a case for that based on the -- the litigation that's transpired in the US, the fact that there's been no response over the last at least 6 years to requests for information, no financial statements.

So they have claims, and the unique circumstances of this case where there are no secured creditors. This isn't, you know, where there's banks or other bond -- secured bond debt standing in front of them. They are the stakeholders here.

So we submit that the applicant creditors have standing to bring the application. And we've cited the *Abitibi* decision to talk about contingent claims. You're nodding. I don't think I need to go into that.

So we say those are the reasons why it makes sense here to pursue the CCAA, but of course there is other relief in the alternative sought if the Court has trouble with any of -- exercising its discretion in this manner.

THE COURT: Okay. Thank you very much. Mr. Ramessar?

Submissions by Mr. Ramessar

MR. RAMESSAR: Thank you, My Lord. Ramessar, first initial N. I'm here with my associate, Tolu Adetomiwa, both from Carscallen LLP. Sir, I apologize for appearing on Webex. I didn't realize we were applying in person today, otherwise I would have ran down to the courthouse, and really that shows how little time we've had to respond to these materials. I heard about this file at 6:30 PM on Tuesday night and got retained on Wednesday morning. We were served with over 1,800 pages of applications, affidavits, briefs, and a Monitor's report, all of which largely say the same thing over and over, to the extent that I can tell. A lot of internet searches, a lot of conclusions drawn from -- from foreign jurisdictions to come together to weave this case to come before you and asking for unusual relief of CCAA proceedings. We intend to defend this application and we're looking for an adjournment to properly parse these materials and come up with a fulsome response to them. It's obvious that my friend had weeks to prepare these materials before they came to us.

Now, Sir, it's important to note, you know, that my friend represents five -- five investors. In Angus Manor, and this is what I've heard from my client, and it'll have to come in affidavit evidence eventually, there's 587 investors that are involved in that limited partnership. So we're talking about less than 5 percent of the total investment base are these applicants before you. In the Windridge project, there's 1,606 investors, and these investors that they're -- that we're dealing with today are owed 26,000 out of a $26.4 million land claim. Fossil Creek, only one of the -- one of the applicants is involved in that enterprise here today, for a total investment of $10,000, when there's 817 other investors involved. There's a significant amount of interests at play here that are going to be affected by this Court's decision. Specifically, if you look at title to the Ontario property, the Angus Manor property, I think that's at Exhibit 27 of my friend's Edwards affidavit, you'll see

that there's 14 pages of title holders on that title to land. My friend picks out that one of the GPs is struck for failing to file annual returns. That doesn't deal with all of the other 14 pages of title holders that aren't in the style of cause of this hearing and may not be subject to any order of this Court.

You know, quite frankly, our position is going to be that we're not insolvent. There's this land in Ontario, and I'll get to the pending offer, the conditional offer that my friend is using Facebook evidence to try to make submissions on, but the fact is that this land is unencumbered, it's remained in the name of the limited partnership since the formation, and nothing has changed. So there's this property that's sitting there with all of these title holders and no -- no financial encumbrances against it. If there was going to be bad behaviour in transferring land, that would have happened a long time -- a long time ago.

Now, you heard my friend mention an offer. There is a conditional offer on the land for $14 million. The conditions expire on November 20th and it's their intention to call an extraordinary meeting of all of the investors with proper notice so that a vote with a scrutineer can occur on whether the investment should be sold. Now, I can't speak to the -- the veracity of the -- the order or, you know, how much due -- or the offer or how much work went into generating it. I just simply haven't gotten that far with my client yet --

THE COURT: Well, hold --

MR. RAMESSAR: -- to be able to give the Court --

THE COURT: Hold on a second --

MR. RAMESSAR: -- this information.

THE COURT: -- Mr. Ramessar. Conditional offer expires on November 20th, which is next Wednesday. When is this investor meeting going to happen?

MR. RAMESSAR: Well, it's a conditional offer, so conditions would be removed, and at that point the meeting would be called after that.

MS. GUROFSKY: That's not what the notice says.

MR. RAMESSAR: Well, I don't know what that notice is, with due respect to my friend. That's a Facebook screenshot. I haven't had a chance to review that with my client to get what their evidence is on it.

There -- the circumstances of urgency here, Sir, simply don't exist. If this matter was really

urgent, what my friend should have done was bring some sort of oppression application in Ontario and get an attachment order, not come to an Alberta court and ask that a federal Monitor be appointed that affects all of these interests. And maybe that will be the Court's eventual decision anyways, but the fact is, is that 2 days notice to respond to this substantive application just simply isn't enough. And it's -- it just offends the principles of fairness. There will be evidence that I understand we will be able to give to rebut some or all of the points that are being made by my friend here today. We just simply need the time to do it. And my friend has also advanced a significant legal argument on the CCAA. We're entitled to respond to that and put argument forward before this Court on why it should or should not apply. We're just not being given any time to actually do that.

And so my -- my friend talks about the urgency of this and how this Facebook post changed her timeline from December to -- to now November with 2 days notice. It quite simply is just unfair, Sir. So we're applying today for an adjournment. We think that this should be put into the new year to allow time to get an affidavit together, to complete any cross-examinations that are required, and to file a brief in response to my friend's application.

THE COURT: The new year?

MR. RAMESSAR: Well, I was looking at the commercial list availability and that's when the next availabilities are. So we certainly can move faster than that, but I did want to be mindful of the Court's schedule, as well.

THE COURT: Okay. Set aside your mindfulness of the schedule. How fast could you be ready?

MR. RAMESSAR: Sir, I would think that we would need 2 weeks to deal with this. If we could come back at the end of November, we would have enough time to get an affidavit together and respond to my friend's position. Now, subject to everybody's availability, I will make myself available on the last week of November.

THE COURT: Okay. And I'm not saying I'm going to do that, but what kind of comfort could you give the Court that there aren't going to be shenanigans?

MR. RAMESSAR: Yeah. Well, and I was thinking about that today, Sir, and I would recommend that you look at Exhibit 27 of the affidavit to see what the title is of these -- of this property. I don't think that mechanically you could gather that many signatures on a -- on a transfer of land between now and then, but obviously, Sir, I'm going to be -- I'm going to be honest. I appear in front of you. I met this client yesterday and I heard from them. I've seen the materials. The paperwork seems to be in order, but that's

the extent of what I can tell you today.

THE COURT: Would your clients consent to an injunction preventing them from selling the properties and otherwise dissipating assets?

MR. RAMESSAR: Well, a time-limited injunction to the conclusion of our proceedings. Is that what you're suggesting?

THE COURT: Well, to cover the period of the adjournment.

MR. RAMESSAR: Sir, that may be a great solution to this situation.

THE COURT: Okay. Well, let me hear from Ms. Gurofsky.

Submissions by Ms. Gurofsky (Reply)

MS. GUROFSKY: So two points on that, Sir, and perhaps Mr. Ramessar's client didn't advise him, but according to the notice, which is at Exhibit 39 of the Edwards affidavit --

THE COURT: So let me --

MS. GUROFSKY: Yeah.

THE COURT: -- pull that up. Okay. Is it Edwards?

MS. GUROFSKY: Edwards affidavit --

THE COURT: Yeah.

MS. GUROFSKY: -- Exhibit 39, which is in -- I don't know if you have the physical copies, but --

THE COURT: No, I don't.

MS. GUROFSKY: Or it looks like you have it online.

THE COURT: I've got the electronic. This is the sale notice.

MS. GUROFSKY: Yes, that was posted on Facebook. According to this notice -- let me know when you're there.

THE COURT: I'm there.

MS. GUROFSKY: Okay. According to this notice, proxies were due from the investors to the angusmanorpark@a2aglobal.com email address by November 24 -- or, pardon me, November 12th --

THE COURT: Yeah.

MS. GUROFSKY: -- 2024. Votes are being tabulated November 13th to 15th. And November 15th, tomorrow, there will be a passing of a special resolution, assuming the votes pass, and the purchaser will be notified. So just --

THE COURT: So tomorrow.

MS. GUROFSKY: Tomorrow. Tomorrow, in advance, of course, of the condition date, which makes sense.

The other point I'm going to make is that -- that according to the materials, the A2A Trust companies and the facilitator, who is represented by -- or led by Mr. Foo, has control and the ability to vote on behalf of the offshore investors, and certainly no one has solicited the advice of the Canadian investors. So if that is in fact true, while you would normally look at the title and see however many pages, 14 pages, a long list of parties on title, if it's so easy as a signature by Mr. Foo, the transfer can be effected easily. So at the very least, a form of injunctive relief is necessary that we could at least register on title.

I would also submit this, Sir. We are seeking an initial order today. It's preliminary relief under the CCAA provisions with a 10 day comeback. We have time in front of Justice Simard on the 21st for the comeback hearing, and at that point parties are at liberty to make any submissions to revise the order, withdraw the order, oppose the order. They are welcome to do that. And so given the plethora of evidence here, I would submit it's not inappropriate to grant the relief at least of the initial order today, with the ability of Mr. Ramessar and his clients to respond properly at the comeback, which is often what happens. And, you know, this request of end of November or early -- early next year, I mean, this is real-time litigation, unfortunately. I wish I had the benefit of weeks to prepare for this. I have not. There are urgent circumstances here.

THE COURT: You said November 21st is the comeback?

MS. GUROFSKY: That's right.

THE COURT: Okay.

MS. GUROFSKY: And I hope I said Justice Simard.

THE COURT: You did.

MS. GUROFSKY: Okay.

THE COURT: Mr. Ramessar, do you have anything to say to that?

Submissions by Mr. Ramessar (Reply)

MR. RAMESSAR: I would oppose her -- my friend's request that the initial order be granted today. I think there's still argument to be presented to the Court on whether this is the appropriate process for this type of litigation or not.

THE COURT: Okay. All right. Is there anybody else who would like to speak to this? (INDISCERNIBLE) Mr. Oliver.

Submissions by Mr. Oliver

MR. OLIVER: Thank you, Sir. I'm cognizant of the time. I'll be as brief as I can. For the record, Jeffrey Oliver, counsel to the proposed Monitor or proposed receiver, Alvarez & Marsal Canada Inc. As we have noted in the prefiling report, Sir, Alvarez is duly qualified to act in either role and would accept either mandate, if appointed. Alvarez has not had the benefit in the preparation of its prefiling report by having any information from management. It has obviously had to rely upon the information that the investors have provided. With that said, Sir, Alvarez is keenly aware of its obligations as an independent court officer, and certainly if the companies have valid and reliable information to present to the Monitor with respect to any of these circumstances, the Monitor is absolutely willing to hear it and consider it and factor all of that into any relief that's ultimately requested.

There is commentary in the report, Sir, about the proposed charges. I won't spend anymore time on them in light of what's -- what's going on. I did wish to note that there is US counsel from Reed Smith who are attending the hearing remotely who are able to proceed in the United States if relief is granted. In that regard, Sir, one concern I do have with an injunction as opposed to the issuance of either a CCAA or a receivership order is for the purposes of chapter 15, recognition, the proceeding needs to be an insolvency proceeding, and it's not entirely clear to me if -- if a simple injunction would necessarily work. US

counsel could advise of that, but certainly a receivership order or an initial order would resolve it.

THE COURT: We grant worldwide *Mareva* injunctions and --

MR. OLIVER: Yeah.

THE COURT: -- things of that sort, but I get it. There's a different process and --

MR. OLIVER: Yes.

THE COURT: Yeah.

MR. OLIVER: And I guess finally, Sir, just in the interests of considering all options, I think one other option that would be available would be a receivership for a -- possibly for a limited period of time, which would allow the receiver to do an independent investigation, report to the Court, and then with the benefit of that, protection could be obtained in the United States and we could all return to court with -- with a full fledge of evidence and information, but I think from the -- from the proposed Monitor and proposed receiver's perspective, it is important that there's some -- some form of asset protection given immediately. Thank you very much.

THE COURT: Thank you. Anyone else? Okay. All right.

Decision

THE COURT: Ms. Gurofsky, I'm going to grant your CCAA order. I am persuaded that based on the evidence presented, that the criteria for a CCAA order has been met in terms of the debt threshold and the solvency, and in particular you mentioned the judgment on title and the failure to pay Ontario tax. In a broader context, I am concerned that there are significant indicators that something is amiss here. You referred to similar real estate schemes that have been found to be fraudulent, and I'm not saying that that's the case here, but I am saying that there are some telltale signs that cause me significant concern.

As for the CCAA versus the receivership versus the injunction idea I mentioned a few moments ago, I am persuaded that the CCAA is the most appropriate tool. It is flexible. It can achieve the purpose of preserving the assets. It is a very useful multijurisdictional tool, and I'm thinking not only of Ontario but also Texas and the recognition through the chapter 15 process in the United States. I am satisfied, and I should have said this earlier, of the

urgency of this matter, given the potential of tomorrow, according to Exhibit 39 to the Edwards affidavit, of the notification of the waiver of conditions with respect to that proposed transaction with respect to the Angus properties.

But I also take considerable comfort from the fact that this matter is going to be back in front of the Court in 6 days, in front of Justice Simard. I discussed with Mr. Ramessar how long it would take him to get ready and when told to disregard the court schedule, he said 2 weeks. While 6 days is not 2 weeks, I expect that in 6 days from now, Mr. Ramessar will be in a much better position to address these issues before Justice Simard, and should he need some additional time, he can address that with Justice Simard at that time. And Justice Simard, being the judge in charge of supervising the commercial list, I'm sure that he can find some time on the list or in front of another judge so that this matter can be dealt with expeditiously.

So that is my decision on this point. Do you have an order for me to sign?

MS. GUROFSKY: I do, Sir. I have -- it was the order that was appended to the application with some minor modifications dealing with protections to the Monitor that one would typically see in a receivership application, given that we're seeking and we have sought enhanced powers for the Monitor to take control of the assets.

THE COURT: Right.

MS. GUROFSKY: What I will do is hand up a package, Sir, that contains on the top a clean copy of the order, followed by a blackline to the template, followed by another blackline to the version that was appended to the application.

THE COURT: All right.

MS. GUROFSKY: And -- and as -- as I mentioned, those changes are minor. Well, they don't look minor when you see the blackline, but you'll see that they are -- and I'll -- I'll walk you through those changes, Sir.

THE COURT: Sure.

MS. GUROFSKY: So perhaps what I'll do is I'll take you very quickly through the order. We're seeking to revive the corporate entities that have been struck. That's in --

THE COURT: Yeah.

MS. GUROFSKY: -- paragraph 4. In paragraph 9, we're giving the Monitor enhanced powers to exercise control, which will be back before -- again, in front of Justice Simard, again, just given the lack of management involvement to date --

THE COURT: M-hm.

MS. GUROFSKY: -- with the investors. The restructuring clauses provide permission to sell a single asset worth 500,000 without court approval or an aggregate million. Otherwise, it's court approval required.

THE COURT: M-hm.

MS. GUROFSKY: This order also appoints the Canadian rep counsel and the foreign rep counsel.

THE COURT: Yeah.

MS. GUROFSKY: It goes on to address charges. So I'll take you to page 17 of the last blackline --

THE COURT: Yeah. Just a second.

MS. GUROFSKY: Yeah.

THE COURT: There's nothing stopping a group of shareholders saying, It's fine you've appointed counsel, we're going to hire somebody else, too, or --

MS. GUROFSKY: No, not --

THE COURT: Okay.

MS. GUROFSKY: No.

THE COURT: Okay.

MS. GUROFSKY: And, you know, that could be dealt with on -- next week, or if they subsequently decide to retain their own counsel, there's nothing preventing them from doing that.

THE COURT: Okay.

MS. GUROFSKY: We're hoping to make the proceedings more efficient, streamlined, cost-effective, but there's nothing preventing --

THE COURT: Understood.

MS. GUROFSKY: Yeah.

THE COURT: I just thought, you know, somebody may --

MS. GUROFSKY: Yes, people are free to engage whom they --

THE COURT: Yes.

MS. GUROFSKY: -- would like to engage.

THE COURT: Yes.

MS. GUROFSKY: Paragraph 34 is where we see -- and 38 and 39, sort of the -- the changes that were made to the version appended to the application, and these are the protection provisions. So deeming that the Monitor is not a receiver, they're not responsible for environmental liabilities, they're not the owner of the property.

THE COURT: Yeah.

MS. GUROFSKY: Those -- those sorts of protections.

THE COURT: Yeah.

MS. GUROFSKY: They're not incurring liability as a result of exercising their role, of course, outside of the normal wilful misconduct, that -- that type language. We've got interim financing and part of this relief, which was in the application, seeks approval for Pillar financing, because, of course, we don't know if there's cash in these companies. We --

THE COURT: Yeah.

MS. GUROFSKY: And the proceedings cost money. And then we've got the administration charge, right now to a minimum of $250,000, just for the interim period, to cover the costs really of the professionals and all of the work that's been done to date and to the comeback.

THE COURT: Yeah.

MS. GUROFSKY: And, of course, at paragraph 61, we've got the comeback hearing. I -- one more thing I want to bring your attention to, and this is what I've been calling the notice protocol. It's basically a protocol that -- because we don't have the full list of investors. It's a protocol that allows the Monitor to place ads in publications, including, at their discretion depending on cost, key publications in Asia --

THE COURT: M-hm.

MS. GUROFSKY: -- posting on the Facebook page, the investor Facebook page, and any other social media they think appropriate in order to give notice to particularly the offshore investors.

THE COURT: Yeah.

MS. GUROFSKY: Oh, the other thing that's somewhat unique, although we've seen it before, is extending the stay of proceedings to the LPs and the trusts, which is practical and necessary here, given that they are critical to the investment scheme structure. This was done in *Walton* and most recently on *Razor Energy*, which is mentioned in our brief.

THE COURT: Okay. A couple of small points.

MS. GUROFSKY: Yes.

THE COURT: Paragraph 69, it's Mountain Standard Time.

MS. GUROFSKY: Thank you.

THE COURT: I know that's pedantic. And I don't really believe in making orders effective at 12:01 AM, which is before today, you know, the start of today, in case somebody has been offside it during the day. I think the order should be effective from the time of pronouncement, which, before I pronounce it, I should ask, does anyone have any comments with respect to the contents of the order?

MR. RAMESSAR: No comments, Sir.

THE COURT: Okay. Hearing nothing, it's effective at 3:05 PM.

MS. GUROFSKY: Mountain Standard.

THE COURT: That's correct.

MS. GUROFSKY: Thank you.

THE COURT: Okay. There you go.

MR. OLIVER: Sir, if I may, I've just -- I've been asked by my client to just put on the record that they hope to have the ability to work in a cooperative fashion with -- with Mr. Ramessar's client in order to assure a smooth transition of -- of the business. At this point, our client has no records, no insight into the day-to-day affairs of the business, so it's our hope and expectation that there's going to be compliance in that -- in that regard. Thank you.

THE COURT: Okay. Thank you. All right. Unless anyone else has anything to say, I think that's all we can do on this matter today.

PROCEEDINGS ADJOURNED UNTIL NOVEMBER 21, 2024

Certificate of Record

I, Caitlyn McGiverin, certify that this recording is the record made of the evidence in the proceedings, in the Court of King's Bench, held in courtroom 1402, at Calgary, Alberta, on the 14th day of November, 2024, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Victoria Winning, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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Order: TDS-1072626
Dated: November 18, 2024

TAB 3

IIC-ART Vol. 13-1
Insolvency Institute of Canada (Articles)

— An Exploration of Creditor-Initiated CCAA Proceedings

——*Katherine Forbes* [*]

1. INTRODUCTION

The *Companies' Creditors Arrangement Act* [1] [CCAA] does not require a debtor to make their own application for an initial order. [2] The acceptability of a creditor initiating CCAA proceedings is well-established; courts have been satisfied in several cases that " . . . circumstances exist to make the order appropriate", [3] even in the face of opposition by the debtors. [4] CCAA proceedings initiated over a 26.5-month period from January 1, 2022, through March 15, 2024 (Review Period) were compiled to measure the recent prevalence of creditor-initiated CCAA proceedings and the context in which to explore the particularities of CCAA proceedings initiated in this manner. The review of CCAA proceedings comprised sourcing CCAA filings in the Review Period from the Office of the Superintendent of Bankruptcy's CCAA records list, [5] reviewing each initial order granted to determine if the applicant or applicants in the proceedings were a party other than a debtor company (Other Parties), and tallying those instances (Review). The author also identified those Other Parties and their relationship to the debtor(s) (*e.g.*, interim receiver, receiver, primary secured creditor, or unsecured creditor) from information in the initial order and, if necessary, from the initial application materials.

Supported by the Review, the following questions were examined:

- when CCAA applicants are Other Parties, who are they, and what are the practical considerations in making the initial application?
- where the Other Parties are secured creditors, why is the CCAA the chosen statute?
- what are the particularities of the relief obtained in the initial orders sought by Other Parties?
- what are examples of risks and key considerations when the applicant is not the debtor in CCAA proceedings?

2. CONTEXT

While not the standard approach to the CCAA, initial applications made by Other Parties are also not rare; of the 122 CCAA filings initiated in the Review Period, 19 (16 percent) were initiated by Other Parties. Taking an annual view, in 2023, 11 of 63 CCAA filings were initiated by Other Parties — an occurrence rate of approximately 17 percent, and an increase from the instance rate of 10 percent in 2022, when 4 of 39 successful applications were brought by Other Parties. At the time of writing, the relative popularity of creditor-initiated CCAA proceedings has continued into 2024; in the first 75 days of the year, 4 of the 20 CCAA proceedings initiated were on application by Other Parties (*i.e.*, 20 percent of the time).

From a jurisdictional standpoint, more than half of CCAA proceedings initiated by Other Parties were filed in Quebec (representing 40 percent of Quebec's CCAA proceedings in the Review Period). While not explored here, the instance rate of creditor-initiated CCAA proceedings in Quebec is noteworthy given the particularities of the provincial legislation, where the appointment of a receiver pursuant to the *Bankruptcy and Insolvency Act* [6] [BIA] requires a longer notice period by the secured creditor (20 days in the case of movable property, and 60 days in the case of immovable property) than the BIA requires. In

Séquestre de Media5 Corporation, [7] the Quebec Court of Appeal confirmed, among other things, that notwithstanding the 10-day notice requirement under the BIA, the prior notice requirements pursuant to the *Civil Code of Quebec* must be respected. [8]

Still, in the rest of Canada, nearly one in ten proceedings (9 percent) were initiated by Other Parties in the Review Period.

3. SECURED CREDITORS INITIATING CCAA PROCEEDINGS

Of the 19 initial orders granted upon application by Other Parties in the Review Period, those Other Parties were by and large the primary secured creditors (*i.e.*, secured lenders) of the debtors, with the distribution of applicants being as follows: primary secured creditor(s) (14), primary unsecured creditor(s) (2 [9]), receivers (2 [10]), and interim receiver (1 [11]).

Of the alternative remedies available to primary secured creditors (*i.e.*, secured lenders), such as receivership proceedings pursuant to the BIA, what are the potential motivations for initiating proceedings pursuant to the CCAA?

Regardless of who makes the application, several attributes of the CCAA could be beneficial to a secured lender's interests, making it a preferred tool, particularly when exploring either restructuring or going-concern transaction alternatives. Key attributes include that, upon commencement of CCAA proceedings, the debtor remains in possession and control of their operations and hence their employee base and the rights, title and interest in their assets, including, importantly, contracts, licenses, and other intangible assets which can be key to enterprise value and difficult to transfer to another party. Further, proceedings under the CCAA are relatively familiar to stakeholders and potential interested purchasers for the business, improving the market signaling over BIA proceedings, particularly in a SISP that targets interested parties outside of Canada where BIA proceedings are less understood. In *Validus Power Corp. et al.* (*Validus*), the receiver noted in its successful application for CCAA proceedings that conducting a SISP under that statute was preferred over the ongoing receivership proceedings for maximizing value, in the circumstances. [12] There could also be reputational considerations by a secured lender in a decision to appoint a receiver as compared to debtor-in-possession proceedings under the CCAA or the BIA, which can be viewed as more constructive, regardless of whether the ultimate outcome is substantially the same. These key attributes are widely understood by insolvency professionals and secured lenders in Canada but are noted here to support an exploration of potential additional considerations in CCAA proceedings when the debtor is not the applicant.

Debtors initiating CCAA proceedings with a view to a sale or restructuring of their business often do so with the cooperation or support of their secured lender(s), particularly where interim financing is also required within the proceedings; with that in mind, there must be a particular set of circumstances motivating a secured lender to initiate the proceedings themselves. Key motivating factors for a secured lender initiating the initial application may include:

- initiating the application provides the applicant with a degree of control with respect to the timing of the application and the relief being sought; if a secured lender has lost patience with a debtor's attempt to find a resolution to its financial concerns outside of insolvency proceedings, or the debtor's board of directors has not resolved to initiate CCAA proceedings, the secured lender may be within their right to initiate proceedings themselves;

- the applicant may be looking for a catalyst to effect a sale or restructuring of the debtor; or

- the secured lender may have lost faith in the debtor's ability to lead its business in the circumstances, and desires for restructuring efforts to proceed under the direction of a chief restructuring officer (CRO), and/or to obtain expanded powers for the monitor so that the monitor can take a more "hands on" approach to the business early in the proceedings to progress a value-maximizing resolution.

While the court must be satisfied that making an order pursuant to the CCAA is appropriate, as applications by Other Parties are permitted under section 11 of the CCAA, an Other Party's substantiation for being the applicant need not be disclosed in the initial application. Therefore, to explore the impetus of Other Parties — largely secured lenders — in initiating a debtor's CCAA proceeding, relief granted by the courts early in creditor-initiated CCAA proceedings was surveyed: the initial orders and the related amended and restated initial orders (each an ARIO) in the following six cases initiated by secured lenders in

various jurisdictions (Select Cases) were reviewed against the model orders of the courts to identify variations which appeared to be related to the particularities of those creditor-initiated proceedings, along with a review of certain application materials for those cases to obtain additional context for the proceedings:

- *Crown Crest Capital Management Corp. et al.* [13] (*Crown Crest*);
- *South Shore Seafoods Ltd. et al.* [14] (*South Shore Seafoods*);
- *Groupe Sélection Inc. et al.* [15] (*Groupe Sélection*);
- *13517985 Canada Inc.* [16] (*13517985 Canada*);
- *Bifano Consolidated Inc. et al.* [17] (*Bifano*); and
- *Saltwire Network Inc. et al.* [18] (*Saltwire*).

The review of the Select Cases was not exhaustive; orders other than the initial order and the ARIO were not reviewed, and at the time of writing, all cases were ongoing.

4. SELECT RELIEF OBTAINED — INITIAL ORDERS

The primary focus in reviewing the select initial orders was to identify any expanded powers afforded to monitors at the outset of the creditor-initiated proceedings, particularly considering the requirement pursuant to CCAA section 11.001 that relief in the initial 10-day stay period be limited to that which is " . . . reasonably necessary for the continued operations of the debtor company in the ordinary course of business . . . " in the face of other remedies available to secured lenders.

(a) Monitor's Powers

At least some degree of expanded powers was afforded to the monitor in the initial order in many of the cases reviewed, however, these powers were only substantively expanded at this stage in the proceedings in certain of the cases, and the relief varied.

In cases where the monitor's powers were not expanded or were expanded only partially in the initial order with the result that the monitor did not have the powers sufficient to effectively control the business and operations, a CRO was found to be appointed pursuant to the initial order. [19] Key examples of a limited expansion of monitor powers in the initial orders reviewed included that: the consent of the monitor was required for disbursements (pre-filing and post-filing), retention and/or payment of assistants, and replacement of cash management system by the debtors, and in most cases the monitor was afforded the ability to apply to the court for an order in the proceedings.

In *South Shore Seafoods* and *Saltwire*, while a CRO was appointed, the monitor was not afforded expanded powers in the initial order. However, as discussed in a later section, expanded monitor powers were later granted in each of *South Shore Seafoods* and *Saltwire*.

In *Crown Crest*, expanded powers granted to the monitor in the initial order were limited to certain expanded consent rights, including that the monitor's consent was required for payments proposed to be made by the debtors and any changes proposed to the debtors' cash management system, as well as certain rights with respect to the CRO's engagement. [20]

Conversely, in *Groupe Sélection*, the initial application materials of the secured lenders noted a loss of confidence in management and a request that the court grant "super monitor powers". [21] When the initial order was granted (in the face of appeal by the debtors, which leave to appeal was denied), powers were far reaching: the monitor was required to control the receipts and disbursements of the debtors, and was generally afforded the ability to step into the shoes of the debtor, being authorized (but not required) to do the following (not an exhaustive list):

- execute documents in connection with the interim financing, and perform the debtor's obligations thereunder;

- in consultation with the applicants, engage in restructuring efforts, including the cessation/shutdown of operations, investigation of refinancing, marketing and/or sale of the debtor's assets, and temporarily laying off the debtor's employees; and

- in consultation with the debtors, for and on behalf of the debtors, control the financial affairs and/or operations of the debtors, execute documents and enter into agreements, take steps to preserve or protect the assets, take any action that debtors could take, and exercise any shareholder rights of the debtors. [22]

In the court's endorsement accompanying the initial order, the court explains, among other things, that it granted those powers which were required to control the debtor's affairs and begin the implementation of the restructuring process. [23]

In *13517985 Canada* and *Bifano*, the powers afforded to the monitor in the initial order were similar to those granted in *Groupe Sélection*, in that they were likewise far reaching and largely permissive in nature. While in each of *13517985 Canada* and *Bifano*, the monitor was authorized but not required to control the debtor's cash management, in *13517985 Canada*, it was the monitor who was empowered to borrow under the interim financing agreement, pursuant to borrowing certificates.

(b) Appointment of CRO

As noted above, other key relief granted in the initial orders of *South Shore Seafoods*, *Crown Crest*, and *Saltwire* included the appointment (or ratification of the appointment) of a CRO. Review of the Select Cases did not include a comprehensive examination of whether the appointment of the CRO was made by the applicant, or if the CRO had been previously employed by the debtor(s) and the engagement simply affirmed in the CCAA proceedings. However, in the *South Shore Seafoods* brief filed in support of the request for an initial order, it was noted that the debtors had engaged the CRO, [24] indicating that in those cases where a CRO was appointed, the appointment of the CRO was a not necessarily a key driver for bringing an initial application.

In *Groupe Sélection*, *Bifano*, and *13517985 Canada*, no CRO appointment is ratified in the initial order, which would be expected given that the monitor's powers were substantively expanded in the initial order, affording the monitor the ability to step into the shoes of the debtor to the extent it deemed necessary. In fact, prior to the commencement of *Groupe Sélection*'s CCAA proceedings, the debtors had a CRO in place; however, in the court's reasons for granting the lenders' initial application over that of the debtors, the court noted that the CRO did not have the restructuring experience to meet the debtors' needs. [25]

5. SELECT RELIEF OBTAINED — AMENDED AND RESTATED INITIAL ORDERS

The relief subsequently granted in the Amended and Restated Initial Orders (ARIO) of the Select Cases was reviewed as against the initial orders, primarily to evaluate incremental powers afforded to the monitor at the comeback hearing, if any, or any other further relief granted which would be particular to creditor-initiated proceedings.

(a) Monitor's Powers

As noted, the monitor's powers in *Crown Crest* were expanded on a limited basis in the initial order; no substantive changes were made to the monitor's powers in the ARIO to further extend its involvement in the debtors.

Conversely, the monitor's powers were expanded in the *South Shore Seafoods* ARIO, and further, the scope of these powers requested by the applicant continued to evolve in advance of the comeback hearing, as a result of certain developments in the interim period. Initially, the monitor's report filed with the court in connection with the application for the ARIO advised that the applicant was seeking certain expanded powers for the monitor (which were supported by the debtor and ultimately granted), summarized as follows:

- approval of the debtor's receipts and disbursements;

- conduct of the SISP (exclusively, due to shareholder interest in the SISP);
- authorization to retain employees or assistants, award discretionary non-material bonuses to the debtor's employees, and/or terminate the debtor's employees, subject to certain conditions; and
- authority over the debtor's contracts, including execution, assignment, disclaimer, or resiliation of same. [26]

Shortly before the comeback hearing, the monitor filed a supplemental report with the court detailing, among other things, a material adverse change in the debtor's business, and reporting that the applicant had lost faith in management. [27] The applicant requested that the court grant a revised set of expanded monitor powers in the ARIO which would effectively afford the monitor with control over the debtor's business. However, these further powers were contested by the debtors; ultimately, the court authorized the following additions to those powers initially requested:

- report and meet with any persons the monitor may deem appropriate;
- cause the debtors to complete any transaction; and
- cause the debtors to engage assistants or advisors and provide instructions to same. [28]

In *Saltwire*, the powers of the monitor were expanded in the ARIO to include its authority to bring motions in the proceedings, but on balance, the majority of the managerial powers were left with the CRO, whose powers were significantly expanded in the ARIO.

Given the broad expanded monitor powers granted in the initial orders of *Groupe Sélection*, *Bifano*, and *13517985 Canada*, no further powers were granted to the monitor in the ARIO of each of the proceedings.

(b) Observations

The relief obtained across the initial orders reviewed was found to be wide-ranging, arguably reflective of the set of circumstances in each case and recognizing that the courts are hesitant to grant any extraordinary relief in the initial order, but in all cases ultimately the presence of a CRO and/or the expanded powers of the monitor may indicate a presence of increased risk over many conventional CCAA proceedings.

By the end of the initial 10-day stay period, the monitor is granted some degree of expanded powers in all of the Select Cases, indicating that the circumstances of these creditor-initiated proceedings necessitate a greater degree of intervention by the monitor early on, as compared to conventional CCAA proceedings. While in *Crown Crest* and *Saltwire* the monitor had only been granted select expanded powers in the ARIO, powers are broadly afforded in *Groupe Sélection* and *Bifano*, whereby the monitor effectively controls the business and operations more akin to typical court-appointed receivers than monitor powers of CCAA sections 23-25, notwithstanding that the debtor remains in possession and control in all cases (subject to the powers granted to the monitor). [29] Similarly, in *South Shore Seafoods*, while not at the comeback hearing, the monitor was eventually provided significantly enhanced powers once the court was satisfied that it was necessary in furtherance of the preservation of a going concern transaction. [30]

6. EXAMINING RISKS DURING THE INITIAL 10-DAY STAY PERIOD

If, in most cases, expanded powers are ultimately determined to be appropriate early in creditor-initiated CCAA proceedings, then how may the statute's section 11.001 limitation on relief granted upon initial application impact the conduct of creditor-initiated proceedings? Further, could that limitation result in potential risk to secured lender applicants?

In instances where the monitor's powers were expanded early in the CCAA proceedings but were largely not expanded until the ARIO, evidence that any of the applicants had requested expanded powers for the monitor in the initial order, but were

not granted the relief, was not observed. Additionally, it is not possible to determine — from a review of the court materials alone — if expanded powers were desired at the time of the initial application, but not requested on the basis that the court may determine that the relief was not necessary in the circumstances (or on the basis that, on balance, a potentially time-consuming opposition by the debtor may pose a greater challenge to restructuring efforts than limitations on the monitor's powers in the first 10 days of the proceedings). In *South Shore Seafoods,* the materials filed in connection with the comeback hearing indicate, in hindsight, that there likely was an elevated risk of an adverse development in the initial stay period.

While seldom occurring in the Review Period, the receiver of the debtors was the applicant in each of the CCAA proceedings of *Validus* and *MJardin Group, Inc.*, as the respective secured lenders had initially appointed a receiver pursuant to the BIA. This course of action may have been taken to avoid the potential adverse consequences of leaving the debtor in possession of its business and operations without sufficient expanded monitor powers, at least during the initial 10-day stay period in CCAA proceedings.

Based on a review of the Select Cases, it appears that in evaluating the benefits of CCAA proceedings, secured lender applicants are likely also considering the potential for dissipation of assets and other events which could occur at the detriment to value when a court officer is not in control. Contrasting against CCAA proceedings, the receiver's powers need not be limited for an initial period once the appointment order is granted.

Another particularity of creditor-initiated CCAA proceedings can be the monitor's role prior to its appointment. In the select cases reviewed, the monitor had acted as financial advisor to the secured lender the majority of the time, which meant that the monitor had familiarity with the debtor prior to its appointment. However, a monitor who had previously acted as the secured lender's financial advisor may have had less access to the business and operations prior to the proceedings than as financial advisor to the debtor, as is often the case in CCAA proceedings initiated by the debtor. Particularly in proceedings where the applicant is not the debtor, there may be an increased the risk of unknown matters at the outset of the proceedings, and this would be a consideration when evaluating risk in the initial stay period when the monitor's powers may not yet have been fulsomely expanded.

7. PARTICULARITIES IN THE OPERATION OF THE PROCEEDINGS

(a) Initial Application and Application for ARIO

Two key documents that must accompany an initial application pursuant to CCAA subsection 10(2) are the weekly cash flow forecast of the debtor, and the report on the debtor's representations regarding the preparation of the cash flow forecast. [31] Of the cases reviewed, half were contested (to varying degrees) by the debtor. Initial applications by Other Parties may not be cooperative and as such, representatives of the debtor may not be available to produce the documents required in the initial application. Naturally, it then would fall to the proposed monitor to assist the applicant with the necessary documents to demonstrate to the court the debtor's projected liquidity (including, potentially, projected interim financing requirements) for the initial 10-day stay period. In instances where secured lenders are the applicants, the proposed monitor would likely have familiarity with the debtor leading up to the commencement of the proceedings, and so would likely have received certain financial information, including earlier cash flow forecasts, and obtained know-how in that capacity that would assist in projecting cash flows for the initial stay period. For example, in *Crown Crest* the proposed monitor prepared the cash flow forecast without input from the debtors at that time, leveraging an earlier forecast prepared by the debtors and provided to the proposed monitor in its then capacity as financial advisor to the applicant. [32] Further, it then falls to the proposed monitor as the sole party making representations as to the reasonableness of the assumptions used in the cash flow forecast and asserting same in the report typically executed by the debtor's management. Given the limitations on information and access to the debtor's management team in these unique circumstances, applicants (or proposed monitors, as the case may be) would need to exercise additional conservatism in using dated projections to project liquidity at the commencement of the proceedings.

In the court's consideration of whether to grant any stay extension under the CCAA, the statute requires, among other things, that the applicant satisfy the court " . . . that the *applicant* has acted, and is acting, in good faith and with due diligence" [33]

[emphasis added]. However, in the case of creditor-initiated proceedings, the applicant is neither in possession and control of the business and operations, nor is it conducting the restructuring activities or exercising powers afforded by orders of the court. In most of the cases reviewed, motion materials for the ARIOs granted disclose to the courts that either the debtors, or both the applicants and the debtors have been acting in good faith and with due diligence. In these circumstances where the applicant is not the debtor, it is clear from certain of the motion materials reviewed that the applicant has necessarily relied on information obtained from the monitor in order to make statements regarding the debtor's actions in the initial stay period, and the court would naturally consider the position of the monitor, and the action of any CRO in place, in its consideration of good faith and due diligence of the parties.

(b) Subsequent Motions and Exercise of Powers

In the Select Cases, the initial order or the ARIO often grants the monitor the power to apply to court for orders in the proceedings. As a result, for subsequent motions, there are several parties who can bring motions in creditor-initiated proceedings: the applicant, the debtor, and the monitor. As the CCAA (inherently flexible) does not dictate which party should bring motions in the proceedings, insolvency professionals must coordinate and agree amongst these parties to ensure that the proceedings can operate on an efficient and cost-effective basis when the debtor is not the applicant.

As noted, in the Select Cases, several of the expanded powers ultimately afforded the monitor in the ARIO were granted on a permissive basis; in other words, the monitor was authorized but not obligated to undertake several actions either in place of, or on behalf of, the debtor. Structuring certain court officer powers in this way is common and practical, allowing for the iteration and flexibility required of insolvency proceedings, and is seen in the powers of a trustee in the BIA and the powers of a receiver pursuant to court order. What is unique in CCAA proceedings when monitors' powers are expanded early in the proceedings is that the debtor is still in possession and control, and hence there is an additional party involved as compared to bankruptcy or receivership proceedings. An elevated level of coordination and communication of responsibilities amongst the monitor and the debtor and/or CRO is required in creditor-initiated CCAA proceedings to ensure accountabilities of the various parties are appropriately understood, and to ensure the efficient and effective conduct of these proceedings.

8. CONCLUSION

CCAA proceedings initiated by Other Parties are firmly planted in the Canadian insolvency landscape, and in these cases, the applicant is most frequently the primary secured lender.

Initial applications may not be made on a consensual basis and as applicant, the Other Party may have to rely on the proposed monitor, and not the debtor, to prepare the debtor's cash flow forecast and to file a report on the reasonableness on the assumptions therein. While the proposed monitor in these proceedings often has familiarity with the debtor, it is often in its former capacity as financial advisor to the lender (and not the debtor), and as such they may not have had the same access to the business and operations as it would have as the debtor's financial advisor.

Secured lender applicants often obtain expanded powers for the monitor in the ARIO, if not in the initial order, reflecting the desire for further oversight than in conventional CCAA proceedings. Weighing the risks and opportunities of CCAA proceedings over the appointment of a receiver, secured lenders will be primarily focused on the efficiency and "going-concern" market signaling of debtor-in-possession proceedings versus the control afforded to a receiver immediately upon appointment, given the limitations to day one relief in CCAA proceedings. It is clear from the Select Cases that the courts continue to closely examine what relief is necessary during the initial stay period, and do not broadly grant expanded powers to the monitor prior to the comeback hearing, except where circumstances warrant it. The reach of the monitor's powers can range from distinct powers to effective control over the business and operations; in the absence of substantially-expanded monitor powers early in these CCAA proceedings, a CRO is found to have been utilized to provide further oversight and direction within the management team.

The applicant, the debtor, and the monitor are all active parties in creditor-initiated CCAA proceedings, each with standing to bring motions to court following the granting of the initial order. The flexibility afforded under the CCAA can allow for value-maximizing outcomes, but also necessitates increased coordination and cooperation to ensure accountability for roles and

responsibilities, and to avoid duplicative professional costs in these types of proceedings. It is anticipated that the courts will continue to look to the conduct of the applicant, the monitor, and the CRO, and not just the debtor in considering whether to grant the relief sought in creditor-initiated CCAA proceedings given the intricacies of the roles and responsibilities of the parties.

Footnotes

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

2 CCAA, *ibid.*, s. 11.

3 CCAA, *ibid.*, s. 11.02(3)(a).

4 See, *e.g.*, *Arrangement relatif à Groupe Sélection Inc.*, 2022 CarswellQue 18028 (C.S. Que.) (Judgment on Applications for an Initial Order and an Amended and Restated Initial Order) (; leave to appeal refused 2022 QCCA 1596 (C.A. Que.)) [*Groupe Sélection Endorsement*]; *Arrangement relatif à Dicepizza S de RL de CV*, 2024 QCCS 786 (C.S. Que.) (Initial Order) [*Anfis*].

5 Office of the Superintendent of Bankruptcy, "CCAA — Records List" (last modified 26 March 2024), online: <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/ccaa-records-list>.

6 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA].

7 *Séquestre de Media5 Corporation*, 2020 QCCA 943 (C.A. Que.); leave to appeal refused 2021 CarswellQue 3382 (S.C.C.).

8 Noah Zucker and Sébastien Girard, "Court of Appeal Clarifies the Test for Appointing a Receiver in Québec", *LCM Avocats* (30 July 2020), online: <https://lcm.ca/en/court-of-appeal-clarifies-the-test-for-appointing-a-receiver-in-quebec/>.

9 *Anfis*, *supra* note 4; *In the matter of North American Lamb Company Ltd. et al.* (August 8, 2022), Doc. Calgary 2201-08920 (Alta. Q.B.) (Initial Order).

10 *In the matter of Validus Power Corp. et al.* (August 29, 2023), Doc. Toronto CV-23-00705215-00CL (Ont. S.C.J. [Commercial List]) (Initial Order); *In the matter of MJardin Group, Inc.* (June 2, 2022), Doc. Toronto CV-22-00682101-00CL (Ont. S.C.J. [Commercial List]) (Initial Order).

11 *In the matter of Canada Fluorspar (NL) Inc. et al.* (March 11, 2022), Doc. St. John's 2022 01G 0709 (N.L. S.C.) (Initial Order).

12 *In the matter of Validus Power Corp. et al.* (August 23, 2023), Doc. Toronto CV-23-00703754-00CL (Ont. S.C.J. [Commercial List]) (Pre-filing Report of KSV Restructuring Inc. as Proposed Monitor); *In the matter of Validus Power Corp. et al.* (August 29, 2023), Doc. Toronto CV-23-00703754-00CL (Ont. S.C.J. [Commercial List]) (Endorsement of Justice Osborne).

13 *In the matter of Crown Crest Capital Management Corp. et al.* (November 9, 2023), Doc. Toronto CV-23-00709183-00CL (Ont. S.C.J. [Commercial List]) (Initial Order) [*Crown Crest Initial Order*]; *In the matter of Crown Crest Capital Management Corp. et al.* (November 17, 2023), Doc. Toronto CV-23-00709183-00CL (Ont. S.C.J. [Commercial List]) (Amended and Restated Initial Order) [*Crown Crest ARIO*].

14 *In the matter of South Shore Seafoods Ltd. et al.* (September 21, 2023), Doc. Saint John SJM/125/2023 (N.B. K.B.) (Initial Order) [*South Shore Seafoods Initial Order*]; *In the matter of South Shore Seafoods Ltd. et al.* (September 29, 2023), Doc. Saint John SJM/125/2023 (N.B. K.B.) (Amended and Restated Initial Order) [*South Shore Seafoods First ARIO*]; *In the matter of South Shore Seafoods Ltd. et al.* (October 26, 2023), Doc. Saint John SJM/125/2023 (N.B. K.B.) (Second Amended and Restated Initial Order) [*South Shore Seafoods Second ARIO*].

15 *In the matter of Groupe Sélection Inc. et al* (November 21, 2022), Doc. Montreal (C.S. Que.) (Initial Order) [*Groupe Sélection Initial Order*]; *In the matter of Groupe Sélection Inc. et al* (December 1, 2022), Doc. Montreal (C.S. Que.) (Amended and Restated Initial Order) [*Groupe Sélection ARIO*].

16 *In the matter of 13517985 Canada Inc.* (December 20, 2023), Doc. Montreal 500-11-063165-233 (C.S. Que.) (First Day Initial Order) [*13517985 Canada Initial Order*]; *In the matter of 13517985 Canada Inc.* (December 28, 2023), Doc. Montreal 500-11-063165-233 (C.S. Que.) (Amended and Restated Initial Order) [*13517985 Canada ARIO*].

17 *In the matter of Bifano Consolidated Inc. et al.* (February 28, 2024), Doc. Vancouver S241161 (B.C. S.C.) (Initial Order) [*Bifano Initial Order*]; *In the matter of Bifano Consolidated Inc. et al.* (March 11, 2024), Doc. Vancouver S241161 (B.C. S.C.) (Amended and Restated Initial Order) [*Bifano ARIO*].

18 *Fiera Private Debt Fund v. SaltWire Network Inc.*, 2024 CarswellNS 225 (N.S. S.C.) (Initial Order) [*Saltwire Initial Order*]; *Fiera Private Debt Fund v. SaltWire Network Inc.*, 2024 CarswellNS 239 (N.S. S.C.) (Amended and Restated Initial Order) [*Saltwire ARIO*].

19 *Crown Crest Initial Order*, *supra* note 13; *South Shore Seafoods Initial Order*, *supra* note 14; *Saltwire Initial Order*, *supra* note 18.

20 *Crown Crest Initial Order*, *supra* note 13 at para. 17.

21 *In the matter of Groupe Sélection Inc. et al.* (November 14, 2022), Doc. Montreal 500-11-061657-223 (C.S. Que.) (Application for an Initial Order, an Amended and Restated Initial Order and Other Relief) at paras. 8 and 14(a).

22 *Groupe Sélection Initial Order*, *supra* note 15 at paras. 44-45.

23 *Groupe Sélection Endorsement*, *supra* note 4 at paras. 158-160.

24 *In the matter of South Shore Seafoods Ltd. et al.* (September 19, 2023), Doc. Saint John SJM/125/2023 (N.B. K.B.) (Brief on Law) at para. 47.

25 *Groupe Sélection Endorsement*, *supra* note 4 at para. 137.

26 *In the matter of South Shore Seafoods Ltd. et al.* (September 25, 2023), Doc. Saint John SJM/125/2023 (N.B. K.B.) (First Report of the Monitor) at para. 34.

27 *In the matter of South Shore Seafoods Ltd. et al.* (September 27, 2023), Doc. Saint John SJM/125/2023 (N.B. K.B.) (Supplemental to the First Report of the Monitor) at para. 33.

28 *South Shore Seafoods Second ARIO*, *supra* note 14 at para. 24.

29 *Crown Crest ARIO*, *supra* note 13 at para. 21; *Saltwire ARIO*, *supra* note 18 at para. 23; *Groupe Sélection ARIO*, *supra* note 15 at paras. 47-49; *Bifano ARIO*, *supra* note 17 at paras. 25-28.

30 *South Shore Seafoods First ARIO*, *supra* note 14 at para. 23; *South Shore Seafoods Second ARIO*, *supra* note 14 at para. 24.

31 CCAA, *supra* note 1, s. 10(2).

32 *In the matter of Crown Crest Capital Management Corp. et al.* (November 6, 2023), Doc. Toronto CV-23-00709183-00CL (Ont. S.C.J. [Commercial List]) (Report of KPMG Inc. in Its Capacity as Proposed Monitor) at para. 46.

33 CCAA, *supra* note 1, s. 11.02(3)(b).

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