COURT FILE NO.:	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED DIGITALLY
2401 15969
Aug 19, 2026
3:18 PM
CLERK OF THE COURT

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

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

APPLICANT	**ALVAREZ & MARSAL CANADA INC.**, in its capacity as Court-appointed Monitor of ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC., A2A CAPITAL SERVICES CANADA INC., WINGHAM A2A DEVELOPMENTS INC., LAKE HURON SHORES A2A DEVELOPMENTS INC., and MEAFORD A2A DEVELOPMENTS INC.
DOCUMENT	**SUPPLEMENTAL BENCH BRIEF OF THE MONITOR**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
Suite 3700, Bankers Hall West
888 3rd Street SW
Calgary, Alberta, T2P 5C5

Telephone: 403 351 2920/ 403 351 2638
Facsimile: 403 648 1151
Email: joliver@cassels.com / djorgenson@cassels.com

File No.: 57100-4

Attention: Jeffrey Oliver/Danica Jorgenson

VI. LIST OF AUTHORITIES

STATUTES & RULES

Tab	Authority
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36

JURISPRUDENCE

Tab	Authority
2.	*Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156
3.	*Angus A2A GP Inc (Re)*, 2025 ABKB 51
4.	*Angus A2A GP Inc. (Re)*, 2025 ABKB 613
5.	*Carroll v Toronto-Dominion Bank*, 2021 ONCA 38
6.	*Imperial Oil Limited v. Haseeb*, 2023 ONCA 364
7.	*Imperial Tobacco Limited*, 2025 ONSC 1375

I. INTRODUCTION

1. This Brief is submitted by Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as court-appointed monitor (in such capacity, the "**Monitor**") of Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc.("**Windridge GP**"), Windridge A2A Developments, LLC ("**Windridge LLC**"), Fossil Creek A2A GP Inc. ("**Fossil GP**"), Fossil Creek A2A Developments, LLC ("**Fossil LLC**" and together with Windridge LLC, the "**Texas LLCs**"), A2A Developments Inc., Serene Country Homes (Canada) Inc. ("**Serene**"), A2A Capital Services Canada Inc., Meaford A2A Developments Inc., Wingham A2A Developments Inc. and Lake Huron Shores A2A Developments Inc. (collectively, the "**Debtor Companies**" and each a "**Debtor Company**") on the threshold issue of the standing of certain parties represented by Miles Davison LLP ("**Miles Davison**") and Bennett Jones LLP ("**Bennett Jones**") to make submissions in response to the Monitor's application to charge the interests of Offshore Investors' (as defined in the Tenth Report of the Monitor dated May 19, 2026 (the "**Tenth Report**")) in the Lands (as defined in the Tenth Report), whether legal or beneficial, arising from the Offshore Investors' undivided fractional interests ("**UFIs**") in the Lands (the "**Charge Extension Application**").

2. This Brief is supplemental and should be read in conjunction with the Monitor's Brief of Law filed May 20, 2026 (the "**Monitor's Brief**"), the Monitor's Supplemental Brief filed June 15, 2026 (the "**First Supplemental Brief**"), and the Monitor's Reply Brief filed June 26, 2026 in these CCAA proceedings.

3. In particular, the Monitor submits this Brief to provide this Court with written submissions in support of the Monitor's position that:

   (a) Allan Lind ("**Mr. Lind**") has no power to direct any of the Debtor Companies as a representative of the "residual interests" of the Debtor Companies; and

   (b) Mr. Lind, in his personal capacity, has no economic or legal interest in the Charge Extension Application.

4. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the ARIO and the Tenth Report.

II. BACKGROUND

5. Paragraphs 35 and 36 of the Amended and Restated Initial Order ("**ARIO**") granted in these CCAA proceedings state:

> 35. All current and former directors and officers of the Debtor Companies shall have no further power or authority to manage or direct the Debtor Companies including, but not limited to, the power to direct the sale, transfer or other

> disposition of the Property or Business on behalf of the Debtor Companies or incur any obligations on behalf of the Debtor Companies.
>
> 36. All of the current and former directors, officers, shareholders and Assistants of the Debtor Companies and all other persons acting on the instruction or behalf of any of the foregoing having notice of this Order shall and are hereby directed to co-operate with and provide the Monitor with reasonable access to the books and records of the Debtor Companies and Affiliate Entities.[1]

6. The Alberta Court of Appeal has heard appeals advanced by the Debtor Companies seeking to have the ARIO set aside and has dismissed such appeals in their entirety.[2] As such, the ARIO remains in full force and effect.

7. Mr. Lind purportedly opposes the Charge Extension Application (i) in his capacity as a representative of the "residual interests" of the Debtor Companies[3] and/or (ii) in his personal capacity as the sole director of the Texas LLCs and former representative of the Canadian Debtor Companies.[4]

8. Prior to the commencement of these CCAA proceedings, Mr. Lind was listed as a director on record of certain of the Debtor Companies.[5] However, Mr. Lind previously testified on cross-examination to having retired from the A2A Group in 2019.[6] Furthermore, other than reviewing Mr. Lind's affidavits and attending his cross-examinations the Montor and its counsel have had no contact with Mr. Lind since the commencement of these CCAA proceedings.

9. Mr. Lind has stated on cross-examination that he does not have any knowledge of the day-to-day decision making of the Debtor Companies and that he is not the party in possession of certain critical information with respect to the Projects (as defined in the Tenth Report).[7]

---

[1] Order of the Honourable Justice C Simard, granted November 25, 2024, 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 et al, Court of King's Bench of Alberta Court File No 2401-15969 [**ARIO**] at paras 35-36.[**Compendium of Evidence filed by Bennett Jones LLP on June 19, 2025 ("BJCOE") Tab K**].
[2] *Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156 [**Appeal Decision**] at paras 9 and 160.
[3] Supplemental Brief of Law filed by Miles Davison LLP on August 7, 2026 at para 4 [**Miles Davison Supplemental Brief**].
[4] Miles Davison Supplemental Brief at para 5; Supplemental Brief of Law field by Bennett Jones LLP on August 7, 2026 at para 3 [**Bennett Jones Supplemental Brief**].
[5] *Angus A2A GP Inc (Re)*, 2025 ABKB 51 [**January Decision**] at para 21.
[6] Transcript of Questioning of Allan Lind, September 4, 2025, at 62:12-21 [**Monitor's Compendium of Evidence filed June 26, 2026 ("COE") TAB 4**]; See also *Angus A2A GP Inc. (Re)*, 2025 ABKB 613 [**Additional Project Decision**] at para 12.
[7] See for example Transcript of Questioning of Allan Lind, dated January 7, 2025 at 51:20-23, 52:1-6, 53:8-13, 53:20-24, 58:3-7, 59:2-11 [**Compendium of Evidence of Canadian Rep Counsel filed June 19, 2026 ("Rep CEO") Tab 14**].

III. ISSUE

10. The principal issue addressed in this Brief is whether Mr. Lind has standing to oppose the Charge Extension Application either as a representative of the "residual interest" of the Debtor Companies in the outcome of the Charge Extension Application, or otherwise in his personal capacity.

IV. LAW & ANALYSIS

A Standing under the *Companies' Creditors Arrangement Act*

11. For a party to have private interest standing with respect to a given issue, such party must have a personal and direct interest in the issue being litigated.[8] An interest must not be too indirect, remote or speculative.[9] Courts have interpreted this requirement to mean that for a party to have standing, that party must, at a minimum, have a personal legal interest in the outcome of the proceeding.[10]

12. CCAA proceedings differ from other litigation matters in so far as they engage the interests of numerous stakeholders affected by the insolvency of a debtor company (or debtor companies).

13. There is limited jurisprudence on the issue of standing in CCAA proceedings. However, the Ontario Superior Court of Justice has held that a party's status as a *bona fide* stakeholder under the CCAA does not grant that party standing to raise objections on issues that do not affect such party.[11]

14. Furthermore, pursuant to section 11 of the CCAA, this Court may make orders on the application of any person interested in the matter.[12]

15. The Alberta Court of Appeal determined in these very proceedings that the phrase "interested person" should be interpreted in a manner that is consistent with the remedial objectives of the CCAA.[13] The term "interested person" should at minimum be read as referring to someone with a financial interest in the outcome of these proceedings.[14]

16. Accordingly, for a party to be granted standing with respect to a given matter proceeding under the CCAA, that party must establish either a legal or economic interest in the outcome of such matter.

---

[8] *Carroll v Toronto-Dominion Bank*, 2021 ONCA 38 at para 33; *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 [***Imperial Oil***] at para 92.
[9] *Imperial Oil* at para 92.
[10] *Imperial Oil* at para 92.
[11] *Imperial Tobacco Limited*, 2025 ONSC 1375 at para 23.
[12] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 at s 11 [**CCAA**].
[13] Appeal Decision at para 67.
[14] Appeal Decision at para 68.

B Mr. Lind has no further power or authority to direct the Debtor Companies

17. Mr. Lind lacks proper authority to direct the Debtor Companies to oppose the Charge Extension Application, whether residual or otherwise.

18. In accordance with the express language of the ARIO, the only person with the authority to manage and direct the Debtor Companies is the Monitor.[15]

19. Mr. Lind and/or the Debtor Companies have advanced no authority for the proposition that the Debtor Companies are entitled to separate representation of the "residual interest" of the Debtor Companies because these CCAA proceedings could theoretically terminate against them in the future. Such an outcome would undermine the very purpose of the granting of expanded powers to the Monitor, to the exclusion of management; it would permit, in virtually any CCAA proceeding, hostile management to continue to frustrate the proceeding and the objectives it seeks to achieve.

20. Even if the foregoing argument had merit, and debtor companies in CCAA proceedings where a Monitor has been granted expanded powers to the exclusion of management do retain a "residual interest", the Debtor Companies in question in this case are single-purpose entities which were incorporated solely for the purpose of facilitating investment from the Investors. According to Mr. Lind's own evidence, there is no business or operations of the Debtor Companies that would survive these CCAA proceedings for the Debtor Companies to retain an interest in.[16]

21. Finally, Mr. Lind lacks the proper corporate authority to direct litigation on behalf of many, if not all, of the Debtor Companies.[17]

22. By his own admission, Mr. Lind retired from the A2A Group in 2019. Moreover, prior to his retirement, Mr. Lind was only listed as a director on record for Fossil LLC, Windridge LLC, Fossil GP, Windridge GP and Serene.

23. There is no evidence of Mr. Lind's authority, past or present, to direct the other Debtor Companies.

24. Given that former management has no further authority to direct or manage the companies, the onus is on Mr. Lind to establish that he is an "interested person" in his personal capacity as it relates to the Charge Extension Application.

---

[15] ARIO at paras 35-36.
[16] See for example Affidavit of Allan Lind sworn November 21, 2024 at para 15 [**COE Tab 3**].
[17] Additional Project Decision at paras 12.

C Mr. Lind has no legal or economic interest in the outcome of the Charge Extension Application

25. Mr. Lind and the other directors do not have a direct legal or economic interest in the Charge Extension Application.

26. As further detailed in the Monitor's Brief and the Monitor's First Supplemental Brief, the only parties who retain any economic interest in the Lands are the Investors and, in some instances, creditors.

27. Likewise, the parties whose economic interests will be impacted by the outcome of the Charge Extension Application are the Investors and creditors.

28. If the Charge Extension Application is successful, the Offshore Investors' interests will be charged, and the Canadian Investors will no longer bear all of the cost and risk associated with the CCAA proceedings. Conversely, if the Charge Extension Application is unsuccessful, the Canadian Investors will continue to bear all of the economic risk of these CCAA proceedings. The Investors' legal and economic interests are directly engaged by the outcome of the Charge Extension Application.

29. On the other hand, there is no evidence that Mr. Lind has any financial or legal interest in the outcome of the Charge Extension Application. The Supplemental Brief of Law filed by Bennett Jones LLP on August 7, 2026 in these CCAA proceedings (the "**Bennett Jones Supplemental Brief**") states that Mr. Lind has status to make submissions in connection with the Monitor's Application because, among other things, "[t]he Monitor has consistently and repeatedly disparaged the director of the Texas LLCs (*i.e.* Mr. Lind), including in relation to this Application, and has painted a picture to the Courts of the directors and management of the respondent entities as "rogues", non-compliant, and non-cooperative."[18]

30. The Monitor's representations with respect to the conduct of and cooperation from Mr. Lind, and other member so of former management, have bene accepted as findings of fact of this Court and the Alberta Court of Appeal.[19] Any submissions on behalf of Mr. Lind with respect to these findings amounts to nothing more than an unnecessary re-litigation of the factual findings of this Court and the Alberta Court of Appeal.

31. The Bennett Jones Supplemental Brief further states that Mr. Lind has an interest in the Charge Extension Application in his capacity as director of the Texas LLCs because, in the event that the Texas Plan is unsuccessful and the CCAA terminates with respect to the Texas LLCs and Mr. Lind

[18] Bennett Jones Supplemental Brief at para 5(b).
[19] See for example, January Decision at paras 42, 43, 70 and 72; Additional Project Decision at paras 11-12; Appeal Decision at paras 79, 112 and 115.

regains his authority as director, he will have a residual legal interest in the outcome of the Charge Extension Application.[20]

32. Any residual legal interest that Mr. Lind may have by virtue of his position as a director of certain of the Debtor Companies is too indirect and speculative to grant his standing in the Charge Extension Application.[21]

33. Finally, Mr. Lind submits that as relief has been granted against the current and former directors of the Debtor Companies in these CCAA proceedings and since nothing in the Initial Order (or any order granted thereafter) precludes the current or former directors from participating in these CCAA proceedings, that he should be granted standing to oppose the Charge Extension Application.

34. Mr. Lind is conflating his status as a stakeholder in these CCAA proceedings with his standing to oppose relief which has no direct effect on his legal or economic interests. The Monitor does not contest Mr. Lind's right to participate in these proceedings to the extent that the Monitor, or any other party, seeks relief that will impact his direct interests. However, to the extent that Mr. Lind wishes to bring an objection to relief which has no direct impact on his rights, Mr. Lind should not be heard.

V. CONCLUSION

35. Based on the foregoing, the Monitor requests that this Honourable Court deny the Debtor Companies and Mr. Lind standing as it relates to the Charge Extension Application. To the extent that this Court chooses to hear submissions from Mr. Lind in relation to the Charge Extension Application those submissions should be afforded minimal to no weight.

[20] Bennett Jones Supplemental Brief at para 5(c).
[21] *Imperial Oil* at para 92.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of August, 2026.

Cassels Brock & Blackwell LLP

Per: 

Jeffrey Oliver

Counsel for the Monitor

VI. LIST OF AUTHORITIES

STATUTES & RULES

Tab	Authority
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36

JURISPRUDENCE

Tab	Authority
2.	*Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2026 ABCA 156
3.	*Angus A2A GP Inc (Re)*, 2025 ABKB 51
4.	*Angus A2A GP Inc. (Re)*, 2025 ABKB 613
5.	*Carroll v Toronto-Dominion Bank*, 2021 ONCA 38
6.	*Imperial Oil Limited v. Haseeb*, 2023 ONCA 364
7.	*Imperial Tobacco Limited*, 2025 ONSC 1375

TAB 1

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

KeyCite treatment
Most Recently Cited in: Roman Catholic Episcopal Corporation of St. John's (Re) , 2026 NLSC 84, 2026 CarswellNfld 162 | (N.L. S.C., Jul 6, 2026)

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

s 11. General power of court

Currency

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

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

Relevant Judicial Consideration (6)
View all 6
Judicial Consideration listed below contains your search terms.

In debtors' restructuring proceedings under Companies' Creditors Arrangement Act (CCAA), court granted "super-priority" or priming charges in favour of interim financier and others — Motion by Canada Revenue Agency (CRA) for order that such court-ordered interests did not take priority over statutory deemed trusts for unremitted source deductions was dismissed on basis that CCAA allowed court to rank priority charges necessary for restructuring ahead of CRA's interest — Crown's appeal was dismissed — Crown appealed — Appeal dismissed — CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, even those protected by deemed trusts, and financing was critical aspect of CCAA regime premised on restructuring to preserve debtors' greater value as going concerns — Most important feature of CCAA was broad discretionary power vested in supervising court by s. 11 — Preservation by s. 37(2) of CCAA of deemed trusts created by s. 227(4.1) of Income Tax Act (ITA) does not modify their characteristics — Section 227(4.1) of ITA does not establish proprietary interest because Crown's claim does not attach to any specific asset — Deemed removal of property from debtor's estate does not prevent judge from ordering super priority — There was no conflict between CCAA and ITA, as deemed trust created by ITA has priority only over defined set of security interests into which super-priority charge ordered under s. 11 of CCAA does not fall — Section 227(4.1) of ITA does not create true trust because there is no certainty of subject matter, so Crown's beneficial ownership was weaker than under common law and its content could not be inferred solely from ITA — Broad discretionary power under s. 11 of CCAA permits court to rank priming charges ahead of deemed trust for unremitted source deductions, as s. 6(3) of CCAA gives specific effect to Crown's deemed trust for CCAA purposes by requiring plan of compromise to pay Crown in full. *Canada v. Canada North Group Inc.*; 2021 SCC 30, 2021 CSC 30; 19 B.L.R. (6th) 1, 2021 CSC 30, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 2021 SCC 30, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318, [2021] 10 W.W.R. 1, [2021] 2 R.C.S. 571, [2021] 2 S.C.R. 571, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, [2021] S.C.J. No. 30;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 2

In the Court of Appeal of Alberta

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

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

2026 ABCA 156 (CanLII)

Docket: 2401-0350AC

Between:

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

Appellants

- and -

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

Respondent

Docket: 2401-0352AC

And Between:

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

Appellants

- and -

Alvarez & Marsal Canada Inc.

Respondent
Docket: 2501-0050AC

And Between:

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

Appellants

- and -

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

Respondents

Docket: 2501-0053AC

And Between:

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

Appellants

- and -

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

Respondents

The Court:

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

2026 ABCA 156 (CanLII)

Memorandum of Judgment

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

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

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

2026 ABCA 156 (CanLII)

Memorandum of Judgment

2026 ABCA 156 (CanLII)

The Court:

I. OVERVIEW

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

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

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

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

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

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

---

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

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

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

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

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

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

II. FACTS

A. Real Estate Projects and the Investment Structure

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

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

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

2026 ABCA 156 (CanLII)

2026 ABCA 156 (CanLII)

Fossil Creek

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

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

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

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

[17] The following are important points to note:

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

Windridge

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

[24] The following are important points to note:

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

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

2026 ABCA 156 (CanLII)

B. Investors' Rights

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

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

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

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

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

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

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

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

---

[3] Fossil Creek LLC.

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

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

C. Procedural History

Initial Order

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

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

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

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

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

---

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

2026 ABCA 156 (CanLII)

Amended and Restated Initial Order

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

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

Continuation of the Comeback Hearing

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

III. DECISIONS APPEALED

A. The ARIO Decision

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

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

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

2026 ABCA 156 (CanLII)

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

B. The Comeback Decision

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

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

IV. ISSUES ON APPEAL

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

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

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

2026 ABCA 156 (CanLII)

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

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

V. ANALYSIS — General Issues

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

---

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

a. Consistency with the purposes of the *CCAA*

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

2026 ABCA 156 (CanLII)

2026 ABCA 156 (CanLII)

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

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

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

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

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

---

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

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

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

2026 ABCA 156 (CanLII)

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

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

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

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

---

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

2026 ABCA 156 (CanLII)

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

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

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

c. Fairness to other investors and issuers

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

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

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

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

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

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

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

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

3. Whether the decisions were procedurally defective

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

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

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

b. Did the decisions misplace the burden of proof?

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

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

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

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

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

[12] Fossil Creek LLC and Windridge LLC.

2026 ABCA 156 (CanLII)

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

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

VI. ANALYSIS — Specific Issues

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

a. *Factual and legal background*

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

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

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

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

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

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

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

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

---

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

2026 ABCA 156 (CanLII)

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

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

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

d. ***Summary***

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

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

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

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

2026 ABCA 156 (CanLII)

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

---

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

2026 ABCA 156 (CanLII)

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

[159] Our conclusions are summarized below:

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

2026 ABCA 156 (CanLII)

2026 ABCA 156 (CanLII)

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

VIII. DISPOSITION

[160] The appeals are dismissed.

Appeals heard on September 8, 2025

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

de Wit J.A.

Shaner J.A.

Appearances:

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

K.J. Meyer, KC
L.R. Rollingson (no appearance)
C.K. Brown
for the Appellants Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC

J.L. Oliver
D. Marechal (no appearance)
D. Jorgenson
for the Respondent Alvarez & Marsal Canada Inc.

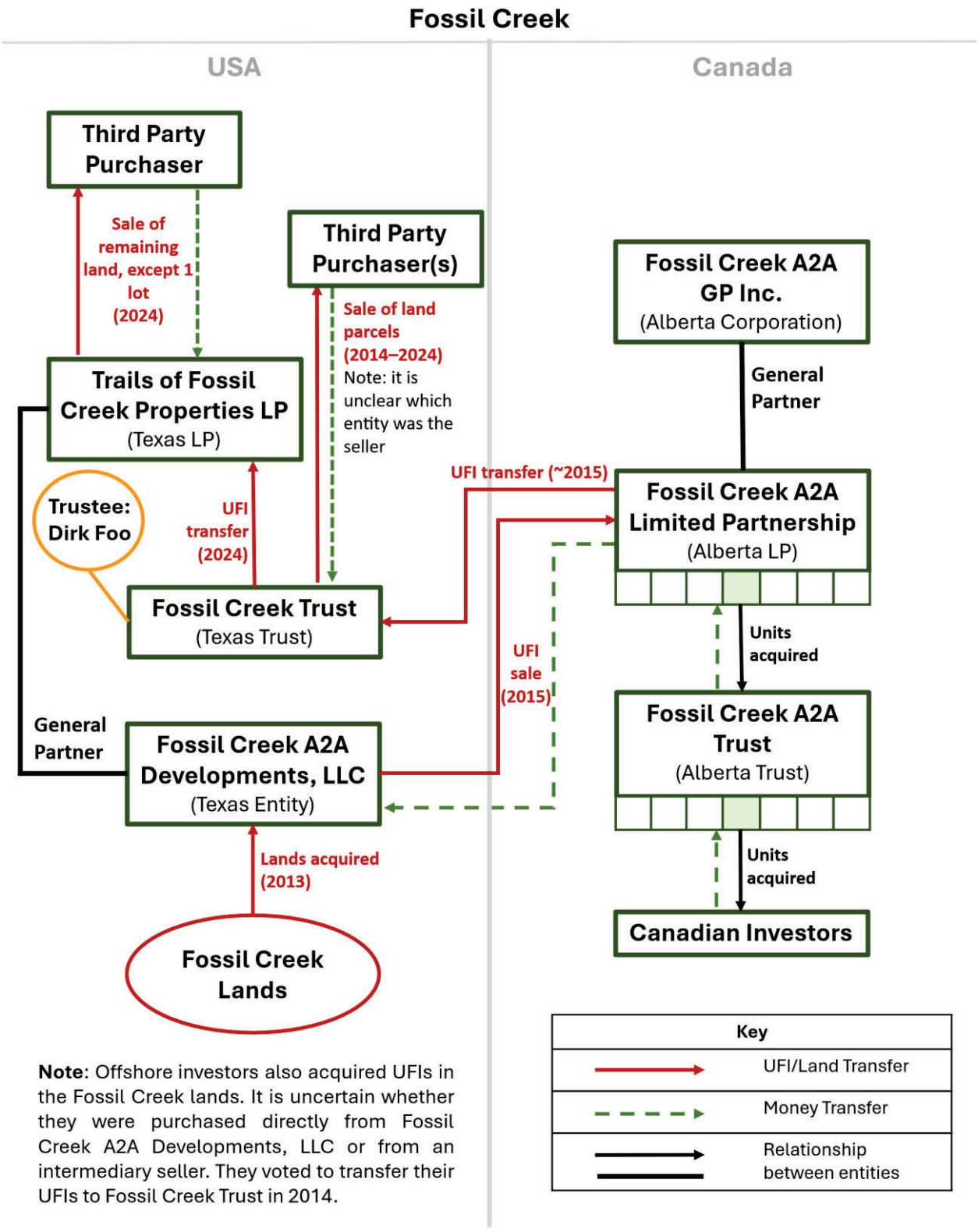
R. Gurofsky
K.M.G. Wong
for the Respondents Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, Brian Richards and Canadian Investors

H.A. Gorman, KC (no appearance)
A. Stephenson
D.L.W. Stethem (no appearance)
for the Respondent Offshore Investors

K. Kashuba (no appearance)
for Pillar Capital Corp, The Interim Lender

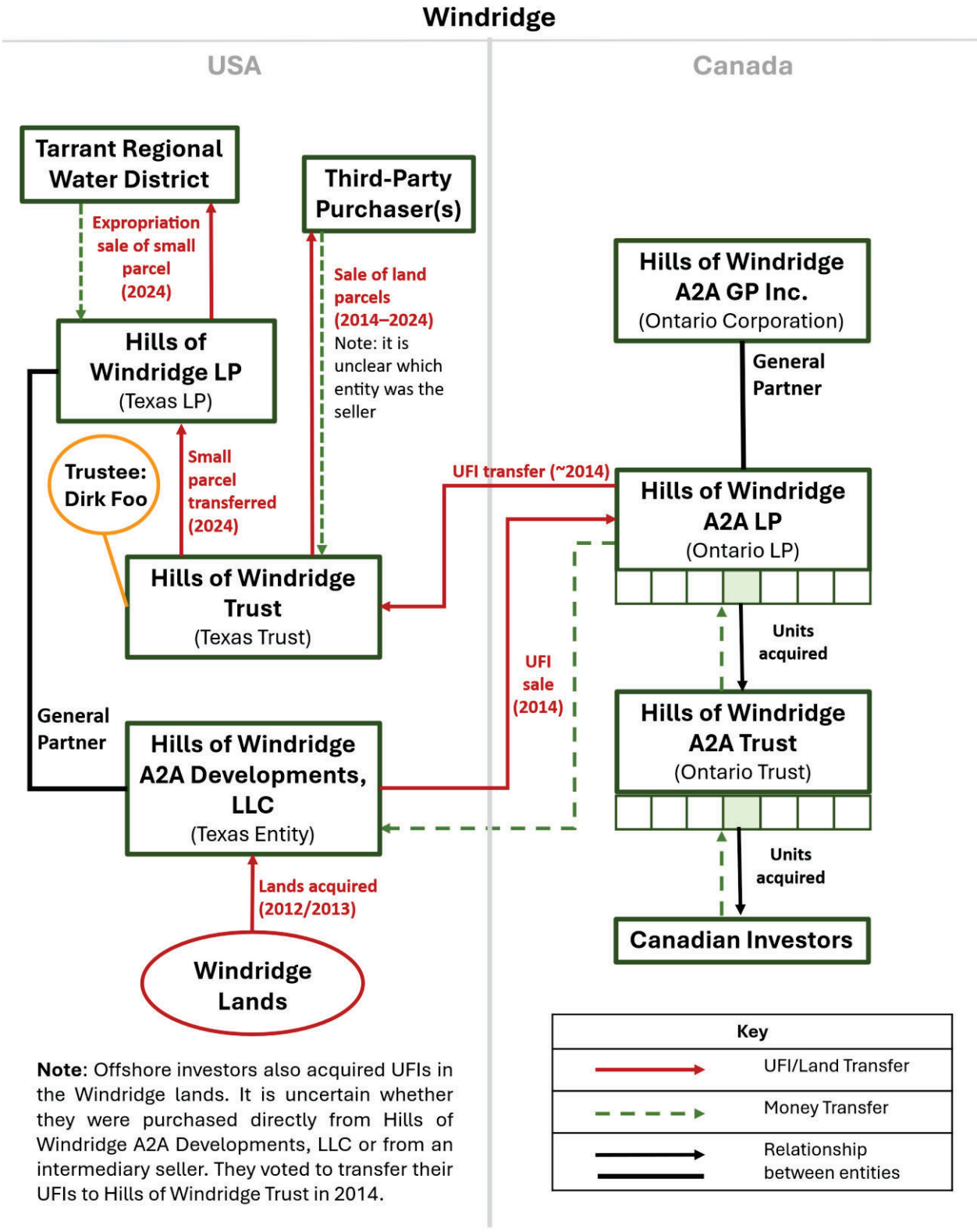
2026 ABCA 156 (CanLII)

Appendix A – Corporate structures for Canadian investment



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

2026 ABCA 156 (CanLII)



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

2026 ABCA 156 (CanLII)

TAB 3

Court of King's Bench of Alberta

Citation: Angus A2A GP Inc (Re), 2025 ABKB 51

Date: 20250129
Docket: 2401 15969
Registry: Calgary

2025 ABKB 51 (CanLII)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

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

[2] A group of Canadian investors (the "Canadian Investors") applied for and were granted an Initial Order pursuant to the *CCAA* on November 14, 2024 in respect of various related entities involved in real estate development ventures in Ontario and Texas. I refer to the entities subject to the Initial Order as the Canadian Respondents and the US LLCs and when referring to

them together I call them the Respondents. The Initial Order appointed counsel to represent investors from outside Canada (the "Offshore Investors"). For convenience, I refer to the Canadian Investors and Offshore Investors as the Applicants even though the Offshore Investors are not, strictly speaking, applicants because the two groups are aligned in respect of the Initial Order and ARIO.

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

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

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

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

II. Procedural Background

A. Initial Order

[7] The Initial Order application was made before me on November 14, 2024. The application was presented as a matter of serious urgency because the Applicants feared that conditions on the sale of the Ontario property, Angus Manor Park ("Angus Manor"), would be waived the following day and the sale would become firm. The Respondents were represented by their corporate counsel who had little more than one day's notice of the application. The Initial Order application was effectively made *ex parte*.

2025 ABKB 51 (CanLII)

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

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

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

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

B. Amended and Restated Initial Order

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

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

[14] Before Justice Simard, the Respondents were represented by litigation counsel who was retained after the Initial Order was granted. The Respondents submitted that the US LLCs had not been properly served with the Initial Order application. Justice Simard found that the defects

2025 ABKB 51 (CanLII)

in service were excused by the urgency of the application and that all the Respondents had proper notice of the Comeback Hearing. He went on to find at page 8 of the transcript of his November 25, 2024 oral decision:

> The two Texas LLCs are proper respondents because they are inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors in Canada through Alberta and Ontario corporations, limited partnerships, and trusts.
>
> Despite the deficiencies in service of the application for the initial order, I find that I have jurisdiction over all of the existing respondents, including the two Texas LLCs.

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

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

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

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

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

C. US Bankruptcy Code Chapter 15 Recognition Proceedings

[20] On December 20, 2024, a US Bankruptcy Judge of the US Bankruptcy Court, Northern District of Texas, Fort Worth Division issued an "Order Granting Recognition of Foreign Main Proceeding and Additional Relief." The US Bankruptcy Judge held that the Chapter 15 proceedings were properly commenced and that the *CCAA* proceeding in the Alberta Court of King's Bench should be recognized as a foreign main proceeding and a stay should extend to the Respondents and their property within the territorial jurisdiction of the US. The US Bankruptcy Judge further held that granting relief was "in the interest of the public and international comity,

2025 ABKB 51 (CanLII)

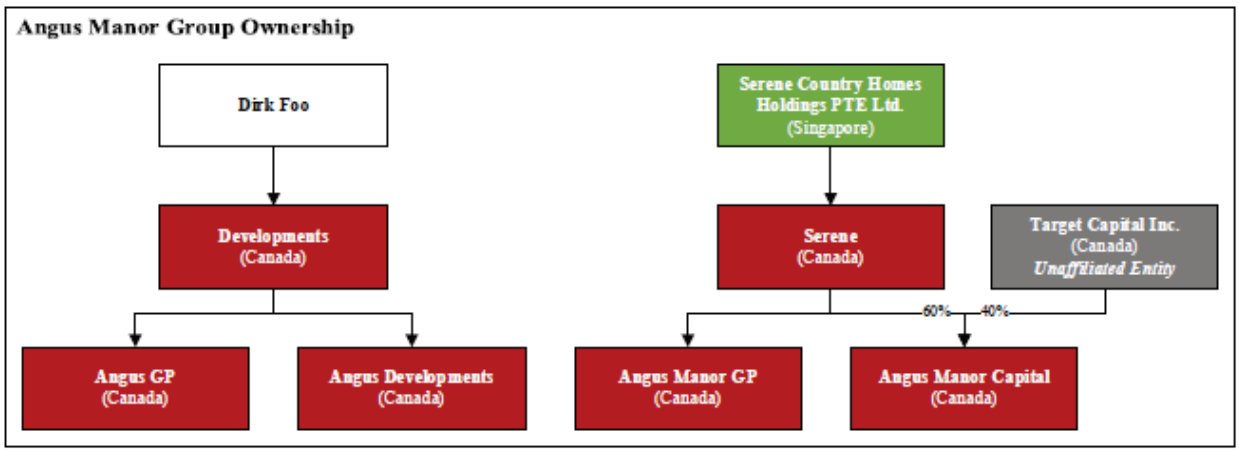
consistent with the public policy of the United States, and will not cause any hardship to any party in interest that is not outweighed by the benefits of the relief granted."

III. The Respondents' Business and the Applicants' Investments

A. The Respondents' Organizational Structure

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

[22] Angus Manor is a 167-acre residential development project located in Essa Township which is just southwest of Barrie, Ontario. The Angus Manor Group ownership is depicted on the chart below taken from the Monitor's Third Report. Angus Manor Park A2A GP Inc, shown below as Angus GP (Canada), is an Alberta corporation that was struck from the corporate registry on September 2, 2021. Angus GP (Canada) is the general partner of the Angus Manor Park A2A Limited Partnership ("Angus Manor LP") which is an Alberta limited partnership. Angus Manor A2A Capital Corp ("Angus Manor Capital") owned 100% of the units of Angus Manor LP and issued bonds (discussed below) to finance the development of the Angus Manor project. Angus Manor Park A2A Developments Inc, shown below as Angus Developments (Canada), is an Ontario corporation. Angus Developments (Canada) was the company responsible for developing the Angus Manor real estate project.



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

2025 ABKB 51 (CanLII)

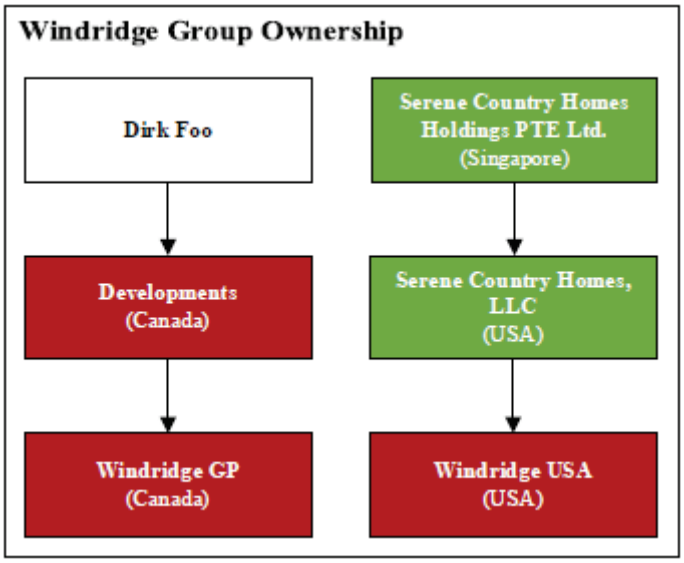
Third Report that the proposed purchase price for the Angus Manor lands is fair. However, the Respondents proposed to use the whole $3 million initial payment to cover transaction fees and management fees. The Monitor expressed concern that "the VTB structure must be done in a way to protect the interest of the A2A Investors and be done so in a clear and transparent manner."

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

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

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

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



[27] Records obtained by the Monitor indicate that Windridge LP transferred the UFIs to a different Windridge Trust, governed by Texas law ("Windridge Texas Trust") which now holds

2025 ABKB 51 (CanLII)

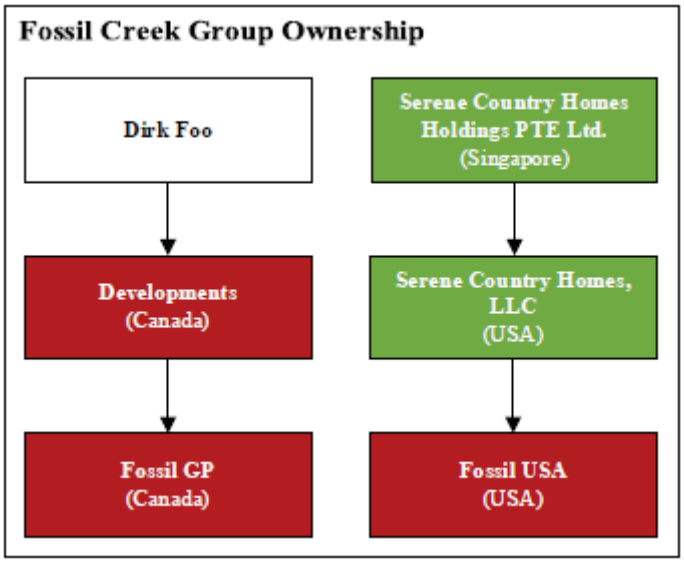
title to the Windridge lands. The trustee of Windridge Texas Trust is Dirk Foo. A small parcel of the Windridge lands was transferred by the Windridge Texas Trust to a new limited partnership, the general partner of which is Windridge LLC, for the purposes of effecting a sale to the Tarrant Regional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

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

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

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

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



[31] Records obtained by the Monitor show that Fossil Creek LP transferred its UFIs to Fossil Creek Trust, a Texas trust ("Fossil Creek Texas Trust"). The trustee of Fossil Creek Texas Trust

2025 ABKB 51 (CanLII)

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

B. The Applicants' Interests and Rights

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

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

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

[34] The Respondents argue that the Bonds are, in effect, equity instruments because the Confidential Offering Memorandum specified that the Bonds are "entitled to share in the Net Profits or Income" of Angus Manor LP and that the Bonds rank *pari passu* with other unsecured obligations of Angus Manor Capital. The peculiar structure of the Bonds was driven by the fact that limited partnership units are not RRSP and TFSA eligible. The Angus Manor group wanted to make investing in Angus Manor RRSP and TFSA eligible so that it was more attractive. The result is an interest-bearing security that Angus Manor Capital marketed as a bond but otherwise has the characteristics of equity. As a matter of consistency and fairness, the Respondents cannot style a security as a "bond" – a paradigm example of a debt instrument – to obtain certain attributes as a matter of tax law to assist in soliciting investment and then claim in the *CCAA* process that the same security is really equity. Be that as it may, I explain later in these Reasons, whether the bonds are debt instruments or equity is beside the point because Angus Manor Capital failed to make the September 30, 2021 interest payment making the bondholders creditors regardless of the nature of their security.

[35] The Offshore Investors hold UFIs in the Angus Manor lands. Angus Manor UFI holders have the right to vote on the sale of all or any part of the Angus Manor lands. Some of the

2025 ABKB 51 (CanLII)

Angus Manor UFI holders were given proxies to vote on the Angus Manor transaction that was halted by the Initial Order.

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

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

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

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

[40] The Offshore Investors in Windridge own UFIs which are governed by the Windridge Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Windridge lands but they have the right to vote on the sale of all or any part of the Windridge

2025 ABKB 51 (CanLII)

lands. Pursuant to the Windridge Deed of Covenant, Windridge LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Windridge LLC's office in Texas. The Windridge Deed of Covenant provides that a Facilitator other than Windridge LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial records for Windridge were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

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

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

> (a) comply with basic requirements to keep and maintain accurate books and records;
>
> (b) comply with basic reporting requirements to which the A2A Investors are entitled;
>
> (c) maintain corporate registrations of key entities in the A2A Group; and
>
> (d) fully account for the source and uses of funds of the A2A Group.

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

ii. The (In)significance of Investor Contractual Rights

[44] The Canadian Investors are "accredited investors" as that term is used in securities law. Accredited investors are required to have income or financial resources greater than prescribed thresholds. Net worth and income are used by securities law as a proxies for investor sophistication. Because the Applicants are accredited investors, the securities sold by the

2025 ABKB 51 (CanLII)

Respondents were exempt from the prospectus requirements of securities laws in Canada. The securities regulatory regime that applied to the Offshore Investors is not clear to the Court. The securities purchased by the investors were limited partnership units, trust units, bonds, and UFIs, so the Applicants do not enjoy the rights afforded to shareholders in corporate law nor do they have recourse to statutory remedies in corporate or securities law. The terms of the securities and the rights of the Applicants are set out in the offering memoranda for each security and other material agreements relevant to each project.

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

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

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

IV. Are *CCAA* Proceedings Appropriate?

A. The Solvency of the Respondents

[48] Justice Simard concluded that the Respondents were insolvent, but certain additional evidence that has come to light since his decision must be noted. Simard J's decision on the solvency of the Respondents turned, in part, on the fact that there was an unpaid $3.8 million

2025 ABKB 51 (CanLII)

judgment against the US LLCs in Texas. The Respondents submit that the Texas judgment should not be considered a liability because it is a default judgment and does not impede the Windridge and Fossil Creek projects. In addition, whether the Texas judgment can be considered turns on the status of the US LLCs as parties to this proceeding, an issue that will be dealt with in a later section of these Reasons.

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

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

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

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

[52] Mr. Lind further advised on cross-examination that records concerning Windridge and Fossil Creek were lost when the Respondents were locked out of their Fort Worth office by their landlord in 2018 and not permitted to retrieve their records. I infer from this evidence that the

2025 ABKB 51 (CanLII)

Respondents were not paying their rent as it came due. Mr. Lind also admitted on cross-examination that the Respondents were unable to produce certain information concerning UFIs because they failed to maintain their subscription to a software service that they used to keep track of land ownership interests because of financial constraints. The failure of the Respondents, a corporate group involved in land development, to maintain a software subscription that was essential to tracking land ownership interests is a further indication of their insolvency.

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

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

B. Equity and the Purposes of the *CCAA*

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

[56] The Respondents submit that Justice Simard agreed with their position. The Respondents place great emphasis on his observation that "there are limits to the [*CCAA*'s] flexibility. As its name suggests, the purpose of the *Act* is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay may not be appropriate if the purpose of the proceedings is not to further that fundamental purpose of the *Act*" [emphasis added]. Justice Simard's comments demonstrate that he recognized that the issue raised by the Respondents must be taken seriously. Indeed, he directed the Respondents to provide additional information to the Monitor so that the issue could be considered with the benefit of a more robust evidential record.

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

[58] The idea that equity investors may never commence *CCAA* proceedings sits uneasily with the fact that equity holders sometimes have significant economic interests in companies that are

2025 ABKB 51 (CanLII)

insolvent. This can be illustrated with the definition of insolvency typically used in the *CCAA* context which is found in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), s 2:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

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

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

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

2025 ABKB 51 (CanLII)

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

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

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

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

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

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

2025 ABKB 51 (CanLII)

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

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

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

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

[70] Second, it does not take much imagination to know what a plan in this case will look like at a high level. The debtor companies control real estate that, following their own business model, must be sold before money is returned to investors. Precisely how that is to be done and

2025 ABKB 51 (CanLII)

what steps must be taken prior to the sales are details that the Applicants and Monitor cannot be expected to know at this stage of the proceedings. The reality is that the Applicants' "germ of a plan" is the same as the Respondents'. The difference between the two is that the Applicants believe that the process of liquidating real estate assets and returning money to investors should be under the control of a professional, neutral, independent, competent ,and trustworthy steward (*i.e.* the Monitor, not management).

C. Do the Applicants Represent the Interests of Investors?

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

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

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

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

2025 ABKB 51 (CanLII)

V. Jurisdiction over US LLCs

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

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

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

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

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

[79] Where, as in the present case, the applicants are creditors and equity investors, a court should apply the same principles outlined for debtor corporation applicants by Osborne J in

2025 ABKB 51 (CanLII)

BZAM. The US LLCs are analogous to the BZAM affiliates based in Europe and the US that did not conduct business in Canada. The inclusion of the US LLCs is appropriate and necessary because, as Simard J found, they are intextricably intertwined in the business of the debtor companies. Further, the inclusion of the US LLCs mitigates the risk of uncoordinated realization and enforcement and promotes the maximization and protection of value for stakeholders.

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

V. *CCAA* v Receivership

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

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

[83] Courts faced with the question of choosing between *CCAA* and receivership proceedings in the context of real estate development ventures often opt for a receivership: see, for example, ***Ashcroft Urban Developments Inc. (Re)***, 2024 ONSC 7192 and the discussion in Jeremy Opolsky, Jacob Babad, & Mike Noel, "Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis" (2020) 18 *Annual Review of Insolvency*

2025 ABKB 51 (CanLII)

Law 199. A Court's decision between *CCAA* and receivership proceedings often turns on a weighing of the prejudice and benefits to creditors.

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

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

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

VI. Conclusion

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

2025 ABKB 51 (CanLII)

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

Heard on the 17th day of January, 2025.
Dated at the City of Calgary, Alberta this 29th day of January, 2025.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Kelsey J. Meyer and Luc Rollingson, Bennett Jones LLP
for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC

Daniel Jukes, Miles Davison LLP
Sammy Lee, and Stephen Barbier, Metcalfe, Blainey & Burns LLP
for Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc, Fossil Creek A2A GP Inc., A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc.

Robyn Gurofsky and Kaitlyn M. G. Wong, Fasken Martineau DuMoulin LLP
for the Canadian Investors

Howard A. Gorman, KC and Daniel L.W. Stethem, Norton Rose Fulbright LLP
for Offshore Investors

Jeffrey Oliver and Danica Jorgenson, Cassels Brock & Blackwell LLP
Counsel for Alvarez & Marsal Canada Inc. (the Monitor)

Kyle Kashuba, Torys LLP
for Pillar Capital Corp. (the Interim Lender)

2025 ABKB 51 (CanLII)

TAB 4

Court of King's Bench of Alberta

Citation: Angus A2A GP Inc. (Re), 2025 ABKB 613

2025 ABKB 613 (CanLII)

Date: 20251023
Docket: 2401 15969
Registry: 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., FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. AND A2A CAPITAL SERVICES CANADA INC.

Reasons for Decision
of the
Honourable Justice M.H. Bourque

---

[1] In this *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36 (**CCAA**) proceeding, Alvarez & Marsal Canada Inc. (Monitor) seeks an order adding Wingham Creek A2A Developments Inc., Lake Huron Shores A2A Developments Inc. and Meaford A2A Developments Inc. (**Meaford**) (collectively, **Additional Project Entities**).

[2] The background and history of these CCAA proceedings are set out in several previous decisions: ***Angus A2A GP Inc (Re)***, 2024 ABKB 769; ***Angus A2A GP Inc (Re)***, 2025 ABKB 51 (***Comeback Decision***); ***Angus A2A GP Inc v Alvarez & Marsal Canada Inc***, 2025 ABCA 147. Briefly stated, a group of Canadian investors in several debtor entities listed in the style of cause involved in real estate development ventures in Ontario and Texas sought and obtained an Initial Order under the CCAA on November 14, 2024. On November 25, 2024, the Court granted an Amended and Restated Initial Order. Since that time, the Court has granted additional orders, *inter alia*, extending the stay period, increasing the Lender's Charge and Administration Charge, and approving various plans related to the project entities.

[3] The entities currently subject to these CCAA proceedings, as well as the Additional Project Entities, are all part of a larger real estate and land investment in Canada and in the United States (**A2A Group**), indirectly controlled by an individual, Foo Tiang Meng Dirk Robert (Dirk Foo), through entities registered in Singapore.

[4] Like the other entities subject to these CCAA proceedings, the Additional Project Entities were used as investment vehicles to enable offshore investors to acquire undivided fractional interests in lands in Canada. The real estate and land development projects managed by the A2A Group already currently subject to these proceedings are Angus Manor, Fossil Creek, and the Hills at Windridge. Upon its appointment, the Monitor received 198 inbound communications from investors involved in various A2A Group project entities. This number has since increased to 579 communications from more than 245 individual investors, raising concerns about entities not currently subject to these proceedings, including but not limited to the Additional Project Entities.

[5] Paragraph 39(e) of the Amended and Restated Initial Order empowers the Monitor to bring an application to add a respondent. In addition, section 11 of the *CCAA* authorizes the Court to make, subject to the restrictions in the CCAA, any order it considers appropriate in the circumstances.

[6] In their counsel's brief, the Additional Project Entities initially opposed the Monitor's application to add them to the CCAA proceedings because their insolvency had not been established, and the Monitor was not a proper applicant. After hearing the Monitor's oral submissions, the Additional Project Entities' counsel indicated that they no longer opposed the Monitor's application on those bases. Instead, the Additional Project Entities oppose the Monitor's application on the basis that their addition will not further the purposes of the existing CCAA proceedings.

[7] According to the Additional Project Entities, these CCAA proceedings aim to protect the interests of the investors in the current debtor companies. Given that the current debtor companies have no interest in the Additional Project Entities or their property, adding the Additional Project Entities does nothing to maximize returns or address these investors' concerns. Moreover, the Additional Project Entities are nominal owners in their respective land development projects, owning between 0.15% to 2.1% of the undivided fractional interests.

[8] The Additional Project Entities also oppose their addition because the costs of the proceedings would outweigh any benefits they might gain from the appointment of a Monitor to oversee the land sale process. In particular, the Additional Project Entities take issue with the Monitor's statement that it "stands to reason" that the Additional Project Entities cannot be trusted to monetize the projects fairly or transparently based on similar conclusions made by Justice Feasby with respect to the current debtor companies. The Additional Project Entities describe this as a "remarkably tenuous conclusion" and amounts to "[jumping] to conclusions about different projects and different companies with no real regard to the specific evidence about the Additional Project Entities."

[9] The Additional Project Entities also argue that the relief sought against them is extraordinary, as it strips the companies of all management and control, including control of any ongoing sales processes. They analogize the relief to the appointment of a receiver, and that such a remedy should not be granted lightly, citing ***BG International Ltd v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17.

[10] I reject the Additional Project Entities' arguments. In my view, it is appropriate to add the Additional Project Entities to the current CCAA proceedings because their addition advances the policy objectives underlying the CCAA: ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60, at para 70. Their addition advances several CCAA remedial objectives, namely

2025 ABKB 613 (CanLII)

preserving and maximizing the value of their assets, ensuring a fair and equitable treatment of claims against them, and protecting the public interest (***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 at para 40).

[11] I have the same concerns about the Additional Project Entities as Justice Feasby expressed regarding the current entities in the ***Comeback Decision*** (at para 42). As in previous reports, in its Seventh Report (paras 43 ff), the Monitor highlights systemic issues that lead me to conclude that the Additional Project Entities also cannot fulfill their responsibilities to their respective investors. Consequently, they appear unable to conduct a fair realization and distribution process, thereby putting the distribution to which investors might be entitled at significant risk.

[12] The evidence put forward by the Additional Project Entities does not ease my concerns. The affiant for the Additional Project Entities, Mr. Lind, a resident of Singapore, was previously involved in the historical aspects of the Meaford project. He is an unpaid "Senior consultant" to the Additional Project Entities. He retired from any employment with the A2A Group over half a decade ago. In his affidavit, he says he is authorized to swear this Affidavit on their behalf; however, it is unclear how or by whom this authorization was given. At best, Mr. Lind's knowledge is dated, and the reliability of his information regarding more recent events is problematic. The corporate records attached to the Seventh Report all show a Mr. Ambrose as being a longstanding director and officer of the Additional Project Entities. Yet, I have no evidence from Mr. Ambrose, who, according to the corporate registry report, is a resident of Calgary and, as an officer and director, presumably in a better position to provide evidence to the Court on behalf of the Additional Project Entities.

[13] Turning to the Additional Project Entities' argument that adding them to the CCAA proceedings will do little to enhance any potential recovery for the investors of the current debtor entities, that is but one factor in the appropriateness assessment. To focus solely on potential recovery unduly narrows the assessment. Indeed, in these proceedings, the reality is that the development projects housed in individual corporations are part of a broader enterprise. The issues that led to the initiation of these proceedings clearly transcend across the broader enterprise and are not limited to the current debtor entities. In my view, resolving those issues across the board is in the public interest.

[14] I also disagree that adding the Additional Project Entities to the existing CCAA proceedings is an extraordinary remedy in the circumstances. The Additional Project Entities have been marketing their respective development properties for sale for several years, without any success. Moreover, they have depleted the portion of the investment funds initially reserved for developing or marketing the properties. Adding the Additional Project Entities to these proceedings is unlikely to reverse the previously chosen sale-of-land course of action, but appointing the Monitor to oversee it might improve its chances of success through a fair and transparent court-supervised process. In that regard, I note that in Meaford's case, the decision to sell its project lands was made in late 2017. Despite nearly 8 years having passed, the current management team has been unable to sell that land.

[15] For all these reasons, I am satisfied that the relief sought is appropriate in the circumstances. Accordingly, I exercise my discretion and order that the Additional Project Entities be added as respondents in these CCAA proceedings.

Heard on September 26, 2025.

2025 ABKB 613 (CanLII)

Dated at Calgary, Alberta, on October 23, 2025.

M.H. Bourque
J.C.K.B.A.

Appearances:

Jeffrey Oliver and Danica Jorgenson, Cassels Brock & Blackwell LLP
for the Monitor, Alvarez & Marsal Canada Inc.

D. Aaron Stephenson and Armaan Dhillon (student-at-law), Norton Rose Fulbright Canada LLP
for the Offshore Investors

Daniel Jukes, Miles Davison LLP
for Meaford A2A Development Inc., Lake Huron A2A Development Inc., and Wingham Creek A2A Development Inc.

2025 ABKB 613 (CanLII)

TAB 5

Carroll v. Toronto-Dominion Bank

Ontario Reports

Ontario Court of Appeal

Tulloch, Miller and Paciocco JJ.A.

January 21, 2021

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

2021 ONCA 38 (CanLII)

Case Summary

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

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

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

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

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

2021 ONCA 38 (CanLII)

Held, the appeal should be dismissed.

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

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

The motion judge did not err in finding that the applicant had not pleaded facts establishing a *prima facie* case of standing. The motion judge found that the applicant was not a unitholder in the trust and had no financial interest in the outcome of the litigation she commenced. Despite her role as a whistleblower, she lacked a direct personal interest in the litigation. The judge was

correct in rejecting the applicant's contention that she could sustain a standing claim based on her potential liability as a constructive trustee. There was no foundation to support the applicant's liability as a knowing assister, and the pleadings did not suggest that she might have been a knowing receiver or trustee *de son tort*.

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

2021 ONCA 38 (CanLII)

Cases referred to

Air Canada v. M & L Travel Ltd. (1993), 15 O.R. (3d) 804, [1993] 3 S.C.R. 787, [1993] S.C.J. No. 118, 108 D.L.R. (4th) 592, 159 N.R. 1, J.E. 93-1761, 67 O.A.C. 1, 50 E.T.R. 225, 45 A.C.W.S. (3d) 801, 1993 SOACQ para. 10,010*; Astors Settlement Trusts (Re)*, [1952] Ch. 534, [1952] 1 All E.R. 1067 (Eng. Ch.); *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 146 C.L.R. 493, 45 LGRA 245, 28 A.L.R. 257, 54 ALJR 176*; Campisi v. Ontario (Attorney General)* (2018), 144 O.R. (3d) 638, [2018] O.J. No. 5825, 2018 ONCA 869, 85 C.C.L.I. (5th) 183, 2019 OABC para. A-1351 [Leave to appeal to S.C.C. refused [2019] S.C.C.A. No. 52]; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, 2012 SCC 45, 352 D.L.R. (4th) 587, 434 N.R. 257, [2012] 10 W.W.R. 423, J.E. 2012-1793, 325 B.C.A.C. 1, 34 B.C.L.R. (5th) 1, 290 C.C.C. (3d) 1, 95 C.R. (6th) 1, 267 C.R.R. (2d) 1, 220 A.C.W.S. (3d) 536, 103 W.C.B. (2d) 625, EYB 2012-211411, 2012EXP-3353*; Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, [1992] S.C.J. No. 5, 88 D.L.R. (4th) 193, 132 N.R. 241, J.E. 92-198, 2 Admin. L.R. (2d) 229, 5 C.P.C. (3d) 20, 8 C.R.R. (2d) 145, 16 Imm. L.R. (2d) 161, 31 A.C.W.S. (3d) 214; *Crociani v. Crociani*, [2014] UKPC 40, 17 ITELR 624, [2015] WTLR 975*; Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, 33 D.L.R. (4th) 321, 71 N.R. 338, [1987] 1 W.W.R. 603, J.E. 87-100, 23 Admin. L.R. 197, 17 C.P.C. (2d) 289, 2 A.C.W.S. (3d) 277, 8 CHRR D/3789*; Gallant v. Gaudet*, [1996] P.E.I.J. No. 124, 149 Nfld. & P.E.I.R. 31, 16 E.T.R. (2d) 202, 68 A.C.W.S. (3d) 55 (S.C.T.D.)*; Initial Services Ltd. v. Putterill*, [1968] 1 Q.B. 396, [1967] 3 All E.R. 145, [1967] 3 W.L.R. 1032, 2 K.I.R. 863 (C.A.); *Landau v. Ontario (Attorney General)*, [2013] O.J. No. 4443, 2013 ONSC 6152, 293 C.R.R. (2d) 257; *McLean v. Burns Philp Trustee Co. Pty Ltd*. (1985) 2 N.S.W.L.R. 623, 9 ACLR 926 (Aus. S.C.);*MF Global UK Ltd. (In Special Administration) (Re)*, [2013] EWHC 1655, [2013] 1 W.L.R. 3874, [2013] 2 BCLC 426; *Miner v. Kings (County)*, [2017] N.S.J. No. 20, 2017 NSCA 5, 274 A.C.W.S. (3d) 863, 60 M.P.L.R. (5th) 1; *Morice v. Bishop of Durham* (1805), 32 E.R. 947, 10 Ves. 522 (Ch.), affg (1804), 32 E.R. 656, 9 Ves. 399 (Ch.); *Polish National Catholic Church of Canada v. Polish National Catholic Church*, [2014] O.J. No. 3750, 2014 ONSC 4501; *R. v. Imperial Tobacco Canada Ltd*., [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42, 335 D.L.R. (4th) 513, 419 N.R. 1, [2011] 11 W.W.R. 215, J.E. 2011-1326, 308 B.C.A.C. 1, 21 B.C.L.R. (5th) 215, 83 C.B.R. (5th) 169, 86 C.C.L.T. (3d) 1, [2011] I.L.R. para. G-2404, 205 A.C.W.S. (3d) 92, 2011 CCLG para. 25-249, 2011EXP-2380, 25 Admin. L.R. (5th) 1

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 89(3) [as am.]

Public Guardian and Trustee Act, R.S.O. 1990, c. P.51 [as am.]

Substitute Decisions Act, 1992, S.O. 1992, c. 30 [as am.]

Variation of Trusts Act, R.S.O. 1990, c. V.1 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194,rule 21.01

Authorities referred to

Clarry, Daniel, *The Supervisory Jurisdiction Over Trust Administration* (Oxford: Oxford University Press, 2019)

Gillese, Eileen E., *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014)

Halsbury's Laws of England, 5th ed., Vol. 98, "*Trusts and Powers*" (London: LexisNexis, 2019)

David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 18th ed. (London: LexisNexis Butterworths, 2010)

Pettit, Philip H., *Equity and the Law of Trusts*, 12th ed. (Oxford: Oxford University Press, 2012)

Waters, Donovan W.M., Gillen, Mark R. & Smith, Lionel D., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters, 2012)

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

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

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

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

Overview

2021 ONCA 38 (CanLII)

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

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

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

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

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

Material Facts

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

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

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

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

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

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

-- sought an order for an accounting and payment to beneficiaries of the trust for amounts equal to TD's wrongful gains; and

-- requested a declaration that TD had been unjustly enriched.

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

The Issues

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

(Emphasis added; citations omitted)

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

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

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

> -- As a "knowing assister", who knowingly or wilfully blindly encouraged or assisted in a dishonest and fraudulent breach of trust: *Air Canada v. M & L Travel Ltd.* (1993), 15 O.R. (3d) 804, [1993] 3 S.C.R. 787, [1993] S.C.J. No. 118, at pp. 809-11 S.C.R.;
>
> -- As a "knowing receiver", who knowingly, or wilfully blindly, or with knowledge of facts which would put an honest person on inquiry, received trust property in their own capacity in breach of trust: *Air Canada*, at pp. 810-13 S.C.R.; or
> -- As a *trustee de son tort*, who assumed the role of trustee without proper appointment and then breached the trust: *Air Canada,* at pp. 808-809 S.C.R.

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

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

2021 ONCA 38 (CanLII)

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

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

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

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

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

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

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

Conclusion

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

Appeal dismissed.

End of Document

2021 ONCA 38 (CanLII)

TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: Imperial Oil Limited v. Haseeb, 2023 ONCA 364
DATE: 20230523
DOCKET: C70037

2023 ONCA 364 (CanLII)

van Rensburg, Sossin and Copeland JJ.A.

BETWEEN

Imperial Oil Limited

Applicant (Respondent)

and

Muhammad Haseeb and the
Human Rights Tribunal of Ontario

Respondents (Appellant/Respondent)

Toby G. Young and Megan Evans Maxwell, for the appellant

Richard Nixon and Duncan Burns-Shillington, for the respondent Imperial Oil Limited

Brian A. Blumenthal, for the respondent Human Rights Tribunal of Ontario

Sujit Choudhry and Arash Nayerahmadi, for the interveners the South Asian Legal Clinic of Ontario and the Colour of Poverty/Colour of Change Network

Heard: November 24, 2022

On appeal from the order of the Divisional Court (Justices Thomas R. Lederer, Graeme Mew, and Harriet E. Sachs, dissenting), dated June 1, 2021, with reasons reported at 2021 ONSC 3868, granting an application for judicial review of the decisions of the Human Rights Tribunal of Ontario, dated July 20, 2018, with reasons reported at 2018 HRTO 957, dated February 14, 2019, with reasons reported at 2019 HRTO 271, and dated August 23, 2019, with reasons reported at 2019 HRTO 1174.

Table of Contents

A. INTRODUCTION AND BACKGROUND ..... [1]
(1) The appellant's status in Canada and eligibility to work ..... [5]
(2) The hiring process..... [10]
(3) The withdrawal of the offer..... [13]
(4) The human rights claim..... [16]
(5) The tribunal decision ..... [10
(6) The Divisional Court decision ..... [23]
B. GROUNDS OF APPEAL AND ADDITIONAL ISSUES RAISED BY THE RESPONDENT ..... [30]
C. SUMMARY OF MY CONCLUSIONS ..... [34]
D. STANDARD OF REVIEW ..... [37]
E. RELEVANT PRINCIPLES OF ANALYSIS OF DISCRIMINATION CLAIMS UNDER HUMAN RIGHTS LEGISLATION ..... [49]
(1) Elements of a claim of discrimination under human rights legislation [50]
(2) The burden of proof and the shifting evidential burdens..... [52]
(3) Direct versus adverse impact discrimination..... [56]
(4) Partial discrimination is still discrimination ..... [67]
F. WAS THE TRIBUNAL'S LIABILITY DECISION REASONABLE? ..... [70]
(1) Was the tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable? ..... [72]
(2) Was the tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?..... [99]
(3) Was the tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or a permanent resident, rather than solely because of his dishonesty in the job competition, reasonable? ..... [200]
(4) Was the tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial reasonable? ..... [225]
G. CONCLUSION ..... [239]

2023 ONCA 364 (CanLII)

Copeland J.A.:

A. INTRODUCTION AND BACKGROUND

[1] The appellant appeals from the decision of the Divisional Court, which set aside the decision of the Human Rights Tribunal of Ontario (the "tribunal") finding that the respondent ("Imperial") discriminated against him in employment on the basis of citizenship.

[2] Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*"), prohibits discrimination in employment on the basis of citizenship. In the time period relevant to this appeal, the appellant was not a Canadian citizen or permanent resident (he has since become a Canadian citizen). He was an international student in Canada about to graduate with a mechanical engineering degree. As a matter of federal immigration law, upon graduation, he would be entitled to a Post-Graduate Work Permit ("PGWP"), which would allow him to work full-time, anywhere in Canada, for any employer, for up to three years. This entitlement forms part of a scheme of immigration legislation and regulation designed to attract skilled workers to settle in Canada, become permanent residents, and ultimately, Canadian citizens.

[3] During his last semester of university, the appellant applied for an entry-level engineering job with Imperial. Imperial had a policy that required, as a condition of employment, permanent eligibility to work in Canada, as established by proof of either Canadian citizenship or permanent resident status. The appellant

2023 ONCA 364 (CanLII)

was the top candidate for the job. Imperial offered him the job, conditional on permanent eligibility to work in Canada, as established by proof of either Canadian citizenship or permanent resident status. When the appellant disclosed that he was neither a Canadian citizen nor a permanent resident, and would have to initially work on the three-year PGWP, Imperial withdrew its job offer.

[4] For reasons I explain below, I conclude that the tribunal's decision that Imperial discriminated against the appellant on the basis of citizenship was reasonable. I would allow the appeal and restore the tribunal's order.

(1) The appellant's status in Canada and eligibility to work

[5] In the fall of 2014, the appellant was a student in his final semester of a mechanical engineering degree at McGill University. He was scheduled to complete his studies in December 2014, and to formally graduate in January 2015.

[6] The appellant was, at that time, a citizen of Pakistan. He was in Canada on a student visa. Upon graduation from his university program, he would be eligible for a PGWP for a period of three years. The appellant's entitlement to a PGWP was conditional only on his providing a letter from the university attesting to the completion of his degree. The PGWP would permit him to work full-time, for any employer, anywhere in Canada. That is, it would give him an unrestricted right to work in Canada, subject only to the three-year time limit.

2023 ONCA 364 (CanLII)

[7] The PGWP program is part of a federal immigration program aimed at attracting international students to attend Canadian universities and colleges, in order to provide a source of skilled labour to Canada. The PGWP program is designed as a pathway to Canadian citizenship.[1] It has three stages. First, while an international student is still in school, federal immigration law permits them to work up to 20 hours per week during academic sessions, and full-time during scheduled breaks in academic sessions. Second, once an international student, like the appellant, graduates, they are eligible for a PGWP, which allows them to work full-time, for any employer, anywhere in Canada, for up to three years. Third, once the individual is working under the PGWP, they are eligible to apply for permanent resident status from within Canada after they have one year of full-time work experience in Canada. The finding of the tribunal, based on the evidence of immigration experts who testified before it, was that if all went smoothly, a PGWP-holder would obtain permanent residency status within 6-18 months of applying for it.

[8] The tribunal found that there was no doubt that the appellant would obtain a PGWP shortly after his graduation in January 2015. The tribunal also accepted

2023 ONCA 364 (CanLII)

---

[1] I base this description of the PGWP program on the tribunal's findings. These findings were based on expert evidence before the tribunal. See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 87.1, 186, 199, 205, enacted pursuant to s. 14 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

that the appellant reasonably anticipated obtaining permanent resident status before his PGWP expired. As alluded to above, the appellant followed this path and became a permanent resident in June 2017 (more than one year before the expiration of his PGWP), and a Canadian citizen in March 2022.

[9] I pause to underline the finding of the tribunal with respect to the appellant's entitlement to a PGWP upon graduation. Based on the record before it, the tribunal found:

- "There was no genuine issue regarding [the appellant's] eligibility to obtain a post-graduate work permit that would coincide with the job start in 2015 contemplated by both [Imperial] and [the appellant]."
- "Obtaining the PGWP was conditional only on proof that [the appellant] had completed his degree, and he indeed received his SIN for full time post-graduate work within minutes of applying for same in early 2015."
- "[T]he [appellant] was at all times in status as an international student, with no hindrance to obtaining a PGWP and SIN for commencement of work with [Imperial] in February 2015 or any other later employment start date that could have been negotiated between the parties."

Thus, the tribunal's analysis of whether Imperial discriminated against the appellant on the basis of citizenship proceeded from its factual finding that there was no doubt that the appellant would be granted a PGWP shortly after his graduation in January 2015 (he was granted a PGWP in February 2015).

2023 ONCA 364 (CanLII)

(2) The hiring process

[10] In September 2014, during the final semester of his university program, the appellant applied for a full-time job as an entry-level engineer in Sarnia, Ontario, with Imperial. The job posting stated that applicants must be "permanently eligible to work in Canada" and that proof of permanent eligibility to work in Canada "must be in the form of your Canadian birth certificate, Canadian citizenship certificate or Canadian certificate of permanent residence." This requirement was repeated by Imperial throughout the job competition process.

[11] The appellant, fearful that he would be screened out of the competition, lied and answered "yes" on the application to a question asking whether he was "eligible to work in Canada on a permanent basis". During the interview process with Imperial, between October and November 2014, the appellant was asked this question several more times, and gave the same untruthful answer. On December 1, 2014, in response to an inquiry from Imperial, the appellant told Imperial that he had received his permanent resident card and his social insurance number the previous year. These statements were untrue.

[12] The appellant was successful in his job application to Imperial. Indeed, he was the top-rated candidate in his group. On December 2, 2014, Imperial wrote to him offering him the position. The letter stated that the offer of employment was conditional on the appellant providing proof that he was "eligible to work in Canada

2023 ONCA 364 (CanLII)

on a permanent basis." The letter continued that such proof could be in the form of a Canadian birth certificate, a Canadian citizenship certificate, or a Canadian certificate of permanent residence. The conditional offer stated that the appellant was to provide his acceptance by December 11, 2014.

(3) The withdrawal of the offer

[13] On December 10, 2014, by two phone calls followed by an email, the appellant advised Imperial that because he was an international student, he would have to work on a PGWP, which would be issued upon his graduation (which was scheduled for January 2015), before he would be permanently allowed to work in Canada. He advised that the PGWP would be valid for three years, and that before it expired, he would obtain permanent residence in Canada. He also attached a link to an immigration website to support this information. He stated that he intended to work and settle in Canada on a permanent basis. He asked if Imperial could make an exception regarding proof of eligibility to work in Canada on a permanent basis.

[14] Imperial responded by letter dated January 8, 2015, and withdrew its job offer. The letter withdrawing the job offer stated as follows:

> By letter dated December 2, 2014 Imperial Oil extended a conditional offer of employment to you. That offer was expressly subject to a number of conditions, including your ability to work permanently in Canada. You were required to submit proof of your permanent eligibility in

2023 ONCA 364 (CanLII)

> the form of a copy of one of the following: Canadian birth certificate, Canadian citizenship certificate or a Canadian certificate of permanent residence. You have since notified Imperial Oil that you are not eligible to work in Canada on a permanent basis. Because you have not met the conditions of employment as outlined in our offer letter dated December 2, 2014 our offer of employment has now been rescinded.

The letter went on to invite the appellant to re-apply to Imperial if he became eligible to work in Canada on a permanent basis in the future. It further stated that if the appellant reapplied when he was eligible to work permanently in Canada, Imperial "would be pleased to consider [his] application at that time."

[15] The appellant graduated from McGill in January 2015 and obtained his PGWP in February 2015, as anticipated.

(4) The human rights claim

[16] In February 2015, the appellant filed an application with the tribunal alleging discrimination on the basis of citizenship.[2] In particular, the appellant claimed that Imperial had discriminated against him on the basis of citizenship in requiring that he be a Canadian citizen or permanent resident to be hired, despite the fact that by the time the position was anticipated to commence, he would have his PGWP and an unrestricted right to work in Canada for up to three years.

---

[2] The appellant's application to the tribunal also raised place of origin and ethnic origin as grounds of discrimination; however, these grounds were not pursued by the appellant at the tribunal hearing.

2023 ONCA 364 (CanLII)

[17] The appellant's position before the tribunal was that Imperial's requirement of permanent eligibility to work in Canada disadvantaged only non-citizens (PGWP-holders, who have a lawful right to work full-time in Canada for any employer). PGWP-holders, all of whom are non-Canadian citizens, are disadvantaged by the policy. The fact that permanent residents, a subset of non-Canadian citizens, are not subject to the disadvantage does not cure the discriminatory impact of Imperial's policy.

[18] Imperial's position was that its policy did not constitute discrimination based on citizenship because of the exception for permanent residents. Imperial took the position that the distinction its policy drew was based on "immigration status" and not citizenship, because candidates did not need to be Canadian citizens to meet the requirement. Imperial further argued that it withdrew the job offer because of the appellant's dishonesty and not because he was unable to fulfil its permanent eligibility to work in Canada requirement. Imperial also challenged the appellant's standing to bring the human rights claim.

(5) The tribunal decision

[19] At the request of Imperial, the liability and remedy portions of the hearing were bifurcated. The liability hearing was heard over 13 days spanning a period of eight months. Six witnesses testified – the appellant, three witnesses from

2023 ONCA 364 (CanLII)

Imperial, and two experts on immigration matters. In addition, approximately 430 documents were filed, including affidavits.

[20] The tribunal found in the appellant's favour in a decision issued July 20, 2018. The tribunal's findings included: (1) that the appellant had standing under s. 34 of the *Code* to bring his application; (2) that Imperial discriminated against the appellant on the basis of citizenship by imposing an employment condition of permanent eligibility to work in Canada which must be proved by Canadian citizenship or permanent resident status; (3) that the discrimination was direct discrimination; (4) that Imperial had not established that the appellant's dishonesty was the *sole* reason for withdrawing the job offer – even if the appellant's dishonesty was one factor in Imperial's withdrawal of the job offer, it was clear that the appellant's citizenship status was also a factor, and thus the decision was tainted by discrimination on the basis of citizenship; and (5) in the alternative, if the discrimination was not direct discrimination, that Imperial had not established a *bona fide* occupational requirement ("BFOR") defence.

[21] Imperial sought reconsideration of the tribunal's decision. The tribunal denied the reconsideration application in a decision issued February 14, 2019. No issues relating to the reconsideration decision are raised in the appeal by either party.

2023 ONCA 364 (CanLII)

[22] The tribunal held a further hearing with respect to remedy. In a decision issued August 23, 2019, the tribunal awarded the appellant $120,360.70 in damages for lost income, injury to dignity, feelings and self-respect, and pre-judgment interest. No issues are raised in the appeal relating to the tribunal's decision on remedy.

2023 ONCA 364 (CanLII)

(6) The Divisional Court decision

[23] Imperial brought an application for judicial review to the Divisional Court. The Divisional Court (Sachs J. dissenting) found that the tribunal's decision was unreasonable. The majority granted the application for judicial review, quashed the tribunal's decision, and declined to remit the matter to the tribunal for a new hearing.

[24] Lederer J. and Mew J. gave separate reasons for the majority. Lederer J. characterized the tribunal's decision as subsuming "permanent resident" status into Canadian "citizenship" and held that the tribunal effectively created a ground of discrimination on the basis of not having Canadian permanent resident status that was not in s. 5 of the *Code*. In other words, according to Lederer J., the tribunal found that under s. 5 of the *Code*, the concept of "citizenship" directly protects against discrimination founded on "permanent residence." In his view, the effect of the tribunal decision was to allow permanent residence to become a separate ground on which discrimination could be alleged – one which was not, in fact, within

s. 5 of the *Code*. Based on this characterization of the tribunal's reasons, Lederer J. faulted the tribunal's failure to examine the "plain and ordinary" meaning of "citizenship" and "permanent residence" and found this to be a gap in the tribunal's analysis. In his view, the tribunal failed to provide a coherent chain of analysis for the conclusion that "permanent residence" is a ground for a claim of discrimination under the ground of "citizenship".

[25] Mew J. agreed with the result reached by Lederer J. In Mew J.'s view, a requirement that a job applicant be able to work permanently in Canada is not discrimination on the basis of citizenship. He held that it went beyond a reasonable interpretation of the *Code* to interpret the s. 5 prohibition against discrimination on the basis of citizenship as covering discrimination on the basis of non-Canadian citizenship. Taken to its logical conclusion, any person denied employment because they are not eligible to work in Canada could, in the absence of a BFOR defence, claim discrimination based on citizenship. In this regard, he referred to the example of a hypothetical American, living in Detroit, who is not a permanent resident in Canada (i.e., who has no status in Canada) (a hypothetical posited by Lederer J.).

[26] In addition, Mew J. observed that, if a Canadian employer is to make a substantial investment in training a professional employee, "it is reasonable to

2023 ONCA 364 (CanLII)

require the prospective employee to have a permanent and unrestricted right to accept and maintain employment in Canada."

[27] Sachs J., in dissent, found that the tribunal's decision was reasonable, and would have dismissed the application. She began by setting out several basic principles governing interpretation of human rights legislation. In her view, the tribunal's interpretation of the scope of discrimination on the basis of citizenship was reasonable. In particular, she found reasonable the tribunal's consideration of the defences to discrimination on the basis of citizenship in s. 16 of the *Code* as a tool to interpret the scope of citizenship discrimination in s. 5 of the *Code*. As she summarized this point: "If discriminating on the basis of citizenship or permanent residence status cannot constitute discrimination on the basis of citizenship, why put in the defence?"

[28] Sachs J. further found that the tribunal's conclusion that Imperial discriminated against the appellant on the basis of citizenship was consistent with the burden in human rights litigation that a claimant need only establish that a decision not to hire is *connected to* their status as a non-citizen (the protected ground), and not that it was the *sole* reason they were not hired. She also concluded that the tribunal reasonably addressed the argument that not all non-citizens were affected by Imperial's policy (because of the exception for permanent residents). Consistent with the decision in *Brooks v. Canada Safeway Ltd.*, [1989]

2023 ONCA 364 (CanLII)

1 S.C.R. 1219, the tribunal recognized that the fact that not all non-Canadian citizens were disadvantaged by the policy did not detract from the fact that only non-Canadian citizens were disadvantaged, while Canadian citizens were not. Finally, Sachs J. rejected Imperial's attempt to raise a defence under s. 16(1) of the *Code* for the first time on judicial review (this issue was not considered by the majority).

[29] I discuss the reasons of both the tribunal and the Divisional Court in more detail in the analysis section of these reasons.

B. GROUNDS OF APPEAL AND ADDITIONAL ISSUES RAISED BY THE RESPONDENT

[30] The appellant raises five grounds of appeal:

1. The majority of the Divisional Court incorrectly applied the reasonableness standard by misinterpreting and mischaracterizing the tribunal's reasons for finding discrimination on the basis of citizenship, and by substituting its own decision rather than beginning the analysis with respectful attention to the reasons of the tribunal;
2. The majority of the Divisional Court erred in concluding that the tribunal's finding that the appellant had established *prima facie* direct discrimination on the basis of citizenship was unreasonable, and in so

2023 ONCA 364 (CanLII)

doing, the majority erred in its approach to the concepts of direct and indirect discrimination;

3. The majority of the Divisional Court incorrectly failed to apply the principle of partial discrimination;
4. The majority of the Divisional Court breached rules of procedural fairness by considering a BFOR defence which had been abandoned by Imperial; and
5. If the decision of the tribunal was unreasonable, the Divisional Court breached rules of procedural fairness and failed to provide adequate reasons for declining to remit the appellant's claim to the tribunal for a new hearing.

[31] Imperial raises a number of additional issues, seeking to uphold the Divisional Court decision on other grounds. Imperial raises the following additional issues:

1. The tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship was unreasonable;
2. The tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or a permanent resident, rather than solely because he lied on his application, was unreasonable;

2023 ONCA 364 (CanLII)

3. The tribunal erroneously shifted the burden to Imperial to prove that it did not discriminate against the appellant, thereby rendering its decision unreasonable; and
4. The tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial was unreasonable because no reasons were given for that conclusion.

[32] It is open to a respondent in an appeal to advance arguments to sustain the judgment below which were not raised by the appellant. However, a respondent may not raise entirely new arguments which were not raised below or which would require further evidence which was not led at first instance: *R. v. Perka*, [1984] 2 S.C.R. 232, at p. 240; *Fanshawe College of Applied Arts and Technology v. Au Optronics Corporation*, 2016 ONCA 131, 129 O.R. (3d) 391, at para. 9; *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 102.

[33] As I explain in the course of the analysis below, three of the additional issues raised by Imperial meet the requirements of *Perka* for this court to consider them on appeal – the appellant's standing, whether the appellant's lies about his status in Canada were the sole basis for the withdrawal of the job offer, and whether the tribunal improperly shifted the burden of proof. However, one issue –

2023 ONCA 364 (CanLII)

the defence under s. 16(1) of the *Code* – was not raised by Imperial before the tribunal, and I would not allow Imperial to raise it now.

2023 ONCA 364 (CanLII)

C. SUMMARY OF MY CONCLUSIONS

[34] I would allow the appeal and restore the order of the tribunal. I am of the view that the tribunal's decision is reasonable and that the Divisional Court majority incorrectly applied the reasonableness standard of review in overturning the tribunal's decision.

[35] In the context of the appellant's circumstances – that by the anticipated commencement of work he would be permitted to work full-time, anywhere in Canada, for any employer, for a period of three years under the PGWP program – the tribunal's finding that Imperial's requirement that only Canadian citizens and permanent residents were eligible for the position was discrimination on the basis of citizenship was reasonable. Imperial's policy denied eligibility for the position only to non-Canadian citizens. The fact that Imperial excepted one class of non-Canadian citizens (permanent residents) did not insulate its policy from being discrimination on the basis of citizenship. Policies that discriminate on the basis of a prohibited ground are not saved on the basis that they only partially discriminate. As that policy applied to PGWP-holders, who are eligible to work without restriction in Canada for up to three years, it constituted discrimination on the basis of

citizenship. The tribunal's finding that Imperial had not established any defence was also reasonable.

2023 ONCA 364 (CanLII)

[36] Nor would I uphold the Divisional Court majority's decision on the basis of any of the additional issues raised by Imperial. The tribunal's finding that the appellant had standing to bring his claim alleging employment discrimination on the basis of citizenship was reasonable. Regarding the appellant's dishonesty, the tribunal's finding of fact that there was insufficient evidence to demonstrate that Imperial withdrew the job offer solely because the appellant was neither a Canadian citizen nor a permanent resident was reasonable. The tribunal did not improperly place a burden on Imperial to prove that it did not discriminate on a prohibited ground. The tribunal's application of the burden of proof is consistent with jurisprudence on the ultimate burden of proof and evidential burdens in discrimination claims under human rights legislation. Finally, I would not permit Imperial to invoke a defence under s. 16(1) of the *Code*, as Imperial did not raise that defence before the tribunal.

D. STANDARD OF REVIEW

[37] In an appeal to this court from a decision of the Divisional Court on an application for judicial review, this court must determine whether the Divisional Court identified the appropriate standard of review and applied that standard correctly in reviewing the tribunal's decision. The latter step requires this court to

"step into the shoes" of the Divisional Court and focus on the tribunal's decision, applying the applicable standard of review. The appeal is, in effect, a *de novo* review of the tribunal's decision. This court is not restricted to asking whether the Divisional Court committed a palpable and overriding error in its application of the appropriate standard: *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458, 161 O.R. (3d) 561, at para. 42; *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 49, leave to appeal to S.C.C. requested, 40564 (January 16, 2023); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46; *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, 157 O.R. (3d) 753, at para. 20; *Briggs v. Durham (Police Services Board)*, 2022 ONCA 823, at para. 36, leave to appeal to S.C.C. requested, 40587 (January 27, 2023).

[38] The first step of the analysis is to determine whether the Divisional Court identified the correct standard of review. In this case, both the majority and the dissent in the Divisional Court identified the standard of review as reasonableness.

[39] The appellant and Imperial accept that the applicable standard of review for decisions of the tribunal is reasonableness.

2023 ONCA 364 (CanLII)

[40] The tribunal participated in this appeal for the purpose of addressing the appropriate standard of review from the tribunal's decisions. In its factum, the tribunal argued that the appropriate standard of review is "patent unreasonableness" because this is the standard of review set out at s. 45.8 of the *Code*, and because, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 34, the Supreme Court instructed that courts should "to the extent possible, respect clear statutory language that prescribes the applicable standard of review."

[41] After the tribunal's factum was filed, in *Midwives*, this court considered and rejected the same argument put forward by the tribunal that the patent unreasonableness standard should apply. The court held in *Midwives*, at paras. 44-83, that the standard of review applicable to reviews of the tribunal's decisions is reasonableness, consistent with this court's previous decision in *Shaw v. Phipps*, 2012 ONCA 155, 347 D.L.R. (4th) 616.

[42] In light of the decision in *Midwives*, the tribunal did not pursue oral submissions on the standard of review. Although the tribunal did not abandon its position that the appropriate standard of review is patent unreasonableness, it accepted that the court should follow the holding in *Midwives*. In light of the recent considered analysis of this issue in *Midwives*, I agree that the appropriate standard of review of the tribunal's decision is reasonableness.

2023 ONCA 364 (CanLII)

[43] Reasonableness review finds its starting point in judicial restraint and respect for the distinct role of administrative decision-makers. A reviewing court must pay "respectful attention" to the reasons offered for an administrative decision. This means focusing on the decision actually made by the administrative decision-maker and starting the analysis by developing an understanding of the decision-maker's reasoning process in order to determine whether the decision as a whole is reasonable. A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker". In applying the reasonableness standard, the focus is "on the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome." In addition, the reviewing court is not to hold the reasons up to a standard of perfection or conduct a "line-by-line treasure hunt for error": *Vavilov*, at paras. 75, 82-86, and 99-135; *Turkiewicz*, at paras. 55-60; *Midwives,* at para. 82.

[44] Because the standard of review requires this court to step into the shoes of the Divisional Court and conduct a *de novo* review, these reasons focus on the tribunal's decision. However, in the course of my analysis, I highlight areas where the Divisional Court majority erred in its application of the reasonableness standard.

2023 ONCA 364 (CanLII)

[45] Although the majority and dissenting decisions of the Divisional Court correctly identified the standard of review as reasonableness, in my view, the majority erred in its application of the reasonableness standard in three ways.

[46] First, the majority failed to give "respectful attention" to the reasons of the tribunal. Although the majority said it was applying a reasonableness standard, the substance of the analysis by both judges in the majority approached the review by asking how they themselves would have decided the issues and restarted the analysis from scratch.

[47] Second, the majority mischaracterized the tribunal's reasoning, contrary to the direction in *Vavilov* to begin the reasonableness analysis by developing an understanding of the administrative decision-maker's reasoning that led to the decision. Starting with a mischaracterization of an administrative decision-maker's reasoning undermines both deference and the possibility of reviewing the decision on a reasonableness standard.

[48] Third, the majority's analysis ignored well-established law on the approach to be followed in analyzing a claim of discrimination under human rights legislation. As a result, the majority erred by failing to apply the reasonableness standard conscious of the law that constrained both the tribunal and the Divisional Court.

2023 ONCA 364 (CanLII)

E. RELEVANT PRINCIPLES OF ANALYSIS OF DISCRIMINATION CLAIMS UNDER HUMAN RIGHTS LEGISLATION

[49] Before turning to the reasonableness of the tribunal's decision, I begin with a discussion of a number of basic principles for the analysis of human rights claims that are well-established in the jurisprudence. This context is relevant to understanding the law that constrained the tribunal as a decision-maker, and also relevant to where the Divisional Court majority misapplied the reasonableness standard.

(1) Elements of a claim of discrimination under human rights legislation

[50] The three-step analysis to establish a *prima facie* claim of discrimination is well-established. The applicant must show: (1) that they have a characteristic protected from discrimination under the *Code* (i.e., they are a member of a group protected by the *Code*); (2) that they have experienced an adverse impact (treatment) in a category of activity regulated by the *Code*, such as employment or a service; and (3) that the protected characteristic was a factor in the alleged adverse treatment: *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 33; *Midwives*, at para. 101; *Peel Law Association v. Pieters*, 2013 ONCA 396, 116 O.R. (3d) 81, at paras. 55-59.

[51] Under the third branch of the analysis for a *prima facie* case of discrimination, the applicant need only prove a *connection* between the prohibited

2023 ONCA 364 (CanLII)

ground and the adverse treatment. The connection does not need to be causal. Further, the connection between the adverse treatment and the prohibited ground can co-exist with other non-discriminatory factors. The prohibited ground need not be the only reason for the adverse treatment, or even the predominant reason: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at paras. 43-52; *Midwives*, at para. 102; *Pieters*, at paras. 59-60.

(2) The burden of proof and the shifting evidential burdens

[52] The ultimate burden to prove a claim of discrimination on a prohibited ground is on the applicant. However, the case law establishes a series of shifting evidential burdens to structure the analysis. The law is well-settled and was recently considered by this court in *Midwives*, at paras. 143-51.

[53] An applicant who brings a claim under the *Code* bears the ultimate burden to prove that a discriminatory ground under the *Code* was a factor in the impugned conduct. If the applicant establishes a *prima facie* case of discrimination, then the evidential burden shifts to the responding party to rebut the *prima facie* case by providing a credible, non-discriminatory explanation for the impugned conduct which rebuts the *prima facie* case. In other words, once a *prima facie* case of discrimination on a prohibited ground is demonstrated, the evidential burden shifts to the respondent to rebut that a prohibited ground of discrimination was a factor

2023 ONCA 364 (CanLII)

in the impugned conduct. If the responding party succeeds in rebutting the *prima facie* case, then the evidential burden shifts back to the applicant to prove that the respondent's non-discriminatory explanation is pretextual. See also: *Pieters*, at paras. 63-74; *Ontario v. Association of Midwives*, 2020 ONSC 2839, 82 Admin L.R. (6th) 241, at paras. 144-51, aff'd 2022 ONCA 458, 161 O.R. (3d) 561.

[54] The ultimate burden of persuasion always rests with the party claiming discrimination. However, the shifting evidential burdens support the underlying principle of anti-discrimination legislation that where a responding party seeks to demonstrate a non-discriminatory reason for the impugned action, it is not sufficient to show that a non-discriminatory reason was part of the reason for the action if discriminatory reasons were also part of the reason. Rather, the responding party must show that the non-discriminatory reason was the *sole* reason for the action. In other words, the jurisprudence recognizes that the reasons that motivate actions taken by, for example, an employer or potential employer, may be multi-factorial. If one of the reasons is discriminatory, this establishes a violation of the *Code* (subject to statutory defences): *Bombardier*, at paras. 43-52. The presence of a non-discriminatory reason for the impugned conduct does not insulate the conduct from a finding of discrimination under the *Code* if it is combined with one or more discriminatory reasons.

2023 ONCA 364 (CanLII)

[55] The shifting evidential burdens also recognize that if there is a non-discriminatory explanation for the impugned conduct, the respondent is uniquely positioned to provide evidence on that issue, because it has to do with the respondent's state of mind or motivation: *Pieters*, at paras. 70-73.

(3) Direct versus adverse impact discrimination

[56] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the Supreme Court adopted a revised unified approach to employer defences under human rights legislation, no longer based on categorizing discrimination as direct or adverse impact (sometimes referred to as indirect). The court gave several reasons for this, including that the distinction is sometimes artificial, difficult to apply, and manipulable; that it is difficult to justify different remedies depending on which category is applied to a discrimination claim; that it can tend to legitimate systemic discrimination; and that it is inconsistent with the purposes of human rights legislation: at paras. 25-53.

[57] However, the distinction between direct and adverse impact discrimination continues to have relevance in Ontario because the BFOR defence in s. 11 of the

2023 ONCA 364 (CanLII)

Code is only available where discrimination is indirect:[3] *Entrop v. Imperial Oil Limited* (2000), 50 O.R. (3d) 18 (C.A.), at paras. 67-69.

[58] Although the Supreme Court in *Meiorin* signalled a move away from categorizing discrimination as direct or adverse impact, the concepts of direct and adverse impact discrimination have relevance to this appeal because one of the issues on which the majority of the Divisional Court found the tribunal decision to be unreasonable was the finding that Imperial's policy constituted direct discrimination.

[59] The distinction between direct and adverse impact discrimination has its origin in Canadian law in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"). In *O'Malley*, McIntyre J., writing for the court, described the distinction as follows, at p. 551:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the

[3] There is a more limited BFOR defence for some circumstances of direct discrimination in the context of "special employment" in s. 24 of the *Code*. However, none of the defences in s. 24 would apply to the circumstances of this case, and Imperial did not raise s. 24 at any point in this litigation.

2023 ONCA 364 (CanLII)

> concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code, I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. [Emphasis added.]

[60] Thus, direct discrimination exists where a rule or policy discriminates against a protected group on its face. Adverse impact discrimination exists where a rule or policy is neutral on its face, but adversely affects members of a protected group (i.e., on the basis of a prohibited ground, such as race, sex, or creed).

[61] As is clear from the passage from *O'Malley*, the concern which motivated recognition of adverse impact discrimination is that a neutrally expressed rule or policy may affect particular groups protected from discrimination under human rights legislation in a discriminatory way. The fact the discrimination is not expressly intended by a neutral rule or policy does not make its effects any less real for the affected group: see also *Meiorin*, at para. 25; *Entrop*, at para. 71.

2023 ONCA 364 (CanLII)

[62] More recent articulations of the distinction between direct and indirect discrimination have maintained the approach from *O'Malley* that discrimination is characterized as direct where a rule or policy is discriminatory on its face, and adverse impact where a rule or policy is neutral on its face but discriminatory in its effects on a particular group based on a prohibited ground: *Entrop*, at para. 65; *Fraser v. Canada (Attorney General),* 2020 SCC 28, 450 D.L.R. (4th) 1, at paras. 30-39; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 15 ("*Grismer*"); *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591, at para. 24.

[63] The Supreme Court in *Meiorin* and this court in *Entrop* recognized that in some cases, characterizing the alleged discrimination as direct or adverse impact may be difficult: *Meiorin*, at para. 27; *Entrop*, at para. 70.

[64] In light of the direction in *Meiorin* signalling a move away from undue focus on whether discrimination was direct or adverse impact, but mindful of the language of s. 11(1) of the *Code* which makes a BFOR defence unavailable for cases of direct discrimination, this court held in *Entrop*, at para. 80, that the s. 11 defence should be unavailable only in cases which can be "neatly characterized" as direct discrimination. In other words, if there is doubt about whether discrimination should be characterized as direct or adverse impact in a particular

2023 ONCA 364 (CanLII)

case, it should be characterized as adverse impact, to allow a BFOR defence under s. 11 to be considered.

[65] I flag now an issue I return to below. The Supreme Court has held that the test to establish *prima facie* discrimination is the same whether the claim is of direct or adverse impact discrimination: *Grismer*, at paras. 18-19; *Fraser*, at para. 49.

[66] As a result, whether a discrimination claim is characterized as direct or adverse impact has one practical effect in Ontario – whether a BFOR defence under s. 11 is available. Where a BFOR defence is not in issue, the question of whether a claim of discrimination is properly characterized as direct or adverse impact has no practical effect.

(4) Partial discrimination is still discrimination

[67] In order to establish a finding of *prima facie* discrimination, it is not necessary that all members of the protected group at issue be affected or affected in the same way. For example, in *Brooks*, the Supreme Court held that an employer's policy that denied benefits to employees during pregnancy constituted discrimination on the basis of sex. Although not all women become pregnant, the policy had a discriminatory impact on women. In other words, the fact that discrimination is partial does not convert it into non-discrimination: *Brooks*, at

2023 ONCA 364 (CanLII)

pp. 1247-48. See also: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at pp. 1288-89; *Fraser*, at paras. 72-75; *Meiorin*, at paras. 11 and 69.[4]

[68] The interveners, the South Asian Legal Clinic of Ontario and the Colour of Poverty/Colour of Change Network, directed the court to another helpful example of this principle. At one time, elementary school teaching contracts often either barred married women from contracts, or required that they be placed on limited-term contracts. These policies were based on sexist stereotypes of conflict between child-rearing and work for mothers, and gendered division of labour in families. Despite the fact that these policies did not affect women who chose not to marry – and thus did not affect all women – such policies were found to constitute discrimination on the basis of sex.[5] The policies only applied to women. The fact that not all women were affected did not "cure" the discriminatory effect. It simply made the policies partially, rather than fully, discriminatory.

2023 ONCA 364 (CanLII)

---

[4] The partial discrimination principle is not expressly discussed in *Meiorin*. However, the evidence was clear that some women were capable of passing the physical fitness requirement that was found to constitute adverse impact discrimination. The discrimination arose out of the fact that the policy impacted women differently (and negatively) compared to men. The fact that not all women were so affected did not render the policy non-discriminatory.

[5] These cases were decided prior to the inclusion of "marital status" in the relevant human rights legislation. See discussion of this type of policy in *Tomen v. O.T.F. (No. 4)*, 1994 CanLII 18431 (Ont. H.R.T.), at paras. 262-67. This type of policy was found to be discrimination on the basis of sex in *Ferguson v. Cape Breton District School Board*, 1986 CanLII 6514 (N.S.H.R.C.), aff'd (1987), N.S.R. (2d) 106 (C.A.).

[69] In light of this review of the human rights law principles and constraints governing the analysis of the tribunal (and the Divisional Court), I turn now to a consideration of whether the tribunal's decision was reasonable.

F. WAS THE TRIBUNAL'S LIABILITY DECISION REASONABLE?

[70] As outlined above, the standard of review in this case requires this court to step into the shoes of the Divisional Court and assess the reasonableness of the tribunal's decision. For this reason, rather than structure the analysis as a point-by-point assessment of the appellant's grounds of appeal and then the respondent's additional issues, I structure the analysis around whether the tribunal's decision was reasonable and focus on the areas where the reasonableness of the decision is challenged. The ultimate question this court must answer is whether the decision of the tribunal "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and the law that constrain the decision maker:" *Vavilov*, at paras. 85 and 99.

[71] I structure my analysis of the reasonableness of the tribunal's decision around the following issues:

1. Was the tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable?

2023 ONCA 364 (CanLII)

2. Was the tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?

3. Was the tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or permanent resident, rather than solely because of his dishonesty in the job competition, reasonable?

4. Was the tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial reasonable?

(1) Was the tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable?

[72] Imperial argues that the tribunal's finding that the appellant had standing to bring his claim alleging discrimination in employment on the basis of citizenship was unreasonable. The substance of Imperial's submission is that the appellant did not have standing to bring the claim because, at the time he applied for the position and until the date Imperial withdrew the job offer (as distinct from the time he would have been anticipated to commence work), he did not have status in Canada that permitted him to work without restriction, since up to that time, he was a foreign national and did not yet have the PGWP.

2023 ONCA 364 (CanLII)

(a) Is Imperial entitled to raise the standing issue?

[73] There is a preliminary issue of whether Imperial may raise the appellant's standing on appeal, as there is dispute about whether it was raised in the Divisional Court.

[74] Neither the majority nor the dissent in the Divisional Court addressed the merits of Imperial's position that the appellant lacked standing to bring his application under the *Code*. However, Imperial's Notice of Application and factum in the Divisional Court raised the standing issue as a ground of review. In light of the lack of clarity on what position Imperial took in oral submissions in that court, I address the issue on the merits.

[75] As I explain below, in my view, the tribunal's conclusion that the appellant had standing to bring the claim that Imperial discriminated against him on the basis of citizenship is reasonable. I would not interfere with it.

(b) The tribunal's reasons on the appellant's standing to bring the claim

[76] The tribunal found that the appellant had standing to bring his claim under the *Code* because he had a "direct interest" in the pre-employment condition imposed by Imperial that he was unable to meet.

2023 ONCA 364 (CanLII)

[77] Imperial had argued before the tribunal that the appellant did not have standing to bring his application because from the date that he made his job application to Imperial (September 10, 2014) to the date of the withdrawal of the job offer (January 8, 2015), he was an international student on a student visa, and as a result was not permitted to work off-campus on a full-time basis. In other words, Imperial argued that although the appellant's status as a PGWP-holder upon graduation (which the tribunal found was imminent) would entitle him to work full-time, anywhere in Canada, for any employer, for up to three years, because he had not yet graduated when the job offer was withdrawn, he did not have standing to bring the application.

[78] The tribunal rejected this argument. The tribunal's conclusion on standing is founded on both the wording of s. 34(1) of the *Code*, which defines the right to bring an application under the *Code*, and the evidence in the record, which supported the finding that the appellant had a direct interest in the application.

[79] The tribunal noted the breadth of the right of standing codified in s. 34(1) of the *Code*. Section 34(1) of the *Code* provides: "If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2" (either within one year after the incident if it is a single incident, or within one year after the last incident, if it is a series of incidents).

2023 ONCA 364 (CanLII)

[80] The substance of the tribunal's holding on standing was as follows:

> The HRTO has repeatedly ruled that to have standing to bring an application under section 34(1) of the *Code*, an applicant need only allege that her or his *Code* rights have been infringed. It is clear on the face of the Application that the applicant has alleged that *his* right to be free from discrimination with respect to employment was engaged in his interactions with IO. The applicant is not a "public interest" applicant but is indeed a person whose interest was directly at stake and who alleged that he experienced discrimination on the basis of citizenship. [Emphasis in original.]

[81] The tribunal referred to prior authority of the tribunal in support of assessing the appellant's standing based on whether he had a direct interest at stake in the subject matter of the proceeding: *Carasco v. University of Windsor*, 2012 HRTO 195. The tribunal also noted that it is settled law in Ontario that job applicants enjoy the protection of the *Code* before they are formally employed because the wording in s. 5(1) "with respect to employment" has been interpreted to include pre-employment scenarios – that is, it covers discrimination in the job search process.

[82] The tribunal then made findings based on the record before it in support of its conclusion that the appellant had a direct interest in the application. Central to these findings was evidence that under the PGWP program, the appellant would be entitled, upon graduation (which was imminent – scheduled for January 2015), to obtain a PGWP without delay. The evidence before the tribunal was that the only condition on the appellant obtaining the PGWP was confirmation from the

2023 ONCA 364 (CanLII)

university that he had completed his university program. The PGWP was “open” and permitted him to work full-time, anywhere in Canada, for any employer, but was limited to three years. In other words, upon graduation, the appellant’s right to work in Canada was unrestricted, but was time-limited to three years.

[83] At the time the appellant applied for the job with Imperial, he anticipated completing his engineering studies in December 2014 and formally graduating in January 2015. Imperial’s job posting indicated the start date for the position was May 2015, after the appellant’s anticipated graduation. In the job offer letter of December 2, 2014, the start date listed was February 2, 2015, but the letter indicated that that date was “negotiable”. There was no evidence led before the tribunal that the appellant would be expected to commence work in the position with Imperial before his graduation. Indeed, the evidence from Imperial’s witnesses was that new graduate hires would start employment after their graduation. Thus, the evidence established that the appellant would be eligible to work without restriction for three years, by the time he would have been expected to start work for Imperial in the position. The evidence before the tribunal was that the appellant received his PGWP in February 2015, as anticipated at the time he applied for work with Imperial.

[84] The tribunal further accepted the uncontroverted evidence that the appellant was a student engineer who, in applying for the position at Imperial, was

2023 ONCA 364 (CanLII)

genuinely seeking his first job that would commence after his graduation. The tribunal concluded that "[a]s a genuine job seeker, for work to commence at some yet to [be] determined date after his graduation, it is abundantly clear to the Tribunal that the [appellant] had a direct stake in [Imperial's] hiring process, starting with [Imperial's] screening of recruits on the McGill campus and thus he has standing to challenge [Imperial's] employment practices under the *Code*."

2023 ONCA 364 (CanLII)

(c) Positions of the parties on standing

[85] Imperial argues that the tribunal's finding that the appellant had standing to bring his application under the *Code* was unreasonable. Imperial's argument is the same as that raised before the tribunal – that up until the date of Imperial's letter withdrawing the job offer (January 8, 2015), the appellant was not yet eligible to work without restriction in Canada. As such, according to Imperial, he did not have standing to bring an application under s. 34(1) of the *Code* based on discrimination in employment because he did not have an unrestricted legal right to work in Canada at the time he applied for the job and up to the time the job offer was withdrawn. Until his graduation, the appellant's right to work in Canada was limited to part-time work on the university campus or full-time work only in the regular breaks between academic terms. Imperial's position is that in order for a person to have standing to bring a claim based on discrimination in employment on the basis of citizenship, a person must be eligible to work in Canada, and that the relevant

time to assess an applicant's right to work is when they apply or when the job offer is made, not the anticipated date of commencement of work. Imperial argues that the tribunal's standing analysis does not reveal a rational chain of analysis.

[86] The appellant argues that the tribunal's decision that he had standing based on having a direct interest in the issues raised in the application was reasonable. The tribunal's reasons demonstrate that it applied the relevant legal principles grounded in the text of s. 34(1) of the *Code* and the concept of having a "direct interest" to ground standing, and its analysis and application of those principles on the factual record before it were reasonable.

(d) The tribunal's decision on the appellant's standing was reasonable

[87] I agree with the appellant that the tribunal's analysis and conclusion regarding his standing were reasonable. The principles relied on by the tribunal to assess the appellant's standing are consistent with the broad language of s. 34(1) of the *Code*, with prior jurisprudence of the tribunal on standing, and with the approach to direct interest standing (private standing) in the courts. The factual conclusions reached by the tribunal are well-grounded in the evidentiary record and are reasonable.

[88] As the tribunal noted, s. 34(1) of the *Code* provides for a broad grant of standing. Any person who "believes that any of his or her rights under Part I have been infringed" has standing to apply to the tribunal for a remedy. One could

2023 ONCA 364 (CanLII)

imagine scenarios where there is no factual basis for a person's belief that their rights have been infringed, and on that basis the assertion of standing would be speculative. But that is not the case here.

[89] As noted above, the tribunal referred to its prior decision in *Carasco* regarding the principles governing standing under the *Code*. *Carasco* considered the three types of standing available under the *Code*. I will only address the type of standing under s. 34(1), as that is what is at issue in this case. *Carasco* held, in accordance with the wording of s. 34(1), that standing to bring an application under the *Code* is available to a person who believes that any of their rights under Part I have been infringed. *Carasco* notes that s. 45.2, which is referred to in s. 34(1), makes the tribunal's authority (following a hearing) to award a remedy conditional on the tribunal finding an infringement of the rights of the party bringing the application. Thus, in order for an applicant to have standing to bring an application under s. 34(1), the application must assert a breach of the applicant's rights under the *Code*, and seek a remedy for the breach of the rights. The analysis in *Carasco* focused on the importance of the claim being for the breach of the applicant's own rights, as opposed to a claim in the nature of public interest standing (which under s. 35(1) of the *Code*, may only be brought by the Ontario Human Rights Commission).

2023 ONCA 364 (CanLII)

[90] The "direct interest" analysis applied by the tribunal in this case is consistent with the approach in *Carasco*. The tribunal considered whether the applicant had a viable claim that his rights under the *Code* had been infringed by Imperial and sought a remedy for the alleged breach.

[91] The analysis of standing under the *Code* need not be identical to the approach taken by the courts in civil matters, particularly given the broad grant of standing in s. 34(1) of the *Code*. That said, the tribunal's approach to standing in this case is consistent with established principles regarding direct interest standing in the courts.

[92] The test applied by the courts for private interest standing requires that the applicant or plaintiff have a personal and direct interest in the issue raised in the proceeding. The interest must not be too indirect, remote, or speculative. Various formulations of this requirement are used in the jurisprudence, including that the person is "specifically affected by the issue", has a "personal legal interest", or has a "personal and direct interest" in the outcome of the proceeding. This type of standing is often referred to as "direct interest" or "private" standing to distinguish it from public interest standing (the latter having different requirements): *Canada (Minister of Finance) v. Finlay*, [1986] 2 S.C.R. 607, at pp. 617-18; *Bedford v. Canada*, 2010 ONSC 4264, 102 O.R. (3d) 321, at paras. 44-47, aff'd on this point, 2012 ONCA 186, 109 O.R. (3d) 1, at para. 50, rev'd in part on other grounds, 2013

2023 ONCA 364 (CanLII)

SCC 72, [2013] 3 S.C.R. 1101; *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, 153 O.R. (3d) 385, at para. 33; Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at p. 5.

[93] The ultimate concern behind rules for private standing (as distinct from public interest standing) is that the party bringing the proceeding have a real legal interest in the proceeding that they are seeking to vindicate, rather than just a "sense of grievance": *Carroll*, at para. 33; *Landau v. Ontario (Attorney General)*, 2013 ONSC 6152, at paras. 16 and 21; Cromwell, at pp. 9-10.

[94] The tribunal reasonably found that the appellant had a real legal interest in the claim he made. The tribunal applied the direct interest test reasonably to the record before it. The tribunal considered the legal and factual issues raised by the application, asked whether the appellant had a direct interest in them, and found that he did. The evidence before the tribunal supported its findings that the appellant was a genuine job seeker; that upon graduation he would be entitled to a PGWP which would entitle him to work full-time, anywhere in Canada, for any employer, for up to three years; that he was anticipated to graduate in January 2015 (and in the event did); and that the expectation of both the appellant and Imperial was that he would commence work after he graduated (i.e., once he was permitted to work without restriction under the PGWP program). These findings support the conclusion that the appellant had a direct interest in the hiring policy

2023 ONCA 364 (CanLII)

of Imperial limiting prospective employees to Canadian citizens and permanent residents. The tribunal's conclusion that the appellant had satisfied the requirements for standing under s. 34(1) of the *Code* is reasonable.

[95] Imperial largely focuses its argument on the timing of the alleged discrimination in relation to the appellant's eligibility to work in Canada, arguing that because he did not have a legal right to work in Canada at the time the alleged employment discrimination occurred, he did not have standing to bring this claim. Lying behind Imperial's submissions on this issue is the asserted concern (as set out in Imperial's factum) that, if the appellant had standing to bring his claim, "then any person in the world would have standing to file a claim of discrimination in employment contrary to Section 5(1) of the *Code*."

[96] Respectfully, this argument is based on a false premise that is not supported by the record or the tribunal's reasoning. The tribunal found that the appellant had standing to bring the claim because on the record before it, the appellant was entitled to the PGWP once he graduated, conditional only on providing proof from the university of the completion of his degree. The appellant had already finished the coursework for his degree when the job offer was rescinded, and was just waiting on the formal graduation. Thus, the appellant's claim that he would have the status to work in Canada without restriction imminently was well-grounded in the record. The tribunal found that there was no

2023 ONCA 364 (CanLII)

doubt that he would obtain his PGWP following his graduation in January 2015. The appellant's claim based on an anticipated right to work without restriction in the immediate future was not a speculative claim.

[97] By contrast, a hypothetical human rights claim filed by "any person in the world" (as posited in Imperial's factum), without any claim to a status in Canada that would give them an unrestricted right to work, would fail the test for standing because the assertion of any right to work in Canada would be speculative.

[98] The tribunal's finding that the appellant had standing to bring the claim of discrimination on the basis of citizenship was reasonable.

(2) Was the tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?

[99] The Divisional Court majority held that the tribunal's finding that Imperial engaged in employment discrimination on the basis of citizenship was unreasonable. The appellant challenges this holding. Whether the tribunal's finding that Imperial discriminated against the appellant on the basis of citizenship was reasonable is at the heart of this appeal.

[100] The appellant argues that the tribunal's decision was reasonable. The appellant argues that the tribunal reasonably interpreted the meaning of discrimination in employment on the basis of citizenship in s. 5 of the *Code* in the context of the legislation as a whole – and in particular s. 16 of the *Code* – and in

2023 ONCA 364 (CanLII)

accordance with the principle to interpret human rights legislation in a liberal manner, consistent with its purposes. The appellant argues that the tribunal did not conceive of “permanent resident status” as a distinct ground of discrimination under the *Code*. Rather, the tribunal found that the ability to live and work in Canada on a permanent basis is closely associated with Canadian citizenship, and that under Imperial’s policy, non-Canadian citizens who were eligible to work in Canada were excluded from consideration (although not all non-Canadian citizens were excluded because of the exception for individuals with permanent resident status). The tribunal found that based on these factors, the exclusion of PGWP-holders from consideration for employment constituted discrimination on the basis of citizenship. The fact that Imperial’s policy did not discriminate against all non-Canadian citizens, because of the exception for individuals with permanent resident status, did not cure the discrimination. Further the appellant argues that the tribunal reasonably characterized the discrimination as direct because it is apparent on the face of Imperial’s policy and the job posting.

[101] Imperial argues that its policy does not discriminate on the basis of citizenship, but rather on the basis of immigration status, which is not a prohibited ground under the *Code*. Imperial points to the fact that its policy provided that individuals with permanent resident status were eligible for employment as establishing that the policy did not discriminate on the basis of citizenship. Imperial

2023 ONCA 364 (CanLII)

argues that the tribunal's reasons do not provide a coherent chain of reasoning. Imperial argues that the tribunal's reasoning unreasonably extended the prohibited ground of citizenship in s. 5 of the *Code* to include status as a permanent resident of Canada as an additional ground of prohibited discrimination.

[102] I begin the analysis with a summary of the tribunal's reasons on this issue.

(a) The tribunal's reasons for finding a *prima facie* claim of employment discrimination on the basis of citizenship

[103] The tribunal began its analysis of whether Imperial engaged in discrimination on the prohibited ground of citizenship with the applicable legal framework. This included:

- Section 5 of the *Code*, which provides that every person has the right to be free from discrimination with respect to employment on a number of grounds, including citizenship.
- Section 9 of the *Code*, which states, among other things, that no one shall "infringe or do, directly or indirectly, anything that infringes a right under this Part" (which includes a right under s. 5).
- Section 11 of the *Code*, which sets out the BFOR defence.
- The onus of proof in human rights claims. (I discuss the tribunal's consideration of the onus in more detail below, as it is a separate issue raised by Imperial).

[104] The tribunal then accurately summarized the positions of the parties.

2023 ONCA 364 (CanLII)

[105] The tribunal pointed out that the issue raised in this case was somewhat novel to the tribunal, as earlier cases involving allegations of discrimination on the basis of citizenship were ultimately decided "without resort to a detailed analysis of this ground in the *Code* and its relationship to various subgroups of non-citizens." In this section of the analysis, the tribunal explained why particular prior tribunal decisions could not be said to have decided the issue raised in this case.

[106] As part of its interpretation of the meaning of discrimination on the basis of "citizenship" in s. 5 of the *Code*, the tribunal considered another section of the *Code* that uses the word "citizenship", s. 16, to ensure that a consistent meaning is attached to the term within the *Code*. The tribunal noted that s. 16(1) creates a defence to discrimination on the basis of citizenship by providing that a right to non-discrimination based on citizenship is not infringed "where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law." Section 16(2) provides that a right to non-discrimination based on citizenship is not infringed "where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence." Section 16(3) provides that the right to non-discrimination based on citizenship is not infringed "where

2023 ONCA 364 (CanLII)

Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions."

[107] Based on considering the meaning of citizenship in s. 5 of the *Code* in the context of its use in s. 16 of the *Code*, the tribunal found as follows:

> In the Tribunal's view, the very fact that the Legislature saw fit to deem that in certain situations, hiring preference for "Canadian citizens" and "permanent residents" is not discrimination, means that *conversely*, in the absence of the s. 16 defence, HRTO can find that preferential hire on the basis of Canadian citizenship and permanent residence status amounts to discrimination under the *Code*. The language chosen by the Legislature in formulating a defence in s. 16 clearly contemplated that "permanent residence" (or "domicile in Canada with intention to obtain citizenship") as well as "Canadian citizenship" are requirements that in certain context[s] may properly found a claim of discrimination *on the ground of citizenship*.
>
> A plain reading of the text above indicates that the Legislature, in drafting the s. 16 *Code* defence(s) expressly associated "domicile in Canada", "permanent residence" with the concept of "Canadian citizenship". In the Tribunal's view, this association supports the view that "permanent residence", although not expressly a listed "ground", is properly associated with the ground of "citizenship" (or lack thereof) under the *Code*. [Emphasis in original.]

[108] The tribunal found that citizenship (of Canada) and non-citizenship were "clear demarcations captured by the *Code*" and that non-citizenship captures all individuals in Ontario who are not Canadian citizens. The tribunal recognized that

2023 ONCA 364 (CanLII)

among non-citizens, there are individuals "with varying residence status and different degrees of entitlement to work in Canada." The tribunal found that for the appellant to obtain protection from discrimination under the *Code* on the basis of citizenship, he need only establish that the alleged discriminatory treatment was linked to his personal characteristic of being a non-citizen of Canada (or a non-Canadian citizen).

[109] The tribunal relied on the principle that discrimination only affecting some members of a protected group does not render the treatment non-discriminatory, referring to the Supreme Court decision in *Meiorin*. That is, partial discrimination against some members of a protected group is still prohibited discrimination. Thus, the fact that Imperial's policy only discriminated against some non-Canadian citizens (because it excepted permanent residents) did not render its policy non-discriminatory. On this issue of whether Imperial's policy discriminated on the basis of citizenship, the tribunal concluded:

> The case law is clear that the applicant need only demonstrate that he belongs to a class of non-Canadian citizens; he need not demonstrate that all members of that class are disadvantaged by IO's requirement. [Citation omitted.]
>
> The Tribunal finds that IO's "permanence requirement"[6] imposed a disadvantage on the applicant and is linked to

[6] The "permanence requirement" was defined earlier in the reasons to refer to Imperial's policy that a condition of employment for the position at issue was eligibility "to work in Canada on a permanent basis".

2023 ONCA 364 (CanLII)

> "Canadian citizenship" and "permanent residence", terminology contemplated by the Legislature and used together when drafting a defence to "Canadian citizenship" being a non-discriminatory requirement under s.16 of the *Code*. The fact that IO's requirement distinguished on the basis of "Canadian citizenship" and "permanent residence" does not morph the distinction to one based on "immigration status". As in *Washington* [*v. Student Federation of the University of Ottawa*, 2010 HRTO 1976] above, it is sufficient that "Canadian citizenship" is engaged by IO's requirement for it to run afoul of the *Code* on the ground of citizenship. [Emphasis in original.]
>
> For greater clarity, the fact that permanent residents, a category of non-Canadian citizens, are advantaged relative to the applicant is immaterial to the finding that IO's requirement imposed a disadvantage on the applicant and is discriminatory on the ground of "citizenship".

[110] The tribunal then turned to the three-part analysis for discrimination in hiring, which requires an applicant to show: (1) that they were qualified for the job; (2) that they did not get the job because of a prohibited ground; and (3) that the person who got the job was no more qualified but lacked the attribute on which the applicant based their human rights complaint.

[111] The tribunal noted that Imperial did not dispute that it treated the appellant differently based on its policy that a condition of employment was being eligible to work in Canada on a permanent basis. Thus, the tribunal found that a *prima facie* case was made out that required an answer from Imperial.

2023 ONCA 364 (CanLII)

[112] The tribunal noted that Imperial did not dispute that its policy was designed to exclude job candidates who did not have eligibility to work permanently in Canada. However, Imperial took the position that its policy was not discrimination on a prohibited ground (i.e., that it was discrimination on the basis of immigration status and not citizenship), and also asserted a BFOR defence on the basis that permanence of employees was an operational requirement (I address the BFOR defence further below).

[113] The tribunal rejected Imperial's submission that the policy was not discrimination on the basis of citizenship because it permitted the hiring of permanent residents, and thus the distinction was on the basis of "immigration status" and not citizenship.

[114] The tribunal further held that Imperial's policy constituted direct discrimination. It explained that it reached this conclusion because the policy, on its face, distinguished between candidates based on whether they could work permanently in Canada, and barred any person who was not "eligible to work permanently in Canada", with such eligibility to be proven by proof of Canadian citizenship or Canadian permanent resident status. The tribunal held that this was direct discrimination on the basis of citizenship because only non-Canadian citizens are disadvantaged by the policy. As applied to the appellant's situation, all PGWP-holders (all of whom are non-Canadian citizens) are discriminated against,

2023 ONCA 364 (CanLII)

despite their right to work in Canada for three years. The tribunal noted that no statistical analysis or examination of disparate impact was required to determine the impact of Imperial's policy. The discriminatory effect on non-Canadian citizens was express on the face of Imperial's policy. The fact that the discrimination was partial because permanent residents were excepted did not change that characterization. On this basis the tribunal found that the appellant had established a *prima facie* case of discrimination on the basis of citizenship.

[115] I break my analysis of the reasonableness of the tribunal's conclusion with respect to discrimination on the basis of citizenship into four parts:

- the reasonableness of the tribunal's interpretation of the scope of discrimination on the basis of citizenship under s. 5 of the *Code*;
- the reasonableness of the tribunal's finding that Imperial discriminated against the appellant on the basis of citizenship, including its findings in relation to the principle of partial discrimination;
- the reasonableness of the tribunal's analysis in light of this court's decision in *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)* (2001), 55 O.R. (3d) 43 (C.A.); and
- the reasonableness of the tribunal's characterization of the discrimination as direct, rather than indirect.

2023 ONCA 364 (CanLII)

(b) The tribunal's interpretation of the scope of discrimination on the basis of citizenship in s. 5 of the *Code* in the context of PGWP-holders is reasonable

[116] In my view, the tribunal's analysis of the scope of discrimination on the basis of citizenship in s. 5 of the *Code* is reasonable. The tribunal's reasons provide a rational chain of analysis that is justified in relation to the record before it and the relevant law. In particular, the tribunal's interpretation of s. 5 of the *Code* is reasonable in light of the principles of statutory interpretation.

[117] *Vavilov* is clear that decisions of administrative bodies involving the interpretation of statutes are subject to review on a standard of reasonableness, unless they raise (*inter alia*) "general questions of law of central importance to the legal system as a whole": *Vavilov*, at paras. 4, 53, 58-62, 69. No party to this appeal contends that the issues raised fall within the exception for general questions of law of central importance to the legal system as a whole.

[118] In light of the standard of review, I am cautious about elaborating on the interpretation of s. 5 of the *Code* beyond the reasons given by the tribunal. However, as the issue of the interpretation of discrimination in employment on the basis of citizenship comes before this court for the first time in this appeal, in my view, it is helpful for clarity of the analysis to address the issue in more detail. I do so, recognizing that it is not the role of this court to conduct a *de novo* interpretation

2023 ONCA 364 (CanLII)

of s. 5, but rather to engage with the tribunal's reasoning and determine whether the tribunal's interpretation is "defensible in light of the interpretive constraints imposed by law": *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, at para. 41.

2023 ONCA 364 (CanLII)

(i) Principles of statutory interpretation and interpretation of human rights legislation

[119] The modern approach to statutory interpretation is set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41, quoting Professor Elmer Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In the administrative law context, a decision-maker must interpret legislative provisions "consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue": *Vavilov*, at paras. 120-21.

[120] When the legislation to be interpreted is human rights legislation, a further principle applies. Human rights legislation is to be given a broad, liberal, and purposive interpretation, consistent with its remedial objectives: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; and *Brooks*, at pp. 1244-45.

[121] Both of these principles must be borne in mind when considering the meaning of discrimination on the basis of citizenship in s. 5 of the *Code*.

(ii) Text and history of ss. 5 and 16 of the *Code*

[122] Although not the focus of the tribunal's analysis, the legislative history of s. 5 and other provisions of the *Code* provides useful context for assessing the reasonableness of the tribunal's decision. The original version of the *Code*, passed in 1962, did not include citizenship as a protected ground. Section 4 of the original version prohibited discrimination in employment on the basis of "race, creed, colour, nationality, ancestry or place of origin."

[123] Citizenship as a protected ground in relation to employment discrimination was added to the *Code* in amendments passed in 1981.[7] At the same time, the defences in what is now s. 16 were enacted: *Human Rights Code*, *1981*, S.O. 1981, c. 53, ss. 4 and 15.

[124] Neither party provided the tribunal, the Divisional Court, or this court with references to the legislative debates in relation to the amendments leading to the addition of citizenship as a prohibited ground of discrimination. This may be because there is little in the legislative debates that assists with the interpretation

[7] At the same time, citizenship was also added as a protected ground under ss. 1-3 and 5, prohibiting discrimination in services, accommodation, contracts, and vocational assessments.

2023 ONCA 364 (CanLII)

of what are now ss. 5 and 16. Given the significant changes that the 1981 amendments made to the *Code*, and the expansion of prohibited grounds of discrimination, the debates largely focused on other topics, including whether to add sexual orientation as a prohibited ground: see e.g., Ontario, Legislative Assembly, *Hansard*, 31st Parl., 4th Sess. (9 December 1980); Ontario, Legislative Assembly, *Hansard*, 32nd Parl., 1st Sess. (15 May 1981).

2023 ONCA 364 (CanLII)

[125] The text of both ss. 5 and 16 of the present *Code* is the starting point for the interpretation of the meaning of "equal treatment with respect to employment without discrimination because of … citizenship". The tribunal set out the text of s. 5, which enacts the right to equal treatment in employment and provides as follows:

> 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. [Emphasis added.]

[126] The tribunal recognized that s. 16 creates statutory defences to claims of discrimination on the basis of citizenship in some circumstances where Canadian citizenship is a requirement, qualification, or consideration. It provides as follows:

> 16 (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.

> (2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.
>
> (3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions. [Emphasis added.]

2023 ONCA 364 (CanLII)

(iii) Grammatical and ordinary meaning of s. 5 of the *Code*

[127] The tribunal noted that "citizenship" is not defined in the *Code*. While the tribunal did not explicitly discuss the term's ordinary meaning, it is clear the tribunal understood "citizenship" to refer to being a citizen of a country – that is, the formal status of citizenship. Section 5 does not limit itself to citizenship of any particular country. Thus, on a plain reading, s. 5 appears to prohibit[8] (subject to applicable defences) discrimination based on whether someone is or is not a Canadian citizen and also discrimination based on whether someone is or is not a citizen of another country (for example, discrimination based on whether someone is or is not a citizen of France).

---

[8] As a technical matter, the prohibitions on discrimination are created by s. 9 and 11 of the *Code*. However, the grounds on which discrimination in employment is prohibited are defined in s. 5.

[128] However, *Rizzo* is clear that the ordinary meaning is not the end of the analysis. In this case, consistent with *Rizzo*, the tribunal reasonably considered how a related provision of the *Code*, s. 16, impacts the interpretation of discrimination on the basis of citizenship in s. 5.

(iv) Reading s. 5 in the context of s. 16 of the *Code*

[129] The crux of the Divisional Court majority's concern with the tribunal's analysis was the majority's view that interpreting s. 5 to cover employment discrimination based on citizenship or a factor associated with citizenship (ability to work in Canada permanently) would overshoot the purpose of s. 5, because in general, as a matter of federal immigration law, non-Canadian citizens are either not permitted to or have very limited ability to work in Canada. In my view, reading s. 5 in the context of s. 16 of the *Code*, as the tribunal did, supports the tribunal's analysis of the broader scope of s. 5.

[130] I pause to refer back to the established structure of analysis for human rights claims, which I have set out above, which involves assessing if a *prima facie* claim of discrimination has been established, and if so, considering whether any defences raised are applicable. This structure of analysis effectively separates the consideration of whether there has been discrimination on the basis of citizenship under s. 5 of the *Code* from the consideration of whether a defence has been made out under any of the subsections of s. 16.

2023 ONCA 364 (CanLII)

[131] However, for purposes of statutory interpretation of the meaning of discrimination on the basis of "citizenship" in s. 5 of the *Code*, s. 5 must be read in the context of the *Code* as a whole, including s. 16: *Rizzo*, at para. 21; Ruth Sullivan, *The Construction of Statutes,* 7th ed. (Toronto: LexisNexis Canada, 2022) at § 13.02[3]. As the Supreme Court explained in *Heritage Capital Corp. v. Equitable Trust Co.,* 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 28, provisions of a statute are presumptively intended to work together as a whole:

> There is a presumption of statutory interpretation that the provisions of a statute are meant to work together "as parts of a functioning whole" and form an internally consistent framework. In other words, "the whole gives meaning to its parts", and "each legal provision should be considered in relation to other provisions, as parts of a whole". [Citations omitted.]

[132] Based on these principles of statutory interpretation, it was reasonable for the tribunal to consider the scope of the defences available in s. 16 of the *Code* as providing interpretive guidance on the scope of "citizenship" as a prohibited ground of discrimination in s. 5.

[133] Section 16 of the *Code* enacts defences which are specific to discrimination on the basis of citizenship. Both ss. 16(1) and 16(3) create defences to allegations

2023 ONCA 364 (CanLII)

of discrimination on the basis of citizenship that are applicable to the employment context.[9]

[134] The full scope of application of the s. 16(1) defence is beyond the scope of this appeal (as I discuss further below). But what is clear is that it creates a defence to allegations of discrimination on the basis of citizenship (in employment and in any other areas where discrimination on the basis of citizenship is prohibited) where "Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law."

[135] Consistent with the tribunal's reasoning, the fact that the legislature created this defence and the terms in which it is expressed, show that the legislature understood that the concept of discrimination on the basis of citizenship in s. 5 of the *Code* applied to a requirement of Canadian citizenship. There would be no need to create a defence where a requirement of Canadian citizenship is imposed by law if requiring Canadian citizenship did not infringe s. 5 (in the absence of the statutory defence).

---

[9] A portion of s. 16(2) applies indirectly to the employment context, to the extent it applies to "trade union…activities"; however, by its text, s. 16(2) is not directly applicable to allegations of discrimination by employers or potential employers (except, perhaps, employers involved in cultural, educational, or athletic activities). That said, the existence and scope of the s. 16(2) defence also supports a broad reading of the scope of discrimination on the basis of "citizenship" in s. 5. This is for the same reason that I articulate in relation to s. 16(1) and (3) – that the legislature would not have enacted these defences if the scope of discrimination on the basis of "citizenship" were as narrow as conceived of by the Divisional Court majority.

2023 ONCA 364 (CanLII)

[136] Section 16(3) provides further support for interpreting s. 5 such that the exclusion of non-Canadian citizens or a subset of non-Canadian citizens constitutes discrimination on the basis of citizenship. There are two aspects of s. 16(3) that support this conclusion. First, the existence of a specific defence in s. 16(3) applicable to circumstances where a requirement of employment for "chief or senior executive positions" is "Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship" supports the conclusion that the legislature was of the view that absent the enactment of s. 16(3), this type of requirement would infringe the right to be free of discrimination on the basis of citizenship protected by s. 5. The legislature would not have provided for the defence in s. 16(3) if the conduct was not otherwise in breach of s. 5, as it would be unnecessary.

[137] Second, the defence in s. 16(3) is limited to "holder[s] of chief or senior executive positions." The limiting of the defence to a class of high-level managerial employees supports that the legislature did not intend for there to be a defence created by s. 16(3) to apply to other types of employees.

[138] The tribunal reasonably relied on reading s. 5 in the context of s. 16 – considering it in the context of the statute as a whole – in interpreting the meaning of discrimination in employment on the basis of citizenship.

2023 ONCA 364 (CanLII)

[139] The tribunal reasonably found that reading s. 5 and s. 16(1) together demonstrates a legislative intent to recognize limits placed on employment of non-Canadian citizens as a matter of federal immigration law, but to prohibit employers from placing additional barriers on non-citizens beyond the limits imposed by their status in Canada under federal immigration law (unless such limits can be brought within the defences in ss. 16(2) or (3)).

(v) Relevance of federal immigration law and the PGWP program

[140] Another consideration supports the tribunal's interpretation of discrimination in employment on the basis of citizenship in the context of PGWP-holders, although it is a consideration that was not directly addressed by the tribunal.

[141] In the usual course, provincial legislation is interpreted without regard to federal law. However, in the statutory context of ss. 5 and 16 of the *Code*, and in particular s. 16(1), the provincial statute clearly invokes considerations of federal immigration law.

[142] The s. 16(1) defence refers to a "requirement, qualification or consideration imposed or authorized by law." This language could apply to either provincial or federal law. That said, because immigration and citizenship law is a matter of federal jurisdiction, with extensive federal legislation and regulation, the provincial legislature must have been aware that federal law is the most likely source of a

2023 ONCA 364 (CanLII)

requirement, qualification or consideration relating to Canadian citizenship "imposed or authorized by law."

[143] In this particular context, the harmony between the tribunal's interpretation of the scope of discrimination on the basis of citizenship and federal immigration law and policy supports the reasonableness of its interpretation. The tribunal and courts should strive to adopt interpretations of provincial laws that achieve harmony with, rather than frustrate, federal legislation: see e.g., *Fawcett v. Fawcett*, 2018 ONCA 150, at para. 35; *Maurice v. Priel*, [1989] 1 S.C.R. 1023, at pp. 1030-33.

[144] In general, by virtue of ss. 2(1) and 30(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 ("*IRPA*"), a "foreign national", defined as a person who is not a Canadian citizen or a permanent resident, may not work in Canada. However, s. 30(1) of *IRPA* also includes an exception to the prohibition against foreign nationals working in Canada, where they are "authorized to do so under [*IRPA*]."

[145] The clear legislative intent of the combined effect of ss. 5 and 16(1) of the *Code* is to prohibit discrimination on the basis of citizenship, including non-Canadian citizenship, but to create a defence so that a requirement, qualification, or condition of Canadian citizenship does not infringe the *Code* if it is imposed or authorized by law, including federal immigration law.

2023 ONCA 364 (CanLII)

[146] The evidence and findings of the tribunal regarding the federal PGWP program are clear that the purpose of the PGWP program is to create a pathway to Canadian citizenship for international students who come to Canada to study and who intend to settle in Canada, in order to give Canada the benefit of these skilled workers. The program's design involves allowing individuals with a PGWP to work in Canada, obtain Canadian workplace experience, and establish roots in Canada. Indeed, workplace experience is a requirement to proceed through the program on the path to permanent residency and Canadian citizenship, because individuals on a PGWP must have one year of full-time employment in Canada on the PGWP before they can apply for permanent residency.

[147] In this context, interpreting s. 5 of the *Code* as prohibiting discrimination in employment against PGWP-holders on the basis that they are not eligible to work in Canada permanently is not contrary to federal immigration law. Indeed, the opposite is true. The federal PGWP program is undermined when job postings are restricted to Canadian citizens and permanent residents, excluding PGWP-holders such as the appellant. Such restrictions bar PGWP-holders from consideration for entry-level jobs which are a necessary step to successful labour market integration, and a condition precedent to their applying for permanent resident

2023 ONCA 364 (CanLII)

status. The tribunal's interpretation is consistent with federal immigration law and policy.[10]

[148] Considering all of these factors together, I conclude that the tribunal's interpretation of the scope of discrimination in employment on the basis of citizenship as it relates to PGWP-holders is reasonable.

(c) The tribunal's conclusion that Imperial's policy discriminated against PGWP-holders on the basis of citizenship is reasonable

[149] The tribunal concluded that Imperial's policy discriminated against the appellant on the basis of citizenship (and, similarly, against all PGWP-holders on the basis of citizenship) because the policy excluded from hiring a group of non-Canadian citizens (and only non-Canadian citizens) who were eligible to work full-time, for any employer, anywhere in Canada. Even though not all non-Canadian citizens were excluded from hiring (because of the exception for permanent residents), the excluded group was composed solely of non-Canadian citizens who had a right to work in Canada (PGWP-holders).

[150] In my view, this conclusion is reasonable and is consistent with the law regarding proof of a claim of employment discrimination.

---

[10] And I pause to note that, were federal immigration policy to change, that is a matter which could be considered in a given case in assessing the availability of a defence under s. 16(1) of the *Code*.

2023 ONCA 364 (CanLII)

[151] As I have outlined above in the section of these reasons addressing principles of interpretation and application of human rights legislation, in order to establish a claim of discrimination, a claimant is required to show, *inter alia*, a "connection" between the prohibited ground and the adverse treatment they experienced. A claimant is not required to show that the prohibited ground was the only reason for the treatment, or even the predominant reason.

[152] In this case, the tribunal reasonably found that the appellant was a member of a group defined by a protected ground under the *Code*, citizenship, because he was a non-Canadian citizen. The tribunal reasonably found that the appellant experienced adverse treatment because the job offer was withdrawn. The tribunal reasonably found that the appellant's non-citizenship was a factor in the adverse treatment. The appellant was a non-Canadian citizen, who had a right to work full-time, for any employer, anywhere in Canada, for up to three years. Imperial withdrew the job offer because his right to work in Canada was not permanent – a factor that the tribunal reasonably found is closely connected to Canadian citizenship.

[153] An argument made by Imperial, and also relied on by the majority of the Divisional Court, is that Imperial's policy is not discriminatory because Imperial did not limit its hiring *only* to Canadian citizens, as it would also hire individuals with

2023 ONCA 364 (CanLII)

permanent resident status. The tribunal rejected this contention, and in my view, did so reasonably.

[154] The fact that the policy does not exclude all non-Canadian citizens does not "cure" its discriminatory effect. Rather, it results in partial discrimination (against a subset of non-Canadian citizens eligible to work in Canada), rather than full discrimination (against all non-Canadian citizens eligible to work in Canada). It is well-established in Canada that partial discrimination is still discrimination. I have set out the law on this basic principle of human rights law above.

[155] Imperial's job posting and policy distinguished between two classes of non-Canadian citizens in circumstances where both classes are eligible to work full-time for any employer, anywhere in Canada – permanent residents (who were eligible for the position under Imperial's policy), and PGWP-holders (who were not eligible under Imperial's policy). Imperial argues, and the Divisional Court majority found, that this was discrimination on the basis of immigration status or permanent resident status, which are not prohibited grounds under the *Code*. While the conclusion that permanent resident status and immigration status are not prohibited grounds of discrimination under the *Code* is correct as far as it goes, it fails to acknowledge that Imperial's policy is also *partial* discrimination on the basis of citizenship.

2023 ONCA 364 (CanLII)

[156] Imperial's policy denies one group of non-Canadian citizens, who are legally entitled to work full-time, for any employer, anywhere in Canada (PGWP-holders), eligibility for the position. The group excluded from the position by Imperial's policy is exclusively non-Canadian citizens. Based on the principles in *Brooks* and other cases, the fact that Imperial's policy does not discriminate against all non-Canadian citizens (because permanent residents are excepted) does not render it non-discriminatory.

[157] Further, the fact that Imperial's policy can also be described as discrimination on the basis of immigration status or lack of permanent resident status (which are not protected grounds) does not change the fact that it is also partial discrimination on the basis of citizenship. In this regard, it is like the cases involving discrimination against married women teachers referred to above. At the time those cases were decided, "marital status" was not a prohibited ground of discrimination under the Nova Scotia *Human Rights Act,* R.S.N.S. 1989, c. 214. Thus, although the policy discriminated on the basis of marital status, that in itself did not contravene the legislation. However, notwithstanding the fact that one could describe the policy as discrimination on the basis of marital status (not a prohibited ground), and notwithstanding that it did not apply to all women, since unmarried women were excepted, the policy was still found to constitute discrimination on the basis of sex.

2023 ONCA 364 (CanLII)

[158] In sum, the tribunal's decision that Imperial's policy discriminated on the basis of citizenship demonstrates an internally coherent chain of analysis that is justified in relation to the facts and law. The decision is reasonable and the reviewing court was not justified in intervening.

(d) The tribunal's analysis of discrimination on the basis of citizenship was reasonable in light of this court's decision in *Irshad*

[159] The appellant argues that the Divisional Court majority erred in holding that one of the reasons the tribunal's decision was unreasonable is because it did not specifically reference or deal with this court's decision in *Irshad*. I agree.

[160] In *Irshad*, this court considered an argument made under s. 15 of the *Canadian Charter of Rights and Freedoms* involving an allegation of discrimination on the basis of citizenship. Imperial argued before the tribunal that the conclusions in *Irshad* about citizenship discrimination under s. 15 of the *Charter* should bear on the interpretation of discrimination on the basis of citizenship under the *Code*. The tribunal did not specifically reference *Irshad* in its reasons and the Divisional Court concluded this omission rendered its decision unreasonable.

[161] The appellant argues before us that the tribunal's decision is not unreasonable for not mentioning *Irshad* by name because the decision addresses the substance of Imperial's argument and because, in any event, *Irshad* is

2023 ONCA 364 (CanLII)

distinguishable from the case at hand. Imperial responds that the issues raised in *Irshad* were analogous to the issues in this case, and as a result, the tribunal ought to have treated *Irshad* as persuasive legal precedent.

[162] I would reject Imperial's submission that the tribunal decision is unreasonable in light of *Irshad* for two reasons.

[163] First, although the tribunal did not mention *Irshad* by name, the tribunal addressed in substance the issue that Imperial had argued based on *Irshad* – that the interpretation of the scope of discrimination on the basis of citizenship under s. 5 of the *Code* should be governed by a case which considered an allegation of discrimination on the basis of citizenship under the *Charter*.

[164] The tribunal recognized that interpreting the meaning of citizenship discrimination under the *Code* was an issue of statutory interpretation. As a result, the meaning of discrimination on the basis of citizenship in s. 5 of the *Code* had to be considered within the context of the entire statute, and in particular related provisions of the *Code*. The tribunal found that the defences in s. 16 of the *Code* cast light on the meaning of discrimination on the basis of citizenship in s. 5 of the *Code*, which distinguished it from the interpretation of discrimination on the basis of citizenship under the *Charter*, because the *Charter* has no analogous defence to s. 16 of the *Code*. The tribunal concluded on this issue as follows:

2023 ONCA 364 (CanLII)

> As cases decided under that *Charter* invariably engage government actors as respondents, those cases do not provide much guidance in deciding Applications under the *Code* regarding "citizenship" given that the *Code* provides a defence under s.16(1) that where "Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law", a right is not infringed. This defence effectively screens government (and others) who elect to use citizenship as a requirement and who can demonstrate that the requirement is imposed or authorized by law. In the instant Application, this defence is not available to [Imperial].

2023 ONCA 364 (CanLII)

[165] The tribunal was not required to explicitly reference *Irshad* for its decision to be reasonable. *Vavilov* is clear that an administrative body is not required in its reasons to address every argument made by a party: at para. 91. In any event, the issue Imperial raised in relation to the *Irshad* decision was addressed, even though the case was not referred to by name. The tribunal dealt with the substance of Imperial's argument that discrimination on the basis of citizenship under s. 5 of the *Code* should be interpreted the same way as discrimination on the basis of citizenship under the *Charter*, and rejected it. This does not render the tribunal's decision unreasonable, per *Vavilov*.

[166] Second, the tribunal's conclusion that the analysis of discrimination on the basis of citizenship under the *Code* was distinguishable in this case from the interpretation of discrimination on the basis of citizenship under the *Charter* was

reasonable. In other words, the legal and factual circumstances in *Irshad* are distinguishable from the legal and factual circumstances in this case.

[167] It was reasonable for the tribunal to conclude that the presence of s. 16 as interpretive context for discrimination on the basis of citizenship in s. 5 of the *Code* distinguished the issue before it from the issue of discrimination on the basis of citizenship under s. 15 of the *Charter*. The *Charter* has no analogue to s. 16 of the *Code*. In the absence of reasons to interpret guarantees in human rights legislation differently from *Charter* guarantees, anti-discrimination provisions in human rights legislation and the *Charter* right to equality are often interpreted similarly where they address the same subject matter: see e.g., *Fraser*, at paras. 37-49. But where, as here, the statutory scheme provides a basis to support a different interpretation of human rights legislation, that context must inform the interpretation of human rights legislation because it speaks to a different intention.

[168] Further, the factual circumstances of *Irshad* are distinguishable from this case. *Irshad* involved a s. 15 *Charter* challenge to legislation and regulations that limited the right to insured health services in Ontario. The purpose of the legislation and regulations at issue was to limit healthcare expenditures by defining the residency requirement to be insured more precisely, and in particular, to eliminate insurance coverage for individuals who were temporarily resident in Ontario.

2023 ONCA 364 (CanLII)

[169] The legislation and regulations limited eligibility to insured health services based on two factors. First, a person had to be “ordinarily resident” in Ontario, as that term was defined in the regulation. Second, individuals who were “ordinarily resident” in Ontario had to bring themselves within one of 11 categories set out in the regulation. Many, but not all, of the categories were based on immigration status.

[170] In *Irshad*, the individuals challenging the legislation and regulations were ordinarily resident in Ontario, but could not bring themselves within one of the 11 categories. They argued that the legislation and regulation drew a distinction between “new immigrants” who were ordinarily resident in Ontario and other persons ordinarily resident in Ontario. In addition, they challenged the three-month waiting period for coverage, which applied regardless of citizenship or immigration status (although with some exceptions). For example, it applied to Canadian citizens who moved to Ontario from another province.

[171] This court found that the legislation did not infringe the s. 15 right to equality. The court held that the impugned legislation and regulations did not draw a distinction based on whether individuals were or were not new immigrants. Many new immigrants would be within the 11 categories and eligible for health insurance (such as landed immigrants, some applicants for landed immigrant status, refugees, and some applicants for refugee status). Further, some people not

2023 ONCA 364 (CanLII)

eligible for health insurance were neither new to Ontario nor new immigrants. This court also rejected the argument that the legislation and regulations drew a distinction on the basis of citizenship. The court found that under the scheme many non-citizens were eligible for health insurance, and that Canadian citizenship was "but one of many criteria" that would make a person eligible for health insurance if they were ordinarily resident of Ontario. Further, the court held that the three-month waiting period was not discriminatory, as it applied to all new residents of Ontario, regardless of their citizenship, former place of residence, or immigration status.

[172] In short, in *Irshad*, this court found that the distinctions drawn in the legislation and regulations at issue were not based on citizenship or being a new immigrant. Rather, they were based on a requirement that individuals have an intention to make Ontario their permanent home, and the legal status to "legitimately hold that intention": at para. 133. In my view, the factual and legal distinctions between *Irshad* and the case at hand mean that *Irshad* does not govern the result in this appeal, and that the tribunal sufficiently addressed the substance of Imperial's argument based on *Irshad*.

2023 ONCA 364 (CanLII)

(e) The tribunal's finding that the discrimination was direct rather than indirect was reasonable

[173] In my view, the tribunal's finding that Imperial's discrimination against the appellant was direct is reasonable. However, if there is any doubt about whether the discrimination ought to have been characterized as adverse impact, in the circumstances of this case it would have no impact on the result.

[174] As I have explained above, given the jurisprudence and legislation concerning the availability of a BFOR defence under s. 11 of the *Code*, the only relevance to whether the discrimination in this case is characterized as direct or adverse impact is the availability of the BFOR defence. The tribunal found that the discrimination was direct, but went on, in the alternative, to consider whether Imperial had established a BFOR defence (in the event that the discrimination was better characterized as adverse impact). The tribunal found on the record before it that Imperial failed to establish a BFOR defence. Imperial did not seek review of that finding in the Divisional Court or raise it in this court. Thus, whether the discrimination was reasonably characterized as direct or indirect had no impact on the outcome. I will address each of these points in turn.

[175] As I have summarized above, direct discrimination occurs where an employer adopts a practice or policy which on its face discriminates on a prohibited ground. Adverse impact discrimination occurs where an employer's practice or

2023 ONCA 364 (CanLII)

policy is neutral on its face, but has a discriminatory effect on a prohibited ground on an employee or a group of employees by imposing obligations or restrictions on them not imposed on other employees.

[176] The tribunal found that Imperial's discrimination against the appellant (and all PGWP-holders) was direct. The tribunal reached this conclusion because it found that, on its face, Imperial's policy discriminated against a subset of non-Canadian citizens. The tribunal found that this was so because the policy was clear that the only people eligible for employment were Canadian citizens and permanent residents. On its face, the policy excluded all non-Canadian citizens apart from permanent residents. It excluded a subset of non-Canadian citizens, and only non-Canadian citizens.

[177] In my view, particularly given the standard of review and the difficulty recognized in the jurisprudence of characterizing whether discrimination is direct or adverse impact, I find that the tribunal's conclusion that the discrimination was direct is reasonable.

[178] Reading the job posting and Imperial's policy, as well as its communications with the appellant, the effect is: We will hire Canadian citizens and also will hire a subset of non-Canadian citizens (i.e., permanent residents). On its face, Imperial's policy is clear that a subset of non-Canadian citizens eligible

2023 ONCA 364 (CanLII)

to work in Canada is excluded from hiring, and it is only non-Canadian citizens who are excluded.

[179] Having said this, I accept that on this particular issue, reasonable people could differ on whether to characterize the discrimination as direct or indirect.[11] It may be that one could conceptualize the discrimination as being adverse impact if the requirement imposed by Imperial's policy were characterized as "permanent eligibility to work in Canada." Given the policy's express reference to Canadian citizenship, I am not persuaded that this would be the best characterization of the policy. For this reason, I do not view this case as a situation where this court's decision in *Entrop* would suggest characterizing the discrimination as adverse impact in order to leave open a BFOR defence. However, if the distinction made by the policy were characterized as being on the basis of "permanent eligibility to work in Canada", the policy would be neutral on its face, but have an adverse impact on non-Canadian citizens. All Canadian citizens are eligible to work under

2023 ONCA 364 (CanLII)

---

[11] I pause to note that certain comments of Lederer J. in the Divisional Court could be read as suggesting that statistical evidence is always required to support a claim of adverse impact discrimination. That is not the case. What is required to establish a claim of adverse impact discrimination is that the policy, which is neutral on its face, adversely impacts a group of employees who are members of a group against whom discrimination is prohibited (race, gender, etc.). In some cases, statistical evidence will be required to establish the adverse impact – for example the physical fitness standards in *Meiorin*. In other cases, statistical evidence will not be necessary to show the adverse impact – for example, adverse impact discrimination on the basis of religion caused by Sunday being the only closing day, or a refusal to allow accommodation for religious observance of holidays which are not statutory holidays. In the latter situation, evidence about the employee's religious beliefs will be required, but not statistical evidence. See also *Fraser*, at paras. 56-67.

the policy. But only a subset of non-Canadian citizens are eligible – permanent residents. This policy has an adverse impact on PGWP-holders, like the appellant, and the adverse impact is connected to their non-Canadian citizenship. Only non-Canadian citizens are impacted by the policy (although not all non-Canadian citizens are impacted because of the exception for individuals with permanent resident status).

[180] As I have adverted to above, and discuss further below, many non-Canadian citizens do not have the broad right to work that PGWP-holders have. As a practical matter, the claims of many non-Canadian citizens would founder on the s. 16(1) defence. But PGWP-holders, like the appellant, are legally eligible to work full-time, for any employer, anywhere in Canada. They are legally eligible to hold the job the appellant applied for. But Imperial's policy, even if characterized as a requirement of eligibility to work permanently in Canada, has an adverse effect on PGWP-holders that is connected to their non-Canadian citizenship.

[181] In light of this possibility to characterize the discrimination as adverse impact rather than direct, if I had concluded that the tribunal's finding that discrimination in this case was direct rather than indirect was unreasonable, is there any possibility that the outcome of this case would have been different? In my view, there is not. In the circumstances of this appeal, whether the

2023 ONCA 364 (CanLII)

discrimination is characterized as direct or adverse impact has no impact on the outcome.

[182] As I have outlined above, the only practical effect in this case of whether the discrimination is characterized as direct or adverse impact is that, in Ontario, a BFOR defence under s. 11 of the *Code* is only available as a defence to a finding of adverse impact discrimination, and not available as a defence to direct discrimination.

[183] Although the tribunal concluded that the discrimination was direct, and thus a BFOR defence was not available pursuant to s. 11 of the *Code*, the tribunal went on to consider the BFOR defence on the merits, in the alternative.

[184] The tribunal found that Imperial had not established a BFOR defence on the merits. I do not summarize the reasons why the tribunal came to this conclusion because Imperial did not contest that finding in its application for judicial review to the Divisional Court. Nor does it contest that finding in its response to the appeal in this court.

[185] As Imperial did not contest the reasonableness of the tribunal's alternative finding that a BFOR defence was not established, even if the tribunal's conclusion that the discrimination was direct rather than adverse impact were found to be unreasonable, the characterization of the discrimination as direct had no impact on the outcome of the proceedings before the tribunal.

2023 ONCA 364 (CanLII)

(f) The Divisional Court majority did not correctly apply the standard of review

[186] As the standard of review directs this court to step into the shoes of the Divisional Court on an appeal from an application for judicial review, I need not examine in detail the errors made by the Divisional Court majority. But I will flag them briefly.

[187] First, the majority reasons did not take as a starting point respectful attention to the reasons of the tribunal. Rather, the majority started by assessing the question of whether Imperial discriminated against the appellant by re-doing its own analysis from scratch. This is evident from, for example, the hypothetical fact situations involving non-citizens without any legal right to work in Canada that appear to have driven the majority's analysis. These hypothetical situations do not arise from the tribunal's analysis, which was focused squarely on the record before it.

[188] Second, the majority mischaracterized the reasons of the tribunal. Respectful attention to a tribunal's reasons, which is the starting point of reasonableness review, cannot be accorded if the reviewing court mischaracterizes the tribunal's reasons. The reasons of Lederer J. characterize the tribunal as having effectively created a new ground of discrimination not found in the *Code* based on permanent resident status. As I have outlined above, that

2023 ONCA 364 (CanLII)

was not the basis on which the tribunal found that Imperial had discriminated against the appellant. Nor did the tribunal fail to examine the "plain and ordinary" meaning of "citizenship" and "permanent residence". The tribunal's reasons show that it understood the difference between these statuses as a matter of federal immigration law. The tribunal's finding of discrimination on the basis of citizenship was not based on subsuming the concept of "permanent residence" into citizenship.

[189] Third, the majority of the Divisional Court failed to follow well-established analytical principles for human rights claims. I will highlight two examples of this.

[190] The first is in the reasons of Lederer J. His reasons fail to consider the principle from *Brooks* and subsequent decisions that partial discrimination on a prohibited ground is still discrimination. Indeed, his reasons proceed on a basis that is contrary to this well-established principle. In substance, he found that Imperial did not discriminate on the basis of citizenship *because* it permitted hiring of one sub-group of non-citizens – permanent residents of Canada.

[191] The second failure to follow well-established principles of analysis for human rights claims is the focus in the reasons of Mew J. on the hardship for employers if Imperial's policy constitutes discrimination on the basis of citizenship. This approach failed to follow the established structure to analysis of human rights claims. Potential hardship to an employer is not considered when assessing

2023 ONCA 364 (CanLII)

whether a *prima facie* claim of discrimination on a prohibited ground has been established. Rather, it is a matter to be considered after a *prima facie* case of discrimination has been established, as part of a BFOR defence and consideration of an employer's duty to accommodate to the point of undue hardship: see e.g., *Stewart*, at paras. 22-23; *Pieters*, at paras. 64-66.

[192] I note as well two other problems with the focus on employer hardship in the reasons of Mew J. First, as I have noted, Imperial did not pursue the BFOR defence in the Divisional Court. With the issue not having been raised by Imperial, it was unfair to resurrect it as a ground to overturn the tribunal decision.

[193] Second, the record did not support the conclusion that Imperial would suffer undue hardship if it was required to change its policy and consider PGWP-holders for employment. Indeed, the tribunal made specific findings of fact to the contrary. The tribunal considered whether there would be hardship to Imperial if it were required to consider PGWP-holders for employment in its consideration of whether Imperial had established a BFOR defence. Imperial had asserted that being required to hire PGWP-holders would pose a risk to succession planning and to Imperial losing its investment in training of new hires. The tribunal found that this assertion was not borne out on the evidence led by Imperial.

[194] In particular, the tribunal found that, to the extent Imperial had in some cases waived its policy for more senior positions and hired PGWP-holders, there

2023 ONCA 364 (CanLII)

was “no empirical data” to demonstrate that these PGWP-holders left employment with Imperial at higher rates than Canadian citizens or permanent residents within the two to three years it generally took to obtain permanent resident status, or that those who left within that timeframe did so because of a failure to obtain permanent resident status.

[195] Because Imperial did not challenge the reasonableness of the tribunal’s alternate finding that a BFOR defence was not established, it is not necessary for this court to consider whether the tribunal’s conclusion in that regard was reasonable. However, I flag these issues in relation to the record because they demonstrate that Mew J. did not start his analysis from a posture of respectful attention to the reasons of the tribunal. Rather, he raised concerns about hardship to employers which, as related to the employer before the tribunal, Imperial, the tribunal had found were not supported in the record before it.

[196] What appears to have driven the reasoning of the majority in the Divisional Court was a floodgates concern that if Imperial’s treatment of the appellant constituted discrimination on the basis of citizenship, then, in the view of the majority, any non-Canadian citizen anywhere in the world could claim discrimination in employment on the basis of citizenship if they were not considered for a job in Canada. Both judges in the majority referred to the situation of a hypothetical American who lives in Detroit (just over the Canadian border).

2023 ONCA 364 (CanLII)

The majority was of the view that the tribunal's analysis of the appellant's claim would have the result that this hypothetical American, with no status in Canada at all, and no legal right to work in Canada, could allege discrimination on the basis of citizenship if they were refused employment by Imperial.

[197] The analogy posited by the majority of the Divisional Court is flawed. It fails to recognize the fundamental distinction between PGWP-holders and other non-Canadian citizens – PGWP-holders have a legal right under federal immigration law to work full-time, for any employer, anywhere in Canada. This distinguishes PGWP-holders from other non-Canadian citizens in terms of their right to work in Canada. The tribunal was clear in its reasons that the central fact that drove its analysis was that when the appellant received his PGWP on graduation (of which there was no doubt based on the tribunal's findings), he would have the right to work full-time, anywhere in Canada, for any employer. The tribunal's reasoning would not extend to a person without an unrestricted right to work in Canada.

[198] This is particularly so given s. 16(1) clarifies that the right to non-discrimination based on citizenship is not infringed "where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law." Because federal immigration law does not give most non-citizens a right to work in Canada, the hypothetical American living in Detroit without any status in Canada would not have a viable citizenship discrimination claim, as they would not be

2023 ONCA 364 (CanLII)

authorized by law to work in Canada. Accordingly, the concern of the majority in the Divisional Court that the tribunal's analysis would allow any non-Canadian citizen to allege discrimination in employment is unfounded.

[199] In sum, the tribunal's finding that Imperial discriminated against the appellant on the basis of citizenship was reasonable. The majority of the Divisional Court applied the standard of review incorrectly. When the standard of review is correctly applied, there is no basis for the reviewing court to intervene.

(3) Was the tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or a permanent resident, rather than solely because of his dishonesty in the job competition, reasonable?

[200] Imperial argues that the tribunal's finding that Imperial withdrew the job offer from the appellant at least in part because he was not a Canadian citizen or a permanent resident, rather than solely because of his dishonesty in the job competition, was unreasonable. Imperial submits that the appellant's dishonesty was a reasonable non-discriminatory explanation for withdrawing the job offer that had nothing to do with the fact that he was not a Canadian citizen or permanent resident. Imperial asserts that there was "uncontradicted" evidence from John Blysniuk, a manager at Imperial, that the reason that Imperial withdrew the job offer

2023 ONCA 364 (CanLII)

was because of the appellant's dishonesty in the job competition about his status in Canada, not because he was not a Canadian citizen or permanent resident.

[201] The appellant argues that the tribunal's factual finding that the reason that Imperial did not hire the appellant was because he was not a Canadian citizen or a permanent resident, and its rejection of Imperial's evidence that it was because he was dishonest about his status in Canada, was reasonable. The tribunal was not obliged to accept the evidence of Mr. Blysniuk in the face of the contradictory documentary record. The tribunal's factual finding is owed deference.

[202] I do not accept Imperial's submission on this issue. In explaining my reasons for this conclusion, I begin with the tribunal's finding and its reasons on this issue.

(a) The tribunal's reasons for finding that Imperial did not withdraw the job offer solely because of the appellant's dishonesty

[203] The tribunal acknowledged in its reasons that the appellant had conceded that he had misled Imperial on a number of occasions during the job competition process about his eligibility to work in Canada on a permanent basis.

[204] The tribunal reviewed the evidence led by Imperial on this issue, including the evidence of Mr. Blysniuk. The substance of Mr. Blysniuk's evidence was that he considered the appellant's file on January 4, 2015, and sent a direction by email that the December 2, 2014 conditional job offer to the appellant should be

2023 ONCA 364 (CanLII)

rescinded. By this time, the appellant had admitted to Imperial that he could not satisfy the condition in their offer (eligibility to work in Canada as proven by Canadian citizenship or permanent residence), and had requested an exception. Mr. Blysniuk testified that he made this decision on the basis of the appellant's dishonesty and nothing else.

[205] The tribunal rejected Mr. Blysniuk's evidence that the appellant's dishonesty was the *sole* reason that the job offer was withdrawn. In coming to this credibility-based finding of fact, the tribunal placed particular emphasis on two aspects of the documentary record. First, there was no mention in the letter Imperial sent January 8, 2015 withdrawing the job offer that the appellant's dishonesty was a factor in the withdrawal of the offer. The letter expressly stated that the job offer was being withdrawn because the appellant was unable to provide proof of Canadian citizenship or permanent residence to demonstrate his eligibility to permanently work in Canada. Second, there was no evidence in any internal correspondence of Imperial or its communications by phone and email with the appellant that it considered at any time waiving the requirement that to be eligible for the job the appellant had to be a Canadian citizen or permanent resident. In other words, had there been evidence that Imperial considered waiving that requirement, and chose not to do so solely based on the appellant's dishonesty,

2023 ONCA 364 (CanLII)

that could have supported a conclusion that a discriminatory ground was not a factor in the decision to withdraw the job offer.

[206] In sum, the tribunal found that the documentary record was inconsistent with Mr. Blysniuk's evidence that the *sole* reason the job offer was withdrawn was because of the appellant's dishonesty. The tribunal found that (with the appellant having established a *prima facie* case of discrimination) "there is insufficient evidence to demonstrate on a balance of probabilities that the [appellant's] dishonesty was the *sole* reason for his non-hire" (emphasis in original).

[207] The tribunal then referred to established jurisprudence that discrimination on a protected ground need not be the only factor involved in a decision not to hire, or even the primary factor, citing *Janzen*. The tribunal concluded that Imperial's requirement of eligibility to work in Canada on a permanent basis, as proven by Canadian citizenship or permanent residence, "tainted the hiring process, resulting in discrimination in employment on the ground of citizenship."

[208] The two judges in the majority of the Divisional Court did not address the issues related to the appellant lying about his status in Canada or whether the reason for the dismissal was solely due to the appellant lying about his status in Canada. Sachs J., in dissent in the result, found that the tribunal reasonably found that the appellant's lying about his status was not the sole reason for the withdrawal of the job offer. In her view, despite Imperial's oral evidence from Mr. Blysniuk, the

2023 ONCA 364 (CanLII)

tribunal's conclusion that there was insufficient evidence to demonstrate that the appellant's dishonesty was the sole reason for Imperial not hiring him was reasonable – particularly because the letter sent to the appellant withdrawing the job offer did not mention his dishonesty, but rather stated that the offer was being withdrawn because the appellant could not provide proof that he was either a Canadian citizen or permanent resident.

2023 ONCA 364 (CanLII)

(b) The tribunal's finding that Imperial did not withdraw the job offer solely because of the appellant's dishonesty is reasonable

[209] For substantially the same reasons as Sachs J., I am of the view that the tribunal's finding that the appellant's dishonesty during the job competition was not the sole reason that Imperial withdrew the job offer was reasonable and supported by the evidentiary record before it.

[210] As I have noted, Imperial argues that the tribunal's finding that the appellant's inability to fulfil Imperial's requirement of permanent eligibility to work in Canada by proof of citizenship or permanent residency was unreasonable because there was "uncontradicted" evidence from Mr. Blysniuk that the reason that Imperial withdrew the job offer was because the appellant lied about his status in Canada, not because he was not a Canadian citizen or permanent resident.

[211] Imperial is incorrect that Mr. Blysniuk's evidence was uncontradicted.

[212] As the tribunal noted, the letter that Imperial sent to the appellant withdrawing the job offer expressly stated that the job offer was being withdrawn because he was unable to meet the employment condition of permanent eligibility to work in Canada established by proof of either Canadian citizenship or permanent residence. The letter also invited the appellant to re-apply for work with Imperial if he became eligible to work permanently in Canada, and said that if he did so, Imperial "would be pleased to consider [his] application at that time." The letter made no reference whatsoever to the appellant's dishonesty about his status, and the invitation to reapply belies Imperial's reliance on the appellant's lies as the reason for withdrawing the job offer.

[213] Mr. Blysniuk's evidence was contradicted by the documentary evidence – Imperial's own letter.

[214] The tribunal accepted that there was some evidence that the appellant's dishonestly may have played a role in Imperial's decision to withdraw the job offer. But the tribunal did not accept that the lies were the only reason the job offer was withdrawn. The tribunal found that the appellant's citizenship was a factor in Imperial's decision to withdraw the job offer.

[215] It was open to the tribunal to prefer the contemporaneous documentary evidence about the reason for the withdrawal of the job offer over Mr. Blysniuk's after-the-fact explanation.

2023 ONCA 364 (CanLII)

[216] Further, the tribunal's legal analysis about the impact of the appellant's dishonesty about his eligibility to work permanently in Canada during the job competition was reasonable and consistent with human rights jurisprudence.

[217] The tribunal held that a discriminatory ground (citizenship) was a factor in the decision to withdraw the job offer. The tribunal further held that the fact that a non-discriminatory factor (the lies) may have also played a role did not insulate Imperial's conduct from being discriminatory. As I have outlined above, only if the conduct alleged to be discriminatory was *solely* motivated by non-discriminatory factors can it rebut a *prima facie* case of discrimination.

[218] The tribunal's finding that the appellant's dishonesty was not the sole factor that motivated Imperial to withdraw the job offer was reasonable on the record before it.

(c) The tribunal did not erroneously shift the burden of proof to Imperial during the discrimination analysis

[219] Imperial argues that the tribunal erroneously shifted the burden to it to prove that it did not discriminate against the appellant. Imperial submits that after it produced evidence from Mr. Blysniuk that the decision to withdraw the appellant's job offer was motivated solely by his lies about his status, the appellant then produced no evidence to establish that Mr. Blysniuk's evidence was false or pretextual. Imperial argues that having rebutted the appellant's *prima facie* claim

2023 ONCA 364 (CanLII)

of discrimination, the burden of proof remained on the appellant to prove on a balance of probabilities that his dishonesty was not the sole reason that the job offer was withdrawn.

[220] I reject this argument. The tribunal discussed the burden of proof at the outset of its discrimination analysis, correctly stating that in human rights cases, the applicant has the onus of proving, on a balance of probabilities, that a violation of the *Code* has occurred. The initial onus is on the applicant to establish a *prima facie* case of discrimination on a prohibited ground on a balance of probabilities. If the applicant does so, an evidential burden shifts to the respondent to establish that there is an applicable statutory defence, or that there is a non-discriminatory explanation that provides the sole basis for the impugned treatment. If the respondent meets the onus to rebut the *prima facie* case of discrimination, then the onus shifts again to the applicant to establish that the respondent's explanation is erroneous or is a pretext for discrimination. The tribunal correctly recognized that while the evidential burden may shift to the respondent during the analysis, the ultimate onus of proving discrimination remains on the appellant. I note that as recently as *Midwives*, this court found a similar application of the burden of proof to be reasonable: *Midwives*, at para. 149.

2023 ONCA 364 (CanLII)

[221] Imperial takes issue with the following portion of the tribunal's assessment of whether the appellant's dishonesty was the sole reason that the job offer was withdrawn, arguing that it demonstrates an impermissible shifting of the burden:

> In the result, the Tribunal finds that there is insufficient evidence to demonstrate on a balance of probabilities that the applicant's dishonesty was the *sole* reason for his non-hire. [Emphasis in original.]

[222] I do not agree that this demonstrates an improper shifting of the burden of proof. The tribunal followed the established law regarding the burden of proof in discrimination claims. The tribunal found a *prima facie* case of discrimination on the basis of citizenship. Only then did the tribunal shift the burden to Imperial to show a non-discriminatory basis was the sole motivating factor for withdrawing the appellant's job offer – in other words, that the decision was not tainted by discrimination on the basis of citizenship. This is clear throughout the tribunal's reasons, including in the following passage, situated after the tribunal found that the appellant had established a *prima facie* case of discrimination on the basis of citizenship:

> In the Tribunal's view, given that a *prima facie* case has been established [Imperial] was required to provide a response to the allegation of discrimination by way of a *statutory defence and/or credible non-discriminatory explanation for the impugned treatment*. [Emphasis in original.]

2023 ONCA 364 (CanLII)

[223] The tribunal then reasonably found that Imperial had failed to meet its evidential burden to show that the appellant's dishonesty was the sole factor behind its decision to withdraw the job offer. Imperial provided oral evidence from Mr. Blysniuk to support its argument, but, as above, the tribunal reasonably found that his oral evidence was contradicted by Imperial's recission letter. Accordingly, Imperial did not satisfy its evidential burden to establish a non-discriminatory reason for the impugned treatment, and thus the appellant was not required, at this stage of the analysis, to demonstrate that Imperial's alleged non-discriminatory basis for the appellant's treatment was false or pretextual.

[224] The tribunal's application of the burden of proof was thus reasonable and consistent with the applicable law.

(4) Was the tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial reasonable?

[225] Imperial argues that the tribunal's conclusion that the defence under s. 16(1) of the *Code* was not available to Imperial was unreasonable because no reasons were given for that conclusion. Imperial argues that according to *Vavilov*, reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable" and that the absence of reasons raises issues of procedural fairness and whether a decision is substantively reasonable: *Vavilov*, at para. 81.

2023 ONCA 364 (CanLII)

[226] I reject Imperial's argument. Imperial failed to raise the s. 16(1) defence before the tribunal. It should not be permitted to raise it for the first time on review.

[227] Imperial did not raise a s. 16(1) defence before the tribunal. In its response to the appellant's claim, Imperial pleaded that the appellant did not have standing to bring the claim and that its decision to withdraw the job offer was based on his not being able to work in Canada on a permanent basis and not on the prohibited ground of citizenship.[12] In the alternative, it pleaded a BFOR defence, pursuant to s. 11 of the *Code*. Imperial did not raise a s. 16(1) defence in its response.

[228] Nor did Imperial raise the s. 16(1) defence during the tribunal hearing. On the final day of evidence before the tribunal, prior to an adjournment for hearing of submissions, counsel for the appellant asked whether Imperial was raising a defence under s. 16 of the *Code*, because she did not want to be taken by surprise and because it might require reopening the hearing for more evidence. Counsel for Imperial undertook to notify counsel for the appellant prior to submissions if he was raising a s. 16 defence. When the hearing resumed approximately six weeks later, Imperial did not assert a s. 16 defence in its submissions. Indeed, during submissions, Imperial expressly took the position that it was not relying on the

[12] At the tribunal hearing, Imperial added as a defence that the reason that the job offer was withdrawn was because the appellant lied to Imperial. However, this was not its position in its written response to the claim.

2023 ONCA 364 (CanLII)

s. 16(1) defence. Rather, Imperial argued that the appellant did not have standing to bring the claim; that the job offer was withdrawn only because the appellant lied; that if there was discrimination, it was on the basis of immigration status, which is not a prohibited ground; and that if there was discrimination on the prohibited ground of citizenship, Imperial had a BFOR defence.

[229] Imperial attempted to raise the s. 16(1) defence in its application for judicial review. The majority of the Divisional Court did not address s. 16(1). Sachs J., in dissent, held that Imperial should not be permitted to raise the s. 16(1) issue on the review when it had not raised the issue before the tribunal.

[230] It is clear that Imperial's decision not to raise the s. 16(1) defence before the tribunal was a tactical decision. When asked by this court during submissions about the reason for not raising the s. 16(1) defence before the tribunal, counsel for Imperial (who was also counsel before the tribunal) advised that the defence was not raised before the tribunal because raising it would have been inconsistent with and undermined Imperial's position that the sole reason for withdrawing the job offer was the appellant's dishonesty about his status in Canada. Counsel also said the s. 16(1) defence was not raised below because Imperial took the position that the appellant did not have standing to bring his claim and that if there was discrimination it was on the basis of "immigration status" and not the appellant's

2023 ONCA 364 (CanLII)

citizenship. These are all tactical reasons Imperial chose not to raise the s. 16(1) defence.

[231] I pause to note that there is nothing in the tribunal's *Rules of Procedure,* nor the *Common Rules* of Tribunals Ontario, that prohibits alternate pleadings.

[232] Imperial should not now be permitted to change the footing of its defence on judicial review. In addition to the premise that a party should not ordinarily be permitted to raise a new issue on appeal, particular concerns arise in the judicial review context because of the reviewing court's role vis-à-vis the tribunal.

[233] The legislature made the decision to entrust adjudication of human rights claims to the tribunal, subject to review by the courts. Where an issue is not raised before the tribunal, there is no decision on an issue to review. Further, the premise of judicial review starting with "respectful attention" to an administrative decision-maker's reasons cannot be applied where an issue was not raised below, and the tribunal was not given the opportunity to consider the issue and provide reasons.

[234] One difficulty with allowing Imperial to raise the issue for the first time on judicial review is evident. Imperial faults the tribunal for giving insufficient reasons in rejecting a s. 16(1) defence. This is a mischaracterization of what the tribunal did in relation to s. 16(1).

[235] In two places in its reasons, the tribunal briefly states that Imperial's policy was "not excused" by s. 16(1) of the *Code* and that the defence under s. 16(1) of

2023 ONCA 364 (CanLII)

the *Code* was “not available”. No reasons were provided for these statements. Given that Imperial had been asked whether it would argue a s. 16(1) defence, and chose not to raise it, these passages can only be read as the tribunal finding that the defence was not available because Imperial chose not to raise it. This interpretation of the tribunal’s reasons has particular force because it would have been Imperial’s burden to establish this affirmative defence in light of the established law about the burden of proof in human rights claims, discussed above. Obviously, Imperial could not meet its burden to establish a defence under s. 16(1) when it chose not to rely on that defence before the tribunal.

[236] In the present appeal, it was reasonable for the tribunal not to consider the s. 16(1) defence, since Imperial chose not to assert it.

[237] Because the s. 16(1) issue was not raised by Imperial at first instance, it is beyond the scope of this appeal to pronounce on the scope of that statutory defence. Further, the court does not have a record before it in this appeal that would permit consideration of the variety of situations in which the s. 16(1) defence may be applicable. The scope of application of the s. 16(1) defence in the context of discrimination in employment on grounds of citizenship appears to be to a large

2023 ONCA 364 (CanLII)

extent driven by federal immigration law[13] ("imposed or authorized by law"); however, there is no record before the court of what, if any, other types of status in Canada allow an unrestricted right to work.

[238] Neither this court nor the Divisional Court has considered the interpretation of the s. 16(1) defence.[14] In light of the concerns I have discussed about the defence not having been raised before the tribunal and it being an issue of first impression in the courts, the interpretation of the s. 16(1) defence is better left for a case where the issue is raised and considered by the tribunal.

2023 ONCA 364 (CanLII)

---

[13] The text of s. 16 encompasses "a requirement, qualification or consideration authorized or imposed by law", whether the law is federal or provincial. However, in the context of discrimination in employment on grounds of citizenship, it appears that the most likely source would be federal law, in particular, *IRPA*.

[14] Without opining on the correctness of the analysis, I note that the leading decision of the tribunal regarding the interpretation of the s. 16(1) defence in the context of discrimination in employment is *Koenig v. University of Toronto*, 2012 HRTO 767. The s. 16(1) issue in *Koenig* arose in the context of an allegation that the university's job advertisements were discriminatory. The advertisements stated: "All qualified candidates are encouraged to apply, however, Canadians and permanent residents will be given priority." The claimant alleged that the preference for Canadian citizens was discriminatory. The university argued that the s. 16(1) and 16(2) defences applied such that there was no discrimination on the basis of citizenship. The tribunal agreed with the university that the s. 16(1) defence applied (and declined to rule on the s. 16(2) defence). The tribunal accepted the university's argument, based on the record before it, that as a matter of federal law, prior to hiring a foreign national in Canada, the university was required to apply for a Labour Market Opinion from Human Resources and Skills Development Canada. In addition, also as a matter of federal law, there were guidelines for advertising such jobs, including that job postings must include the type of statement about priority for Canadian citizens and permanent residents that the claimant challenged. The tribunal accepted the university's argument that the s. 16(1) defence applied in these circumstances because the priority in the advertisement for Canadian citizens and permanent residents was a requirement imposed by law. I note that the expert evidence before the tribunal in the present appeal was that no Labour Market Opinion (now known as a Labour Market Impact Assessment) is required before an employer can hire a PGWP-holder.

G. CONCLUSION

[239] I am satisfied that the tribunal's decision is reasonable. It demonstrates a coherent chain of reasoning that is justified in relation to the factual record before the tribunal and the legal constraints relevant to the issues before it.

[240] Accordingly, I would allow the appeal, set aside the Divisional Court decision, and restore the order of the tribunal. As agreed by the parties, Imperial shall pay costs of the appeal to the appellant in the amount of $15,000, inclusive of disbursements and applicable taxes.

[241] The parties did not address costs of the Divisional Court proceedings before this court. If the parties are unable to agree on costs of the proceedings before the Divisional Court, they may make written submissions not exceeding three pages each. The submissions of the appellant shall be delivered within 15 days after the release of these reasons. The submissions of Imperial shall be delivered within 15 days after the receipt of those of the appellant.

Released: May 23, 2023 "KMvR"

"J. Copeland J.A."
"I agree. K. van Rensburg J.A."
"I agree. Sossin J.A."

2023 ONCA 364 (CanLII)

TAB 7

CITATION: Imperial Tobacco Limited, 2025 ONSC 1375
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL
DATE: 2025-03-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT**

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

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

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

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Craig Lockwood, Deborah Glendinning, Marc Wasserman and Martino Calvaruso*, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Natasha MacParland and Chanakya Sethi, for FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Robert Thornton, for JTI-Macdonald Corp.

Linc Rogers, for Deloitte Restructuring Inc. in its capacity as Monitor of JTI-Macdonald Corp.

Jamey Gage and Trevor Courtis, for Rothmans, Benson & Hedges Inc.

R. Shayne Kukulowicz and Monique Sassi, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.

Jacqueline Wall, for the Province of Ontario

Sam Cotton, for the Heart and Stroke Foundation

Jesse Mighton, Jeffrey Leon, Mike Eizenga and Preet Gill, for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan,

2025 ONSC 1375 (CanLII)

Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims

André I.G. Michael, for the Consortium of Provinces and Territories

Brett Harrison and Guneev Bhinder, for the Province of Quebec

HEARD: March 3, 2025

2025 ONSC 1375 (CanLII)

ENDORSEMENT

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

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

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

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

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

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

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

[8] The allocation of the $750 million holdback to be retained by the Tobacco Companies to fund working capital (the "Working Capital Holdback") remained unresolved at the time of the Sanction Hearing. The Tobacco Companies have now agreed in principle that on the Plan

Implementation Date, RBH will retain the entire Working Capital Holdback. In exchange for RBH, JTI and JTI Macdonald TM Corp. ("JTI-TM") have agreed to withdraw all of their objections to the sanctioning of the CCAA Plans.

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

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

[11] In addition, the Tobacco Companies require that section 5.4 of the CCAA Plans be amended to: (i) provide that the Working Capital Holdback is to be retained by RBH as the "RBH Retained Amount", (ii) permit RBH to deal with the RBH Retained Amount in its sole discretion, including to transfer or distribute such monies outside of Canada in such manner as RBH may determine; and (iii) clarify that any such transfers or distributions of the RBH Retained Amount will be deemed to be permitted transfers for the sole purpose of Article 11 of the CCAA Plans.

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

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

[14] No Claimants oppose the motions.

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

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

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

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

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

2025 ONSC 1375 (CanLII)

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

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

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

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

[24] The proposed amendments to the plan fix the allocation of the Working Capital Holdback. None of the amendments sought on this motion affect Heart & Stroke as a social stakeholder. The proposed amendments have no impact on the scope of the *Cy-près* Foundation. The issues raised by Heart & Stroke on this motion were raised in the Sanction Hearing. The court's decision on the motion to sanction the plan is under reserve. Heart & Stroke's objections will be addressed in the court's decision on that motion.

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

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

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

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

2025 ONSC 1375 (CanLII)

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

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

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

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

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

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

Chief Justice Geoffrey B. Morawetz

Date: March 3, 2025

2025 ONSC 1375 (CanLII)