COURT FILE NO.	2401-09247
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LONG RUN EXPLORATION LTD. and CALGARY SINOENERGY INVESTMENT CORP.
APPLICANT	FTI CONSULTING CANADA INC. IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF LONG RUN EXPLORATION LTD. AND CALGARY SINOENERGY INVESTMENT CORP.
DOCUMENT	**BENCH BRIEF OF THE MONITOR (Claims of Henenghaixin Corp.)**

Clerk's Stamp

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Oct 31, 2024
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CLERK OF THE COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: 39586-2010

APPLICATION BEFORE THE HONOURABLE JUSTICE D.R. MAH ON NOVEMBER 14, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

COURT FILE NO.	2401-09247
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APPLICATION BEFORE THE HONOURABLE JUSTICE D.R. MAH ON NOVEMBER 14, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

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PART I - INTRODUCTION

1. FTI Consulting Canada Inc. (the "**Monitor**"), on behalf of Long Run Exploration Ltd. ("**Long Run**") and Calgary Sinoenergy Investment Corp. ("**Sinoenergy**", and collectively with Long Run, the "**Debtors**"), seeks an order under the *Companies' Creditors Arrangement Act* (the "**CCAA**")[1] approving the transactions contemplated in the Amended and Restated Subscription Agreement between the Debtors and 2657493 Alberta Ltd. dated October 30, 2024, and granting a reverse vesting order (the "**RVO**") in respect of the transactions proposed.

2. Henenghaixin Corp. ("**H Corp**") is opposing the Application for the RVO, and the Monitor understands that H Corp intends to argue that they have a valid constructive trust claim and it is a contingent proprietary claim that ought to be preserved as a priority claim against the assets of the Debtors and resolved in an expedited fashion. H Corp alleges that the Claimed Funds (as defined below) were wrongfully diverted to the Debtors and consequently, that the Debtors have been unjustly enriched at H Corp's deprivation.

3. It is the Monitor's view that H Corp does not have a trust claim over the Claimed Funds, or any priority to all other security interests, trusts, liens, charges, encumbrances, and claims of the Debtors' secured creditors, statutory or otherwise.

4. The CCAA process aims to maximize value for all creditors, and imposing a constructive trust in favour of H Corp would disrupt the balance that the statute seeks to maintain by effectively granting H Corp a *de facto* super-priority.

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

5. Consequently, the imposition of a constructive trust in insolvency proceedings is reserved for extraordinary cases, necessitating specific judicial criteria that H Corp has not met.

6. Pursuant to a consent order dated September 9, 2024 granted by the Court of King's Bench of Alberta (the "**Court**"), Torys LLP is acting as special legal counsel to the Monitor in respect of the H Corp claims as described herein.

PART II - FACTS

A. Interco Loan Agreement between the Debtors

7. Long Run as borrower and Sinoenergy as lender entered into a loan facility agreement dated June 29, 2016 (the "**Interco Loan Agreement**"), pursuant to which Sinoenergy agreed to advance loans in the aggregate principal amount of $120,000,000.[2]

8. The Interco Loan Agreement was subsequently amended on August 29, 2016, January 31, 2017, and October 27, 2020.[3] The aggregate amount of the Interco Loan Agreement was increased from time to time, to $600,000,000. The balance owing under the Interco Loan Agreement as at June 30, 2024, including principal and interest, was approximately $558 million.[4]

B. Secured loan made prior to the Claimed Funds being allegedly diverted

9. Long Run as borrower and Sinoenergy as guarantor entered into a credit agreement with China Construction Bank Toronto Branch ("**CCBT**") dated January 31, 2017 (the "**Credit Agreement**").[5]

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[2] Supplement to the Fifth Report of FTI Consulting Canada Inc, in its capacity as Monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp at para 37 [**Supplement to Fifth Report**].
[3] Supplement to Fifth Report at para 38.
[4] Supplement to Fifth Report at para 38.
[5] Credit Agreement between Long Run Exploration Ltd as borrower, Calgary Sinoenergy Investment Corp as guarantor and China Construction Bank Toronto Branch as lender dated January 31, 2017 **[Credit Agreement]**.

The Credit Agreement established credit facilities in an amount up to $431,000,000 (the "**Credit Facilities**").[6]

10. On January 30, 2017, the Debtors issued a drawdown notice for the maximum amount available under the Credit Facilities, to be drawn on January 31, 2017 (the "**Drawdown Notice**").[7]

11. CCBT registered its security against Long Run at the Alberta Personal Property Registry on January 26, 2017 (the "**CCBT Security**").[8]

12. The Monitor understands that the proceeds from the Credit Facilities were used to repay and cancel Long Run's existing credit facilities, which had approximately $413 million outstanding as at December 31, 2016.[9]

13. Approximately $355 million remains outstanding to CCBT from the Debtors (the "**CCBT Debt**").[10]

C. The H Corp Claim

14. H Corp commenced an action against the Debtors, Tianzhou Deng ("**Deng**"), Xiaobo Deng Aka Lake Deng ("**Lake**"), and Michael Lam ("**Lam**", and collectively with Deng and Lake, the "**Individual Defendants**") on February 28, 2020, in Alberta Court of King's Bench Action No. 2001-03353 (the "**Action**").[11]

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[6] Credit Agreement, Schedule A.
[7] Supplement to Fifth Report at para 26; Drawdown Notice from Long Run Exploration Ltd. to China Construction Bank Toronto Branch dated January 30, 2017.
[8] Supplement to Fifth Report at para 29.
[9] Supplement to Fifth Report at para 31.
[10] Supplement to Fifth Report at para 53.
[11] Affidavit of Gaoyong Zhang, sworn September 13, 2024 at paras 2, 4 [**Zhang Affidavit**].

15. The parent companies of H Corp, JiangYin Henenghaixin Investment Partnership and Wuhan Changxin Hesheng Industrial Investment Fund Partnership, through a complex series of transactions involving a number of their subsidiaries including York City Enterprise Inc. ("**York City**"), which wholly owns H Corp, arranged to move money out of China and ultimately provide $352.2 million to H Corp (the "**Investment Fund**"). A large portion of the Investment Fund was used to acquire the assets of Twin Butte Energy Ltd. ("**Twin Butte**") for H Corp's wholly owned subsidiary West Lake Energy Corp. ("**West Lake**").[12]

16. H Corp alleges that from approximately January 2017 to September 2017, while Deng, assisted by Lake and Lam, was simultaneously a director of H Corp and director of the Debtors, by way of breach of fiduciary duty, fraud, misrepresentation, knowing receipt and knowing assistance, conversion, conspiracy, fraudulent conveyance and unjust enrichment, wrongfully diverted approximately $43,765,669 of the Investment Funds received by H Corp to the Debtors (the "**Claimed Funds**") in his capacity as director of H Corp.[13] Consequently, it is claimed that the Debtors have been unjustly enriched at H Corp's expense (the "**H Corp Claim**").[14] H Corp further claims that the diversion of the Claimed Funds was unknown and unknowable to H Corp until January 2019.[15]

17. H Corp alleges that the following transfers were made from H Corp, with the transfers occurring between April 12, 2017 and September 5, 2017:

(a) $76,956,491 to Sinoenergy; and

[12] Zhang Affidavit at paras 9–20.
[13] Zhang Affidavit at para 5; Henenghaixin Corp statement of claim against Tianzhou Deng, Xiaobo Deng aka Lake Deng, Michael Lam, Calgary Sinoenergy Investment Corp, Long Run Exploration Ltd, John Doe and ABC Corporation at paras 28–30 [**H Corp SoC**].
[14] Zhang Affidavit at para 6.
[15] H Corp SoC at para 20.

(b) $150,000 to Long Run.[16]

18. They assert that because the Debtors made payments towards a deposit for the Twin Butte assets and interest payments against a York City loan, the net outflow from H Corp to the Debtors amounts to the Claimed Funds.[17]

19. H Corp further alleges that the loan agreement between Sinoenergy and York City dated April 10, 2017 which, among other things, loans Sinoenergy $58,576,000 (the "**York City Loan Agreement**"), and the shareholder declaration of H Corp dated April 10, 2017 with respect to the York City Loan Agreement ("**H Corp Declaration**"), are fraudulent.[18]

20. The Monitor has not made any determination as to the legitimacy of the York City Loan Agreement or the H Corp Declaration.[19]

21. H Corp seeks in the Action, among other things, a declaration that the Claimed Funds and benefits received by the Debtors from H Corp be held in trust for its benefit, and that H Corp is entitled to trace the Claimed Funds into the accounts and assets of the Debtors.[20]

D. The Debtors' Position

22. The Debtors filed their statement of defence in response to the Action on February 11, 2021, denying that H Corp is entitled to the relief it seeks.[21] They assert that to the extent the Claimed Funds

[16] Zhang Affidavit at para 29.
[17] Zhang Affidavit at paras 30–32.
[18] Zhang Affidavit at paras 36–48.
[19] Supplement to Fifth Report at para 41.
[20] Zhang Affidavit at para 6.
[21] Statement of Defence of Calgary Sinoenergy Investment Corp and Long Run Exploration Ltd dated February 11, 2011 at para 38 [**Debtors' SoD**].

were received by the Debtors, they were subject to contracts entered into by one of the Debtors with the other, or with H Corp or York City.[22]

23. Among other things, the Debtors also claim that the Individual Defendants directed the Debtors to make material payments to various individuals and companies without proper records or justification.[23] These transactions, they assert, were not in the Debtors' best interests and were made to advance the personal or business interests of the Individual Defendants, including benefiting H Corp or West Lake, and were unrelated to any legitimate business purposes of the Debtors.[24]

24. The Debtors also filed a third-party claim dated August 11, 2021 against the Individual Defendants and West Lake, among others. In the third-party claim, the Debtors allege that there were intercompany loans which offset any amounts found owing by the Debtors to H Corp, including the Claimed Funds, which include interest payments made to York City, among other payments.[25]

E. Procedural History of the Action

25. On April 23, 2020, H Corp applied *ex parte* for an attachment order/Mareva injunction/disclosure order (the "**Attachment Order**") against the Debtors and the Individual Defendants.[26] The Attachment Order was granted on April 24, 2020.[27]

26. The Debtors and the Individual Defendants subsequently sought to set aside the Attachment Order on March 3, 2021, and it was held that the Attachment Order against the Debtors be set aside.[28]

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[22] Debtors' SoD at para 26.
[23] Debtors' SoD at paras 20, 25.
[24] Debtors' SoD at paras 20, 25.
[25] Third Party Claim of Calgary Sinoenergy Investment Corp and Long Run Exploration Ltd dated August 11, 2011 at para 40 [**Third Party Claim**].
[26] Zhang Affidavit at para 53.
[27] Zhang Affidavit at para 53.
[28] Zhang Affidavit at para 54.

27. As for the Individual Defendants, it was initially stipulated that the Attachment Order terminate three months from the date of the decision unless H Corp submitted affidavits from the CEO of West Lake, David Middleton ("**Middleton**"), and a director of West Lake, Steven Neu ("**Neu**").[29] H Corp provided the affidavits of Neu and Middleton.[30]

28. The Individual Defendants appealed the March 3, 2021 decision to the Alberta Court of Appeal ("**ABCA**"), which allowed the appeal and set aside the Attachment Order due in part to the lack of direct evidence from individuals such as Neu and Middleton.[31]

29. H Corp had also filed an application to resolve a particular question or issue pursuant to Rule 7.1 of the *Alberta Rules of Court,* Alta Reg 124/2010 on October 18, 2021 (the "**Rule 7.1 Application**"), to determine whether certain documents were false, forged or authentic, but H Corp's application was denied approximately three years later, on January 24, 2024.[32]

F. CCAA Proceedings and Stay of the Action

30. On July 4, 2024 (the "**Filing Date**"), CCBT, in its capacity as collateral agent, sought and obtained an initial order (the "**Initial Order**") from the Court to commence proceedings under the CCAA (the "**CCAA Proceedings**") in respect of the Debtors.[33]

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[29] Zhang Affidavit at para 54.
[30] Zhang Affidavit at para 56.
[31] Zhang Affidavit at paras 57–58.
[32] Zhang Affidavit at paras 59, 62.
[33] Fourth Report of FTI Consulting Canada Inc, in its Capacity as Monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp dated October 9, 2024 at para 1 [**Fourth Report**].

31. The Initial Order, among other things, established a stay of proceedings in favour of the Debtors for an initial stay period up to and including July 14, 2024 (the "**Stay Period**"), and appointed the Monitor, with enhanced powers, pursuant to the provisions of the CCAA.[34]

32. On July 12, 2024, this Court granted an amended and restated initial order (the "**ARIO**") in the CCAA Proceedings. The ARIO granted, among other things, an extension to the Stay Period in favour of the Debtors to July 31, 2024.[35]

33. On July 30, 2024, this Court granted a Second Amended and Restated Initial Order (the "**SARIO**") in the CCAA Proceedings.[36] The SARIO granted, among other things, the following relief within the CCAA Proceedings:

(a) an extension of the Stay Period from July 31, 2024 to October 31, 2024;

(b) authorized the Debtors to obtain interim financing from the DIP Lender (as defined in the SARIO) pursuant to terms of the DIP Financing Agreement (as defined in Schedule "**A**" to the SARIO), up to an amount equal to $7 million (the "**DIP Fund**"), and granting a DIP Lender's Charge (as defined in the SARIO) against the property of the Debtors ranking in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person (as defined in the SARIO);

[34] Fourth Report at para 1.
[35] Fourth Report at para 2.
[36] Second Amended and Restated Initial Order dated July 30, 2024.

(c) approving the terms of a stalking horse subscription agreement between the Monitor, on behalf of Long Run, and Hiking Group Shandong Jinyue Int't Trading Corporation ("**Hiking**") dated July 23, 2024 (the "**SARIO Subscription Agreement**"); and

(d) approving a stalking horse sale and investment solicitation process in relation to the assets, property, and undertakings and/or business operations of the Debtors (the "**SISP**").[37]

34. Pursuant to the SARIO Subscription Agreement, the following will occur, among other things:

(a) the H Corp Action will be listed as one of the "Transferred Liabilities" to be transferred to the "Creditor Trust";[38]

(b) the Creditor Trust will be created and named the "Long Run Exploration Residual Trust";[39]

(c) the Creditor Trust will be substituted as a party in the legal proceedings of the Action in place of Long Run and the style of cause for the proceedings of the Action will be changed by deleting Long Run as a party and replacing it with the Creditor Trust as the named defendant;[40]

(d) Long Run's redemption of all its "Common Shares" issued to its sole shareholder Sinoenergy will be approved and outstanding immediately prior to the "Closing Date" at the redemption price of $0.00001 each;[41] and

[37] Second Amended and Restated Initial Order dated July 30, 2024; Supplement to Fifth Report at para 3.
[38] Subscription agreement between FTI Consulting Canada Inc, on behalf of Long Run Exploration Ltd, and Hiking Group Shandong Jinyue Int't Trading Corporation dated July [**SARIO Subscription Agreement**], Schedule "B".
[39] SARIO Subscription Agreement, Schedule "A".
[40] SARIO Subscription Agreement, Schedule "A".
[41] SARIO Subscription Agreement, s 3.3.

(e) the issuance of the "Purchased Shares" by Long Run to Hiking at the "Purchase Price", funded by way of credit bid through the DIP Fund, will be transferred free and clear from any "Losses" or "Encumbrances" (as they are defined by the SARIO Subscription Agreement), other than the "Retained Liabilities", which includes:

(A) "Environmental Liabilities" of approximately $453 million;[42] and

(B) the CCBT Debt.[43]

35. Counsel for H Corp attended the July 30, 2024 application and objected to the SARIO Subscription Agreement being approved, on the basis that if the SARIO Subscription Agreement ultimately became the Successful Bid as defined in the SISP, given that the SARIO Subscription Agreement contemplates that upon the granting of a reverse vesting order, the H Corp Action would become one of the "Transferred Liabilities" transferred to the proposed Creditor Trust, and the Stalking Horse Bidder would not assume any liability in relation to the same.[44] H Corp's objections were dismissed.[45]

36. The SARIO Subscription Agreement has since been amended and restated (the "**Subscription Agreement**") and pursuant to it, Hiking has been substituted as the transferee of the "Purchased Shares" and "Retained Liabilities" with its wholly owned subsidiary 2657493 Alberta Ltd. ("**SubCo**" and collectively with Hiking, the "**Stalking Horse Bidder**").[46]

37. The Monitor understands that the Subscription Agreement is substantially the same form as the SARIO Subscription Agreement, the terms of which were approved under the SARIO, with the

[42] Supplement to Fifth Report at para 53.
[43] SARIO Subscription Agreement, ss 2.2, 3.3(j).
[44] Fourth Report at para 4.
[45] Fourth Report at para 4.
[46] Amended and restated subscription agreement between FTI Consulting Canada Inc, on behalf of Long Run Exploration Ltd, and 2657493 Alberta Ltd. [**Subscription Agreement**].

exception of substituting Hiking to SubCo and other minor changes to the closing sequence for tax planning purposes.[47]

G. Stalking Horse Bid and Subscription Agreement are at Risk

38. The Subscription Agreement provides the following benefits to certain stakeholders of the Debtors, including:

(a) CCBT, a secured creditor over the Long Run assets pursuant to the CCBT Security;

(b) municipalities which are owed $13.6 million in satisfaction in outstanding municipal taxes;

(c) the DIP Lender;

(d) freehold surface and mineral lease holders which have pre-filing liabilities owing from Long Run;

(e) approximately 116 employees and contractors of the Debtors will continue their employment;

(f) creditors and suppliers will be able to sustain their ongoing relationships; and

(g) the Alberta Energy Regulator (the "**AER**") and Orphan Well Association (the "**OWA**") will benefit as the "Environmental Liabilities" will be assumed by the Stalking Horse Bidder.[48]

39. Counsel for H Corp stated in a letter dated October 8, 2024 that they have instructions to exhaust all legal remedies and oppose the Stalking Horse Bid at the Monitor's application scheduled for

[47] Fifth Report of FTI Consulting Canada Inc, in its capacity as monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp dated October 30, 2024, at para 34.
[48] Supplement to Fifth Report at para 53.

November 14, 2024 unless, among other things, the H Corp Action is treated as a "Retained Liability" in the Subscription Agreement.[49]

40. H Corp maintains the position that regardless of who the Successful Bidder is under the SISP, H Corp's constructive trust claim is a contingent proprietary claim that ought to be preserved as a priority claim against the assets of the Debtors and resolved in an expedited fashion.[50]

41. Counsel for the Stalking Horse Bidder, as stated in a letter dated September 11, 2024, maintains the position that the Stalking Horse Bidder will not proceed with the Stalking Horse Bid, or any other similar transaction, if the H Corp Action is treated as a "Retained Liability" under the Subscription Agreement.[51]

42. The Debtors will not have sufficient liquidity to continue meeting post-filing obligations or the cost of these CCAA Proceedings past November 30, 2024, and will exhaust the current maximum amount available under the DIP Financing Agreement.[52]

PART III - ISSUES

43. The issues on these Applications are:

(a) Does the Monitor have jurisdiction to investigate the H Corp Claim?

(b) Is a constructive trust available to H Corp because the Debtors were unjustly enriched?

(c) Is a constructive trust available to H Corp because the Debtors committed a wrongful act?

[49] Letter from Trevor Batty of Field Law LLP dated October 8, 2024 [**Trevor Batty Letter**].
[50] Trevor Batty Letter.
[51] Letter from Jeffrey Oliver of Cassels Brock & Blackwell LLP dated September 11, 2024 [**Jeffrey Oliver Letter**].
[52] Supplement to Fifth Report at para 57.

(d) Would the imposition of a constructive trust for H Corp undermine the integrity of the CCAA?

PART IV - LAW AND ARGUMENT

A. Does the Monitor have jurisdiction to investigate the H Corp Claim?

44. The Monitor has jurisdiction to investigate the H Corp Claim, as its investigation is necessary to determine whether the Stalking Horse Bid is reasonable and fair, and in the best interest of all stakeholders of the Debtors.

45. The Monitor was appointed with enhanced powers pursuant to the Initial Order and under the CCAA, including the authority to preserve and protect the Debtors' property.[53]

46. The Ontario Court of Appeal ("**OCA**") in *Ernst & Young Inc v Essar Global Fund Limited* emphasized that the Monitor serves as the "eyes and ears of the court" and at times, the "nose", and must act impartially, ensuring that all parties are treated fairly while fulfilling the objectives of the CCAA.[54] The Monitor is also required to take positions during CCAA proceedings, including with respect to the evaluation of key claims and transactions.[55]

47. Given the existence of the Action and the H Corp Claim, the Monitor's role in preserving the Debtors' property and ensuring creditors are paid according to established priorities is necessary.

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[53] Initial Order at para 25(b).
[54] ***Ernst & Young Inc v Essar Global Fund Limited***, 2017 ONCA 1014 at para 109.
[55] CCAA, s 23(1)(i).

48. Case law supports the Monitor's duty to review transactions for fraud, preferences, or other reviewable issues, in a role akin to that of a bankruptcy trustee.[56] This role includes scrutinizing claims that may impact the restructuring process.[57]

49. Furthermore, the CCAA mandates that the Monitor advise the court on the reasonableness and fairness of any proposed compromise or arrangement between a debtor company and its creditors.[58]

50. The Stalking Horse Bid is held hostage by H Corp, at the cost of all creditors, as it seeks that the H Corp Claim be treated as a "Retained Liability" in the Subscription Agreement. If granted, the H Corp Claim would then be attached to the Purchased Shares, which the Stalking Horse Bidder is contemplating acquiring. This would directly jeopardize the transaction and the restructuring process, as the Stalking Horse Bidder has made it clear that they will not execute the Stalking Horse Bid if the H Corp Claim is considered a "Retained Liability".[59] Other potential bidders would likely be deterred as well.

51. To protect the interests of all stakeholders and preserve the Stalking Horse Bid, the Monitor must investigate and provide its position on the H Corp Claim. This investigation is essential for determining whether the Stalking Horse Bid is reasonable and fair and is therefore required for the Monitor to fulfill its duties. It is central to the efficacy of these CCAA Proceedings.

B. Is a constructive trust available to H Corp because the Debtors were unjustly enriched?

52. The Supreme Court of Canada has clarified that a finding in favour of a plaintiff for unjust enrichment does not automatically imply the existence of a constructive trust.[60] For a constructive trust

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[56] ***Woodward's Ltd. Estate***, 100 DLR (4th) 133 [***Woodward's***].
[57] ***Woodward's***.
[58] CCAA, s 23(1)(i).
[59] Jeffrey Oliver Letter.
[60] ***Peter v Beblow***, [1993] 1 SCR 980, 1993 CarswellBC 1258 at para 25 [***Peter***].

to be established, the plaintiff must demonstrate a direct connection to the property in question based on their contributions.[61]

53. While a finding of unjust enrichment does not necessarily result in the imposition of a constructive trust, establishing unjust enrichment remains a necessity when one party has been unjustly enriched to the detriment of another.[62] To establish unjust enrichment, it must be proven that there was: (i) an enrichment; (ii) a corresponding deprivation; and (iii) no juristic reason for allowing the enrichment or deprivation.[63]

54. H Corp has failed to identify specific property to which a constructive trust could apply; therefore, a constructive trust is not available to H Corp. Additionally, H Corp has not established a basis for unjust enrichment, as there exists a valid juristic reason for the enrichment. This reason includes the various loan agreements between the parties and the necessity to protect the interests of all creditors involved.

H Corp has not identified specific property

55. H Corp has failed to identify specific property to which the trust could apply and is effectively seeking a floating charge over the Debtors' property.

56. Where a constructive trust is granted, the property is removed from the bankrupt's estate, which effectively reorganizes the priorities of creditors.[64]

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[61] ***Peter*** at para 25.
[62] ***Soulos v Korkontzilas***, [1997] 2 SCR 217, 32 OR (3d) 716 [***Soulos***].
[63] ***Pettkus v Becker***, 1980 CanLII 22 (SCC), [1980] 2 SCR 834 at 845 [***Pettkus***].
[64] ***306440 Ontario Ltd. v 782127 Ontario Ltd. (Alrange Container Services)***, 2014 ONCA 548 at para 24 [***Alrange Container Services***].

57. Here, the imposition of a constructive trust would effectively remove the property subject to the trust from the estate of Long Run.

58. However, H Corp has not identified any specific property to which the constructive trust could apply. This is a fatal deficiency as, in cases involving bankruptcy, a close and causal connection between the property over which a constructive trust is sought and the misappropriated property is required.[65]

59. The requirement for a close connection in the commercial context, such as in the case at bar, was emphasized by the Ontario Court of Appeal:[66]

> The very nature of the constructive trust remedy demands a close link between the property over which the constructive trust is sought and the improper benefit bestowed on the defendant or the corresponding detriment suffered by the plaintiff. Absent that close and direct connection, I see no basis, regardless of the nature of the restitutionary claim, for granting a remedy that gives the plaintiff important property-related rights over specific property. A constructive trust remedy only makes sense where the property that becomes the subject of the trust is closely connected to the loss suffered by the plaintiff and/or the benefit gained by the defendant.
>
> Professor Paciocco goes on to argue that the requirement of a close connection between the property over which the trust is sought and the product of the unjust enrichment is particularly strong in the commercial context. He observes, at p. 333:
>
> > In the commercial contest where there should be a hesitance to award proprietary relief, a purer tracing process is justifiable. This approach accurately describes the prevailing trend in Canadian case law. [Emphasis added.]

60. Furthermore, the OCA has also clarified that the property subject to a trust must be specifically identified and cannot be general, and emphasized that the absence of specific property is likely sufficient to deny the creation of a trust:

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[65] ***Alrange Container Services*** at paras 26–27.
[66] ***Alrange Container Services*** at paras 26–27.

> [T]here is no specific property which is the subject of the trust. The property ordered held comprises all of the property of the bankrupts. This alone would probably be sufficient to decide the appeal.[67] [Emphasis added.]

61. Additionally, simply "knowing receipt" of the funds is not sufficient if specific property cannot be identified which is the subject of the enrichment.[68] The failure to identify specific property effectively turns the claim into a request for a floating charge, which courts have consistently rejected:[69]

> As the Court recognized in Citadel, a plaintiff may have the option to pursue either a restitutionary remedy of a constructive trust or a tracing remedy at common law, where both are available on the facts. In this case, no common law tracing remedy is available as the monies paid by 126 to 113 in breach of trust cannot be traced to any specific assets acquired by 113 as the full $111,000 was expended on various expenses related to the ongoing operations of the hotel, other than $951 used to purchase furniture that would likely have been sold as part of the sale of the hotel, and the $43,404 paid to the subcontractor. While the monies in the Trustee's possession reflect the remaining proceeds from the sale of the hotel, those funds cannot be traced directly to any specific assets acquired with the funds from 126.
>
> Mr. Wurth's claim to a constructive trust based on "knowing receipt" and unjust enrichment must also fail due to the fact that he cannot identify specific property which is the subject of the enrichment and is essentially seeking the equivalent of a floating charge over all the assets of 126. This is not available for the reasons outlined in Barnabe and Bassano. [Emphasis added.]

62. H Corp claims that between January 2017 and September 2017, funds were diverted to the Debtors. During this period, the Debtors operated as a going concern and had various other fund inflows and outflows that were comingled with the Claimed Funds, as particularized below:

(a) CCBT advanced funds under the Credit Facilities on January 31 2017 pursuant to the Drawdown Notice, which was prior to the alleged first transfer by H Corp on April 13, 2017. The Monitor understands that the proceeds from the Credit Facilities were utilized

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[67] ***Barnabe v Touhey***, 1995 CanLII 1672 (ON CA), 1995 CarswellOnt 167 at para 3.
[68] ***Wurth v 1135096 Alberta Ltd.***, 2014 ABQB 520 at paras 25–26 [***Wurth***].
[69] ***Wurth*** at paras 25–26.

to repay and cancel Long Run's existing credit facilities, which had an outstanding balance of approximately $413 million as of December 31, 2016.

(b) The Debtors had an Interco Loan Agreement which was subsequently amended on August 29, 2016, January 31, 2017 and October 27, 2020 to $600,000,000. The Interco Loan Agreement had a balance at June 30, 2024, including principal and interest, of approximately $558 million.

(c) The York City Loan Agreement in the amount of $58,576,000.

63. It is self-evident that the Claimed Funds have been commingled with the Debtors' operations.

64. Both H Corp and the Debtors describe a complex web of inter-company transfers involving the Claimed Funds, further supporting this comingling. The complexity of H Corp's claim is further evidenced by the denial of their Rule 7.1 Application, underscoring the substantial time and resources that would be required to address the H Corp Claim.

65. Regardless, from January 2019 until the Filing Date of the Initial Order, H Corp had ample opportunity to advance its claim and prove the existence of specific property subject to their trust claim. Despite this, they failed to provide direct evidence to support their claims.

66. This position is also supported by the ABCA as it set aside the Attachment Order in 2022 against the Individual Defendants, which had already been set aside for the Debtors on March 3, 2021.[70]

67. The ABCA specifically noted that H Corp failed to provide any direct evidence from its own representatives regarding the alleged diversion of funds, leaving their claim unsupported:[71]

[70] ***Henenghaixin Corp v Deng***, 2022 ABCA 271 at para 39 [***Henenghaixin Corp***].
[71] ***Henenghaixin Corp*** at paras 40–41.

> Paragraph 11 of the Statement of Claim alleges that "H Corp believed that the Investment Funds, less the purchase price for the Twin Butte assets net of adjustments, would be available for West Lake to operate the Twin Butte assets. Those remaining funds were not to be used for any other purpose." There was no evidence provided by anyone from H Corp as to what it "believed".
>
> Paragraphs 19 and 20 allege that there was "no legitimate reason" for the diversion of approximately $44 million and that the "improper diversion ….was unknown, and unknowable to H Corp until January, 2019 at the earliest." Mr Zhang's affidavit explains why the investment funds believed there was no legitimate reason for the diversion and why they may not have known about the "diversion" until January 2019, however, the investment funds are not the plaintiff in this action. There was no direct information from anyone from H Corp regarding its knowledge, information or explanation about the diversion and whether, and if so how, that occurred without its knowledge. [Emphasis added.]

68. Since the ABCA set aside the Attachment Order on August 8, 2022, H Corp had further time, motivation and opportunities to gather evidence and identify specific property before the stay was ordered pursuant to the Initial Order in the CCAA Proceedings.

69. However, despite this opportunity, they remain unable to demonstrate any specific property that would be subject to a constructive trust.

70. On the Filing Date, the Debtors commenced proceedings under the CCAA. Accordingly, pursuant to the Initial Order, the Debtors are required to continue to carry on business in a manner consistent with the preservation of their business.

71. Further complicating the Debtors' cash flow, this Court authorized the DIP Financing Agreement, which provided up to $7 million to the Debtors, the DIP Fund, to support the Debtors' operations, among other purposes.

72. However, the Debtors will not have sufficient liquidity to meet post-filing obligations or cover the costs of these CCAA Proceedings beyond November 30, 2024 and will have exhausted the funds in the DIP Fund.[72]

73. Accordingly, aside from the funds advanced under the DIP Financing Agreement, the Debtors currently lack sufficient liquidity to meet their present obligations.

74. As a result, the H Corp Claim is essentially a request for a floating charge over the entire estate of Long Run, which is not a remedy available in this context.

75. Notwithstanding, even if the funds are traceable to the consequences of fraud, which the case at bar does not provide, the imposition of a constructive trust is not a necessity,[73] nor is it appropriate in the circumstances:

> Before leaving this issue, I believe it is important to make a final observation. The appeal judge's reasons should not be interpreted to suggest that once a civil fraud by the bankrupt on the claimant, whose claim was disallowed by the trustee, is proven, and that is coupled with a loss and an ability to trace the consequences of the fraud, then a constructive trust will always be imposed. That, in my view, is too broad.
>
> Constructive trust is a discretionary remedy. In a bankruptcy there are other interests to consider besides those of the defrauder and the defraudee: there are other creditors. Thus, the exercise of remedial discretion must be informed by additional considerations than in a civil fraud trial. The appeal judge in our case clearly understood this, considered the claims of the creditors, found them to be tainted by Benarroch's misconduct, and concluded that a rigid formulaic approach, relying strictly on the letter of the BIA would produce an unjust result. [Emphasis added.]

76. Regardless, as H Corp has failed to identify specific property to which a constructive trust could apply; a constructive trust is not available to H Corp.

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[72] Supplement to Fifth Report at para 57.
[73] ***Credifinance Securities Limited v DSLC Capital Corp.***, 2011 ONCA 160 at paras 43–44 [***Creditfinance***].

Valid juristic reason for the enrichment

Right to arrange their affairs by contract

77. In addition to failing to identify specific property, H Corp has not established unjust enrichment and is therefore not entitled to a constructive trust.

78. To establish unjust enrichment, it must be proven that there was: (i) an enrichment; (ii) a corresponding deprivation; and (iii) no juristic reason for allowing the enrichment or deprivation.[74]

79. H Corp alleges that the Debtors have been unjustly enriched at H Corp's expense because of the receipt of the Claimed Funds. It therefore seeks the declaration the Claimed Funds and benefits received by the Debtors from H Corp be held in trust.

80. If it is assumed that the Debtors were enriched with the Claimed Funds and H Corp was correspondingly deprived, there exists a valid juristic reason to justify the enrichment.

81. The Supreme Court of Canada, in *Kerr v Baranow*, described this element of the test for unjust enrichment as follows:[75]

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention unjust in the circumstances of the case.
>
> Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law. The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors

[74] ***Pettkus*** at 845.
[75] ***Kerr v Baranow***, 2011 SCC 10 at paras 40–41 [***Kerr***].

> such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract". [Citations omitted and emphasis added.]

82. Case law further suggests that when there is a contractual relationship between the parties, particularly when a bank advances funds to a debtor, there is a juristic reason for the enrichment.[76]

83. The Debtors assert that there was juristic reason as there was a Loan Agreement between York City, the parent of H Corp, and Sinoenergy, the parent of Long Run, suggesting that the Claimed Funds were transferred in accordance with the York City Loan Agreement,[77] which the Debtors claim that they made interest payments for.[78] The Debtors further claim that Interco Loan Agreement suggests that the funds received by Sinoenergy were transferred to Long Run in accordance with it.[79]

84. Therefore, if it is assumed that the Debtors claims are accurate, there is a juristic reason for the enrichment as the parties have the right to order their affairs by contract.

85. However, H Corp alleges that the York City Loan Agreement and H Corp Declaration are fraudulent.[80]

86. The Monitor has not made any determination as to the legitimacy of the York City Loan Agreement or the H Corp Declaration.[81]

87. Regardless, the protection of the interests of all creditors is also a juristic reason for permitting an enrichment to a bankrupt estate and is applicable to the case at bar.

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[76] ***Baltman v Coopers & Lybrand Ltd.***, 1996 CarswellOnt 4337, [1996] O.J. No. 3963 at para 41.
[77] Debtors' SoD at para 26.
[78] Third Party Claim at para 40.
[79] Third Party Claim at para 40.
[80] Zhang Affidavit at paras 36–48
[81] Supplement to Fifth Report at para 41.

Protection of the interest of all creditors

88. This Court in *Bassano Growers Ltd v Price Waterhouse Ltd* noted that the operation of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 can be a juristic reason precluding the imposition of a constructive trust in bankruptcy situations, as any deprivation is a result of bankruptcy, not unjust enrichment:[82]

> Before a constructive trust can be imposed, unjust enrichment must be established. An unjust enrichment occurs where there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment and deprivation. The Applicants argue that Diamond S was unjustly enriched by virtue of the fact that the funds were retained by it upon bankruptcy. But this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the BIA. The British Columbia Court of Appeal was asked to find a constructive trust in National Bank, supra where taxes collected under a deemed trust had not been segregated from the tax collector's own funds. The Court found at 238-40 that there could be no unjust enrichment in such cases. In bankruptcy situations, the creditors who benefit from the failure of a s. 67(1)(a) trust claim are not "enriched," but merely recover what they are owed, and any deprivation experienced by the unsuccessful trust claimants results from the bankruptcy. In other words, the operation of the BIA is a juristic reason which precludes the possibility of awarding a constructive trust remedy. [Citations omitted and emphasis added.]

89. This Court has noted that the same reasoning applies to the CCAA:[83]

> The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy.
>
> As noted at para 23 of Hoard, given that the BIA provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the CCAA. [Citations omitted and emphasis added.]

90. The British Columbia Supreme Court has also held that protecting the interests of all creditors is a valid juristic reason for permitting an enrichment of a bankrupt's estate:[84]

> In Achilles, Re, Drost J. held that protection of the interests of other creditors is a juristic reason for permitting an enrichment to a bankrupt estate. In upholding the

[82] ***Bassano Growers Ltd. v Price Waterhouse Ltd.***, 1997 CanLII 14969 (ABQB), 214 AR 380 at para 20.
[83] ***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 809 at paras 77–78.
[84] ***MacKay (Bankruptcy of)***, 2003 BCSC 413 at para 37.

> decision of Master Bolton, Drost J. quoted with approval, at page 130, the following passage from the Master's reasons:
>
> > ... In the total scheme of things it is no more inequitable that Georgia Pacific should be required to prove its monetary claim, along with all the other unsecured creditors, than it is inequitable to compel any other particular creditor to settle for less than 100 cents on the dollar in the bankruptcy. In my respectful opinion, the appellant here is in no different position, with regard to "equity", than any other creditor contemplates taking security, and either fails to do so or fails to ensure that the security is effective. [Citations omitted and emphasis added.]
>
> I reach a similar conclusion in the case at bar. HFC has no greater claim in equity than do the other unsecured creditors of the bankrupt.

91. Applying this reasoning to the H Corp Claim, H Corp, like all other unsecured creditors, is required to prove their claim. However, H Corp has yet to establish that they even hold an unsecured claim and therefore, are in no different position than any other creditor that has failed to do establish their claim in "equity".

92. The imposition of a constructive trust in favour of H Corp, which possesses an unproven claim, would effectively establish a *de facto* super-priority over all other creditors, and cause the Stalking Horse Bidder to reject the Stalking Horse Bid.

93. Such an outcome clearly jeopardizes and prejudices the interests of the following creditors:

(a) **CCBT**, the secured creditor that initially commenced the CCAA Proceedings against the Debtors, advanced the Credit Facilities on or about January 31, 2017 pursuant to the Drawdown Notice. CCBT perfected the CCBT Security on January 26, 2017. H Corp, however, claims that the disputed funds were advanced over the period from January to September 2017. Notably, the first transfer from H Corp did not occur until April 13, 2017, subsequent to CCBT's Credit Facilities advance and registration of the CCBT Security. If a constructive trust were imposed in favour of H Corp, it would effectively grant H Corp a *de facto* super-priority, subordinating the CCBT Security

despite CCBT having fully satisfied its statutory obligations and holding valid, perfected security. Such an outcome jeopardizes and prejudices the CCBT Security, undermining the priority and protection that CCBT secured through its compliance with statutory requirements which it may nevertheless enforce through foreclosure, potentially allowing it to seize Long Run's assets free and clear of the H Corp Claim.

(b) The **DIP Lender**, that this Court empowered and authorized the Debtors to obtain and borrow from under credit to finance their working capital requirements, has been granted the DIP Lender's Charge pursuant to the SARIO. The SARIO explicitly indicates that the DIP charge will rank in priority to Encumbrances, which include trusts in favour of any Person (as defined by the SARIO) and includes the H Corp Claim. The DIP Lender extended credit with the understanding that their charge would maintain super-priority status pursuant to the SARIO, as no commercially reasonable lender would provide funds to a debtor in CCAA proceedings without such protections. Any reordering of priorities to favour other claims would jeopardize this protection, prejudicing the DIP Lender's interests and undermining the very assurances that this Court ordained to facilitate the financing essential to the Debtors' continued operations.

(c) **Municipalities** stand to receive approximately $13.6 million in settlement of outstanding taxes. Reordering creditor priorities to favour an unproven and unsecured claim jeopardizes this recovery, undermining their secured status and prejudicing essential municipal funding.

(d) Certain **freehold surface and mineral lease holders** that have their pre-filing liabilities owing from Long Run will see their chances of recovery further diminished if a

constructive trust is granted. In other words, creditors with proven claims will rank below an unproven claim.

94. Accordingly, H Corp cannot establish a claim for unjust enrichment, as there exists a juristic reason for the enrichment aimed at protecting the interests of the aforementioned creditors, among others.

95. Given the absence of unjust enrichment, H Corp lacks a valid claim for a constructive trust.

C. Is a constructive trust available to H Corp because the Debtors committed a wrongful act?

96. A constructive trust is not available to H Corp as discussed above, as H Corp has not identified specific property upon which a constructive trust could be imposed. Furthermore, imposing a constructive trust in this case would also unjustly impact the creditors, making such a remedy unavailable to H Corp.

97. The Supreme Court of Canada, in *Soulos v Korkontzilas*, outlined certain conditions that must be met before a constructive trust is ordered from a wrongful act:

(a) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in the defendant's hands;

(b) the assets in the defendant's hands must have resulted from agency activities of the defendant in breach of their equitable obligation to the plaintiff;

(c) the plaintiff must show a legitimate reason for seeking a proprietary remedy; and

(d) there must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.[85]

98. The Debtors do not have an equitable obligation to H Corp and are legally distinct entities from the Individual Defendants, notwithstanding Deng served as a director for both the Debtors and H Corp simultaneously.

99. H Corp alleges that Deng, in his capacity as the director of H Corp, had misrepresented to officers of H Corp that the Claimed Funds be diverted to the Debtors.[86] Therefore, H Corp is required to find vicarious liability for the actions of Deng against the Debtors.

100. The Supreme Court of Canada instructs that a finding of vicarious liability requires a "strong connection" between the employment role and the wrongful act.[87]

101. Therefore, to impose vicarious liability against the Debtors from the actions of Deng, Deng would need to be acting within the scope of his duties as a director of the Debtors.

102. As H Corp alleges that Deng was acting in his capacity as director of H Corp when the Claimed Funds were diverted, he was not acting within the scope of his duties as a director of the Debtors.

103. Furthermore, the Debtors assert the alleged improper actions of each of the Individual Defendants were done for their own personal benefit or their other business interests unrelated to the Debtors.[88]

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[85] ***Soulos*** at para 45.
[86] H Corp SoC at paras 28–30.
[87] ***Bazley v Curry***, 1999 CanLII 692 (SCC), [1999] 2 SCR 534 at para 42.
[88] Debtors' SoD at para 25.

104. Therefore, the Debtors did not have an equitable obligation in relation to the activities asserted by H Corp which gave rise to the Claimed Funds.

105. Regardless, in considering the above criteria in the context of an insolvency proceeding, courts in Canada have given significant weight to the fourth factor in *Soulos v Korkontzilas*, specifically the impact on other creditors.[89]

106. As mentioned above, the Supreme Court of Canada in *Soulos v Korkontzilas* described the fourth factor as follows:

> [T]here must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.[90] [Emphasis added.]

107. If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate, as discussed above. Accordingly, the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high".[91]

108. Consequently, as constructive trust in a CCAA proceeding can seriously affect the distribution of assets among creditors, courts reserve this remedy for the most extraordinary cases, where the connection between the property and the unjust enrichment is clear, and the harm to other creditors is minimal.

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[89] ***Caterpillar Financial Services v 360networks corporation et al***, 2007 BCCA 14 at para 66; ***Creditfinance*** at para 44.
[90] ***Soulos*** at para 45.
[91] ***Creditfinance*** at paras 32–33.

109. As discussed above, imposing a constructive trust in favour of H Corp would distort the balance the CCAA by granting H Corp a *de facto* super-priority, against all creditors, including:

(a) CCBT;

(b) the DIP Lender;

(c) the municipalities; and

(d) certain freehold surface and mineral lease holders.

110. Moreover, the circumstances of this case do not rise to the level of "extraordinary," which is required for a constructive trust in bankruptcy proceedings.[92]

111. As noted, a remedial constructive trust would effectively take funds from the secured creditors to the benefit of an unproven claim. Here, H Corp had ample opportunity to further the H Corp Claim beyond mere allegations and has failed to do so.

112. It is inappropriate to impose a constructive trust based on unproven claims, especially when doing so would come at the cost of other creditors who have satisfied their statutory obligations and secured property of the Debtor, particularly prior to the Claimed Funds being allegedly diverted.

113. Given that the Debtors do not have an equitable obligation towards H Corp; the negative impact on the creditors; and the absence of extraordinary circumstances, the imposition of a constructive trust in this case is not justified.

[92] ***Creditfinance*** at paras 32–33.

D. Would the imposition of a constructive trust for H Corp undermine the integrity of the CCAA?

114. The imposition of a constructive trust for H Corp undermines the integrity of the CCAA.

115. It would be unjust to impose a constructive trust because the effect of doing so would interfere with the priority scheme otherwise prevailing under the CCAA, which touches on significant public interest considerations. The CCAA process is intended to maximize value for all creditors, and imposing a constructive trust in favour of H Corp would distort the balance the statute is designed to maintain by granting H Corp a *de facto* super-priority.

116. If the H Corp Claim is included in the "Retained Liabilities" under the Subscription Agreement, the claim would then be attached to the "Purchased Shares", which the Stalking Horse Bidder is contemplating acquiring. This would directly jeopardize the transaction and the restructuring process, as counsel for the Stalking Horse Bidder has made it clear that they will not execute the Stalking Horse Bid if the H Corp Claim is considered a "Retained Liability."

117. Other potential bidders would likely be deterred as well, because a looming contingent constructive trust claim reduces the chance of a successful restructuring and harms the value for all stakeholders.

118. Allowing H Corp to hold the Stalking Horse Bid hostage could jeopardize the entire CCAA process. As Campbell J noted, such uncertainty would deter financers from supporting distressed businesses, fundamentally undermining the flexibility and discretion crucial to the CCAA's success:

> I posed the following question rhetorically to Mr. Moore: "what financer in the same business as Catalyst would be prepared to advance funds in a distressed business if it could be exposed to claims of this kind"?

> In my view it would present a practical uncertainty that would effectively destroy the flexibility and discretion that has been the hallmark of the operation of CCAA if such claims as advanced here could be raised to the level to provide a super priority without the agreement of all the creditors.[93] [Emphasis added.]

119. Additionally, Long Run holds approximately $453 million in environmental liabilities that may be burdened upon the AER and OWA.[94] The Stalking Horse Bidder, if allowed to proceed with the Stalking Horse Bid, has committed to assuming these liabilities.[95] However, the Stalking Horse Bidder has expressly stated it will not proceed with the Stalking Horse Bid if the H Corp Claim is deemed a "Retained Liability" in the Subscription Agreement.

120. Imposing a constructive trust in favour of H Corp would result in the Stalking Horse Bidder withdrawing from the transaction, leaving the AER and OWA with the entire $453 million liability. This would significantly prejudice the AER and OWA and place a substantial financial burden on entities tasked with critical environmental responsibilities.

121. Furthermore, if the Debtors are able to continue their operations, approximately 116 employees and contractors will retain their jobs, and creditors and suppliers will be able to sustain their ongoing relationships.[96]

122. In addition to the imposition of a constructive trust, H Corp is also seeking permission to trace the Claimed Funds from the Debtors. This exemplifies the unreasonableness of this request as the Action was initiated in 2020 and they have yet to obtain such a determination.

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[93] ***Hollinger Inc. (Re)***, 2013 ONSC 5431 at paras 41–42.
[94] Supplement to Fifth Report at para 53.
[95] Supplement to Fifth Report at para 53.
[96] Supplement to Fifth Report at para 53.

123. Notwithstanding, such a request would take time and will likely exhaust the current maximum amount available under the DIP Fund pursuant to the DIP Financing Agreement if the Stalking Horse Bid is not executed. As a result, both the creditors and H Corp will be left with no funds to recover.

124. This public policy rationale solidifies that a constructive trust remedy is not appropriate in the specific circumstances.

PART V - CONCLUSION

125. The Monitor requests that this Court grant the relief requested by it, including granting the application for the approval of the RVO sought on the terms proposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF OCTOBER, 2024.

Torys LLP
Counsel for the Monitor

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	***Companies' Creditors Arrangement Act***, RSC 1985, c C-36.
2.	***Ernst & Young Inc v Essar Global Fund Limited***, 2017 ONCA 1014.
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4.	***Peter v Beblow***, [1993] 1 S.C.R. 980, 1993 CarswellBC 1258.
5.	***Soulos v Korkontzilas***, [1997] 2 SCR 217, 32 OR (3d) 716.
6.	***Pettkus v Becker***, 1980 CanLII 22 (SCC), [1980] 2 SCR 834.
7.	***306440 Ontario Ltd. v 782127 Ontario Ltd. (Alrange Container Services)***, 2014 ONCA 548.
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15.	***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 809.
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