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COURT FILE NUMBER 2401-02664

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

MATTERS IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, as amended
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION AND 1263343 ALBERTA INC. dba LYNX AIR

APPLICANTS EDMONTON REGIONAL AIRPORTS AUTHORITY, HALIFAX INTERNATIONAL AIRPORTS AUTHORITY, THE CALGARY AIRPORT AUTHORITY, VANCOUVER AIRPORT AUTHORITY, and WINNIPEG AIRPORTS AUTHORITY INC.

RESPONDENTS LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR

DOCUMENT **APPLICATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **STIKEMAN ELLIOTT LLP**
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Clerk's stamp

C51676
Jun 24, 2024
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Lawyers for the Applicants,
Edmonton Regional Airports Authority, Halifax International Airports Authority, The Calgary Airport Authority, Vancouver Airport Authority, and Winnipeg Airports Authority Inc.

File No.: 156280.1001

NOTICE TO THE RESPONDENT

This application is made against you. You are a respondent.
You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:	June 24, 2024
Time:	10:00 am 2pm
Where:	Calgary, Alberta
Before Whom:	The Honourable Justice Romaine presiding on the Calgary Commercial Duty List

Go to the end of this document to see what you can do and when you must do it.

Remedy claimed or sought:

1. Edmonton Regional Airports Authority (“**ERAA**”), Halifax International Airports Authority (“**HIAA**”), The Calgary Airport Authority (“**CAA**”), Vancouver Airport Authority (“**VAA**”), and Winnipeg Airports Authority Inc. (“**WAA**”) (collectively, the “**Airport Authorities**”) seek an Order, substantially in the form attached as **Schedule “A”**, for the following relief:
 - (a) a declaration stating that the unremitted Airport Improvement Fees (“**AIF**”) owed to the Airport Authorities by 1263343 Alberta Inc. dba Lynx Air (“**Lynx**”) is subject to either an express, implied, or constructive trust;
 - (b) instructing Lynx to release to the Airport Authorities the following amounts from the amount held in reserve by Lynx to satisfy claims relating to AIF:
 - (i) \$355,640.79 to the ERAA;
 - (ii) \$319,435.80 to the HIAA;
 - (iii) \$282,895.00 to the WAA;
 - (iv) \$2,031,140.16 to the CAA;
 - (v) \$1,110,231.54 to the VAA; and
 - (c) such further and other relief as counsel for the Airport Authorities may advise.

Grounds for making this application:

The Memorandum of Agreement

2. The Airport Authorities and Lynx are parties to a Memorandum of Agreement between the Air Transport Association of Canada, certain air carriers, and certain airport authorities (the “**MOA**”).
3. The MOA recognizes that the Airport Authorities have the responsibility to manage, operate and develop the airports for which they are responsible. In order to meet the air traffic demands on their respective airports and ensure that the public has access to quality air transport, the Airport Authorities from time to time must undertake airport expansion projects. As stated in the preamble to the MOA, the Airport Authorities may obtain the funds to undertake such expansion projects by imposing fees or charges upon all departing airport passengers. Such fees are referred to as “Airport Improvement Fees” or “AIF”.

4. Pursuant to section 6.1 of the MOA, the decision to charge AIF and at what rate to charge it at is made by each Airport Authority. Further pursuant to the MOA, signatory air carriers such as Lynx agree to collect and remit AIF on behalf of the Airport Authorities.
5. The MOA states at section 20.1 that the parties expressly disclaim any intention to create a partnership, joint venture, trust relationship or joint enterprise *except* as Lynx acting as agent for the Airport Authorities in collecting and remitting the AIF funds.

Collection and remittance of AIF by Lynx

6. At all times, the Airport Authorities understood that the AIF collected by Lynx was being held in trust by Lynx until its ultimate remittance to the Airport Authorities. At all times, the amount required to be charged per passenger in AIF was mandated by each of the Airport Authorities and then collected by Lynx on behalf of the Airport Authorities. The Airport Authorities set AIF rates as follows:
 - (a) ERAA: \$35.00 per passenger;
 - (b) HIAA: \$22.00 per intraprovincial passenger and \$35.00 per interprovincial and international passenger;
 - (c) WAA: \$38.00 per passenger;
 - (d) CAA: \$35.00 per passenger; and
 - (e) VAA: \$5.00 per passenger flying within British Columbia or the Yukon and \$25.00 per passenger flying to all other destinations.
7. In its reservation terms and conditions for passengers (the “**T&Cs**”), Lynx represented that “Airport Improvement Fees (AIF) ... are generally collected by Lynx at the time of booking. Lynx collects these fees from passengers and remits them directly to the airports.” (emphasis added)
8. After collecting the AIF on behalf of the Airport Authorities, Lynx would remit the AIF to the Airport Authorities on a monthly basis.
9. However, at the time that Lynx filed for CCAA protection, it was in arrears on its remittance of AIF to the Airport Authorities and owed the Airport Authorities the following amounts for unremitted AIF:
 - (a) ERAA: \$355,640.79;

- (b) HIAA: \$319,435.80;
- (c) WAA: \$282,895.00;
- (d) CAA: \$2,031,140.16; and
- (e) VAA: \$1,110,231.54.

Unremitted AIF held by Lynx is subject to a trust in favour of the Airport Authorities

10. Based on the MOA, Lynx's T&C's, and the relationship between the Parties, it is clear that the parties intended to create a trust relationship with respect to AIF in favour of the Airport Authorities.
11. Nonetheless, should this Court find that an express or implied trust relationship does not exist, a constructive trust should be imposed over the unremitted AIF in order to avoid an otherwise inequitable result.
12. All of the factors required to establish a constructive trust are present with respect to the unremitted AIF:
 - (a) The MOA clearly establishes that Lynx was acting as agent (if not trustee) to the Airport Authorities in collecting and remitting AIF funds and Lynx therefore has an equitable obligation in relation to the activities that caused it to obtain the AIF funds.
 - (b) The AIF funds came to be in Lynx's possession by virtue of this agency relationship and failing to remit them to the Airport Authorities constitutes a breach of its equitable obligations.
 - (c) Failing to grant the constructive trust remedy in this situation would result in the unjust enrichment of Lynx's creditors at the Airport Authorities' expense.
 - (d) There is nothing that would render the imposition of a constructive trust unjust; instead, it would be unjust if Lynx's creditors were to receive a windfall by gaining access to the AIF funds.
13. At no point did the Parties intend to create a creditor-debtor relationship with respect to AIF. Though the VAA and WAA had letters of credit from Lynx and the HIAA had a security deposit, these were not for the purpose of securing AIF. Instead, the security deposit and letters of credit were used to secure aeronautical fees, a different category of fees paid by Lynx to the Airport

Authorities. Neither the ERAA nor the CAA had recourse to any security deposits or letters of credit, whether with respect to aeronautical fees or otherwise.

14. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

15. All pleadings and proceedings filed in the within Action;
16. Affidavit of Leslie Kwasny, affirmed on May 23, 2024;
17. Affidavit of Paul Brigley, sworn on May 23, 2024;
18. Affidavit of Jennifer Pon, affirmed on May 23, 2024;
19. Affidavit of Diana Vuong, affirmed on May 23, 2024;
20. Affidavit of Nicole Stefaniuk, sworn on May 23, 2024; and
21. Such further and other material as counsel for the Lender may advise and this Honourable Court may permit.

Applicable rules:

22. The *Alberta Rules of Court*, AR 124/2010, as amended; and
23. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

24. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; and
25. Such further and other acts and regulations as counsel for the Lenders may advise or this Honourable Court may permit.

Any Irregularity Complained of or Objection Relied on:

26. There are no irregularities complained of or objections relied on.

How the Application is Proposed to be Heard or Considered

27. Via Webex Video Conference, before the Honourable Justice Romaine presiding on the Calgary Commercial Duty List on June 24, 2024 at 10:00am.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

SCHEDULE "A"
PROPOSED FORM OF ORDER

COURT FILE NUMBER	2401-02664	Clerk's stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
MATTERS	IN THE MATTER OF THE <i>COMPANIES' CREDITORS ARRANGEMENT ACT</i> , R.S.C. 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION AND 1263343 ALBERTA INC. dba LYNX AIR	
APPLICANTS	EDMONTON REGIONAL AIRPORTS AUTHORITY, HALIFAX INTERNATIONAL AIRPORTS AUTHORITY, THE CALGARY AIRPORT AUTHORITY, VANCOUVER AIRPORT AUTHORITY, and WINNIPEG AIRPORTS AUTHORITY INC.	
RESPONDENTS	LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR	
DOCUMENT	ORDER	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	STIKEMAN ELLIOTT LLP Barristers & Solicitors 4200 Bankers Hall West 888-3rd Street SW Calgary, AB T2P 5C5 Karen Fellowes, K.C. / Archer Bell Tel: (403) 724-9469 / (403) 724-9485 Fax: (403) 266-9034 Email: kfellowes@stikeman.com / abell@stikeman.com Lawyers for the Applicants, Edmonton Regional Airports Authority, Halifax International Airports Authority, The Calgary Airport Authority, Vancouver Airport Authority, and Winnipeg Airports Authority Inc. File No.: 156280.1001	

DATE ON WHICH ORDER WAS PRONOUNCED:	June 24, 2024
LOCATION OF HEARING:	Calgary Courts Centre, Calgary, Alberta
NAME OF JUSTICE WHO GRANTED THIS ORDER:	The Honourable Justice Romaine

UPON the application of Edmonton Regional Airports Authority ("**ERAA**"), Halifax International Airports Authority ("**HIAA**"), The Calgary Airport Authority ("**CAA**"), Vancouver Airport Authority ("**VAA**"),

and Winnipeg Airports Authority Inc. (“**WAA**”) (collectively, the “**Airport Authorities**”) in relation to Airport Improvement Fees (“**AIF**”) collected by 1263343 Alberta Inc. dba Lynx Air (“**Lynx**”) on behalf of the Airport Authorities pursuant to a Memorandum of Agreement dated January 20, 2004; **AND UPON** having read the Application, the Affidavit of Leslie Kwasny, affirmed on May 23, 2024, the Affidavit of Paul Brigley, sworn on May 23, 2024, the Affidavit of Jennifer Pon, affirmed on May 23, 2024, the Affidavit of Diana Vuong, affirmed on May 23, 2024, and the Affidavit of Nicole Stefaniuk, sworn on May 23, 2024; **AND UPON** hearing counsel for the Airport Authorities, Lynx, and any other counsel or interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

Declaration

1. The \$4,099,343.29 in unremitted AIF held by Lynx on behalf of the Airport Authorities is subject to a trust and therefore does not form part of Lynx’s insolvency estate.

Release of Holdback

2. Lynx shall release to the Airport Authorities the following amounts from the amount held in reserve by Lynx to satisfy claims relating to AIF:
 - a. \$355,640.79 to the ERAA;
 - b. \$319,435.80 to the HIAA;
 - c. \$282,895.00 to the WAA;
 - d. \$2,031,140.16 to the CAA; and
 - e. \$1,110,231.54 to the VAA.

Service

3. The time for service of the notice of application for this order (the “**Order**”) is hereby abridged and deemed good and sufficient and this application is properly returnable today.
4. Service of this Order shall be deemed good and sufficient by:
 - a. serving the same on:
 - i. the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

- ii. any other person served with notice of the application for this Order;
 - iii. any other parties attending or represented at the application for this Order;
 - iv. posting a copy of this Order on the Monitor's Website at: <http://cfcanada.fticonsulting.com/lynxair/>; and
 - v. service on any other person is hereby dispensed with.
5. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of King's Bench of Alberta