Court of King's Bench of Alberta

Citation: Greater Toronto Airports Authority v Lynx Air Holdings Corporation, 2024 ABKB 514

Date: 20210826
Docket: 2401 02664
Registry: Calgary

Between:

Greater Toronto Airports Authority, Edmonton Regional Airports Authority, Halifax International Airports Authority, The Calgary Airport Authority, Vancouver Airport Authority and Winnipeg Airports Authority Inc.

Applicants

- and -

Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air

Respondents

Reasons for Decision
of the
Honourable Justice B.E. Romaine

I. Introduction

[1] On February 22, 2024, Lynx Air Holdings Corporation and 1263343 Alberta Inc. (collectively "Lynx") were granted an initial order under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36. The stay granted by the order has been extended to September 30, 2024.

[2] In this application, Lynx sought an order extending the stay period to September 30, 2024, granting the Monitor enhanced powers and approving a procedure for the solicitation determination and resolution of claims against the current and former directors and officers of Lynx, all of which was granted.

[3] Lynx also seeks an order:

(a) declaring that Lynx has remitted all pre-filing airport improvement fees ("**AIF**") owed to the Greater Toronto Airport Authorities (the "**Toronto Airport**"); and

(b) declaring that the Vancouver Airport Authority (the "**Vancouver Airport**"), the Calgary Airport Authority (the "**Calgary Airport**"), the Edmonton Regional Airport Authority (the "**Edmonton Airport**"), the Winnipeg Airport Authority Inc. (the "**Winnipeg Airport**"), and the Halifax International Airports Authority (the "**Halifax Airport**"), (collectively, the "**Airport Authorities**") do not have a trust claim over pre-filing AIF in priority to all other security interests, trusts, liens, charges, encumbrances, and claims of secured creditors, statutory or otherwise.

[4] The Toronto Airport seeks the following relief:

(a) a declaration that the unremitted AIF collected and held by Lynx on behalf of the Toronto Airport pursuant to an AIF Agreement are subject to a trust in favour of the Toronto Airport;

(b) an order requiring Lynx to release the unremitted AIF in the amount of $1,659,80.87 to the Toronto Airport from the amount currently held in reserve by Lynx to satisfy claims relating to AIF; and

(c) an order requiring Lynx to pay the Toronto Airport's expenses incurred in recovering the unremitted AIF, including legal fees on a full indemnity basis.

[5] The Airport Authorities seek the following relief:

(a) a declaration stating that the unremitted AIF owed to the Airport Authorities by 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;

a) $355,640.79 to the Edmonton Airport;

b) $319,435.80 to the Halifax Airport;

c) $282,895.00 to the Winnipeg Airport;

d) $2,031,140.16 to the Calgary Airport; and

e) $1,110,231.54 to the Vancouver Airport.

II. Facts

[6] The following uncontested facts are relevant to the AIF issues:

(a) AIF are collected by Lynx from passengers on behalf of the Toronto Airport and the Airport Authorities. These fees are charged to passengers and are used to fund capital development and improvement of the respective airports.

(b) A trust relationship exists between Lynx Air and the Toronto Airport with respect to pre-filing AIF. Pursuant to an AIF Agreement dated January 1, 2023, a Letter of Credit was issued to secure both debt and trust obligations, including AIF. The Letter of Credit required by Toronto Airport's application for entry was "in an amount calculated by the [Toronto Airport's] Finance Controller for Landing Fees, General Terminal Fees, Apron fees, Check-in Fees and AIF". Lynx posted a $3,100,000 Irrevocable Standby Letter of Credit in accordance with this requirement.

(c) As of April 6, 2022, Lynx became a signatory to a Memorandum of Agreement, dated May 31, 1999, as amended (the "**MOA**"). The parties to the MOA include (i) the Airport Transport Association of Canada, (ii) Signatory Air Carriers (as defined in the MOA, which includes Lynx), and (iii) Airports (as defined in the MOA, which includes the Airport Authorities). Lynx did not negotiate the MOA with the Airport Authorities: it was required to sign it in order to use the Airport Authorities' airports.

(d) The Toronto Airport is not a signatory to the MOA.

(e) Among other things, the MOA contains terms regarding Lynx's collection of AIF from air carrier passengers on behalf of the Airport Authorities. Section 20.1 provides:

> **The Parties expressly disclaim any intention to create a partnership, joint venture, trust relationship or joint enterprise**. Nothing contained in this MOA nor any acts of any Party taken in conjunction hereunder, shall constitute or be deemed to constitute a partnership, joint venture, or principal/agency relationship in any way or for any purpose except as the Signatory Air Carriers acting as agents for the Airports in collecting and remitting the AIF funds. Except as expressly set forth herein, no Party, shall have any authority to act for, or to assume any obligations or responsibility on behalf of, any other Party. [Emphasis added]

(f) The MOA is the only agreement governing the collection and remittance of AIF as between Lynx and the Calgary and Edmonton Airports.

(g) In addition to the MOA, Lynx was required to enter into an Air Carrier Operating Agreement effective June 29, 2022 with the Halifax Airport, which also governs the collection and remittance of AIF. This is a standard form agreement that is updated with respect to term, the air carrier's licence information and plan of operations.

A security deposit is required based on the carrier and its planned activity. Lynx was required to, and did, provide a cash deposit to the Halifax Airport in the amount of $100,000 on July 29, 2022.

(h) Lynx did not enter into a separate agreement with the Winnipeg Airport governing AIF. However, pursuant to Winnipeg's Tariff of Aviation Fees effective April 2, 2021, AIF were to be charged and payable by all air carriers operating out of the airport. Further, Lynx was required to post, and did post, a cash deposit to secure payment of any monies due under the Tariff, in the amount of an $83,333 on April 12, 2022.

(i) In addition to the MOA, Lynx agreed to be bound by an Airport User Licence effective November 16, 2021 with the Vancouver Airport, which granted a licence to Lynx to operate at the airport. Article 10 of the License required Lynx to post security to payment of Fees in an amount equal to three months of Fees under the licence. The License defines Fees to mean "any monies or amounts payable under this License," which therefore includes AIF. On April 6, 2022, Lynx posted an Irrevocable Standby Letter of Credit to the Vancouver Airport in the amount of $279,645.96.

III. Analysis

A. Toronto Airport

[7] The Toronto Airport has demanded $1,710,148.23 from Lynx for pre-filing AIF. Lynx accepts the existence of a trust relationship under the AIF Agreement with the Toronto Airport, but submits that all the trust remittances were made upon the Toronto Airport drawing on the Letter of Credit. Lynx submits that the draw-down should have been applied against AIF in priority to debt, and that any residual amounts claimed by the Toronto Airport constitute unsecured pre-filing debt.

[8] Lynx calculates the amount of pre-filing AIF it collected on behalf of the Toronto Airport prior to the Initial Order, as $1,782,424. On or about March 1, 2024, the $3,100,000 Letter of Credit was drawn by the Toronto Airport and applied first to debt other than the AIF. Lynx calculates non-AIF pre-filing debt owed to the Toronto Airport at $2,977,156.83, leaving a balance of outstanding debt of $1,659,580.87, which Lynx submits is unsecured debt and the Toronto Airport submits are AIF unremitted amounts.

[9] The issue with respect to the Toronto Airport's claim is whether the proceeds of the Letter of Credit should be applied first to its trust claim in priority to unsecured debt. Section 5 of the Toronto Airport Application for Entry provides that the Letter of Credit serves as a security deposit for Landing Fees, General Terminal Fees, Apron Fees, Check-In Fees and AIF. It does not stipulate how the Letter of Credit is to be apportioned among the various fees. The Toronto Airport submits that the governing agreements between it and Lynx do not remove its discretion to apply the Letter of Credit however it determines, and do not require that it use or apply the Letter of Credit proceeds in any particular way.

[10] The Toronto Airport Authority cites section 2.38 of its Rules in support of its submission that it has full discretion as to how to apply the Letter of Credit. This section reads as follows:

> Air Carriers must submit a security deposit in a form and amount determined by the [Toronto Airport's] Finance Controller and detailed in the [Toronto Airport's] Air Carrier – Application for Entry prior to commencing operations. The [Toronto Airport] may apply the security deposit towards overdue amounts of Aeronautical Fees and Charges or to cover costs associated with violations of the [Toronto Airport] Rules or under any other agreements. (*emphasis added*)

[11] The Rules form part of the Application for Entry and the defined term "Aeronautical Fees and charges" includes AIF. The Toronto Airport submits that the agreements as a whole have secured Lynx's general indebtedness and trust obligations through two separate methods: the AIF trust and the security deposit. It submits that the agreements demonstrate a clear intention that the Toronto Airport was to be protected in relation to the full amount of Lynx debt and trust obligations that may be outstanding or unremitted at any given time.

[12] Lynx Air submits that the agreements are silent on the issue of how the proceeds of the Letter of Credit are to be allocated between non-AIF indebtedness and AIF obligations, and this is correct. However, the agreements as a whole give the Toronto Airport discretion as to how to allocate the funds: e.g. Rule 2.38, Section 3.8.4 of the Toronto Airport's Airport Improvement Fee Agreement.

[13] The Application for Entry, which is the umbrella governing document, refers to the Letter of Credit as security for a full host of airport fees, including AIF. Lynx agreed to the Airport Fee Agreement, which provided it with payment as agent to collect AIF. It agreed to observe the Rules, which describe the security deposit consisting of a Letter of Credit in an amount calculated to cover Landing Fees, General Terminal Fees, Apron Fees, Check-in Fees and AIF. There is no express provision that curtails the Toronto Airport's ability to apply the Letter of Credit to any one of these types of fees.

[14] The Toronto Airport points out that the trust created by its agreements would be nullified or made redundant if the Letter of Credit is treated as the principal or first means by which it can cover unremitted AIF. Therefore, an interpretation of the contracts that nullifies their provisions or renders them redundant must be disregarded in favour of an interpretation that gives effect to each provision of the agreements read as a whole: ***Tercon Contractort Ltd. v British Columbia (Transportation and Highways),*** 2010 SCC 4 at para. 64; ***369413 Alberta Ltd. v Pocklington***, 2000 ABCA 307 at para. 19.

[15] As the Toronto Airport notes, the Letter of Credit is by its fundamental nature an agreement between the beneficiary of the Letter of Credit and the bank, to be paid on demand without restriction. It does not include any restriction or limitation with respect to how it is to be used. Section 13.5 of the Rules provides the Toronto Airport with sole discretion in undertaking appropriate and necessary action with respect to the failure of a carrier to address a non-compliance notice, such as the one issued in this case.

[16] Lynx submits that since the agreements are silent on allocation, the Court should invoke the principle of *pari passu*, citing ***Capital Steel Inc. v Chandos Construction Ltd.,*** 2019 ABCA 32. The facts of Capital Steel are distinguishable, as the case involves a contractual provision that imposed a monetary consequence in the event of Capitol Steel's insolvency. At any rate, an analysis of the *pari passu* rule in this case does not aid Lynx.

[17] As Lynx itself admits, the rule applies with respect to the distribution of the insolvent estate among classes of unsecured creditors. It invalidates contractual provisions that, if enforced during bankruptcy proceedings, would alter the bankruptcy scheme of distribution: ***Capital Steel*** at para 20. That is not the case here. This case is essentially a dispute between secured creditors, and its outcome would not affect unsecured creditors. The AIF funds are trust funds that in any event are not part of the Lynx estate, and the other indebtedness was properly secured by the Letter of Credit.

[18] Invoking section 11 of the CCAA is not appropriate in this case, as there is no statutory gap to fill. Nor is the application of the principle of *contra proferentem*, as there is no ambiguity about the contractual terms at issue. Mere silence with respect to allocation is not ambiguity but complements the discretion as to application of funds granted to Toronto Airport.

[19] The Letter of Credit does not stand in place of the trust property, but as an additional guarantee of payment.

[20] Lynx also submits that if an agreement is silent on how security is to be applied with respect to certain categories of debt, a CCAA court should not allow a creditor to make a unilateral decision with respect to how it allocates debt, as that would allow the creditor to put itself in a position that none of the other creditors could possibly be in and allows the creditor to be significantly advantaged vis-à-vis other creditors. However, while the Toronto Airport agreements are silent of how the letter of credit is to be applied, they give the Toronto Airport the contractual right of discretion with respect to that issue. As the Toronto Airport notes, the Lynx submission would mean that, before insolvency, the letter of credit could be used at the Toronto Airport's discretion to pay down non-AIF debt, but because of the intervention of the CCAA the Toronto Airport would have to use the letter of credit to collect on the trust debt. As the Court noted in ***Redstone,*** the CCAA should not be used to prejudice contractual rights or to reorder priorities as they existed on the day that the CCAA stay is granted: para 57. The Toronto Airport did what it was able to within the confines of the agreements. It did nothing in breach of the agreements.

[21] Therefore, I dismiss Lynx's application for an order declaring that Lynx has remitted all pre-filing AIF owed to the Toronto Airport, and grant the relief sought by the Toronto Airport, other than with respect to costs, which are referenced later in this decision.

B. Airport Authorities

[22] The Airport Authorities submit that the second sentence of section 20.1 of the MOA implies that the collected AIF is intended to be held in trust.

[23] This is not a correct or reasonable interpretation of section 20.1. The first sentence clearly disclaims any intention to create a trust relationship. While there is authority for the proposition that there is no need for any technical words or expressions for the creation of a trust, the first sentence precludes any intention to create even an implied trust. The second sentence ensures that nothing in the MOA nor any acts of any party can "be deemed to constitute a partnership, joint venture or principal /agency relationship", except for the principal / agent relationship that exists with respect to the collection of AIF. While an agency relationship clearly exists, it does not follow that a trust is created.

[24] As noted in ***KPMG Inc. v Canadian Imperial Bank of Commerce***, [1998] O.J. No 4746 at para 3:

> "The cardinal interpretive rule of contracts ... is that the court should give effect to the intention of the parties as expressed in their written agreement. Where that intention is plainly expressed in the language of the agreement, the court should not stray beyond the four corners of the agreement." (*emphasis added*)

[25] There is no ambiguity about the words of section 20.1, and even if there was, as a contract of adhesion, ambiguity would have to be resolved in favour of Lynx.

[26] The Airport Authorities submit that, because the contractual language of the MOA refers to the carriers' duty to be to "collect and remit" AIF, this phrase implies more than just a debtor-creditor relationship,and should give rise to a trust. It is clear that the parties defined their relationship with respect to AIF as being a principal/agent relationship, but the express denial of an intention to create a trust over-rides any such implication.

[27] Alternatively, the Airport Authorities submit that the relationship between them and Lynx gives rise to a constructive trust. relying on ***Redstone Investment Corporation (Re),*** 2015 ONSC 533, to support their submission.

[28] The facts of ***Redstone*** are similar, with one notable exception. At issue in ***Redstone*** were a series of loans between the applicant Maplebrook and certain borrowers, the funds for which were advanced to Maplebrook through the CCAA debtor, RIC.

[29] The general structure of the loans was such that RIC would obtain an assignable promissory note from the borrower which RIC would assign to Maplebrook. Maplebrook irrevocably appointed RIC as its agent to collect and enforce the loans and the related security. Maplebrook would advance the funds to RIC which would advance the loan proceeds to the borrowers. RIC would collect and remit payments of principal and interest with respect to the loans to Maplebrook: ***Redstone*** at para. 10.

[30] RIC had received payments of interest and principal on the loans but for some time had not remitted these funds to Maplebrook.

[31] The Receiver of RIC submitted that the funds collected by RIC in respect of the assigned loans were not trust funds. The agreements for the assigned loans did not explicitly state that the proceeds of the loans were to be held in "trust" for Maplebrook.

[32] Maplebrook took the position that RIC had no beneficial entitlement to the funds, and neither the Receiver nor RIC's creditors had any higher claim. It submitted that a constructive trust in Maplebrook's favour was necessary to prevent this unjust result.

[33] There was no formal written documentation in respect of the assigned loans.

[34] On the issue of a constructive trust, Morawetz, J., (as he then was), commented at paras 57-58:

> The purpose of a CCAA stay order is to maintain the status quo amongst creditors and prevent their maneuvering for position. While the stay order prevents secured creditors and other parties from exercising and confirming their security for proprietary rights, it should not be used to prejudice those rights or to reorder the priorities as they existed on the date that the stay is granted (see: *Re Sharpe-Rite Technologies Ltd.,* 2000 BCSC 414 and *Re Winsdor Machine & Stamping Limited,* 2009 CanLII 39771 (ON. SC.)).

> The stay order effectively prevented Maplebrook from terminating RIC's agency agreement so as to take over the administration of the loans and ensure that it receive the post-CCAA collections directly from the debtors... Counsel to Maplebrook submitted that RIC was not at liberty – during the status quo period – to negate these property rights by receiving the post-CCAA collections and depositing them in its general account. I agree.

[35] In response to the Receiver's submission that the absence of an agreement to hold funds in a separate account results in a legal conclusion that the debtors were in a debtor/creditor relationship, the Court reviewed recent authority with respect to the issue, including ***Shenzhen City Luohu District Industrial Development Co. v Yao,*** 2000 BCSC 677, in which the Court commented that:

> [T]he presence of comingling, while a factor to be weighted in favour of a debtor-creditor relationship is not necessarily determinative. The nature of the relationship depends on whether the certainties which constitute a trust are present. Factors to consider include: whether there was an obligation to keep the funds separate; whether the terms of the agreement clearly set out an obligation to keep the funds separate; whether it was intended that, should the funds be comingled, the trustee could do as he pleased with the money; whether the trustee was required to fulfil a specific purpose; whether the recipient would use the funds for any other purpose before making payment for the specific purpose; and whether the settlor had any direct supervision or control over the financial dealings of the recipient. (See also ***Air Canada v M+L Travel Ltd.,*** [1993] 3 SCR 787 at para 25.

[36] Morawetz, J. also considered ***R v Lowden***, 1981 ABCA 79, where the Alberta Court of Appeal held that a travel agent receiving funds from a customer for the specific purpose of purchasing travel services or hotel accommodations assumed a trust obligation to apply the funds as directed or return them to customers. Thus, the relationship was found to be more than a simple debtor and creditor relationship.

[37] He noted that there was no dispute with respect to the following principles:

> ...a constructive trust may be imposed in circumstances where:
>
> a) the alleged constructive trustee has engaged in the type of wrongful conduct that is capable of giving rise to a constructive trust; or
>
> b) the alleged constructive trustee has been unjustly enriched, and a constructive trust is the appropriate remedy...

[38] There is nothing in this case that would justify a finding of a constructive trust on the basis of wrongful conduct. The issue is whether the second kind of constructive trust should be imposed.

[39] As noted in ***Redstone,*** the following criteria is to be considered in determining the availability of the remedial constructive trust:

> 1. the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

2. the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

3. the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

4. there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[***Redstone*** paras 67-68, citing ***Soulos v Kovkontzilas***, [1997 2 SCR 217].

[40] Of particular relevance to the present application, the Court in ***Redstone*** referred to ***Cummings v Peopledge HR Services***, 2013 ONSC 2781, a case involving a receivership of a payroll management company. When the company went into receivership, employees sought to recover funds that had been conveyed to Peopledge but that had not yet been distributed to employees. The Court in ***Peopledge*** found that the funds at issue had been received by Peopledge as agent for the employers, and that therefore they could not in good conscience be applied to discharge Peopledge's obligations to its own creditors:

> "In these circumstances, it would appear to be inequitable to permit the general creditors of *Peopledge* other than the customers who provided the funds to now be paid their claims from those funds. It was never intended that *Peopledge* or its creditors would have any beneficial interest in these funds. ... Under the umbrella of good conscience, constructive trusts are recognized to remedy the unjust and corresponding deprivation (see McLaughlin, J. in Soulos at paras. 20 and 43). In this case, *Peopledge* and its general creditors would be enriched by having the ability to access the payroll funds advanced by customers to *Peopledge.* The customers and their employees, would be deprived by not having the funds paid to them and <u>there would be no juristic reason for this to occur</u>. It was never intended that Peopledge or its creditors, would have any beneficial interest in the payroll funds advanced by customers. (*emphasis added)*

[41] Conducting its analysis, the Court in ***Peopledge*** appeared to refer to the oft-cited case on constructive trusts: ***Pettkus v Becker***, [1980] 2 SCR 834 at pg. 844, citing ***Rothwell v Rothwell***, [1978] 2 S.C.R. 436 at 455:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. ...for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason – <u>such as a contract</u> or disposition of law – for the enrichment. (*emphasis added)*

[42] In ***Redstone,*** Morawetz, J. found that "it was ... understood between the parties that the funds at issue were the property of Maplebrook. With respect to a subset of the loans at issue, he found that "[t]he actions of both RIC and Maplebrook established that there was an intention to settle a trust and impose trust obligations.

[43] Here is where the facts of ***Redstone*** and the facts in this application differ in a material way. One of the essential requirements for a finding of unjust enrichment is an absence of a juristic reason for the enrichment. In this application, the MOA specifically disclaims the creation of a trust relationship. While such an intention is not always required to support a finding of constructive trust as it depends instead upon a breach of an equitable obligation, the clear language in a contract between sophisticated entities must be a factor in determining whether a constructive trust can be imposed.

[44] Lynx submits that the MOA provides a juristic reason why a constructive trust should not be imposed. This gives rise to the question of whether equity should intervene in a commercial transaction between sophisticated parties where the Airport Authorities could have protected themselves contractually.

[45] The Airport Authorities submit that, without the imposition of a constructive trust, allowing the outstanding AIF to remain in the Lynx estate would be unfair to the Canadian public, and that the imposition of such a trust is necessary, not only to do justice between the parties, but "to maintain the integrity of the system." However, there were ways for the Airport Authorities to protect the system, as illustrated by the Toronto Airport agreements. While the mere fact that the MOA was a contract between sophisticated commercial parties does not preclude a finding of a constructive trust, the equities of the situation do not favour that outcome.

[46] There is no reason in this case to rewrite the MOA between the parties. There is no equitable reason to grant the Airport Authorities the additional rights that flow from recognition of a right of property. The creation of such a trust would in fact violate the *pari passu* principle, by giving an unsecured, or partially unsecured creditor an advantage over any other unsecured creditor.

[47] Given that I have found no trust relationship between Lynx and the Airport Authorities, there is no need to consider whether the application of cash, security deposits or letters of credit applied by the Halifax Airport, the Winnipeg Airport and the Vancouver Airport were improperly allocated.

C. Costs

[48] The Toronto Airport has been successful in its application. The AIF agreement provides that if legal action is brought by the Toronto Airport for the recovery of AIF, Lynx shall pay "all expenses incurred therefor, including solicitors' fees, if awarded by a court of competent jurisdiction."

[49] If this litigation had been brought outside of insolvency proceedings, it is likely that the Toronto Airport would be entitled to solicitors' fees. However, as a general rule, no costs to either party are ordered in CCAA proceedings. The policy reason that underlies this general proposition is that the reality of a matter under CCAA proceedings is that "the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs.": ***Re Indalex,*** 2011 ONCA 578 at para. 4.

[50] In ***Re Calpine,*** 2008 ABQB 537 at para. 1, this Court described the type of application where the general rule with respect to costs in insolvency proceedings may not be followed:

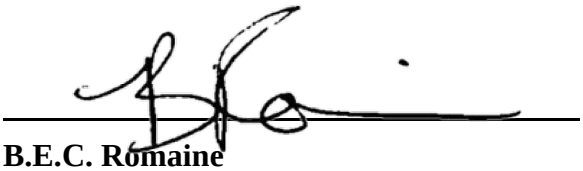
> Often in proceedings under the *Companies' Creditors Arrangement Act,* costs are not awarded against unsuccessful parties. There are policy reasons for this convention: generally, stakeholders in CCAA proceedings are involuntary parties

> in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act. Creditors and other stakeholders often bring applications in order to protect the priority of their positions or to seek a lifting of the stay provisions in circumstances they believe warrant such relief. The applications … that are the subject of this decision on costs are different from the usual type of CCAA application in that [the parties] were disappointed bidders or potential bidders on the purchase and sale of an asset of one of the Calpine applicants. Catalyst sought re-consideration of an existing order and Khanjee sought an amendment to an existing order that would allow it to bid on the asset despite its contractual obligation not to do so. The parties are sophisticated commercial entities that entered the fray voluntarily in an attempt to better their positions… The policy reasons that underlie the no-costs convention are thus not operative in this case, and there is no reason to depart form the general rule awarding costs to the successful parties, not as a punishment but as a recognition of the usual risks of litigation.

[51] In this case, the Toronto Airport and Lynx brought their cross-applications with respect to an issue on which there was no clear authority. There is no reason to depart from the court's usual practice other than the clause of the AIF Agreement that provides for solicitors "fees" if awarded by a court of competent jurisdiction.

[52] There are other stakeholders in these proceedings, both secured and unsecured. The policy reason for the no-costs convention remains valid in this case. The Toronto Authority's application for costs is dismissed.

Heard on the 24th day of June, 2024.
Dated at the City of Calgary, Alberta this 26th day of August, 2024.



B.E.C. Romaine
J.C.K.B.A.

Appearances:

Tommy Gelbman, Julie Treleaven
for the CCAA Debtors

Jason Wadden
for the Toronto Airport

Karen Fellowes, K.C., Archer Bell
for the Airport Authorities