

**COURT OF APPEAL OF ALBERTA**

**COURT OF APPEAL FILE NUMBER**

**TRIAL COURT FILE NUMBER**

**COURT**

**REGISTRY OFFICE:**

2401-02664

COURT OF KING'S BENCH OF ALBERTA

CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, as amended

Clerk's Stamp

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 AIRPORT 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

NOT PARTIES TO THE APPEAL (MONITOR)

FTI CONSULTING CANADA

**DOCUMENT**

**APPLICATION FOR PERMISSION TO APPEAL**

**ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT**

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File No.: 156416.1001

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**NOTICE TO THE RESPONDENTS**

This application is made against you. You are a respondent.



undertake such capital expenditure projects by imposing fees or charges upon all departing airport passengers in the form of AIF.

5. Section 20.1 of the MOA set forth the nature of the relationship between the parties:

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)

6. Pursuant to the terms of the MOA, Lynx was to collect the AIF from its passengers on behalf of the Airport Authorities and remit the AIF to the Airport Authorities on a monthly basis. However, at the time that Lynx obtained an initial order pursuant to the CCAA on February 22, 2024, it was in significant arrears on its remittance of AIF to the Airport Authorities, with a total of \$4,099,343.29 outstanding (following application by the Airport Authorities of any deposits or letters of credit).

7. On May 24, 2024, the Airport Authorities filed an application seeking an order:

(a) Declaring that the unremitted AIF owed to the Airport Authorities by Lynx was subject to either an express, implied, or constructive trust; and

(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; and

(v) 1,110,231.54 to the VAA

(the "**Airport Authorities' Application**").

8. Similarly, on May 24, 2024, the Greater Toronto Airports Authority (the “**GTAA**”) brought a separate application seeking an order for, *inter alia*, the following:
  - (a) Declaring that the unremitted AIF owed to the GTAA was subject to a trust;
  - (b) Directing Lynx to release \$1,659,580.87 to the GTAA from the amount held in reserve by Lynx to satisfy claims relating to AIF  
(the “**GTAA Application**”).
9. Unlike the Airport Authorities, the GTAA was not a party to the MOA and instead maintained a separate agreement with Lynx governing the collection and remittance of AIF.
10. On June 24, 2024, the Honourable Justice Romaine heard the Airport Authorities’ Application and the GTAA Application (collectively, the “**Trust Application**”).
11. On August 26, 2024, the Honourable Justice Romaine released a written decision (the “**Decision**”) granting the GTAA Application with respect to declaring a trust over unremitted AIF and directing Lynx to release such unremitted AIF to the GTAA. However, the Honourable Justice Romaine declined to grant the Airport Authorities’ Application, holding that the unremitted AIF owed to the Airport Authorities by Lynx was not subject to a trust.
12. Respectfully, the Airport Authorities submit that the Honourable Justice Romaine erred:
  - (a) By failing to consider the effects of the fiduciary duties surrounding the agency relationship outlined in the MOA, including the imposition of a constructive trust or other equitable remedy which could arise from the breach of Lynx’s fiduciary duties. The Honourable Justice Romaine based the Decision primarily on the wording in the MOA which purported to disclaim the intent to create a trust relationship, and, based thereon, determined that the parties had an agency relationship but not to create a trust. However, there was no consideration of the nature and impact of this agency relationship and the fiduciary duties commensurate therewith and how those fiduciary duties were to be applied in the context of handling the AIF funds;
  - (b) By failing to properly apply the principles of contractual interpretation in interpreting the MOA. The Honourable Justice Romaine failed to consider an interpretation of section 20.1 of the MOA that would give meaning to both the agency relationship and the obligations to handle the AIF funds by establishing a trust over AIF collected and held by Lynx as agent for the Airport Authorities while disclaiming the intention to create any *other* trust relationship between the parties (for example, a trust relationship which might exist in the context of a partnership or joint venture);

- (c) By finding the disclaimer of an intention to create a trust in the MOA to be a juristic reason permitting the unjust enrichment of Lynx. Section 20.1 of the MOA does not permit Lynx to retain collected AIF. Furthermore, Lynx was unjustly enriched to the detriment of the Airport Authorities and the passengers who paid the AIF, the latter of which is not party to the MOA;
  - (d) By failing to consider the intentions of the parties who settled the trust (the passengers) who remitted the AIF to Lynx, on the understanding that those funds would flow to the Airport Authorities; and
  - (e) By failing to consider the injustice of finding that the AIF owing to the GTAA is subject to a trust while denying the same relief to the Airport Authorities when the nature of the funds subject to the trust are the exact same in both instances, with both being used to fund capital expenditure projects to maintain and improve airports for the Canadian public.
13. The points in issue are of significance to insolvency law and the air travel industry and warrant appellate review. Notably, the Honourable Justice Romaine's interpretation of the MOA and the relationship between the Airport Authorities and Lynx as giving rise to an agency relationship, but not a trust relationship, does not consider the true nature and implications of an agency relationship, which is solely limited to the collection and remittance of funds by the agent to the principal. Creditors, debtors and practitioners would benefit from a decision from this Honourable Court on the interplay between agency and trust relationships and the obligations and consequences arising therefrom, especially when dealing with funds held by debtors who file for CCAA protection in the midst of the collection/remittance cycle.
14. Furthermore, there is no recent caselaw in Canada on the nature and treatment of AIF. Given the importance of AIF to the air travel industry as one of the primary tools used by airport authorities to undertake capital expenditure projects to maintain and improve their respective airports, a decision from this Honourable Court would be greatly beneficial to both airport authorities and air carriers in determining how to properly allocate risk and ensure that airport authorities have access to sufficient funds to maintain the safety and integrity of their respective airports.
15. The points in issue are significant to the parties. As a result of the errors made by Honourable Justice Romaine, the Airport Authorities are left unable to recover \$4,099,343.29 in AIF owed to them by Lynx, which funds otherwise would have been used by the Airport

Authorities to fund capital expenditure projects for the benefit of the Canadian public using their airport facilities.

16. The Airport Authorities' appeal is *prima facie* meritorious. There are serious and arguable grounds of appeal with respect to the numerous errors made by the lower Court.
17. The appeal will not unduly hinder or delay the within CCAA proceedings. On September 13, 2024, the Monitor for Lynx was granted an order extending Lynx's CCAA proceedings until January 31, 2025. The only substantive extant issue is with respect to the trust and/or agency relationship between the Airport Authorities and Lynx over AIF.
18. Such other grounds as counsel may advise and this Honourable Court may permit.

**Material or evidence to be relied on:**

19. The Reasons for Decision of the Honourable Justice B.E. Romaine, issued on August 26, 2024 (2024 ABKB 514);
20. The Trust Application materials before the Honourable Justice B.E. Romaine filed in Court of King's Bench of Alberta Action No. 2401-02664;
21. The Affidavit of Jessica Watts, sworn on September 16, 2024; and
22. Such further and other material as counsel may rely upon and this Court may permit.

**Applicable rules:**

23. Parts 1 and 14 of the Alberta Rules of Court, Alta Reg 124/2010.
24. Such further and other rules as counsel may advise and this Honourable Court may rely upon.

**Applicable Acts and regulations:**

25. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, ss. 13 and 14.
26. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

**Any irregularity complained of or objection relied on:**

27. None.

**How the application is proposed to be heard or considered:**

28. By WebEx or in person, in accordance with the directions of the Court of Appeal.

**WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) 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 the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.