Form 7
[Rule 3.8]

Clerk's Stamp

COURT FILE NUMBER	2401-02664
COURT JUDICIAL CENTRE	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 AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR
APPLICANTS	GREATER TORONTO AIRPORTS AUTHORITY, 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	**BENCH BRIEF OF THE RESPONDENTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place, Suite 2700 225 6 Ave SW Calgary, AB T2P 1N2 Solicitors: Tommy Gelbman / Julie Treleaven Telephone: 403.260.7073 / 403.260.7048 Email: tgelbman@osler.com / jtreleaven@osler.com

APPLICATION BEFORE THE HONOURABLE JUSTICE ROMAINE ON JUNE 24, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

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PART I - INTRODUCTION

1. Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air (collectively, "**Lynx Air**"), seek an Order under the *Companies' Creditors Arrangement Act* (the "**CCAA**").[1]

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

   (b) declaring that the Vancouver Airport Authority ("**VAA**"), the Calgary Airport Authority ("**CAA**"), the Edmonton Regional Airport Authority ("**ERAA**"), the Winnipeg Airport Authority Inc. ("**WAA**"), and the Halifax International Airport Authority ("**HIAA**") (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.

2. The GTAA asserts that Lynx Air held AIF collected on behalf of the GTAA in trust and has yet to remit $1,659,580.87. It the release of the unremitted AIF to the GTAA.

3. A trust relationship exists between Lynx Air and the GTAA with respect to the pre-filing AIF. Pursuant to the AIF Agreement, the GTAA Letter of Credit (as those terms are defined below) was issued to secure both debt and trust obligations, including AIF. Taking into account principles of contractual interpretation and insolvency law, it is clear that the AIF claim was satisfied upon the GTAA drawing on the GTAA Letter of Credit. As such, Lynx Air owes no further amounts to the GTAA in respect of AIF.

4. In contrast with the GTAA, the Airport Authorities do not have a valid trust over their pre-filing AIF. Despite the Airport Authorities' contentions, the requirements for an express, implied or constructive trust simply cannot be made out in the circumstances.

5. The MOA governing the relationship between Lynx Air and each of the respective Airport Authorities *expressly disclaims* the creation of a trust relationship. The express language

[1] R.S.C. 1985, c. C-36, as amended.

of the MOA is fatal to their trust claims. Further, the judicial requirements to impose a constructive trust are very specific, and not satisfied in the current circumstances.

PART II - FACTS

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

6. Prior to the issuance of the Initial Order (as defined below), Lynx Air operated as a Canadian ultra-low-cost carrier, offering flights to 18 destinations between April 2022 and February 2024.

> Affidavit of Micheal Woodward, sworn May 31, 2024 (the "**Woodward Affidavit**") at para 4.

B. The Relevant Agreements

7. To conduct its business, Lynx Air entered into various agreements with each of the Applicants that govern, among other things, the various fees payable by Lynx Air for use of each airport, and for some of the Applicants, the security that Lynx Air was required to post. These agreements are described below.

> Woodward Affidavit at para 5.

8. On of the fees, and the category at issue in these applications, are Airport Improvement Fees ("**AIF**"), which are collected by Lynx Air from passengers on behalf of the Applicants. AIF are fees charged to passengers by the Airport Authorities that are used to fund the capital development and improvement of the respective airports.

> Affidavit of Jason Boyd, sworn May 24, 2024 (the "**Boyd Affidavit**") at para 22

Agreements with the Greater Toronto Airports Authority

9. On January 1, 2023, Lynx Air signed The Greater Toronto Airports Authority Airport Improvement Fee Agreement (the "**GTAA AIF Agreement**") with the GTAA in respect of the use of Toronto-Lester B. Pearson International Airport ("**Pearson**").

> Woodward Affidavit at para 6.

10. Among other things, the GTAA AIF Agreement governs the collection, remittance and use of AIF in respect of flights in and out of Pearson.

Woodward Affidavit at para 7.

11. Section 5 of the GTAA's Air Carrier – Application for Entry (the "**GTAA Air Carrier Application**") required Lynx Air to post an irrevocable letter of credit as a security deposit "in an amount calculated by the GTAA Finance Controller for Landing Fees, General Terminal Fees, Apron Fees, Check-In Fees and Airport Improvement Fees."

Woodward Affidavit at para 8.

12. Based on GTAA's calculations, Lynx Air posted a $3,100,000 Irrevocable Standby Letter of Credit, backed by a cash deposit held by ATB (the "**GTAA Letter of Credit**").

Woodward Affidavit at para 10.

13. Section 3 of the GTAA Air Carrier Application required Lynx Air to be bound by the terms of the Toronto Pearson Handbook for Business Partners (the "**Pearson Handbook**") and the directives issued by the GTAA. The Pearson Handbook was superseded by the Pearson Standard: Rules and Regulations, dated June 5, 2023 (the "**GTAA Rules**").

Boyd Affidavit at para 17.

The Airport Authorities' MOA

14. As of April 6, 2022, Lynx Air 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 Air), and (iii) Airports (as defined in the MOA, which includes the Airport Authorities). Lynx Air did not negotiate the MOA with the Airport Authorities; it was required to sign it in order to use the Airport Authorities' airports.

Woodward Affidavit at paras 12-13.

15. The GTAA is the only Applicant that is ***not*** a signatory to the MOA.

16. Among other things, the MOA contains terms regarding Lynx Air'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]

Woodward Affidavit at para 16.

The Calgary Airport Authority

17. The MOA is the only agreement governing the collection and remittance of AIF as between CAA and Lynx Air. Lynx Air did not post security in respect of any amounts to be remitted to the CAA.

Woodward Affidavit at paras 17, 19.

The Edmonton Regional Airports Authority

18. The MOA is the only agreement governing the collection and remittance of AIF as between the ERAA and Lynx Air. Lynx Air did not post security in respect of amounts to be remitted to the ERAA.

Woodward Affidavit at paras 20-21.

The Halifax International Airport Authority

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

security deposit also depends on the carrier and their planned activity. There were no other negotiated changes in respect of the ACOA.

Woodward Affidavit at para 22.
HIAA Response to Undertaking, dated June 7, 2024.

20. Pursuant to the section titled "Security Deposit", Lynx Air was required to "deposit with HIAA […] a security deposit in the amount of $100,000.00 in the form of a letter of credit".

Woodward Affidavit at para 23.

21. On July 29, 2022, Lynx Air provided a cash deposit to the HIAA for the account of Lynx Air in the amount of $100,000.00 (the "**Halifax Security Deposit**").

Woodward Affidavit at para 24.

Winnipeg Airports Authority Inc.

22. Lynx Air did not enter into a separate agreement with WAA governing AIF. However, pursuant to WAA's Tariff of Aviation Fees effective April 1, 2021, AIF was to be charged and payable by all air carriers operating out of the Winnipeg James Armstrong Richardson International Airport. Further, Lynx Air was required to post a cash deposit or irrevocable letter of credit to secure payment of any monies due under the Tariff.

Woodward Affidavit at para 25.

23. On April 12, 2022, Lynx Air posted a cash deposit to WAA for the account of Lynx Air in the amount of $83,333.00 (the "**Winnipeg Security Deposit**").

Woodward Affidavit at para 26.

The Vancouver Airport Authority

24. In addition to the MOA, Lynx Air agreed to be bound by an Airport Use Licence effective November 16, 2021 (the "**Licence**") with the VAA, which granted a licence to Lynx Air

to operate at the Vancouver Airport. The License required Lynx Air to co-operate with the VAA in its administration of the AIF.

Woodward Affidavit at paras 28-29.

25. Article 10 of the License required Lynx Air to post security for 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.

Woodward Affidavit at para 30.

26. On April 6, 2022, Lynx Air posted an Irrevocable Standby Letter of Credit to the VAA in the amount of $279,645.96 (the "**Vancouver Letter of Credit**").

Woodward Affidavit at para 31.

C. Lynx Air's CCAA Proceedings

27. On February 22, 2024, Lynx Air obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), pursuant to an initial order granted by the Honourable Justice Gill (the "**Initial Order**").

Woodward Affidavit at para 32.

28. Among other things, the Initial Order: (i) declared that Lynx Air are companies to which the CCAA applies; (ii) appointed FTI Consulting Canada Inc. as Monitor; and (iii) granted a stay of proceedings in favour of Lynx Air up to March 4, 2024 (the "**Initial Stay**").

Woodward Affidavit at para 33.

29. On March 1, 2024, the Honourable Justice Whitling granted an amended and restated initial order that, *inter alia*, extended the Initial Stay to April 15, 2024 (the "**Stay Period**"). The Stay Period was extended by further orders of this Court, most recently to June 28, 2024.

Woodward Affidavit at paras 34-35.

D. Correspondence Between Lynx Air and the Applicants

30. By letter dated March 5, 2024, the GTAA demanded payment from Lynx Air in the amount of $1,710,148.23 for pre-filing AIF. The GTAA explained that pursuant to paragraph 2.1.1(c) of the GTAA AIF Agreement, AIF were held in trust on behalf of the GTAA. The GTAA reiterated its demand for payment of pre-filing AIF by letter dated March 28, 2024.

Woodward Affidavit at paras 37-38.

31. Separately, by letter dated March 28, 2024, the Airport Authorities demanded remittance of approximately $4,100,000 in pre-filing AIF claimed to be held in trust by Lynx Air on behalf of the Airport Authorities.

Woodward Affidavit at para 39.

32. On April 2, 2024, Lynx Air replied to the Applicants' two March 28, 2024 letters, disagreeing that any amounts were held in trust by Lynx Air.

Woodward Affidavit at para 41.

33. By letter dated April 12, 2024, Lynx Air advised the GTAA that it accepted the existence of a trust relationship, citing section 2.1.1(c) of the GTAA AIF Agreement. Notwithstanding the existence of a trust relationship, Lynx Air took the position that all trust remittances had been made upon the GTAA drawing on the GTAA Letter of Credit. The payment was applied against the AIF in priority to debt, and any residual amounts claimed by the GTAA constituted unsecured pre-filing debt.

Woodward Affidavit at para 42.

34. By letter dated April 15, 2024, Lynx Air provided the Airport Authorities an accounting of pre-filing AIF owed to each Airport Authority and stated its position that there was no evidence of a trust relationship between Lynx Air and any of the Airport Authorities.

Woodward Affidavit at para. 43.

E. Lynx Air's Accounting

The Airport Authorities

35. According to Lynx Air's accounting records, the following AIF were collected by Lynx prior to the Initial Order, on behalf of the Airport Authorities by virtue of a debtor and creditor relationship:

Airport Authority	Pre-filing AIF	Other Pre-filing Debt
Calgary	$2,031,140.16	$1,431,308.26
Edmonton	$355,640.78	$114,237.51
Halifax	$365,788.78	$53,647.02
Vancouver	$1,185,768.45	$204,109.05
Winnipeg	$282,895.00	$131,568.94

Woodward Affidavit at para 45.

36. Lynx Air collected AIF from passengers, and the AIF had been held in its general bank account, comingled with other funds.

Woodward Affidavit at para 46.

37. On or around April 3, 2024, ATB Financial paid the VAA $279,645.96 23 as a draw on the Vancouver Letter of Credit.

Woodward Affidavit at para 47.

38. The HIAA and WAA also applied the Halifax Security Deposit and Winnipeg Security Deposit (respectively) to amounts owing from Lynx Air.

Affidavit of Paul Brigley, sworn May 23, 2024 at para 13.
Affidavit of Nicole Stefaniuk, affirmed May 23, 2024 at para 13.

39. Following the foregoing payments according to Lynx Air's accounting records, the amounts owed to each of the Airport Authorities for AIF is as follows:

Airport Authority	Pre-Filing AIF	Other Pre-Filing Debt	Security Drawn	Total Net Outstanding
Calgary	$2,031,140.16	$1,431,308.26	N/A	$3,462,448.42
Edmonton	$355,640.78	$114,237.51	N/A	$469.878.29
Halifax	$365,788.78	$53,647.02	($100,000.00)	$319,435.80
Vancouver	$1,185,768.45	$204,109.05	($279,645.96)	$1,110,231.54
Winnipeg	$282,895.00	$131,568.94	($83,300.00)	$331,163.94

Woodward Affidavit at para 48.

40. In calculating the foregoing, Lynx Air treated AIF and other pre-filing debt as unsecured debt, and did not treat AIF as trust funds for accounting purposes.

Woodward Affidavit at para 49.

41. As CAA and ERAA held no security, there is no change to total outstanding AIF or other debt.

Woodward Affidavit at para 51.

The GTAA

42. According to Lynx Air's accounting records, it collected $1,782,424 in AIF prior to the Initial Order, which was held in trust for the GTAA.

Woodward Affidavit at paras 56-57.

43. On or around March 1, 2024, ATB Financial paid the GTAA $3,100,000 as a draw on the GTAA Letter of Credit.

Woodward Affidavit at para 58.

44. Lynx Air's accounting records applied the GTAA Letter of Credit against pre-filing AIF in priority over debt claims to ensure the remittance of the trust amounts, as follows:

Airport Authority	**Pre-Filing AIF**	**Pre-Filing Other Debt**	**Letter of Credit**	**Total Outstanding AIF**	**Total Outstanding Other Debt**
Toronto	$1,782,424.04	$2,977,156.83	($3,100,000.00)	**$0**	**$1,659,580.87**

Woodward Affidavit at para 59.

45. Lynx Air has paid all post-filing AIF to the GTAA, and it is not at issue in this Application.

Woodward Affidavit at para 61.

46. Any residual amounts claimed by the GTAA constitutes unsecured pre-filing debt.

Woodward Affidavit at para 62.

PART III - ISSUES

47. The issues on these Applications are:

(a) In respect of the GTAA:

(i) Does the GTAA have a valid trust over its claimed AIF?

(ii) If so, should the proceeds of the GTAA Letter of Credit be applied first to its trust claim in priority over unsecured debt?

(b) In respect of the Airport Authorities:

(i) Do the Airport Authorities have a valid trust over the unremitted AIF?

(ii) If so, should the various security deposits be applied first to its trust claim in priority over unsecured debt?

PART IV - LAW AND ARGUMENT

A. GTAA's AIF

48. In its Application, the GTAA alleges that Lynx Air held AIF collected on behalf of the GTAA in trust, and has yet to remit an amount of $1,659,580.87. It therefore seeks direction that Lynx Air release unremitted AIF in that amount to the GTAA.

49. While it is correct that the AIF collected by Lynx Air on behalf of the GTAA was subject to a trust, the funds were remitted when the GTAA drew on the GTAA Letter of Credit.

50. In other words, when the relevant agreements are correctly interpreted, in a method consistent with principles of contractual interpretation and insolvency law, it becomes clear that Lynx Air owes no further amounts to the GTAA in respect of AIF.

Existence of Trust in respect of GTAA's AIF

51. It is trite law that the existence of a trust depends on the satisfaction of the three certainties: certainty of intention, certainty of subject-matter and certainty of objects.

> Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 5th Ed. (Toronto: Thompson Reuters Canada, 2021) [*Waters*] at 5.I **[Tab 21]**.

52. In these circumstances, the three certainties are satisfied, creating a trust relationship between Lynx Air and the GTAA:

(a) Certainty of intention is satisfied, as the express trust language in section 2.1.1(c) of the GTAA AIF Agreement demonstrates a clear intention to create the trust: "*the AIF collected by the Air Carrier* […] *shall be held by the Air Carrier in trust for the benefit of the GTAA*".

(b) Certainty of subject-matter is satisfied, because the language in section 2.1.1(c) of the GTAA AIF Agreement is clear that the trust property is "*the AIF collected by*

the Air Carrier (excluding the amounts collected by the Air Carrier for itself in respect of the Administration Cost)".

(c) Certainty of objects is satisfied because GTAA is the sole beneficiary of the trust.

53. Section 2.1.1(c) permits commingling.[2] There is ample authority holding that a provision of an agreement explicitly permitting commingling does not negate a trust relationship.

> *Alberta Treasury Branches v. Exall Energy Corporation,* 2017 ABQB 602 at para 62 ("An agreement to commingle funds is a factor that must be considered in determining the legal relationship between parties. The agreement of the parties to commingle trust funds with other funds is not fatal to the trust concept. When the commingling clause is viewed in the context of the entire 1990 Operating Procedure, it does not negate the trust relationship").
>
> *Bank of Nova Scotia v. Société générale (Canada),* 1988 CarswellAlta 288 (C.A.) at para 10 ("The appellant's principal argument against inferring a trust relationship was based on s. 507, which expressly allows the commingling of the non-operator's funds with other funds in Sorrel's account. It must be noted that counsel for the appellant was unable to produce any authority for the proposition that the mere agreement of the parties to commingle the trust funds with other funds is fatal to the trust concept. Certainly such an agreement to commingle is one feature which a court must consider in determining the true relationship created by the agreement between the parties. In the case at bar, the commingling clause is, in our view, an administrative aid to the smooth implementation of the agreement. When it is viewed in the context of the entire agreement, it does not negate a trust relationship.")
>
> *Air Canada v. M & L Travel Ltd*., [1993] 3 S.C.R. 787 at para 25 ("While the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative").
>
> *Alberta Treasury Branches v Exall Energy Corporation,* 2017 ABQB 602 at para 62 **[Tab 2]**.
> *Bank of Nova Scotia v Société générale (Canada),* 1988 CarswellAlta 288 (CA) at para 10 **[Tab 4]**.
> *Air Canada v M & L Travel Ltd*., [1993] 3 SCR 787 at para 25 **[Tab 1]**.

[2] Section 2.1.1(c): "… such AIF collected may be commingled in the accounts of the Air Carrier with other funds collected during the normal course of business."

54. In light of the foregoing, Lynx Air does not dispute that the AIF collected by Lynx Air on behalf of the GTAA was subject to a trust. However, as discussed below, these trust funds were remitted when GTAA drew on the GTAA Letter of Credit.

Allocation of Security Deposit

55. The issue of how to allocate the proceeds of the GTAA Letter of Credit is the key issue in the GTAA's application. It is largely one of first impression, as there is no case law directly on point. However, when the relevant agreements are reviewed, taking into account foundational principles of contractual interpretation and insolvency law, it becomes clear that the GTAA Letter of Credit should be first allocated to unremitted AIF, with the result that there are no further amounts owing from Lynx Air to the GTAA in respect of AIF.

56. Specifically, section 5 of the GTAA Air Carrier Application provides that the GTAA Letter of Credit serves as a security deposit "for Landing Fees, General Terminal Fees, Apron Fees, Check-In Fees and Airport Improvement Fees", but does not govern how it is to be apportioned as among the various fees.

57. The GTAA points to section 2.38 of the GTAA Rules to assert it has full discretion as to how to apply the Letter of Credit in the circumstances. However, when read carefully, it is clear this is not the intent of the provision:

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

58. The purpose of section 2.38 of the GTAA Rules is to allow the GTAA to apply the security deposit to any amounts owed by Lynx Air to the GTAA; it also includes costs associated with violations of the GTAA Rules or other agreements between the parties. It does not set out how the security deposit is to be allocated as among multiple sets of charges that are concurrently owing by the Air Carrier (as here). In essence, it is a set-off provision governing the debt against which the security deposit may be applied.

59. The GTAA also points to Section 2.8.4 of the GTAA AIF Agreement as giving it discretion with respect to how it applies the security deposit in the circumstances, but as before, this is not the intent of the provision:

> GTAA may elect to call upon and collect against the Security Amount in whole or in part where Air Carrier has failed to comply with any obligations hereunder with respect to the collection or remittance of Deposits or where, in GTAA's sole opinion (acting reasonably) an Event of Default may reasonably be anticipated to be committed by Air Carrier. Where GTAA has claimed some or all of the Security Amount, Air Carrier will promptly (and in no event later than 15 calendar days) replenish the Security Amount by a sum equal to the amount claimed by GTAA in accordance with the terms hereof.

60. While Section 2.8.4 gives the GTAA discretion to "elect to call upon and collect" against the security deposit where the Air Carrier has breached its obligations relating to the collection and remittance of AIF, it does not confer on the GTAA the discretion to allocate the security deposit among multiple sets of charges that are concurrently owing by the Air Carrier. The relevant agreements remain entirely silent on how the security deposit is to be allocated in such circumstances.

61. Within each of the GTAA Air Carrier Application, the GTAA AIF Agreement and the GTAA rules, the GTAA has given itself both discretion and various forms of protection, as it is entitled to do. However, those agreements are silent on the GTAA Letter of Credit is to be allocated in circumstances such as these.

62. In the face of this silence, the effect of the *pari passu* principle, the foremost principle in the law of insolvency, must govern. The *pari passu* principle states that the insolvent debtor's assets are to be distributed among classes of unsecured creditors rateably and equally in payment of the debts as they existed at the date of insolvency. Two purposes underpin the *pari passu* principle: fairness to creditors and orderly administration of an insolvent debtor's estate.

Re Nortel Networks Corp., 2015 ONCA 681 at paras 23-24 **[Tab 15]**.

63. A court has broad powers make orders in accordance with the *pari passu* principle. For example, courts have invoked the *pari passu* principle to invalidate contractual provisions

that, if enforced during bankruptcy proceedings, would alter the bankruptcy scheme of distribution.

> *Capital Steel Inc v Chandos Construction Ltd.*, 2019 ABCA 32 [*Capital Steel*] at para 20 **[Tab 6]**.

64. In these instances, allocating the proceeds from the GTAA Letter of Credit first against the unsecured debt violates the *pari passu* principle. All unsecured creditors should rank equally in right of repayment in an insolvency, and allocating the proceeds in this way would significantly advantage the GTAA against all other unsecured creditors.

65. The agreements at issue are silent on how the security deposit is to be allocated as between AIF and other fees. Therefore, where the CCAA governs, it falls to this Court to determine how to allocate the proceeds of the GTAA Letter of Credit; it is not for the GTAA to unilaterally determine.

66. As explained by the Supreme Court of Canada in *Century Services Inc. v Canada (Attorney General)*, the fact that the CCAA is skeletal in nature gives a CCAA court broad discretion to make any order it sees fit, in accordance with section 11 of the CCAA.

> *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at paras 57-68 **[Tab 7]**.

67. To that end, the court should exercise its discretion in a way that is most fair to Lynx Air's other creditors – that is, to applying the proceeds of the GTAA Letter of Credit first against the unremitted AIF before the other amounts owing by Lynx Air.

68. Further, the GTAA's claim that such an interpretation would nullify or make redundant the trust is simply incorrect. As the GTAA itself points out, the parties have bargained for two different types of security <u>for the AIF</u>. Even though the security deposit should be applied against the AIF claims first, consistent with the *pari passu* principle, the trust still serves an important purpose in the event that the security deposit is insufficient to cover the full amount of the AIF claims.

69. This is consistent with section 2.8.1 of the GTAA AIF Agreement, which provides:

> Notwithstanding the fact that Air Carier is collecting Deposits from Enplaned Passengers on account of the AIF, Air Carrier will deliver to GTAA a security payment (the "**Security Amount**") which will act as a guarantee of Air Carrier's obligation to collect and remit Deposits.[3] The Security Amount must be delivered prior to the Effective Date (except where Air Carrier is already operating at the Airport and has already provided the Security Amount as of the Effective Date hereof, in which case the Parties acknowledge that the Security Amount has been paid).

70. In fact, section 2.8.1 serves as evidence that (i) the GTAA Letter of Credit was intended to act as security over funds held in trust, and (ii) the GTAA drafter turned their minds to the fact that funds held in trust would not typically require security given that trust funds would be paid to a beneficiary in priority in the event of an insolvency event.

71. Using the GTAA Letter of Credit to satisfy unremitted AIF does not make the trust redundant. It is precisely what GTAA intended when it drafted the GTAA AIF Agreement: multiple mechanisms to ensure recovery in an event of default.

72. In other words, the existence of both the trust and the security deposit as two different types of security for the AIF is not disputed. What is disputed is the GTAA's assertion that it may allocate the proceeds of the GTAA Letter of Credit in a way that disadvantages Lynx Air's other unsecured creditors in violation of the *pari passu* principle.

73. Even if the agreements were interpreted as giving the GTAA a degree of discretion in pursuing its various remedies against Lynx Air, which is denied as a matter of contractual interpretation, this Court cannot allow that discretion to be exercised unilaterally in a way that violates the *pari passu* principle and deprives other unsecured creditors of their rights to recovery. In these circumstances, the GTAA is looking to do just that.

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[3] Note that "Deposit" is defined at s. 1.1 of the GTAA AIF Agreement as only constituting amounts collected by Air Carrier in respect of AIF: " 'Deposit' means an amount collected by Air Carrier on behalf of GTAA as a deposit from a prospective Enplaned Passenger equal to the amounts set out in Schedule 'B', payable by such prospective Enplaned Passenger should they become an Enplaned Passenger."

74. In the alternative, if this Court does not accept Lynx Air's interpretation of the relevant agreements, then Lynx Air submits that they are ambiguous on the question of how to allocate the GTAA Letter of Credit.

75. The *contra proferentem* rule of contractual interpretation states that "[i]n the event that the court is unable to resolve a contradiction or ambiguity in the terms of a contract, the language of the contract will be construed against its author in accordance with the contra proferentem rule".

> *Scanlon v Castlepoint Development Corp.*, [1992] OJ No 2692, 11 OR (3d) 744 at para 90 (Ont CA), leave to appeal refused [1993] SCCA No 62 (SCC) **[Tab 17]**, citing *Consolidated-Bathurst Export Ltd. v Mutual Boiler and Machinery Insurance Co.*, [1979] SCJ No 133, [1980] 1 SCR 888 at 901 **[Tab 8]**.

76. This rule is one of general application, applying whenever "there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording".

> *Hillis Oil and Sales Ltd. v Wynn's Canada Ltd.,* [1986] 1 SCR 57 at para 17 **[Tab 9]**.

77. In other words, *contra proferentem* "applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between it and the counterparty who did not participate in its drafting".

> *McClelland & Stewart Ltd. v Mutual Life Assurance Co. of Canada*, [1981] SCJ No 60, [1981] 2 SCR 6 at 15 **[Tab 13]**.

78. As explained by the Nova Scotia Court of Appeal "where the meaning of a contract is ambiguous, that is, that its meaning is obscure, the application of the *contra proferentem* rule requires that the meaning least favourable to the author of the contract ought to prevail.

> *Arnoldin Construction & Forms Ltd. v Alta Surety Co.*, [1995] NSJ No 43, 137 NSR (2d) 281 at paras 38-39 (NSCA), leave to appeal refused [1995] SCCA No 143 (SCC) **[Tab 3]**.

79. As described above, each of the GTAA AIF Agreement, GTAA Air Carrier Application and GTAA Rules is silent on how the security deposit is to be allocated between two sets of charges where both are owing by the Air Carrier. It is similarly ambiguous as to how the GTAA intended that it is to be allocated. Therefore, the meaning of these agreements is obscure, and they are ambiguous for the purposes of the *contra proferentem* rule.

80. In short, the relevant agreements – all drafted by the GTAA – are silent as to how to allocate the GTAA Letter of Credit. The effect of the GTAA's argument is that, notwithstanding the terms of the Rules, it alone should determine how to allocate the GTAA letter of credit, notwithstanding that the CCAA governs, and the rights of other stakeholders are engaged. The GTAA complains that applying the GTAA Letter of Credit against the AIF first "generates results that were not bargained for." There was no bargain. The GTAA dictated the terms of its relationship with Lynx Air, including forms of unilateral collection. If it had intended the result it now seeks from the Court, it could have expressly done so in its contracts of adhesion.

81. In light of the foregoing, the relevant agreements must be interpreted to apply the security deposit against the AIF claims first, for consistency both with the *contra proferentem* rule of contractual interpretation, and the *pari passu* principle in insolvency law.

82. In the further alternative, if this Court determines that, as a matter of contractual interpretation, the relevant agreements give the GTAA the full discretion to allocate the proceeds of the GTAA Letter of Credit, this Court should nonetheless exercise its broad powers under the CCAA to override those contracts in accordance with the *pari passu* principle.

83. As referenced above, section 11 of the CCAA gives the Court broad powers to make "any order that it considers appropriate in the circumstances." And, courts have previously invoked the *pari passu* principle to invalidate contractual provisions that could potentially alter the bankruptcy scheme of distribution.

> *Capital Steel Inc v Chandos Construction Ltd.*, 2019 ABCA 32 [*Capital Steel*] at para 20 [**Tab 6**].

84. Allowing GTAA the full discretion to allocate the proceeds of the GTAA Letter of Credit as it sees fit would effectively allow it to contract out of the *pari passu* principle, resulting in prejudice to Lynx Air's other creditors, an outcome this Court should not sanction.

85. Therefore, it would be appropriate for this Court to override the relevant contracts and use its own discretion to allocate the proceeds of the GTAA Letter of Credit in a way that is consistent with the *pari passu* principle of insolvency.

B. Airport Authorities' AIF

86. By contrast with the GTAA, the Airport Authorities do not have a valid trust over their unremitted AIF. As discussed in further detail below, the requirements for an express, implied or constructive trust simply cannot be made out in the circumstances.

Existence of Trust in respect of Airport Authorities' AIF

No Express Trust

87. As discussed above, the existence of a trust depends on the satisfaction of the three certainties: certainty of intention, certainty of subject-matter and certainty of objects.

> *Waters* at 5.I **[Tab 21]**.

88. It is conceded that the two last-mentioned certainties have been established by the terms of the MOA as both the trust property (the AIF collected by a Signatory Air Carrier) and the beneficiaries (the Airports) are clearly identified therein.

89. However, in order to satisfy the requirement for certainty of intention, the relevant words must demonstrate a clear intention to create a trust.

> *Willis (Litigation Guardian of) v Willis Estate*, 2006 CarswellOnt 1757 (SCJ) at para 32, affirmed 2007 ONCA 552 **[Tab 20]**.

90. In contrast with the clear language contained in section 2.1.1(c) of the GTAA AIF Agreement, the language of MOA does not demonstrate a clear intention to create a trust. In fact, it explicitly and completely disclaims the creation of any such trust:

> **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.

91. This language could not be any clearer in establishing that the parties did not intend to create a trust. It is impossible to establish certainty of intention in the face of such clear, unambiguous wording.

92. Although the Airport Authorities contend that the language in the second sentence of Section 20.1 implies that the collected AIF is intended to be held in trust, this is simply and obviously incorrect. The first sentence of Section 20.1, by its plain language, disclaims any intention to create a trust relationship, full stop.

93. The second sentence of Section 20.1 goes on to prevent the formation of a principal/agency relationship, "except as the Signatory Air Carriers acting as agents for the Airports in collecting and remitting the AIF funds." This exception is limited to the formation of a principal/agency relationship; there is absolutely no indication that this exception extends to the creation of a trust, which has been explicitly disclaimed by the first sentence.

94. The Airport Authorities cite much authority for the principle that there is no need for any technical words or expressions for the creation of a trust. This is generally correct – as long as the intention to create a trust can be established from the words used and the surrounding circumstances, certainty of intention can be satisfied.

Waters at 5.II **[Tab 21]**.

95. However, the clearest indication of intention is achieved by looking at the words used in the relevant agreement. Here, the words of the agreement (specifically Section 20.1 of the MOA) expressly and conclusively disclaim the creation of a trust.

96. This is not a situation where the relationship bears all the hallmarks of a trust, but the relevant document simply omitted to use specific trust language. Again, by the express language of Section 20.1 of MOA, the clear intention was not to create a trust.

97. The interpretation of a contract always beings with the words used. All of the various aspects of contractual interpretation are rooted in the actual language used by the parties.

> *Leggett & Platt Canada Co. v Brink Forest Products Ltd.*, 2010 BCCA 14 at para 20 **[Tab 12]**.

98. As explained by the Ontario Court of Appeal:

> 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.
>
> *KPMG Inc. v Canadian Imperial Bank of Commerce*, [1998] OJ No 4746 at para 3 **[Tab 10]**.

99. The same principle was explained by the Supreme Court of Canada in the following terms:

> Were I convinced that a different interpretation would advance the true intent of the parties, I would gladly subscribe to it. However, when the wording of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from that which is expressed by its clear terms, unless the contract is unreasonable or has an effect contrary to the intention of the parties.
>
> *Scott v Wawanesa Mutual Insurance Co.*, [1989] 1 SCR 1445 at para 51 **[Tab 18]**.

100. In the alternative, as noted in the undertaking responses of HIAA, the MOA is a contract of adhesion, which was not negotiated by Lynx Air. If this Court determines there is an ambiguity, which is denied, then it must be resolved in favour of the Air Carrier.

> HIAA Response to Undertaking, dated June 7, 2024.

101. The Airport Authorities cannot point to any case law supporting the satisfaction of certainty of intention and creation of an express trust in the face of such clear and unambiguous language, for good reason. This would be a completely illogical result, flipping the entire concept of certainty of intention on its head. The only certainty here is that the parties did not intend to create a trust, by their own express wording.

No Implied Trust

102. As described by *Waters*, in the common usage of today, the terms "express" and "implied" refer to the intention of the alleged settlor. If the settlor clearly and specifically says that certain property is to be held in trust, then he or she has created an express trust. Similarly, if the settlor's language has to be construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he or she has created a trust arising by implied intent. In other words, both express trusts and implied trusts are varieties of intentional trusts, it is just a question of whether that intent is clearly expressed, or discovered from more indirect and ambiguous language.

Waters at 2.I **[Tab 21]**.

103. Given that an implied trust also requires an intention to create the trust, the clear language of section 20.1 of the MOA evidencing the parties' *intention to disclaim* a trust is sufficient to prevent an implied trust from being formed in the same way as discussed above in respect of an express trust.

No Constructive Trust

104. A constructive trust comes into existence when the law imposes upon a party an obligation to hold specific property for the benefit of another. The person obligated becomes by force of law a constructive trustee towards the person to whom he or she owes performance of the obligation.

Waters at 11.I **[Tab 21]**.

105. Constructive trusts have been imposed both to prevent an unjust enrichment and to avoid a wrongful gain. These two categories of constructive trusts are discussed separately below.

106. However, note that in both cases, the requirements to impose a constructive trust are very specific, and not satisfied in the current circumstances, particularly in light of the explicit disclaimer of any trust.

Unjust Enrichment

107. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, the Supreme Court of Canada set out the two-step approach for analyzing whether a constructive trust should be granted as a remedy for unjust enrichment. First the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment.

> *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 [*Lac Minerals*] at para 71 **[Tab 11]**.

108. In other words, even if a restitutionary claim for unjust enrichment has been made out, this does not guarantee the creation of a constructive trust.

109. In the current circumstances neither step is satisfied, as no unjust enrichment can be established, and even if it could be, a constructive trust would not be an appropriate remedy.

110. It is well established that there are three requirements to be satisfied before an unjust enrichment can be said to exist: (1) an enrichment, (2) a corresponding deprivation and (3) the absence of any juristic reason for the enrichment.

> *Becker v Pettkus*, [1980] 2 SCR 834 [*Becker*] at para 38 **[Tab 5]**.

111. In this case, Lynx Air is not benefiting from any kind of enrichment, as all of its assets will be distributed to creditors.

112. Further, and most importantly, even if there were an enrichment and a corresponding deprivation to point to, it could not be said to in the absence of any juristic reason. Lynx Air has collected the AIF on behalf pursuant to the terms of the MOA (which explicitly

disclaims the creation of a trust relationship). It is well established that a contract constitutes a juristic reason for the purposes of this analysis.

Becker at para 25 **[Tab 5]**.

113. The MOA, in combination with the fact that Lynx Air is insolvent, would constitute the juristic reason for the enrichment and corresponding deprivation. Insolvency proceedings, by their very nature, will result in certain creditors suffering "deprivations" by the simple fact that the debtor does not have the assets to satisfy all claims against it. And since the MOA explicitly disclaims the creation of a trust relationship, the Airport Authorities are unsecured creditors in respect of the AIF, subject to suffering losses in an insolvency of the debtor.

114. Even if an unjust enrichment could be established, La Forest J., for himself and Lamer J., thought that a constructive trust would be inappropriate in "the vast majority of cases". He went on to say that "a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property". Among the most important of these rights, he said, is priority for the plaintiff in the defendant's bankruptcy.

Lac Minerals at para 78 **[Tab 11]**.

115. Under the framework set out in *Lac Minerals*, it would be inappropriate to grant a constructive trust here. There is no need to grant the Airport Authorities the additional rights that flow from recognition of a right of property, because they have already disclaimed the existence of a trust by the clear wording of the MOA.

116. Further, the Airport Authorities had the opportunity to protect their priority in a bankruptcy by requiring a security deposit, an opportunity that most Airport Authorities took advantage of, thereby putting themselves into a better position than most of Lynx Air's other creditors.

117. The Airport Authorities do not require the protection of a constructive trust, and granting them one at this late stage would violate the *pari passu* principle, as discussed above in the context of the GTAA's claims.

118. All unsecured creditors should rank equally in right of repayment in an insolvency, and creating a constructive trust on behalf of the Airport Authorities would significantly advantage them against all other unsecured creditors beyond their contractually agreed security deposits.

Wrongful Gains

119. The Supreme Court of Canada established a four-part test for a constructive trust in the case of a supposed wrongful gain:

(a) 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;

(b) 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;

(c) 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;

(d) 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.

Soulos v Korkontzilas, [1997] 2 SCR 217 at para 45 **[Tab 19]**.

120. These requirements are not met in these circumstances. Specifically, in respect of requirements (i) and (ii), Lynx Air owed contractual obligations to the Airport Authorities, not equitable ones. Therefore, any alleged breaches would be contractual, not equitable.

121. Although Lynx Air was nominally acting as agent for the Airport Authorities in collecting the AIF, the clear disclaimer of a trust meant that Lynx Air and the Airport Authorities were in a debtor-creditor relationship. To that end, principals and their agents can and do

operate on a debtor-creditor basis in relation to the accounts between them. Certainly, the fact of a agency relationship does not in and of itself create a trust.

> *Ontario (Egg Producers' Marketing Board) v Clarkson Co*., 1981 CarswellOnt 658 **[Tab 14]**.

122. Further, note that this is not an instance of profiteering on the part of the agent. Lynx Air has done nothing inappropriate in the circumstances – it has collected AIF as the MOA required it to, and is now merely seeking to distribute its remaining assets in a way that is fair and equitable to all of its creditors.

123. For requirement (iii), the Airport Authorities do not have a legitimate reason for a proprietary remedy for many of the same reasons discussed above in the context of unjust enrichment.

124. Specifically, there is no need to grant the Airport Authorities the additional rights that flow from recognition of a right of property, because they have already disclaimed the existence of a trust by the clear wording of the MOA.

125. Further, the Airport Authorities had an opportunity to protect their priority in a bankruptcy by requiring a security deposit.

126. In respect of requirement (iv), granting a constructive trust at this late stage would be unjust to the other creditors of Lynx Air, violating the *pari passu* principle.

127. All unsecured creditors should rank equally in right of repayment in an insolvency, and creating a constructive trust on behalf of the Airport Authorities would significantly advantage them against all other unsecured creditors beyond their contractually agreed security deposits.

128. The Airport Authorities heavily rely on the decision of *Redstone Investment Corp.* in arguing that a constructive trust should be granted in the current circumstances. However, *Redstone* can be distinguished: although the agreements in Redstone did not explicitly

require the funds be held in trust, they also did not expressly disclaim the creation of such a trust (as here).

Re Redstone Investment Corp., 2015 ONSC 533 at paras 18 and 72 **[Tab 16]**.

129. In short, it would be inequitable to impose a constructive trust in circumstances where the parties have explicitly disclaimed the existence of such a trust, where other creditors would be prejudiced by the creation of such a trust (in violation of the *pari passu* principle), and where the Airport Authorities had the opportunity to protect themselves by asking for security deposits from Lynx Air.

Allocation of Security Deposits

130. In the alternative, if this Court finds that the Airport Authorities have a trust over their unremitted AIF, then the Halifax Security Deposit, Winnipeg Security Deposit and Vancouver Letter of Credit (collectively, the "**Security Deposits**") should be put towards the unremitted AIF, reducing the amount of the trust claim.

131. Although the Airport Authorities claim that these Security Deposits were intended to secure aeronautical fees and not AIF, there is nothing in the relevant agreements to that effect. Further, the actions of the VAA and HIAA to enforce against the full amount of their Security Deposits despite the quantum of those Security Deposits exceeding the amount of aeronautical fees owing demonstrates that they were clearly intended to secure AIF (and the relevant Airport Authorities understood this fact).

132. Given that the Security Deposits secured both aeronautical fees and AIF and the relevant agreements are silent on how these Security Deposits are to be allocated, then, for much of the same reasons as in respect of the GTAA Letter of Credit (namely, the *pari passu* principle and the *contra proferentem* rule) the Security Deposits should be first allocated

to the unremitted AIF, with the result that there the trust claims from the VAA, HIAA and WIAA are reduced by the amount of the corresponding Security Deposit, as follows:

Airport Authority	Pre-Filing AIF	Pre-Filing Other Debt	Letter of Credit Drawn / Deposit Applied	Total Outstanding AIF	Total Outstanding Other Debt
Halifax	$365,788.78	$53,647.02	($100,000.00)	$265,788.78	$53,647.02
Vancouver	$1,185,768.45	$204,109.05	($279,645.96)	$906,122.49	$204,109.05
Winnipeg	$282,895.00	$131,568.94	($83,300.00)	$199,595.00	$131,568.94

Woodward Affidavit at para 61.

PART V - CONCLUSION

133. Lynx Air requests that this Honourable Court grant the relief requested by it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17 DAY OF JUNE, 2024

Osler, Hoskin & Harcourt LLP
Counsel for the Applicants

TABLE OF AUTHORITIES

TAB	AUTHORITY
Secondary Sources	
21.	Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 5th Ed. (Toronto: Thompson Reuters Canada, 2021)