

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: Appeal No. 2401-0244AC
TRIAL COURT FILE NUMBER: 2401-02664
REGISTRY OFFICE: 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: 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

NOT PARTIES TO THE APPEAL (MONITOR): FTI CONSULTING CANADA

DOCUMENT: **MEMORANDUM OF ARGUMENT (RESPONDENTS)**

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PART I - OVERVIEW

1. This memorandum of argument is submitted on behalf of the respondents, Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air (collectively, “**Lynx Air**”), in this proceeding under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”), in response to the application for permission to appeal the decision of the Honourable Justice B.E.C. Romaine dated August 26, 2024 (the “**Decision**”) filed by the Edmonton Regional Airport Authority, Halifax International Airport Authority, Calgary Airport Authority, Vancouver Airport Authority, and Winnipeg Airport Authority Inc. (collectively, the “**Airport Authorities**”).
2. The primary issue before the chambers judge was whether section 20.1 of the Memorandum of Agreement between the Airport Authorities and Lynx Air created a trust over pre-filing airport improvement fees (“**AIF**”) collected by Lynx Air:

20.1 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.¹

3. The chambers judge correctly concluded that the plain language of the agreement precluded the creation of an express or implied trust.²

4. The second issue was whether the equities favoured the creation of a constructive trust. The chambers judge correctly concluded there was (i) nothing to “justify a finding of a constructive

¹ The Affidavit of Micheal Woodward, sworn May 31, 2024 (the “**Woodward Affidavit**”) at para 16 [emphasis added], being Exhibit “M” to the Affidavit of Jessica Watts, sworn September 16, 2024 (the “**Watts Affidavit**”).

² *Greater Toronto Airports Authority v Lynx Air Holdings Corporation*, 2024 ABKB 514 [Decision] at para [47](#).

trust on the basis of wrongful conduct” and (ii) “no equitable reason” to otherwise grant a constructive trust.³

5. As sophisticated commercial parties, the Airport Authorities could have drafted their agreements to create an express trust in respect of AIF, as did the Greater Toronto Airports Authority (the “GTAA”). Not only did they elect not to do so, they expressly *disclaimed* such a trust. Notwithstanding the Airport Authorities’ submissions, any differing treatment between the Airport Authorities and the GTAA is explained by drafting choices, not some greater injustice.

PART II - FACTS

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

6. Prior to the Initial Order (defined below), Lynx Air operated as a Canadian ultra-low-cost carrier, offering flights to 18 destinations between April 2022 and February 2024.⁴

B. Lynx Air’s CCAA Proceedings

7. On February 22, 2024, Lynx Air obtained protection under the CCAA, pursuant to an initial order, which, *inter alia*: (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 Order**”).⁵ The stay was extended by subsequent orders of the Court, to January 31, 2025.⁶

³ *Decision* at paras [22-26](#), and [43](#).

⁴ Woodward Affidavit at para 4.

⁵ Woodward Affidavit at paras 32-33.

⁶ Woodward Affidavit at paras 34-35; [Order \(Stay Extension\) dated September 13, 2024](#).

C. The Relevant Agreement Governing the Collection of AIF

8. To conduct its business, Lynx Air entered into various agreements with each of the Airport Authorities that govern, *inter alia*, the various fees payable by Lynx Air for use of each airport. The common relevant agreement between Lynx Air and each of the Airport Authorities was the Memorandum of Agreement, dated May 31, 1999, as amended (the “MOA”). The parties to the MOA include (i) 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; it was required to sign it to use the Airport Authorities’ respective airports, which it did effective April 6, 2022.⁷

9. The category of fees at issue are AIF, which are charged to passengers by the Airport Authorities, and used to fund the capital development and improvement of the respective airports.⁸ Lynx Air collected AIF from passengers on behalf of the Airport Authorities.

10. As noted above, section 20.1 of the MOA governs Lynx Air’s relationship with the Airport Authorities in respect of the collection of AIF, and otherwise:

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.⁹

⁷ Woodward Affidavit at paras 12-13.

⁸ The Affidavit of Jason Boyd, sworn May 24, 2024 (the “Boyd Affidavit”) at para 22, being Exhibit “L” to the Watts Affidavit.

⁹ Woodward Affidavit at para 16 [Emphasis added].

11. At the time of the Initial Order, Lynx Air held AIF that it had collected from passengers, but which had not been paid to Airport Authorities.

D. The Trust Application

12. On May 24, 2024, the Airport Authorities filed an application (the “**Trust Application**”) seeking, *inter alia*, a declaration that the unremitted AIF owed to the Airport Authorities by Lynx Air “is subject to either an express, implied, or constructive trust.”¹⁰

13. Separately, the GTAA filed a similar application to that of the Airport Authorities, which was heard at the same time as the Trust Application. The Airport Authorities now argue that it was unjust that the GTAA’s trust claim was accepted, but that theirs was rejected. However, this was because the relationship was governed by a different agreement, with strikingly different wording. Moreover, the issue for GTAA was not *whether* there was a trust relationship; indeed, Lynx Air had accepted the trust relationship under the relevant agreement – The Greater Toronto Airports Authority Airport Improvement Fee Agreement (the “**GTAA AIF Agreement**”) in respect of the use of Toronto-Lester B. Pearson International Airport – but had argued that the trust claim had already been satisfied.

14. The reason that Lynx Air had acknowledged the trust relationship was the express language of section 2.1.1(c) of the GTAA AIF Agreement, which is different from section 20.1 of the MOA:

[...] the AIF collected on behalf of the GTAA by the Air Carrier from the Enplaned Passengers (excluding the amounts collected by the Air Carrier for itself in respect of the Administration Cost) are funds or revenues properly belonging to the GTAA and not the Air Carrier; and (ii) **the AIF collected by the Air Carrier (excluding the amounts collected by the Air Carrier for itself in respect of the Administration Cost) shall be held by the Air Carrier in trust for the benefit of the GTAA.**

¹⁰ Application by the Airport Authorities filed May 24, 2024 at para 1(a), being Exhibit “E” to the Watts Affidavit.

Notwithstanding and without prejudice to the fact that the AIF shall be collected and held by the Air Carrier in trust for the GTAA, the Parties each acknowledge that such AIF collected may be commingled in the accounts of the Air Carrier with other funds collected during the normal course of business.¹¹

15. Ultimately, the Decision as it relates to the GTAA is irrelevant to this Application, other than to demonstrate that it is possible to create an express trust in the circumstances, and that other airport authorities in Canada do exactly that.

PART III - ISSUES

16. The sole issue before this Court is whether to grant permission to appeal the Decision.

PART IV - LAW AND ARGUMENT

17. Permission to appeal CCAA proceedings should only be granted “sparingly”. Courts have recognized a four-part test in deciding whether permission to appeal should be granted:

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point raised is of significance to the proceeding itself;
- (c) whether the appeal is *prima facie* meritorious; and
- (d) whether the appeal will unduly hinder the progress of the action.¹²

18. Permission to appeal will be granted only if the applicants can clearly show the chambers judge “erred in principle or exercised its discretion unreasonably.”¹³ As this Court has held:

The fact that an appeal lies only with leave of an appellate court (s. 13, CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the

¹¹ Woodward Affidavit at paras 6-7 [Emphasis added].

¹² *Companies’ Creditors Arrangement Act*, RSC 1986, c C-36 at [s 13](#); *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at paras [7-8](#); *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at para [16](#); *Canadian Airlines Corp (Re)*, 2000 ABCA 149 [*Canadian Airlines*] at paras [7, 34](#).

¹³ *9354-9186 Quebec inc v Callidus Capital Corp*, 2020 SCC 10 at paras [53-54](#).

supervising judge. This supports the view that those decisions should be interfered with only in clear cases.¹⁴

19. In this proposed appeal, the applicants ask this Court to second-guess the chambers judge even though this is an issue which turns entirely on the wording of the MOA, and the chambers judge correctly interpreted the clear language of the MOA, applying established case law. The Airport Authorities unequivocally disclaimed any trust relationship in the MOA, but are nevertheless attempting to summon a trust in the face of language in the MOA that specifically disclaims a trust relationship.

20. This application is the only matter left to be resolved before this CCAA proceeding can be concluded, and the Monitor discharged. Further delay in resolving this issue would be prejudicial to Lynx Air and other stakeholders, as it would lead to unnecessary expense and delay.

A. The Proposed Appeal is of no Significance to the Practice

21. Permission to appeal will generally only be granted in a CCAA proceeding if the proposed appeal raises issues of “significance to the practice”, or on which there is no clear authority. This factor is influenced by whether there is appellate authority on the question proposed to be considered on appeal.¹⁵

22. The proposed appeal would be of limited significance to the practice. As illustrated by the authorities cited in the Decision, there is a large body of case law, including from the Supreme Court of Canada,¹⁶ considering the availability of constructive trusts, the key consideration in this

¹⁴ *Re Smoky River Coal Ltd*, 1999 ABCA 179 at para [61](#).

¹⁵ *Canadian Airlines* at para [33](#).

¹⁶ *Air Canada v M+L Travel Ltd.*, [\[1993\] 3 SCR 787](#); *Soulos v Kovkontzilas*, [\[1997\] 2 SCR 217](#); *Pettkus v Becker*, [\[1980\] 2 SCR 834](#); *Rothwell v Rothwell*, [\[1978\] 2 SCR 436](#).

case. The availability of a constructive trust has been clearly and precisely defined by this weight of case law.

23. The Airport Authorities cite other legal concepts at play (agency, fiduciary duties, contractual interpretation and unjust enrichment) but these are similarly well-worn ground. The mere fact that there is limited case law specifically governing the treatment of AIF,¹⁷ is of no real importance. Fundamentally, the Decision turns on the interpretation of the language used in the MOA, an issue unique to this case and of no broad significance to the practice. There is no reason to believe that the legal principles set out in the jurisprudence cannot be applied to AIF and the specific circumstances of this case. Where the proposed appeal turns on applying well-established principles of law to the unique facts of a case, these do not qualify as issues of significance to the practice.¹⁸ Moreover, the GTAA AIF Agreement demonstrates that there is no crisis surrounding this issue that requires the intervention of this Court in respect of AIF.

B. The Proposed Appeal is not of Significance to the Proceeding Itself

24. The proposed appeal is of no significance to this proceeding, which would be concluded but for this last issue. All of Lynx Air’s assets have been sold, and the SISP is concluded. This application is all that stands in the way of a conclusion of these CCAA proceedings.

¹⁷ However, there are some cases regarding AIF, see e.g., *Jetsgo Corp. (Bankruptcy), Re*, [2005 CanLII 10198 \(QCCS\) \[Jetsgo\]](#). In *Jetsgo*, some of the very same Airport Authorities argued pursuant to the very same MOA, the AIF was “collected by Jetsgo as agent for and on behalf of the Airport authorities” and not as a trust, para [8](#).

¹⁸ *DEL Equipment Inc. (Re)*, 2020 ONCA 555 at para [20](#). See also *Bluberi Gaming Technologies Inc. (Arrangement relative à)*, [2016 QCCA 1306](#): where issues arise in a highly particular, fact-specific context, this limits the possibilities of extrapolating general principles of CCAA law.

25. The proposed appeal is of no significance to this CCAA proceeding; it is of significance only to the Airport Authorities, who are attempting to litigate a benefit they did not bargain for in the first instance.

26. Further, the Airport Authorities overstate the importance of the debt to them. Although the amount owing in total is approximately \$4.1 million, this is divided between the five separate Airport Authorities – the amount owing to any single entity is not nearly as high. The Airport Authorities have not provided any evidence that these amounts constitute a material debt.¹⁹

C. The Proposed Appeal is not *Prima Facie* Meritorious

27. The proposed appeal must be *prima facie* meritorious. As this Court has said,

...there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier “*prima facie*” meritorious.²⁰

28. Contrary to the Airport Authorities’ submissions (which are unsupported by any law or evidence), the chambers judge made no errors. The most important factor in coming to the Decision, and one that was well-considered, was the clear language of the MOA disclaiming a trust relationship. There are no principles of contractual interpretation which would require a departure from the plain meaning of the words used by the parties within the MOA.

¹⁹ Indeed, the case law suggests that the amounts at issue are immaterial to each of the Airport Authorities. For example, in *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6 at para 43, the Competition Tribunal noted that the Vancouver Airport Authority alone generated \$159 million in AIF in 2017.

²⁰ *Canadian Airlines* at para 35.

29. Further, the chambers judge did not fail to consider the agency relationship in these circumstances. An agency relationship and a trust relationship are two very different concepts. An agency relationship can result in the imposition of a constructive trust only in very specific circumstances. As Lamer J. stated in *Lac Minerals*, a constructive trust would not be an appropriate remedy in “the vast majority of cases”.²¹ The chambers judge’s approach on the constructive trust issue considered all the relevant case law before ultimately concluding (correctly) that a constructive trust could not be made out on these facts.

30. Finally, the Airport Authorities point to the passengers who remitted the AIF to Lynx Air and argue that the chambers judge failed to consider the intention of those passengers to create a trust (as potential settlors). However, the Airport Authorities have proffered no evidence to suggest that the passengers intended to create a trust in respect of the AIF.

D. Granting Permission would Unduly Hinder the Progress of the Action

31. Even where any or all criteria for permission to appeal are satisfied, a court may still deny permission if it would unduly hinder the progress of the CCAA proceeding. The party seeking permission must establish, through affirmative evidence, that the proposed appeal will not do so.²²

32. The Airport Authorities have not done so, for the simple reason that granting permission to appeal the Decision here *would* hinder the progress of the CCAA proceeding. This issue is the only matter left to be resolved before Lynx Air can conclude the CCAA proceedings.

²¹ *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at para [78](#).

²² *Canadian Airlines* at paras [41-45](#).

33. Presumably, if permission to appeal were to be granted, the appeal would not be heard until the summer of 2025, and the Monitor would need to remain in place to deal with this issue until an appeal is concluded, thereby leading to unnecessary cost.

34. For these reasons, Lynx Air respectfully submits that permission to appeal should be denied and Lynx Air should be permitted to conclude the CCAA proceedings and discharge the Monitor.

TABLE OF AUTHORITIES

Tab	Authority
Legislation	
1.	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36
Case Law	
2.	<i>Air Canada v M+L Travel Ltd.</i> , [1993] 3 SCR 787
3.	<i>Bluberi Gaming Technologies Inc (Arrangement relative à)</i> , 2016 QCCA 1306
4.	<i>BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd</i> , 2020 ABCA 264
5.	<i>Canadian Airlines Corp (Re)</i> , 2000 ABCA 149
6.	<i>DEL Equipment Inc (Re)</i> , 2020 ONCA 555
7.	<i>Greater Toronto Airports Authority v Lynx Air Holdings Corporation</i> , 2024 ABKB 514
8.	<i>Jetsgo Corp. (Re)</i> , 2005 CarswellQue 3346
9.	<i>Lac Minerals Ltd. v International Corona Resources Ltd.</i> , [1989] 2 SCR 574
10.	<i>Liberty Oil & Gas Ltd (Re)</i> , 2003 ABCA 158
11.	<i>Pettkus v Becker</i> , [1980] 2 SCR 834
12.	<i>Re Smoky River Coal Ltd</i> , 1999 ABCA 179
13.	<i>Rothwell v Rothwell</i> , [1978] 2 SCR 436
14.	<i>Soulos v Kovkontzilas</i> , [1997] 2 SCR 217
15.	<i>The Commissioner of Competition v Vancouver Airport Authority</i> , 2019 CACT 6
16.	<i>9354-9186 Quebec inc v Callidus Capital Corp</i> , 2020 SCC 10