

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended (the "**CCAA**")

AND IN THE MATTER OF an application by Blue Lobster Capital
Limited, 3284906 Nova Scotia Limited, 3343533 Nova Scotia Limited
and 4318682 Nova Scotia Limited (collectively, the "**Applicants**") for
relief under s. 11 of the CCAA and other relief.

BRIEF OF LAW OF THE MONITOR

August 26, 2026

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To the Honourable Associate Chief Justice Jamieson, AlixPartners Restructuring, Inc. (formerly KSV Restructuring Inc.), in its capacity as Court-appointed monitor (the “**Monitor**”) of the Applicants, submits:

PART I – OVERVIEW¹

1. As directed by the Court, this Brief of Law is filed by the Monitor to assist the Court in its consideration of the equitable doctrine of marshalling in the context of a pre-filing debt repayment made by BLCL to RBC (the “**RBC Debt Repayment**”). Specifically, the Monitor has asked this Court for direction as to whether the RBC Debt Repayment should be treated as having reduced Spirit Co’s indebtedness to RBC, as RBC applied it, or BLCL’s indebtedness to RBC, as the BLCL Parties assert.
2. The Court has requested the Monitor provide this Brief of Law to assist its determination of whether, having regard to the applicable legal principles, the equitable doctrine of marshalling is engaged in relation to the RBC Debt Repayment. The Monitor does not take a position on the determination of that issue. This Brief of Law is provided solely to assist the Court by summarizing the relevant principles of law.

PART II – FACTS

3. The facts giving rise to the RBC Debt Repayment occurred before the Monitor’s involvement and the commencement of these CCAA proceedings. Accordingly, the Monitor’s understanding of those facts is based on information provided by the Applicants and RBC, rather than on the Monitor’s firsthand knowledge or involvement. The Monitor’s understanding of the relevant factual background is summarized in the Tenth Report.

¹ Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Tenth Report of the Monitor dated August 10, 2026 [“**Tenth Report**”].

PART III – ISSUE

4. This Brief of Law sets out the general legal principles relevant to the Court’s determination of whether the equitable doctrine of marshalling is engaged in relation to the RBC Debt Repayment. Pursuant to the Court’s direction, it also addresses the following specific questions:
- (a) whether an unsecured creditor may invoke the doctrine of marshalling; and
 - (b) whether the doctrine requires a common debtor.

PART IV – LAW

Overview of the Equitable Doctrine of Marshalling

5. Marshalling is an equitable doctrine that regulates the rights of creditors as between themselves. It may arise where one creditor has recourse to two funds to satisfy its claim and another creditor has recourse to only one of those funds. In such circumstances, the doctrine seeks to prevent the creditor with access to both funds from defeating the other creditor’s ability to recover from the sole fund available to it.²
6. In *Gerrow v Dorais*, the Court cited the following description of the doctrine from *Snell’s Principles of Equity*:

[W]here there are two creditors of the same debtor, and one creditor has a right to resort to two funds for payment of his debt, and the other a right to resort to one fund only, the court will 'marshal' or arrange the funds so that both creditors are paid as far as possible.³

² *Gerrow v Dorais*, [2010 ABQB 560](#) [**“Gerrow”**] at [paras 21–22](#); *House v Baird*, [2019 ONSC 1712](#) [**“Baird”**] at [para 35](#).

³ *Gerrow* at [para 22](#).

7. Although marshalling is an equitable doctrine and its application depends on the circumstances of each case, the following conditions are commonly identified as the framework for determining whether the doctrine is available:
- (a) two creditors;
 - (b) one common debtor;
 - (c) two funds of the debtor with the superior creditor having access to both and the inferior creditor to but one;
 - (d) no interference with the choice of remedy of the superior creditor; and
 - (e) no prejudice to third parties.⁴
8. Legal commentators have noted that the doctrine of marshalling “has not received any significant treatment by the Supreme Court of Canada and only limited treatment among appellate courts across the country.”⁵ The doctrine has historically been applied inflexibly and in limited circumstances.⁶

The Availability of Marshalling to Unsecured Creditors is Unsettled

9. In *Wolfe et al. v. Taylor et al.*, the Manitoba Court of Appeal described marshalling as “an equitable remedy, intended to protect the recovery of a junior creditor against the arbitrary action of a senior creditor, and to thereby treat all secured creditors equitably.”⁷ The Court held that to invoke marshalling, certain specific criteria must be met, including that “two or more creditors share a single common debtor; and the senior creditor has a claim against

⁴ *Baird* at [para 39](#) citing *Green v Bank of Montreal*, [1999 CanLII 821](#) (ON CA) at para 10; **see also** *Re Griffon Partners Operation Corporation*, [2024 ABKB 277](#) [“*Griffon*”] at [para 21](#).

⁵ Matti Lemmens, Jakub Maslowski and Heather Cattell, The Marshalling Plan for Junior Creditors, 2024 *22 Annual Review of Insolvency Law*, [2024 CanLII Docs 3047](#) [“*Lemmens et al.*”] at pp. 2-3 citing *Wolfe et al v Taylor et al*, [2020 MBCA 44](#) [“*Wolfe*”] at [para 34](#).

⁶ *Lemmens et al.* at p. 4.

⁷ *Wolfe* at [para 31](#).

two of the debtor's funds, while the junior creditor, ranking behind the doubly secured senior creditor, has recourse to only one".⁸

10. Historically, marshalling cases have typically arisen as a contest between two secured creditors and there are limited examples in which an unsecured creditor has attempted to invoke the doctrine.
11. In *Re Allison*, the Ontario Court (General Division) denied relief to an unsecured creditor seeking to marshal and concluded that an unsecured creditor could not avail itself of the doctrine.⁹ On appeal however, the Ontario Court of Appeal expressly declined to make a determination on whether the doctrine of marshalling was available to unsecured creditors, finding instead that although the two debtors owed a joint debt to a secured lender in the form of cross-guaranteed mortgages on each of their properties, the creditor seeking to invoke the marshalling doctrine *did not* have a guarantee by the other debtor whose property they were seeking to marshal, and so failed to satisfy the requirement that there be a single debtor. The Court of Appeal stated:

In the present appeal, Mrs. and Mr. Allison held a joint debt in the form of two mortgages on their respective parcels of land that were cross-guaranteed much like the mortgage to Canada Permanent the McAsey brothers held in Ernst. Unlike in Ernst, however, where Jeremiah McAsey was assigned the debt of Frank McAsey to Ernst Bros. Co. because Jeremiah bought Frank's lot, in the present appeal, Mrs. Allison never was assigned or otherwise obligated towards the debt owed by Mr. Allison to the appellant. Mrs. and Mr. Allison were common debtors to Tomas (as Ground J. found), but they were not common debtors with respect to the debt owed by Mr. Allison to the appellant. Mrs. Allison was not under any obligation to pay both debts, and therefore should not suffer, especially at the hands of an equitable doctrine. Unless the appellant can establish that it is just and equitable that Mrs. Allison should pay in the first instance, it has no equity to compel a person such as Tomas, who has resort to both funds, to go against Mrs. Allison's parcel of land.

[...]

As indicated above, in this case Ground J. found that there was but one debtor in the circumstances of the cross-guarantees. But this merely made the two Allisons

⁸ Wolfe at [para 33](#).

⁹ *Allison (Re)*, [1995 CanLII 7146](#) (ON CTGD) [*"Allison"*] at paras 32-34.

liable for the same debt to Tomas. There is nothing in the two guarantees that permits Mr. Allison to claim over against Mrs. Allison with respect to debts he incurred on the Meaford Project. In fact, he cannot claim over against Mrs. Allison on the Tomas mortgage because both are principals of the same debt as well as being guarantors.

*With respect, I am unable to agree with the trial judge on his preliminary finding. In my opinion, he should have found that the doctrine of marshalling had no application to the facts of this case because the appellant's claim was against a single creditor, namely, Mr. Allison. As noted, he did find that the doctrine did not apply because the appellant was not a secured creditor. In view of my finding on the primary point, I do not propose to deal with this issue.*¹⁰ [Emphasis added]

12. The rationale reflected in the trial decision in *Re Allison and Williamson v. Loonstra*, which the former relies upon, is that marshalling protects a creditor's equitable interest in a particular fund, whereas an unsecured creditor has only a general claim against the debtor's residual estate and no proprietary or security interest in a specific fund. Therefore, as the unsecured creditor stands in the place of the debtor, they have no more right than the debtor to complain that a particular fund is being exhausted by secured creditors, who have a right to act on their security as they wish.¹¹
13. To the contrary, other authorities support a broader equitable approach to marshalling. For instance, in *Governor and Company of the Bank of Scotland v Nel (The)*, the Court relied on English authorities that recognized marshalling in favour of simple contract creditors. The Court distinguished authorities denying marshalling relief to unsecured creditors, including *Loonstra*, on the basis that they concerned creditors with *in personam* claims, whereas the claimants before it held interests *in rem*. The Court held that such distinction "does no violence to the original concept of marshalling, which clearly extended to contractual creditors."¹²

¹⁰ 807933 *Ontario Inc v Paddon and Associates*, [1998 CanLII 3766 \(ON CA\)](#) ["**Allison ONCA**"] at paras 22, 25 and 26.

¹¹ *Allison* at paras 32-34; **see also** *Williamson v Loonstra et al*, [1973 CanLII 1186 \(BC SC\)](#) ["**Loonstra**"] at pp. 278-279 and *Wolfe* at [para 38](#).

¹² *Governor and Company of the Bank of Scotland v Nel (The)*, [1998 CanLII 9082](#) (FCTD) at para 22.

14. Other cases leave the door open to the assertion of the doctrine by unsecured creditors.

For example, in *Strategic Acquisition Corp. v. Multus Investment Corporation*, the Alberta Court of King's Bench held that:

The principle of marshalling is straightforward. Where there are two creditors of the same debtor and one of those creditors has the ability to recover from two funds of the debtor and the other creditor only has resort to one, the court will marshal the funds to pay out both creditors as much as possible. A first mortgagee, however, cannot be prejudiced by marshalling: Snell's Principles of Equity, 28th ed, at 416, cited in First Investors Corp. v Veeradon Developments Ltd, 1988 ABCA 38 (CanLII), 47 DLR (4th) 446, 84 AR 364 at para 11 (ABCA).

*There is nothing in the doctrine that says that both creditors must be secured or mortgagees and there is nothing that says that it only operates where there is one debtor rather than related debtors [...].*¹³

15. Yet other cases suggest the contrary. In *Griffon*, the Alberta Court of King's Bench cites the above paragraphs in *Strategic Acquisition* directly, but found these statements to be *obiter*, referencing in its reasons other cases dealing with the "single debtor" rule, but not expressly addressing whether the doctrine is available to unsecured creditors.¹⁴
16. Notably, while prejudice to third parties has been identified as a consideration that may preclude the application of the doctrine, some Courts have found that "potential prejudice to unsecured creditors is irrelevant".¹⁵ This appears consistent with the general assumption that marshalling is available to secured creditors (and unsecured interests are secondary).
17. However, in more recent cases, Courts have declined to dismiss unsecured interests out of hand. For instance, in the recent decision of *Bear Creek Contracting Ltd. v. Canadian Western Bank*, in considering the relevant authorities on marshalling and potential

¹³ *Strategic Acquisition Corp v Multus Investment Corporation*, [2013 ABQB 534](#) at [paras 13-14](#).

¹⁴ *Griffon* at [paras 23-24](#).

¹⁵ *Wolfe* at [para 38](#) citing [Loonstra](#) at p. 278.

prejudice to unsecured creditors, the Supreme Court of Newfoundland and Labrador commented:

*I will not deal with this concern by simply saying, as the Manitoba Court of Appeal did in Wolfe that “[p]otential prejudice to unsecured creditors is irrelevant”. Indeed, I note as my colleague, MacDonald, J. did in paragraph 64 of Bear Creek, the companion piece to this matter, that “Bear Creek will have to satisfy a court that...(d)...it is materially prejudiced more than other creditors, including Universal’s unsecured ones...”?*¹⁶

18. While not directly connected to the question of whether unsecured creditors may avail themselves of the doctrine of marshalling, there appears to be some openness to considering unsecured creditor interests in the analysis.

Marshalling Requires a Common Debtor

19. Courts appear more regularly to focus their analysis on whether there is a common debtor, rather than on the secured or unsecured status of the creditor seeking to marshal.
20. The traditional formulation of the doctrine of marshalling requires two creditors of a common debtor. The common-debtor requirement is reflected both in the authorities’ formulation of the doctrine and in the conditions generally identified for its application.¹⁷
21. In *Brown v Canadian Imperial Bank of Commerce*, the Court cited the following statement from *Halsbury’s Laws of England*:

*Generally, three conditions must be satisfied in order that the doctrine of marshalling may be applied as regards claims by creditors. First, the claims must be against a single debtor. If one creditor has a claim against C and D, and another creditor has a claim against D only, the latter creditor cannot require the former to resort to C unless the liability is such that D could throw the primary liability on C, for example where C and D are principal and surety.*¹⁸

¹⁶ *Bear Creek Contracting Ltd v Canadian Western Bank*, 2026 NLSC 13 (CanLII) [**“Bear Creek”**] at para 44.

¹⁷ *Griffon* at paras 21-22; see also *Baird* at para 39.

¹⁸ *Brown v Canadian Imperial Bank of Commerce et al*, 1985 CanLII 2116 (Ont HCJ) [**“Brown”**] at para 4.

22. As described above, the Ontario Court of Appeal in *Re Allison* held that it need not make a determination on whether an unsecured creditor could marshal, since the analysis failed to establish there was a common debtor in any event.¹⁹
23. Consistent with that rationale, the Manitoba Court of Appeal in *Wolfe* considered a marshalling request by an unsecured creditor. Two companies, TBF and EPG owed a debt to BMO. BMO would be paid in full from the liquidation of some property, leaving EPG holding acres of land. The unsecured creditor was a creditor of TBF and sought to marshal as against the real property held by EPG.²⁰
24. The Court found that EPG did not owe any direct obligation to the creditor and the creditor did not have a guarantee from EPG. The Court found that the debtors were not sufficiently connected so the “single common debtor” criterion was not satisfied, and that the principal/surety exception did not apply. The Manitoba Court of Appeal found it was not just and equitable to apply marshalling, noting that based on the facts of that case the unsecured creditor could have sought security from, EPG, but did not. The Court held that the proposed relief would effectively make the creditor secured against the assets of another corporation, notwithstanding that it had not obtained security over those assets.²¹
25. More significantly, the Court found that the “effect of allowing marshalling is that RLW [the creditor seeking to marshal] would be paid before unsecured creditors of EPG”, harkening back to the equitable character of the analysis.²²

¹⁹ *Allison ONCA* at paras 22, 25 and 26.

²⁰ *Wolfe* at [paras 7, 10, 16-17](#).

²¹ *Wolfe* at [paras 56, 60-61, 64-66](#).

²² *Wolfe* at [para 65](#).

Consolidation of Debtor Entities

26. Where a marshalling argument depends on treating related corporations as a single debtor, the principle of separate corporate personality remains relevant. A corporation is generally a legal person separate from its shareholders and from other corporations within the same corporate group.²³
27. As the Ontario Superior Court (Gen. Div.) held in *Transamerica Life Insurance Company of Canada v Canada Life Assurance Company*, common ownership or control alone does not justify disregarding a corporation's separate legal personality. It must be shown that the corporation is completely dominated, does not function independently, or is being used as a shield for fraudulent or improper conduct.²⁴
28. This conclusion is reinforced in *Wolfe*, where the Manitoba Court of Appeal rejected veil-piercing because the evidence did not justify treating the corporations as a single entity.²⁵

Principal-Surety Exception to the Common Debtor Rule

29. The authorities do recognize a potential exception to the common-debtor requirement is where the relationship between the relevant parties permits one debtor to rest primary liability on the other, as in the principal-surety relationship. The exception is grounded in the principal debtor's obligation to indemnify the surety. It does not operate merely because a senior creditor holds recourse against both a principal debtor and a guarantor.²⁶
30. In *Griffon*, the Alberta Court of King's Bench held that the nexus between debtors was not established merely because the senior creditor had recourse to both the assets of the

²³ *Transamerica Life Insurance Company of Canada v Canada Life Assurance Company*, [1996 CanLII 7979 \(ON CTGD\)](#) [*"Transamerica"*] at paras 13, 21-22.

²⁴ *Transamerica* at paras 22-23.

²⁵ *Wolfe* at [para 53](#) and [56](#).

²⁶ *Brown* at paras 11-12; **see also** *Griffon* at [para 31](#) and *Wolfe* at [paras 57-61](#).

borrower and guarantor while the junior creditor was only owed a secured debt by the borrower alone. The Court emphasized that the required relationship must permit primary liability of one debtor to rest with the other debtor or guarantor entity.²⁷

31. On the application for leave to appeal in *Griffon*, the Alberta Court of Appeal held that the proposed appeal raised serious and arguable issues concerning the scope of marshalling in the principal-guarantor context. The Court observed that equitable doctrines may be applied flexibly where justified by the circumstances of a particular case. The appeal was ultimately settled before hearing and no argument made on the issue.²⁸
32. Legal commentators have invited Court consideration of the surety exception to the common debtor principle, noting that modern guarantees often include language whereby the surety agrees to indemnify a creditor in full and to become primarily liable for debts owing by a principal.²⁹ Such analysis would necessarily include a determination based on the facts of an individual case whether a guarantee exists.

PART V – CONCLUSION

33. The Monitor was requested to respond to two questions. Based on a review of applicable case law and secondary sources:
 - (a) **Can an unsecured creditor invoke the doctrine of marshalling?** The authorities are mixed on whether an unsecured creditor may invoke the doctrine of marshalling. The traditional formulation of a marshalling analysis involves two secured creditors, and in most instances, Courts accept that marshalling is not available to unsecured creditors. However, there are authorities opining to the contrary and that issue has not been meaningfully considered by appellate courts.

²⁷ *Griffon* at [paras 32-33](#).

²⁸ *Re Griffon Partners Operation Corporation*, [2024 ABCA 279](#) at [para 10](#).

²⁹ [Lemmens et al.](#) at p. 14.

- (b) **Does the doctrine of marshalling require a common debtor?** The authorities are clear that there must be a common debtor for marshalling to be invoked. The question of whether there is a common debtor is a question of fact. Exceptions to the common debtor rule include where there is a principal-surety relationship between debtors, and where there is reason to disregard a corporation's separate legal personality.
34. The Monitor respectfully provides this Brief of Law as a summary of the applicable legal principles for the Court's assistance. The Monitor takes no position on whether the doctrine of marshalling applies to the RBC Debt Repayment or the appropriate disposition of the underlying allocation issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF AUGUST, 2026



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SCHEDULE "A"

List of Authorities

1. *Gerrow v Dorais*, [2010 ABQB 560](#).
2. *House v Baird*, [2019 ONSC 1712](#).
3. *Green v Bank of Montreal*, [1999 CanLII 821 \(ON CA\)](#).
4. *Re Griffon Partners Operation Corporation*, [2024 ABKB 277](#).
5. Matti Lemmens, Jakub Maslowski and Heather Cattell, The Marshalling Plan for Junior Creditors, 2024 22 *Annual Review of Insolvency Law*, [2024 CanLIIDocs 3047](#).
6. *Wolfe et al v Taylor et al*, [2020 MBCA 44](#).
7. *Allison (Re)*, [1995 CanLII 7146 \(ON CTGD\)](#).
8. *807933 Ontario Inc. v. Paddon and Associates*, [1998 CanLII 3766 \(ON CA\)](#).
9. *Williamson v Loonstra et al*, [1973 CanLII 1186 \(BC SC\)](#).
10. *Governor and Company of the Bank of Scotland v. Nel (The) (T.D.)*, [1998 CanLII 9082 \(FCTTD\)](#).
11. *Strategic Acquisition Corp v Multus Investment Corporation*, [2013 ABQB 534](#).
12. *Bear Creek Contracting Ltd v Canadian Western Bank*, [2026 NLSC 13 \(CanLII\)](#).
13. *Brown v Canadian Imperial Bank of Commerce et al*, [1985 CanLII 2116 \(HC\)](#).
14. *Transamerica Life Insurance Company of Canada v Canada Life Assurance Company*, [1996 CanLII 7979 \(ON CTGD\)](#).
15. *Re Griffon Partners Operation Corporation*, [2024 ABCA 279](#).

SCHEDULE "B"

Statutory Authorities

Companies Creditors Arrangement Act, [RSC 1985, c C-36](#)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.