Court of Appeal File No. M53250
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants/Responding Parties

FACTUM OF THE CREDIT FACILITY LENDERS

(Plaintiffs' Counsel's Motion for Leave to Appeal)

April 29, 2022

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TO: THE SERVICE LIST

PART I—OVERVIEW

1. An appellate court reviewing the decision of a supervising *Companies' Creditors Arrangement Act* ("**CCAA**") judge must be cognizant that factual findings and discretionary decisions are owed considerable deference absent an extricable legal error.[1]

2. In this case, there is no such error. The decision of Justice McEwen dated February 9, 2022 (the "**Order**"),[2] supported by reasons issued on February 23, 2022 (the "**Endorsement**"),[3] was a reasonable and appropriate exercise of discretion that appropriately balanced the interests of the parties and furthered the purposes of the CCAA. The senior secured lenders under the Credit Agreement (defined below) (the "**Credit Facility Lenders**") support the submissions of the CCAA Applicants[4] that leave to appeal the Order should not be granted.

3. The moving parties in this case are counsel to uncertified class claimants with, at best, contingent, unsecured claims ("**U.S. Class Counsel**").[5] They take issue with Justice McEwen's exercise of discretion on a motion that they brought to seek an expedited process to adjudicate their clients' asserted claims notwithstanding an ongoing, court-approved claims procedure.

4. That motion was brought when the CCAA Applicants were actively engaged in a process to develop a CCAA Plan with certain key stakeholders. Support of those stakeholders

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[1] *Grant Forest Products Inc v Toronto-Dominion Bank*, 2015 ONCA 570 at paras 97-98 ("***Grant Forest***"); *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 ("***Callidus***") at paras 53-54; *Laurentian University of Sudbury (Re)*, 2021 ONCA 199 ("***Laurentian***") at paras 19-20.

[2] Order of Justice McEwen dated February 9, 2022 ("**Order**").

[3] Written Reasons of Justice McEwen issued February 23, 2022 (the "**Endorsement**").

[4] The CCAA Applicants are also referred to herein as "**Just Energy**".

[5] Fifth Report of the Monitor dated February 4, 2022 ("**Monitor's Fifth Report**") at para 54.

is required for a successful restructuring of the Applicants and its ongoing operations thereafter. The relief sought by U.S. Class Counsel threatened to disrupt that critical Plan-development process in order to address the contingent, unsecured claims asserted by their clients on an expedited basis prior to the presentation of any CCAA Plan to creditors and prior to any requests for relief relating to a Plan, such as a meeting order or sanction order motion.

5. The CCAA supervising judge appropriately exercised his discretion to refuse to order such a process, noting that U.S. Class Counsel would have the opportunity to make submissions in due course when the Plan was presented.[6] This decision is a quintessential exercise of discretion by a CCAA judge. It reflected an appropriate balancing of interests of the various parties involved in the restructuring and created the best conditions for ongoing restructuring discussions. The CCAA judge is best-positioned to make such determinations with respect to the ongoing CCAA process and his decision should be respected.

6. In this factum, the Lenders will not duplicate submissions made by Just Energy in its factum dated April 29, 2022 (the "**Just Energy Factum**"), which the Credit Facility Lenders adopt. Rather, the Credit Facility Lenders focus on two key points:

(i) Justice McEwen's decision was a discretionary decision that reflected an appropriate balancing of interests in the complex, dynamic CCAA restructuring of Just Energy; and

(ii) Justice McEwen's exercise of discretion to refuse production of documentation relating to confidential negotiations contained no error

[6] Endorsement, *supra* note 3 at 15.

and served to protect the open discussions aimed to develop a restructuring plan.

PART II—FACTS

7. The key facts are set out in the Just Energy Factum. In addition, the Credit Facility Lenders note:

(a) the Applicants are either borrowers or guarantors in respect of the $335 million senior secured credit facility (the "**Credit Facility**") pursuant to the ninth amended and restated credit agreement (the "**Credit Agreement**") dated as of September 28, 2020 with the Credit Facility Lenders (the "**Credit Agreement**");[7]

(b) in the CCAA Proceedings, the Applicants obtained additional financing through a debtor-in-possession interim financing facility in the maximum principal amount of US$125 million from certain affiliates (the "**DIP Lenders**") of Pacific Investment Management Company ("**PIMCO**").[8] PIMCO affiliates are also assignees of a significant secured supplier claim and the proposed Plan sponsor;[9]

[7] Affidavit of Michael Carter sworn February 2, 2022 ("**Seventh Carter Affidavit**") at para 11; Motion Record of the Moving Parties dated April 5, 2022 ("**Motion Record**"), Tab 7 at 388; Seventh Carter Affidavit, Exhibit "I", Motion Record, Tab 7 at 597.

[8] Seventh Carter Affidavit, Exhibit "I", Motion Record, Tab 7 at 515.

[9] Seventh Carter Affidavit at para 11, Motion Record, Tab 7 at 388.

(c) the Credit Facility is secured and subject to a complex intercreditor arrangement that governs the secured debt portion of the Just Energy capital structure;[10]

(d) secured claims against Just Energy, including claims of the Credit Facility Lenders and secured claims of commodity suppliers such as claims by Shell[11] and the PIMCO entity that is an assignee of the BP Debt, total approximately $900 million;[12]

(e) in addition, claims of the lenders under the non-revolving term loan established pursuant to the Term Loan Agreement as part of the Applicants' 2020 balance sheet recapitalization transaction (the "**Term Loan Lenders**") and certain noteholders total nearly $300 million.[13]

8. While the U.S. Class Counsel filed two overlapping claims in the Just Energy claims procedure totalling US$7.32 billion combined, such claims are unsecured, based on proposed and uncertified class actions and were disallowed in their entirety by Just Energy, in consultation with the CCAA monitor.[14]

9. Just Energy has been engaged in extensive discussions with its most significant stakeholders, including the DIP Lenders, the Term Loan Lenders, the Credit Facility Lenders and Shell to develop a CCAA Plan and a framework to recapitalize the Just Energy entities

[10] Seventh Carter Affidavit at para 13, Motion Record, Tab 7 at 389.

[11] Shell Energy North American (Canada) Inc., Sell Energy North America (US), L.P., and Shell Trading Risk Management, LLC (collectively, "**Shell**").

[12] Fifth Report of the Monitor dated February 4, 2022 ("**Fifth Report**"), Motion Record, Tab 8 at 716.

[13] Fifth Report, Motion Record, Tab 8 at 716: with this figure reflecting $633 million less the $335 million claim of the Credit Facility Lenders.

[14] Fifth Report, Motion Record, Tab 8 at 719-720.

and their business. The purpose of the Plan is to preserve the going concern value of Just Energy's businesses, maintain employment for its more than 1000 employees and support the long-term viability of the business.[15]

PART III—LAW

10. The Credit Facility Lenders support the submissions of Just Energy with respect to the stringent four-part test for leave to appeal.[16]

11. In considering a leave application, the starting point is to remember the key role played by a CCAA judge, who has broad discretionary powers to provide the conditions under which a debtor can reorganize:

> It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors."[17]

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[15] Seventh Carter Affidavit at para 12, Motion Record, Tab 7 at 388-389.

[16] In determining whether leave should be granted, this court considers whether (a) the proposed appeal is *prima facie* meritorious or frivolous; (b) the points on the proposed appeal are of significance to the practice; (c) the points on the proposed appeal are of significance to the action; and (d) the proposed appeal will unduly hinder the progress of the action. See *Urbancorp Toronto Management Inc (Re)*, 2022 ONCA 181 ("***Urbancorp***") at para 3; *Stelco Inc (Re)*, 2005 CanLII 8671 (ON CA) at para 24; *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at para 34, application for leave to appeal discontinued, [2016] SCCA No 301; *Timminco Limited (Re)*, 2012 ONCA 552 at para 2; *DEL Equipment Inc (Re)*, 2020 ONCA 555 at para 12.

[17] *Grant Forest*, *supra* note 1 at para 103.

12. A supervising CCAA judge exercising such discretionary power is owed a high degree of deference.[18] Appellate courts must not substitute their own discretion. Indeed, appellate intervention is only justified "if the supervising judge erred in principle or exercised their discretion unreasonably."[19]

13. The Court of Appeal recently described the reason why leave to appeal in CCAA proceedings is only to be granted "sparingly" and "only where there are serious and arguable grounds that are of real and significant interest to the parties"[20] as follows:

> [20] First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the CCAA proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably" [citations omitted].
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> [21] Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests" [citations omitted].
>
> [22] Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.[21]

14. Each of these considerations is reflected in the decision of Justice McEwen in this case.

Discretionary Decision Appropriately Balanced Interests

15. U.S. Class Counsel argues that their appeal is *prima facie* meritorious because Justice McEwen refused to order the expedited process that they requested to adjudicate their clients'

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[18] *Canada v Canada North Group Inc*, 2021 SCC 30 ("***Canada North***") at paras 21-22.

[19] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 ("***Callidus***") at paras 53-54; See also *Urbancorp*, *supra* note 16; and *Laurentian*, *supra* note 1 at paras 19-20.

[20] *Crystallex International Corporation (Re)*, 2021 ONCA 87 at para 10.

[21] *Laurentian*, supra note 1 at paras 20-22; see also *Nortel Networks*, *supra* note 16 at para 34; *Callidus*, *supra* note 19 at paras 47, 53-54; *Edgewater Casino Inc (Re)*, 2009 BCCA 40 at paras 19-22.

alleged claims. They say this failed to allow their clients to meaningfully vote and was an error in respect of a proper balancing of interests.[22] However, U.S. Class Counsel fails to acknowledge, as Justice McEwen did, that there are other interests that must be balanced with their own, including the interests of other creditors and the fundamental interest of achieving a restructuring solution for the benefit of all stakeholders.

16. The Credit Facility Lenders are significant stakeholders of the Applicants, with nearly $335 million in secured debt. Together, the Credit Facility Lenders, DIP Lenders (and the related party which assumed the BP debt), Term Lenders, noteholders and Shell are owed approximately $1.2 billion, including approximately $900 million in secured debt. It is plain and obvious that any viable restructuring solution for the CCAA debtors must address this sizable debt.

17. In addition, these key stakeholders play a critical role in ensuring that the Just Energy debtors are sufficiently capitalized and able to continue operations going forward.

18. The motion below came before Justice McEwen at a time when the Applicants were working with this core group of stakeholders, including the Credit Facility Lenders, to develop a CCAA Plan to address these fundamental points. Indeed, Justice McEwen described in the Endorsement the "backdrop" against which the motion was brought, including that the Applicants, supported by the Monitor, were "working with their DIP Lenders (who are also the Term Loan Lenders, and the assignee of a large secured supplier claim from BP), the

[22] Moving Parties' Factum dated April 1, 2022 ("**Moving Parties' Factum**") at paras 50, 55.

Credit Facility Lenders and Shell who is also a significant, unsecured supplier" and "hopeful that an agreement on the Plan can be reached in the near future."[23]

19. Justice McEwen described this as a "critical juncture" in the restructuring and expressed concern that if the process proposed by U.S. Class Counsel was allowed to occur, "it would be a tremendous distraction from the restructuring."[24] His Honour understood that the discussions ongoing amongst key stakeholders were essential to achieve a restructuring solution and that the requested relief created "the possibility of derailing the ongoing, sensitive negotiations that are currently ongoing."[25]

20. In considering the appropriate balance in the case, Justice McEwen correctly and reasonably found that unlike the sensitive negotiations, which were at a critical stage, the concerns raised by U.S. Class Counsel were premature and could be raised in due course. Among other things, Justice McEwen noted:

> "If the order was granted it would allow the unsecured Class Claimants to partially dictate the form of the Plan *which has not yet been placed before this Court*. This runs contrary to the case law that allows debtors to determine how they should deal with creditors in a proposed plan – subject to a creditor vote."[26] [emphasis added]
>
> "the Applicants' Plan *has not yet been offered to the Court, nor has the issue of a meeting order been addressed – the CCAA process should be allowed to progress further before the adjudication proposed by U.S. Class Counsel is considered*."[27] [emphasis added]

[23] Endorsement at 3-4.

[24] Endorsement at.11.

[25] Endorsement at 16.

[26] Endorsement at 7.

[27] Endorsement at 11.

> "…overall, I am not of the view that the hotly contested Class Claims (both on liability and quantum) ought to [be] adjudicated before other claims *and prior to the next contemplated steps in the CCAA Proceedings*…"[28] [emphasis added]
>
> "*In due course, the Plan will be presented to the Court and the question of a meeting order will be dealt with. US Class Counsel will have the opportunity to make submissions.* This is preferable and fairer to all creditors than to have the Class Claims receive enhanced treatment insofar as an expedited hearing and production are concerned." [29] [emphasis added]

21. In making the Order, Justice McEwen appropriately and reasonably considered the very real impact the expedited process requested by U.S. Class Counsel could have on the sensitive negotiations required to produce a viable CCAA Plan. His Honour then balanced that against the interests of the uncertified class claimants who would have an opportunity to address any perceived unfairness during the typical CCAA process at the appropriate time.

22. This is precisely the type of balancing, and consideration of the evolving restructuring process, that a CCAA judge is best positioned to conduct.[30]

23. Moreover, it was plainly the right choice. Allowing the Applicants to continue to work closely with stakeholders holding nearly $1 billion in secured debt, subject to a complex Intercreditor arrangement, and whose support is required for ongoing operations, is essential to a successful restructuring. To allow such a process to be circumvented by an uncertified, contingent and unsecured claim – regardless of what dollar figure they unilaterally chose to add to their disallowed claim – would not be reasonable and would undermine the restructuring process.

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[28] Endorsement at 11-12.

[29] Endorsement at 15.

[30] See *Canada North*, *supra* note 18 at para 22 in which the Supreme Court of Canada indicated an appellate court is required to exercise "particular caution" before interfering with orders made by a CCAA judge in exercise of his or her discretion since: a) a supervising CCAA judge has a "difficult role of continuously balancing conflicting and changing interests"; and b) "orders are generally temporary or interim in nature and…the restructuring process is constantly evolving."

24. For these reasons, the appeal is not *prima facie* meritorious. Moreover, the interim nature of the Order, which makes clear that U.S. Class Counsel would have an opportunity to make submissions at an appropriate time, reflects that the Order is not of significance to the practice or this action. Leave to appeal should not be granted.

Request for Additional Productions

25. Briefly, the Credit Facility Lenders also note that the CCAA judge correctly held that the Applicants should not be compelled to produce information concerning the ongoing CCAA Plan negotiations to U.S. Class Counsel.

26. In the Endorsement, Justice McEwen rightly notes that "the secured lenders will not provide their consent to share information/documentation sought which concerns their confidential negotiations."[31] Justice McEwen noted that US Class Counsel should not be allowed to documentation concerning ongoing CCAA Plan negotiations and his Honour was "generally satisfied that adequate production has been made."[32]

27. U.S. Class Counsel does not appear to continue to challenge this decision; however, to the extent it is challenged, the Credit Facility Lenders confirm that the discussions and documentation relating to ongoing, without prejudice, Plan negotiations are confidential among the parties and include confidential information and positions of the Credit Facility Lenders.

[31] Endorsement at 13.
[32] Endorsement at 14.

28. Without prejudice discussions and confidential information of third parties, where such parties have not agreed to disclosure, must remain confidential. If parties were required to disclose their without prejudice negotiating positions and documentation to all other stakeholders in a CCAA process, parties would no longer be able to engage in forthright and productive discussions, which would impede their ability to achieve a restructuring solution.

29. Once again, the supervising CCAA judge appropriately exercised his discretion, correctly recognizing it would not further the restructuring process to allow production of confidential information to an unsecured, contingent creditor and that it would be inappropriate to compel production of the Credit Facility Lenders' confidential information without their consent.

PART IV—CONCLUSION

30. In all of the circumstances, the Credit Facility Lenders support the submissions of the CCAA Applicants and respectfully request that the motion for leave to appeal the Order be dismissed.

31. **ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29th day of April, 2022.

McCarthy Tétrault LLP

Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case
1.	*9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
2.	*Canada v Canada North Group Inc*, 2021 SCC 30.
3.	*Crystallex International Corporation (Re)*, 2021 ONCA 87.
4.	*DEL Equipment Inc (Re)*, 2020 ONCA 555.
5.	*Edgewater Casino Inc (Re)*, 2009 BCCA 40.
6.	*Grant Forest Products Inc v Toronto-Dominion Bank*, 2015 ONCA 570.
7.	*Laurentian University of Sudbury (Re)*, 2021 ONCA 199.
8.	*Nortel Networks Corporation (Re)*, 2016 ONCA 332, application for leave to appeal discontinued, [2016] SCCA No 301.
9.	*Stelco Inc (Re)*, 2005 CanLII 8671 (ON CA).
10.	*Timminco Limited (Re)*, 2012 ONCA 552.
11.	*Urbancorp Toronto Management Inc (Re)*, 2022 ONCA 181.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC. ET AL.

Court File No: CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE CREDIT FACILITY LENDERS
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