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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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., JUST ENERGY FINANCE HOLDING INC., 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.

(each, an "**Applicant",** and collectively, the "**Applicants")**

REPLY BRIEF OF AUTHORITIES OF THE MOVING PARTIES

May 9, 2022

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Court of Appeal File No. M53250
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COURT OF APPEAL FOR ONTARIO

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED
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(each, an "**Applicant",** and collectively, the "**Applicants")**

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Tab 1

2013 ONCA 518 (CanLII)

See paras. 6 and 7

COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2013 ONCA 518
DATE: 20130815
DOCKET: M42159

Laskin, Rosenberg and Tulloch JJ.A.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

Alan D'Silva, Ellen M. Snow and Ingrid Minott, for Chartis Insurance Company of Canada

Lyndon A.J. Barnes, for the Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited

Gavin H. Finlayson, for the Canadian Lawyers for The Informal Nortel Noteholder Group

R. Shayne Kukulowicz, for the Canadian Lawyers for the Official Committee of Unsecured Creditors

Barbara Walancik, for the Former Employees of Nortel

Robin B. Schwill, for the Joint Administrators of Nortel Networks UK Limited

Joseph Pasquariello, for the Monitor, Ernest & Young Inc.

Thomas McRae, for Nortel Canadian Continuing Employees

Alan Merskey, for the Applicants

Scott A. Bomhof, for Nortel Networks Inc.

2013 ONCA 518 (CanLII)

Considered in writing on: June 10, 2013

Application for leave to appeal the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated November 16, 2012, with reasons reported at 2012 ONSC 5653.

ENDORSEMENT

[1] The applicant, Chartis Insurance Company of Canada, seeks leave to appeal the order of the motion judge that it is required to pay the legal fees of Nortel's executives in respect of two proceedings without reference to the ten million dollar retention amount or the directors and officers trust fund.

[2] The motion judge held that Nortel Networks Corporation was subject to a pre-filing obligation to indemnify its directors and officers for their legal fees, but that it was precluded from doing so by the CCAA stay of proceedings. He interpreted the directors' and officers' insurance policy to mean that the retention amount did not apply, because payment was not "permitted". Therefore the insurer, Chartis, was required to indemnify the directors and officers now and not after the $10 million retention amount was depleted. He also interpreted the trust indenture to mean that the trustee of the $12 million trust account for the benefit of the directors and officers had full discretion as to whether to provide access to the trust funds. He was of the view that to permit Chartis to access those funds would be to improperly elevate Chartis over other unsecured creditors.

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[3] Chartis argues that the motion judge erred in finding the indemnification to be a pre-filing claim and therefore subject to the stay. Had he found that the obligation continued after the stay, he would have found that the retention amount applied. Chartis also argues that the motion judge erred in his interpretation of the trust indenture, in that the liability claims should be paid out of the trust.

[4] In our view, the motion judge's finding that the indemnification was a pre-filing claim and that allowing access to the trust would improperly elevate Chartis' priority were findings that were squarely within his expertise and entitled to deference. They involved the interpretation of his own Initial Order. His legal analyses of the directors and officers insurance policy and the trust indenture were not shown to contain any *prima facie* errors. These issues are specific to this case and not of broader interest to the practice or the public.

[5] In a CCAA proceeding, leave to appeal is granted sparingly and only where there are serious and arguable grounds of significant interest to the parties. The applicant has not succeeded in meeting the stringent test for leave to appeal as set out in *Re Timminco Ltd.*, 2012 ONCA 552, at paras. 2-3.

[6] The moving party included an unsealed affidavit in the moving party's Motion Record that was not before the motion judge. Fresh evidence on motions for leave to appeal is not admissible as of right. On a motion for leave from

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Divisional Court, it is only admissible with leave of the court and then only for a limited purpose. Weiler J.A. set out the appropriate procedure to follow for tendering fresh evidence on motions for leave to appeal in *Iness v. Canada Mortgage and Housing Corp.* (2002), 62 O.R. (3d) 255 (C.A.), at para. 15:

> [T]he party seeking to adduce evidence on the matter of public importance should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal. Similarly, any response to the affidavit should be filed with the responding materials on the leave motion. The panel hearing the application for leave to appeal would then consider the motion to admit the evidence on the issue of public importance when considering the leave application. Motions to strike affidavits and motions to cross-examine on such affidavit material would properly be made to the chambers judge.

[7] The moving party did not bring a motion for leave to admit the fresh evidence. The respondents did not bring a motion to strike, but the applicants below and the Monitor objected to its admissibility before the panel. The parties have not provided any submissions on the test to be applied on a motion for fresh evidence on an application for leave to appeal in CCAA proceedings. In the circumstances, we think it preferable to deal with the question of the appropriate test for fresh evidence on a motion in which the issue has been fully argued.

[8] Given that there was no motion for leave to admit the fresh evidence, it was not considered.

[9] Leave to appeal is denied.

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[10] Costs are awarded to the three groups of responding parties as follows: $3,000 to the applicants below (the Nortel companies) and the Monitor (who filed joint materials), $1,000 to the former directors and officers of Nortel, and $1,000 to Nortel Networks Inc. and the other U.S. Debtors and the Official Committee of Unsecured Creditors (who filed joint materials).

Tab 2

See para. 15

Iness v. Canada Mortgage and Housing Corporation and
Caroline Co-operative Homes Inc. et al.

[Indexed as: Iness v. Canada Mortgage and Housing Corp.]

62 O.R. (3d) 255
[2002] O.J. No. 4334
Docket Nos. M29024 and M29044 (M28836)

Court of Appeal for Ontario,
Weiler J.A. (in chambers)
November 15, 2002

Appeal -- Application for leave to appeal order of Divisional Court to the Court of Appeal -- Applicant filing affidavits on the public importance of the legal issue raised by the appeal -- Court of Appeal may grant leave for applicant to file affidavits about public importance -- Affidavit should be limited to factual information and not express opinions about the legal issue to be decided -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1)(a) -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 61.03.1 [page256]

EI filed a complaint with the Ontario Human Rights Commission against Caroline Co-operative Homes Inc. (the "Co-op"), which operated pursuant to an agreement with Canada Mortgage and Housing Corporation ("CMHC"). Her complaint was filed because the Co-op had changed its policy about charging rent as a result of a directive from CMHC. She alleged that the policy discriminated against those receiving provincial social assistance. A Board of Inquiry was appointed and, despite CMHC's argument that as a federal Crown corporation, it was not subject to provincial human rights legislation, it was added as a party. CMHC sought judicial review, and the Divisional Court granted its application and quashed the Board's order. Under s. 6(1)(a) of the Courts of Justice Act, R.S.O. 1990, c. C.43, EI

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sought leave to appeal to the Court of Appeal. In support of her application for leave, she filed two affidavits in which the deponents described the public importance of the legal issues raised by the appeal. CMHC moved to have the affidavits struck out.

Held, the motion should be dismissed save that certain paragraphs of the affidavits should be struck out.

On an application for leave to appeal to the Court of Appeal, pursuant to s. 6(1)(a) of the Courts of Justice Act, affidavit material about the public importance of the legal issues raised on the appeal cannot be filed as of right. However, the court may grant leave to file such an affidavit in appropriate circumstances. The affidavit must be relevant to the issue of public importance, and the extent of the impact of the court's decision is one factor to be considered in determining the question of public importance. Affidavits or portions of them that simply express opinions on the very issues raised may be struck, and the affidavit should limit itself to factual information. Except for several paragraphs, the affidavits in the immediate case were proper in form and in their content. The improper paragraphs should be struck out, but leave should be granted to adduce the remainder of the two affidavits as evidence of the public interest. In this case, cross-examination on the affidavits would not be useful and leave to cross-examine should be denied, although CMHC may file contradictory affidavit evidence in response to those portions of the affidavit that it submits are inaccurate.

In the future, a party seeking to adduce evidence on the matter of public importance should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal. Any response to the affidavit should be filed with the responding material on the leave motion. The panel hearing the application for leave to appeal will consider the motion to admit evidence when considering the leave application. Motions to strike affidavits and motions to cross-examine on such affidavit material may be made to the chambers judge.

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Cases referred to

Ballard Estate v. Ballard Estate, [1991] S.C.C.A. No. 239; Canada Mortage and Housing Corp. v. Iness, [2002] O.J. No. 2761 (Quicklaw) (Div. Ct.); Markevich v. Canada, [2001] S.C.C.A. No. 371; R. v. Palmer, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22 (sub nom. Palmer and Palmer v. R.); Sault Dock Co. v. Sault Ste. Marie (City), [1973] 2 O.R. 479, 34 D.L.R. (3d) 327 (C.A.); Thomas Furniture Ltd. v. Borooah (2002), Docket M28743; United Glass and Ceramic Workers of North America (AFL-CIO-CLC), Local 246 and Dominion Glass Co. Ltd. (Re), [1973] 2 O.R. 763, 35 D.L.R. (3d) 247 (C.A.)

Statutes referred to

Canadian Human Rights Act, R.S.C. 1985, c. H-6
Constitution Act, 1867 (U.K.), 1867, c. 3, s. 91(1A) [page257]
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1)(a)
Human Rights Code, R.S.O. 1990, c. H.19

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 39.01, 61.03 [as am.], 61.03.1
Rules of the Supreme Court of Canada, SOR/2002-156, s. 25(1)(b)
Court of Appeal Rules, B.C. Reg. 297/2001, rule 7, Form 4

MOTION to strike affidavits filed on an application for leave to appeal to the Court of Appeal from a decision of the Divisional Court.

Raj Anand and Marie-Andre Vermette, for respondent (moving party).
Alan L.W. D'Silva and Sophie Vlahakis, for the applicant (responding party).
Margaret Leighton, for the Board of Inquiry.

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[1] WEILER J.A. (in Chambers): -- Eleanor Iness has brought an application for leave to appeal a decision of the Divisional Court. In support, she has filed two affidavits on the public importance of the legal issue raised. The [Canada] Mortgage and Housing Corporation ("CMHC") has brought a motion to strike these affidavits from the record, leaving this court to decide the narrow issue of whether or not affidavit evidence may be filed on the question of public importance of the appeal.

[2] The background to the motion is as follows. Iness filed a complaint with the Ontario Human Rights Commission (the "Commission") on May 15, 1995 against Caroline Co-operative Homes Inc. (the "Co-op"), a rent-geared-to-income co-op operating pursuant to an agreement with CMHC. Up until that time, Iness, and all other persons living at the Co-op, had been charged rent geared-to-income amounting to 25 per cent of income regardless of its source. On January 1, 1995, the Co-op changed its policy and Iness was charged the maximum amount of her shelter allowance as rent. The result was that she now had to pay $27.50 per month toward hydro and insurance costs out of the living portion of her allowance. Other residents of the Co-op not in receipt of public assistance continued to simply pay 25 per cent of income. Iness alleged discrimination against her on the prohibited ground of receipt of provincial social assistance. A Board of Inquiry was appointed and both Iness and the Co-op sought to add CMHC as a party.

[3] The Co-op's position was that it was obliged to comply with a directive from CMHC stating that housing costs for members in receipt of social assistance were to be calculated in a different manner from those income tested members not in receipt of [page258] social assistance. CMHC opposed the motion to add it as a party on the basis that it is a federal crown corporation operating pursuant to federal legislation and exercising its federal spending power pursuant to s. 91(1A) of the Constitution Act, 1867 (U.K.), 1867, c. 3. As such, it claims it is not subject to provincial human rights legislation but only the Canadian Human Rights Act, R.S.C. 1985, c. H-6, which is a complete code regarding human rights in the federal sphere. On June 13, 2001, the Board of Inquiry held that CMHC

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was subject to the Ontario Human Rights Code, R.S.O. 1990, c. H.19, and added CMHC as a party. CMHC sought judicial review of the Board's decision before the Divisional Court and, on July 8, 2002, the Divisional Court agreed with CMHC's position, quashing the Board's order: Canada Mortgage and Housing Corp. v. Iness, [2002] O.J. No. 2761 (Quicklaw) (Div. Ct.).

[4] Iness is seeking leave to appeal to this court. Under s. 6(1)(a) of the Courts of Justice Act, R.S.O. 1990, c. C.43, appeals from a decision of the Divisional Court will only be granted with leave on a question that is not a question of fact alone. The possibility that there may be an error in the judgment or order sought to be appealed will not generally be a ground in itself for granting leave. Matters considered in granting leave include: (a) whether the Divisional Court exercised appellate jurisdiction (in which case the applicant for leave is seeking a second appeal) or whether the Divisional Court was sitting as a court of original jurisdiction; (b) whether the appeal involves the interpretation of a statute or regulation including its constitutionality; (c) the interpretation, clarification or propounding of some general rule or principle of law; and (d) whether the interpretation of the law or agreement in issue is of significance only to the parties or whether a question of general interest to the public or a broad segment of the public would be settled for the future: Re United Glass and Ceramic Workers of North America (AFL-CIO-CLC), [1979] 2 O.R. 763 (C.A.); Sault Dock Co. v. Sault Ste. Marie (City), [1973] 2 O.R. 479, 34 D.L.R. (3d) 327 (C.A.).

[5] The two affidavits filed by Iness as part of her leave motion are intended to support her position that the questions of law raised are a matter of public importance. The affidavits purport to address the number of co-ops and non-profit housing corporations that are, like the Co-op, funded by CMHC's "s. 56.1" program and to further describe how that funding program works. CMHC opposed the filing of the affidavits on the basis that they do not comply with the test for the admission of fresh evidence set out in R. v. Palmer, [1980] 1 S.C.R. 759 at p. 775, 106 D.L.R. (3d) 212 and it also disagrees with much of the content in the affidavits.

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[6] Iness took the position she was entitled as of right to file the affidavits based on the endorsement of Simmons J.A. (in chambers) [page259] on August 8, 2002 in Thomas Furniture Ltd. v. Borooah, Docket M28743. Alternatively, Iness seeks leave to file the affidavits. The first question, therefore, is whether a moving party may file affidavits on a motion for leave to appeal to address the issue of public importance, and if so, whether the filing of such an affidavit is as of right or whether leave is required. If such affidavits may be filed, but only with leave, the question then becomes when leave should be granted.

[7] Rule 61.03.1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 governs motions for leave to appeal to the Court of Appeal. Subrule 2 of rule 61.03.1 states that a motion record, factums and transcripts, if any, are to be served. The documents to be contained in the motion record are those listed in rule 61.03(2).12 The rule does not state that the motion record cannot contain any other materials. In Thomas Furniture, supra, Simmons J.A. dealt with the question whether affidavit material on the public importance of the matter could nonetheless be filed. She endorsed the record in part as follows: [page260]

> I do not read rule 61.03.1 as prohibiting a party from filing evidence on a motion for leave to appeal to address whether the proposed appeal raises an issue of public importance, nor, in my view, have any authorities been filed that establish that such evidence should be prohibited.

In the motion before her, however, she held that there was no basis for concluding that the affidavit of David Butler was admissible as addressing an issue of public importance. Rather, it dealt with matters relevant to the interpretation of the by-law that could have been raised previously.

[8] I do not read the decision of Simmons J.A. as indicative that affidavit evidence on the question of public importance can be filed as of right. Rather, it supports the conclusion that the court may grant leave to file such an affidavit in

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appropriate circumstances. This conclusion is further supported by an examination of the approach taken in two other jurisdictions where the filing of such affidavit material is expressly permitted.

[9] The Rules of the Supreme Court of Canada, SOR/2002-156, s. 25(1)(b) expressly permit the filing of "any affidavits in support of the application for leave to appeal". No separate leave is required to file such an affidavit, though the responding party may make a motion to strike the affidavit out if it is not relevant or contains improper submissions: Ballard Estate v. Ballard Estate, [1991] S.C.C.A. No. 239. Similarly, the British Columbia Court of Appeal Rules, B.C. Reg. 297/2001, rule 7 and Form 4 also envisage the filing of such affidavit material. In the absence of any rule expressly permitting the filing of an affidavit concerning the issue of the public importance of an appeal, I am of the opinion that the matter is discretionary and leave must be obtained.

[10] The question therefore is whether this is an appropriate case in which to grant leave and allow the affidavits to be filed. The Palmer test is of no assistance on the issue before me; it is directed to the admissibility of fresh evidence affecting the substance of a decision as opposed to its process. The decision of the Supreme Court in Markevich v. Canada, [2001] S.C.C.A. No. 371 is much more pertinent to a motion to strike an affidavit filed in support of granting leave to appeal. Markevich implicitly states that the affidavit in question must be relevant to the issue of public importance. The extent of the impact of the court's decision is one factor to be considered in determining the question of public importance. In that case, the impact centred on a dollar figure -- the ability of the public purse to collect tax debts. Affidavit evidence filed by the appellant seeking leave to appeal stated that significant amounts of taxes would become uncollectable if the judgment of the lower court was allowed to [page261] stand. This was held to be entirely relevant to the issue of the national importance of the legal question raised, and the affidavit evidence was allowed. In addition, the request of the respondent on appeal for leave to examine the individual who had filed the affidavit was rejected. All

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the Supreme Court wanted to know was that a "substantial amount may be involved". They did not wish to become bogged down in superfluous debate over the exact figure.

[11] The affidavit evidence before me similarly establishes the wide impact of the Divisional Court's decision. While it focuses on the number of persons affected rather than a dollar value, the affidavits are relevant in that they go to the importance of the court's decision on the broader public beyond the parties involved directly. Relevance, however, is not the only question to consider when granting leave to file affidavits on the issue of public importance. The Supreme Court struck out affidavits in Ballard Estate, supra, when they simply expressed matters of opinion on the very issues raised on appeal. Ballard Estate contrasted this opinion evidence to "statistical data as to the effects of a decision [which] may be of great assistance". Any affidavit submitted on the issue of public importance should limit itself to factual information. Otherwise, expert legal opinion to the effect that the issue between the parties raises questions of public importance is inappropriate as this is the very issue for the court to decide on the leave application.

[12] An examination of the affidavits of J. David Hulchanski and Mary Todorow reveals that, for the most part, they confine themselves to statistical data. While CMHC claims that the affidavits go to the substantive issues in this matter by discussing CMHC's role in the housing industry and funding, these paragraphs are incidental to the main purpose of the affidavit, namely, a demonstration of the wide impact that the court's decision will have. The fact that this evidence was available to counsel at the time of the initial motion before the Board of Inquiry is irrelevant, it is only at this stage that Iness must demonstrate the public importance of the issues raised.

[13] CMHC further objects to the affidavits on the basis of form, claiming that they do not meet the standard of rule 39.01. On the whole, both affidavits are acceptable to the court in that each affiant states that they have "knowledge of the matters herein deposed": Affidavit of J. David Hulchanski

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at para. 2, Affidavit of Mary Todorow at para. 3. Hulchanski's affidavit, however, steps over the line into opinion in para. 9 where he states, in part, "Protection from discrimination in access to subsidized rental units is of critical importance for disadvantaged [page262] groups in Ontario, including social assistance recipients." Paragraph 10 also deviates from an analysis of the number of people affected by the CMHC and the structure of its programs. Paragraph 14 of Todorow's affidavit similarly crosses into opinion when she states that "CMHC is the author of the shelter component requirement, which is potentially discriminatory under the [Ontario Human Rights] Code." I would therefore strike paras. 9 and 10 from the affidavit of J. David Hulchanski and para. 14 of the affidavit of Mary Todorow, but grant leave to adduce the remainder of these two affidavits as evidence as to the public interest.

[14] Finally, CMHC disagrees with some of the statements in the affidavits. It wishes to cross-examine on them and also wishes to file affidavit evidence. I cannot see that cross-examination on the affidavits will serve a useful purpose. As in Markevich, the exact number of persons affected by the decision is not pertinent. It is the general picture which is important. Consequently, leave to cross-examine on the affidavits is denied. CMHC is at liberty to file contradictory affidavit evidence in response to those portions of the affidavit that it submits are inaccurate.

[15] In the future, it seems to me that the party seeking to adduce evidence on the matter of public importance should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal. Similarly, any response to the affidavit should be filed with the responding materials on the leave motion. The panel hearing the application for leave to appeal would then consider the motion to admit the evidence on the issue of public importance when considering the leave application. Motions to strike affidavits and motions to cross-examine on such affidavit material would properly be made to the chambers judge.

[16] CMHC's motion for an order striking out the affidavits of Hulchanski and Todorow is therefore dismissed, but only in

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part. Paragraphs 9 and 10 of the affidavit of J. David Hulchanski and para. 14 of the affidavit of Mary Todorow shall be struck out, and leave to admit the remainder of these affidavits is granted.

[17] Both sides have agreed to bear their own costs of this motion.

Order accordingly.

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Tab 3

See para. 17

DATE: 20030210
DOCKET: M29462
C37941

2003 CanLII 36977 (ON CA)

COURT OF APPEAL FOR ONTARIO

CRONK J.A. (in chambers)

B E T W E E N :	)	
	)	
Terence G. Gain and Donna L. Gain	)	Bernard Eastman,
	)	for the applicants
	)	(respondents in appeal)
Applicants	)	
(Respondents in appeal)	)	
	)	
- and -	)	
	)	
	)	
Ideal Milk Haulage Limited and The Corporation of the Township of Otonabee-South Monaghan	)	Michael Miller,
	)	for the respondent
	)	(appellant in appeal)
	)	
Respondent	)	
(Appellant in appeal)	)	
	)	
	)	**Heard:** January 30, 2003

CRONK J.A.:

[1] This is a motion for directions concerning the cross-appeals by The Corporation of the Township of Otonabee-South Monaghan (the "Township") from the judgments of Ferguson J. of the Superior Court of Justice dated February 20, 2002 and August 6, 2002.

2003 CanLII 36977 (ON CA)

I. BACKGROUND

[2] This case originated in a dispute between two neighbours, the applicants on this motion, Terence G. Gain and Donna L. Gain, and Ideal Milk Haulage Limited ("IMHL"), concerning the use by IMHL of property purchased by it in or about 1999, which was situated near the home of the applicants. IMHL used its property for a milk transportation depot. This involved 18 to 20 trips by diesel trucks, on a daily basis, in and out of the property, 7 days per week, including three trips daily between approximately 12:00 a.m. and 6:00 a.m. The applicants claimed that IMHL's use of its property interfered with their enjoyment of their home, and regularly disturbed their sleep. Accordingly, they brought an application for a declaration that IMHL was using its property for purposes not permitted under the applicable municipal zoning by-law, an order restraining such use by IMHL, and an order requiring IMHL to comply with the zoning provisions of the by-law. The applicants sought no relief against the Township.

[3] By judgment dated February 20, 2002, the applications judge: (1) granted a declaration that IMHL, at the time of the application, was using its property for uses which were not permitted by the applicable Township zoning by-law; (2) ordered that IMHL forthwith cease using its property for other than residential, business office, maintenance garage, or other uses as specifically permitted by the Township by-law; (3) declined to order that IMHL comply with the zoning provisions of the Township's zoning by-law; and (4) ordered that a shed located on IMHL's property be used in the future only for one of the permitted industrial uses specified by the Township's by-law and that, if the proposed use of the shed was for a permitted industrial use, IMHL was not required to comply with the zoning requirements of the by-law. The reasons and supplementary reasons for judgment of the applications judge concerning those orders were released on February 20, 2002 and May 20, 2002.

[4] In addition, by judgment dated August 6, 2002, the applications judge granted the applicants their costs of the application, fixed in the amount of $91,107, inclusive of disbursements and Goods and Services Tax. He further ordered that, of the costs awarded to the applicants, IMHL was required to pay the sum of $61,107 to the applicants, and the Township was required to pay the sum of $30,000 to the applicants (the "Costs Reasons").

[5] IMHL appealed part of the February 20, 2002 judgment of the applications judge. The applicants cross-appealed that part of the applications judge's decision set out in his reasons for judgment dated May 20, 2002. The Township cross-appealed from the three decisions of the applications judge, including from his judgment concerning costs.

[6] On September 20, 2002, IMHL abandoned its appeal and, within a matter of days, paid the costs which it was ordered to pay under the Costs Reasons.

[7] When IMHL decided to sell its property, the applicants reached an agreement, dated October 18, 2002, with the proposed purchasers of the property, whereby it was agreed that IMHL's property could be used in the future for residential purposes only (the "Land Use Agreement"). The applicants allege that the Land Use Agreement was registered on title, and that it is binding on IMHL's successors in interest, including any subsequent purchaser of the IMHL property.

[8] On November 15, 2002, Labrosse J.A. of this court granted the Township an extension of time within which to cross-appeal from the judgments of the applications judge. That extension was necessary because the Township had not commenced its cross-appeals on a timely basis. Given that IMHL had abandoned its appeal, Labrosse J.A. also ordered that the Township proceed as the primary appellant.

[9] On November 29, 2002, IMHL sold its property to the persons with whom the applicants entered into the Land Use Agreement. On December 16, 2002, the applicants abandoned their cross-appeal as required by the terms of the Land Use Agreement. Accordingly, at present, only the Township's cross-appeals are outstanding. The Township wishes to proceed with those cross-appeals.

II. RELIEF SOUGHT BY THE APPLICANTS

[10] The applicants seek directions from this court concerning:

(1) whether the Land Use Agreement, and events associated with it, render the cross-appeals moot; and

(2) the contents of the appeal and exhibit books to be used on the cross-appeals, and the Township's obligation to serve a certificate respecting evidence under rule 61.05(1) of the *Rules of Civil Procedure*.

The applicants also seek an extension of time within which to deliver their factum, should the cross-appeals proceed.

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III. PRELIMINARY ISSUE ON MOTION

[11] In response to the applicants' motion, the Township filed an affidavit by Ann-Marie Tindale, a law clerk in the offices of the solicitors for the Township, sworn on January 23, 2003.

[12] At the outset of the argument of this motion, counsel for the applicants objected to certain of the contents of Ms. Tindale's affidavit. In particular, he argued that counsel for the Township, Michael Miller, should not be permitted to argue this motion because the affidavit relied upon by his client in response to the motion had been sworn by Mr. Miller's law clerk based on information provided, and known, solely by Mr. Miller. For that reason, counsel for the applicants initially argued that Ms. Tindale's affidavit should be wholly disregarded on the motion. However, after further consideration, the applicants' counsel restricted his objection to the contents of paragraph 13 of Ms. Tindale's affidavit. Counsel for the Township agreed, for the purpose of this motion, that I should not have regard to that paragraph of Ms. Tindale's affidavit. Accordingly, I have not taken paragraph 13 of Ms. Tindale's affidavit into account in arriving at my decision.

IV. MOOTNESS ISSUE

[13] The applicants argue that the issues concerning the use of IMHL's former property, as considered by the applications judge, are moot. They rely on the Land Use Agreement, and on the alleged fact that the covenant in the Land Use Agreement concerning the future use of the land was registered on title, in order to run with the land and to be binding on any successors in title.

[14] The applicants submit that a single judge of this court has jurisdiction to provide directions concerning the mootness issue. In the alternative, they seek an order permitting them to file an affidavit on the Township's cross-appeals, setting out the basis of their mootness argument.

[15] In my view, the applicants' motion for directions on the mootness issue must be dismissed.

[16] Under rule 61.16(2.2) of the *Rules of Civil Procedure*, a motion to this court for an order that finally determines an appeal, other than an order dismissing the appeal on consent, must be heard and determined by a panel of three judges of this court sitting together. If the directions sought by the applicants on the mootness issue were to be provided, and if I were to conclude that all or some of the issues raised by the Township

in its cross-appeals are moot as a result of events post-dating the judgments of the applications judge, I would, in effect, be finally determining those issues. Accordingly, under rule 61.16(2.2), determination of the mootness issue, and its consequences if the applicants' assertion of mootness is accepted, must be made by the panel hearing this appeal.

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[17] For similar reasons, I deny the alternative relief sought by the applicants, that is, an order permitting them to file an affidavit on the cross-appeals setting out the basis of the alleged mootness argument. The evidence sought to be introduced by the applicants to ground their mootness argument is evidence concerning events which occurred after the date of the judgments of the applications judge. Accordingly, it is fresh evidence which they may seek to place before the panel hearing the cross-appeals according to the usual rules governing the admission of fresh evidence on appeals to this court. It is for the panel hearing the cross-appeals to determine whether the fresh evidence is properly admissible.

V. CONTENTS OF THE TOWNSHIP'S APPEAL AND EXHIBIT BOOKS AND THE TOWNSHIP'S OBLIGATIONS UNDER RULE 61.05(1)

[18] The applicants allege that the Township failed to comply with rule 61.05(1) of the *Rules of Civil Procedure* by failing to serve a certificate respecting evidence, despite request therefor by the applicants. They also allege that materials relevant to the issues raised on the cross-appeals have been omitted from the appeal and exhibit books filed by the Township. In that connection, the applicants contend that the following omitted materials are relevant to the cross-appeals:

(i) the applicants' affidavits, sworn on March 3, 2002, relating to the costs hearing before the applications judge (the "Gain Affidavits");

(ii) the factum filed by the Township on the application, in which the Township sought costs of the application;

(iii) the transcript of that part of the proceedings below, when the applications judge ruled that the Township could participate in the application, subject to any costs award that ultimately might be made;

(iv) the transcript of that part of the proceedings below pertaining to discussion of *Beer v. Hayes*, [2001] O.J. No. 4062;

(v) the exhibits on the cross-examination of Mr. R. Beckstead;

(vi) a copy of a "flyer" circulated to residents of the Township in July 1999, as referenced in the Costs Reasons; and

(vii) copies of all bills of costs, disbursements calculations, and written submissions of the applicants on costs, as filed with the applications judge.

I will address each of these matters in turn.

(i) the Township's certificate respecting evidence

[19] The Township does not object to filing a certificate respecting evidence. However, in response to the assertion that it failed to comply with rule 61.05(1), the Township points to the certificate respecting evidence filed by IMHL on its appeal. In that certificate, dated March 15, 2002, counsel for IMHL certified that all of the affidavit evidence, and all of the transcripts of cross-examinations, filed with the Superior Court of Justice for use at the hearing of the application, were required for the appeal. Based on that expansive certificate, the Township claims that it understood that there was no dispute concerning the evidence required pursuant to rule 61.05(1) for use on the cross-appeals. Accordingly, it did not file its own certificate.

[20] The certificate respecting evidence served by IMHL was filed in IMHL's appeal from part of the February 20, 2002 judgment of the applications judge. It did not concern the decision of the applications judge set out in his May 20, 2002 supplementary reasons for judgment, or the costs decision of the applications judge as set out in his Costs Reasons, neither of which was appealed by IMHL. For that reason alone, the Township should file a certificate respecting evidence in connection with its cross-appeals. In addition, given the procedural history of this matter, and the fact that the Township is now the designated appellant, it is advisable that the Township comply with rule 61.05(1). Accordingly, I order that the Township serve and file with this court its certificate respecting evidence in connection with its cross-appeals, as contemplated by rule 61.05(1), within 10 days from the date of this order.

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(ii) the Gain Affidavits

[21] Much of the argument on this motion concerned whether the Gain Affidavits should form part of the materials filed with this court to be considered on the Township's cross-appeals.

[22] The applicants argue that the exhibits to one or both of the Gain Affidavits provide evidence concerning offers to settle, the Township's alleged change of position at the hearings before the applications judge despite an agreement or undertaking by the Township to remain neutral, and the dockets submitted to the applications judge on behalf of Mr. Gain, a solicitor, and by counsel for the applicants.

[23] The Township opposes the inclusion of the Gain Affidavits in its appeal book on the basis that the applications judge did not consider them in arriving at his decision concerning costs. The Township relies on the following passage from the Costs Reasons:

> The Applicants rely on their affidavits filed on the issue of costs. Those affidavits describe a long history of activity concerning this dispute and are relied on to support an award of solicitor and client costs on a ground of misbehaviour by the Township and Ideal Milk. I am not going to consider that material. I accept the submission of Mr. Miller that if the Applicants seek some compensation based on that history they should have raised it in the Application. I am concerned only with conduct relating to the conduct of this litigation.

[24] However, the applications judge later stated in his Costs Reasons:

> For purposes of convenience, I shall analyse the costs of the Applicants with reference to the summary at p. 9 of Tab A of the Applicants' Record Re Costs Submissions.

[25] Thereafter, in the next 11 paragraphs of his Costs Reasons, the applications judge referred to the hourly rates charged by counsel for the applicants and by Mr. Gain for his own time, and to the hours and the total costs, the counsel fees, the disbursements, and the Goods and Services Tax claimed by the applicants. Information relating to those issues, the applicants contend, is set out in the Gain Affidavits or in the exhibits attached thereto. The applicants further argue that in responding to the Township's cross-appeal from the costs decision of the applications judge, they should be permitted to refer to the contents of the Gain Affidavits concerning the Township's conduct.

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[26] Counsel for the Township concedes that the quoted passages from the Costs Reasons indicate that, in arriving at his decision concerning costs, the applications judge considered the dockets submitted on behalf of the applicants. Although counsel for the Township further concedes that those offers to settle which form part of the Gain Affidavits should be included in the Township's appeal book, he disputes the relevance of the remainder of the Gain Affidavits.

[27] In my view, it is possible to interpret the applications judge's statement that he was "not going to consider" the Gain Affidavits as meaning that he was not going to consider those parts of the Gain Affidavits which address the alleged improper past behaviour of the Township. That does not mean that the applications judge did not consider other parts of the Gain Affidavits. As set out in the Costs Reasons, it appears that the applications judge did consider those parts of the Gain Affidavits relating to the fees, disbursements, and Goods and Services Tax claimed by the applicants. It is not clear whether he also considered the offers to settle attached as exhibits to Mr. Gain's affidavit of March 3, 2002.

[28] I have reviewed the Gain Affidavits and the applicants' undated record concerning costs submissions, as filed with the applications judge. Page 9 of Tab "A" and Tabs "B" to "D", inclusive, of that record pertain to the applicants' bills of costs, docketed time, and fees and disbursements claimed. Those materials, in my view, are relevant to the Township's cross-appeal from the costs decision of the applications judge.

[29] Part only of the Gain Affidavits, which were filed with the applications judge as part of the applicants' record on the costs hearing, appear to concern the fees and disbursements claimed by the applicants. Other parts of the Gain Affidavits concern the alleged conduct of the Township.

[30] On the record before me, it is not possible to identify with certainty those parts of the Gain Affidavits that were considered by the applications judge. In addition, in my view, the applicants are entitled to rely on those parts of the Gain Affidavits which they claim properly bear on the costs disposition of the applications judge.

[31] Accordingly, I conclude that it is necessary that page 9 of Tab "A" and Tabs "B" to "D", inclusive, of the applicants' record below concerning costs, and the Gain Affidavits sworn on March 3, 2002, and the exhibits attached to those affidavits, be included by the Township in a supplementary appeal book to be filed by it in accordance with these reasons. The panel hearing the cross-appeals will determine if those materials are relevant to the issues raised on the Township's cross-appeal from the costs decision of the applications judge.

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(iii) the factum filed by the Township on the application

[32] The applicants seek to have the factum filed by the Township on the application included in the Township's appeal book filed on its cross-appeals, for the purpose of establishing that the Township sought an award of costs in its favour. Counsel for the Township acknowledged that fact during oral argument of this motion. Given that acknowledgement, upon which the applicants may rely during argument of the Township's cross-appeals, the inclusion in the Township's appeal book of the Township's factum filed on the application is unnecessary.

(iv) the transcript of that part of the proceedings below, when the applications judge ruled that the Township could participate in the application, subject to any costs award that ultimately might be made

[33] As I understand the submissions of the applicants, this part of the transcript is sought to be included in the Township's appeal book for the purpose of establishing that the Township's participation in the proceedings before the applications judge was conditional on the Township's exposure to potential liability in costs. Counsel for the Township acknowledged that fact during oral argument of this motion. Given that acknowledgement, upon which the applicants may rely during argument of the Township's cross-appeals, the inclusion in the Township's appeal book of the requested transcript extract is unnecessary.

(v) the transcript of that part of the proceedings below pertaining to discussion of Beer v. Hayes, [2001] O.J. No. 4062.

[34] This transcript excerpt, pertaining to discussion of *Beer v. Hayes*, is now available to counsel for the applicants. The Township does not object to the inclusion of that transcript excerpt in its appeal book, providing that counsel for the applicants furnishes the Township's counsel with a copy of the excerpt. Accordingly, the applicants are directed to provide the relevant transcript excerpt to counsel for the Township within 10 days from the date of this order, and the Township is directed to include that excerpt in a supplementary appeal book to be filed by it in accordance with these reasons.

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(vi) the exhibits on the cross-examination of Mr. R. Beckstead

[35] The Township acknowledges that the exhibits on the cross-examination of Mr. Beckstead should have been included in its original appeal book, as filed with this court. Accordingly, the Township is directed to include a copy of those exhibits in a supplementary appeal book to be filed by it in accordance with these reasons.

(vii) the flyer circulated to residents of the Township in July 1999

[36] Neither counsel for the applicants nor counsel for the Township could assist concerning whether the flyer in dispute was marked as an exhibit or otherwise admitted by the applications judge as part of the materials properly before him. However, the Township does not object to the inclusion of a copy of the flyer in its appeal book. Accordingly, the Township is directed to include a copy of the flyer in a supplementary appeal book to be filed by it in accordance with these reasons.

(viii) the bills of costs, disbursements calculations, and written submissions of the applicants on costs, as filed with the applications judge

[37] The applicants argue that all bills of costs, disbursements calculations, and written submissions by them on costs, as filed with the applications judge, are relevant to the Township's cross-appeal concerning the applications judge's costs decision. I have already concluded that page 9 of Tab "A", and Tabs "B" to "D", inclusive, of the applicants' record concerning costs submissions, as filed with the applications judge, are to be included by the Township in its supplementary appeal book to be filed in accordance with these reasons.

[38] The Township argues that the applicants' previous costs submissions are not relevant to the Township's cross-appeals. In the alternative, to the extent that such costs submissions are relevant to the cross-appeals, the Township submits that the applicants are free to repeat their submissions on costs to the panel hearing the cross-appeals. I agree. Accordingly, save as earlier directed in these reasons, the written costs submissions of the applicants, as filed with the applications judge, need not be included in the Township's appeal book filed on its cross-appeals.

[39] One further observation concerning the disputed materials in connection with the Township's appeal and exhibit books is appropriate. In my view, with minimal co-

operation between counsel, many of those issues raised, and argued in detail, on this motion could have been resolved without the necessity for argument of this motion.

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VI. EXTENSION OF TIME FOR DELIVERY OF THE APPLICANTS' FACTUM

[40] In their notice of motion, the applicants sought an order extending the time for delivery of their factum on the cross-appeals. However, that matter was not addressed by counsel during oral argument of this motion. In addition, the applicants' motion materials do not specify the length of the extension requested. Accordingly, within 7 days from the date of this order, the applicants shall provide a letter to the Registrar, copied to counsel for the Township, outlining the length of the extension requested. The Township's responding position, if any, shall be provided by letter to the Registrar, copied to the applicants' counsel, within 7 days from the date of delivery to the Registrar of the applicants' letter. In the circumstances, I would not expect either letter to exceed two pages in length.

VII. DISPOSITION

[41] Accordingly, for the reasons given, the Township is directed to serve and file, within 14 days from the date of this order, a supplementary appeal book or books containing the materials required by these reasons to be contained therein. The Township's certificate respecting evidence shall be filed within 10 days from the date of this order. As success on this motion is divided, no award of costs on this motion is appropriate.

RELEASED:

"EAC"

_____"E.A. Cronk J.A."

Tab 4

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 21st
	)	
JUSTICE MCEWEN	)	DAY OF APRIL, 2022

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.
(each, an "**Applicant**", and collectively, the "**Applicants**")

ORDER
(Stay Extension)

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order extending the Stay Period (as defined in paragraph 17 of the Second Amended and Restated Initial Order, granted May 26, 2021) was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the Notice of Motion of the Applicants, the Affidavit of Michael Carter sworn April 14, 2022, including the exhibits thereto, the Eighth Report of FTI Consulting Canada Inc. in its capacity as monitor (the "**Monitor**") dated April 7, 2022 (the "**Eighth Report**"), the Ninth Report of the Monitor dated April 18, 2022 (the "**Ninth Report**"), and on hearing the submissions of respective counsel for the Applicants, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Emily Paplawski, affirmed April 14, 2022, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

STAY EXTENSION

2. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including May 26, 2022.

APPROVAL OF MONITOR'S REPORT

3. **THIS COURT ORDERS** that that the activities and conduct of the Monitor prior to the date hereof in relation to the Applicants and these CCAA proceedings are hereby ratified and approved.

4. **THIS COURT ORDERS** that the Eighth Report and the Ninth Report be and are hereby approved.

5. **THIS COURT ORDERS** that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approvals set forth in paragraphs 3 and 4 of this Order.

GENERAL

6. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

7. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or in the United States of America to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

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

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., *et al.*

Applicants

21 April 22

Order to go as per the draft filed and signed.
The motion is unopposed and supported by the Monitor.
The stay extension is fair and reasonable, as is the related relief.
The Monitor's conduct, activities and reports are approved.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Stay Extension)

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Counsel for the Applicants

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

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 JUSTENERGY GROUP INC. ET AL.
Applicant

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*