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")**

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MOVING PARTIES' FACTUM

PART I. STATEMENT OF THE CASE

1. The moving parties, U.S. class counsel ("**U.S. Class Counsel**") to millions of the Applicants' U.S. customers (the "**U.S. Customers**") in two U.S. class actions,[1] seek leave to appeal the order of the Honourable Justice McEwen dated February 9, 2022,

[1] *Donin* v. *Just Energy Group Inc. et al*. (the "**Donin Action**") and *Trevor Jordet* v. *Just Energy Solutions, Inc.* (the "**Jordet Action**", together with the Donin Action, or the "**U.S. Class Actions**").

dismissing their motion seeking, among other things, a process to ensure an adjudication of the claims in the U.S. Class Actions (the "**U.S. Customer Claims**") prior to any vote of creditors in the Applicants' restructuring under the *Companies Creditors Arrangement Act.*[2]

PART II. OVERVIEW

2. The Applicants have indicated their intention to file a CCAA restructuring plan (the "**Plan**"). Only days before the hearing of the motion below, and after repeatedly telling U.S. Class Counsel that their inquiries were premature, the Applicants gave notice through the Monitor that a plan would be filed by March 3, 2022, and that a meeting of creditors would be held by March 30, 2022. To date, no plan has been filed.

3. The U.S. Customer Claims represent a potentially large and material constituency in the CCAA proceedings. In these circumstances, absent an assurance that the U.S. Customer Claims would be unaffected, U.S. Class Counsel sought a direction from the Court implementing an expedited process to ensure that the U.S. Customer Claims would be adjudicated or fairly estimated in sufficient time to permit them to vote at a meeting of creditors.

4. The Motion Judge dismissed the motion, choosing to take a "wait and see" approach. His Honour stated: "the CCAA process should be allowed to progress further before the adjudication proposed by U.S. Class Counsel is considered".

5. In exercising his discretion in this way, the Motion Judge failed to apply the correct principles. Most fundamentally, he characterized the adjudicative process

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[2] R.S.C. 1985, c. C-36 (as amended) (the "***CCAA***").

necessary to facilitate that vote as “a tremendous distraction” to the restructuring process.

6. The valuation of claims in a restructuring process is not a “distraction”. It is necessary and fundamental to the democratic underpinnings of the statute—especially where the Applicants have indicated their intention to hold a meeting of creditors in short order.[3]

7. Moreover, the U.S. Customer Claims are not frivolous claims. They are serious claims which deserve the opportunity to be considered on their merits prior to a vote on any plan the Applicants put forward.

8. The Motion Judge’s approach is particularly concerning given that CCAA proceedings can be a useful vehicle to resolve complex, multi-party disputes. However, a process that fails to ensure that claims are evaluated prior to the meeting of creditors will disenfranchise claimants and undermine confidence in Canadian restructuring proceedings.

9. Leave to appeal should be granted and the appeal heard on an expedited basis.

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[3] The Motion Judge’s failure to apprehend the importance of the claim valuation process to the operation of the CCAA process also permeated the balance of his reasons. For example, when he stated that he was “not of the view that the [U.S. Customer Claims]… ought to be adjudicated… prior to the next contemplated steps in the CCAA Proceedings”. See Unofficial transcript of the Handwritten endorsement of Justice McEwen dated February 23, 2022 (“**Transcript of McEwen J’s Endorsement**”), Motion Record, Tab 4, p. 45. Based on the Monitor’s last report, the next contemplated step in the proceeding was the imminent filing of a plan and the scheduling of a meeting of creditors a few weeks thereafter. See Fifth Report of the Monitor dated February 4, 2022, Motion Record, Tab 8, p. 712.

PART III. CONCISE STATEMENT OF FACTS

A. Background to the U.S. Customer Claims

10. The Donin Action was commenced on October 3, 2017.[4] The Jordet Action was commenced on April 6, 2018.[5] In each case, a class action is proposed on behalf of the plaintiffs and other U.S. customers in 11 states in which the Applicants named as defendants (the "**Just Energy Defendants**") do business, alleging, among other things, that the Just Energy Defendants breached their contractual obligations and implied covenant of duty of good faith and fair dealing.[6]

11. The U.S. Customer Claims are as straightforward as they are strong.

12. The U.S. Customer Claims allege that the Just Energy Defendants target consumers and businesses hoping to save on energy supply costs. They lure customers in with a teaser or fixed rate for a limited time period that is initially below its competitors' rates. Once that initial rate expires, the Just Energy Defendants charge what they represent to be a "variable rate" which under the applicable contracts must be set according to "business and market conditions".[7]

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[4] Affidavit of Robert Tannor, sworn January 17, 2022 ("**Tannor Affidavit**"), para 4, Motion Record, p. 81; Exhibit "B" to the Tannor Affidavit - October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 6, Exb. B, p. 100.

[5] Tannor Affidavit, para 6, Motion Record, p. 82; Exhibit "D" to the Tannor Affidavit – April 6, 2018 Jordet Complaint, Motion Record, Tab 6, Exb. D, p. 191.

[6] Tannor Affidavit, paras 4, 6, Motion Record, Tab 6, pp. 81-82; Exhibit "B" to the Tannor Affidavit, October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 6, Exb B. pp. 153-156; Exhibit "D" to the Tannor Affidavit – April 6, 2018 Jordet Complaint, Motion Record, Tab 6, Exb. D, pp. 202-205.

[7] Exhibit "B" to the Tannor Affidavit, October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 6, Exb. B, p. 102; Exhibit "D" to the Tannor Affidavit – April 6, 2018 Jordet Complaint, Motion Record, Tab 6, Exb. D, p. 191.

13. As one U.S. federal judge has already observed: “business and market conditions’ has some standard that [the Just Energy Defendants] had to apply in [their] variable pricing but apparently failed to adhere to in [their] pricing.”[8]

14. The U.S. Customer Claims further allege that the Just Energy Defendants exploit their pricing discretion and the dramatic information asymmetry with its customers to artificially inflate its variable rates without regard to its contractual obligations. As a result, the Just Energy Defendants’ variable rates are consistently substantially higher than those otherwise available in the natural gas and electricity supply markets, and its rates do not fluctuate based on any reasonable interpretation of “business market conditions”, such as wholesale market energy prices or the rates other competitive market participants (including local utilities and the Just Energy Defendants’ own fixed rates).

15. The Just Energy Defendants moved unsuccessfully to dismiss the U.S. Class Actions.[9]

16. Then, on March 9, 2021, a few months after the release the first decision in respect of the Just Energy Defendants’ unsuccessful dismissal motion[10], the Ontario

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[8] Tannor Affidavit, para 7, Motion Record, Tab 6, p. 82; Exhibit “E” to the Tannor Affidavit – Decision & Order of Judge Skrenty dated December 7, 2020, Motion Record, Tab 6, Exb. E, p. 230.

[9] Tannor Affidavit, para 7, Motion Record, Tab 6, p. 82; Exhibit “C” to the Tannor Affidavit – Decision & Order of Judge Kuntz dated September 24, 2021, Motion Record, Tab 6, Exb. C, p. 174; Exhibit “E” to the Tannor Affidavit – Decision & Order of Judge Skrenty dated December 7, 2020, Motion Record, Tab 6, Exb. E, p. 230;

[10] The decisions were delayed significantly due to the Covid-19 pandemic.

Superior Court of Justice issued an Initial Order granting CCAA protection to the Applicants.[11] As a result, the U.S. Class Actions are stayed.[12]

B. The Proofs of Claim

17. On September 15, 2021, the Applicants proposed, and the Court issued, a "**Claims Procedure Order**" which established a procedure for the adjudication of claims, but does not provide timelines for the final adjudication of disputed claims.[13]

18. On November 1, 2021, U.S. Class Counsel filed detailed Proof of Claim forms in respect of the Donin Action and the Jordet Action in the aggregate, unsecured amount of approximately $3.66 billion (reflecting a joint damages claim encompassing both lawsuits).[14]

19. For both cases, U.S. Class Counsel provided over 40-pages of Claim Documentation setting out the relevant background and merits of the respective U.S. Class Actions, including:

(a) a detailed analysis of the breach of contract and breach of duty of good faith claims, including significant case law and statutory support;[15]

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[11] Tannor Affidavit, para 9(a), Motion Record, Tab 6, p. 82.

[12] Tannor Affidavit, paras 9-11, Motion Record, Tab 6, pp. 82-83.

[13] Tannor Affidavit, para 9(b), Motion Record, Tab 6, p. 82. See also Claims Procedure Order, Exhibit "A" to the Seventh Affidavit of Michael Carter, sworn February 2, 2022, Motion Record, Tab 7, Exb. A, pp. 415-488.

[14] Exhibit "F" to the Tannor Affidavit, Donin/Golovan Proof of Claim, Tab 6, Exb. F, pp. 246-249; Exhibit "G" to the Tannor Affidavit, Jordet Proof of Claim, Tab 6, Exb G, pp. 251-254; Exhibit "H" to the Tannor Affidavit – Claim Documentation filed November 1, 2021, Tab 6, Exb. H, pp. 256-301.

[15] Exhibit "H" to the Tannor Affidavit – Claim Documentation filed November 1, 2021, Tab 6, Exb. H, pp. 257-260.

(b) reference to four (and as of February 2022, five) similar US class actions that were certified following a contested class-certification motion (all five cases are in respect of energy service company customers who were overcharged under the terms of their customer agreements);[16]

(c) evidence of denunciation of the Just Energy Defendants' pricing practices by relevant regulators as further demonstration of the strength of the U.S. Customer Claims;[17] and

(d) a supporting expert report.[18]

20. The U.S. Customer Claims are perfectly suited for certification.[19] There is substantial precedent for certification of this type of class action.[20]

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[16] *Bell v. Gateway Energy Services Corp.,* Decision and Order of Eisenpress J. dated February 25, 2021, Book of Authorities of the Moving Parties (**BoA**), Tab 1; *BLT Steak LLC v. Liberty Power Corp.*, Decision and Order of Hagler J.S.C. dated August 14, 2020, BoA, Tab 2; *Claridge v. North American Power & Gas LLC,* 2016 WL 7009062, BoA, Tab 3; *Martinez v. Agway Energy Services LLC*, 2022 WL 306437 (N.D.N.Y. Feb. 2, 2022), BoA, Tab 4; *Roberts v. Verde Energy*, USA, Inc., 2017 WL 6601993, (Conn. Super. Ct. Dec. 6, 2017), *aff'd*, *Roberts v. Verde Energy, USA, Inc.*, 2019 WL 1276501 (Conn. Super. Ct. Feb. 1, 2019), BoA, Tabs 5 and 6.

[17] Exhibit "H" to the Tannor Affidavit – Claim Documentation filed November 1, 2021, Tab 6, Exb. H, pp. 260-266.

[18] Exhibit 1 to Exhibit "H" to the Tannor Affidavit – Expert Report of Dr. Serhan Ogur, Motion Record, Tab 6, Exb. H, p. 277.

[19] Rule 23 of the Federal Rules of Civil Procedure, Fed. R. Civ. P., provides the applicable criteria for class certification: see also *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 79-81 (2d Cir.) 2015 at pp. 9-10, BoA, Tab 7. Here, the U.S Customer Claims arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer contract. Just Energy provides its prospective electricity and natural gas customers with its standard contract prior to each contract's initiation. If the customer accepts the agreement, then it becomes the operative contract. Additionally, not only are the contractual commitments concerning Just Energy's variable rate uniform, but the resultant injury to the classes is also uniform because when Just Energy sets its variable rates, it uses the same rate for all customers within each utility region, regardless of which version of the contract governs its relationship with each variable rate customer.

[20] Indeed, in the U.S. multistate breach of contract and breach of the covenant of good faith and fair dealing classes are routinely found by U.S. courts to satisfy the required "predominance factor" because such common law claims are generally uniform across the U.S. See for e.g. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 127, BoA, Tab 8: where the Court found no predominance issue in respect of a nationwide class asserting claims for breach of contract under the laws of multiple states.

21. Nevertheless, on January 11, 2022, the Applicants served a Notice of Revision or Disallowance entirely disallowing the U.S. Customer Claims as "meritless"(the "**Notices of Disallowance**").[21]

22. The Notices of Disallowance are *pro forma* responses to the U.S. Customer Claims in that they:

(a) largely repeat the failed legal arguments that the Applicants made in their unsuccessful attempts to have the Donin Action and the Jordet Action dismissed in U.S. federal court;

(b) do not cite a single legal authority for the positions it takes on certification, scope of the action, jurisdiction, standing, merits or damages;

(c) do not explain the applicable tests in respect of any of the broad sweeping legal propositions/issues that it alleges are "substantial hurdles…to any recovery";

(d) take issue with the alleged size of the Classes and quantum of the alleged claims without providing any data or information to support the Applicants' assertions; and,

(e) fails to address or respond to the comprehensive expert report tendered in support of the U.S. Customer Claims.[22]

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[21] Tannor Affidavit, para 38, Motion Record, Tab 6, p. 92; Exhibit "Q" to the Tannor Affidavit - Notice of Revision or Disallowance (Donin/Golovan), dated January 11, 2022, Motion Record, Tab 6, Exb. Q, p. 353; Exhibit "R" to the Tannor Affidavit, Notice of Revision or Disallowance (Jordet), dated January 11, 2022, Motion Record, Tab 6, Exb. R, p. 364.

23. U.S. Class Counsel disputed the disallowance within the timeframe contemplated by the Claims Procedure Order. The Notices of Dispute includes additional legal and evidentiary support for the U.S. Customer Claims.

C. US. Class Counsel Proposes an Expedited Adjudication Plan

24. On December 13, 2021, U.S. Class Counsel first proposed an adjudication plan for the U.S. Customer Claims to the Applicants' counsel, contemplating: (i) the appointment of 3 arbitrators from JAMS[23] with consumer class action experience to sit as Claims Officers in this CCAA Proceeding; (ii) the use of the "Expedited Procedures" in the JAMS Comprehensive Arbitration Rules; (iii) a process for exchanging documents, subject to the oversight of the Claims Officers; and (iv) a hearing lasting 5-7 days in February 2022.[24]

25. On December 15, 2021, the Applicants, through counsel, advised that "the Just Energy Entities anticipate further discussions with your group concerning a fair and reasonable method of adjudicating your clients' claims at the appropriate time".[25]

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[22] Tannor Affidavit, para 38, Motion Record, Tab 6, p. 92; Exhibit "Q" to the Tannor Affidavit - Notice of Revision or Disallowance (Donin/Golovan), dated January 11, 2022, Motion Record, Tab 6, Exb Q, pp. 353-362; Exhibit "R" to the Tannor Affidavit, Notice of Revision or Disallowance (Jordet), dated January 11, 2022, Motion Record, Tab 6, Exb R, pp. 364-373. The Notices of Disallowance are in stark contrast to the U.S. Customers' Proof of Claims which address each particular legal "hurdle" (which hurdles are in reality just the procedural steps associated with class actions) and include specific citations to dozens of legal authorities, regulations, and evidence, including a supporting expert report. See Exhibit "H" to the Tannor Affidavit – Claim Documentation filed November 1, 2021, Tab 6, Exb. H, pp. 256-301.

[23] JAMS, formerly known as Judicial Arbitration and Mediation Services, Inc., is a leading U.S. organization providing alternative dispute resolution services, including arbitration services.

[24] Tannor Affidavit, para 41, Motion Record, Tab 6, p. 93; Exhibit "S" to the Tannor Affidavit – Proposed Adjudication Plan, dated December 13, 2021, Motion Record, Tab 6, Exb. S, p. 375-377.

[25] Tannor Affidavit, para 42, Motion Record, Tab 6, p. 94; Exhibit "N" to the Tannor Affidavit – Email correspondence between Paliare Roland and counsel for the Applicants dated December 15, 2021, Motion Record, Exb. N, Tab 6, p. 328.

26. The Applicants then waited until February 1, 2022 to finally send a with prejudice alternative process that would see the U.S. Customer Claims determined on a schedule of more than a year, and certainly well after the Plan would be filed and voted on.[26]

27. On February 4, 2022, at approximately 3:20 pm (the day that U.S. Class Counsel's factum was due), the Monitor delivered its Fifth Report, which reported that the DIP Lenders demanded a timeline that would require a vote on the plan no later than March 30, 2022.[27]

28. Later that afternoon, U.S. Class Counsel wrote to the Applicants and advised that their proposal was not accepted because the timelines proposed by the Applicants were not sufficiently expedited to ensure that the U.S. Customers could meaningfully participate in the CCAA process.[28]

29. Neither the Monitor's Fifth Report nor the other materials filed with the court in connection with the motion below disclosed a commercial basis for the DIP Lenders' timeline, and, indeed, to date a plan has not been filed and a meeting of creditors has not been scheduled.[29]

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[26] Seventh Affidavit of Michael Carter sworn February 2, 2022 ("**Carter Affidavit"**), para 58, Tab 7, p. 410; Exhibit "M" to the Carter Affidavit – Correspondence dated February 1, 2022 and Applicants' Proposed Schedule, Motion Record, Tab 7, Exb. M, p. 696.

[27] Fifth Report of the Monitor dated February 4, 2022, Motion Record, Tab 8, p. 712.

[28] Schedule "C" to Factum of Class Counsel, Motion Record, Tab 9, p. 769.

[29] Stay Extension Order of McEwen J. dated March 24, 2022, BoA, Tab 9: the Stay Period is currently extended until and including April 22, 2022.

30. Nonetheless, although U.S. Class Counsel had intended to propose a 3 month adjudication process resulting in a decision on the merits in May 2022[30], they modified their proposal according to the information in the Monitor's Fifth Report and proposed the following (the "**Expedited Adjudication Framework**"):

(a) to ensure that expertise in US class action law was balanced with experience in Canadian procedure generally and CCAA proceedings specifically, a panel of three Claims Officers would be appointed, comprised of the Honourable Dennis O'Connor and two JAMS arbitrators to be named (the "**Panel**");

(b) the Panel would determine all substantive and procedural issues in connection with the U.S. Customer Claims, subject to court-imposed outside deadline for the release of a decision on the merits on the earlier of three days prior to the meeting of creditors and March 27, 2022 (the "**Deadline**");

(c) if necessary, the Deadline could be extended by the CCAA court on a motion for directions (and, in that event, U.S. Class Counsel would seek direction with respect to the estimation of the claim for voting purposes, as opposed to a final determination).[31]

[30] Notably, had U.S. Class Counsel's proposal of December 13, 2021 (or some form of it) been negotiated/agreed to in December, the process would have been completed as of the filing of this factum on April 1, 2022.

[31] Schedule "C" to Factum of Class Counsel, Motion Record, Tab 9, pp. 769-772.

D. The Motion Judge's Decision

31. The motion below was heard on February 9, 2022. At the end of the hearing, the Motion Judge advised the parties that the motion was dismissed with reasons to follow. His Honour delivered his reasons on February 23, 2022.[32]

32. The Motion Judge expressed the following reasons for denying the Expedited Adjudication Framework proposed by U.S. Class Counsel:

(a) found that the "3 week" delay taken by the Applicants to respond to the adjudication process first proposed by U.S. Class Counsel on December 13, 2021 was reasonable in the circumstances – but misapprehended the delay which was actually 7 weeks (being December 13, 2021 to February 1, 2022);[33]

(b) noted that U.S. Class Counsel had yet to deliver their dispute of the disallowance of the U.S. Customer Claims so as to trigger the adjudication process in the Claims Procedure Order – but did not advert to: (i) the fact that the time for filing the dispute had not expired; or (ii) the uncontroverted and incontrovertible evidence of U.S. Class Counsel that they would be filing their Notice of Dispute within days of the hearing;[34]

(c) expressed concern regarding the viability of the Expedited Adjudication Process – but did not advert to the fact that an adjudication would need to occur to address the dispute in respect of the U.S. Customer Claims for

[32] Handwritten Endorsement of Justice McEwen dated February 23, 2022, Motion Record, Tab 3, p. 26.
[33] Transcript of McEwen J's Endorsement, Motion Record, Tab 4, p. 45.
[34] Transcript of McEwen J's Endorsement, Motion Record, Tab 4, p. 45.

the purpose of determining their standing to vote at the meeting of creditors;[35]

(d) characterized the Expedited Adjudication Process as a "tremendous distraction" – but failed to reconcile this characterization with the fundamental importance of the right to vote within the scheme of the CCAA and the Applicants' stated intention to file a plan within weeks;[36]

(e) noted that the Applicants' Plan had not yet been filed and that the issue of a meeting order had not been addressed, and observed that the CCAA process should be allowed to progress further before the adjudication proposed by U.S. Class Counsel is considered – again, without reconciling this "wait and see" approach with the fundamental importance of the right to vote within the scheme of the CCAA, the Applicants' stated intention to file a plan within weeks, and that, within the context of real time litigation, time forfeited today may not be recoverable tomorrow;[37]

(f) expressed the opinion that the adjudication of the U.S. Customer Claims ought not to be adjudicated in priority to other claims or prior to the next steps take in the CCAA – overlooking that no other creditor having a contingent claim opposed the relief sought.[38]

[35] Transcript of McEwen J's Endorsement, Motion Record, Tab 4, p. 45.
[36] Transcript of McEwen J's Endorsement, Motion Record, Tab 4, p. 45
[37] Transcript of McEwen J's Endorsement, Motion Record, Tab 4, p. 45.
[38] Transcript of McEwen J's Endorsement, Motion Record, Tab 4, pp. 45-46.

PART IV. QUESTIONS TO BE ANSWERED IF LEAVE IS GRANTED

33. The proposed appeal raises serious and arguable grounds with respect to how contingent claims ought to be addressed in CCAA proceedings in the face of a pending plan or arrangement or compromise.

34. If leave is granted, U.S. Class Counsel propose that this court answer the following question:

> A. Did the supervising judge err in failing to order a process for the adjudication of the U.S. Customer Claims so as to allow for the determination of the claims for voting purposes prior to the meeting of creditors?

PART V. ISSUES & ARGUMENT

A. Test for granting leave to appeal

35. The sole issue on this motion is whether leave to appeal should be granted.

36. An appeal lies to the Court of Appeal from an order made under the CCAA with leave of this Court.[39] The factors this Court considers in granting leave to appeal in the CCAA context are well-established and include whether:

(a) the point on the proposed appeal is of significance to the practice;

(b) the point is of significance to the action;

(c) the proposed appeal is prima facie meritorious or frivolous; and

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[39] *CCAA*, ss. 13-14.

(d) the appeal will unduly hinder the progress of the action.[40]

37. The U.S. Customers meet this test.

1. The issues are significant to the insolvency practice.

38. The issue in this appeal about how contingent claims are addressed in the context of an imminent plan, is of profound significance to the insolvency practice.

39. Contingent claims often play a material role in CCAA restructuring proceedings. Some relatively recent examples of such cases (some of which are still before the court) include: the Imperial Tobacco, Rothmans, and JTI-MacDonald insolvency proceedings[41] (the "**Big 3 Tobacco Insolvency Proceedings**"), *Arrangement relatif à 9323-7055 Québec inc.*[42], *Montreal, Maine & Atlantic Canada Co./Montreal, Maine & Atlantic Canada Cie, Re*[43], *CannTrust Holdings Inc. et al., Re*,[44] *Sino-Forest Corp. Re*,[45] and *Poseidon Concepts Corp., Re.*[46]

40. Typically, the debtor company engages with the contingent creditor(s), and the treatment of their claims are addressed as part of the negotiation and settlement of the Plan.[47]

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[40] *Timminco Limited (Re)*, 2012 ONCA 552, at para. 2, BoA, Tab 10; *Stelco (Re)* (2005), 78 O.R. (3d) 241 (C.A.), BoA, Tab 11.

[41] *Rothmans, Benson & Hedges Inc. Re*, 2019 CarswellOnt 24229 (SCJ), BoA, Tab 12; *JTI-Macdonald Corp., Re,* 2019 ONSC 1625, BoA, Tab 13.

[42] 2019 QCCS 5904, *aff'd*, *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659, BoA, Tabs 14 and 15.

[43] 2015 CarswellQue 5917 (SC), BoA, Tab 16.

[44] 2021 ONSC 4408, BoA, Tab 17.

[45] 2012 ONSC 7050, BoA, Tab 18.

[46] 2018 CarswellAlta 951, BoA, Tab 19.

[47] See for example, The Second Amended and Restated Initial Order of McEwen J. dated April 25, 2019 in the CCAA proceeding of Rothmans, Benson and Hedges Inc., paras. 39-44, BoA, Tab 20.

41. What is unusual and worrisome in this case is that the Applicants have signaled their intention to file a Plan without making any meaningful effort to adjudicate or value the U.S. Customer Claims in advance of the creditor vote on the Plan.

42. In so doing, the Applicants are proposing to deal with the U.S. Customer Claims in a perfunctory manner and perhaps even seeking to deny them any vote on the plan at all (without any recourse) in circumstances where the size of their claims could determine the outcome of the vote.[48]

43. Allowing the Applicants to effectively disregard the U.S. Customer Claims in this way sets a worrisome precedent for future cases and may have a material impact on other significant cases that are currently before the court.

44. For example, in the Big 3 Tobacco Insolvency Proceedings all but one of the tort-claimants appearing in those cases have contingent claims.[49] If a consensual resolution is not reached, it is important for those contingent creditors to know that a process must be established that gives them a meaningful vote in respect of any CCAA restructuring plan.

45. Needless to say, it will be a lot easier for wrongdoers to escape responsibility for their tortious conduct if the debtors are not required to make a material effort to value

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[48] The DIP Lenders explicitly submitted to the Court in their factum that the "appropriate approach to deal with these claims is to value or disallow them for voting purposes…" and cited cases that valued claims on a summary basis at zero or $1 dollar for voting purposes: Factum of the DIP Lenders dated February 7, 2022, paras. 36-41, Motion Record, Tab 10, pp. 800-802.

[49] See reference to contingent creditors and the health care costs recovery action contingent claims (the HCCR Actions) at: *Rothmans, Benson & Hedges Inc. Re*, 2019 CarswellOnt 24229 (SCJ), at para. 6, BoA, Tab 12 and *JTI-Macdonald Corp., Re,* 2019 ONSC 1625, at paras. 5-6, and 14, BoA, Tab 13.

contingent claims prior to the meeting of creditors, with the result that claimants do not get a meaningful (or perhaps any) vote on the restructuring plan.

46. Accordingly, this Court's guidance regarding the principles to be applied to the treatment of contingent claims in anticipation of the filing of a plan and a meeting of creditors are plainly of profound significance to CCAA proceedings and restructurings generally.

2. The point is of significance to the action.

47. The question of if and how the U.S. Customer Claims will be valued in the face of a pending plan has great significance to this proceeding below, and in particular to the U.S. Customers of the Applicants, who number in the millions and whose contingent claims are valued at over $3 billion in the aggregate.[50]

48. The point at issue on this appeal is of particular significance in this case, considering that the U.S. Customers are U.S. citizens and the Applicants have significant operations in the United States.

49. If asked to recognize a restructuring plan, the U.S. Bankruptcy Court will need to consider whether these proceedings adequately recognized the U.S. Customers' and perhaps other creditors' constitutional right not to be deprived of property without due process.[51] In that regard, it is noteworthy that the case of *In re Adelphia Comm. Corp.*,

[50] Tannor Affidavit, paras. 10-11, Motion Record, Tab 6, p. 83.

[51] *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (2012) at pp. 4-5, 11-12, BoA, Tab 21; *In re Toft*, 453 B.R. 186 (2011) at p. 9, BoA Tab 22, where failure to give the debtor notice of the Chapter 15 proceedings was relevant to the court's refusal to recognize the foreign proceeding; *In re Ephedra Prods. Liability Litig.*, 349 B.R. 333 (2006) at p. 2, BoA Tab 23, where the court acknowledged that a failure to afford stakeholders due process in the claims process *can* result in a refusal to recognize the foreign proceeding as a violation of public policy.

the U.S. Bankruptcy Court described the ability to vote on a reorganization plan as "one of the most sacred entitlements that a creditor has in a chapter 11 case."[52]

3. The proposed appeal is *prima facie* meritorious

50. The proposed question on appeal is *prima facie* meritorious. There are serious and arguable grounds for appeal regarding the Motion Judge's refusal to order an adequate process for the adjudication of the U.S. Customer Claims so that the U.S. Customers could meaningfully participate in a vote on the Plan. This is a genuine and novel issue which has not been addressed by an appellate court and requires this Court's guidance.

51. There are two core requirements for approval of a restructuring plan pursuant to the CCAA: (i) a vote by creditors; and (ii) a court sanction. The Motion Judge's order undermines the voting requirement, one of the foundational pillars of a CCAA restructuring.[53]

52. The CCAA process must not be engineered in a way that disenfranchises (or increases the likelihood of disenfranchisement of) creditors.[54] Indeed, the procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor.[55] This necessarily

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[52] *In re Adelphia Communications Corp.,* 359 B.R. 54 (2006) at p. 3, BoA, Tab 24.

[53] S. 6 CCAA; see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (*Callidus*), at para. 69, BoA, Tab 25.

[54] See e.g. *Menegon v Philip Services Corp.*,1999 CanLII 15004, at para. 38, BoA, Tab 26.

[55] *Callidus*, at para. 51, BoA, Tab 25.

requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights.[56]

53. The CCAA confers upon courts the broad and flexible authority to achieve the remedial purpose of the CCAA; to protect the integrity of its own process; to impose adherence to "baseline considerations" such as "appropriateness, good faith, and due diligence"; and to create conditions for a reorganization that is fair to all. These principles are at the heart of the proposed appeal.[57]

54. It is therefore incumbent upon the Court, in its supervisory role, to ensure that the CCAA process unfolds in a fair manner.[58]

55. In the present case, however, the Motion Judge fundamentally misconstrued the law and erred in respect of the proper balancing of interests in the circumstances. Accordingly, the appeal is prima facie meritorious and appellate intervention is justified.[59]

4. The appeal will not unduly hinder the progress of the action

56. The appeal will not unduly hinder the progress of this action. The Court of Appeal for Alberta considered the test for this fourth criterion of the test for leave:

> [T]he fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in the prosecuting, hearing and deciding the

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[56] *Callidus*, at para. 51, BoA, Tab 25.

[57] CCAA s. 11; Callidus, at paras. 69-70, BoA Tab 25.

[58] *Target Canada Co. Re*, 2016 ONSC 316, at para. 72, BoA, Tab 27.

[59] *Callidus*, at para. 53, BoA, Tab 25; see also *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, at para. 98, BoA, Tab 28. The deferential standard of review accounts for the fact that supervising judges are "steeped in the intricacies of the CCAA proceedings they oversee." However, in this case the Motion Judge had just been assigned to this matter and it was his first contested decision.

> appeal be of such length so as to unduly impede the ultimate resolution of the matter by vote or court sanction.[60]

57. If leave is granted, U.S. Class Counsel submits that the appeal should be heard on an expedited basis. The appeal adds no impediment to the ultimate resolution of this restructuring, and indeed, will facilitate the fair completion of these proceedings. Moreover, the Applicants still have not filed a plan, which underscores that there was and still remains sufficient time to put a speedy adjudication process in place in respect of the U.S. Customer Claims.

April 1, 2022

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[60] *Re: Canadian Airlines Corp.*, 2000 ABCA 149, at para. 41, BoA, Tab 29.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bell v. Gateway Energy Services Corp.,* Decision and Order of Eisenpress J. dated February 25, 2021

2. *BLT Steak LLC v. Liberty Power Corp.*, Decision and Order of Hagler J.S.C. dated August 14, 2020

3. *Claridge v. North American Power & Gas LLC,* 2016 WL 7009062

4. *Martinez v Agway v. Agway Energy Services LLC*, 2022 WL 306437

5. *Roberts v Verde Energy*, *USA, Inc*., 2017 WL 6601993

6. *Roberts v Verde Energy, USA, Inc.* 2019 WL 1276501

7. *Sykes v. Mel S. Harris & Assocs. LLC,* 780 F.3d 70

8. *In re U.S. Foodservice Inc. Pricing Litig*., 729 F.3d at 127

9. Stay Extension Order of McEwen J. dated March 24, 2022

10. *Timminco Limited (Re)*, 2012 ONCA 552

11. *Stelco (Re)* (2005), 78 O.R. (3d) 241 (C.A.)

12. *Rothmans, Benson & Hedges Inc. Re*, 2019 CarswellOnt 24229 (SCJ)

13. *JTI-Macdonald Corp., Re,* 2019 ONSC 1625

14. *Arrangement relatif à 9323-7055 Québec inc.*, 2019 QCCS 5904

15. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659

16. *Montreal, Maine & Atlantic Canada Co./Montreal, Maine & Atlantic Canada Cie, Re*, 2015 CarswellQue 5917 (SC)

17. *CannTrust Holdings Inc. et al., Re,* 2021 ONSC 4408

18. *Sino-Forest Corp. Re*, 2012 ONSC 7050

19. *Poseidon Concepts Corp., Re*, 2018 CarswellAlta 951

20. The Second Amended and Restated Initial Order of McEwen J. dated April 25, 2019 in the CCAA proceeding of Rothmans, Benson and Hedges Inc.

21. *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (2012)
22. *In re Toft,* 453 B.R. 186 (2011)
23. *In re Ephedra Prods. Liability Litig.*, 349 B.R. 333 (2006)
24. *In re Adelphia Communications Corp.,* 359 B.R. 54 (2006)
25. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
26. *Menegon v Philip Services Corp.*,1999 CanLII 15004
27. *Target Canada Co. Re*, 2016 ONSC 316
28. *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570
29. *Re: Canadian Airlines Corp.*, 2000 ABCA 149

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the 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. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(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.

Stays, etc. — other than initial application

(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.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Court of appeal

14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

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 JUST ENERGY GROUP INC. ET AL.

Applicant

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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