Court of Appeal File No. M53259
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 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.

APPLICANTS

FACTUM OF THE RESPONDENT DIP LENDERS

MOTION FOR LEAVE TO APPEAL
(ORDER OF JUSTICE MCEWEN DATED FEBRUARY 9, 2022)

April 29, 2022

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

COURT OF APPEAL FOR ONTARIO

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PART I - OVERVIEW

1. The Putative Class Claimants in years-old uncertified U.S. class actions seek leave to appeal a discretionary order of a CCAA supervising judge.

2. On February 9, 2022, Justice McEwen dismissed the Putative Class Claimants' motion for advice and directions in its entirety. They have now abandoned the primary

relief sought before Justice McEwen and attack only his refusal to let the adjudication of these litigation claims dictate the Just Energy Entities' ability to emerge from CCAA.

3. Justice McEwen's discretionary decision on the sequencing of the litigation was the very essence of case management. As the supervising judge, he applied his knowledge of the proceeding and made findings of fact based on the evidence to determine when (or when not) the uncertified class actions would be decided.

4. The matters raised by the Putative Class Claimants on this motion do not reveal an appeal that is meritorious, significant to the practice, or significant to the proceeding. Rather, they go well-beyond the scope of what was before Justice McEwen and what he decided, and they threaten to unduly hinder a successful restructuring.

5. No palpable and overriding error in Justice McEwen's discretionary decision is alleged by the Putative Class Claimants and none exists. Nor is there any error of law or principle calling for appellate court intervention. Justice McEwen's decision is entitled to significant deference. This motion for leave to appeal should be dismissed.

PART II - THE FACTS

6. The summary of facts set out by the Just Energy Entities is adopted by the DIP Lenders, as supplemented by the following.

A. Background

7. The DIP Lenders have been stakeholders and supporters of the Just Energy Entities' business since well-before this proceeding was commenced. They hold significant secured claims, a substantial portion of the obligations under the pre-filing

senior unsecured term loan, and a substantial portion of the Just Energy Entities' existing equity.[1] The DIP Lenders are now working with the Just Energy Entities and key creditors to finalize a restructuring plan where the DIP Lenders will provide exit financing.[2]

8. On September 15, 2021, the CCAA court issued a final claims procedure order to identify and determine all claims against the Just Energy Entities.[3] On November 1, 2021, the Putative Class Claimants filed proofs of claim based on the uncertified class actions.[4]

9. The proofs of claim were far more expansive than the existing proposed class actions, which were significantly narrowed on motions to dismiss in the U.S. courts.[5]

10. Pursuant to the claims procedure order, the claims were disallowed on the bases that the uncertified class actions:

(a) are contingent, uncertified, speculative, and remote;

(b) attempt impermissibly to expand the scope of the actual claims by adding new defendants and new customer groups, and by introducing extended class periods; and

(c) inflate damages based on flawed assumptions, including by assuming that 50% of natural gas and electricity usage of the Just Energy Entities'

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[1] Affidavit of Michael Carter, sworn February 2, 2022 ("**Carter Affidavit**"), para 11, Motion Record of the Moving Parties dated April 1, 2022 ("**MPMR**"), Tab 7, p 388; Handwritten Endorsement of Justice McEwen dated February 26, 2022 ("**McEwen Endorsement**"), MPMR, Tab 3, p 33.
[2] Carter Affidavit, para 11, MPMR, Tab 7, p 388; McEwen Endorsement, MPMR, Tab 3, p 28.
[3] Carter Affidavit, para 9 and Exhibit A, MPMR, Tab 7, pp 387 and 415.
[4] Carter Affidavit, para 31, MPMR Tab 7, p 396; Affidavit of Robert Tannor sworn January 17, 2022 (the "**Tannor Affidavit**") Exhibits F, G, and H, MPMR Tab 6, pp 246-301.
[5] Fifth Report of the Monitor dated February 4, 2022, para 49, MPMR Tab 8, p 720. McEwen Endorsement, MPMR, Tab 3, p 31.

> customer base is attributable to customers that are parties to variable rate contracts when in reality only 2.1% and 0.04%, respectively, of natural gas and electricity usage is attributable to customers who are parties to variable rate contracts with the Just Energy Entities.[6]

11. The Putative Class Claimants did not dispute the disallowance of their claims prior to the hearing before Justice McEwen,[7] which was required to trigger the appointment of a claims officer who determines their own procedure and a timetable for adjudication.[8] Instead, they brought a motion for advice and directions with respect to their treatment in the CCAA proceeding and the timing and procedures for adjudication of their claims.

B. Justice McEwen's Decision

12. The Putative Class Claimants' primary request on the motion before Justice McEwen was a declaration that their claims would be unaffected by any CCAA plan. No plan was before the court. They provided no caselaw whatsoever to support this request.[9]

13. Justice McEwen rejected that request out of hand since it would have allowed the Putative Class Claimants to "partially dictate the form of the Plan which has not yet been placed before this Court." According to Justice McEwen, the request ran "contrary to the caselaw that allows directors to determine how they should deal with creditors in a proposed plan – subject to a creditor vote."[10]

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[6] Carter Affidavit, paras 32-33 and 37(c), MPMR Tab 7, pp 397, 399-400; Tannor Affidavit, Exhibits Q and R, MPMR Tab 6, pp 353-373.
[7] McEwen Endorsement, MPMR, Tab 3, p 35. In fact, they did not dispute the disallowance of their claims until the last possible day, and only after Justice McEwen had dismissed their motion with reasons to follow.
[8] Carter Affidavit, Exhibit A, paras 37, 39, MPMR Tab 7, pp 443-444.
[9] Notice of Motion and Cross-Motion dated January 19, 2022, para 2, MPMR Tab 5, p 50; McEwen Endorsement, MPMR Tab 3, pp 32-33.
[10] McEwen Endorsement, MPMR, Tab 3, p 32.

14. In the alternative, after failing for years to advance the U.S. class actions to certification and despite the claims procedure order, which they did not oppose or appeal, the Putative Class Claimants sought an order imposing a process for final adjudication of their uncertified class action claims, to be completed on an utterly unrealistic timetable.[11] The timetable ignored that, before final adjudication, the uncertified class actions would require (i) discovery in the case of one of the claims, (ii) the exchange of expert reports, (iii) a judicial determination on summary judgment, and (iv) a judicial determination on certification.[12] It also ignored all-but-certain judicial appeals.[13]

15. The Putative Class Claimants argued that adjudication of their claims must be a pre-condition to a vote by creditors on any plan proposed in the CCAA proceeding. In doing so, they disregarded that a timely restructuring is critical to the Just Energy Entities and their stakeholders given the length of time already spent under CCAA protection, the volatility of the energy market, the threat of additional weather events, the need for additional liquidity, and the risk that the support of key creditors will be lost.[14]

16. Justice McEwen rejected the request that the uncertified class actions be finally adjudicated before creditors could vote on a plan. In coming to that discretionary decision, he made the following findings based on the evidence:

(a) contrary to their assertion, the Putative Class Claimants were never "sandbagged" by the Just Energy Entities;

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[11] Notice of Motion and Cross-Motion dated January 19, 2022, para 3(a), MPMR Tab 5, p 51; Tannor Affidavit, Exhibit S, MPMR Tab 6, p 375-377; McEwen Endorsement, MPMR Tab 3, pp 26-27.
[12] Carter Affidavit, paras 56-57 and Exhibit M, MPMR Tab 7, 409-410 and 697-698.
[13] McEwen Endorsement, MPMR, Tab 3, 30.
[14] Carter Affidavit, para 14, MPMR Tab 7, p 389. McEwen Endorsement, MPMR Tab 3, p 36.

(b) the adjudication process had not been triggered by the Putative Class Claimants because they had not contested the disallowance of their claims;

(c) there were "significant concerns, and very much doubt, that the process proposed by the Putative Class Claimants is viable given the significant number of hearings – including certification and damage – that would have to occur in a compressed timeline (it bears noting that in the 3-4 years that the Putative Class Claims have been outstanding they have not completed these stages)";

(d) such a process would, in any event, be a "tremendous distraction from the restructuring which is at a critical juncture"; and

(e) the claims, which are contested on both liability and damages, should not be adjudicated before other claims and prior to the next contemplated steps in the CCAA proceeding.[15]

17. Justice McEwen also found that the relief sought was, in any event, entirely premature given that a plan had not yet been finalized and put before the court.[16]

PART III - LAW & ARGUMENT

18. The Putative Class Claimants must overcome a very difficult hurdle: to convince this court that the "supervising judge erred in principle or exercised their discretion unreasonably" and in a way that meets the CCAA leave test.[17]

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[15] McEwen Endorsement, MPMR, Tab 3, pp 35-37.
[16] McEwen Endorsement, MPMR, Tab 3, pp 35-37.
[17] *9354-9186 Quebec Inc. v Callidus Capital Corp*, 2020 SCC 10, para 53, Book of Authorities of the Respondent DIP Lenders dated April 29, 2022 ("**BOA**"), Tab 1.

19. The stringent leave test is accurately set out by the Just Energy Entities. The DIP Lenders adopt the arguments of the Just Energy Entities and supplement them with respect to the appeal's lack of merit and insignificance to the practice and this proceeding.

A. The Appeal Is Not *Prima Facie* Meritorious

20. The Putative Class Claimants have abandoned their request for the never-before-granted relief of declaring them unaffected creditors.[18] The potential appeal is now solely an attack on Justice McEwen's case management – specifically his fact-based decision not to give the Putative Class Claimants special treatment in this proceeding.

21. Discretionary decisions made by CCAA judges are entitled to considerable deference, in part because delays inherent in appellate review can have an adverse effect on the proceedings.[19] That is especially the case here, where this motion is brought in the context of a live restructuring of an operating business that is working quickly to emerge from CCAA protection as a going concern.

22. By the time an appeal could be decided, it is likely that further restructuring steps, including a creditor vote on the plan, will have already taken place. The spectre of appellate intervention in parallel or after such events creates problematic uncertainty for stakeholder decision-making, and ultimately the Just Energy Entities' exit from CCAA.

23. As to the proposed class actions, the claims are speculative, contingent, and unsecured. They will be dealt with fairly and in due course, and in a fashion that does not privilege – or give leverage to – the Putative Class Claimants over all other stakeholders.

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[18] This is apparent from their stated question for appeal, which diverges from the notice of motion for leave to appeal.
[19] *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282, para 33, BOA Tab 2.

24. There is nothing in Justice McEwen's discretionary decision that shows a palpable and overriding error or any error of law or principle warranting any appellate court scrutiny. As such, the putative appeal is not *prima facie* meritorious.

B. Insignificance to the Practice and the Proceeding

25. The issues raised in connection with the putative appeal are not of any significance to the practice or the proceeding. Nor are they properly before the Court of Appeal since they were not decided by Justice McEwen.

26. First, no determination about the treatment of any creditors whatsoever, including contingent creditors such as the Putative Class Claimants, was made by Justice McEwen in connection with any plan. No plan had even been put before the court and the issue of a meetings order had not, and was not being, addressed. No voting rights were "undermined". Nobody was "disenfranchised".

27. This motion should be dismissed on the same basis as the motion before Justice McEwen was dismissed: the Putative Class Claimants' complaints were, and are, premature.

28. Second, and in any event, the Putative Class Claimants' complaints are baseless. Adjudication of a dispute is only given primacy when the underlying issue may otherwise present a bar to a successful restructuring or is the fundamental issue in the restructuring. That principle is well known and was set out in the law relied on by the Putative Class Claimants before Justice McEwen.[20]

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[20] *Essar Steel Algoma (Re),* Order of Justice Newbould (Grievance Claims Procedure) dated March 14, 2016, BOA Tab 5; *Essar Steel Algoma Inc. (Re),* 2016 ONSC 1802 (Commercial List) refused leave to appeal 2016 ONCA 274,

29. The corollary is equally well understood. When the underlying issue does not present a bar to a successful restructuring and is not the fundamental issue in the restructuring, claims are litigated in the wake of restructuring or liquidation activities, not in advance of them.[21]

30. In this case, the valuation of claims at the time of voting was not an issue decided by Justice McEwen and is not properly an issue on this motion or on any appeal. However, even if it were, CCAA law and practice show that this issue should not be regarded as significant to the practice or this proceeding. The established approach to dealing with contingent claims is often to value them at a *de minimis* amount (*i.e.* $1)[22] or to disallow them for voting purposes and record the disputed portion.[23]

31. Any concerns about fairness are then, as noted in the classification context, dealt with as part of the assessment of the overall fairness of the plan at the sanction hearing:

> […] if the plan is accepted by the various classes of creditors, it must still come to the court for approval. The court is clearly entitled to reject the plan and if necessary the court can and will deal with any alleged unfairness or inequity at that time. At the application to approve the plan, the court will determine whether the appropriate majority approved the plan at a meeting held in accordance with the Act and the court's orders and whether the plan is fair and reasonable.[24]

BOA Tab 4; *Covia Canada Partnership Corp. v PWA Corp.*, 1993 CanLII 9429 (ONSC) affirmed 1993 CanLII 815 (ONCA), BOA Tab 3.

[21] *Re Port Chevrolet Oldsmobile Ltd*., 2002 BCSC 1874; 2004 BCCA 37 (appeal denied), BOA Tab 10; *Target Canada Co., Re*, 2016 CarswellOnt 8815 (SC), BOA Tab 13; *Nalcor Energy v Grant Thornton*, 2015 NBQB 20, BOA Tab 7; *Re Canadian Triton International Ltd.*, 1997 CanLII 12412 (ONSC), BOA Tab 8.

[22] *Target Canada Co., Re*, 2016 CarswellOnt 8815 (SC), Schedule "C", s 30, BOA Tab 13. See also *T. Eaton Company Limited, Amended and Restated Plan of Compromise*, (I.I.C. Ct. Filing 44993447021) (WL), Schedule "A" – Claims Procedure for Voting and Distribution Purposes, s 3 and Order of Justice Farley dated November 23, 1999 (I.I.C. Ct. Filing 44993495001), BOA Tab 12; *Sem Canada Crude Company*, (Action No. 0801-008510) (WL), Schedule "A" – Canadian Creditors' Meetings Order, para 35(b) and Reasons for Decision of the Honourable Madam Justice B.E. Romaine dated August 24, 2009 (Filing 341079516004), BOA Tab 11.

[23] *Re Clover on Yonge Inc.* (CV-20-00642928-00CL), Endorsement of Justice Hainey dated January 8, 2021 (unreported), BOA Tab 9.

[24] *Fairview Industries Ltd. et al. (Re)*, 1991 CanLII 4266 (NSSC), BOA Tab 6.

32. Ultimately, the proposition that the CCAA court may manage litigation to, from, or in conjunction with a plan is not controversial. The appropriate sequence is dictated by the nature of the CCAA proceeding and the nature of the claim. The Putative Class Claimants propose an untenable approach: that an ancillary litigant be permitted to "wag the dog" by shutting down a CCAA proceeding until its contingent claim is resolved, over the objections of the debtor, the debtor's other stakeholders, and the monitor.

PART IV - ORDER REQUESTED

33. The DIP Lenders respectfully request that the motion be dismissed with costs.

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

Cassels

CASSELS BROCK & BLACKWELL LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *9354-9186 Quebec Inc. v Callidus Capital Corp*, 2020 SCC 10

2. *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282

3. *Covia Canada Partnership Corp. v PWA Corp.*, 1993 CanLII 9429 (ONSC) affirmed 1993 CanLII 815 (ONCA)

4. *Essar Steel Algoma Inc. (Re)*, 2016 ONSC 1802 (Commercial List) refused leave to appeal 2016 ONCA 274

5. *Essar Steel Algoma (Re)*, Order of Justice Newbould (Grievance Claims Procedure) dated March 14, 2016

6. *Fairview Industries Ltd. et al. (Re)*, 1991 CanLII 4266 (NSSC)

7. *Nalcor Energy v Grant Thornton*, 2015 NBQB 20

8. *Re Canadian Triton International Ltd.*, 1997 CanLII 12412 (ONSC)

9. *Re Clover on Yonge Inc.* (CV-20-00642928-00CL), Endorsement of Justice Hainey dated January 8, 2021 (unreported)

10. *Re Port Chevrolet Oldsmobile Ltd*., 2002 BCSC 1874; 2004 BCCA 37 (appeal denied)

11. *Sem Canada Crude Company*, (Action No. 0801-008510) (WL) and Reasons for Decision of the Honourable Madam Justice B.E. Romaine dated August 24, 2009 (Filing 341079516004)

12. *T. Eaton Company Limited, Amended and Restated Plan of Compromise*, (I.I.C. Ct. Filing 44993447021) (WL) and Order of Justice Farley dated November 23, 1999 (I.I.C. Ct. Filing 44993495001)

13. *Target Canada Co., Re*, 2016 CarswellOnt 8815 (SC)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) 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*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted. R.S., 1985, c. C-36, s. 20 2005, c. 47, s. 131 2007, c. 36, s. 70

***Rules of Civil Procedure*, RRO 1990, Reg 194**

Amending, Setting Aside or Varying Order

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding. R.R.O. 1990, Reg. 194, r. 59.06 (1).

Setting Aside or Varying

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed. R.R.O. 1990, Reg. 194, r. 59.06 (2).

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