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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

REPLY FACTUM OF THE DIP LENDERS

MOTION FOR AUTHORIZATION ORDER, MEETINGS ORDER, AND OTHER RELIEF RETURNABLE JUNE 7, 2022

June 5, 2022

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PART I - OVERVIEW

1. The only parties opposing the Applicants' motion for a meetings order are counsel for class action or "mass tort" plaintiffs with contingent disputed claims (the "Contingent Claimants"). They oppose the motion because they believe the treatment their supposed clients are afforded under the Plan (assuming their claims are even allowed) is unfair and unreasonable. U.S. counsel in two uncertified class actions have even filed a cross-motion seeking orders that this Court provide their alleged clients (or alternatively, counsel) with sufficient votes and an "estimated" claim value so they can obtain a veto to block this restructuring and use that leverage to try to negotiate a different outcome.

2. With that objective, the Contingent Claimants raise two principal complaints with the Applicants' proposed Plan. First, that it is unfair that they have not been awarded hundreds of thousands of votes on the Plan and a significant "estimated" valuation in respect of their disputed contingent litigation claims. Second, that it is unreasonable that their unsecured claims are placed in the same class as the unsecured claims of the Term Loan Lenders who will receive different consideration (although equivalent in value).

3. The first complaint asks for something unprecedented and unsupportable. There is no place for guesswork in the allocation of votes or claim value, and there is no reason to depart from established precedent for the treatment of contingent disputed claims for voting purposes. The second complaint similarly ignores established precedent and the uncontroverted facts. Non-fragmentation should be favoured. No creditor should be given a veto.

4. The Contingent Claimants' relentless attempts to hijack this restructuring are a transparent effort to obtain a better recovery than they are entitled to, or is even available. Even if their concerns had merit, which they do not, they would not be appropriately addressed at this stage of the proceeding. Both complaints relate plainly to the fairness and reasonableness of the Plan. They are issues for the sanction hearing, when this Court will have the benefit of a full record, including the results of the vote.

5. The Applicants cannot remain in CCAA indefinitely. In the 15 months since these proceedings began (and in the year before that), neither the Applicants nor the Contingent Claimants nor any other parties have identified or presented a superior proposal, or any alternative exit path supported by secured stakeholders. Nevertheless, the Meetings Order will provide for an extended period in which the Contingent Claimants or anyone else will have an opportunity to put forward an actionable superior transaction.

6. The Plan clearly meets the legal test to proceed to a creditor vote – it is not doomed to fail. There is no justification to further delay the Applicants' ability to advance their restructuring. The cross-motion should be dismissed. The Applicants' motion for a Meetings Order and an Authorization Order should be granted.

PART II - THE FACTS

7. The DIP Lenders repeat and rely on the facts outlined in their factum dated May 20, 2022 and the facts outlined in the Applicants' factums, as supplemented by the following.

A. The Applicants Operate in an Uncertain Environment – Continuing to Operate in CCAA Increases Risk

8. The Applicants are forecast to continue operating in the ordinary course of business during the requested extension of the Stay Period.[1] That does not mean, as the Contingent Claimants argue, that the Applicants can remain in CCAA without significant risk.

9. The Contingent Claimants completely ignore the reality that the Applicants are operating in an uncertain environment. The Applicants initially sought CCAA protection due to sudden unanticipated ERCOT obligations arising from Texas energy market fluctuations and unusual seasonal temperatures in Texas.[2]

10. Risks to the Applicants' business which could jeopardize a successful restructuring continue to exist. For example, on May 26, 2022, the Applicants were forced by market conditions to request a waiver of an aspect of the DIP Budget to enable them to place additional collateral with ERCOT. The requirement to post greater collateral had nothing to do with internal operations. It arose due to Texas energy market fluctuations and unusual seasonal temperatures in Texas.[3]

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[1] Tenth Report of the Monitor, dated May 18, 2022, para 112(b), p 45, Reply Book of Authorities of the DIP Lenders dated June 5, 2022 ("Reply BOA"), Tab 10.
[2] Endorsement of Justice Koehnen, issued March 9, 2021, paras 24-28, Book of Authorities of the DIP Lenders dated May 20, 2022 ("BOA"), Tab 3.
[3] Affidavit of Michael Carter sworn May 29, 2022 ("Supplementary Carter Affidavit"), para 6.

11. Obviously, there can be no assurance that there will be no heat waves in Texas in the summer or other abnormal weather events, or that fluctuations in world energy prices driven by the continuing pandemic, war in Europe or other events beyond the Applicants control, will not have additional negative impacts on the value of the Applicants the longer they remain in CCAA.

12. These risks are real and cannot be swept aside to obscure the true impact of delaying emergence from these proceedings. Deleveraging the Applicants' balance sheet through the proposed Plan will allow the Applicants to emerge in an improved financial position so that they can more efficiently deal with these risks in the normal course as a healthy business.

B. There Are No "Undisclosed Assets"

13. The Contingent Claimants have sought to cast aspersions relating to what they call "Undisclosed Assets" arising from the Applicants' interactions with ERCOT. The "Undisclosed Assets" (which are in fact fully disclosed) include recovery in the approximate amount of US$145 million, to be received by the Applicants as a result of Texas House Bill 4492.

14. Contrary to paragraph 22 of the Tannor Affidavit, all stakeholders – not just the Term Loan Lenders – will benefit from that recovery.

15. The Applicants anticipate that the total amounts to be paid, distributed, or reserved to implement the Plan will be approximately $170,000,000 and US$337,000,000, plus any accrued and outstanding interest with respect to such amounts.[4]

16. The HB 4492 recovery is needed to fund the distributions provided for under the Plan. Without those funds, the Applicants would have insufficient cash to fulfill their distribution obligations under the Plan.[5]

[4] Section 10.1(o) of the Plan.

[5] Affidavit of Mark Caiger, sworn May 12, 2022 ("Caiger Affidavit"), para 7(a), Motion Record of the Applicants dated May 12, 2022 ("Applicants' MR"), Tab 3, p 1778.

17. With respect to the other "Undisclosed Asset" relating to ERCOT, this Court is well aware of the litigation claims against ERCOT, having recently issued a decision facilitating their ongoing determination in the Chapter 15 proceedings.[6] Specific reference to this litigation is made in section 11.4 of the Plan.

18. Further detail relating to prior disclosure of the so called "Undisclosed Assets" is set out at paragraphs 12-22 of the Monitor's Supplement to the Tenth Report.[7]

C. The Contingent Claimants Continue to Seek to Delay the Restructuring

19. On May 24, 2022, the Contingent Claimants sought an adjournment to deliver evidence and to cross-examine the Applicants' affiants, whose affidavits had been served nearly two weeks before the adjournment was sought. The adjournment resulted in the loss of the previously scheduled full-day hearing on May 26, 2022.

20. Two days after the case conference, voluminous records were served by the Respondents. Then, having previously emphasized the need for cross-examination, the Contingent Claimants waived that process. In the case of U.S. counsel, that communication was made even prior to receipt of the Applicants' reply evidence.

PART III - LAW & ARGUMENT

21. The DIP Lenders repeat and rely on the arguments outlined in their factum dated May 20, 2022 and the arguments outlined in the Applicants' factums, as supplemented by the following.

A. There Is No Place for Unprecedented Guesswork

22. The Contingent Claimants argue that both the number and value of their claims for voting purposes should "simply be estimated". Not surprisingly, there is no precedent cited by the

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[6] *Just Energy Group Inc et. al. v Morgan Stanley Capital Group Inc et. al.*, 2022 ONSC 2697, Reply BOA, Tab 8.
[7] Supplement to the Tenth Report of the Monitor, dated June 1, 2022, at paras 12-22, Reply BOA, Tab 14.

Contingent Claimants, or known to the DIP Lenders, for this radical proposition. It has never been done in these circumstances – including in the cases ostensibly relied on by the Contingent Claimants. In fact, unlike here, each case cited by the Contingent Claimants appears to have dealt with accepted, proven claims.

23. By way of example only:

(a) in *Sears*, each of the individual employees and retirees had established and valued claims to various unpaid benefits arising from the insolvency;[8]

(b) in *Bloom Lake*, the claims that were being voted by proxy similarly related to employment or post-employment benefit claims; [9]

(c) in *HSBC*, the amounts of the critical supplier claims were verified by the Monitor;[10]

(d) in *Red Cross*, the federal and provincial governments with what appear to have been liability indemnity claims were granted "deemed proven claims" with total value of $1,100;[11] and

(e) in *Blackburn*, the claims assignments in question appear to have related to a proven claim and the whole challenge was based on improper purposes, not existence of a claim or quantifiability.[12]

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[8] Twenty-Ninth Report of FTI Consulting Canada Inc., as Monitor, dated February 6, 2019, Reply BOA, Tab 15, Sears Canada Inc. and Related Applicants, paras 74 and 87; and Sears Canada Inc. and Related Applicants Plan of Arrangement dated February 15, 2019, Reply BOA, Tab 13, see definitions of "Eligible Voting Claims", "Unresolved Voting Claim", and "Voting Claim", pp 34 and 46.
[9] *HSBC Bank v Bear Mountain Master Partnership,* 2010 BCSC 1563, para 11, Reply BOA, Tab 7.
[10] Forty-Fifth Report of the Monitor, FTI Consulting Canada Inc., dated March 22, 2018, Bloom Lake, paras 12-29, Reply BOA, Tab 6.
[11] *Blackburn Developments Ltd., Re,* 2011 BCSC 1671, para 20, Reply BOA, Tab 3.
[12] Amended Plan of Compromise and Arrangement pursuant to the CCAA, concerning, affecting and involving The Canadian Red Cross Society / *Société Canadienne de la Croix Rouge*, dated July 31, 2000 as Amended and Approved at Meetings of Creditors held on August 30, 2000, s. 6.02, Reply BOA, Tab 2.

24. The Contingent Claimants do not have proven claims. There is no simple or reliable mechanism to "estimate" fairly (or timely) the number or value of their disallowed claims, especially given that they are made:

(a) by individuals on behalf of an uncertified group of an unknown number, which is alleged to be in the hundreds of thousands;

(b) by an individual on behalf of a class whose members have not established liability or damages, which are both highly speculative; and

(c) on behalf of a group of "mass tort" claimants whose claims to damages are also highly speculative.

25. Estimating the individual number and value of the disallowed claims of any of these diverse categories of litigants would invariably result in significant, contentious, and expensive further litigation and delay. This Court is already familiar with the case management status of U.S. counsel's claims before the claims officer. This Court observed on February 23, 2022 that the "hotly contested class claims (both on liability and quantum)" are a long way from determination:

> I have very significant concerns and very much doubt that the process proposed by US Class Counsel 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 Class Claims have been outstanding they have not completed these stages.[13]

26. While leave to appeal has been sought by U.S. counsel, their approach to the proceedings before the claims officer has resulted in very little progress being made in the three months since then. Instead, U.S. counsel have spent their time unsuccessfully re-litigating:

[13] Affidavit of Michael Carter, sworn May 12, 2022 ("Carter Affidavit"), Exhibit B, Applicants' MR, Tab 2, pp 254-255.

(a) their demand to appoint additional JAMS arbitrators;[14] and

(b) prior U.S. Federal Court decisions limiting the scope of discovery in one of the uncertified class actions and ending discovery in one of the actions.[15]

27. The simple fact is that U.S. counsel, as lawyers for proposed representative plaintiffs in uncertified class actions, represent no one but those individual plaintiffs. Their demand to be allocated hundreds of thousands of votes (customers) is premised on overcoming the hurdle of certification and then proving liability and damages, which they are no closer to today than they were in February.

28. The same applies to the other Contingent Claimants. The representative plaintiff has sought to differentiate himself from U.S. counsel's clients on the basis that his action is certified. However, as a precondition to the possibility of recovery in that proceeding, among others things, the claims of each class member must be independently quantified from individualized assessments based on each worker's individual circumstances and experience.[16] It would appear that the claims of approximately 7,000 of the 7,900 class members are barred by the *Limitations Act, 2002*.[17] In any event, no evidence has been adduced of actual losses or damages for <u>any</u> of these individual class members.

29. There is nothing in the CCAA, any orders made in this proceeding to date, or the *Class Proceedings Act, 1992* vesting a representative plaintiff with the authority to exercise one vote for each member of the class. Nor would that be appropriate here. If class actions were viewed otherwise in the context of CCAA restructurings, class counsel would almost always have the

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[14] Supplementary Carter Affidavit, Exhibit F, paras 1 and 8.
[15] Supplementary Carter Affidavit, Exhibit R, paras 5-8.
[16] Carter Affidavit, Exhibit K, Applicants' MR, Tab 2, pp 919-920.
[17] Carter Affidavit, Exhibit K, Applicants' MR, Tab 2, p 920.

ability to assert absurdly large contingent claims (where liability and damages have not been determined) to hold restructurings hostage – as they are now attempting to do.

30. The claims of the “mass tort” claimants – although much smaller in number of claimants, and still a moving target – suffer from the same defects for voting purposes as those of the other Contingent Claimants. For example, according to the Applicants, 141 of the 364 claimants were not even customers at the time of the weather event and the claimants themselves have already withdrawn 92 of the 364 claims.[18] In any event, they are disallowed and unproven, with no simple or short path to determination of their true number or value.

31. The Contingent Claimants have asserted that the Applicants are engaged in “blatant gerrymandering”.[19] That rhetoric is more accurately attached to their efforts to invent votes or establish unproven claims by “estimation” – or more bluntly, guesswork.

32. Underlying the Contingent Claimants’ attempt to have this Court or a claims officer engage in guesswork is a strategy intended to prevent the Court from considering whether the Plan is fair and reasonable at the sanction hearing, when the Court has the benefit of a full record on Plan fairness, including the results of the vote.

33. As the Court is aware, for a plan of arrangement to be put before this Court for sanction, it must first pass the double majority vote required by the CCAA by obtaining approval in each class of more than 50% of those creditors voting (known as “numerosity”) who represent more than two-thirds or more of the value of the claims voting.[20]

34. The Contingent Claimants hope that imprecise guesswork will give them enough votes to threaten numerosity or enough value to defeat the vote, thereby preventing a sanction hearing

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[18] Carter Affidavit, para 71(b)(ii), Applicants’ MR, Tab 2, pp 123-124.
[19] Responding Factum of Haidar Omarali in his capacity as representative plaintiff, dated June 2, 2022, at paras 7, 38, 78; Responding Factum of US counsel dated, June 2, 2022, at paras 2 and 48.
[20] *Companies’ Creditors Arrangement Act,* RSC 1985, c C-36, s 6(1).

altogether. The Monitor has been clear that providing such artificial numerosity to the Contingent Claimants would determine the vote and thereby preclude the Plan from coming forward for sanction:

> Although the Monitor notes that the actual number of Class Members will not be established until the Claim is fully and finally adjudicated, granting each of the Class Members with their own vote would effectively provide a "veto" over the Plan, assuming such Class Members would vote against the Plan. The same issue and effective "veto" arises in respect of the Donin/Jordet Actions.[21]

35. Accordingly, the approach to deal with these claims is to value them at a nominal amount or disallow them for voting purposes, record the disputed portion (which the Monitor will do here), and consider the fairness of that treatment at the sanction hearing.

36. As previously set out by the DIP Lenders,[22] that is the approach consistently adopted in CCAA proceedings at the meeting order and sanction order stage. For example, in *Re Target Co.*, Justice Morawetz ordered:

> [T]hat the Canada Revenue Agency shall have one vote in respect of its Disputed Claims, the dollar value of which shall be equal to $1, without prejudice to the determination of the dollar value of such Disputed Claims for distribution purposes in accordance with the Claims Procedure Order.[23]

37. In the context of an order sanctioning a CCAA plan in *Re Clover on Yonge Inc.*, Justice Hainey was confronted with similar circumstances. Notwithstanding the prior disallowance for voting purposes of a material contingent claim, Justice Hainey sanctioned a plan as fair and

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[21] Supplement to the Tenth Report of the Monitor, dated June 1, 2022, at para 29, Reply BOA, Tab 14.
[22] Factum of the DIP Lenders, dated May 20, 2022, p 9-11.
[23] *Target Canada Co., Re*, 2016 CarswellOnt 8815 (SC), Schedule "C", s 30, BOA, Tab 16, 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 15; *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 12.

reasonable. In doing so, consistent with section 20(1)(a)(iii) of the CCAA,[24] the Court adopted "strikingly similar" law from *Nalcor Energy v Grant Thornton* in the proposal context of the *BIA*.[25]

38. In *Nalcor Energy*, the New Brunswick Court of Queen's Bench rejected a claim for voting purposes on the basis that the validity of the claim, as well as the assessment of damages, was completely dependent on the outcome of the litigation.[26]

39. In *Re Port Chevrolet Oldsmobile Ltd.*, the Court upheld the disallowance for voting purposes of a contingent and unproven claim, which was based on an unresolved appeal of the *Excise Tax Act*.[27] In *Re Canadian Triton International Ltd.,* Justice Farley determined that a claimant could not vote on a proposal as a result of the contingent nature of its claim, which was disputed by the insolvent entity with respect to liability and damages.[28]

40. There is no valid reason to treat Contingent Claimants in this case differently. The relief they seek is highly prejudicial to the Applicants and their stakeholders, including unsecured creditors whose proven claims would be unfairly dwarfed by unproven claims. It also threatens timely completion of this restructuring and could jeopardize the Applicants' ability to emerge from CCAA at all. The Contingent Claimants should not be given a veto based on guesswork,[29] especially where this Court will have the final say on whether the Plan is fair and reasonable.

B. The Proposed Creditor Classification Is Appropriate

41. The test to be applied to voter classification is one of "non-fragmentation". Classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company

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[24] *Re Clover on Yonge Inc.* (CV-20-00642928-00CL), Endorsement of Justice Hainey, dated January 8, 2021 (unreported), BOA, Tab 7.
[25] Section 20(1)(a)(iii) of the CCAA prescribes that the amount of an unsecured claim is the amount of the claim which might be proven under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3.
[26] *Nalcor Energy v Grant Thornton*, 2015 NBQB 20, paras 45-46 and 51-52, BOA, Tab 5.
[27] *Re Port Chevrolet Oldsmobile Ltd*., 2002 BCSC 1874, paras 41 and 45-46, Reply BOA, Tab 11; 2004 BCCA 37 (appeal denied), BOA, Tab 8.
[28] *Re Canadian Triton International Ltd.,* 1997 CanLII 12412 (ONSC), para 9, BOA, Tab 6.
[29] *Canadian Airlines Corp. (Re),* 2000 ABQB 442, paras 31 and 38-41, Reply BOA, Tab 4.

in the context of the proposed plan, not their rights as creditors in relation to each other.[30] Absent valid reasons to have separate voting classes, fewer classes avoids the impact of fragmentation.[31]

42. It is not controversial that creditors may be allocated to the same voting class despite being entitled to different recoveries under the proposed Plan.[32] In *SemCanada Crude Co.*, unsecured creditors sought allocation to a separate class from the noteholders who were treated more advantageously under the proposed plan.[33] The Court held that there was no good reason to create separate creditor voting classes:

> The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors. That difference, while it may be subject to submissions at the sanction hearing, is an issue of fairness, and not a difference material enough to warrant a separate class for the Noteholders in this case. A separate class for the Noteholders would only be necessary if, after considering all the relevant factors, it appeared that this difference would preclude reasonable consultation among the creditors of the class: *Re San Francisco Gifts* at para 24.[34]

43. Similarly, in *Sherritt,*[35] a plan of arrangement under the *Canada Business Corporations Act* was opposed by two unsecured creditors who complained that they were unfairly placed into the same voting category as other unsecured creditors. The proposed plan provided the two groups of creditors, referred to as the "unsecured noteholders" and the "CFA lenders", with vastly different recoveries,[36] and this Court approved the requested single class, applying CCAA

[30] *SemCanada Crude Co., Re.*, 2009 ABQB 490 *("SemCanada")*, para 30, BOA, Tab 12; *Re Woodward's Ltd.*, 1993 CarswellBC 555, paras 27, 29, BOA, Tab 10.
[31] *SemCanada*, para 21, BOA, Tab 12; *Stelco Inc Re.,* 2005 CanLII 42247 (ONCA) ("*Stelco*"), para 13, BOA, Tab 14.
[32] *SemCanada*, para 22, BOA, Tab 12; *Stelco,* para 26, BOA, Tab 14.
[33] *SemCanada,* paras 12, 26, BOA, Tab 12.
[34] *SemCanada*, para 47, BOA, Tab 12.
[35] *Re Sherritt International Corporation,* 2020 ONSC 5822 ("*Sherritt*"), Reply BOA, Tab 12.
[36] *Sherritt,* paras 30, 39, Reply BOA, Tab 12. In *Sherritt*, under the plan of arrangement, the unsecured noteholders would continue to have an unsecured claim against Sherritt and certain of its subsidiaries. Their claim would, however, be reduced from approximately $628,000,000 to $433,000,000. The maturity date of the reduced debt would then be extended by several years. In addition, $75,000,000 of the debt would be placed into a more junior

principles, and expanded on three key principles that emerged from *Canadian Airlines*, all of which are applicable here:

(a) securityholders with similar legal rights should vote in a single class;[37]

(b) creditors should not be fragmented into groups that would defeat the plan unless there is good reason to do so;[38] and

(c) creditors should vote as a common class so long as their rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.[39]

44. Within the Unsecured Creditor Class, the Term Loan Lenders – who hold claims against all Just Energy Entities – will receive 10% of the new common shares for their claims. This is consideration for consenting to a process that consolidates all of the Applicants' assets and claims into one pool. As explained in the Carter Affidavit, but ignored by the Contingent Claimants:

> The Plan is being presented on a consolidated basis on behalf of all of the Just Energy Entities. As discussed further in my affidavit sworn March 9, 2021 in support the Initial Order, the business of the Just Energy Entities are heavily intertwined… all of the Just Energy Entities are either borrowers or guarantors of the Term Loan Claim.[40]

45. In contrast, the other unsecured creditors primarily hold claims only against various individual Just Energy Entities. This includes the proposed representative plaintiffs in the uncertified U.S. class actions. While they may have opportunistically filed proofs of claims against

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position than the current notes hold. The CFA lenders would not take any reduction on their debt but would lose the right to claim against Sherritt. Instead, the CFA lenders would receive Sherritt's interest in the Ambatovy joint venture.

[37] *Sherritt,* para 37, Reply BOA, Tab 12.
[38] *Sherritt,* para 40, Reply BOA, Tab 12.
[39] *Sherritt,* para 41, Reply BOA, Tab 12.
[40] Carter Affidavit, para 17 Applicants' MR, Tab 2, p 90.

"all" of the Applicants, the underlying actions are far more limited, based on both the pleadings and prior court orders.[41] As a result, and to preview the arguments for sanction, the other unsecured creditors will receive different consideration, which is fair and reasonable in the circumstances.

46. It is well established that a plan featuring differential treatment of creditors may nevertheless be "fair and reasonable" as long as there is sufficient rationale for the differential treatment, such as a substantial contribution by a particular creditor.[42] As with all CCAA plans, fair and reasonable means equitable treatment, not equal treatment.[43]

47. In the absence of cross-examinations, the only evidence before this Court with respect to the issue of fragmentation is, in essence:

(a) the Contingent Claimants' assertion, through Mr. Tannor, that shares and cash are "fundamentally different in kind" as a general proposition;[44] and

(b) the evidence of the Applicants' financial Advisor, BMO, that the shares and cash under examination in this case are equivalent in value based upon a range of outcomes.[45]

48. In the circumstances, grouping all unsecured creditors together is consistent with the legal rights they hold in relation to the Applicants and will avoid fragmentation.[46]

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[41] Decision of Justice O'Connor dated May 24, 2022, paras 22-28, Reply BOA, Tab 5.
[42] *Canwest Global Communications Corp., Re.*, 2010 ONSC 4209 , para 23, BOA, Tab 2; *Sino-Forest Corporation, (Re)*, 2012 ONSC 7050, para 66, BOA, Tab 13.
[43] *Sammi Atlas Inc., Re,* 1998 CanLII 14900 (ONSC), para 4, BOA, Tab 11.
[44] Affidavit of Robert Tannor, sworn May 26, 2022 ("Tannor Affidavit"), para 19, Responding Motion Record and Motion Record of U.S. counsel, dated May 26, 2022 ("RMRMR"), Tab 2, p 19.
[45] Caiger Affidavit, paras 11-12, and 20-24, Applicants' MR, Tab 3, pp 1780-1785.
[46] *SemCanada*, para 26, BOA, Tab 12.

C. The Contingent Claimants' Objections Are Improper

49. The Contingent Claimants' attempts to raise issues of fairness and reasonableness on this motion are inappropriate. The fairness and reasonableness of the Plan are matters for consideration at the sanction hearing, after the creditors vote."[47] Consistent with *Clover on Yonge*, Justice Farley's reasons in *Algoma Steel Corp. v Royal Bank* are instructive:

> Whether a plan is fair and reasonable must take into consideration the impact of same upon all interested parties (in this situation all creditors and shareholders). What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate, particularly in light of the wholly owned subsidiary scenario. The whole scheme of C.C.A.A. proceedings is to see whether a compromise or arrangement can be effected among the creditors and shareholders of a company with a view to see if the company can be made viable, assuming certain changes are made. See Doherty J.A.'s comments, supra, in *Nova Metal Products Inc.* […]
>
> **(c) it would be premature and inappropriate to rule on whether the write-down of the C.I.O.C. receivable to one dollar was fair and reasonable; such should be determined in the context of considering the sanction of the plan as it affects all interested parties.**[48] [emphasis added]

50. Similarly, a claimant's concerns regarding the classification of creditors for the purposes of voting at the meeting order stage are appropriately considered as part of the assessment of the overall fairness of the plan at the sanction hearing:

> even 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.[49]

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[47] *US Steel Canada Inc. (Re),* 2017 ONSC 1967, para 12, BOA, Tab 19; see also *Arrangement Relatif à Bloom Lake,* 2018 QCCS 1657, para 19, BOA, Tab 1.
[48] *Algoma Steel Corp. v Royal Bank,* 1992 CarswellOnt 162 (SC), paras 30 and 34, Reply BOA, Tab 1.
[49] *Fairview Industries Ltd. et al. (Re)*, 1991 CanLII 4266 (NSSC), BOA, Tab 4.

51. It is already contemplated that the Monitor will record the Contingent Claimants' votes separately. They will know after the creditor meeting how the vote would have turned out if they had voted based on the number and value to which they believe they are entitled. Accordingly, they will be able to raise issue of fairness and reasonableness, if any, at the appropriate time on that basis without prejudice.

52. Finally, U.S. counsel in particular also assert that the Plan is a deliberate attempt to "gerrymander"[50] the vote because it includes, among, other things:

(a) a convenience class that "unjustly prefers certain unsecured creditors"[51] by giving them the option of accepting the lesser of $1,500 or the full amount of their claim; and

(b) proposes that creditors who are actually receiving no consideration shall be deemed to have voted in favour of the Plan.[52]

53. Each of these contentions is a direct and perhaps deliberate misreading of the Plan provisions. A convenience class is just that. It allows accepted creditors to gain certainty of recovery in return for which the company streamlines claims and distribution, including by receiving a 'yes' vote and other administrative efficiencies to the benefit of all.[53] Disputed claims, claimants whose identities are uncertain, claimants who do not wish to vote yes, and claimants whose circumstances make it inconvenient to deal with them – all of which apply to the Contingent Claimants – cannot by definition participate in such procedures.

54. With respect to creditors who receive no consideration, bankruptcy proceedings (and the Superintendent) have long recognized that some claims are so small that the cost of distribution

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[50] Notice of Motion, dated May 26, 2022, para (aa), RMRMR, Tab 1 p 9.
[51] Notice of Motion, dated May 26, 2022, para (aa)(ii), RMRMR, Tab 1 p 9.
[52] Notice of Motion, dated May 26, 2022, para (aa)(iii), RMRMR, Tab 1 p 9.
[53] *Lutheran Church Canada (Re),* 2016 ABQB 419, para 155, Reply BOA, Tab 9.

(and therefore voting as well) exceed the benefit to the recipient. As such, *de minimis* claims, in this case those of $10 or less, are deemed to vote in favour of the plan but are excluded from distribution. It is that typical and practical application of bankruptcy process about which the Contingent Claimants object. Unlike the claims of the Contingent Claimants, the *de minimis* claims are proven.

55. The representative plaintiff complains that 35 proven *de minimis* claims are unfairly receiving 35 times more votes than their class is receiving.[54] That is unfounded. Obviously, any number multiplied by 0 is still 0. The claims in question are unproven and disputed. As such, the representative plaintiff is receiving one vote for one dollar in respect of his disputed claim.

56. Ultimately, however, none of that has anything to do with the issue before the Court on the Applicants' motion which is whether the Plan meets the legal test to proceed to a creditor vote. It does meet that test. It is not doomed to fail.[55]

PART IV - ORDER REQUESTED

57. The relief sought by the Applicants is appropriate. Their motion should be granted and the cross-motion should be dismissed in its entirety, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2022.

Cassels

CASSELS BROCK & BLACKWELL LLP

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[54] Responding Factum of Haidar Omarali in his capacity as representative plaintiff, dated June 2, 2022, at para 36.
[55] *US Steel Canada Inc. (Re),* 2017 ONSC 1967, para 12, BOA, Tab 19.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Algoma Steel Corp. v Royal Bank,* 1992 CarswellOnt 162 (SC)
2. Amended Plan of Compromise and Arrangement pursuant to the CCAA, concerning, affecting and involving The Canadian Red Cross Society / *Société Canadienne de la Croix Rouge*, dated July 31, 2000 as Amended and Approved at Meetings of Creditors held on August 30, 2000
3. *Arrangement Relatif à Bloom Lake,* 2018 QCCS 1657
4. *Blackburn Developments Ltd., Re,* 2011 BCSC 1671
5. *Canadian Airlines Corp. (Re),* 2000 ABQB 442
6. *Canwest Global Communications Corp., Re.,* 2010 ONSC 4209
7. Decision of Justice O'Connor, dated May 24, 2022
8. Endorsement of Justice Koehnen, issued March 9, 2021
9. *Fairview Industries Ltd. et al. (Re)*, 1991 CanLII 4266 (NSSC)
10. Forty-Fifth Report of the Monitor, FTI Consulting Canada Inc., dated March 22, 2018, Bloom Lake
11. *HSBC Bank v Bear Mountain Master Partnership,* 2010 BCSC 1563
12. *Just Energy Group Inc et. al. v Morgan Stanley Capital Group Inc et. al.,* 2022 ONSC 2697
13. *Lutheran Church Canada (Re),* 2016 ABQB 419
14. *Nalcor Energy v Grant Thornton*, 2015 NBQB 20
15. Tenth Report of the Monitor, dated May 18, 2022
16. *Re Canadian Triton International Ltd.,* 1997 CanLII 12412 (ONSC)
17. *Re Clover on Yonge Inc.* (CV-20-00642928-00CL), Endorsement of Justice Hainey dated January 8, 2021 (unreported)
18. *Re Port Chevrolet Oldsmobile Ltd*., 2002 BCSC 1874; 2004 BCCA 37
19. *Re Sherritt International Corporation,* 2020 ONSC 5822
20. *Re Woodward's Ltd.*, 1993 CarswellBC 555
21. *Sammi Atlas Inc., Re,* 1998 CanLII 14900 (ONSC)
22. Sears Canada Inc. and Related Applicants Plan of Arrangement dated February 15, 2019

23. *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)

24. *SemCanada Crude Co., Re.*, 2009 ABQB 490

25. *Stelco Inc Re.,* 2005 CanLII 42247 (ONCA)

26. *Sino-Forest Corporation, (Re),* 2012 ONSC 7050

27. Supplement to the Tenth Report of the Monitor, dated June 1, 2022

28. *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, and Order of Justice Farley dated November 23, 1999 (I.I.C. Ct. Filing 44993495001)

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

30. Twenty-Ninth Report of FTI Consulting Canada Inc., as Monitor, dated February 6, 2019, Sears Canada Inc. and Related Applicants

31. *US Steel Canada Inc. (Re),* 2017 ONSC 1967

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Companies' Creditors Arrangement Act,* RSC 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 bindings

(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.

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.

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.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

REPLY FACTUM OF THE DIP LENDERS

MOTION FOR AUTHORIZATION ORDER, MEETINGS ORDER, AND OTHER RELIEF RETURNABLE JUNE 7, 2022

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