

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., 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**")

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE MOVING PARTY, Haidar Omarali in his capacity as representative plaintiff of the certified class (the "**Class**") in *Omarali v. Just Energy* (the "**Omarali Action**"), will make a motion to the Court of Appeal for Ontario on a date to be fixed by the Registrar.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing or as otherwise determined by this Court.

THE MOTION IS FOR:

1. An order granting Mr. Omarali, on behalf of the Class, leave to appeal to the Court of Appeal for Ontario from the decision of Justice McEwen (the "**Motion Judge**") dated June 10, 2022, which, *inter alia*, ordered the Class is entitled to only one vote in respect of the voting on the proposed Plan, and not one vote for each of the members of the Class;
2. An order validating the manner of service of the notice of motion and motion materials herein, if necessary;
3. An order abridging the time for the hearing of this motion;
4. If leave to appeal is granted, an order expediting the hearing of this appeal;
5. Costs of this motion, to be fixed by the court; and
6. Such further and other relief as this Honourable Court deems fit.

THE GROUNDS FOR THIS MOTION ARE:

7. This case raises important issues with respect to the requirement pursuant to ss. 6(1) of the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") that a Court cannot sanction a plan of arrangement and compromise unless a majority in *number* of creditors, which also represents two-thirds in *value* of the creditors' claims, vote to approve it.
8. The proposed appeal raises serious and arguable grounds with respect to the rights of each creditor to vote on a proposed Plan, and engages issues that are important to the parties and to these CCAA proceedings, but are also significant to the public and the practice of insolvency law in general.

Background to the Meeting Order

9. The Omarali Action was commenced against Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario LP (collectively, "**Just Energy**"). It concerns Just Energy's misclassification of over 7,700 employees as "independent contractors" and resulting violations of the minimum requirements of the *Employment Standards Act, 2000*, SO 2000, c 41, including with respect to minimum wage, overtime pay, vacation pay, holiday pay and minimum working hours and conditions.
10. On July 27, 2016, Justice Belobaba certified the Omarali Action as a class proceeding with 13 common issues (the "**Certification Order**").
11. After an opt out process concluded, where individuals meeting the class definition could choose not to be part of the Class, 7,723 Class Members were identified.
12. On March 9, 2021, Just Energy Group Inc. ("**Just Energy**") and certain of its affiliates (collectively, the "**Applicants**") were granted protection under the CCAA from the Ontario Superior Court of Justice (Commercial List). The Omarali Action was stayed and the trial scheduled for November 2021 would not proceed.
13. On September 8, 2021, Just Energy sought court approval of a claims procedure order.
14. On September 10, 2021, Class Counsel sought confirmation that the Class Counsel may, through the Representative Plaintiff, file one proof of claim form on behalf of all Class Members rather than file thousands of individual claim forms. Just Energy did not propose any alternative.
15. On February 2, 2022, Just Energy wholly disallowed the Class Members' claims.

16. On February 24, 2022, Class Counsel filed a Notice of Dispute for all Class Members.
17. The Applicants filed its Plan of Compromise and Arrangement on May 26, 2022.
18. The Applicants filed a Motion on May 13, 2022, which *inter alia* sought a Meeting Order. The proposed Meeting Order sought a meeting date of August 2, 2022. The proposed Meeting Order also sought to provide one vote for the Class as a whole.
19. By an endorsement dated June 10, 2022, the Motion Judge ordered that the Class was entitled to one vote at the meeting, and further ordered the conduct of expedited summary proceedings to determine the validity and value of the Omarali Class Action.
20. On June 21, 2022, the Motion Judge released a supplementary endorsement which included reasons with respect to the June 10, 2022 endorsement. The Motion Judge held that the members of the Class are creditors, and therefore entitled to vote at the meeting.
21. The Motion Judge accepted the submission of the Applicant that the Class should be accorded only one vote, noting that it would be unfair if individuals in class proceedings could "use their votes to swamp the unsecured class on numerosity grounds *and defeat a plan* in a situation where they have yet to have a proven claim" [Emphasis added].

The proposed appeal

22. If leave is granted, this court would be asked to answer the following questions:
 - (a) Did the Motion Judge err in ordering that the class members in a certified class action with 7,723 members be entitled to only one vote, regardless of whether their claims were found to meritorious before the creditors' meeting?

- (b) Did the Motion Judge err in approving a voting process which would not require a majority in number of creditors within a class to vote to approve a Plan?
- (c) Did the Motion Judge err in concluding that providing each of the members of the Class a vote would be unfair based on speculative concerns that they may vote against the Plan?

The factors relevant to granting leave to appeal favour leave being granted

- 23. The issue of the number of votes to which creditors in a group with common contingent claims are entitled is of significance to the practice. The Motion Judge's determination that the Class is only entitled to one vote has the effect of disenfranchising thousands of individual creditors. These individuals are creditors who were left out of the consultations and negotiations that led to the proposed Plan, and this decision would deny them a voice in the approval of the Plan.
- 24. If this decision is left undisturbed, it may have a significant impact on how future Plans are negotiated between creditors in CCAA proceedings which involve certified but as yet unproven class action claims. Specifically, it may encourage and facilitate the sidelining and exclusion of class action claimants and members of other representative actions from the process of negotiating a Plan.
- 25. This issue is also significant to this proceeding. The approach to the vote of the Meeting Order disenfranchises thousands of members of a certified class. As acknowledged by both the Applicant and the Motion Judge, the effect of this approach is of such significance that it could have an impact on the outcome of the vote, and whether or not the Plan is approved.

26. The proposed appeal is *prima facie* meritorious. The Motion Judge erred in ordering that the Class is only entitled to one vote as:
- (a) Section 6(1) of the CCAA states that the court *may* sanction a plan of compromise or arrangement if a "majority in number representing two thirds in value of the creditors, or the class of creditors..." agree. There are two separate requirements, that a majority in number of the creditors agree, and that their claims represent two thirds of the value of all creditors.
 - (b) The Motion Judge sought a "harmonious reading of the provisions of the CCAA and the [*Bankruptcy and Insolvency Act* ("**BIA**")]," and concluded such a reading supported the notion that the Litigation Claimants are creditors, and that they are entitled to vote at the meeting. Section 2 of the BIA defines creditor as "a person having a claim provable as a claim under this Act."
 - (c) Mr. Omarali has been appointed to represent the Class, he does not – and cannot – subsume the Class Members' claims or rights. Although the class has a court-appointed representative to take them through the certified common issues, class members do not lose entitlements associated with their individuals claims. The Motion Judge's order contravenes the *Class Proceedings Act, 1992, S.O. 1992, c. 6* and the Certification Order.
 - (d) The Omarali Action is certified and was ready for trial. The Motion Judge has concluded the Class has a provable claim, and as such the number of votes should be determined by the number of claims.

- (e) The Motion Judge cited that individuals in class proceedings might "use their votes to swamp the unsecured class on numerosity grounds and defeat a plan in a situation where they have yet to have a proven claim." This is an improper consideration which should not determine voting rights. Treating creditors appropriately in a Plan such that they willingly support it is the proper way to ensure they do not use their votes as a "veto."

27. The proposed appeal will not unduly hinder the progress of the CCAA proceeding.

Statutory Grounds

28. Rules 1.04, 1.05, 61.03 and 61.03.1 of the Rules of Civil Procedure.
29. Sections 2, 6, 11, 13 and 14 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36.
30. Sections 24, 25 and 26 of the *Class Proceedings Act, 1992*, S.O. 1992
31. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

32. The orders and endorsements made in the CCAA Proceedings;
33. Affidavit of Vlad Calina, affirmed May 26, 2022;
34. Supplemental Affidavit of Vlad Calina, affirmed June 1, 2022;
35. Factum of the Applicant, dated May 13, 2022; and

36. Such further and other evidence as counsel may advise and as this Honourable Court may permit.

July 4, 2022

KOSKIE MINSKY LLP

20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

David Rosenfeld (LSO #51143A)

(t) 416-595-2700

(f) 416-204-2894

drosenfeld@kmlaw.ca

Aryan Ziaie (LSO #70510Q)

(t) 416-595-2104

(f) 416-204-2815

aziaie@kmlaw.ca

James Harnum (LSO #60459F)

(t) 416-542-6285

(f) 416-204-2819

jharnum@kmlaw.ca

**Counsel for Haidar Omarali in his
capacity as Representative Plaintiff
*Omarali v. Just Energy***

TO: CCAA SERVICE LIST

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

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

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

Applicants

ONTARIO

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**NOTICE OF MOTION
FOR LEAVE TO APPEAL**

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

David Rosenfeld (LSO #51143A)
Tel: 416-595-2700 / Fax: 416-204-2894
drosenfeld@kmlaw.ca

Aryan Ziaie (LSO #70510Q)
Tel: 416-595-2104 / Fax: 416-204-2815
aziaie@kmlaw.ca

James Harnum (LSO #60459F)
Tel: 416-542-6285 / Fax: 416-204-2819
jharnum@kmlaw.ca

**Counsel for Haidar Omarali in his
capacity as Representative Plaintiff
*Omarali v. Just Energy***