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., 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

APPLICANTS' SUPPLEMENTARY SUBMISSIONS
(Recoveries Within Unsecured Class)

June 15, 2022

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TO: THE SERVICE LIST

PART I - OVERVIEW

1. The Applicants file these Supplementary Submissions in response to this Court's request in its endorsement of June 10, 2022 for submissions addressing:

> the appropriateness of the terms of the proposed differential consideration being offered to unsecured creditors in the plan, which is contested and which I have not yet approved. Specifically, the submissions should address the rationale for providing New Common Shares to the unsecured Term Loan Lenders and cash consideration to the General Unsecured Creditor Class.[1]

2. The consideration provided to the unsecured creditors under the Plan reflects a heavily negotiated transaction pursuant to which the Term Loan Lenders, in their capacity as Plan Sponsor, have agreed to take equity in the New Just Energy Parent in satisfaction of their very substantial claims. As part of this negotiated transaction, the Plan requires that Just Energy Group Inc. ("**JEGI**") will become a private company, a condition which could not be satisfied if the other unsecured creditors were entitled to receive New Common Shares in exchange for their indebtedness.

3. This Court will have a full opportunity to consider the fairness and reasonableness of the consideration to be provided to the General Unsecured Creditors at the Sanction Hearing. The Applicants submit that it would be premature to finally determine this issue before the conclusion of the Voting Period and without the benefit of the creditor vote.

PART II - SUPPLEMENTARY SUBMISSIONS OF THE APPLICANTS

(a) *Rationale for Term Lender Recoveries*

4. The rationale for the provision of New Common Shares to the Term Loan Lenders and cash consideration for the General Unsecured Creditor Class is grounded in the status of the Term

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[1] Endorsement of McEwen J, dated June 10, 2022, para. ix.

Loan Lenders as Plan Sponsor. Specifically, in that capacity, the Term Loan Lenders have agreed to equitize their debt in satisfaction of the Term Loan Claims.

5. Similar receipt of equity by the other unsecured creditors is not an option under the Plan. The transactions contemplated under the Plan involve a reorganization and rationalization of the businesses of the Just Energy Entities. Among other things, this reorganization is intended to allow the Just Energy Entities to emerge from the CCAA with a deleveraged balance sheet and with an improved ability to withstand the volatility of the market in which they operate. The resulting going-concern restructuring will preserve over 1000 jobs, as well as preserving relationships with suppliers and other stakeholders.

6. One element of this complex reorganization involves taking Just Energy private. This is the basis on which the Plan Sponsor has indicated its willingness to enter into the contemplated restructuring transactions that would see the business emerge in the near term as a going concern.

7. Thus, it is a condition precedent to the implementation of the Plan that Just Energy shall have satisfied all conditions or requirements necessary for JEGI to cease to be a reporting issuer under the US Exchange Act (or any other US securities laws) and shall have ceased to be a reporting issuer under those laws. JEGI must also cease to be a reporting issuer under applicable Canadian securities laws, and no Just Energy Entity shall be deemed to have become a reporting issuer under applicable Canadian securities laws.[2]

8. This requirement is set out in the terms of the Plan as follows:

> JEGI shall satisfy any and all conditions or requirements necessary to cease to be a reporting issuer (or the equivalent) under the U.S. Exchange Act (or any other U.S. securities laws) and JEGI shall cease to be a reporting issuer and no Just Energy Entity shall be deemed to have become a reporting issuer under applicable

[2] Eleventh Carter Affidavit, para. 106(k), Applicants' MR, Tab 2, p. 150.

> Canadian Securities Laws and the Common Shares shall have been delisted from the TSX Venture Exchange, in each case, as and from the Effective Time.[3]

9. The "taking private" of JEGI in accordance with the Plan is beneficial to the Just Energy Entities. It will generate material cost savings associated with maintaining JEGI's status as a public company, and reduce inefficiencies associated with the dual layer of compliance obligations arising from JEGI's status as reporting issuer in both Canada and the US. This condition precedent, like all the terms of the Plan, was extensively negotiated. If this condition cannot be satisfied – and the Term Loan Lenders have indicated that they do not intend to waive it – then the Plan, as negotiated, cannot be implemented.

10. If the General Unsecured Creditors, other than the Term Loan Lenders, were entitled to receive New Common Shares under the Plan instead of or in addition to cash consideration, JEGI would not be able to satisfy this condition precedent. This is because the acquisition of New Common Shares by individual unsecured creditors would inevitably lead to a requirement under Canadian and US securities laws for JEGI to continue to be a reporting issuer and would introduce an unacceptable level of uncertainty into the proposed restructuring.

11. The equity consideration available to the Term Loan Lenders in the General Unsecured Class, as well as the determination not to offer similar consideration to the other General Unsecured Creditors, is therefore supported by a commercial rationale integral to the reorganization transactions negotiated under the Plan. Moreover, since taking JEGI private is a condition precedent to the implementation of the Plan, there is no basis on which – for example –

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[3] Plan, s. 10.1(l), Conditions Precedent to Implementation of the Plan, Applicants' MR, Tab 2A, p. 224. See also Restructuring Term Sheet, Applicants' MR, Tab 2E, p. 727.

the Applicants can be directed to revise the Plan to provide for New Common Shares to be made available to all of the General Unsecured Creditors for their claims.

12. This Court does have the authority to determine whether the consideration provided to the General Unsecured Creditors, as negotiated, is fair and reasonable. However, for the reasons set out below, this authority is properly exercised at the Sanction Hearing, if the Plan is approved by the requisite majorities of creditors at the Creditors Meetings.

(b) ***Approval of Consideration within the General Unsecured Creditor Class Not Necessary at this Stage***

13. In the hearing on June 7, 2022, the Applicants sought this Court's approval of the Creditors Meetings Order. This included the proposed voting by the General Unsecured Creditors in a single class that includes the unsecured claims of the Term Loan Lenders, the Contingent Litigation Claimants, the Convenience Class Creditors and all of the other general unsecured creditors.

14. This Court held in its endorsement of June 10, 2022 that:

> iii. There shall be two classes of creditors for the purposes of considering and voting on the Plan: the Secured Creditor Class and the Unsecured Creditor Class.
>
> iv. For greater clarity, the Unsecured Creditors Class shall include the Term Loan Lenders, the two U.S. class actions, the Omarali class action and the Texas Power Interruption Claimants

15. In its endorsement, this Court described the consideration provided to the Term Loan Lenders and the other creditors in the General Unsecured Class as a "secondary issue" in relation to classification and requested these further Supplemental Submissions. However, having agreed with the Applicants that two classes of creditors are appropriate for the purposes of voting at the Creditors Meeting, this Court is not required to separately or specifically approve the consideration provided to the creditors within the General Unsecured Class at this time, prior to the Creditors Meetings or, more importantly, the Sanction Hearing.

16. In support of the proposed classification of the Applicants' creditors into the two classes that have been approved by this Court, the Applicants relied on case law supporting the ability of a CCAA debtor, where appropriate, to classify creditors with the same legal interests *vis-à-vis* the debtor in the same class, even where all creditors within the class are not given identical consideration in type or amount.[4]

17. That creditors can be classified together despite receiving different types of consideration is demonstrated in *SemCanada Crude*, a case referenced by a number of parties in relation to classification. In that case, the Court approved the debtor's proposed classification, allowing the secured lenders to vote their unsecured deficiency claim within the same class as other unsecured creditors, despite the fact that those secured lenders were receiving a different kind of distribution in relation to their unsecured deficiency claim (a share in a litigation trust) than the other creditors in the same class. In granting the meeting order, the Court neither approved nor disapproved of the different consideration offered within the class. The Court noted only that this differential treatment did not justify separate classification. The appropriateness of the consideration was held to be "an issue of fairness for the sanction hearing".[5]

18. Similarly, the Court in *SemCanada Crude* considered the fact that the noteholders, who were to vote within the unsecured class, were entitled to a higher share of distributions of assets than the ordinary unsecured creditors. The Court noted the rationale for such treatment – namely, that multiple debtor companies were indebted to the noteholders, as compared to the other ordinary unsecured creditors. Again, the Court specifically held that this difference in consideration within

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4 See Main Factum, paras. 48 to 49. See also paras. 41 to 47 of Main Factum for general submissions on the legal principles applicable to creditor classification.

5 *SemCanada Crude*, *Re*, 2009 ABQB 490 ("***SemCanada Crude***") at para. 25.

the class did not justify separate classification but was an issue of fairness that should properly be addressed at the sanction hearing.[6]

19. Finally, the Applicants reiterate that any considerations regarding the identity of a creditor – e.g. the status of that creditor as plan sponsor – within a class and their economic motivation for approving a plan have been held to be properly addressed as a matter of fairness at the Sanction Hearing.[7]

20. The Applicants submit that a conclusion at this stage that the consideration provided to the General Unsecured Creditor class is either "appropriate" or "inappropriate" would pre-determine matters of fairness and reasonableness that are properly the subject of the Sanction Hearing.

21. Moreover, this determination would be premature – it would occur before the Voting Period has concluded and it is determined whether there is any alternative, superior restructuring transaction available. It would be made prior to consideration of the creditor vote on the Plan, if no such alternative transaction emerges. And it would be made without the benefit of full submissions and a proper record addressing the fairness and reasonableness of the Plan as a whole, the manner in which the various aspects of the Plan transactions interact, as well as all of the other considerations that may affect the fairness and reasonableness of the Plan, viewed holistically.

22. In any event, BMO explains that, based on certain assumptions and the enterprise value multiple that is implied by the Plan to the estimated Fiscal 2023 EBITDA, the percentage of the recoveries for the Term Loan Claim Holders and the other General Unsecured Creditors are

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6 *SemCanada Crude* at para. 26.

7 *Canadian Airlines Corp. (Re),* 2000 CanLII 28185 (AB QB) at para. 34.

reasonably equivalent, regardless of the magnitude of unsecured Claims that are finally accepted or the amount of the General Unsecured Creditor Cash Pool ultimately available for distribution.[8]

23. To state the obvious, a pre-determination that the consideration offered to the General Unsecured Creditors is not permissible or appropriate would effectively determine that the Plan cannot go ahead as negotiated. None of the parties in this proceeding have cited CCAA precedent for making such a determination prior to a meeting.

24. The Applicants submit that this Court will have ample opportunity to consider whether the consideration provided is fair and reasonable at the Sanction Hearing and that the Court should not attempt to do so prior to that time. The ability to give full consideration to these matters at the Sanction Hearing will be preserved by requiring the Monitor to tabulate the votes separately within the General Unsecured Class.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of June, 2022.

Karin Sachar per: 

Marc Wasserman / Michael De Lellis / Jeremy Dacks

[8] Details of the valuation comparison are set out in the Caiger Affidavit at paras. 9-24, Applicants' MR, Tab 3, pp. 1780-1785.

SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *Canadian Airlines Corp. (Re),* 2000 CanLII 28185 (AB QB)

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

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Applicants

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PROCEEDING COMMENCED AT Toronto

APPLICANTS' SUPPLEMENTARY SUBMISSIONS

(Recoveries Within Unsecured Class)

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