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.
(each, an "**Applicant",** and collectively, the "**Applicants")**

SUPPLEMENTARY SUBMISSIONS OF

U.S. CLASS COUNSEL, HAIDAR OMARALI IN HIS CAPACITY AS REPRESENTATIVE PLAINTIFF IN OMARALI V. JUST ENERGY, AND THE TEXAS POWER INTERRUPTION CLAIMANTS

June 15, 2022

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TO: **THE SERVICE LIST**

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B E T W E E N:

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1. On June 10, 2022, the Court released its endorsement in respect of the Applicants' motions returnable June 7, 2022, directing, among other things, that there shall be one class of unsecured creditors for the purposes of voting on the proposed Plan. The Court further requested supplementary submissions from the parties addressing the appropriateness of the differential consideration being offered to unsecured creditors in the proposed Plan, which may be contested and which the Court advised it had not yet approved.

2. U.S. Class Counsel, Haidar Omarali in his capacity as representative plaintiff in Omarali v. Just Energy, and the Texas Power Interruption Claimants (collectively, the "**Contingent Creditors**") accept that in appropriate circumstances, creditors in the same class can receive different forms of consideration.

3. Ultimately, however, where there is to be one class of creditors, those creditors must have a "commonality of interest" so as to enable the members to "consult together with a view to their common interest".[1]

4. When considering whether there is a "commonality of interest" among the members of the class such that the proposed Plan can be sanctioned, the Court must consider the entirety of a creditor's interests. This holistic consideration must go beyond considering whether or not a creditor is an "unsecured creditor" or the form of their claim,

[1] The "commonality of interest" test has been codified in s. 22 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36 (the "*CCAA*"); however, the caselaw decided prior to 2009 continues to be relevant to the courts' reasoning: see Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada, 4th Edition, Section 23:12, Brief of Authorities of U.S. Class Counsel ("**BoA**"), Tab 32.; *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386 at para. 10, BoA, Tab 13; and *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC), BoA, Tab 14.

and the Court must also consider the substance of the entirety of their interests in the context of the proposed Plan, and consider whether the impact of the structure of the claims has the effect of skewing the vote in favour of a creditor who has interests and legal rights that are different than the other members of the class.[2]

5. Under the current proposed Plan, the type of consideration being offered to the Term Loan Lenders (equity and a continuing relationship with the debtor) is so fundamentally different from the consideration being offered to the Other General Unsecured Creditors (a one-time cash payout) that consultation is not possible. This concern is only amplified in the present case where the entity that holds substantially all of the Term Loan Claim: (i) is also the Plan Sponsor; (ii) is also affiliated with the DIP Lenders; and (iii) was involved in crafting the proposed Plan that benefits the Term Loan Lenders at the expense of the Other General Unsecured Creditors.[3]

6. As the Alberta Court of Appeal found in *San Francisco Gifts Ltd. V. Oxford Properties Group Inc.*, in these circumstances it "stretches the imagination to think that there would be meaningful consultation about the Plan" between the Term Loan Lenders and the Other General Unsecured Creditors.

7. Accordingly, since this Court determined that there is to be one class of unsecured creditors in this case, the only way that meaningful consultation amongst the unsecured creditors (as mandated by the *CCAA*) could occur in this case, as required to find that the

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[2] See generally *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 (CanLII).

[3]: see s. 22 of the CCAA; *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386 at para. 10, BoA, Tab 13; and *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC), BoA, Tab 14.

proposed Plan is fair and reasonable, is if the proposed Plan provided that all of the unsecured creditors are to be given the same rights to receive the offered cash and equity consideration and the same rights to participate in the New Equity Offering, all on a *pro rata* basis.[4]

8. A *pro rata* distribution of both the cash consideration and the share consideration among the Term Loan Lenders and the Other General Unsecured Creditors would limit the issue for the fairness hearing to the overall adequacy of consideration being made available to unsecured creditors and would facilitate the consultation between creditors that is required pursuant to s. 22 of the *CCAA*. It would also provide a framework for meaningful consultation between the Term Loan Lenders and Other General Unsecured Creditors in advance of the creditors' meeting, as required.

9. The DIP Lenders have suggested that the Plan requires the issuance of shares as part of a going private transaction. The Contingent Creditors are not suggesting that the issuance of shares, in itself, is improper; rather, the Contingent Creditors submit that the issuance of shares (and the right to participate in the new equity offering) to only the Term Loan Lenders is inappropriate in this case when they are part of the same class of the Other General Unsecured Creditors.

10. Accordingly, without an amendment to address the materially different consideration being offered to the Term Loan Lenders and the Other General Unsecured

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[4] *Re: San Francisco Gifts Ltd.*, 2004 ABQB 705 at paras. 29-35, BoA, Tab 15, Caselines B-3-746 to B-3-747: in which the Court, rather than creating a new unsecured class, directed that the plan be amended to preserve certain landlords' unique statutory cause of action against third parties. See also *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC), BoA, Tab 14.

Creditors, the proposed Plan cannot be sanctioned and is doomed to fail. In these circumstances, the Plan should not go to a vote because there is no way that the Plan could be sanctioned as fair.

11. In any event, if the Plan is sent to a vote, the Contingent Creditors reserve all their rights to make submissions at the sanction hearing regarding the fairness of the Plan, including making submissions with respect to the value of the different consideration being offered under the Plan and the need for greater disclosure regarding the consideration being offered to the unsecured creditor class prior to the sanction hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

June 15, 2022

Paliare Roland Rosenberg Rothstein LLP
Lawyers for U.S. Class Counsel

Koskie Minsky LLP
Lawyers for Haidar Omarali in his capacity as representative plaintiff in Omarali v. Just Energy

Tyr LLP
Lawyers for the Texas Power Interruption Claimants

SCHEDULE "A"

LIST OF AUTHORITIES

1. Houlden & Morawetz,Bankruptcy and Insolvency Law of Canada, 4th Edition, Section 23:12

2. *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386

3. *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC)

4. 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10

5. *Re: San Francisco Gifts Ltd.*, 2004 ABQB 705

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Classes of Creditors

Company may establish classes

- **22 (1)** A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

- **Factors**

  (2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

  - **(a)** the nature of the debts, liabilities or obligations giving rise to their claims;
  - **(b)** the nature and rank of any security in respect of their claims;
  - **(c)** the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
  - **(d)** any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

- **Related creditors**

  (3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

- 1997, c. 12, s. 126
- 2005, c. 47, s. 131
- 2007, c. 36, s. 71

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SUPPLEMENTARY SUBMISSIONS OF U.S. CLASS COUNSEL, HAIDAR OMARALI IN HIS CAPACITY AS REPRESENTATIVE PLAINTIFF IN OMARALI V. JUST ENERGY, AND THE TEXAS POWER INTERRUPTION CLAIMANTS

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