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

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., 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")**

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE MOVING PARTIES, Wittels McInturff Palikovic, Finkelstein Blankinship, FreiPearson, Garber LLP, and Shub Law Firm LLP (collectively, "**U.S. Class Counsel**"), in their capacity as counsel to at least hundreds of thousands of the Applicants' U.S.

customers (the "**U.S. Customers**") in in two U.S. class actions,[1] will make a motion to a panel of the Court of Appeal for Ontario, in writing, on a date to be fixed by the registrar.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.

THE MOTION IS FOR:

1. An order granting U.S. Class Counsel leave to appeal to the Court of Appeal for Ontario from the order of Justice McEwen (the "**Motion Judge**") dated June 10, 2022 (the "**Order**"), allowing the Applicants' motion for an Authorization Order and a Meetings Order;

2. An order validating the manner of service of this notice of motion and motion materials herein, if necessary;

3. The costs of this motion; and

4. Such further and other relief as this Honourable Court deems fit.

THE GROUNDS FOR THE MOTION ARE:

5. The Motion Judge's orders dated June 10 and 23, 2022 (the "**Orders**") undermine the democratic principles that form the foundation of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("***CCAA***"). The Plan of Arrangement and Compromise ("**Plan**") endorsed in the Orders effectively disenfranchises hundreds of thousands of creditors, setting a new precedent that could have far-reaching impacts for *CCAA* litigation and the practice of insolvency law more broadly.

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[1] (*Donin* v. *Just Energy Group Inc. et al*. (the "**Donin Action**") and *Trevor Jordet* v. *Just Energy Solutions, Inc*. (the "**Jordet Action**", together with the Donin Action, or the "**U.S. Class Actions**")).

6. Specifically, under the endorsed Plan creditors in the U.S. Class Actions are denied the meaningful right to vote because:

(a) they are allocated only one vote per class action (two votes in total) in circumstances where each class action represents (at least) hundreds of thousands of the Applicants' U.S. Customers with strong and viable claims. Pursuant to the *CCAA*, each of the U.S. Customers is a creditor in their own right and is entitled to a vote; and

(b) the Plan places the Term Loan Lenders (whose legal and financial interests—including the kind of consideration they would receive under the proposed Plan—are so disparate as to frustrate the ability to meaningfully consult on the Plan) in the same class as the Other General Unsecured Creditors (defined below), including the U.S. Customers.

7. The vote by creditors is one of the core requirements of approval of a restructuring plan under the *CCAA*.

8. These issues are of real and significant interest and importance to the parties, the public, *CCAA* proceedings, insolvency practice in general, and the law.

A. Background

1. The U.S. Class Actions

9. The Donin Action was commenced on October 3, 2017. The Jordet Action was commenced on April 6, 2018. In each case, a class action is proposed on behalf of the

plaintiffs and other U.S. customers in 11 states in which the Applicants named as defendants (the "**Just Energy Defendants**") do business.

10. The U.S. Class Actions allege that the Just Energy Defendants target consumers and businesses hoping to save on energy supply costs. They lure in customers with a teaser or fixed rate for a limited time period that is initially below its competitors' rates. Once that initial rate expires, the Just Energy Defendants charge what they represent to be a "variable rate" which under the applicable contracts must be set according to "business and market conditions".

11. The U.S. Class Actions further allege that the Just Energy Defendants exploit their pricing discretion and the dramatic information asymmetry with its customers to artificially inflate their variable rates without regard to their contractual obligations. As a result, the Just Energy Defendants' variable rates are consistently substantially higher than those otherwise available in the natural gas and electricity supply markets, and do not fluctuate based on any reasonable interpretation of "business market conditions", such as wholesale market energy prices or the rates of other competitive market participants (including local utilities and the Just Energy Defendants' own fixed rates).

12. The Just Energy Defendants moved unsuccessfully to dismiss the U.S. Class Actions. In both of the U.S. Class Actions, two different federal court judges found that the U.S. Customers' breach of contract and breach of duty of good faith claims were plausible. The progress of the U.S. Class Actions was significantly delayed by the Just Energy Defendants' unsuccessful motions to dismiss the actions.

2. The CCAA Proceeding

13. On March 9, 2021, the Court issued an Initial Order granting *CCAA* protection to the Applicants (the "**CCAA Proceeding**").

14. On September 15, 2021, the Applicants proposed, and the Court issued, a "**Claims Procedure Order**" which, among other things, establishes a procedure for the adjudication of claims, but does not provide timelines for the final adjudication of disputed claims or any mechanism to ensure that disputed claims are properly estimated for voting purposes if the final adjudication of a disputed claim does not occur before the creditors meeting to vote on a proposed plan.

15. For both cases, U.S. Class Counsel provided over 40 pages of Claim Documentation setting out the relevant background and merits of the respective U.S. Class Actions, including:

(a) a detailed analysis of the breach of contract and breach of duty of good faith claims, including significant case law and statutory support;

(b) reference to four similar U.S. class actions that were certified following a contested class-certification motion (all four cases are in respect of ESCO customers who were overcharged under the terms of their customer agreements);

(c) evidence of denunciation of the Just Energy Defendants' pricing practices by relevant regulators as further demonstration of the strength of the Class Claimants' claims; and

(d) a supporting expert report.

The U.S. Class Actions are perfectly suited for certification. There is substantial precedent for certification of this type of class action.

16. Nevertheless, on January 11, 2022, the Applicants served a Notice of Revision or Disallowance entirely disallowing the U.S. Class Actions as "meritless" (the "**Notice of Disallowance**"). The Notices of Disallowance are pro forma or blanket responses to the U.S. Class Actions in that they largely repeat the failed legal arguments that the Applicants made in their unsuccessful attempts to have the Donin Action and the Jordet Action dismissed.

17. On February 10, 2022, U.S. Class Counsel disputed the disallowance. The Notices of Dispute includes additional legal and evidentiary support for the U.S. Class Actions.

18. On February 9, 2022, U.S. Class Counsel brought a motion for advice and direction requesting, among other things, that the Court order an Expedited Adjudication Framework so that the U.S. Customer Claims could be finally adjudicated prior to a vote on the Plan.

19. At the end of the hearing, the Court advised the parties that the motion was dismissed with reasons to follow. His Honour delivered his reasons on February 23, 2022.

20. On February 24, 2022, U.S. Class Counsel filed a Notice of Motion for Leave to Appeal the February 9 Order to the Ontario Court of Appeal on an expedited basis.

21. On June 28, 2022, the Ontario Court of Appeal dismissed U.S. Class Counsel's motion for leave to appeal.

22. On March 3, 2022, the Court appointed the Honourable Justice Dennis O'Connor as Claims Officer (the "**Claims Officer**"), for the purposes of finally adjudicating the U.S. Customer claims (the "**O'Connor Adjudication**").

23. The O'Connor adjudication is a non-expedited claims process. Although Justice O'Connor has made a number of preliminary rulings in the O'Connor Adjudication in respect of, among other things, class size and discovery rights, thereby streamlining the U.S. Class Action Claims, the O'Connor Adjudication has very little to no chance of determining the U.S. Customer Claims prior to the meeting of creditors.

B. The Meetings Motion and the impugned Order

24. On May 12, 2022, after months of advising the Court and interested parties that a Plan was pending, the Applicants finally filed their Plan.

25. The Plan revealed the intention of the plan sponsor, Pacific Investment Management Company LLC ("**PIMCO**"), together with the other plan supporters, to take control of the Applicants' going-concern business while wiping out all of the other unsecured creditors including the class actions filed against the Applicants, except, as described below, the general unsecured Term Loan Lenders (PIMCO owns 66% of the Term Loan).

26. In effect, PIMCO has turned this restructuring into a "loan to own" process without a proper marketing process or valuation.

27. PIMCO and the Applicants structured the Plan and, in particular, the voting procedure, to guarantee a positive result for themselves while disenfranchising the U.S. Customers (among other creditors).

1. The Applicants proposed to limit (at least) hundreds of thousands of U.S. Customers with claims to one single vote

28. The Plan disclosed that the Applicants proposed to limit (at least) hundreds of thousands of U.S. Customers of the Applicants with claims to one single vote.

29. In the Donin Action alone, U.S. Class Counsel has determined that in just New York state, the class of U.S. Customers is comprised of 417,162 individuals during the relevant time frame.

30. Each of these 417,162 customers has a claim against the Applicants and ought to have a meaningful vote.

2. The Plan contemplates gross disparity in the kind of consideration to the Term Loan Lenders relative to the Other General Unsecured Creditors

31. The Plan contemplates two classes of creditors for the purposes of voting on and receiving distributions (or other treatment) under the Plan:

(a) the Secured Creditor Class (comprised of the Credit Facility Lenders); and

(b) the Unsecured Creditor Class (comprised of the Term Loan Lenders, General Unsecured Creditors, and Convenience Claims, each defined under the Plan).

32. PIMCO owns 66% of the Term Loan, and as a result, is the majority Term Loan Lender. PIMCO's affiliates are also the DIP Lenders, the assignees of a significant secured supplier claim (the BP Debt) and, as noted above, the proposed Plan sponsor.

33. Within the Unsecured Creditor Class, the Plan contemplates the following disparate treatment:

(a) the Term Loan Lenders (66% PIMCO) will receive their pro rata share of 10% of the New Common Shares. The Term Loan Lenders will also have the right to participate in the New Equity Offering. In the result, the Term Loan Lenders will receive 100% of the common equity through a backstopped participation in an equity rights offering that is not available to the non-Term Loan Lender General Unsecured Creditors;

(b) Convenience Claims will be paid in full up to $1,500 from the General Unsecured Creditor Cash Pool (established at $10 million); and

(c) the Other General Unsecured Creditors holding Accepted Claims will be paid their pro rata share of the General Unsecured Creditor Cash Pool (after payment of Convenience Claims and permitted fees and expenses (estimated in the Applicants' record to be in the range of $4-$7 million) and subject to the turnover requirements in the Subordinated Note Indenture and the Plan. The Applicants currently estimate that the Other General Unsecured Creditors will receive 2.5 to 5 cents on the dollar).

34. The proposed cash payment to the General Unsecured Creditors is also at risk of erosion because it remains subject to an unknown number of convenience class creditors receiving a 100% recovery on claims at or below $1,500 (100% recovery) and creditors with claims above $1,500 (other than contingent creditors) opting-in to the convenience class.

35. Moreover, any proceeds to the Other Unsecured Creditors are further diminished by professional fees whereas the Term Loan Lenders' fees are being paid by the Applicants.

36. The forms of consideration given to the Term Loan Lenders (equity) and the Other General Unsecured Creditors (a cash payout) are entirely different in kind and provide very different opportunities and risks.

37. Equity represents a continuing interest in the Applicants with an opportunity for enhanced recovery and profits. This is particularly true given that the value of the Texas Weather Event Assets will accrue entirely to the benefit of the Term Loan Lenders as the new equity holders.

38. Conversely, the proposed (de minimis) cash payment to the Other General Unsecured Creditors is a one-time payment with no up-side potential including no right to participate in or benefit from the Undisclosed Assets.

3. The Applicants proposed to limit the U.S. Customer claims to one dollar

39. The Plan also proposed to arbitrarily limit the U.S. Customers' claims to one dollar, without any meaningful attempt to independently value the claims for voting purposes.

4. U.S. Class Counsel's Response to the Meetings Motion and Notice of Motion

40. In response to the Meetings Motion, U.S. Class Counsel moved for, among other things, an order:

(a) declaring that each U.S. Customer is a creditor in their own right and entitled to a vote on any plan of compromise and/or arrangement filed in these proceedings;

(b) declaring that, in these proceedings, the plaintiffs in the U.S. Class Actions (the "**U.S. Plaintiffs**") are representatives of the U.S. Customers and are entitled to vote on any plan of compromise and/or arrangement filed in these proceedings on behalf of the U.S. Customers, and/or, if necessary, formally appointing the U.S. Plaintiffs as representatives for the U.S. Customers and Paliare Roland Rosenberg Rothstein LLP as their lawyers in these proceedings; and

(c) for advice and directions from the Court in respect of a summary valuation (estimation) of the U.S. Customer Claims for voting purposes only.

5. The Other Contingent Creditors

41. In the motion below, two other groups of contingent creditors with significant claims joined U.S. Class Council in opposing the Meetings Order, on substantially the same bases:

(a) Haidar Omarali, representative plaintiff on behalf of class members in an Ontario class action, certified on July 27, 2016 (the **"Omarali Class Action"**). The Omarali Class Action represents 7,724 former sales agents of Just Energy, who were allegedly wrongfully classified as independent contractors. These claimants seek entitlements as employees pursuant to the *Employment Standards Act, 2000* SO, c. 41; and

(b) approximately 250 claimants in four tort actions brought in Texas pursuant to Texan law. These claimants are pursuing damages for alleged loss of business, personal injury, and/or damage to property arising out of the Applicant's mismanagement during and after the Texas Weather Events (the "**Mass Tort Claimants**", collectively with the Omarali Class Action and the U.S. Customers' the "**Contingent Creditors**").

42. These claimants were joined by a third contingent creditor, Pariveda Solutions Inc., who sought valuation of their contingent claim. Pariveda Solutions Inc., estimates the value of its claim at US $46 million, but the Plan valued the claim at $1 for voting purposes.

6. The June 10, 2022 and June 23 Orders

43. The motions were heard on June 7, 2022.

44. On June 10, 2022, the Motion Judge endorsed the Applicants' motion, with reasons to follow.

45. The Motion Judge accepted the Contingent Creditors' submissions that a purposive reading of the *CCAA* and the *Bankruptcy and Insolvency Act,* RSC 1985 c. B-3 supports the proposition that contingent claimants are legally creditors for the purposes of the *CCAA* and accepted U.S. Class Counsel's submissions that the Applicants' valuation of the contingent claims at $1 was inappropriate in the circumstances and impermissibly devalued the contingent claims. Accordingly, His Honour endorsed that a summary proceeding be conducted on an expedited basis to determine the validity and value of the contingent claims.

46. The Motion Judge also held, however, that:

(a) it was appropriate for the Applicants' to limit (at least) hundreds of thousands of the U.S. Customers with claims to one single vote; and,

(b) the Unsecured Creditor Class would include the Term Loan Lenders as well as the Other General Unsecured Creditors.

47. The Motion Judge released reasons for decision on June 21, 2022, with a further endorsement and reasons released on June 23, 2022 in respect of the issue of the appropriateness of the consideration being offered to the Term Loan Lenders.

48. This proposed appeal addresses the Motion Judge's June 10, 2022 and June 23, 2022 Orders.

C. Proposed appeal

49. If leave is granted, the Court would be asked to answer the following two questions:

(a) Did the court below err in denying a vote to each U.S. Customer (and to other similarly situated creditors)?

(b) Did the Court err in allowing the Term Loan Lenders to vote in the same class as other unsecured creditors who will be receiving a fundamentally different form of consideration through the proposed plan?

D. Leave to appeal should be granted

50. The points raised on the proposed appeal are significant to these proceedings and to the practice of insolvency law and are *prima facie* meritorious.

51. There is good reason to doubt the correctness of the Order appealed.

52. The motion judge erred by denying hundreds of thousands of the Applicants' U.S. Customers and other creditors their right to vote on the plan, and effectively undermined the scheme of the *CCAA*.

53. There is no legal authority, either in the *CCAA* itself or in insolvency jurisprudence more broadly, to support the conclusion that the Applicants' U.S. Customers should only be afforded one vote per class action. To the contrary, the general discretion afforded to a supervising judge by the *CCAA* is expressly "subject to the restrictions set out in this Act".

54. The *CCAA* affords each creditor a vote—it makes no distinction for the procedural mechanism used to advance the creditor's claim, whether class action, mass action or otherwise. Moreover, the *CCAA* expressly empowers individual creditors by conditioning the success of a restructuring plan on a double majority consisting not only a special majority by value, but a majority in number.

55. The Motion Judge's finding that the U.S. Customers should be afforded only one vote per class action runs contrary to the well established and longstanding principle, reflected in the language of the *CCAA* that each creditor is afforded a vote.

56. The Motion Judge's decision has the potential to disenfranchise creditors whose claims are the subject of class actions and other representative claims in future *CCAA* proceedings.

57. The Motion Judge also erred in finding that the Term Loan Lenders should be in the same class as the Other General Unsecured Creditors (including the U.S. Customers) for voting purposes inasmuch as the form of consideration given to the Term Loan Lenders (equity) and the Other General Unsecured Creditors (a declining cash payout) are so entirely different in kind and provide such very different opportunities and risks, as to preclude any meaningful consultation between these two groups of creditors at the creditors meeting.

58. The proposed appeal will not unduly hinder the progress of the CCAA Proceeding.

E. Statutory Grounds

59. Rules 1.04, 1.05, 61.03.1 and 63.02 of the *Rules of Civil Procedure.*

60. Sections 2, 6, 11, 22, and 14(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

61. Sections 2 and 121 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, as amended.

62. Such further and other grounds as the lawyers may advise.

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

63. Orders and endorsements of the court made in the CCAA Proceeding;

64. The evidence before the court on the motion; and

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

July 4, 2022

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