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

RESPONDING FACTUM OF HAIDAR OMARALI IN HIS CAPACITY AS REPRESENTATIVE PLAINTIFF *OMARALI V. JUST ENERGY*

(Motion for Authorization Order, Meetings Order, Stay Extension and Other Relief)
(returnable May 26, 2022)

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

David Rosenfeld (LSO #51143A)
(t) 416-595-2700 / (f) 416-204-2894
(e) drosenfeld@kmlaw.ca

Aryan Ziaie (LSO #70510Q)
(t) 416-595-2104 / (f) 416-204-2815
(e) aziaie@kmlaw.ca

James Harnum (LSO #60459F)
(t) 416-542-6285 / (f) 416-204-2819
(e) jharnum@kmlaw.ca

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

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PART I - INTRODUCTION

1. The Applicants ("**Just Energy**") seek to file a plan of compromise or arrangement that violates the fundamental voting entitlement requirements imposed by the legislature on those seeking creditor protection through the *Companies' Creditors Arrangement Act* ("*CCAA*") by unilaterally allocating one vote to 7,723 claimants. A plan of compromise or arrangement that violates the *CCAA* on its face cannot be accepted for filing and a creditors' meeting to vote on such plan cannot be authorized.

2. Many years prior to Just Energy's filing pursuant to the *CCAA*, this Court appointed Mr. Omarali as the representative of the 7,723 misclassified employees of Just Energy pursuant to the *Class Proceedings Act, 1992* ("*CPA*"). These employees were the army of marketers that Just Energy employed to go door-to-door to sign up the customers that make up hundreds of millions of dollars of revenue that made Just Energy and sustains Just Energy as a going concern.

3. Prior to filing for creditor protection, Just Energy was set to go to trial in a $100 million class action that would determine if it misclassified these 7,723 vulnerable, low-skilled employees as "independent contractors" and wrongfully denied them basic minimum entitlements (minimum wage, etc.) pursuant to the *Employment Standards Act*, *2000* ("*ESA*").[1]

4. On behalf of the 7,723 class members,[2] Mr. Omarali sought to continue the Class' effort to be compensated for Just Energy's violations of the *ESA* by submitting a proof of claim on their

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[1] Shortly after the certification of the Omarali Action (defined below), Just Energy reclassified these same door-to-door salespeople as employees.

[2] While Mr. Omarali represents this Class (defined below), he did not assume their individual claims.

behalf in accordance with the Claims Procedure Order (defined below) and expected that their claim would proceed to adjudication in this *CCAA* process.

5. Instead of determining the Class' claims, Just Energy prepared a plan of compromise and arrangement that unilaterally disenfranchises and devalues the class' claims for voting on that plan without any process for the determination of those class' claims, their value and their voting entitlement. Just Energy proposes that the 7,723 Class Members be allocated collectively a single vote valued at $1 for the proposed creditors meeting. If the Class Members' claims were accepted at the previously scheduled common issues trial or when their claim is successful through a dispute resolution process through this *CCAA* proceeding, each of the 7,723 Class Members would be creditors of Just Energy, each entitled to vote on a plan of compromise or arrangement.

6. Just Energy's unilateral allocation of one vote to 7,723 claimants violates to the fundamental voting requirements established by the legislature in the *CCAA*. The Applicants' extraordinary position is completely inappropriate and unprecedented. The *CCAA* "double majority" requirement for plan approval is codified and cannot be altered by a debtor. That requirement does not provide debtors with free reign to unilaterally dilute creditors' voting entitlement for any reason, let alone based on the debtors' view of the merits of their claims or the debtors' view as to how the creditors are expected to vote. Yet that is precisely the outcome that Just Energy asks this court to condone.

7. Just Energy's asserted justifications are incorrect, implausible and self-serving and cannot be sufficient to overcome the fundamental requirements of the *CCAA*. Although Just Energy may wish it were otherwise, the Class Members whose claims will be compromised by the plan are a significant stakeholder group. While Just Energy says its proposed plan is "the culmination of

months of negotiation among key stakeholders in this restructuring", the truth is that it never even spoke to, much less negotiated with or even involved, the court-appointed representative of the thousands of claimants it now seeks to undermine. While it may choose to ignore a stakeholder group, a debtor cannot then unilaterally and artificially gerrymander that stakeholder group's voting entitlement so the debtor can have their plan proceed against projected opposition from that stakeholder group.

8. Under settled principles of insolvency law, a proposed plan that violates the *CCAA* and is doomed to fail cannot be accepted for filing or proceed to a vote. Just Energy's motion should be dismissed accordingly.

PART II - THE FACTS

A. The Omarali Action - Just Energy misclassifies employees as independent contractors

9. The Omarali Action[3] 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 nearly 7,800 employees as "independent contractors".[4]

10. Just Energy is an independent energy retailer. Rather than distributing or producing gas or electricity, it buys it and resells it to consumers at a markup. To recruit customers, Just Energy relied on an army door-to-door marketers whom it refereed to as "Sales Agents".[5]

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[3] *Omarali v Just Energy* bearing Court File No. CV-15-527493-00CP (the "**Omarali Action**").

[4] Affidavit of Vlad Calina affirmed May 26, 2022 ("**Calina Affidavit**") at para. 2, Responding Motion Record of Haidar Omarali ("**RMR**"), Tab 1.

[5] Factum of the Moving Plaintiff ("**Plaintiff's Summary Judgment Factum**") at paras. 7-8, Calina Affidavit Exhibit B, RMR, Tab 1B.

11. Just Energy classified Sales Agents as "independent contractors" despite the true nature of the engagement – an employment relationship. Just Energy chose to ignore the minimum requirements of the *ESA* and denied Sales Agents minimum wage, overtime pay, vacation pay, holiday pay and minimum working hours and conditions.

12. These nearly 7,800 Sales Agents were fundamental to the business of Just Energy – signing up Just Energy's customers. The efforts of those sales Agents directly led to Just Energy's millions upon millions in annual revenue.[6]

B. The Omarali Action is certified

13. On July 27, 2016, Justice Belobaba certified the Omarali Action as a class proceeding with 13 common issues (the "**Certification Decision**").[7] In doing so, Justice Belobaba stressed that:

> (a) the "applicable law and the actual record before [him] satisfied the commonality" test, with "significant evidence of systemic commonality" that was "quite compelling";
>
> (b) Just Energy's "'individualized inquiries' evidence was surprisingly weak";
>
> (c) despite forceful submissions from Just Energy to the contrary, "the pleadings disclose[d] the following causes of action: breach of the ESA, breach of contract and the duty of good faith, negligence and unjust enrichment";
>
> (d) any "amounts owing for [Canada Pension Plan] and [Employment Insurance] contributions can be determined by reviewing the income records in the defendants' possession" even if aggregate damages are left "to the common issues trial judge"; and
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> (e) a class action "is the preferable procedure" because a "common determination in a class proceeding about [Class Members'] employment

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6 Plaintiff's Summary Judgment Factum at para. 8, Calina Affidavit Exhibit B, RMR, Tab 1B.

7 Just Energy's motion for leave to appeal was dismissed by the Divisional Court on November 17, 2016.

> status will … provide meaningful access to justice [to] some 7000 class members."[8]

14. Justice Belobaba appointed Mr. Omarali as the Representative of "[a]ny person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement" ("**Class**" or "**Class Members**"). Koskie Minsky LLP was appointed as counsel for the Class ("**Class Counsel**").[9]

15. 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. [10]

C. Sales Agents are employees of Just Energy, which classification it later adopts

16. Just Energy's opportunistic decision to circumvent the *ESA* by labelling Sales Agents as "independent contractors" cannot change the true nature of the relationship between the Sales Agents and Just Energy. Sales agents were not engaging in 7,800 independent businesses – they were employees of Just Energy. The structure that Just Energy imposed on its Sales Agents was fundamentally inconsistent with an independent contractor relationship. Just Energy would have been required at trial to explain how Class Members could be "independent contractors" even though Just Energy:

(a) controlled when, where, and how Class Members worked, down to verbatim scripts;

(b) required Class Members to work out of its branded offices in branded clothing, exclusively for its benefit;

(c) required Class Members to market exclusively for it;

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8 Certification Decision at paras. 5, 33, 58, 96-97 and 108, Calina Affidavit Exhibit C, RMR, Tab 1C.

9 Certification Order dated July 27, 2016, Calina Affidavit Exhibit D, RMR, Tab 1D.

10 Calina Affidavit at para. 10, RMR, Tab 1.

(d) required Class Members to undergo extensive standardized training created by it and administer by its employees or agents;

(e) retained supervisors who monitored class members "on the clock" in real-time – including using iPads and text messaging;

(f) centrally recruited Class Members through workers it conceded were its employees;

(g) limited Class Members to fixed commissions it could unilaterally change and "claw back" at any time;

(h) established a pyramidic commission structure that incentivised control and direction from supervisors retained by Just Energy;

(i) had an extensive department devoted to supervision and discipline of Class Member performance through a uniform Compliance Matrix;

(j) retained supervisors who directed on where Class Members were to market by driving the Class Members to the assigned locations in vans, providing maps of territory to market, monitoring locations through iPads and providing direction by text messages; and

(k) directly handled all customer complaints and unilaterally determined to accept to reject customer contracts.[11]

17. Just Energy operated in this fashion and maintained its erroneous "independent contractor" classification of Sales Agents, thereby denying the Class their basic minimum entitlements, for years.

18. Then, despite its adamant defence of the Omarali Action, on November 28, 2016, shortly after the Omarali Action was certified, Just Energy formally reclassified its Sales Agents from "independent contractors" to employees. Former Sales Agents are now called "Energy Advisors", doing the same job but now being paid hourly wages. Despite that, Just Energy did nothing to

[11] See Plaintiff's Summary Judgment Factum at paras. 7, 8, 10-14, 16, 18-21, 23, 25, and 27, Calina Affidavit at para. 6 and Exhibit B, RMR Tab 1 and 1B.

compensate Class Members for minimum wage, overtime, holiday pay and vacation pay that was not paid prior to Just Energy's internal reclassification. [12]

D. Omarali Action was ready for trial

19. The parties exchanged productions in summer 2017 and oral discovery of Just Energy was conducted in January 2018. Shortly thereafter, the Representative Plaintiff moved for summary judgment on all 13 common issues. The summary judgment record was voluminous, consisting of over 7 volumes of evidence and extensive cross-examination.[13]

20. On June 21, 2019, instead of providing judgment on the common issues, Justice Belobaba directed that all 13 common issues shall proceed to trial and reserved the costs of the motion to the trial judge. [14]

21. On November 20, 2019, Justice Chalmers scheduled the Omarali Action for a 20-day trial starting on November 15, 2021 (the "**Omarali Trial**"). The action would have proceeded to trial but for Just Energy's voluntary application for creditor protection pursuant to the *CCAA*.[15]

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[12] Calina Affidavit at para. 11, RMR, Tab 1. Role Description: Sales Representative / Energy Advisor, Calina Affidavit Exhibit E, RMR, Tab 1E. November 4, 2016 email exchange between Richard Teixeira and Rosalba Gullo, Calina Affidavit Exhibit F, RMR, Tab 1F, Transcript of the examination for discovery of Ravi Maharaj, Calina Affidavit Exhibit G, RMR, Tab 1G.

[13] Calina Affidavit at paras. 12-13, RMR, Tab 1

[14] *Omarali v. Just Energy*, 2019 ONSC 3734 ("**Summary Judgment Decision**") at para. 39, Exhibit H to Calina Affidavit, RMR, Tab 1H.

[15] Calina Affidavit at para. 16, RMR, Tab 1.

E. Just Energy seeks creditor protection for cash flow issues

22. On March 9, 2021, the Applicants filed for protection from their creditors and obtained an order commencing these proceedings ("***CCAA* Proceedings**"). In support of its filing, Just Energy focused on short term cash flow issues noting that it:

(a) "sought CCAA protection because of severe short-term liquidity challenges resulting from an unprecedented and catastrophic winter storm in Texas";

(b) "may have incurred losses and additional costs currently totalling over $315 million over a seven-day period as a result of the actions of PUTC [Public Utility Commission of Texas] and ERCOT [Electronic Reliability Council for Texas] and the winter storm";

(c) "vigorously disputed the invoices received from ERCOT" but "was required to pay those invoices within two business days" to avoid draconian regulatory penalties; and

(d) "sought immediate CCAA protection to ensure it can continue as a going concern, service its significant customer base, maintain employment for its almost 1,000 employees, and preserve enterprise value."[16]

23. Although its initial application material did not refer to the Omarali Action, the Certification Decision and summary judgment motion record established that the 7,723 Class Members were instrumental in generating that "significant customer base", played a major part in generating the "enterprise value" that Just Energy sought to preserve, and had a triable claim that Just Energy failed to pay them the required minimum wages for that work. Class Members were, at the timing of filing, one of the largest stakeholders by number.

24. On July 16, 2021, the Governor of Texas signed House Bill 4492 ("**HB 4492**"), which provided "a mechanism for the partial recovery of costs" caused by the "unprecedented and catastrophic winter storm" and the "invoices received from ERCOT" due to it. Just Energy and the

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[16] Calina Affidavit at para. 26, RMR, Tab 1. Just Energy did not address if it could have obtained an injunction in the U.S. for any direction to pay ERCOT while it "vigorously disputed the invoices received from ERCOT".

Monitor noted that it expected to recover US$147.5 million as a result of HB 4492 – thereby recovering almost half of what Just Energy says inappropriately led them to their liquidity crisis and this *CCAA* Proceeding. Neither Just Energy nor the Monitor have identified these funds in the Proposed Plan or reporting thereon.[17]

F. Class Members participate in claims process in good faith

25. On September 8, 2021, Just Energy sought court approval for a claims procedure order.

26. 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.[18]

27. On September 15, 2021, Just Energy obtained a claims procedure order ("**Claims Procedure Order**"). Nothing in the Claims Procedure Order suggested, much less stated, that filing a single proof of claim as a court-appointed representative of the over 7,700 Class Members would impact those Class Members' individual claims or curtail their voting rights on any future proposed plan of compromise or arrangement.

28. On September 21, 2021, Class Counsel wrote to Just Energy and stressed that while the Class would not oppose a claims process, Class Members also had valid claims for unpaid wages against Just Energy's directors and officers, and would be pursuing those claims. Class counsel asked for any applicable insurance policies.[19]

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17 Calina Affidavit at para. 27-28, RMR, Tab 1.

18 Calina Affidavit at para. 10, RMR, Tab 1.

19 Calina Affidavit at para. 19, RMR, Tab 1.

29. On September 27, 2021, Just Energy refused to provide any applicable insurance policies responsive to the claims of the Class against those directors for wages owing pursuant to the *ESA*, *OBCA* and/or *CBCA*. Just Energy stressed that "the Claims Procedure Order… provides for a streamlined method for filing a claim with respect to the [Omarali] Action by allowing such a claim to be filed by the representative plaintiff."[20]

30. On October 29, 2021, Class Counsel filed proof of claim forms on behalf of the Class in connection with the Omarali Action. In support, Class Counsel filed the most recent pleading, and the moving summary judgment motion record and factum, and the parties' summary judgment transcript brief.[21]

31. On February 2, 2022, the same day that Just Energy denied all Class Members' claims, Just Energy disclosed that it had started litigation to recover the some or all of the costs that led it to file for creditor protection (the "**ERCOT Adversary Proceedings**"). There was no analysis, from Just Energy or the Monitor, regarding the likelihood or success or quantum of recovery. [22]

G. Just Energy's disallows Class Members' claims

32. On February 2, 2022, Just Energy wholly disallowed Class Members' claims. The Notice of Disallowance repeats all the basic allegations and defences that Just Energy has been raising in the Omarali action for over five years before this *CCAA* Proceeding.[23]

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[20] September 27, 2021 letter from M. Wasserman to D. Rosenfeld, Exhibit CC to Calina Affidavit, RMR, Tab 1CC.

[21] Calina Affidavit at para. 21, RMR, Tab 1.

[22] Calina Affidavit at paras. 31, 34-37, 39-41, 43, RMR, Tab 1.

[23] Calina Affidavit at para. 23, RMR, Tab 1.

33. On February 24, 2022, Class Counsel filed a Notice of Dispute for all Class Members.[24]

H. No communication, negotiation or dispute resolution process for the Class

34. At no time in the eight months after the Claims Procedure Order was issued on September 15, 2021 has the Class been contacted (1) about a dispute resolution process pursuant to paragraphs 35 and 39 of the Claims Procedure Order, or (2) about any aspect of any proposed plan of compromise or arrangement.[25] The 7,723 creditors represented by Mr. Omarali, in accordance with a final court order, have simply been ignored by Just Energy and the Monitor.

I. Just Energy's refusal to disclose material information

35. Mr. Omarali asked for information on the number and voting entitlements of the claims described by Just Energy in its proposed plan of compromise or arrangement as "Convenience Claims", "General Unsecured Claims" and "De Minimis Claims". Just Energy has refused to provide the information.[26] The Monitor has not required Just Energy to do so. This information is necessary to assess if similarly situated creditors have the same voting entitlement.

36. On June 1, 2022, the Monitor released a Supplement to its 10th Report, which confirmed that approximately 35 creditors have been classified as "De Minimis" creditors, with claims worth less than $10.[27] These "De Minimis" are each deemed to vote in favour of the Plan, despite the fact

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24 Calina Affidavit at para. 23, RMR, Tab 1.

25 Calina Affidavit at para. 24, RMR, Tab 1.

26 Supplemental Affidavit of Vlad Calina, affirmed June 1, 2022 ("**Plaintiff's Supplemental Affidavit**") at paras. 3-7, Supplemental Responding Motion Record of Haidar Omarali ("**SRMR**"), Tab 1, and Exhibits A – E to the Plaintiffs' Supplemental Affidavit, SMR, Tab 1A – Tab 1E.

27 Supplement to the 10th Report of the Monitor, at page 7.

that they will receive no distribution. This means that these 35 creditors, who will receive no distributions, are entitled to 35 times more votes than the over 7,700 class members.

PART III - ISSUES AND THE LAW

37. On this motion Mr. Omarali, on behalf of the Class, addresses whether the plan of compromise and arrangement proposed by Just Energy ("**Proposed Plan**") should be accepted for filing and if a Creditor's Meeting should be authorized and ordered as sought in the draft meeting order ("**Proposed Meeting Order**").

38. This Court should not grant the relief the Applicants seek because it would disenfranchise 7,723 Class Member creditors, and, at the same time, improperly values Class Members' $100 million (plus interest) in claims at $1 collectively for voting purposes, without any process for determination of their claims. This approach violates the *CCAA* and the *CPA* and is inconsistent with the treatment of other representative claims in CCAA processes. In any event, the rationales provided for the Proposed Plan's gerrymandering are not justifiable and, in any event, should not be condoned by this Court. Finally, a determination of voting entitlement cannot and should not be put off until a sanction motion, as voting rights are fundamental to the sanctioning process.

A. The Proposed Plan is inconsistent with the *CCAA*, *CPA* and other representative claims

i. A plan that violates the *CCAA* on its face cannot be filed or proceed to vote

39. The Court will not allow a party to file a plan or proceed to a creditor's meeting to vote on that plan if the plan cannot be sanctioned because it violates the *CCAA* or is otherwise improper.[28]

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[28] *Re Target Co.,* 2016 ONSC 316 at paras. 66-69, 72, 84-86.

Allowing such a plan to be filed and voted on "would only result in a waste of time and money".[29]

40. The Proposed Plan violates the *CCAA* and the *CPA* and is inconsistent with the treatment of other representative claims in *CCAA* processes.

ii. Each creditor is entitled to a vote pursuant to the *CCAA*

41. Pursuant to ss. 6(1) of the *CCAA*, the Court cannot sanction a plan of arrangement and compromise unless "a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims" vote to approve it.[30] Fundamentally, this means that each creditor has the right to vote on a plan of arrangement *regardless of the value of its claim.*[31]

42. This is a requirement codified by the legislature for all those applicants who seek the protections and processes provided by the *CCAA*. Debtors cannot opt-out of the *CCAA* voting regime even if adhering to it complicates their ideal restructuring plan.

43. Each creditor with a provable claim whose interests are affected by a proposed plan is entitled to vote on it, subject to the extraordinary, limited power of a *CCAA* judge to bar a creditor who is otherwise entitled to vote "where the creditor is acting for an improper purpose."[32]

44. Remarkably, without citing any authority, Just Energy proposes to disregard ss. 6(1) of the *CCAA* and reduce the 7,723 Class Member claimants to a single vote. Just Energy certainly has not established that Mr. Omarali or the Class are seeking to exercise voting rights for an improper

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29 *Re Target Co.,* 2016 ONSC 316 at para. 69.

30 *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, s. 6. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 16.

31 Unlike the United States, the *CCAA* Court does not have a "cram down" power that permits it to bind a dissenting class to a plan even though the class has voted to reject the plan.

32 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 65-66.

purpose. If any party is seeking to frustrate, undermines, or runs counter the objectives of the CCAA it is Just Energy, when it seeks to disenfranchise a group of stakeholders who Just Energy does not want acknowledge.

iii. The Proposed Plan contravenes the *CPA*

45. Just Energy's approach is as much at odds with the *CPA* as it is at odds with the *CCAA*. While the Certification Order appoints Mr. Omarali to represent the Class, he does not – and cannot – subsume the Class Members' claims or rights.

46. The *CPA* is a procedural statute.[33] While representative plaintiffs are the named plaintiffs on a pleading and direct the case through the common issues, they do not assume class members' individual claims. Instead, they advance the common interests of the 'class' – the group of people defined in the order authorizing the claim to go ahead as a class proceeding. The certification of a class action does not, and cannot, change class members' underlying claims.[34]

47. Certification only determines the process to be used to determine class members' claims, not the nature or the number of claims made by class members. To successfully certify a proceeding as a class action, representative plaintiffs must show that a class action is the "preferable procedure" for resolving class members claims (with a view to advancing the policy goals of access to justice, behavioural modification, and judicial economy). Technically, it is similar, but in the alternative, to joinder, consolidation or the case management of individual proceedings.[35] In *CCAA* terms, it is essentially similar to representation orders.

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[33] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 14-15.

[34] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 46-51.

[35] *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, 2010 ONCA 466 at para. 49.

48. The certification of a class proceeding avoids the "duplication of fact finding and legal analysis".[36] However, even after the certified common issues (including potentially an award of aggregate damages) are determined, the *CPA* directs a process to address any individual issues for each class member.[37] In *Rumley*, the Supreme Court of Canada explained that,

> … no class member will be able to prevail without making an individual showing of injury and causation. Thus it cannot be said that allowing this suit to proceed as a class action will force complainants into a passive role. Each class member will retain control over his or her individual action, and his or her ultimate recovery will be determined by the outcome of the individual proceedings on injury and causation (assuming, again, that the common issue is resolved in favour of the class) …

49. Even where aggregate damages are awarded after judgment on the common issues, class members retain and must assert their individual claims to share in the distribution of any funds.[38]

50. 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. If that were not the case, as Just Energy's approach seems to imply, then the representative plaintiff would get the proceeds of all class members' claims – and that is simply not how the *CPA* operates and ignores, at minimum, sections 24, 25 and 26 of the that act.[39]

51. In the end, once class members' claims are successfully determined through the *CPA*, each class member is, ultimately, an *individual* creditor even if the claims were pursued by a court-appointed representative plaintiff.

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36 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39.

37 *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ss. 25-26.

38 *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ss. 24, 26.

39 See for example *Brazeau v. Canada (Attorney General),* 2020 ONSC 7229 at paras. 14-20, where class members pursue individual claims themselves after judgment on the common issues.

52. If the Omarali Action were decertified tomorrow, then the 7,723 Class Members would be free to pursue individual claims in the claims process – and they would each be entitled to vote on the Proposed Plan. Certification as a class proceeding cannot change that outcome.

53. Just because the 7,723 Class Members have a court-appointed representative and counsel, does not, and cannot, mean that each loses it status as a claimant, and, ultimately, as a creditor.

iv. Inconsistent with treatment of representation orders and consolidated claims

54. The manner in which Just Energy proposes to deal with the Class Members is inconsistent with how the *CCAA* Court deals with groups of claimants represented under a representation order or creditors with consolidated or assigned claims. In both cases, there is no compromise, affect, or dilution those parties' voting rights.

55. In representation order cases, it is typical for a representative of a group of similarly situated people and their counsel to seek an order to represent the interest of a broad *ad hoc* class of creditors and advance their individual claims as a single proof of claim within a *CCAA* proceeding.[40] In that context, creating an *ad hoc* class subject to a representation order does not compromise those creditors' individual rights – and even though representative counsel may file a single proof of claim for the *ad hoc* class, the creditors have as many votes as claims.

56. A good recent example is in the *Sears CCAA* process, where a representation order was made on behalf of 46,000 members of the ad hoc class and the representative was entitled to submit

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[40] Such orders are granted pursuant to Rule 10.1 of the Rules of Civil Procedure, which is akin to certification pursuant to the *Class Proceedings Act* - *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. 10.01 (1)-(3).

46,000 votes on behalf of the class.[41] It is not clear how the treatment of the Class Members in the Omarali Action certified under the *CPA* should be any different than that ad hoc group represented through a representation order for voting on a plan of compromise.

57. Similarly, in assignment cases, consolidating claims does not dilute the voting rights associated with them even if it jeopardizes the plan of arrangement. Three cases are illustrative:

(a) ***Canadian Red Cross Society***: A significant number of Canadians sickened from contaminated blood transfusions assigned their claim to the Federal, Provincial and Territorial governments to access a compensation fund. The governments voted the assigned claims, and Justice Blair counted their votes at the sanction hearing.[42]

(b) ***HSBC Bank Canada v. Bear Mountain Master Partnership***: Some trade creditors assigned their claims to HBC. On the eve of the sanction hearing, one creditor objected to HBC voting the assigned claims. The Court upheld the vote, stressing that "it is settled that a creditor is entitled to vote its assigned claims so long as they have been obtained in good faith."[43]

(c) ***Re Blackburn Developments Ltd.*:** A creditor moved to disallow the votes cast by a "vulture fund" alleging the fund improperly secured the assignment. The Court did not disallow the vote, and because the vote stood, the plan was not approved.[44]

58. Again, it is not clear how one entity that consolidates (and represents) the claims of other individual creditors can maintain votes for each creditor when a court-appointed representative appointed by the *CPA* cannot do so for the individual class members they represent.

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[41] Representation Order dated January 25, 2018 in Court File No. CV-17-11846-00CL**;** Amended and Restated Meeting Order dated October 27, 2020 at paras. 17, 18 and 24 Court File No. CV-17-11846-00CL. Available here: http://cfcanada.fticonsulting.com/searscanada/courtOrders.htm

[42] *Canadian Red Cross Society / Société Canadienne de la Croix Rouge*, 2000 CanLII 22488 (ON SC), Re 2000 CarswellOnt 3269. Re. The Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge, Court File No. 98-CL-002970, Plan of compromise and Arrangement (WL).

[43] *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563 at para. 11.

[44] *Re Blackburn Developments Ltd.*, 2011 BCSC 1671 at paras. 12, 40, 48, 51-52.

B. Just Energy's rationales for disenfranchisement are not justifiable

59. Just Energy claims it can disenfranchise 7,723 claimants because (i) Class Members took part in the claims process by filing one form through Class Counsel, (ii) because Just Energy thinks the claims of the Class are without merit, and (iii) because the Proposed Plan might fail if the Class is entitled to vote.[45] None of these "rationales" find any basis in any provision of the *CCAA* nor are they otherwise justifiable.

i. Filing a single Proof of Claim cannot affect Class Members' voting rights

60. According to Just Energy, Class Members' participation in its claims' process affects their rights and reduces their 7,723 claims to one. This rational finds no support in the *CCAA* or the Claims Procedure Order.

61. The manner in which the Class Members filed their claims cannot affect their rights as creditors. The law is clear that the "Claims Procedure Order is a procedural order, not a substantive one" – "[i]t is not a stand-alone order which can, in and of itself, affect the claims or rights of creditors."[46] This principle is based in sound policy, and is designed to avoid embroiling the *CCAA* court in a multitude of preliminary fights on creditors' rights that threaten to derail a restructuring.[47]

62. In addition, nothing in the Claims Procedure Order suggests that individual Class Members would be required to file individual proofs of claim. On the contrary, a "Claim" is defined in the Claims Procedure Order as including "any claim brought by any proposed or confirmed representative plaintiff on behalf of a class in a class action…" [emphasis added].

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45 Factum of the Applicants dated May 13, 2022 ("**Just Energy Factum**"), paras. 56, 57, 58 and 59.

46 *Arrangement relatif à Kitco Metals Inc.*, 2017 QCCS 4404 at para. 35.

47 *Arrangement relatif à Kitco Metals Inc.*, 2017 QCCS 4404 at para. 38.

63. Class Counsel specifically asked whether each individual Class Member would be required to submit a proof of claim. At no time did Just Energy or the Monitor ever advise that the filing of a single proof of claim "on behalf of a class" would result in all Class Members only having a single vote on any future plan of compromise.[48]

64. Regardless, Just Energy cannot "lie in the weeds" and insist that Class Members waived or compromised their rights by participating in the claims process in good faith. In *Target*, Justice Morawetz stressed that "[i]t is incumbent upon the court, in its supervisory role, to ensure that the *CCAA* process unfolds in a fair and transparent manner."[49] Just Energy's contention that it could create an after-the-fact trap with a claims process is not "fair and transparent", and this Court cannot condone its conduct.

ii. Disputed nature of Class Member claims cannot determine voting rights

65. Just Energy suggests that the Omarali Action is without merit as "having no legal and/or evidentiary foundation". It also asserts that it doesn't know "at this stage" whether any "would have legitimate claim for voting purpose". It suggests, as a result, the Class Members could not "be accorded more than one vote per representative at the Creditor Meetings."[50] In essence, Just Energy says that because they dispute the claims of the Class, the Class Members should not be entitled to their full voting entitlement even if their claims were later determined to be successful.

66. A creditor's vote pursuant to s.4 and ss. 6(1) of the *CCAA* cannot be finally determined until all of the creditors are identified. To do so, the dispute resolution process established by the

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48 Calina Affidavit at para. 22, RMR Tab 1.

49 *Re Target Co.,* 2016 ONSC 316 at para. 72.

50 Just Energy Factum at paras. 57-58.

Claims Procedure Order must be completed for all disputed claims. As Just Energy acknowledges, "Contingent Litigation Claims" may have "legitimate claims for voting purposes".

67. The merits of a group of common contingent claims does not – and cannot – impact how many votes those creditors will be entitled to if their claims are approved:

(a) if the contingent claims are not provable (i.e., the claims lack merit), then those creditors are not entitled to vote on the plan because they do not have provable claims; but

(b) if the contingent claims are provable (i.e., the claims are meritorious), then the number of votes is determined by the number of claims asserted and not their value.

68. For expediency, a creditors' meeting and vote on a plan of compromise or arrangement can be ordered and the votes of those asserting disputed claims tabulated by the Monitor. If the votes of those asserting disputed claims, after being tabulated, do not impact the ultimate vote of the class of creditors, a plan of compromise could proceed to sanction hearing without first completing the resolution of the disputed claims.

69. However, simply because a debtor does not agree with those asserting disputed claims (here about the employment practices of the debtor) does not mean that those claimants are somehow entitled to fewer votes than any other approved claimant, if their claim is approved in the dispute resolution process.

70. Just Energy's approach is wrong. There is clear authority that a party cannot propose a plan that disenfranchises a potential group of voters if their claim depends on the merits of litigation

(for example, shareholders cannot be denied a vote if there is the prospect that they may receive a residual depending on the outcome of litigation).[51]

71. The number of votes a creditor/claimant has cannot be dependent on the status of that claim in the claims process. If that were the case then the debtor could simply assign whatever voting entitlement it wanted to anyone it disagreed with and avoid/delay the determination of the claims. That would be a very easy way to ensure a plan of compromise was successfully voted on. However, doing so would be contrary the duty of good faith pursuant to section 18.6 of the *CCAA*.

72. In addition, Just Energy cannot avoid the resolution of the disputed claims and then argue that because they remain disputed they should be entitled to less voting rights. Just Energy has known about the Omarali Action for 7 years. Just Energy has defended the action over that time, including a summary judgment motion in July 2019. The action was ready for trial and a trial date was set for November 2021 – eight months after this *CCAA* Proceeding was initiated.[52] Despite this readiness for trial, at no time since the Claims Procedure Order in September 2021, has Just Energy or the Monitor contacted Class Counsel to establish a process for the determination of the Class Members' claims. Just Energy has simply ignored those claims, and now asserts that because they have not been determined, they should be entitled to lesser voting rights.

73. Mr. Omarali does not object to the taking of the votes of the Class contingent on a future determination of the entitlement to those votes, but the number of votes provided to the Class Members cannot be undermined or diluted at this or any stage. If the Class Members claims fail

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[51] *Re Unique Broadband Systems*, 2013 ONSC 676 at para. 125.

[52] In Mr. Carter's Affidavit of May 29, 2022, he asserts that there remained procedural litigation steps before trial including examination for discovery of the Representative Plaintiff and of individual class members. Just Energy chose not to examine the Representative Plaintiff and was welcome to do so. In addition, there is no right to examine individual class members in a class processing– see s. 15 of the *CPA*.

they would not be entitled to any votes. If the Class Members' claims are successful, each Class Member should be entitled to all the votes any other creditor receives – not a fraction of a vote.

74. In terms of the valuation of the Class Member claims for voting purposes, there are alternatives to the arbitrary and inappropriate devaluation that Just Energy proposes. Contrary to Just Energy's assertion, aggregate damages are available even if such an issue is not certified.[53] As the Certification Decision recognized, a component of the Class' damages (vacation pay and lost CPP/EI premiums on amounts already paid) automatically flows from a determination of classification, which can be assessed with Just Energy's own records. While this disregards substantial value that would be owed to Class Members if they succeeded at the Omarali Trial, it is a substantially greater sum than the meagre $1 set by Just Energy, and gives them real voice in the process.

75. However, an alternative process is set out in ss. 20(2) of the *CCAA*, which expressly permits Just Energy to "admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes".[54] Doing so makes sense, since the determination of the value of the claims for voting purposes would be contingent on a future determination in any event. Instead follow the process outlined in the *CCAA*, Just Energy is seeking to undermine and devalue the claims of the Class without such determinations being contingent on any future dispute resolution process.

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53 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 131-132.

54 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 20(2).

iii. Expected voting cannot dictate voting rights

76. Just Energy contends that "[a]ny alternative approach that involves providing a vote to individual claimants… risks skewing the 'head count' as well as providing unjustified leverage to such claimants." The Monitor, on the eve of this motion, characterized it as a "veto". This assertion is fundamentally flawed because it presupposes its conclusion. On the contrary, if Class Members are entitled to individual votes, doing what Just Energy proposes is what "risks skewing the 'head count'" and unjustifiably denies Class Members a say in the Proposed Plan. As Justice Wilton-Siegel held:

> …I do not accept that a shareholder vote requirement gives the shareholders a veto in circumstances in which they should not have one. Any vote is potentially a veto. To avoid a veto, it is necessary to treat the shareholders appropriately under a proposed plan of compromise or arrangement...[55]

77. Just Energy says it consulted with "key stakeholders". In actuality, Just Energy consulted with the stakeholders it wanted to consult with. Just Energy knew of the Omarali Action and knew that Mr. Omarali was asserting claims on behalf of 7,723 vulnerable works who created the enterprise value that is now the subject of the Proposed Plan. That is a key stakeholder group. Just Energy should have consulted with the representative of that group. Instead, Just Energy ignored them, self-servingly delayed the determination of their disputed claims, then tried to silence them by claiming that those Class Members should not be entitled to their full voting rights.

78. Just Energy is not entitled to gerrymander the vote on its plan of arrangement such that only proponents of the plan of arrangement can vote on it. Class Members' voting rights do not, and should not, depend on their views of the plan to be voted on. Their entitlement to vote flows

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[55] *Re Unique Broadband Systems*, 2013 ONSC 676 at para. 124.

from their status as creditors. As much as it wishes otherwise, Just Energy cannot pick and chose which stakeholders get to have a say in its Proposed Plan based on how it thinks they will vote.

79. In its factum, Just Energy contradicts its own position in this regard when it says "[a]bsent bad faith, the motivations of creditors to approve or disapprove of the plan are irrelevant to classification."[56] It is not clear how Just Energy can assert that expected voting should not matter with respect to the plan sponsor but should be a reason to disenfranchise other creditors.

80. It is a candid concession by Just Energy that Class Members may invariably oppose the Proposed Plan. That "begs the question of how a Court could conclude that the Proposed Plan was fair and reasonable at a sanction hearing."[57]As Justice Wilton-Siegel noted, to avoid Just Energy's concerns, it is necessary to treat this stakeholder group appropriately under a proposed plan. Just Energy did the opposite with their approach to voting entitlement.

C. Fundamental voting entitlement issues cannot be deferred to the sanction hearing

81. As a final response to these issues, Just Energy contends that "[a]ny unfairness resulting from this approach is a matter for the Plan Sanction Hearing" – but that is not an answer. The Court cannot sanction a plan that violates the *CCAA*. Voting is a fundamental component of the sanctioning process under the *CCAA*. Just Energy proposes to definitively determine voting entitlement now, with its Proposed Meeting Oder, and silence Class Members' voices. The Proposed Meeting Oder cannot be granted until the issues described above are determined.

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56 Just Energy Factum, para. 47.

57 *Re Unique Broadband Systems*, 2013 ONSC 676at para. 110.

PART IV - ORDER REQUESTED

82. The Representative Plaintiff, on behalf of all Class Members, requests that the Applicants' motion that the Proposed Plan should be accepted for filing and authorizing the proposed Creditor's Meeting in accordance with the Proposed Meeting Oder be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day 2nd of June, 2022.

David Rosenfeld / James Harnum
KOSKIE MINSKY LLP

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

SCHEDULE "A"
LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10

2. *Arrangement relatif à Kitco Metals Inc.*, 2017 QCCS 4404

3. *Canadian Red Cross Society / Société Canadienne de la Croix Rouge*, 2000 CanLII 22488 (ON SC), Re 2000 CarswellOnt 3269. Re. The Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge, Court File No. 98-CL-002970, Plan of compromise and Arrangement (WL)

4. *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570

5. *Hollick v. Toronto (City)*, 2001 SCC 68

6. *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563

7. *Omarali v. Just Energy*, 2016 ONSC 4094

8. *Omarali v. Just Energy*, 2019 ONSC 3734

9. *Re Blackburn Developments Ltd.*, 2011 BCSC 1671

10. *Re Target Co.,* 2016 ONSC 316

11. *Re Ted Leroy Trucking* [*Century Services*] *Ltd.,* 2010 SCC 60

12. *Re Unique Broadband Systems*, 2013 ONSC 676

13. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[…]

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 binding

    - **(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.

- **Court may order amendment**

  (2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

- **Restriction — certain Crown claims**

  (3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the

application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

- **(a)** subsection 224(1.2) of the *Income Tax Act*;
- **(b)** any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- **(c)** any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
  - **(i)** has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
  - **(ii)** is of the same nature as a contribution under the *Canada Pension Plan* if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a provincial pension plan as defined in that subsection.

- **Restriction — default of remittance to Crown**

  (4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

- **Restriction — employees, etc.**

  (5) The court may sanction a compromise or an arrangement only if

  - **(a)** the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of
    - **(i)** amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

- **(ii)** wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

- **(b)** the court is satisfied that the company can and will make the payments as required under paragraph (a).

- **Restriction — pension plan**

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

- **(a)** the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

  - **(i)** an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

  - **(ii)** if the prescribed pension plan is regulated by an Act of Parliament,

    - **(A)** an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

    - **(B)** an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

    - **(C)** an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

  - **(iii)** in the case of any other prescribed pension plan,

    - **(A)** an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the

prescribed plan were regulated by an Act of Parliament, and

- **(B)** an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

- **(C)** an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

- **(b)** the court is satisfied that the company can and will make the payments as required under paragraph (a).

- **Non-application of subsection (6)**

  (7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

- **Payment — equity claims**

  (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

  […]

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.

- **Admission of claims**

  (2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

Class Proceedings Act, 1992, S.O. 1992

Discovery

Discovery of parties

15 (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding. 1992, c. 6, s. 15 (1).

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members. 1992, c. 6, s. 15 (2).

Idem

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant. 1992, c. 6, s. 15 (3).

Idem

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery. 1992, c. 6, s. 15 (4).

[…]

Aggregate assessment of monetary relief

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

Individual issues

25 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. 1992, c. 6, s. 25 (3).

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 25 (5).

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

Judgment distribution

26 (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

(4)-(6) Repealed: 2020, c. 11, Sched. 4, s. 23 (1).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate. 1992, c. 6, s. 26 (8).

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

Duty of person, entity administering distribution

(11) A person or entity administering the distribution of an award under section 24 or 25 shall do so in a competent and diligent manner. 2020, c. 11, Sched. 4, s. 23 (2).

Report

(12) No later than 60 days after the date on which an award made under section 24 is fully distributed, including any distribution under subsection (10) or section 27.2, the person or entity who administered the distribution shall file with the court a report containing their best information respecting the following:

1. The amount of the award.

2. The total number of class members.

3. Information respecting the number of class members identified in each affidavit filed under subsection 5 (3) in the motion for certification.

4. The number of class members who received notice associated with the distribution, and a description of how notice was given.

5. The number of class members who made a claim for monetary relief and, of them, the numbers of class members who did and who did not receive the relief.

6. The amount of the award distributed to class members and a description of how the award was distributed.

7. The amount and recipients of any distribution under subsection (10) or section 27.2.

8. The number of class members who opted out of the class proceeding.

9. The smallest and largest amounts distributed to class members, the average and the median of the amounts distributed to class members, and any other aggregate data respecting the distribution that the person or entity who administered the distribution considers to be relevant.

10. The administrative costs associated with the distribution of the award.

11. The solicitor fees and disbursements.

12. Any amount paid to the Class Proceedings Fund established under the *Law Society Act* or to a funder under a third-party funding agreement approved under section 33.1.

13. Any other information the court requires to be included in the report. 2020, c. 11, Sched. 4, s. 23 (2).

Same

(13) Once the court is satisfied that the requirements of subsection (12) have been met with respect to a filed report, the court shall make an order approving the report and append the report to the order. 2020, c. 11, Sched. 4, s. 23 (2).

Same

(14) If the regulations so provide, the person or entity who administered the distribution, or such other person or entity as may be prescribed, shall provide, in accordance with the regulations, a copy of the approved report to the person or entity specified by the regulations. 2020, c. 11, Sched. 4, s. 23 (2).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Representation of an Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

Representation of a Deceased Person

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.

Relief from Binding Effect of Order

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;

(b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03; O. Reg. 259/14, s. 3.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF HAIDAR OMARALI IN HIS CAPACITY AS REPRESENTATIVE PLAINTIFF *OMARALI V. JUST ENERGY*

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*