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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant",** and collectively, the "**Applicants")**

FACTUM OF U.S. CLASS COUNSEL
(MOTION RETURNABLE JUNE 7, 2022)

June 2, 2022

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TO: **THE SERVICE LIST**

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

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B E T W E E N:

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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.
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PART I. OVERVIEW

1. The two U.S. Class Actions[1] advance claims on behalf of (at least) hundreds of thousands of the Applicants' U.S. customers (the "**U.S. Customers**") for losses arising from the Applicants' wrongful and abusive energy pricing contracts (the "**U.S. Customer Claims**").

2. Notwithstanding the strong and viable U.S. Customer Claims, the Applicants are now attempting to eliminate those claims entirely by gerrymandering the results of the creditors' meeting and undermining the democratic process that is foundational to the *Companies Creditors Arrangement Act* (the "***CCAA***").[2]

3. U.S. Class Counsel's specific concerns about the filing of the restructuring plan (the "**Plan**") and holding meetings of creditors to vote on the Plan (the "**Meetings Motion"**) are as follows:

(a) the Applicants propose to limit the (at least) hundreds of thousands of U.S. Customers to a single vote even though each U.S. Customer is a creditor in their own right and is entitled to a separate vote;

(b) the Plan currently contemplates a gross disparity in the type (and value of) consideration provided to certain unsecured creditors (the "**Term Loan Lenders**") compared to the general body of unsecured creditors (the "**Other General Unsecured Creditors**"), yet the Plan puts all of these unsecured creditors in one class for voting purposes. In these circumstances, the Term Loan

[1] The U.S. Class Actions are *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, the "**U.S. Litigation**" or the "**U.S. Class Actions**").

[2] R.S.C. 1985, c. C-36 (as amended).

Lenders should be placed in a separate class for the purpose of voting on the Plan (alternatively, the Applicants could amend the Plan to provide more comparable treatment of the Term Loan Lenders and the Other General Unsecured Creditors); and

(c) the Applicants propose to arbitrarily limit the U.S. Customer Claims to one dollar without any meaningful attempt at independently valuing this claim for voting purposes. In keeping with ss. 11 and 20 of the *CCAA*, U.S. Class Counsel seek advice and direction on a process for a summary valuation (estimation) of the U.S. Customer Claims for voting purposes. U.S. Class Counsel would also agree to refer this issue to the Claims Officer subject to a direction that the claims be estimated prior to the meeting of creditors.

4. U.S. Class Counsel are also concerned that the Plan fails to provide the general body of unsecured creditors with a fair return. However, that issue requires further consultation, disclosure and consideration, and is ultimately an issue for the sanction hearing rather than the Meetings Motion returnable on June 7, 2022.

5. The *CCAA* process must not be engineered in a way that disenfranchises (or increases the likelihood of disenfranchisement of) creditors. Accordingly, the Applicants' Plan must be halted at this stage. Even though the threshold for approving a meeting order and accepting the filing of a plan is relatively low, there is no basis or benefit to send the Plan to a vote where the results have been pre-determined. This will only delay the eventual approval of a fair Plan and the Applicants' exit from these *CCAA* proceedings.

PART II. SUMMARY OF FACTS

A. Background to the U.S. Class Actions

6. The Donin Action was commenced on October 3, 2017.[3] The Jordet Action was commenced on April 6, 2018.[4] 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.[5]

7. The U.S. Class Actions are as straightforward as they are strong.

8. 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".[6]

9. 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

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[3] Affidavit of Robert Tannor, sworn January 17, 2022 ("**January Tannor Affidavit**"), para. 4, U.S. Class Counsel's Motion Record dated May 26, 2022 ("**Motion Record**"), Tab 3, p. 157; Exhibit "B" to the January Tannor Affidavit - October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 3, Exb. B, p. 193.

[4] January Tannor Affidavit, para. 6, Motion Record, Tab 3, p. 158; Exhibit "D" to the January Tannor Affidavit – April 6, 2018 Jordet Complaint, Motion Record, Tab 3, Exb. D, p. 284.

[5] January Tannor Affidavit, paras. 4, 6, Motion Record, Tab 3, pp. 157-158; Exhibit "B" to the January Tannor Affidavit, October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 3, Exb B. pp. 246-249; Exhibit "D" to the January Tannor Affidavit – April 6, 2018 Jordet Complaint, Motion Record, Tab 3, Exb. D, pp. 295-298.

[6] Exhibit "B" to the January Tannor Affidavit, October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 3, Exb. B, p. 195; Exhibit "D" to the January Tannor Affidavit – April 6, 2018 Jordet Complaint, Motion Record, Tab 3, Exb. D, p. 284.

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).

10. 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.[7] The progress of the U.S. Class Actions was significantly delayed by the Just Energy Defendants' unsuccessful motions to dismiss the actions.

B. Predatory Business Practices of the Just Energy Defendants

11. The U.S. Litigation is by no means the only challenge that has been brought against the predatory business practices of the Just Energy Defendants.[8]

12. U.S. regulators have also recognized the need to respond to unfair and deceptive marketing by energy service companies ("**ESCOs**") such as the Just Energy Defendants. For example, in 2016, New York's Public Service Commissioner (the "**NYPSC**") permanently prohibited ESCOs from serving low-income customers in New York, following an evidentiary hearing and a finding that, over a 36-month period, consumers who took commodity service

[7] January Tannor Affidavit, para. 7, Motion Record, Tab 3, p. 158; Exhibit "C" to the January Tannor Affidavit – Decision & Order of Judge Kuntz dated September 24, 2021, Motion Record, Tab 3, Exb. C, p. 267; Exhibit "E" to the January Tannor Affidavit – Decision & Order of Judge Skrenty dated December 7, 2020, Motion Record, Tab 3, Exb. E, p. 323.

[8] See generally Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, p. 349; see also Exhibit "B" to the January Tannor Affidavit - October 3, 2017 Complaint in the Donin Action, Motion Record, Tab 3, Exb. B, p. 193.

from ESCOs had been overcharged over $1.3 billion dollars.[9] The NYPSC concluded that "[t]he massive $1.3 billion in overcharges is the result of higher, and more often than not, significantly higher, commodity costs imposed by the ESCOs on unsuspecting residential and other mass market customers."[10] In 2019, NYPSC banned the very same variable rate pricing practices challenged in the U.S. Litigation.[11]

13. The Just Energy Defendants have also attracted the sanction of various regulators and have a demonstrated history of misleading and unfair business practices in the Canadian and U.S. retail energy markets.[12]

C. The CCAA Proceedings and the U.S. Customers' Proofs of Claim

14. On March 9, 2021, a few months after the release of the first decision in respect of the Just Energy Defendants' unsuccessful dismissal motion,[13] the Ontario Superior Court of Justice

[9] Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, p. 355.

[10] Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, p. 357.

[11] Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, p. 357.

[12] For example: On December 31, 2014, Just Energy agreed to settle claims strikingly similar to those made in the U.S. Litigation, brought by the Massachusetts Attorney General, making various concessions related to its deceptive residential energy sales and billing practices in Massachusetts and agreeing to refund USD $4 million to Massachusetts customers, among other sanctions; Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, p. 359. In 2009, U.S. Energy Savings Corp. (whose name was changed to Just Energy in 2012) entered a USD $1 million settlement with the Illinois Attorney General in respect of alleged violations of Illinois' consumer fraud laws; Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, p. 361. Other examples of regulatory sanctions made in connection with the Just Energy Defendants' predatory business practices are outlined in the Claims Documentation filed together with the U.S. Customers' Proofs of Claim, discussed below.

[13] The decisions were delayed significantly due to the Covid-19 pandemic.

issued an Initial Order granting *CCAA* protection to the Applicants.[14] As a result, the U.S. Class Actions are stayed.[15]

15. On September 15, 2021, the Applicants proposed, and the Court issued, a "**Claims Procedure Order**" which established 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.[16]

16. On November 1, 2021, U.S. Class Counsel filed detailed Proof of Claim forms in respect of the Donin Action and the Jordet Action in the aggregate, unsecured amount of approximately $3.66 billion (reflecting a joint damages claim encompassing both lawsuits).[17]

17. 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;[18]

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[14] January Tannor Affidavit, para. 9(a), Motion Record, Tab 3, p. 158.

[15] January Tannor Affidavit, paras. 9-11, Motion Record, Tab 3, pp. 158-159.

[16] January Tannor Affidavit, para. 9(b), Motion Record, Tab 3, p. 158. See also Exhibit "DD" to the Affidavit of Michael Carter, sworn May 12, 2022 (the "**Carter Affidavit**") – Claims Procedure Order, dated September 15, 2021, Motion Record of the Applicants dated May 12, 2022 ("**Motion Record of the Applicants**"), Exb. DD, pp. 1700-1773.

[17] Exhibit "F" to the January Tannor Affidavit – Donin/Golovan Proof of Claim, Motion Record, Tab 3, Exb. F, pp. 339-342; Exhibit "G" to the January Tannor Affidavit – Jordet Proof of Claim, Motion Record, Tab 3, Exb. G, pp. 344-347; Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, pp. 349-354.

[18] Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, pp. 350-353.

(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);[19]

(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;[20] and

(d) a supporting expert report.[21]

18. The U.S. Class Actions are perfectly suited for certification.[22] There is substantial precedent for certification of this type of class action.[23]

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[19] *Bell v. Gateway Energy Services Corp.*, Decision and Order of Eisenpress J. dated February 25, 2021, Brief of Authorities of U.S. Class Counsel ("**BoA"**), Tab 1; *BLT Steak LLC v. Liberty Power Corp.*, Decision and Order of Hagler J.S.C. dated August 14, 2020, BoA, Tab 2; *Claridge v. North American Power & Gas LLC,* 2016 WL 7009062, BoA, Tab 3; *Roberts v. Verde Energy, USA, Inc.*, 2017 WL 6601993, (Conn. Super. Ct. Dec. 6, 2017), *aff'd*, *Roberts v. Verde Energy, USA, Inc.*, 2019 WL 1276501 (Conn. Super. Ct. Feb. 1, 2019), BoA, Tabs 4 and 5.

[20] Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, pp. 353-359.

[21] Exhibit 1 to Exhibit "H" to the January Tannor Affidavit – Expert Report of Dr. Serhan Ogur, Motion Record, Tab 3, Exb. H, p. 370.

[22] Rule 23 of the Federal Rules of Civil Procedure, Fed. R. Civ. P., provides the applicable criteria for class certification: see also *Sykes v. Mel S. Harris & Assocs. LLC,* 780 F.3d 70, 79-81 (2d Cir.) 2015 at pp. 9-10, BoA, Tab 6. Here, the U.S Class Actions arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer contract. Just Energy provides its prospective electricity and natural gas customers with its standard contract prior to each contract's initiation. If the customer accepts the agreement, then it becomes the operative contract. Additionally, not only are the contractual commitments concerning Just Energy's variable rate uniform, but the resultant injury to the classes is also uniform because when Just Energy sets its variable rates, it uses the same rate for all customers within each utility region, regardless of which version of the contract governs its relationship with each variable rate customer.

[23] Indeed, multistate breach of contract and breach of the covenant of good faith and fair dealing classes are routinely found by U.S. courts to satisfy the required "predominance factor" because such common law claims are generally uniform across the U.S. See for e.g. *In re U.S. Foodservice Inc. Pricing Litig*., 729 F.3d at 127, BoA, Tab 7: where the Court found no predominance issue in respect of a nationwide class asserting claims for breach of contract under the laws of multiple states.

19. 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**").[24] The Notices of Disallowance are *pro forma* responses to the U.S. Class Actions in that they:

(a) largely repeat the failed legal arguments that the Applicants made in their unsuccessful attempts to have the Donin Action and the Jordet Action dismissed in U.S. federal court;

(b) do not cite a single legal authority for the positions taken on certification, scope of the action, jurisdiction, standing, merits or damages;

(c) do not explain the applicable tests in respect of any of the sweeping legal propositions/issues that they allege are "substantial hurdles…to any recovery";

(d) take issue with the alleged size of the Classes and quantum of the alleged claims without providing any data or information to support the Applicants' assertions; and,

(e) fail to address or respond to the comprehensive expert report tendered in support of the U.S. Class Actions.[25]

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[24] January Tannor Affidavit, para. 38, Motion Record, Tab 3, p. 168; Exhibit "Q" to the January Tannor Affidavit - Notice of Revision or Disallowance (Donin/Golovan), dated January 11, 2022, Motion Record, Tab 3, Exb. Q, p. 446; Exhibit "R" to the January Tannor Affidavit, Notice of Revision or Disallowance (Jordet), dated January 11, 2022, Motion Record, Tab 3, Exb. R, p. 457.

[25] January Tannor Affidavit, para. 38, Motion Record, Tab 3, p. 168; Exhibit "Q" to the January Tannor Affidavit - Notice of Revision or Disallowance (Donin/Golovan), dated January 11, 2022, Motion Record, Tab 3, Exb. Q, pp. 446-455; Exhibit "R" to the January Tannor Affidavit, Notice of Revision or Disallowance (Jordet), dated January 11, 2022, Motion Record, Tab 3, Exb. R, pp. 457-466. The Notices of Disallowance are in stark contrast to the U.S.

20. 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.[26]

D. The Plan and The Meetings Motion

21. On May 12, 2022, after months of advising the Court and interested parties that a Plan was pending, the Applicants finally filed their Plan which unabashedly reveals 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 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).[27]

22. In effect, PIMCO has turned this restructuring into a "loan to own" process without a proper marketing process or valuation.[28]

23. PIMCO and the Applicants have also 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).

Customers' Proof of Claims which address each particular legal "hurdle" (which hurdles are in reality just the procedural steps associated with class actions) and include specific citations to dozens of legal authorities, regulations, and evidence, including a supporting expert report. See Exhibit "H" to the January Tannor Affidavit – Claim Documentation filed November 1, 2021, Motion Record, Tab 3, Exb. H, pp. 349-354.

[26] Exhibit "E" to the Affidavit of Robert Tannor, sworn May 26, 2022 ("**May Tannor Affidavit**") – Donin Notice of Dispute of Revision or Disallowance, dated February 10, 2022, Motion Record, Tab 2, Exb. E, pp. 88-120; Exhibit "F" to the May Tannor Affidavit – Jordet Notice of Dispute of Revision or Disallowance, dated February 10, 2022, Motion Record, Tab 2, Exb. F, pp. 122-153.

[27] Notice of Motion of the Applicants dated May 12, 2022, Motion Record of the Applicants, Tab 1, pp. 63-78; May Tannor Affidavit at paras. 13-15, Motion Record, Tab 2, p. 17..

[28] May Tannor Affidavit, para. 36, Motion Record, Tab 2, p. 26.

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

24. The Plan discloses that the Applicants propose to limit (at least) hundreds of thousands of U.S. Customers of the Applicants with claims to one single vote.[29]

25. 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]

26. 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

27. 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).[31]

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[29] Exhibit "A" to the Carter Affidavit – Plan of Compromise and Arrangement, Motion Record of the Applicants, Tab 2, Exb. A, pp. 199.

[30] May Tannor Affidavit, para. 25, Motion Record, Tab 2, p. 21. U.S. Class Counsel in the Jordet Action has advised that the group of U.S. Customers captured by the Jordet Action is likely even larger than in the Donin Action: see May Tannor Affidavit, para. 27, Motion Record, Tab 2, p. 21.

[31] Carter Affidavit, para. 58(h)(i), Motion Record of the Applicants, Tab 2, p. 112.

28. 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.[32]

29. 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

[32] May Tannor Affidavit, paras. 13-15, Motion Record, Tab 2, p. 17.

currently estimate that the Other General Unsecured Creditors will receive 2.5 to 5 cents on the dollar).[33]

30. 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.[34]

31. 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.

32. 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.[35]

33. 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 Undisclosed Assets (defined and described below) will accrue entirely to the benefit of the Term Loan Lenders as the new equity holders.[36]

34. 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.

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[33] May Tannor Affidavit, para. 16, Motion Record, Tab 2, pp. 17-18.

[34] May Tannor Affidavit, para. 19, Motion Record, Tab 2, p. 20: i.e. a $3,000 creditor would likely opt-in to the convenience class in order to receive a 50% recovery on their claim.

[35] May Tannor Affidavit, para. 19, Motion Record, Tab 2, p. 19.

[36] May Tannor Affidavit, para. 19, Motion Record, Tab 2, p. 19.

35. The "Undisclosed Assets" consist of: (i) the Applicants' approximately USD $145 million recovery in respect of Texas House Bill 4492 ("**HB 4492**");[37] and (ii) material funds that may be awarded to the Applicants in litigation against the Energy Electricity Reliability Council of Texas ("**ERCOT**"), to challenge approximately USD $274 million paid under protest by or on behalf of the Applicants in connection with the Texas weather event.[38]

36. In its 2022 third Quarter Report to Shareholders, the Applicants advised in their Management's Discussion and Analysis dated February 16, 2022: "The Company is expecting to receive reimbursement of Costs in the amount of approximately USD $147.5 million (the "**Cost Recovery**"). The Cost Recovery is expected to be received in the Spring of 2022."[39] No updates in respect of the HB 4492 recovery were provided by either the Company or the Monitor until the Monitor delivered a Supplement to the Tenth Report of the Monitor on June 1, 2022.[40]

37. In the Supplement to the Tenth Report of the Monitor, the Monitor advises that the Applicants expect to receive the USD $147.5 million shortly after the Plan is intended to be sanctioned.[41]

38. Incredibly, none of the Undisclosed Assets are referenced or provided for in the Plan and the Undisclosed Assets do not appear to be considered in the Applicants' analysis.[42] Rather, it is

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[37] Affidavit of Vlad Andrei Calina, sworn May 26, 2022 ("**Calina Affidavit**"), para. 29, Haidar Omarali's Motion Record dated May 26, 2022 ("**Omarali Motion Record**"), Tab 1, p. 12. HB 4492 provides a mechanism for the recovery of costs incurred by Texas energy market participants, including the Applicants, during the Texas weather event in February 2021: see Calina Affidavit, para. 26, Omarali Motion Record, Tab 1, p. 11.

[38] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 2697, BoA, Tab 8.

[39] Exhibit "T" – 2022 Third Quarter Report to Shareholders, February 16, 2022 to the Calina Affidavit, Omarali Motion Record, Tab 1, Exb. T, p. 405.

[40] Calina Affidavit, paras. 33-43, Omarali Motion Record, Tab 1, pp. 13-15.

[41] Supplement to the Tenth Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor dated June 1, 2022, paras. 14-15.

apparent the Applicants expect that shortly *after* the plan is sanctioned, the Term Loan Lenders (as equity holders) will simply receive the entire benefit of the Undisclosed Assets for themselves.

3. The Applicants have limited the U.S. Customer claims to one dollar

39. The Plan proposes to arbitrarily limit the U.S. Customers' claims to one dollar, without any meaningful attempt to independently value the claims for voting purposes. As explained in detail below, there is no basis to disenfranchise the U.S. Customers in this manner.

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

40. U.S. Class Counsel is moving for, among other things, an order: (i) 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; (ii) 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 (iii) for advice and directions from the Court in respect of a summary valuation (estimation) of the U.S. Customer Claims for voting purposes only.[43]

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[42] May Tannor Affidavit, para. 20, Motion Record, Tab 2, p. 20.

[43] Notice of Motion, May 26, 2022, Motion Record, Tab 1, p. 1. On February 9, 2022, U.S. Class Counsel brought a motion for an Expedited Adjudication Framework in order to have the U.S. Customers' claims finally adjudicated in advance of any meeting of creditors to vote on the Plan in these proceedings. The relief requested on this motion is not for a *final* adjudication of the U.S. Customers' claims, that process is unfolding in the O'Connor Adjudication. Rather, U.S. Class Counsel seek a summary valuation (estimation) of the U.S. Customers' claims prior to the vote of the creditors on the Plan in this proceeding.

PART III. STATEMENT OF ISSUES, LAW & ARGUMENT

41. U.S. Class Counsel's response to the Meetings Order Motion and its cross-motion raise three issues, which should be answered as follows:

(a) Should the U.S. Customers be limited to one vote per representative plaintiff? ***No***. The U.S. Plaintiffs should be declared representatives of the U.S. Customers and be entitled to vote on any plan in these proceedings on behalf of the U.S. Customers.

(b) Should the Term Lenders be placed in a separate class of creditors for voting purposes? ***Yes.*** There is no commonality of interest between the Term Loan Lenders and the Non-Term Loan Lender General Unsecured Creditors.

(c) Should the claims asserted by the U.S. Customers in the U.S. Litigation be valued at $1 for voting purposes? ***No.*** A summary valuation (estimation) of the U.S. Customer claims should be undertaken by the Court or the Claims Officer prior to the meetings of creditors.

A. Each U.S. Customer is entitled to a separate vote.

42. The Applicants assert that the only "feasible approach" in this case is to provide each representative plaintiff in the U.S. Class Actions with one vote. That is incorrect.

43. Each U.S. Class Member is a creditor in their own right and is entitled to a separate vote. There is authority for such an approach:

(a) In *Cline Mining Corporation (Re)*, two of the debtors were defendants in an uncertified class action alleging a violation of U.S. labour legislation. The debtors disputed liability, making submissions similar to those advanced by the Applicants on the present motion.[44] The Court approved a Claims Procedure Order and Meetings Order whereby each member of the uncertified class (or their proxyholder) was entitled to cast an individual vote on the Plan.[45]

(b) In *Arrangement relatif à Bloom Lake*, the court gave counsel for the Representative Employees a deemed proxy to vote on the Plan on behalf of 690 individuals. The court rejected the notion that the deemed proxy gave too much leverage to this group of creditors, holding that "each employee and retiree has the right to vote on the Plan and every vote is important", and that the "deemed proxy simply ensures that the employees and retirees exercise the leverage that they should have, based on their numbers and the value of their claims".[46]

(c) In *New Home Warranty of British Columbia Inc., (Bankruptcy of)*, court-appointed counsel was authorized for voting purposes to file a proof of claim in the amount of approximately $20.5 million on behalf of 362 separate creditors who held contingent future claims under warranties issued by the debtor.[47]

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[44] *Cline Mining Corporation (Re)*, 2014 ONSC 6998 at paras. 18, 75, BoA, Tab 9.

[45] *Cline Mining Corporation (Re)*, 2014 ONSC 6998 at Appendix "A", paras. 17, 26(d), BoA, Tab 9. Ultimately, counsel for the uncertified class submitted a proof of claim for $3.7 million on behalf of 307 class members, and voted in favour of the Plan, which the court sanctioned: *Cline Mining Corporation (Re)*, 2015 ONSC 622 at paras. 7, 15-16, BoA, Tab 10.

[46] *Arrangement relatif à Bloom Lake*, 2018 QCCS 1657 at paras. 39, 42-44, BoA, Tab 11.

[47] *New Home Warranty of British Columbia Inc., (Bankruptcy of)*, 1999 CanLII 6751 (BC SC) at para. 13, BoA, Tab 12.

44. Accordingly, U.S. Class Counsel seeks an order declaring that, in these proceedings, 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, including with the authority to vote on the Plan, and Paliare Roland Rosenberg Rothstein LLP as their lawyers in these proceedings.[48]

B. The Term Loan Lenders should be placed in a separate class of creditors for voting purposes.

45. A debtor's discretion in classifying its creditors is limited by the "commonality of interest" test.[49] The foundation of this test is that the classes must be structured so as to "prevent a confiscation and injustice" and to enable the members to "consult together with a view to their common interest".

46. It follows that it is important to carefully examine classes with a view to protecting against injustice, and not simply rely on fairness being evaluated later.[50] Although creditors with different legal rights vis-à-vis the debtor may be included in the same class, those differences must not preclude creditors from consulting together and voting with a common interest.[51]

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[48] The Applicants have taken advantage of Paliare Roland's representation to discharge their notice requirements in respect of the U.S. Customers and their claims: Motion Record of the Applicants, Tab 5 draft Meetings Order, p. 1836 at para. 68: "notice of the sanction hearing: "service to the parties on the Service List shall constitute good and sufficient service of notice of the Sanction Hearing on all Persons entitled to receive such service and no other form of notice or service need be made and no other materials need be served in respect of the Sanction Hearing."

[49] As of 2009, the "commonality of interest" test has been codified in s. 22 of the *CCAA*; however, the caselaw decided prior to 2009 continues to be relevant to the courts' reasoning: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Section 23:12, BoA, Tab 32.

[50] *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386 at para. 10, BoA, Tab 13: the Court approved the chambers judge's decision to order a separate class for certain creditors related to the debtors.

[51] See generally *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC) BoA, Tab 14; *Re: San Francisco Gifts Ltd. (Companies' Creditors Arrangement Act)*, 2004 ABQB 705 at paras. 9, 11, BoA, Tab 15.

47. In this case, there is no commonality of interest among the class of general unsecured creditors. Rather, the proposed Plan provides for a gross disparity in the type of consideration being provided to the Term Loan Lenders as compared to the U.S. Customers and the general body of unsecured creditors:

(a) the U.S. Customers and the Other General Unsecured Creditors will receive limited and eroding *cash consideration*, whereas the Term Loan Lenders will receive *equity* in the New Just Energy Parent by way of a backstopped rights offering.

(b) as equity holders, the Term Loan Lenders will have a continuing legal relationship with the Applicants, and their assessment of the reasonableness of the Plan will revolve around an assessment of the risks and opportunities of that future relationship. Conversely, the assessment of the Plan's reasonableness by U.S. Class Counsel and other Unsecured Creditors will depend on their assessment of a fixed sum and the risk of erosion through the ongoing costs of these proceedings.

48. It stretches the imagination to think that there could be meaningful consultation between the Term Loan Lenders (66% PIMCO) and the Other General Unsecured Creditors. Indeed, if the U.S Customers are only given one vote for $1 (as contemplated in the Plan), then the Term Loan Lenders will control the vote in a Plan they structured and gerrymandered while effectively cancelling all the unsecured creditors' debt but their own.

49. Accordingly, since the Other General Unsecured Creditors and the Term Loan Lenders have substantially different rights and relationships vis-à-vis the Applicants, there is no basis in law to put all of these creditors in one class.

50. None of the cases cited by the Applicants or the DIP Lenders have approved a single class of creditors in circumstances where the creditors are treated substantially differently.[52]

51. To the contrary, a single class of unsecured creditors is inappropriate where some creditors in the class stand to profit from a continuing legal relationship with debtor, whereas other creditors in the class do not. For example, in *Woodward's Ltd., Re*, the court expressed concern that certain landlords, whose leases with the debtors had been wholly repudiated, were to be classified together with other landlords whose leases had been repudiated only partially and whose relationship with the debtors would be continuing. The court observed:

> I was concerned that the continuing legal relationship between these landlords and [the debtors] may give them a different interest from interests of the landlords whose leases are being wholly repudiated. For example, the continuing landlords may be more willing to vote in favour of the Reorganization Plan because they will be able to recoup some of

[52] See, for example, *Banro Corporation (Re)*, 2018 ONSC 2064, BoA, Tab 16: *Banro* dealt with a classification challenge brought by the *sole objecting creditor at the sanction hearing*; moreover, *all creditors* in the relevant class were to receive *share consideration*, and the court concluded there were only "minimal" differences between the two classes of shares; *SemCanada Crude Company (Re)*, 2009 ABQB 490, BoA, Tab 17: *SemCanada* dealt with a unique, cross-border restructuring with multiple, highly integrated and interdependent plans. Under the U.S. Plan, Noteholders and other unsecured creditors were all to receive an equity share in the restructured corporate group. Noteholders who voted in favour of the U.S. Plan were deemed to vote in favour of the three Canadian plans (but waived any entitlement to distributions under the Canadian plans). The classification issues in *SemCanada* must be read in this context: see para. 28; *Target Canada Co., Re*, 2016 ONSC 3651, BoA, Tab 18: Classification was not a contested issue at the sanction hearing, nor was *Target* a case in which only certain creditors in a class were to receive ongoing benefits of an equity share in the reorganized company; *Re: Canwest Global Communications Corp.*, 2010 ONSC 4209, BoA, Tab 19: Classification was not a contested issue, and the unequal distribution was unequal as among creditors in two separate classes; *Sino-Forest Corporation (Re)*, 2012 ONSC 7050, BoA, Tab 20: Classification was not a contested issue, and the plan was sanctioned with virtually unanimous creditor support.

> their losses from the profits generated out of the continuing relationship with [the debtors].[53] [emphasis added]

52. The proposed Plan in this case gives rise to substantially the same conflict. Unlike the rest of the non-Term Loan Lender General Unsecured Creditors, the Term Loan Lenders stand to profit from an ongoing relationship with the Applicants by virtue of their equity share in the New Just Energy Parent.

53. This difference in legal rights cannot simply be characterized as an issue of "fairness" to be addressed at the sanction hearing. Rather, courts must carefully examine classes at the classification stage to protect against injustice.[54] Where creditors have sufficiently different legal rights to warrant a separate classification, as is the case here, it would be fruitless for the court to order a meeting of the creditors only to refuse to approve the outcome of the meeting based on an unfair classification.[55]

54. Finally, contrary to the Applicants' assertion, the U.S. Customers do not seek an "inappropriate veto". Rather, the U.S. Customers seek a classification which appropriately separates creditors with different legal rights in a manner that is consistent with the *CCAA*, the jurisprudence and the facts of this case.

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[53] *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC), BoA, Tab 14. Ultimately, the court's concerns were resolved on the particular facts of that case: the rent under all the continuing leases was to be adjusted to market rent, and the landlords whose leases were being repudiated would also be leasing their premises to new tenants at market rent. Accordingly, there was sufficient commonality of interest to include all the landlords in one class. Such considerations do not arise in this case.

[54] *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386 at para. 10, BoA, Tab 13.

[55] *Woodward's Ltd., Re*, 1993 CanLII 870 (BC SC) at para. 41, BoA, Tab 14.

C. There must be a genuine attempt to value the claims asserted by the U.S. Customers in the U.S. Litigation.

55. The Applicants make the all-or-nothing proposition that the U.S. Customers' Claims should either be limited to one dollar, or allowed at their full face value for voting purposes. This is a false dichotomy.

56. The U.S. Customer Claims, which are based on the alleged predatory business practices of the Just Energy Defendants, are clearly not frivolous or without foundation; accordingly, there must be a genuine attempt to value the U.S. Customers' claims.[56] Indeed, the valuation of claims in a restructuring process is necessary and fundamental to the democratic underpinnings of the *CCAA* statute.[57]

57. The Applicants suggest that any unfairness associated with a $1 valuation of claims is a matter for the sanction hearing and, to that end, they propose to keep a separate record of votes cast by Affected Creditors with Disputed Claims. However, this safeguard is meaningless and gives no voice to the U.S. Customers if, at the return of the motion to sanction the Plan, the claims of the U.S. Customers remain limited to votes in the amount of $1 each.

58. Rather, the only approach that meaningfully preserves the voice of U.S. Customers is one which genuinely attempts to value the U.S. Customer Claims in the U.S. Litigation.[58]

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[56] *Algoma Steel Corp. v. Royal Bank of Canada*, 1992 CanLII 7413 (ON CA) at para. 5, BoA, Tab 21: although not decided in the context of a meeting motion and/or a request for a summary evaluation of a claim for voting purposes, the Court is clear in *Algoma* that where a claim is not frivolous or without foundation, there must be a genuine attempt to value the creditor's claim and finds that a contingent creditor's claim for indemnity against the debtor was not frivolous or without foundation and therefore was not properly valued at $1.

[57] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at para. 68, BoA, Tab 22.

[58] There are two core requirements for approval of a restructuring plan pursuant to the *CCAA*: (i) a vote by creditors; and (ii) a court sanction. The voting requirement is one of the foundational pillars of a *CCAA* restructuring: *CCAA* s. 6(1); see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, BoA, Tab 23.

59. The *CCAA* confers upon courts the broad and flexible authority to achieve the remedial purpose of the *CCAA*; to protect the integrity of its own process; to impose adherence to "baseline considerations" such as "appropriateness, good faith, and due diligence"; and to create conditions for a reorganization that is fair to all.[59]

60. These principles coupled with sections 11 and 20 of the *CCAA* (which provides the Court with the statutory authority for estimating the value of contingent claims in insolvency proceedings), underlie the request for a summary valuation of the U.S. Customers' claims.[60]

61. In U.S. Chapter 11 bankruptcy proceedings, Rule 3018(a) of the Federal Rules of Bankruptcy Procedure permits a bankruptcy court to "temporarily allow a claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan".[61] The U.S. approach has been replicated in Canadian cases where courts, in the context of the final adjudication of claims, have considered whether there is "some basis" to presuppose the happening of the contingency, then make a quantification of the claim by discounting a reasonable percentage from the "best case" scenario to reflect the risk that a less optimistic

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[59] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 70, BoA, Tab 23.

[60] *CCAA* ss. 11, 20; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 69-70, BoA, Tab 23.

[61] Fed. R. Bank. P. 3018(a); see also § 502(c) of the U.S. Bankruptcy Code; *In re Cheng & Company LLC*, 2015 WL 9283267, BoA, Tab 24: MR 619 H Street Capital LLC asserted a secured claim in the amount of $1.4 million. The debtor objected the claim. The court estimated the claim and allowed it in full for the sole purpose of voting on the plan; *In re Pacific Sunwear of California, Inc.*, 2016 WL 4250681, BoA, Tab 25: Two ex-employees of the debtor company filed a motion to have their class action claims estimated for the purpose of voting on the plan. The claims were filed in the aggregate amount of $135 million on behalf of class members. The court estimated the claim at $5 million for the temporary purpose of voting; *In re Cantu*, 2009 WL 1374261, BoA, Tab 26: The claimant sought to have their claim estimated for the purpose of voting on Cantu's Chapter 11 plan. The court estimated the claim at its full face value of $2.1 million.

scenario may in fact result.[62] This process applies even to complex litigation claims,[63] and is well-suited to the claims advanced by the U.S. Customers.

62. In keeping with the foregoing authorities, U.S. Class Counsel asks that the court schedule a summary hearing for the valuation (estimation) of the claims in the U.S. Litigation for voting purposes. U.S. Class Counsel would also agree to refer this issue to the Claims Officer (who is now well familiar with these claims) with a direction that the claim be estimated prior to the meetings of creditors.

D. Principles informing the Court's exercise of discretion to make the Order requested by U.S. Class Counsel

63. The *CCAA* process must be conducted fairly with a view to balancing the interests of all stakeholders, not merely the Applicants' secured creditors and the plan sponsors. Recently, the Supreme Court of Canada in *Century Services* expressed the *CCAA* court's mandate this way:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[64]

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[62] *Air Canada, Re*, 2004 CanLII 6674 (ON SC) at para. 2, BoA, Tab 27.

[63] *AbitibiBowater, Re*, 2010 QCCS 1261 at para. 230, BoA, Tab 28.

[64] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70, BoA, Tab 29 (emphasis added).

64. Even more recently, the Supreme Court of Canada expressed the importance of finding constructive solutions for all stakeholders:

> First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[65]

65. Ultimately, in any particular case, the relative weight of the different *CCAA* objectives may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval.[66]

66. In this particular case, it is worth noting that, even though these proceedings are centered in Canada, the Applicants have significant operations in the United States and the U.S. Customers represent a large cohort of the Applicants' creditors. In these circumstances, it is appropriate for the court, as it applies the principles of inclusiveness and procedural fairness in the exercise of the broad discretion afforded by the *CCAA*, to have regard to the legitimate expectations of the U.S. Customers. In particular, in the case of In *re Adelphia Comm. Corp.*, the U.S. Bankruptcy Court described the ability to vote on a reorganization plan as "one of the most sacred entitlements that a creditor has in a chapter 11 case", and, accordingly, the U.S. Bankruptcy Code expressly contemplates that the value of contingent claims will be estimated to afford creditors the right to meaningfully participate in the restructuring process and avoid their disenfranchisement.[67]

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[65] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 205, BoA, Tab 30 (emphasis added).
[66] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 46, BoA, Tab 23.
[67] *In re Adelphia Communications Corp.*, 359 B.R. 54 (2006) at p. 2, BoA, Tab 31.

PART IV. ORDER REQUESTED

67. U.S. Class Counsel respectfully requests an order for the relief requested in their Notice of Motion and that the Applicants' motion for a Meetings Order in its current form be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

June 2, 2022

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

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bell v. Gateway Energy Services Corp.*, Decision and Order of Eisenpress J. dated February 25, 2021

2. *BLT Steak LLC v. Liberty Power Corp.*, Decision and Order of Hagler J.S.C. dated August 14, 2020

3. *Claridge v. North American Power & Gas LLC*, 2016 WL 7009062

4. *Roberts v. Verde Energy, USA, Inc.*, 2017 WL 6601993

5. *Roberts v. Verde Energy, USA, Inc.*, 2019 WL 1276501

6. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70

7. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 127

8. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 2697

9. *Cline Mining Corporation (Re)*, 2014 ONSC 6998

10. *Cline Mining Corporation (Re)*, 2015 ONSC 622

11. *Arrangement relatif à Bloom Lake*, 2018 QCCS 1657

12. *New Home Warranty of British Columbia Inc., (Bankruptcy of)*, 1999 CanLII 6751 (BC SC)

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

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

15. *Re: San Francisco Gifts Ltd. (Companies' Creditors Arrangement Act)*, 2004 ABQB 705

16. *Banro Corporation (Re)*, 2018 ONSC 2064

17. *SemCanada Crude Company (Re)*, 2009 ABQB 490

18. *Target Canada Co., Re*, 2016 ONSC 3651

19. *Re: Canwest Global Communications Corp.*, 2010 ONSC 4209

20. *Sino-Forest Corporation (Re)*, 2012 ONSC 7050

21. *Algoma Steel Corp. v. Royal Bank of Canada*, 1992 CanLII 7413 (ON CA)

22. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587

23. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10

24. *In re Cheng & Company LLC*, 2015 WL 9283267

25. *In re Pacific Sunwear of California, Inc.*, 2016 WL 4250681

26. *In re Cantu*, 2009 WL 1374261

27. *Air Canada, Re*, 2004 CanLII 6674 (ON SC)

28. *AbitibiBowater, Re*, 2010 QCCS 1261

29. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

30. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

31. *In re Adelphia Communications Corp.*, 359 B.R. 54

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

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

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 claim, - present and voting either in person or by proxy at the meeting or meeting 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 would up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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;

Company may establish class

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

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

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

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

Bankruptcy, 11 USC § 502(c) (2011)

Allowance of claims or interests

502(c) There shall be estimated for purpose of allowance under this section

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

Fed. R. Bank. P. 3018(a)

Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

3018(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with §1126 of the code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule,

an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting the plan.

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

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. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

FACTUM OF U.S. CLASS COUNSEL
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