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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

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

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

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE MOVING PARTIES, Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**U.S. Class Counsel**"), in their capacity as counsel to the plaintiff classes (the "**Class Claimants**") in *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**"), will make a motion to a panel of the Court of Appeal for Ontario, in writing on an expedited basis or, in the alternative, within 36 days after service of the moving parties' motion record and factum, or on the filing of the moving parties' reply factum, if any, which ever is earlier.

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

THE MOTION IS FOR:

1. An order granting U.S. Class Counsel leave to appeal to the Court of Appeal for Ontario from the order of Justice McEwen dated February 9, 2022 (the "**Order**"), dismissing the motion of U.S. Class Counsel seeking, *inter alia*, an order that the Class Claimants be treated as unaffected creditors in the *CCAA* Proceeding (as defined below) or, in the alternative, an order for an expedited adjudication framework and information sharing protocol to allow the Class Claimants the opportunity to vote on a plan and/or have a role in the restructuring process;

2. An order that this leave motion be heard on an expedited basis;

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

4. The costs of this motion; and

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

THE GROUNDS FOR THE MOTION ARE:

6. U.S. Class Counsel's proposed appeal raises serious and arguable grounds with respect to how contingent claims ought to be addressed in *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*") proceedings in the face of a pending plan of arrangement or compromise.

7. More specifically, do the *CCAA* and principles of procedural fairness require the debtor and the Court to implement a process that will make full use of the time available prior to the meeting of the creditors and result in the determination or estimation of the claim for the purpose of voting at a meeting of creditors having regard so far as possible to its merits?

8. 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.

9. Justice McEwen's order undermines the voting requirement, one of the foundational pillars of a *CCAA* restructuring. Justice McEwen erred in not using the time available and by failing to put a process in place that leads to a determination of the Class Claimants' claims prior to a meeting of creditors so that the Class Claimants position is fairly represented at the meeting and they can vote.

10. In respect of the failure to order access to information, Justice McEwen made a further error in principle in denying the Class Claimants access to meaningful information so that they can vote on an informed basis.

11. The *CCAA* process must not be engineered in a way that disenfranchises (or increases the likelihood of disenfranchisement of) creditors.

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

A. Background

1. The U.S. Class Actions

1. On October 3, 2017, Fira Donin and Inna Golovan filed a proposed class action lawsuit on behalf of themselves and all other U.S. customers alleging, among other things, that the Applicants named as defendants (the "**Just Energy Defendants**") breached their contractual obligations and implied covenant of duty of good faith and fair dealing (the Donin Action).

2. On April 6, 2018, Trevor Jordet filed class action claims on behalf of himself and all other U.S. customers in which he made similar allegations to the plaintiffs in the Donin Action (the Jordet Action).

3. The Donin Action and the Jordet Action encompass 11 states in which the Just Energy Defendants do business.

4. The Just Energy Defendants sought to have the U.S. Class Actions dismissed. They were unsuccessful. In each case, the court ruled that key claims in the U.S. Litigation were plausible. Both of the U.S. class actions remain stayed in the United States.

2. The CCAA Proceeding

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

6. On September 15, 2021, the Applicants proposed and the Court issued a "**Claims Procedure Order**" which, among other things, established a "**Claims Bar Date**" of 5:00 p.m. on November 1, 2021 in respect of Pre-Filing Claims (as defined in the Claims Procedure Order).

7. On November 1, 2021, prior to the expiry of the Claims Bar Date, U.S. Class Counsel filed 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, composite damages claim encompassing both lawsuits).

8. In each case, U.S. Class Counsel provided Claim Documentation setting out the relevant background and merits of the respective U.S. class action.

3. The Notice of Disallowance

9. On January 11, 2022, the Applicants served a Notice of Revision or Disallowance with respect to both the Donin and Jordet Proofs of Claim (the "**Notice of Disallowance**"). The Notice of Disallowance disallowed the Donin and Jordet Claims in their entirety.

10. The Notice of Disallowance largely repeats the failed legal arguments that the Applicants made in their unsuccessful attempts to have the Donin Action and the Jordet Action dismissed.

11. The Notice of Disallowance takes issue with the alleged size of the Class and quantum of the alleged claim, yet the Applicants continue to refuse to provide U.S. Class Counsel with the necessary data and information to more precisely determine these issues or to verify the Applicants' unsupported assertions related to class size and damages.

12. The Notice of Disallowance also rejects the alleged class size and quantum without any evidence and without even addressing the comprehensive expert report prepared by Serhan Ogur for the U.S. Litigation.

13. The Class Claimants filed a comprehensive Notice of Dispute of Revision or Disallowance on February 10, 2022.

4. U.S. Class Counsel's Efforts to Obtain Information in Connection with this CCAA

14. U.S. Class Counsel repeatedly requested that the Applicants and the Monitor provide them with access to information in connection with the CCAA Proceeding.

15. U.S. Class Counsel's requests were consistent with the type and character of information that is commonly requested and provided as between creditors and debtors in restructuring proceedings.

16. The information that U.S. Class Counsel requested is necessary to properly evaluate and consider the Applicants' restructuring plan formation and resulting plan proposal in this ongoing CCAA Proceeding. Without this information, the Class Claimants cannot exercise their right to vote on any plan on an informed basis.

17. At this time, with the exception of the DIP Term Sheet and its 15th amendment, U.S. Class Counsel has still not received from the Applicants any substantive information which is useful to evaluate any plan proposal.

18. Notwithstanding repeated requests, the Applicants have largely resisted U.S. Class Counsel's requests. As a result, the flow of information has been deficient and contrary to a consensual *CCAA* restructuring.

5. U.S. Class Counsel, Paliare Roland, Tannor Capital Advisors and the Applicants enter into an NDA

19. On November 30, 2021, Just Energy Group Inc., U.S. Class Counsel, Tannor Capital Advisors and Paliare Roland Rosenberg Rothstein LLP entered into a Confidentiality, Non-Disclosure and Non-Use Agreement (the "**NDA**").

20. Despite the execution of the NDA, the Applicants have continued to delay and resist U.S. Class Counsel's requests for information.

21. Despite requests from U.S. Class Counsel to the Monitor and the Applicants, U.S. Class Counsel has not received substantive information regarding:

(a) the Plan Term Sheet, and the details of the creditor pool and further information on the quantum of claims in this CCAA Proceeding;

(b) whether there are any professionals representing unsecured creditors and the Class Claims in the ongoing realization discussions, given that it now appears the Applicants have equity on the balance sheet (as discussed below);

(c) the expected timing of key events in the CCAA Proceeding, including the release of the Applicants' and/or financiers' proposed exit plan and how such exit plan is to be put before the Court and Creditors for approval; and

(d) how and when the Class Claimants' claims will be adjudicated and/or be treated within a vote.

22. U.S. Class Counsel and its advisors need access to this type of information in order to meaningfully participate in any restructuring file, including this CCAA Proceeding.

23. Without this information, U.S. Class Counsel is hampered in its ability to consider and discuss the Applicant's intended course of conduct, and to develop and propose alternatives that may be attractive to and preserve value for the general body of unsecured creditors.

6. The Class Claimants are Unaffected Creditors

24. U.S. Class Counsel sought an Order that the Class Claimants are unaffected in the CCAA Proceeding so that their claims could continue in the U.S. courts.

25. Alternatively, if the claims were not unaffected, then U.S. Class Counsel sought the prompt and efficient adjudication of the Donin and Jordet Claims within the CCAA Proceeding and meaningful information so that the Class Claimants were not effectively disenfranchised.

7. The Expedited Adjudication Framework

26. In response to a request from Counsel to the Applicants, and in anticipation of the disallowance of the Proofs of Claim, on December 13, 2021, U.S. Class Counsel proposed an adjudication plan for the Donin and Jordet Claims.

27. The proposed adjudication plan was an attempt to put in place a mutually-agreeable process for the adjudication of the Donin and Jordet Claims within the CCAA Proceeding.

28. On February 1, 2022, the Applicants finally responded and sent a with prejudice alternative adjudication process that would see the Donin and Jordet Claims determined on a schedule of more than one year.

29. On February 4, 2022, U.S. Class Counsel proposed a further Expedited Adjudication Framework.

30. To accommodate concerns that had been raised with U.S. Class Counsel, the Expedited Adjudication Framework contemplated a more extensive and lengthier adjudication process than U.S. Class Counsel's initial proposal. Specifically, the Expedited Adjudication Framework proposed:

(a) adjudication by a tripartite panel of two US arbitrators and one Canadian arbitrator (collectively, the "**Claims Officers**");

(b) the Honourable Mr. Dennis O'Connor would sit as the Canadian arbitrator and each side would have the right to appoint one Claims Officer from the extensive list of US JAMS arbitrators with class action experience;

(c) the Claims Officers would have complete jurisdiction and discretion to determine the appropriate process for the proceeding within the JAMS US expedited rules and with consideration to an endorsement from the *CCAA* court that the deadline for the release of a decision on the merits was to be three days prior to the meeting of creditors (implying an outside date of March 27, 2022, as it appeared as though the DIP lenders were requesting a timeline that would have a vote on March 30, 2022).; and

(d) any appeal would be to the *CCAA* court.

31. The Expedited Adjudication Framework established a time-sensitive process that addressed and protected the rights and interests of the parties and ensured that all questions about scope, jurisdiction, discovery or any other matter will be dealt with efficiently by the very panel that would hear the case.

32. Given the potential significance of the Donin and Jordet Claims to the approval of any Plan, there is a need to establish a process for the valuation of these claims in advance of any meeting of creditors and sanction hearing (or any other exit from this CCAA Proceeding).

B. The February 9, 2022 Order

33. Throughout various case conferences and discussions the Applicants and the Monitor told U.S. Class Counsel that their requests for information and for an expedited adjudication process were premature.

34. Then, at approximately 3:20 pm, on February 4, 2022, the day that U.S. Class Counsel's factum was due, and three business days before the motion, the Monitor served the Fifth Report of the Monitor in which it advised that the DIP lenders were requesting a timeline that would see a vote on a plan by March 30, 2022. A motion date was also set for March 3, 2022, at which time the Applicants will seek an order to file the plan and obtain a meeting order.

35. After months of saying that U.S. Class Counsel's requests were premature and that there would be time, a vote was being proposed within 8 weeks.

36. U.S. Class Counsel's motion was heard on February 9, 2022.

37. Justice McEwen dismissed U.S. Class Counsel's motion from the bench, but stated that his Honour "may have some comments on the information sharing". His Honour advised that he hoped to have handwritten reasons delivered to the parties by February 16, 2022.

38. Justice McEwen did not provide handwritten reasons on February 16, 2022.

39. On February 22, 2022, Jeffrey Larry ("**Mr. Larry**"), counsel to U.S. Class Counsel wrote a letter to the Applicants' counsel advising that given that Justice McEwen had not released reasons, and that the import of the decision was not known yet, it was U.S. Class Counsel's position that the time for seeking leave to appeal had not begun running.

40. Mr. Larry requested that the Applicants agree to consent to any motion that U.S. Class Counsel may be required to bring for an extension of time.

41. On February 23, 2022, Justice McEwen delivered handwritten reasons.

42. Later on February 23, 2022, the Applicants' counsel advised that it would not consent to any extension of time regarding this appeal.

C. Proposed Appeal

43. If leave is granted, this court would be asked to answer the following questions:

(a) How are contingent claims to be addressed in *CCAA* proceedings in the face of a pending plan?

(b) Do the *CCAA* and the principles of procedural fairness require a debtor and the Court to implement a process that will result in the determination or estimation of the claim for the purpose of voting at a meeting of creditors?

D. Leave to appeal should be granted

44. The points raised on the proposed appeal are significant to these proceedings and to the practice, and are *prima facie* meritorious.

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

46. Justice McEwen erred in principle in allowing the Applicants to pursue a process that will ultimately result in the Class Claimants' disenfranchisement.

47. Justice McEwen also erred in failing to consider the impact of his decision on one of the two core requirements for approval of a restructuring plan – the vote by creditors.

48. The vote by creditors must be meaningful in order to advance the policy objectives underlying the *CCAA*.

49. The *CCAA* places the restructuring process under the Court's supervision. The Court is required to impose obligations on the debtor to ensure creditors may meaningfully exercise the right to vote.

50. In making the impugned order, the motion judge denied the Class Claimants' procedural fairness.

51. Given the number of claimants and the size of the Donin and Jordet Claims, the fair treatment and assessment of these claims is critical to the outcome of the CCAA Proceeding.

52. Indeed, the Class Claimants are creditors and potentially key stakeholders in the Applicants' restructuring. The Class Claimants are the Applicants' former and current customers. They have a significant interest in the CCAA Proceeding and a successful restructuring of the Applicants.

53. The proposed appeal involves matters of such importance that leave to appeal should be granted.

54. The proposed appeal is of profound significance to *CCAA* proceedings in general. Justice McEwen's order dilutes the principle of *CCAA* proceedings that creditors must be treated fairly and narrows the scope of the fundamental protections to creditors that the *CCAA* is designed to provide.

55. Justice McEwen's decision is a concerning precedent that threatens to disrupt the relationship between creditors and debtors. His Honour's decision creates a restructuring dynamic that is fundamentally at odds with the principles of the *CCAA*. It also undermines the obligations on debtors to satisfy the Court that they have proceeded in a manner where the transparency, integrity, credibility and fairness of the process is beyond reproach.

56. Moreover, the learned motion judge's approach will have significant impact on contingent creditors in *CCAA* proceedings. It will encourage debtors to avoid determining contingent claims.

57. The *CCAA* has a remedial objective. It is focused on *all* stakeholders. It requires that creditors, including contingent creditors, be treated fairly and meaningfully.

58. The appeal is *prima facie* meritorious and is not frivolous.

59. US Class Counsels' proposed appeal will not unduly hinder the progress of the CCAA Proceeding.

E. An Expedited Hearing of this Motion is Necessary

60. U.S. Class Counsel asks that this motion for leave to appeal be heard as soon as possible by this Court.

61. While this motion remains outstanding, the CCAA Proceeding is continuing and the clock continues to run towards a plan and a vote.

F. Statutory Grounds

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

63. Sections 11, 11.02 and 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

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

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

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

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

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

February 24, 2022

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SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
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