COURT OF APPEAL FOR ONTARIO

CITATION: Just Energy Group Inc. (Re), 2022 ONCA 498
DATE: 20220628
DOCKET: M53250

Benotto, Zarnett and Sossin JJ.A.

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.

Ken Rosenberg, Jeffrey Larry and Danielle Glatt, for the moving party U.S. counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.* and U.S. counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

John MacDonald, Marc Wasserman, Michael De Lellis, Jeremy Dacks and Karin Sachar, for the responding parties Just Energy Group Inc. et al.

Alan Merskey, John M. Picone and Christopher Selby, for the DIP Lenders

James Gage, Heather Meredith and Natasha Rambaran, for the Credit Facility Lenders

Heard: in writing

Motion for leave to appeal from the order of Justice Thomas McEwen of the Superior Court of Justice, dated February 9, 2022.

REASONS FOR DECISION

[1] Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP ("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.* and *Jordet v. Just Energy Solutions, Inc.* (the "U.S. Litigation") seek leave to appeal the motion judge's order dismissing their motion seeking, among other things, an order that the Class Claimants be treated as unaffected creditors in the CCAA Proceeding or, in the alternative, an order directing amongst other things, an expedited adjudication framework for their claims. For the reasons that follow, we refuse leave.

Background

[2] Just Energy Group Inc., et al. (the "Applicants") have been under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") since March 2021. The Applicants provide energy to approximately 950,000 customers in Canada and the U.S. and employ over 1,000 people. They

have been working with the significant stakeholders in their capital structure to develop a going-concern restructuring plan.

[3] U.S. Class Counsel brought a Motion for Advice and Direction on February 9, 2022, primarily seeking:

1. An order declaring that the Class Claimants are to be unaffected by this CCAA Proceeding;
2. In the alternative, an order directing an expedited process be undertaken to adjudicate the Class Claimants' asserted claims.

[4] The Applicants, supported by the Monitor, opposed the motion, as did the DIP Lenders, Credit Facility Lenders and Shell.

[5] The motion judge dismissed the motion.

[6] On the first issue, the motion judge disagreed with U.S. Class Counsel's submissions and found that granting an order leaving the Class Claimants unaffected would allow the unsecured Class Claimants to partially dictate the form of the Plan, which has not yet been placed before the CCAA Court.

[7] The motion judge held that the request "ran contrary to the caselaw that allows debtors to determine how they should deal with creditors in a proposed plan – subject to a creditor vote" and concluded that "[t]o allow the relief sought would, in essence, elevate the Class Claims above other unliquidated, unsecured, contingent claims who would undoubtably like to receive similar treatment."

[8] On the second issue, the motion judge disagreed with U.S. Class Counsel's position that they should be granted their requested process to adjudicate their clients' asserted claims. Against the backdrop of there already being a claims procedure order in place and the timing of this particular restructuring, he made the following findings:

i) I do not accept that the Applicants have "sandbagged" the U.S. Class Counsel based on the record before me. Given the complexity of the restructuring and the timing of the Class Counsel's proposed adjudication plan it is not surprising that it took a matter of weeks to respond;

ii) Within the CCAA Proceeding U.S. Class Counsel have not yet contested the disallowance of the Class Claims, [thus] not triggering the adjudication process provided for in claims procedure order;

iii) I have significant concerns, and very much doubt, that the process proposed by U.S. Class Counsel is viable given the significant number of hearings – including certification and damage – that would have to occur in a compressed timeline (it bears noting that in the 3-4 years that the Class Claims have been outstanding they have not completed these stages);

iv) Even if such a process was allowed it would be a tremendous distraction from the restructuring which is at a critical juncture;

v) The Applicants' Plan has not yet been offered to the Court, nor has the issue of a meeting order been addressed – the CCAA process should be allowed to progress further before the adjudication proposed by the U.S. Class Counsel is considered;

vi) Last and overall, I am not of the view that the hotly contested Class Claims (both on liability and quantum) ought to be adjudicated before other claims and prior to the next contemplated step in the CCAA Proceeding.

[9] In seeking leave, U.S. Class Counsel focus on the second issue, concerning the timing and procedures for the adjudication of their claims. U.S. Class Counsel submit that the proposed appeal raises serious and arguable grounds with respect

to how contingent claims ought to be addressed in CCAA proceedings in the face of a pending plan or arrangement or compromise. The proposed appeal would ask:

> Did the supervising judge err in failing to order a process for the adjudication of the U.S. Customer Claims so as to allow for the determination of the claims for voting purposes prior to the meeting of creditors?

The Test for Leave is Not Met

[10] It is well-established that leave to appeal is granted sparingly in CCAA proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider:

1) whether the proposed appeal is *prima facie* meritorious or frivolous;
2) whether the points on the proposed appeal are of significance to the practice;
3) whether the points on the proposed appeal are of significance to the action; and
4) whether the proposed appeal will unduly hinder the progress of the action: see, for e.g., *Stelco Inc. (Re)* (2005), 2005 CanLII 8671 (ON CA), 75 O.R. (3d) 5 (C.A.), at para. 24; *Timminco Ltd. (Re)*, 2012 ONCA 552, 2 C.B.R. (6th) 332, at para. 2; *Nortel Networks Corp. (Re)*, 2016 ONCA 332, 36 C.B.R. (6th) 1, at para. 34.

[11] Having reviewed the materials filed on this leave motion, we are not satisfied that the proposed appeal is *prima facie* meritorious or that the case is of significance to the practice.

[12] U.S. Class Counsel seek to challenge a discretionary order of the motion judge, who as the supervising judge is extensively familiar with this complex cross-border CCAA proceeding. As the supervising judge, he applied his knowledge of

the proceeding and made findings of fact based on the evidence to refuse to order the process requested by U.S. Class Counsel. It is well-established that a supervising judge's exercise of discretion which seeks to balance the competing interests of various stakeholders within the CCAA proceeding is entitled to a high level of deference. "Appellate intervention is justified only where the 'supervising judge erred in principle or exercised their discretion unreasonably'": *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras. 53 to 54"; *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, 87 C.B.R. (6th) 243, at para. 20. We are not satisfied that the motion judge made an error in principle or exercised his discretion unreasonably.

[13] We are also not persuaded that the motion judge's decision is of significance to the insolvency practice, given that it was a fact-specific exercise of his discretion.

Disposition

[14] The motion for leave to appeal is dismissed, with costs to the responding parties Just Energy Group Inc and the DIP Lenders each in the amount of $7,000 inclusive of disbursements and HST.

M. L. Benotto J.A.

B. Zarnett J.A.

L. Sossin J.A.