NOTE TO READER: This is an UNOFFICIAL TRANSCRIPT of the Endorsement of Justice McEwen dated August 18, 2022. The official hand-written endorsement governs in all respects.

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

Written Endorsement of McEwen, J. – Unofficially Transcribed

The Applicants seek a Sales Process Approval Order. The Applicants are supported by the DIP Lenders, Credit Facility Lender and Shell at the motion.

The Monitor also supports the relief sought.

While there is generally no opposition to the order sought, U.S. Class Counsel on behalf of the U.S. Class Actions raise five discrete objections. They are supported by the Omarali Class Action, the Mass Tort Claims and Pariveda.[1]

Given the extreme time sensitivity surrounding this CCAA matter, I am releasing my reasons via this handwritten endorsement. I have reviewed all of the facta filed, affidavits, motion records and Monitor's Eleventh Report.

In providing these reasons, I do not propose to review all submissions made, but will focus on those submission that I consider to be most germane. I have however, reflected on all of the submissions made at the motion.

Before I analyze the five issues in dispute, I will review the overall structure of the Sales Process proposed by the Applicants, and then review the issues not in dispute that were raised at the motion.

Insofar as the Sales Process is concerned, the Applicants seek a sales and investment solicitation process ("SISP") which, among other things, seeks Court authorization, *nunc pro tunc*, to enter into a Stalking Horse Transaction Agreement between the Applicants and the Sponsor (as defined, essentially the related group of companies under the PIMCO umbrella, in the Applicants' factum).

The Applicants also, in this regard, seek approval of the SISP Support Agreement.

As noted, there is no general opposition, and I agree that subject to the determination of the five discrete disputes, the SISP Support Agreement and SISP, which includes the Stalking Horse Transaction, ought to be approved.

The SISP Support Agreement is similar to the previous Plan Support Agreement that I previously approved before the Plan was terminated subsequent to my previous orders in June/22.

Unlike the Plan Support Agreement, however, the SISP Support Agreement contains no restriction on the Applicants to solicit superior offers to the Stalking Horse Transaction. I agree that s. 11 of the CCAA provides this Court with the authority to approve the SISP Support Agreement. I further agree that the SISP Support Agreement is a critical component of the Applicants' going concern restructuring to allow them to market their assets, obtain value and operate in the normal course in the meantime.

This Court has approved similar support agreements in prior cases: *Re. Stelco* (2005) 78 OR (3d) 254 and *U.S. Steel Canada Inc.* 2016 ONSC 7899.

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[1] All as defined in my June 21/22 endorsement.

With respect to the SISP, I accept the Applicants' submission that the criteria as set out in the *Nortel Networks Corp. (Re)* (2009) 55 CBR (5th) (Ont SCJ) at para. 48 have been met, insofar as they ought to be considered at this stage of the proceeding.

Amongst other reasons is the fact that; of present, no other viable options have been presented; other superior proposals can be accepted; and the Stalking Horse Transactions sets a "floor price" and creates the certainty of a going concern sale.

I pause here to note that the Stalking Horse Transaction contemplates a Reverse Vesting Order ("**RVO**"). In this regard, however, it is important to note that at this stage I am not being asked to grant the RVO (which have been viewed as an extraordinary remedy: see *Harte Gold Corp. (Re)* 2022 ONSC 653 at para 38), nor am I being asked to approve the Stalking Horse Transaction.

Approvals in this regard, if the Stalking Horse Transaction is the successful bid, will be dealt with at the conclusion of the SISP.

Turning now to the specific unopposed relief, I grant the following relief:

- The stay period is extended to October 31/22. There is sufficient liquidity. The Applicants are proceeding in good faith and the extension is fair and reasonable given the ongoing Sales Process.

- The KERP is also approved. Previous KERPs have been approved by this Court. As set out in Mr. Carter's affidavit (the CFO of Just Energy) the proposed KERP, for non-executive key employees is justified as previously ordered payments will soon end and there is a genuine concern that non-executive key employees may resign at this important stage of the proceeding. This would prejudice not only the Applicants, but other stakeholders. The proposed amounts are fair and reasonable.

- The Monitor's Tenth and Eleventh Reports are approved as are the activities, conduct and decisions described therein.

- The sealing orders shall go with respect to the KERP order and the SISP Support Agreement which contains, amongst other things, the holding percentages of the various entities comprising the DIP Lenders' Claim.

In both instances the Sierra Club test, as recast in Sherman Estate, has been met. The orders are made on an interim basis. Prior sealing orders have been made concerning KERP Orders. This protects the personal information of the relevant employees.

The interim Sealing Order concerning the SISP Support Agreement is also necessary given the ongoing Sales Process and the commercially sensitive material it contains.

I now turn to the five disputed issues:

1. The first deals with the U.S. Class Actions' allegation that the Sponsor will have "inside information" regarding other bids and other bidders' communications with the Applicants in the absence of the other bidders' consent. This could result in proprietary or competitive information going to the Sponsor. They argue that this would provide an unfair advantage and could chill the market.

   The Applicants submit, as do the supporting stakeholders, that all they seek is an equal playing field.

   The Stalking Horse Transaction Agreement has been finalized and disclosed to all potential bidders. The Sponsor, in particular, seeks the same information from other bidders prior to the auction.

   At the motion the parties agreed that symmetrical information sharing was sensible and would assist in the Sales Process.

   The only potential mischief concerned disclosure of propriety or competitive information. It is frankly difficult to analyze this risk in the abstract.

   It was agreed that the symmetrical bidding information should be exchanged. The Monitor agreed to stay involved in the information sharing process. Further, the Sponsor submits that it is not seeking proprietary information, but rather wants to see the exact type of information that it has provided.

   In all of these circumstances, I therefore order that the parties/stakeholders engage in the fair, equitable and symmetrical sharing of information concerning bids. The Monitor will continue to engage and monitor the exchange of information to ensure no bidder, including the Sponsor, enjoys an advantage that is unfair and/or could chill the market.

2. I now turn to the U.S. Class Actions' submission that the SISP should not automatically default to the proposed auction. They are currently working with a financier to attempt to present a plan of arrangement.

   Counsel for the U.S. Class Actions submit that the SISP should contain a provision that the matter return to Court, before an auction, to determine whether their Plan should be put to a vote of unsecured creditors (or any other plan that surfaces).

   I do not agree and agree with the submissions of the Applicants' wherein they submit that such an attendance is unnecessary and detrimental to the SISP process.

   There is nothing preventing the U.S. Class Actions from submitting their plan into the auction. No stakeholder disputes their right to do so.

In my view this is the preferred path and upon the conclusion of the auction[2] I will determine whether the successful bid ought to be approved.

At that time all relevant issues will be reviewed, including if necessary a proposed RVO.

In the usual way, the relevant issues concerning whether or not the successful bid ought to be approved, including why the successful bid is superior, or not, can be put forth.

Parties are free to put forth all relevant, unfettered arguments. As stated by Monitor's counsel, this Court is not a "rubber stamp" at the motion for approval.

This single track, as unopposed to the motion proposed by counsel for the U.S. Class Actions, is preferrable and provides greater certainty in the marketplace. I am concerned that a return to Court before an auction could chill the Sales Process, as potential bidders would be concerned that their efforts may never make it to auction resulting in wasted time and expense.

3. The third issue involves whether the valuation of the U.S. Class Actions ought to be suspended.

The U.S. Class Actions want to proceed as per my earlier order, that the Contingent Litigations Claims (which include the U.S. Class Actions, the Omarali Class Action, the Mass Tort Claims and the Pariveda Claim[3]) ought to be valuated, in advance of a meeting of creditors when the Meeting Order was sought. Subsequent to that Order being made the Sponsor withdrew from the proposed plan and all parties, including the Contingent Litigation Claims agreed to suspend the valuations to determine the validity and value of the claims.

A letter was provided to me by the Monitor in this regard.

Unbeknownst to me, later in July, the U.S. Class Actions advised the Monitor and other that it, again, wished to carry out the valuations. The matter did not return to me and no valuations were conducted.

At the motion, the Omarali Class Action, the Mass Tort Claims and Pariveda also requested that their claims be valuated.

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[2] Assuming the SISP proceeds to auction.

[3] Pariveda was not part of the defined term but I ordered it be valued.

They all generally submit that in order to formulate and negotiate a plan they (the U.S. Class Actions took the lead here) need to know the creditor pool for the purpose of voting.

The U.S. Class Actions proposed a process by way of letter dated Aug 4/22 which proposes a very aggressive approximate two week process that has either the Honourable J. O'Connor or I conduct the valuations (although they use the word "estimations"). This would now presumably involve valuations of all of the aforementioned claims.

The Applicants submit that such an exercise is wasteful, unnecessary and lacks utility. They further submit that the expedited schedule is unachievable, particularly where the additional claims would also need to be valued.

I agree with the Applicants.

Currently, the only transaction before the Court is the Stalking Horse Transaction which would not result in any recoveries to general unsecured creditors. Further, I agree with the Applicants that the volatile nature of the industry and the Sales Process are placing a strain on resources and personal (as referenced above concerning the KERP).

I further accept the submissions of the Monitor that a valuation can be considered, if and when, a transaction is likely to provide recovery for unsecured creditors. Otherwise it is a costly distraction.

Insofar as the argument of counsel for the US Class Actions is concerned, that it is necessary to formulate and negotiate a plan, this may be of some assistance, but their presence is well known in this proceeding and their desire does not outweigh the above countervailing factors raised by the Applicants and supported by the Monitor.

Last, unlike the valuations ordered with respect to the abandoned plan, here we are dealing with a SISP which, in the ordinary course, should have some value determined before considering a valuation. I also note that the Omarali Class Action submitted that its claim has unique features that further warrant a valuation. Again, I do not accept that those features outweigh the concerns of the Applicants.

4. The fourth issue concerns the break-up fee contained in the Stalking Horse Transaction, in the amount of US$14.66 million in favour of the Sponsor.

Counsel for the US Class Actions submits that the break-up fee is anti-competitive and unfairly prejudices the unsecured creditors.

They add that the Sponsor has had its fees paid throughout these proceedings and the Sponsor is committed to purchasing the asset. Additionally, they argue that the

Applicants/Sponsor have advanced no evidence to support the quantum sought and the break-up fee results in other bidders having to raise additional funds to compete.[4]

Insofar, as the law is concerned, counsel for the US Class Actions point out that this Court has a gatekeeping function and ought not simply act as a "rubber stamp", or merely rely upon the business judgment rule and the seller's discretion.[5]

Last, they submit that each case must be considered in the context of its own unique circumstances and the mere fact that the proposed break-up fee is within the range of reasonableness as determined in other cases does not mean it is reasonable in the given case.[6]

The Applicants/Sponsor argue that the stalking horse bid provides stability and a framework for competitive bidding. In this context break-up fees are almost always required in exchange for the stalking horse setting the floor, exposing the bid, providing other bidders access, and committing funding.

Further, they argue that the Stalking Horse is tying up a significant amount of capital (in the $200 million range) and this resulting loss of opportunity cost must be taken into account.

The Sponsor particularly points out that the break-up fee is not anti-competitive, but rather allows the competitive bidding to occur to benefit of all stakeholders, including the over 1,000 employees and approximately 1,000,000 customers.

The Applicants/Sponsor further submit that the break-up fee is well within the accepted range (3.4%) and rely on the evidence of Mr. Carter (paras. 60-63 of his affidavit) and their expert Mark Caiger. Mr. Caiger opines that the break-up fee is in-line with market terms, consistent with market practice and reasonable in the circumstances of this case.

Mr. Caiger was engaged by Just Energy to advise and assist it. In his May 12/22 affidavit he thoroughly sets out the basis of his analysis (see paras 32-38).

Further, the Applicants point to the fact that the previously approved Termination Fee, in connection with the abandoned Plan, was in the same range and was not opposed.

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[4] See *Mecachrome Canada Inc. Re*. 2009 QCCS 6355 at para 64 for support of this submission

[5] *Boutique Euphoria Inc. Re*. 2007 QCCS 7129 at para 65

[6] *Quest University Canada (Re)* 2020 BCSC 1845 at para 58; *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.* 2014 BCSC 1855 at para 36

In support of the Applicants, the Monitor also emphasizes that the break-up fee is in no way a gratuitous offering but is part of a complicated arm's length agreement, that resulted in the Stalking Horse Transaction. This transaction provides certainty to all stakeholders of a going concern transaction that can close in a timely fashion. The Monitor too is of the view that the break-up fee will not chill the market and its review also has found that it is consistent with break-up fees in similar sales transactions carried out under the CCAA and in the U.S.

I agree that the break-up fee ought to be granted. It is a critical feature of the proposed transaction. The 3.4% is within the range of acceptability.

Although the actual fee, at first glance may seem high, the SISP involves a significant, complicated process involving a complex and large scale business model with secured claims of approximately $1 billion.

The risks and stakes here are extremely high and the break-up fee is reasonable when one considers all the factors – including the price of stability.[7]

In the very unique and complex circumstances of this case I do not accept the U.S. Class Actions' submission that no break-up fee is warranted – this is not realistic.

Rather the proposed break-up fee recognizes, amongst other things, the effort expended by the Sponsor, the capital committed and the benefits of the Stalking Horse Transaction within the SISP as set out in the record filed by the Applicants. Specifically, it also allows the transaction to proceed and attempt to attract other bidders.

5. The last issue involves the request of the U.S. Class Actions to extend the timeline under the SISP by three weeks.

They primarily submit that there are no liquidity issues and the existing timelines are very tight. For example, the NOI is due Aug 25/22.

The Applicants, prior to the motion, maintained that the timelines were appropriate based on its unchallenged evidence, which includes the volatility of the market and effect on employees.

They also submit that the process commenced on Aug 4/22, not as of the date of the motion.

The Applicants conceded liquidity.

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[7] *Green Growth Brands (Re),* 2020 ONSC 3565 at paras 51-52

At the hearing the Applicants met, off the record, with their key secured stakeholder and advised that they would agree to a one week extension.

As I alluded to at the motion, I believe that a two week extension to the milestones is fair and reasonable. As a result of my previous orders, the proposed Sales Process is proceeding essentially as proposed by the Applicants/Sponsor – including the break-up fee.

Further, as the Applicants and their supporters have stated, the Sale Process is extremely complex and involves significant debt and funding.

By allowing an extra week (over and above the concession at the motion) I see no prejudice to the Applicants. This matter has been evolving for many months and it must be remembered that it took the Applicants some time to formulate the prior Plan.

The extra two weeks provides a clear, court ordered structure and path to a definitive auction date.

In my view, this provides a reasonably quick timetable, but allows some breathing room for other bidders which is to be benefit of stakeholders.[8]

In coming to this conclusion, I have not ignored the Applicants' prior marketing efforts.

A two week extension is granted.

[8] *PCAS Patient Care Automation Services Inc. (Re)* 2012 ONSC 2840 at paras 17, 18 for support of this proposition

Orders shall go with respect to the foregoing reason.

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Judges Initials