Court File Number: CV-21-00658423-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

In the Matter of: Just Energy Group Inc.
Plaintiff(s)

AND

Defendant(s)

Case Management ☑ Yes ☐ No by Judge: McEwen J

Counsel	Telephone No:	Facsimile No:
see counsel slip		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

US Class Counsel brought a motion on February 9/22 primarily seeking the following relief:

(1) an order declaring the class claimants in the Donin v. Just Energy Group Inc et and the Tardot v. Just Energy Solutions Inc (the "Class Claimants") are to be unaffected by this CCAA Proceeding; in the alternative, an order directing

23 Feb 22
Date

McEwen J
Judge's Signature

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amongst other things, "a timely schedule and process" leading to the final adjudication of the Donin and Tordet Actions (the "Class Claims") prior to this Court's determination of the Applicants' Plan, or other event to exit the CCAA Proceeding; and,

(3) access to any data room / appointing a mediator / arbitrator to resolve disputes / production of specific documents listed in the Notice of Motion / a compulsory meeting between the Applicants and U.S. Class Counsel.

Upon the conclusion of the motion I dismissed the motion with reasons to follow. I am now providing those reasons by hand given the time sensitive nature of this matter.

I do not propose to outline the background of this matter,

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in great detail, as the facts are well-known to the stakeholders.

Briefly, the Applicants obtained CCAA protection in March/21. The Applicants have been working with its significant stakeholder in their capital structure to develop a going-concern restructuring plan (the "Plan").

The Applicants provide energy to approximately 950,000 customers in Canada and the U.S. and employ over 1,000 people.

Currently, the Applicants are hopeful that agreement on the Plan can be reached in the near future. A motion date has been set for March 3/22 at which time the Applicants will seek an order to file the Plan and obtain a meeting order. There is some

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possibility that the March 3/22 hearing date will be delayed somewhat if the Plan has not been prepared.

In this regard the Applicants are working with their DIP Lenders (who are also the Term Loan Lenders, and the assignee of a large secured supplier claim from BP), the Credit Facility Lenders and Shell who is also a significant, secured supplier.

The Monitor is assisting and is supportive of the attempt to file a Plan.

Against this backdrop, the U.S. Class Counsel bring their motion. Generally, they assert that either the Class Claimants should be unaffected by the CCAA proceeding or, alternatively, that the aforementioned expedited process be

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undertaken before three arbitrators from JAMS (US) to ensure that the Class Claimants can meaningfully participate in the restructuring process and vote at a meeting of creditors considering the Plan.

This would of necessity require a motion on certification, possible summary judgment, outstanding discovery (to date there has been no discovery in the Jordet Action) preparation of experts reports, procedural motions, PTC and trial.[1]

US Class Counsel link their schedule to the Creditors' Meeting where a vote would take place.

Although uncertified, the Class Claims have survived an attempt in the US Courts to have them dismissed outright, although the

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1. A potential appeal could obviously not be dealt with in the proposed timeframe.

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Class Claims have been narrowed in scope.

Also, US Class Counsel have filed two Proofs of Claim, which the Monitor has denied. Each is in the amount of approximately $3.6 billion USD and is an unsecured claim.

Insofar as the motion is concerned, the Applicants oppose the relief sought and are supported by the Monitor.

The DIP Lenders, the Agent/Credit Facility Lenders and Shell also oppose the motion.

I will now turn to the relief sought by U.S. Class Counsel. First, as noted, US Class Counsel seek an order that the Class Claimants should be unaffected by

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this CCAA Proceeding.

Generally, they submit that the Applicants cannot have it both ways. Namely, they cannot describe the Class Claims as being meritless / frivilous and at the same time resist a motion to allow them to proceed outside of the CCAA Proceeding.

I disagree. If the order was granted it would allow the unsecured Class Claimants to partially dictate the form of the Plan which has not yet been placed before this Court. This runs contrary to the caselaw that allows debtors to determine how they should deal with creditors in a proposed plan — subject to a creditor vote.

In this regard, U.S. Class Counsel have not produced any

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caselaw to support its position. To allow the relief sought would, in essence, elevate the Class Claims above other unliquidated, unsecured, contingent claims who would undoubtedly like to receive similar treatment.

Further, as a practical matter, the DIP Lenders who have been longstanding stakeholders, have clearly stated that they will not support a Plan that leaves the Class Claims unaffected. This is a reasonable position given the nature of the proposed Plan.

Second is the motion directing the speedy determination of the Class Claims utilizing JAMS (U.S.) within the general time frame set out above.

Here U.S. Class Counsel submit that the Applicants ignored them

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for approximately three weeks later in 2021 and US Class Counsel were later told in early Feb/22 that there was no time to conduct the proposed process given the proposed meeting date.

US Class Counsel also submit that there is equity in the Applicants based on their own filings (which is hotly contested by the Applicants).

Overall, they argue that the process must be fair and reasonable/constructive for all stakeholders; that their timeline is achievable and has been accomplished in other similar cases[2]; and that given the size of the Class Claims that they should be determined before the creditors' vote, particularly since they have been disallowed by the Monitor.

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2. Essar Steel Algoma (Re) 2016 ONSC 1802, leave refd 2016 ONCA 274; Covia Canada Partnership Corp v PWA Corp 1993 CanLII 9429 (ONSC) aff'd 1993 CanLII 815 (ONCA).

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I do not agree for a number of reasons:

i) I do not accept that the Applicants have "sandbagged" the US Class Counsel based on the record before me. Given the complexity of the restructuring and the timing of the U.S. 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 US Class Counsel is viable given the significant number of hearings – including

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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 U.S. Class Counsel is considered;

vi) last and overall, I am not of the view that the hotly contested Class Claims (both on

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liability and quantum) ought to adjudicated before other claims and prior to the next contemplated steps in the CCAA Proceeding - in this regard the cases relied upon (Essar and Covia) are distinguishable as per the submission of the DIP Lender at paras 34-35 of their factum.[2a]

The third issue concerns the data room / production of documents and related relief.

US Class Counsel generally submit that given the size and nature of their US Class Claims that it is appropriate that they have access to the data room and the specific documents referenced in para 3(c) of their Notice of Motion.

In this regard US Class Counsel rely on a number of other

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2a. See also the Applicants factum at para 69.

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CCAA cases in which significant stakeholders were given access to data rooms / documentation.[3]

US Class Counsel have entered into an NDA with the Applicants. With the assistance of the Monitor, certain documentation, including the Applicants' May 21 Business Plan and DIP Term Sheet amongst other documents, have been provided to US Class Counsel. Many requests have not been agreed to by the Applicants.

It bears noting that the secured lenders will not provide their consent to share information / documentation sought which concerns their confidential negotiations.

Further, in this regard the Monitor submits that it, and the Applicants, have been responsive to US Class

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3. As per para 84 of US Class Counsel Factum.

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Class Counsel's request for documentation and that the early documentation withheld relates to information concerning the negotiations. The Monitor, again, supports the Applicants' position.

At the motion, time did not allow for a granular review of the documents produced and sought.

I agree with the Applicants, however, that US Class Counsel should not be allowed to documentation concerning the ongoing negotiations. Further, based on the record I am generally satisfied that adequate production has been made.

If specific documents, not related to the negotiations, are still sought I can be spoken to.

With respect to the issue of production I also note that the cases relied

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upon by US Class Counsel are not analogous to the within CCAA Proceeding. For example, this CCAA Proceeding is far different than that in Sino-Forest or Nortel.[4]

For all of the reasons above the motion is dismissed. Generally, I am of the view that the CCAA Proceeding ought to proceed as per the provisions of the Act without the relief sought by US Class Counsel (save and except some limited production if deemed sensible by this Court).

In due course the Plan will be presented to the Court and the question of a meeting order will be dealt with. US Class Counsel will have the opportunity to make submissions. This is

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4. See para 84 of the Applicants' Factum.

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preferrable and fairer to all creditors than to have the Class Claims receive enhanced treatment insofar as an expedited hearing and production are concerned.

It also negates the possibility of derailing the ongoing, sensitive negotiations that are currently ongoing and creating a truncated adjudication of the Class Claims that may well be unachievable in the available time period.

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