Gilchrist

v.

Just Energy Group Inc.

A. Pelletier/V. De Marco/ M. Robb/ T. Planeta

P. Martin/S. Armstrong/ C. Casher

Nature of motion and overview

The plaintiff, Stephen Gilchrist (Gilchrist), brings this motion, on consent, for (i) leave pursuant to Part XXIII. 1 of the Ontario *Securities Act,* R.S.O., 1990, c. S.5 (*OSA*) and (ii) certification pursuant to s. 5 of the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6 (*CPA*). For the reasons that follow, I grant the relief sought against Just Energy (as part of the consent, the statement of claim is to be amended to discontinue the claim against the named directors and officers and the plaintiff is not entitled to move for certification at any time of any of the remaining proposed common issues, including negligent misrepresentation and the oppression remedy).

Leave under Part XXIII.1 of the OSA

There is no new evidence to suggest that the action is not brought in good faith. Gilchrist led evidence to establish an honest belief that he has an arguable claim and has the genuine intention and capacity to prosecute the claim if leave is granted.

There is a reasonable possibility of success at trial. Gilchrist has established a reasonable possibility of success by a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim against Just Energy. I rely on the following factors:

(i) Just Energy is a responsible issuer under s. 138.3(1)(a)
(ii) All of the “Impugned Documents” (except for the July 23, 2019 news release) are “core documents”. Consequently, it is not necessary for Gilchrist to establish “gross misconduct” under s. 138.9(1) of the OSA.
(iii) The defendants did not raise a “reasonable investigation” defence on this motion.
(iv) Just Energy’s “Restatement No. 1” (Restatement # 2 is not a basis on this consent motion) can be considered (for leave purposes) as evidence of an acknowledgment that it made material misrepresentations in relation to its audited financial statements that justifies leave to bring a statutory cause of action: *Pannicia v. MDC Partners Inc.,* 2018 ONSC 3470 at par. 75.

(v) Gilchrist filed expert evidence of Stuart H. Holden to support the claim of material misrepresentations of deficient financial controls which failed to identify material operational issues regarding customer enrolment, credit risk and non-payment issues which led to the alleged misrepresentations in the Impugned Documents (incorrect accounting and false assurances of properly designed and effective "Internal Controls over Financial Reporting" (ICFR) and the resulting loss to investors

(vi) Restatement #1 meets the "low bar" of a "reasonable possibility" that it is a public correction connected to the misrepresentation. The Restatement #1 revealed an overstatement of Just Energy's accounts receivable and an understatement of its discoveries for doubtful accounts

(vii) With no evidence from the defendants suggesting that the decrease in value upon disclosure of Restatement #1 was due to any factors other than the alleged "public correction", the significant market impact of the Restatement #1 (a 40% decrease in 24 hours and a 62% decrease in 10 days) supports a reasonable possibility of finding that the alleged misrepresentation was material.

For the above reason, I grant leave under Part XXIII.1 of the OSA to proceed with the present action, on consent.

<u>The proposed plaintiff class members</u>

For the action, the parties agreed, after arm's length negotiations, to amend the plaintiff class to those who acquired any Just Energy securities during the class period from May 16, 2018 to August 14, 2019 inclusive, and retained some or all of those securities until the close of trading on July 22, 2019 or August 14, 2019. The revised class period would exclude from the claim those whose claims fell into a broader category under the initial claim, which included an extended date for acquisition/retention of July 7, 2020. Instead, the parties agreed at par 21 of the draft order that any former putative class members not included in the more narrow definition for leave/certification "may be entitled to compensation under a proposed distribution protocol, to be approved by the court, as if they were part of the certified class, in the event that there is a settlement or judgment in the action".

While the revised class period in the Part XXIII.1 *OSA* action is narrower, I accept the parties' position that it fell within a "zone of reasonableness" for settlement of the leave/certification issues and that the court should not interfere with the proposed change. In particular:

(i) The US action, which will be dismissed and "folded into" the present action upon leave/certification being granted in the present action, does not include the later time period.
(ii) Given the limited funds available on insurance policies, costs incurred to pursue the later claims as part of the action would be prohibitive.
(iii) There would be no additional recovery given that any claims by the revised class would exceed any available funds.
(iv) The claims of the later group might be less meritorious (in the opinion of class counsel) and
(v) The negotiations which led to the reduction of the class size resulted in the benefit of a consent leave/certification motion, avoiding the risks of a contested hearing. The resulting settlement of leave/certification is a "package" (including the parties seeking to reach an agreement no later than 120 days after the close of pleadings or by such other date as agreed regarding the creation of a discovery plan), which the court should not alter, particularly as Class Counsel did provide for the ability of the court to address allocation issues to the later group on settlement or judgment.

Certification

The factors under s. 5 of the *CPA* are met, particularly on the lower threshold to be applied on a consent certification. I find:

(i) Section 5 (1)(a): By consenting to the leave under Part XXIII.1 of the *OSA*, the action discloses the Part XXIII.1 cause of action.
(ii) Section 5 (1)(b): The proposed "global class" of all shareholders who acquired Just Energy's securities during the class period from May 16, 2018 to August 14, 2019 inclusive and retained some or all of them at the close of trading on July 22, 2019 or August 14, 2019 is consistent with numerous global securities class actions certified by the Ontario courts, and with the "long-arm jurisdiction" under Part XXIII.1 of the *OSA*. There is a "real and substantial connection" to Ontario as Just Energy was a reporting issuer in Ontario, its shares traded on the TSX which is based in Ontario, and damages were sustained by class members in Ontario. The common issues are the same for all class members.

I also exercise my discretion under s. 12 of the *CPA* to approve the proposed lack of opt-out procedure. Given the earlier decisions of Justice Hainey and Koehnen, no other claim for damages against Just Energy for the alleged misrepresentations can be brought, so there is no basis on which a class member would benefit from an opt-out.

Section 5(1)(c): There are common issues under the Part XXIII.1 of the *OSA* claim which would avoid the duplication of fact-finding and legal analysis. The resolution of

those common issues is a substantial ingredient and necessary to the resolution of each class member's claim. Those issues include whether the impugned documents contained misrepresentations and whether the Restatement #1 was a public connection.

Section 5(1)(d): Due to the *CBCA*, plan of arrangement and *CCAA* bankruptcy proceedings, the class members cannot bring any other actions. Their sole recourse is through this class proceeding. In any event, the individual litigation of securities cases is difficult, time consuming and expensive.

Section 5(1)(e): Gilchrist is a member of the class and capable of representing and protecting its interests. He is willing and able to retain and instruct competent counsel. The litigation plan is workable. Gilchrist does not have any conflict with the interests of other class members.

Conclusion

For the above reasons, I grant the motion. Order to go as filed at Tab A6 of Caselines, as attached (without attached schedules which are to be incorporated by counsel).

Revised: December 1, 2023