

Court File No. CV-15-527493-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

KIA KORDESTANI Haidar Omarali

Plaintiff

- and -

**JUST ENERGY GROUP INC., JUST ENERGY CORP.
and JUST ENERGY ONTARIO L.P.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. The defendants, Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P., admit the allegations contained in the first two sentences of paragraph 2 and paragraphs 3 and 7 of the Amended Statement of Claim.

2. Except as otherwise expressly admitted in this Statement of Defence, the defendants deny all other allegations contained in the Amended Statement of Claim.

Overview

3. The plaintiff asserts on his own behalf and on behalf of other sales agents of the defendants that, notwithstanding his execution of an agreement (the "Independent Contractor Agreement") which expressly characterized his relationship with the defendants as being an independent contractor and not an employee, he nonetheless is entitled to claim certain benefits

and entitlements pursuant to the *Employment Standards Act, 2000* as if he had been an employee of the defendants.

4. The plaintiff does not deny his execution of the Independent Contractor Agreement, nor allege that he entered into the Independent Contractor Agreement under duress or other disability. Further, he does not allege that it was not his intention to be engaged by the defendants as an independent contractor operating his own business for his own benefit. Rather, the plaintiff alleges the nature of his engagement with the defendants created an employment relationship and that he ought to have been entitled to various benefits as a consequence.

5. Contrary to the plaintiff's allegations, the defendants have consistently acted in relation to the plaintiff and with all of the other sales agent class members in accordance with the provisions of the Independent Contractor Agreement which the plaintiff and all other class members agreed to execute prior to commencing any sales activity on behalf of the defendants. The defendants provided the plaintiff and all other class members the necessary independence, freedom and discretion to engage in their contracted-for sales activities as provided for in each of their agreements. Further, this independence, freedom and discretion was vital to many sales agents of the defendants whose success was related to the individual effort he or she chose to bring to the sales task, particularly as that related to their remuneration on a straight commission basis, and who welcomed and benefited from the flexibility afforded by the freedom from hourly or sales targets.

6. The defendants did not engage in any systemic or other practices which would have restricted the plaintiff or other sales agents in the manner or method of their sales activities. Further, any activities or practices of the defendants alleged by the plaintiff to have controlled

the ability of the plaintiff to conduct his sales activities in the manner of an independent contractor, as expressed in his Independent Contractor Agreement, were made available to the plaintiff on a voluntary basis and were directed to the development and betterment of the plaintiff as a sales agent.

7. In any event, even if any determination were made that the plaintiff or any other class member were to be classified as employees, which classification the defendants deny, the plaintiff and other class members are exempt from the subject provisions of the *Employment Standards Act, 2000* as they were at all times salespeople engaged in sales normally made away from an employer's place of business and were not otherwise engaged as route salespersons.

Just Energy

8. The defendant Just Energy Group Inc. is a public listed entity. It is a holding company and the defendant Just Energy Corp. is one of its subsidiaries. Just Energy Corp. is the contracting party with the plaintiff and all other class members. It is also the general partner of the defendant Just Energy Ontario L.P. Just Energy Ontario L.P. is the contracting party with customers who contract for natural gas, electricity and other energy products. The defendants are hereafter collectively referred to as "Just Energy".

9. Just Energy is a natural gas marketer and electricity retailer to residential and commercial customers across North America. It offers a choice of products to its customers such as fixed pricing and variable pricing under long term agreements. These agreements enable customers to offset their exposure to volatile changes in the price of these commodities.

10. From the commencement of its business in Ontario in 1997, Just Energy has utilized independent contractors ("Independent Contractors") to solicit contracts for natural gas

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and electricity. The use of Independent Contractors has been a universal practice in not only the defendants' industry but in many other industries engaged in direct, door-to-door sales solicitations. These Independent Contractors engage in marketing activities, including door-to-door solicitations, with the purpose of persuading customers to execute contracts for their natural gas and electricity needs. Customers of Just Energy include both commercial and residential users, and both new and existing customers whose contracts may be up for renewal. Based upon the products contracted to be sold and the duration of those contracts, the Independent Contractors receive various commission payments in relation to the value of those contracts.

11. In addition to the promotion of its natural gas and electricity contracts, Just Energy has a complimentary array of energy related products. These products include "Smart Thermostats" and green energy programs.

The Plaintiff

12. The Plaintiff executed an Independent Contractor Agreement on July 23, 2012. He engaged in sales and marketing activities of Just Energy's products thereafter until ceasing those activities in or about December 2013. He was remunerated consistent with the provisions of his Independent Contractor Agreement.

Overview of the Independent Contractor Relationship

13. The foundation for the growth, development and success of Just Energy's business has been the entrepreneurial efforts of its outside door-to-door sales agents. Just Energy's business model has been to engage, motivate and support a full commission-based sales force of Independent Contractors.

14. No one who participates in the sale of Just Energy's products and services, including those who have advanced to more senior sales functions beyond door-to-door sales, are engaged in an employment relationship with Just Energy. Rather, anyone engaged in a sales role on behalf of Just Energy does so on the basis of a written agreement which confirms the intention of both parties to the agreement that the relationship is that of an Independent Contractor at law.

15. In establishing this Independent Contractor model for the conduct of Just Energy's sales functions, Just Energy did so for the mutual benefit of Just Energy and those individuals wishing to pursue the sales opportunity provided by Just Energy. That opportunity included the ability to earn substantial commissions based upon the successful efforts of any Independent Contractor, with the knowledge and understanding that each individual Independent Contractor was free to choose when, how and by what manner he or she might choose to direct their sales efforts.

16. In developing its Independent Contractor model for conducting its sales function, Just Energy was aware that not every person who might agree to become an Independent Contractor would succeed in the role. For many, this was their first experience in a sales environment and sales might not be to their liking. Others would commence selling but shortly move on to other opportunities. Still others would leave the sales role to pursue training or education in other fields. Nonetheless, any engagement with Just Energy was plain — both parties intended to and contracted for the relationship to be one of an Independent Contractor.

Formation of the Independent Contractor Relationship

17. Throughout the alleged class period, the complement of Just Energy's Independent Contractor sales force was quite variable. Accordingly, Just Energy would regularly be looking to add to its available complement of Independent Contractors. To do so, it would advertise in both local and online media and would also directly reach out to prospective sales people who might themselves have posted online or through other media that they were looking for sales opportunities.

18. Once contact occurred between the prospective Independent Contractor and Just Energy, an interview would be arranged at the Just Energy regional office proximate to the prospect. From the initial contact, through the interview process, and at the time that the prospect might agree to execute Just Energy's Independent Contractor Agreement, Just Energy insisted and made plain with any prospect that Just Energy would not engage a prospect in an employment relationship and that only those prospects intending to become an Independent Contractor would be offered the opportunity to execute the Independent Contractor Agreement.

19. In particular, and consistent with Just Energy's business model to only contract on an Independent Contractor basis, all prospects knew that:

- they would only be engaged if they agreed to the Independent Contractor relationship and agreed to execute the Independent Contractor Agreement;
- as an Independent Contractor, they would be remunerated solely by way of a commission structure in relation to any contracts they could successfully solicit;

- as an Independent Contractor, they would not be entitled to any benefits that one would associate with an employment relationship such as vacation pay, overtime, sick leave, medical and dental benefits, and the like;
- as an Independent Contractor, they would not be obliged to maintain and provide to Just Energy call logs, sales logs or the like, or to meet minimum quotas in relation to calls, sales and similar activities; and
- Just Energy offered support, sales training and development programs and initiatives but that, as an Independent Contractor, they could choose to participate or not in any sales training, team building, road trips or other activities that the more senior Independent Contractors in their regional office might organize from time to time.

20. Any obligation imposed upon an Independent Contractor that might proscribe their sales conduct was the result of adherence to relevant legal and regulatory requirements. Such mandated requirements included testing with respect to Ontario Energy Board Standards, the obligation to present appropriate identification during door-to-door solicitations, restrictions on when door-to-door sales could be solicited, the process by which contracts could be executed and/or cancelled and other similar regulatory standards to be adhered to as part of the sales function.

The Independent Contractor Agreement

21. Anyone wishing to provide door-to-door solicitation services to Just Energy executed an Independent Contractor Agreement. That agreement provides, in part, as follows:

This is an agreement (the "Agreement") between Just Energy Corp. ("JEC") and you, an independent contractor (the "Contractor").

WHEREAS, JEC has been retained by Just Energy Ontario L.P. ("JEOLP") to assist JEOLP in obtaining natural gas, electricity and green energy contracts ("Contracts") from consumers located in Ontario.

JEC has developed a door to door solicitation program designed to obtain Contracts for the benefit of JEOLP. The purpose of this Agreement is to confirm the terms and conditions under which the Contractor, acting as an independent contractor, will provide door to door solicitation services to JEC, to assist JEC in obtaining Contracts for the benefit of JEOLP.

1. **Marketing Activity.** The Contractor agrees to market Contracts for the benefit of JEOLP as an independent contractor of JEC. The Contractor understands and agrees that the terms and conditions of the Contracts may not be amended by the Contractor, and the Contractor shall have no authority to enter into any agreements of any kind on behalf of JEC, JEOLP, or any of the affiliates (collectively, "JUST ENERGY"), except as specifically provided in this Agreement. In no event shall the Contractor represent that he or she is an employee of, or connected with, JEC or JEOLP in any way, other than as provided herein.

...

5. **Independent Status:** The Contractor is, and will always be considered, an independent contractor under this Agreement. The Contractor understands and agrees that the Contractor shall be responsible for and neither JEC nor JEOLP will reimburse the Contractor for any transportation, accommodation, food or any other expenses incurred by the Contractor in the performance of the Contractor's services hereunder. The Contractor has control, independent of JUST ENERGY, over the time the Contractor chooses to solicit Contracts, the areas in which the Contractor chooses to solicit Contracts, and the manner in which Contracts are to be solicited, so long as such manner is in accordance with Applicable Law, the Codes and JEC's reasonable policies regarding treatment of potential customers (as described in any JUST ENERGY manual, code of conduct or other document provided to the Contractor by JUST ENERGY). JUST ENERGY does not employ Contractors and there is no employer/employee relationship between JUST ENERGY and the Contractor.

...

The Contractor is not, and shall make no claim that the Contractor is, an employee of JEC. The Contractor shall be responsible (as applicable) for the payment of, and JEC shall not deduct, withhold or pay, income tax, employment insurance premiums, government pension plan premiums, employer health tax premiums or any other similar amounts with respect to the Contract. The Contractor is also

responsible for the payment of workers compensation premiums or contributions and is not entitled to workers compensation. The Contractor is solely responsible for making all of these payments, if required.

THIS INDEPENDENT CONTRACTOR RELATIONSHIP DOES NOT QUALIFY THE CONTRACTOR FOR MINIMUM WAGE, WORKERS COMPENSATION OR OTHER EMPLOYMENT BENEFITS. CONTRACTORS WHO MUST COLLECT G.S.T., MUST HAVE THEIR OWN G.S.T. NUMBER.

...

7. Not Exclusive: The Contractor and JEC agree that the Contractor's services are not, and are not intended to be, exclusive to JEC. Notwithstanding the foregoing, the Contractor agrees not to provide services to other business entities that compete directly with the business carried on by JUST ENERGY during the term of this Agreement and for a period of three (3) weeks following the termination of this Agreement.

...

12. Release and Indemnity: The Contractor agrees to assume the full and complete risk of any injuries, damage or loss of any kind whatsoever, regardless of type or severity (collectively, "Loss") which the Contractor may sustain arising out of, or in connection with, or in any way associated with, the Contractor soliciting Contracts. The Contractor hereby fully releases and discharges JEC, JEOLP and its affiliates and their respective officers, directors, agents, servants and employees from any and all claims for any Loss sustained by the Contractor or related in any way to the Contractor soliciting Contracts. The Contractor further agrees to indemnify and hold JEC, JEOLP and its affiliates and its respective officers, directors, agents, servants and employees harmless from any claims, lawsuits, allegations, or liability, including costs or court and attorneys' fees, arising out of the Contractor's failure to comply with any Applicable Law or arising out of the Contractors' activities hereunder.

This Agreement contains the entire understanding of the parties and merges into it all prior oral and written communications between the parties with respect to the subject matter hereof.

BE SURE THAT YOU HAVE READ AND UNDERSTOOD THIS AGREEMENT BEFORE SIGNING.

Training and Sales Activities

22. Just Energy developed programs, including with respect to door-to-door solicitations, designed to secure customer contracts and the sale of ancillary products. Initial training of Independent Contractors related to the Just Energy programs, the Codes of Conduct proscribed by both the Ontario Energy Board and Just Energy, and an introduction to sales techniques in a door-to-door direct sales environment. Independent Contractors could choose to work on their own or to participate as a member of a crew at their regional office. An Independent Contractor could also choose to participate in further training and motivational exercises which were offered to all Independent Contractors.

23. A Just Energy regional office may have contained a number of interchangeable crews organized by more senior Independent Contractors such as crew coordinators or assistant crew coordinators. Sales crews might go out together into the field to solicit contracts. It has been Just Energy's experience that collaboration among Independent Contractors who work as a team can benefit the crew members who are encouraged to motivate, share experiences and push each other to be successful. This has particularly been demonstrated in respect of door-to-door residential sales efforts. It is a less common practice for Independent Contractors of Just Energy in the solicitation of commercial customers or with respect to the solicitation of existing customers with contracts coming up for renewal.

24. The head of a Just Energy regional office, the regional distributor, is an Independent Contractor as well. A regional distributor, and their assistant regional managers, crew coordinators and assistant crew coordinators, derive their compensation, in whole or in part, as a percentage of the sales of their offices. As such, they organize and manage the sales effort of their offices. That frequently included the management and finance of sales endeavours such

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as road trips and bonus payments. A road trip could involve a group of Independent Contractors travelling to a remote town, city or region in Ontario that may not have recently been canvassed by any Independent Contractors. The expenses of these trips were underwritten by the regional distributor or their crews. An Independent Contractor might choose to go on any or none of the trips as they might determine.

25. The certified class includes Independent Contractors who may have had more senior sales roles as assistant crew coordinators, crew coordinators or assistant regional distributors. In those roles, these Independent Contractors would advise other Independent Contractors, should inquiries be made, respecting the status of Just Energy's sales agents as Independent Contractors and, in particular, any aspects of their remuneration as Independent Contractors.

26. Although there can be benefits to working as an Independent Contractor in a team environment, all Just Energy's Independent Contractors were unfettered with regard to when, how and where they might choose to sell Just Energy's products and services. As such, Independent Contractors did not keep time records, log sheets, call reports or other documents relating to their activities. Just Energy cannot determine when the plaintiff or other class members engaged in any sales activity or for how long in any time period they may have engaged in door-to-door or other sales.

27. In addition, Independent Contractors were not prohibited from engaging in other business activities with the exception of work on behalf of a Just Energy competitor. As a consequence, that has included Independent Contractors engaging in sales of other products while doing sales on behalf of Just Energy. Independent Contractors were able to, and did,

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undertake their sales function through a corporate vehicle and they frequently incurred expenses, particularly related to travel, for which they were personally responsible and which they would expense for tax purposes.

28. The Independent Contractors providing services to Just Energy consisted of a number of subgroups that performed their services in fundamentally different ways. Specifically, the sales force included those who sold natural gas and electricity contracts to new residential customers; those who sold renewal natural gas and electricity contracts to current residential customers; those who sold natural gas and electricity contracts to new commercial entities; those who sold natural gas and electricity renewal contracts to existing commercial customers; and, those who for part of the class period sold water heaters. Only the subgroup selling to new residential customers might elect to work in a team environment, whereas the other subgroups generally worked alone and with their sales efforts directed to selected or targeted prospects or existing customers. Further, any Independent Contractor, subject to availability, could choose which category or categories he or she might choose to pursue at any particular time.

No Employment Relationship

29. Just Energy denies that any employment relationship is created between Just Energy and its Independent Contractors. Any training and direction provided by Just Energy to its Independent Contractors is either mandated by the nature of the regulated industry in which it operates or is accepted voluntarily by the Independent Contractors who appreciate the benefits that might be derived by accessing various aspects of Just Energy's sales program.

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30. Just Energy denies that its Independent Contractors are told where they can solicit customer contracts or that permission is required to service particular locations of an Independent Contractor's choosing.

31. As a consequence of their status at law as independent contractors, the *Employment Standards Act, 2000* provisions are not implied terms of any of the Independent Contractor's agreements with Just Energy. As such, compensation with respect to minimum wage, overtime pay, vacation pay or public holiday and premium pay does not form any part of the contracts of Just Energy's Independent Contractors.

32. Further, even if this Court should find that the plaintiff and other class members should have been classified as employees, which the defendants deny, the *Employment Standards Act, 2000* expressly exempts the plaintiff and all other class members from any of the benefits conferred by that legislation. Specifically, the *Employment Standards Act, 2000* does not apply to a salesperson who receives remuneration as commissions on sales made away from an employer's place of business. The defendants plead and rely on paragraph 2(1)(h) of *Exemptions, Special Rules and Establishment of Minimum Wage, O.Reg. 285/01* in that regard. The defendants further deny that the plaintiff or any other class member were "route salespersons" as referenced in that exemption to the *Employment Standards Act, 2000*.

No Duty of Good Faith

33. Just Energy denies any contractual duties, including the alleged duty of good faith, were owed to the Independent Contractors beyond any obligations owed by Just Energy in relation to the express terms of any Independent Contractor Agreement. In particular, Just

Energy denies any obligation to advise any Independent Contractor with respect to employee status as no such status existed.

No Duty of Care

34. Just Energy denies that any special relationship existed between it and any Independent Contractor and, as such, denies any duty of care as alleged in respect of how Just Energy characterized or classified its Independent Contractors. To the contrary, all Independent Contractors of Just Energy knowingly engaged with Just Energy in accordance with the express terms of the Independent Contractor Agreement. In doing so, each Independent Contractor agreed and intended that their relationship with Just Energy would not be one of employment.

No Misrepresentation of Independent Contractor Classification

35. From its inception, Just Energy has structured its relationship with its door-to-door sales force to ensure their classification as Independent Contractors at law. Any prospective sales person who was unwilling to contract with Just Energy on that basis was not engaged by Just Energy in a contractual relationship. Just Energy denies any misrepresentation in that regard. Just Energy created a performance based sales model that left no doubt with a prospective sales person as to the nature of any ongoing relationship with Just Energy.

36. Just Energy's sales model has proven to be successful not only for Just Energy but for those Independent Contractors with abilities in a direct sales environment. Just Energy's sales model was premised on the understanding that not all Independent Contractors who would be provided with the opportunity to solicit contracts on behalf of Just Energy would necessarily be successful and that many would determine for a myriad of reasons that direct sales would not be a long term endeavour. As such, the Independent Contractor relationship provided for the

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ability of any Independent Contractor of Just Energy to devote as much time or not as they saw fit and to terminate their relationship with Just Energy at any time.

37. Any complaint by an Independent Contractor with respect to the nature of their relationship with Just Energy must necessarily relate to a complaint that they were not provided with the requisite independence that they contracted for or provided with similar indicia of an independent contractor relationship. Such a complaint is necessarily individualistic and would require an examination of the surrounding circumstances and factual matrix of such Independent Contractor with respect to the formation of their contract with Just Energy, the examination of any alleged representations to them in respect of the Independent Contractor position, the negation by them of their express intent in entering into the Independent Contractor Agreement, and any post-contractual conduct relevant to determining their allegation of any breach of the express terms of the Independent Contractor Agreement.

No Systemic Negligence

38. Just Energy denies any duty was owed as alleged with respect to the characterization of its relationship with its Independent Contractors. If any such duty was owed, which is expressly denied, Just Energy denies that it systemically breached that duty.

No Unjust Enrichment

39. Just Energy denies any allegations that it has been unjustly enriched or that the plaintiff or other class members have been correspondingly deprived. In any event, the Independent Contractor Agreement is a juristic reason for any alleged unjust enrichment. Further, the Independent Contractors have had the benefit of those agreements and cannot therefore have been deprived. As a result, there is no basis for the claim for unjust enrichment.

No Damages

40. Just Energy denies the putative class members have suffered any damages as a consequence of its alleged actions. If any such damages have been suffered, such damages are excessive and remote and the class members have wholly failed to mitigate their damages. It further denies any alleged entitlement to punitive damages or to any other relief as may be alleged in the Amended Statement of Claim. Any statutory payments made by the Independent Contractors in respect of Canada Pension Plan or Employment Insurance contributions as alleged were consistent with the relationship between Just Energy and its Independent Contractors.

Claims Barred

41. The claims of any class member engaged as an Independent Contractor prior to May 5, 2013 are statute-barred, either in whole or in part. The defendants plead and rely upon the *Limitations Act, 2002*, S.O. 2002, c. 24.

Dismissal With Costs

42. The defendants ask that this action be dismissed with costs.

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February 28, 2017

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STATEMENT OF DEFENCE

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