

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**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*

**NOTICE OF MOTION FOR LEAVE TO APPEAL  
(Certification Decision of Belobaba J. dated July 27, 2016)**

The defendants will make a motion to a Divisional Court Judge to be heard in writing 36 days after service of the moving parties' motion record, factum and transcripts, if any, or on the filing of the moving parties' reply factum, if any, whichever is earlier, at 393 University Avenue, Toronto, Ontario, M5G 1E6, on a date to be fixed by the Registrar for leave to appeal from the Order of Belobaba J. dated July 27, 2016.

**PROPOSED METHOD OF HEARING:** The motion is to be heard in writing.

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**THE MOTION IS FOR:**

- (a) An order granting leave to appeal the order of Justice Belobaba, made on July 27, 2016 granting the plaintiff's motion to certify this action as a class proceeding (the "Order");
- (b) costs of the motion; and
- (c) such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

- (a) The motion judge erred in his application of the decisions of the Court of Appeal in *McCracken v. Canadian National Railway*, 2012 ONCA 445 and *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677, the leading cases in respect of allegations of "misclassification" in the class action context.
- (b) The motion judge erred in his failure to apply the decision of the Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 which held that "success for one member must not result in failure for another" in circumstances where the purported common issue of "employee or independent contractor" poses a risk of failure to class members who chose the tax and other benefits of self-employment and who will be detrimentally affected by a finding contrary to their interests.
- (c) The motion judge erred in his failure to find it was plain and obvious the causes of action pled by the plaintiff could not succeed, as the facts pleaded were not

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capable of supporting a conclusion that the plaintiff should have been classified as an "employee" of the defendants.

- (d) The motion judge erred in failing to find that the answer to the principal common issue - "employee or independent contractor" - could not be extrapolated to all class members as the answer to such issue is dependent upon individual findings of fact to be made in respect of each class member.
- (e) The motion judge erred in his acceptance of the proposed class definition which includes those "sales agents" who have managerial roles including "assistant crew coordinators", "crew coordinators", "assistant regional distributors" and "regional distributors who each contract with the defendants as independent contractors and who manage other sales agents and receive commission overrides on the contracts secured by those other sales agents.
- (f) The motion judge erred in failing to find that the defendants did not exercise any "control" over class members and, in failing to so find, ignored uncontroverted evidence in support thereof.
- (g) The motion judge erred in failing to take proper account of the consistent determinations of the Workers Safety and Insurance Board, the Employment Standards Office and the Canada Revenue Agency that sales agents of the defendants are properly classified as "independent contractors". In the alternative, there is good reason to doubt the correctness of the motion judge's decision in light of those determinations.

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- (h) The motion judge erred in his failure to apply the principles from *740944 Alberta Ltd. v. Canada (Minister of Revenue)*, [1999] T.C.J. No. 678 (T.C.C.) which held that where no contractual right to impose restrictions exists no element of “control” can be present. Nothing in the Independent Contractor agreement executed by all class members reserved a right to the defendants to discipline or terminate sales agents in the event of non-compliance with respect to any issue as to how, where or when sales agents were to engage in sales activities. Further, the motion judge ignored or failed to consider the uncontested evidence of the defendants that demonstrated their consistent adherence to the provisions of the Independent Contractor agreement entered into by every class member.
- (i) The motion judge erred in his failure to consider the relevance of intention with respect to the interpretation of the Independent Contractor agreement on a class member by class member basis.
- (j) The motion judge erred in his failure to apply the principles from the decisions of *Kognitive Marketing Inc. v. Director of Employment Standards*, 2015 CanLII 61657 (O.L.R.B.) and *VanGrootel v. Advance Beauty Supply Limited*, 2106 CanLII 17209 (O.L.R.B.) and his decision conflicts with those cases in failing to properly interpret the “route salesperson” exception to the *Employment Standards Act* exemption for outside salespersons.
- (k) The motion judge made palpable and overriding errors of fact, including: (i) his failure to find that the defendants do not supervise sales agents at all but rather that sales agents are assigned to regional offices managed by other independent

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contractors; (ii) his erroneous finding that the defendants sanction or reprimand sales agents in any manner other than in relation to matters specifically governed by government regulation and not in relation to any sales performance or lack thereof; (iii) his erroneous finding that the Independent Contractor agreement provides that sales agents must follow “all instructions and orders” of the defendants when this provision relates only to compliance with “Applicable Law and Code of Behaviour” and not to any sales behaviour; (iv) his erroneous finding that there was evidence of only one other sales agent selling other, non-Just Energy, products; and, (v) his erroneous characterization of evidence that relates wholly to Just Energy’s regulatory compliance obligations as evidence of Just Energy’s independent actions to control its sales agents.

- (l) There are conflicting decisions by another judge or court in Ontario or elsewhere on the matters involved in the proposed appeal and it is desirable that leave to appeal be granted;
- (m) There is good reason to doubt the correctness of the Order, and the proposed appeal involves matters of such importance that leave to appeal should be granted;
- (n) The *Class Proceedings Act*, 1992, S.O. 1992, c.6 (the “CPA”), ss. 5 and 30;
- (o) The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “Rules”), Rules 61.03.1 and 62.02;
- (p) The *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”), s. 19(1)(b); and
- (q) Such further and other grounds as the lawyers may advise.

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**THE BASIS OF THE SUPERIOR COURT OF JUSTICE'S JURISDICTION IS:**

- (a) Section 19(1)(b) of the *CJA*, which provides that an appeal lies to the Divisional Court from an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court; and
- (b) Section 30(2) of the *CPA* which provides that an appeal lies to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of Superior Court of Justice as provided in the rules of court.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) The reasons for decisions of Justice Belobaba dated July 27, 2016;
- (b) The order of Justice Belobaba (once taken out by the parties);
- (c) The motion materials filed in support of the plaintiff's certification motion;
- (d) The responding materials filed by the defendants on the certification motion; and
- (e) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

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August 11, 2016

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**JUST ENERGY GROUP INC. et al.**

**Defendants**

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**Plaintiff**

**Haidar Omaral**

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SUPERIOR COURT OF JUSTICE**

Proceeding commenced at  
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