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., 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.

APPLICANTS

FACTUM OF THE APPLICANTS
(Approval and Vesting Order)

October 20, 2022

OSLER, HOSKIN & HARCOURT LLP
100 King Street West, Suite 6200
Toronto ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Tel: 416.862.5997
Email: mdelellis@osler.com

Michael De Lellis (LSO# 48038U)
Tel: 416.862.5997
Email: mdelellis@osler.com

Jeremy Dacks (LSO# 41851R)
Tel: 416.862.4923
Email: jdacks@osler.com

Lawyers for the Applicants

PART I - NATURE OF THIS MOTION

1. On March 9, 2021 (the "**Filing Date**"), the Applicants obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") pursuant to an initial order, as subsequently amended (the "**Initial Order**") of the Ontario Superior Court of Justice (the "**CCAA Court**"). The Initial Order extended the benefits of its protections and authorizations to the partnerships listed on Schedule A to that order (collectively, the "**Just Energy Entities**"). On April 2, 2021, the U.S. Bankruptcy Court granted the Final Recognition Order under Chapter 15 of the United States *Bankruptcy Code*.

2. This factum is filed in support of the Applicants' motion for approval of a going-concern sale transaction (the "**Transaction**") for the business of the Just Energy Entities to be implemented through the proposed draft reverse vesting order (the "**Reverse Vesting Order**") and related relief. The Transaction is the only viable transaction that has emerged in the 19 months since the CCAA filing and the only option for a going-concern exit from these proceedings. It is the product of months of negotiations among the Just Energy Entities' key stakeholders, as well as a robust court-approved sale and investment solicitation process ("**SISP**").

3. There is clear evidence that a reverse vesting order (or "**RVO**") structure is necessary and appropriate to preserve the going-concern value of the Just Energy Entities' business. The granting of the Reverse Vesting Order is a condition of the Transaction, which is amply justified principally by the numerous licences and authorizations (currently totaling 89 in Canada and the US) that are required for the Just Energy Entities to carry out their businesses, as well as by the need to preserve certain key contracts. All of the critical licences or authorizations are not assignable or transferable at all or can only be transferred with regulator approval. The delay, uncertainty and risk if the

Purchaser were required to obtain regulatory approval for their transfer under a traditional vesting order or for the Purchaser to obtain replacement licenses would destroy value and jeopardize the entire going-concern restructuring.

4. The Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. It provides recovery for approximately $1 billion of secured claims. That the Purchase Price provides no recovery for General Unsecured Creditors is a function of the market, not the RVO structure. The Transaction should therefore be approved and the Reverse Vesting Order should be granted, together with the related relief, including the releases, on the basis that the Transaction represents the best possible outcome for all stakeholders.

PART II - FACTS

5. The facts supporting this motion are set out in the Affidavit of Michael Carter[1] and the Affidavit of Mark Caiger.[2]

A. HISTORY OF THE CCAA PROCEEDINGS

6. The Applicants' filing for protection under the CCAA was precipitated by the acute and unforeseen liquidity challenge caused by the unprecedented winter storm in February 2021 in Texas, together with the Texas regulator's response to this storm.[3] To assist in addressing this liquidity challenge, the CCAA Court approved on the Filing Date a debtor-in-possession facility

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1 Affidavit of Michael Carter, sworn October 17, 2022 [Carter Affidavit]. Capitalized terms not otherwise defined have the meaning given to them in the Carter Affidavit.

2 Affidavit of Mark Caiger, sworn October 17, 2022 [Caiger Affidavit].

3 Carter Affidavit, para. 4.

(the "**DIP Facility**") in the amount of US$125 million provided by the DIP Lenders. On September 26, 2022, the Just Energy Entities repaid US$70 million to the DIP Lenders.[4]

7. On September 15, 2021, the CCAA Court granted the Claims Procedure Order (the "**Claims Procedure Order**") establishing a process to determine the nature, quantum and validity of Claims against the Just Energy Entities and their respective Directors and Officers. The Claims Bar Date was November 1, 2021, following which the Just Energy Entities worked together with the Monitor to address the Claims received, until the claims process (with certain limited exceptions)[5] was suspended by the CCAA Court on August 18, 2022.[6]

8. On May 12, 2022, the Just Energy Entities brought a motion (the "**Meetings Order Motion**") seeking (*inter alia*) to authorize the Just Energy Entities to call and hold Creditors' meetings to vote on their proposed Plan of Compromise and Arrangement.[7] The Meetings Order Motion was opposed by certain unsecured litigation claimants, including U.S. Counsel to the proposed representative plaintiffs in two U.S. uncertified class actions (the "**Putative Class Actions**")[8] and the representative plaintiff in an Ontario class action (the "**Omarali Class Action**").[9]

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4 Carter Affidavit, para. 5. See also paras. 111-112 explaining the source of this repayment.

5 See paras. 113-116 of the Carter Affidavit regarding the resolution process with respect to the secured claim of NextEra Energy Marketing LLC.

6 Carter Affidavit, para. 8.

7 Carter Affidavit, para. 11.

8 Carter Affidavit, para. 9. The Putative Class Actions include: *Trevor Jordet v. Just Energy Solutions, Inc.*, Case No. 2:18-cv-01496-MMB (PC-11175-1) and *Fira Donin and Inna Golovan v. Just Energy Group Inc*. et al., Case No. 1:17-cv-05787-WFK-SJB (PC-11177-1).

9 Carter Affidavit, para. 12, referring to *Haidar Omarali v. Just Energy Group Inc. et al*, Ontario Superior Court of Justice Court File No. CV-15-527493-00CP. The Meetings Order Motion was also opposed by approximately

9. On June 10, 2022, the CCAA Court released its endorsement granting the majority of the relief requested by the Applicants but denying their request that the claims of the Contingent Litigation Claimants be voted at a value of $1 each.[10] Following the First Endorsement, the Plan Sponsor/DIP Lenders advised the Court and the stakeholders that their support for the Plan was being withdrawn and that the Plan was no longer feasible.[11] Subsequent discussions among key stakeholders to find a solution that would allow the Plan to move forward did not bear fruit.[12]

10. Accordingly, the Just Energy Entities, Plan Sponsor, Supporting Secured CF Lenders and Shell terminated the Plan Support Agreement and agreed to support a going concern solution for the Just Energy Entities implemented through the SISP. These parties entered into a new SISP Support Agreement on August 4, 2022 and negotiated a stalking-horse transaction, which were approved by this Court on August 18, 2022, with certain related relief.[13] The SISP Approval Motion was once again opposed by the Contingent Litigation Claimants. With the exception of a two-week extension to the applicable milestones, these objections were wholly unsuccessful.[14]

11. The SISP was conducted over a period of ten weeks, in accordance with the SISP Approval Order, as described further below. No Qualified Bids were received by the Qualified Bid Deadline

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250 Mass Tort Claimants (together with the Putative Class Claimants and the Omarali Class Action claimants, the "**Contingent Litigation Claimants**") and Pariveda Solutions Inc.

[10] Carter Affidavit, para. 13. On June 23, 2022, the Court issued its second endorsement addressing a further issue involving differential treatment of unsecured creditors: Carter Affidavit, para. 15.

[11] Carter Affidavit, para. 14.

[12] Carter Affidavit, para. 17.

[13] Carter Affidavit, paras. 18 and 20.

[14] Carter Affidavit, para. 20. On September 19, 2022, the U.S. Bankruptcy Court granted an order recognizing and enforcing the SISP Approval Order and the Claims Procedure Order in the United States: Carter Affidavit, para. 22 and Exhibit B.

and the Transaction was declared to be the Successful Bid.[15] The Applicants now seek this Court's approval of the Transaction, together with certain other relief.

PART III - ISSUES AND THE LAW

12. The issue to be determined on this motion is whether the Transaction and related relief should be approved and the Reverse Vesting Order granted, together with the releases.

A. THE REVERSE VESTING ORDER SHOULD BE GRANTED

(i) An RVO Structure is Appropriate

13. An RVO generally involves a series of steps whereby: (a) the purchaser becomes the sole shareholder of the debtor company; (b) the debtor company retains its assets, including key contracts and permits; and (c) the liabilities not assumed by the Purchaser are vested out and transferred, together with any excluded assets, to a newly incorporated entity.[16] The assets and liabilities that are vested in the separate entity or entities (referred to in the Reverse Vesting Order as "**Residual Cos**") may then be addressed through a bankruptcy or similar process.

14. An RVO can be contrasted with a traditional vesting order in which the assets of the debtor company that a purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those expressly assumed by the purchaser, as contemplated by section 36(4) of the CCAA.[17] The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

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[15] Carter Affidavit, para. 49.

[16] *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828 [*Blackrock Metals*] at para. 85, leave to appeal to QCCA denied, August 5, 2022.

[17] *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36), s. 36(4) ("CCAA").

15. RVOs have been described as a relatively new structure to achieve the remedial objectives of the CCAA.[18] CCAA Courts have expressed the view that they should not be the "norm" and that the CCAA Court should consider carefully whether this approach is warranted.[19] However, RVOs have been recognized on a number of occasions as an appropriate way for a debtor to sell its business as a going-concern where the circumstances justify such a structure.[20]

16. As submitted further below, there can be no question that compelling circumstances justifying this relief exist here. Referring to the factors identified in *Harte Gold* as guideposts for a Court in considering a proposed RVO,[21] the Reverse Vesting Order is necessary in this case to give effect to the going-concern restructuring of the Just Energy Entities' businesses. There is no other viable alternative that would enable the Just Energy Entities to exit these proceedings as a going-concern, let alone an alternative that would produce a better economic result generally, or for any particular stakeholder, as has been amply tested in the market.

17. The jurisdiction to approve a transaction that is to be implemented through an RVO is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit. Many Courts have also referred to jurisdiction under section 36 of the CCAA, which contemplates court approval for the sale of the debtor company's assets out of the ordinary course

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18 *Blackrock Metals*, above at para. 85.

19 *Blackrock Metals*, above at para. 99, citing *Harte Gold (Re),* 2022 ONSC 653 [38.

20 *Blackrock Metals*, above at paras. 86 and 96. See *Harte Gold,* 38. See *Arrangement relatif à Nemaska Lithium inc.,* 2020 QCCA 1488 (CanLII) [*Nemaska*], leave to appeal to SCC denied; *Quest University (Re)*, 2022 BCSC 1883 [*Quest University*], leave to appeal to BCCA refused, to name a few examples.

21 *Harte Gold*, above, para. 38.

of business. In any event, CCAA Courts agree that the factors set out in section 36(3) of the CCAA should guide the Court in evaluating an RVO.[22]

18. In approving an RVO, the Quebec Superior Court held that sections 11 and 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA, as well as the wide discretionary power vested in the supervising judge.[23] Similarly, the Court in *Quest University* stated that such relief must be appropriate in the circumstances and all stakeholders must be treated as fairly and reasonably as the circumstances permit.[24]

19. RVOs are generally appropriate in at least three types of circumstances: (a) where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser; (b) where the debtor is party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.[25]

20. The Reverse Vesting Order is demonstrably necessary in this case to preserve the going-concern value of the Just Energy Entities' business. The Just Energy Entities' business derives its

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[22] *Blackrock Metals*, above at para. 87. See also *Quest University,* above at para. 27. See also *Harte Gold,* above at paras. 36-37 in which Penny J. expressed the view that the jurisdiction is more properly anchored in section 11 but the criteria in section 36(3) are relevant factors for the Court to consider.

[23] *Blackrock Metals*, above at para. 88, citing the lower court decision in *Nemaska*: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, which is only available in French.

[24] *Quest University,* above at para. 157, citing *Century Services Ltd. v. Canada (Attorney General),* 2010 SCC 60 at para 70.

[25] *Blackrock Metals*, above at para. 114-116; *Harte Gold*, above at para. 71; *Quest University*, above at para. 136, referring to the RVO granted in the *Re Comark Holdings Inc et al,* [2020] (Ont SCJ [Commercial List]) proceeding to preserve tax attributes, and para. 142, referring to the RVO granted in *JMB Crushing Systems Inc. (Re)* 2020 ABQB 763 to preserve both licenses and tax attributes.

value almost exclusively from its intangible assets, and in particular, from the gross margin on customer contracts. The business is highly regulated, depending entirely on a substantial number of licences, authorizations or permits in multiple jurisdictions in both Canada and the US, without which the Just Energy Entities could not market or sell energy to customers or otherwise operate.[26]

21. All of these licences, permits or authorizations either cannot be transferred or assigned at all, or can only be transferred to a purchaser with regulatory approval. In some cases, there is no clear regulatory process for the transfer.[27] In particular, in a traditional vesting order structure, the Purchaser would be required to participate in separate regulatory processes in 5 Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the US to try to obtain either a transfer of the Just Energy Entities' 89 current licences, authorizations and certifications, or the issuance of new licences, authorizations and certifications.[28]

22. All of these processes are uncertain in their outcome, given the discretion exercisable by the applicable Regulators in determining whether to grant particular licenses or authorizations or to approve a transfer. The loss of certain licences or authorizations would jeopardize the entire Transaction by precluding the ongoing operation of the Just Energy Entities' business in the applicable jurisdiction and materially impacting both short- and long-term revenues, as well as the going-concern value of the business, to the detriment of the Just Energy Entities' stakeholders.[29]

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26 Carter Affidavit, para. 57.

27 A summary of the specific licenses and authorizations held by the Just Energy Entities, as well as their transferability, is set out in para. 57 of the Carter Affidavit. Further details are found at paras. 63 to 66 (Canada) and 71 to 73 (US).

28 Carter Affidavit, para. 75.

29 Carter Affidavit, paras. 78 and 79. See also *Harte Gold*, at paras. 70 to 75, in which similar considerations were held to constitute compelling reasons for implementing a restructuring transaction by means of an RVO.

23. By contrast, most of the critical licences are not subject to any approval requirement in a change of control transaction and may simply require notice or an update to regulatory filings.[30]

24. Similarly, the Just Energy Entities depend on a number of agreements with more than 100 public utilities (the "**Local Distribution Companies**") to distribute natural gas and electricity in certain markets to their customers.[31] These business-critical agreements cannot be assigned without the consent of the Local Distribution Company. The processes for the Purchaser to obtain such consents and carry out testing required to obtain that consent are extremely time-consuming. These requirements do not apply where a transaction involves only changes in the upstream ownership structure of the applicable Just Energy Entity.[32]

25. The Just Energy Entities are also party to a significant number of hedging transactions, many of which are fundamental to the Just Energy Entities' ability to operate their business and most of which are non-transferable.[33] Finally, under a traditional vesting order structure, any US tax attributes resident in the Just Energy Entities could not be used in the go-forward business.[34]

26. Meanwhile, the Just Energy Entities face mounting pressures to exit these CCAA and Chapter 15 proceedings as quickly as possible. Market conditions in both the US and Canada continue to be difficult, with extremely volatile commodity prices. Employee morale and retention

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30 Carter Affidavit, para. 58. See also paras. 65, 66 and 72. Note that in the US, approval requirements apply to DOE export authorizations and market-based authorizations issued by FERC in the context of both a transfer or a change of control transaction, as explained at para. 73 of the Carter Affidavit.

31 Carter Affidavit, para. 57. In some cases, the Local Distribution Companies also provide billing and collection services.

32 Carter Affidavit, para. 69.

33 Carter Affidavit, para. 60(a).

34 Carter Affidavit, para. 60(b) and 80.

challenges are worsening, as these proceedings near their 19th month. Relationships with employees, Commodity Suppliers and Regulators continue to be strained.[35]

27. The only feasible structure for the Transaction is therefore a sale of equity by means of the Reverse Vesting Order. A traditional vesting order structure would put at risk most of the 89 current licences on which the Just Energy Entities' business depends, and on which the going-concern value of that business is wholly reliant. The risks and uncertainties associated with a transaction that seeks to transfer or assign these licences to the Purchaser could have dramatic impacts on the Just Energy Entities' ability to carry on business and generate revenue for the benefit of stakeholders, not to mention delay for an indeterminate time period the ability of the Just Energy Entities to emerge from these costly CCAA and Chapter 15 proceedings.[36]

28. Finally, as the Quebec Superior Court recently noted in approving an RVO, the Court must be mindful not to modify the contractual terms that have been duly negotiated between the parties.[37] The Transaction has been negotiated on the basis that it will be effected through an RVO, in recognition of the fact that this structure is uniquely suited to the going-concern acquisition of this highly-regulated business. In fact, it is a condition of the Transaction that it be implemented by means of the Reverse Vesting Order granted by the CCAA Court and recognized by the U.S. Bankruptcy Court.[38] As the SISP demonstrated, there is no other option for the Just Energy Entities to exit on a going-concern basis from these CCAA and Chapter 15 proceedings.

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35 Carter Affidavit, para. 77.

36 Carter Affidavit, para. 59.

37 *Blackrock Metals*, above at para. 84.

38 Carter Affidavit, para. 56.

(ii) The Transaction and the Reverse Vesting Order are Fair and Reasonable

29. Where the circumstances supporting the use of the RVO structure are present, the Court must also be satisfied that the proposed Transaction is fair and reasonable.[39]

30. In making this determination, CCAA Courts have referred to the factors set out under section 36 of the CCAA. In particular, the relevant factors include: (a) whether the process leading to the proposed transaction is reasonable in the circumstances; (b) whether the Monitor approved the process leading to the transaction; (c) whether the Monitor has filed a report stating its opinion that the transaction would be more beneficial to creditors than a sale or disposition in a bankruptcy; (d) the extent to which the creditors were consulted; (d) the effects of the proposed transaction on the creditors and other interested parties; and (f) whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.[40]

31. The section 36(3) factors are, on their face, not intended to be exhaustive. Nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA.[41] Specifically, there is no requirement for the Monitor or the Company to provide a liquidation analysis for the debtor company in order for a sale under section 36 to be approved.

32. Additionally, as with an order under section 36 of the CCAA for the sale of assets through a traditional vesting order, the Court should consider the principles set out in *Soundair* – namely,

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[39] *Blackrock Metals*, above at paras. 100-112; *Quest University*, above at paras. 157, 174-177; *Harte Gold*, above at paras. 40-69.

[40] *Blackrock Metals*, above at para. 87, referring to section 36(3) of the CCAA. See also *Harte Gold*, above at para. 37; *Clearbeach and Forbes (Re)*, 2021 ONSC 5564 [*Clearbeach*] at paras. 24-25; *Green Relief (Re)*, 2020 ONSC 6837 [*Green Relief*] at para. 5.

[41] See for example, *White Birch Paper Holding Co. (Re).,* 2010 QCCS 4915 at para. 48; leave to appeal refused, 2010 QCCA 1950 (Que. C.A.).

whether sufficient efforts to get the best price have been made and the parties have acted providently; the efficacy and integrity of the process followed; the interests of the parties; and whether any unfairness resulted from the process.[42]

(A) The SISP Was Fair and Transparent

33. The SISP, supported by the stalking horse transaction (now the Transaction), was developed by the Just Energy Entities in consultation with the Financial Advisor, the Monitor, the Purchaser (in its capacity as Sponsor), the Supporting Secured CF Lenders and Shell to provide a fair and reasonable process to canvass the market to confirm whether the Transaction delivered the best possible result for all stakeholders. It was approved by this Court as a "clear, court-ordered structure and path to a definitive auction date."[43]

34. The process was conducted in an open and transparent manner. The CCAA Court directed parties entitled to receive information on a confidential basis under the SISP Approval Order to engage in "the fair, equitable and symmetrical sharing of information concerning bids" and directed the Monitor to "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."[44] The Just Energy Entities have, throughout the course of the SISP, complied with the information-sharing requirements established by the Monitor.[45]

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[42] *Blackrock Metals*, above at para. 95, citing *Harte Gold,* above and *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (Ont. CA); see also *Clearbeach,* above at para. 25; *Green Relief*, above at para. 6.

[43] Carter Affidavit, para. 24 and Exhibit A at p. 28 (SISP Endorsement).

[44] Carter Affidavit, para. 21. The Monitor circulated a letter to the Service List, dated August 25, 2022, regarding the process for sharing confidential information. The details of the process implemented are set out in the Carter Affidavit at para. 35. See also Exhibit I.

[45] Carter Affidavit, para. 36.

(B) Compliance with the SISP Approval Order

35. The SISP was conducted by the Just Energy Entities with the assistance of the Financial Advisor, under the Monitor's supervision, and in accordance with the SISP Approval Order. Specifically, the SISP was undertaken in two stages. In the first stage, written notices of intention to bid ("**NOIs**") were required to be submitted by interested parties on or before September 8, 2022. In the second stage, all Qualified Bids were to be submitted on or before October 13, 2022.[46]

36. During the first stage, the Financial Advisor and the Just Energy Entities prepared a list of potential bidders identified as having a potential interest in a transaction and established a data room containing diligence information.[47] On August 5, 2022, Just Energy issued a press release announcing that the Just Energy Entities had entered into the Transaction Agreement and the SISP Support Agreement (subject to CCAA Court approval) and filed the SISP Motion.[48]

37. Additionally, on August 5, 2022, the SISP was publicized through an article on a well-known industry website, EnergyChoiceMatters.com. Moreover, the Financial Advisor contacted 41 potential bidders in writing to invite them to participate in the SISP, providing them with a number of materials relevant to the SISP, as well as a form of NDA. Such materials were also provided to certain other third parties who contacted the Financial Advisor expressing interest.[49]

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[46] Carter Affidavit, para. 25. See also Caiger Affidavit, paras 6 and 8.

[47] Carter Affidavit, para. 26(a).

[48] Carter Affidavit, para. 26(b) and Exhibit C. See also Caiger Affidavit, para. 11.

[49] Carter Affidavit, para. 26(c) and (d). The materials provided included the SISP Press Release, the Teaser Letter, the form of SISP procedures, and a link to the SISP motion. See also Caiger Affidavit, para. 12 and 13.

38. The SISP was further publicized by means of a notice published on August 12 and 13, 2022 in the Wall Street Journal and the Globe and Mail (National Edition), respectively.[50]

39. Between August 5, 2022 and early September, the Just Energy Entities negotiated NDAs with potential bidders, facilitated access to the data room for those parties, updated the data room as information was requested, responded to numerous due diligence requests, and offered management presentation meetings. Each potential bidder who signed an NDA, as well as one party who indicated an intention to submit an NOI (but did not sign an NDA), were provided with the SISP Process Letter to invite them to submit an NOI and ultimately a Qualified Bid.[51]

40. Since four NOIs were received by the September 8, 2022 deadline, the process moved to the second stage. The Just Energy Entities, with the assistance of their advisors, prepared a form of transaction agreement, including a disclosure letter, and a form of approval and reverse vesting order, for completion by bidders as part of their submission of a Qualified Bid.[52]

41. Three of the four stage 2 participants eventually either expressly advised that they were not proceeding or stopped corresponding with the Financial Advisor.[53] On September 22, 2022, the Financial Advisor provided a Qualified Bid Process Letter to the one party who had submitted an NOI and remained engaged in the SISP process, inviting it to submit a Qualified Bid.[54]

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50 Carter Affidavit, para. 26(e). See also Exhibit F.

51 Carter Affidavit, para. 26(f) and (g) and Exhibit G. See also Caiger Affidavit, para. 14 to 17 and Exhibit E.

52 Carter Affidavit, para. 30(a). Caiger Affidavit, para. 18 and 19.

53 Caiger Affidavit, para. 22.

54 Carter Affidavit, para. 30(b) and Exhibit H; Caiger Affidavit, para. 24 and Exhibit G.

42. Despite the Financial Advisor's efforts to work with the remaining stage 2 participant, no Qualified Bid, other than the Transaction, was received on or before the Qualified Bid Deadline. The Transaction was therefore declared to be the Successful Bid and no auction was undertaken.[55]

(C) The Market Has Been Thoroughly Canvassed

43. The Transaction is the culmination of a very lengthy, multi-faceted series of attempts to achieve a going-concern resolution to the financial difficulties that have plagued the Just Energy Entities over a number of years.

44. In addition to the SISP, over the past approximately 3 years, the business of the Just Energy Entities has been marketed broadly and extensively. Such efforts included a strategic review process in 2019, followed by unsuccessful efforts to identify a sale transaction, leading up to the balance sheet recapitalization under section 192 of the *Canada Business Corporations Act* ("**CBCA**") in September 2020.[56] Since the Filing Date, interested parties have had an opportunity to come forward to propose possible transactions. The Plan Support Agreement provided a 62-day window ahead of the proposed date for the Creditors Meetings to see if any superior transaction would emerge. No meaningful inquiries or proposals were received.[57]

45. At the time of the SISP Approval Motion, the Just Energy Entities had been negotiating with their key stakeholders for nearly 1.5 years. After the loss of support for the Plan, the SISP was the only viable going concern exit strategy.[58] Following the SISP, the Financial Advisor is of

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55 Carter Affidavit, para. 32; Caiger Affidavit, para. 25.

56 Carter Affidavit, para. 50.

57 Carter Affidavit, para. 51-52.

58 Carter Affidavit, para. 23.

the view that the market has been thoroughly canvassed through a fair and impartial sale process, with a reasonable opportunity for all interested parties to submit a Qualified Bid.[59]

46. Counsel in the Putative Class Actions previously indicated that they intended to file their own restructuring plan for consideration and voting by the Just Energy Entities' creditors. Accordingly, the Just Energy Entities undertook a number of steps to facilitate their participation in the SISP. However, the Putative Class Action claimants did not file an NOI prior to the NOI Deadline. The Putative Class Action claimants also did not engage further in the SISP process.[60]

(D) Benefits of the Transaction

47. The Transaction is the only viable option for a going-concern exit from these proceedings. It represents the highest and best value to the Just Energy Entities and their stakeholders.[61] Specifically, the Transaction represents numerous tangible benefits, including:

(a) preserving the going-concern value of the businesses for the benefit of stakeholders;

(b) maintaining the Just Energy Entities' relations with the majority of its Commodity Suppliers, vendors, trade creditors and other counterparties;

(c) providing for the continued operations of the Just Energy Entities across Canada and the United States and, in particular, the uninterrupted supply of energy to the Just Energy Entities' almost 1 million customers;

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59 Caiger Affidavit, para. 26.

60 Carter Affidavit paras. 28 and 29; Caiger Affidavit, para. 20.

61 Carter Affidavit, paras. 52 and 82.

(d) preserving the ongoing employment of most of the Just Energy Entities' more than 1000 employees;

(e) maintaining critical regulatory and licensing relationships between the Just Energy Entities and its market regulators across Canada and the United States;

(f) satisfying or assuming in full all secured claims and priority payables;

(g) preserving US tax attributes and tax pools;

(h) permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a $250 million New Credit Facility; and

(i) bringing an end to these lengthy and costly proceedings, apart from limited matters remaining in relation to the administration and wind down of the Residual Cos.[62]

48. The extensive market testing both under the SISP and in prior endeavours is the best evidence that the Purchase Price represents the maximum value for the Just Energy Entities' assets and that every effort has been made to obtain the best price. If there were any other transaction available in the market that could provide a higher purchase price and therefore higher recoveries for the creditors of the Just Energy Entities than is provided under the Transaction, there has been more than enough opportunity for such a superior transaction to emerge.

49. The Purchase Price provided by the Purchaser under the Transaction, together with the Just Energy Entities' cash on hand, is only sufficient to satisfy priority and secured claims.[63] No

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62 Carter Affidavit, para. 37 and 53.

63 Carter Affidavit, para. 44.

recoveries will be available for General Unsecured Creditors.[64] This is a function of the market value of the Just Energy Entities' businesses, as determined by a full and fair marketing process, not the RVO structure for implementing the Transaction. The General Unsecured Creditors – and for that matter, the shareholders – would be in the same position in an asset sale implemented through a traditional vesting order.[65]

50. Thus, there is no unfairness in the fact that the claims of unsecured creditors, including the Contingent Litigation Creditors, will be transferred to the Residual Cos., which will have no material assets from which to satisfy those claims. This result reflects the fact that the value of the Just Energy Entities' business is not high enough to permit recovery for unsecured creditors.[66]

51. If the Transaction were implemented through a traditional vesting order, leaving the Purchase Price to stand in place and in stead of the assets conveyed to the Purchaser, the General Unsecured Creditors would recover only to the extent that the amount of the Purchase Price exceeded the value of all the priority and the secured claims. It has been clearly demonstrated in these proceedings that such value is simply not available in the market. There is no other viable option that would produce a different result, nor is there any basis on which the Purchaser can be compelled to pay more, let alone to specifically provide for such recoveries.[67]

52. The Just Energy Entities therefore submit that the Transaction should be approved and the Reverse Vesting Order granted. Certain aspects of the Transaction terms are discussed below.[68]

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64 Carter Affidavit, para. 45.

65 See *Blackrock Metals*, above at para. 120.

66 See *Blackrock Metals*, above at para. 109, in which the Court granted the RVO based on similar facts.

67 See *Quest University,* above at para. 158, in which the Court granted the RVO based on similar facts.

68 See also Carter Affidavit, para. 38 and Exhibit J and paras. 39-43 for further details regarding the Transaction.

(iii) Other Relief is Appropriate

(A) Cancellation of Existing Shares

53. The Transaction provides for Just Energy to file articles of reorganization to provide for the cancellation or redemption of its outstanding common shares for nil consideration. New common shares will be issued to JEUS such that JEUS will become the sole holder of the outstanding equity interests in Just Energy, with the Purchaser wholly-owning JEUS. Just Energy will be delisted from the NEX and, as a condition for the benefit of the Purchaser, will cease to be a reporting issuer under Canadian and US securities laws.[69]

54. Similar approaches have been used in other RVOs.[70] In an insolvency, the existing equity holders have no economic interest in the company, and therefore no entitlement to recovery unless all the creditors are paid in full.[71] Accordingly, in a CCAA restructuring that involves a share acquisition by a purchaser (which is often the case in an RVO), the existing shareholders should not receive consideration for their shares and/or share in the "upside" of the restructured business.

55. The CBCA provides that the share conditions of a CBCA corporation that is under CCAA protection can be changed by means of articles of reorganization. Section 191(1) of the CBCA states that a "reorganization" means a court order made (among other things) under the *Bankruptcy and Insolvency Act* or under any other Act of Parliament that affects the rights among the

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69 Carter Affidavit, para. 42(c).

70 See, for example, *Blackrock Metals*, above, at para. 122; *Harte Gold*, above, at para. 59 – 64 (dealing with the equivalent provision under the *Business Corporations Act* (Ontario) ("OBCA")).

71 CCAA, s. 6(8); see also *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209 [*Canwest*] at para. 34.

corporation, its shareholders and other creditors.[72] It has been held that this includes the CCAA.[73] Similarly, the CCAA also provides that it can be used in tandem with other federal statutes that deal with arrangements between the company and its creditors and/or shareholders.[74]

56. Section 191(2) of the CBCA provides that, where a corporation is subject to an order under section 191(1), its articles may be amended by such order to effect any change that might lawfully be made under section 173.[75] Section 173 permits the articles of the corporation to be amended to "add, change or remove any rights, privileges, restrictions and conditions … in respect of all or any of its shares".[76] Additionally, subsection 176(1)(b) of the CBCA, expressly refers to effecting (among other things) a cancellation of "all or part of the shares of a class".[77] Both of these provisions have been held to permit the CCAA Court to approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a CCAA restructuring transaction.[78]

57. Existing shareholders whose shares are to be cancelled by means of a reorganization under the CBCA are not entitled to a vote.[79] Section 191 of the CBCA does not provide for a shareholder

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72 *Canada Business Corporations Act*, R.S.C., 1985, C. C-44, s. 191(1)(c) ("CBCA").

73 *Canwest,* above at para. 34. See also *Blackrock Metals*, above at para. 122; *Harte Gold*, above at para. 61 (dealing with the equivalent provision of the OBCA).

74 CCAA, s. 42: "The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them." See also section 6(2) of the CCAA, which permits the amendment of constating documents in connection with a CCAA plan.

75 CBCA, s. 191(2).

76 CBCA, s. 173(1)(g), (n) and (o).

77 CBCA, s. 176(1)(b).

78 *Harte Gold*, above at para. 62 (dealing with the equivalent provision of the OBCA); *Blackrock Metals*, above at para. 122; *Laidlaw (Re)*, 2003 CarswellOnt 787 (SCJ) at para. 9.

79 *Canwest*, above at para. 34.

vote and it expressly provides that there are no dissent rights for affected shareholders.[80] Providing for such a vote could confer a veto on those shareholders, despite the fact that their shares have no economic value and those shareholders would have no right to vote on a CCAA plan.[81]

(B) "Deemed" Employees

58. The Reverse Vesting Order provides that all former employees of the Just Energy Entities whose claims are transferred to the Canadian Residual Co. will be deemed to be former employees of the Canadian Residual Co. solely for the purpose of entitlements to termination and severance pay under the *WEPP*. In light of the RVO structure, this language is designed to assist these employees in relation to their entitlements under the *WEPP*, if any are available. Similar relief was granted in the Quest University proceeding, which also involved an RVO.[82]

(C) Expanded Monitor Powers

59. The Just Energy Entities are seeking an order expanding the powers of the Monitor to, among other things, take all steps necessary to wind down, dissolve and/or bankrupt each Residual Co. and administer the Excluded Assets, Excluded Liabilities and each Residual Co. This relief is intended to facilitate the RVO structure. Similar relief has been granted in other RVO cases.[83]

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80 CBCA, s. 191(7).

81 CCAA, s. 6(8); *Harte Gold*, above at para. 64. For similar reasons, the Reverse Vesting Order specifically dispenses with the requirement to comply with Multilateral Instrument 61-101, which provides minority shareholders with an approval right in respect of certain related party transactions or business combinations. This provision may be triggered by the Transaction: Carter Affidavit, para. 46.

82 *Quest University (Re)*, Order Made After Application – Expansion of Monitor's Powers and Stay Extension, Vancouver Registry, No. S-200586, dated December 17, 2020 at para. 4 [Quest Expanded Monitor Powers Order]. See also *Quest University (Re)*, Order Made After Application -- Approval and Vesting Order, Vancouver Registry, No. S-200586, dated November 16, 2020, para. 5(b) [Quest Approval and Vesting Order].

83 See, for example, *Quest University (Re),* Expanded Monitor Powers Order, above at para. 3; *Harte Gold*, above at paras. 91 to 93.

(D) The Implementation Steps Should Be Approved

60. The Applicants are seeking approval of the Implementation Steps, which are structured to settle certain intercompany accounts in a tax efficient manner, consistent with the policy underlying the relevant provisions of the *Income Tax Act* (Canada). Since it is contemplated that certain steps will be completed prior to the exit of the Just Energy Entities from these proceedings, this Court's approval is required as such steps may be otherwise prohibited by the Initial Order.[84]

(E) The Releases Should be Granted

61. The Reverse Vesting Order contains typical broad releases applicable to the Just Energy Entities as well as certain other third parties, including: (a) the Monitor and its legal counsel; (b) the current and former directors, officers, and employees, legal counsel and advisors of the Just Energy Entities and the Residual Cos. (or any of them); (c) the Purchaser and its directors, officers employees, legal counsel and advisors; and (d) the Credit Facility Agent and the Credit Facility Lenders, and their respective current and former directors, officers, employees, legal counsel and advisors (collectively, the "**Released Parties**").[85]

62. Third party releases (i.e. releases in favour of parties other than the CCAA debtor company) have been granted both in CCAA plans and in RVOs. As the Quebec Court recently noted in *Blackrock Metals*, "it has now become commonplace for third-party releases, in favour of parties to a restructuring, their professional advisors, as well as their directors, officers and others,

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84 Carter Affidavit, paras. 102 and 103.

85 Carter Affidavit, para. 83.

to be approved outside of a plan in the context of a transaction."[86] There are numerous examples where such releases have been granted in RVO transactions.[87]

63. The CCAA expressly contemplates that claims against the directors and officers of a debtor company can be compromised and released in a plan, subject to certain exceptions.[88] The same should apply where a CCAA restructuring does not involve a plan, as this Court has noted: "I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release."[89]

64. The same test for granting third party releases in a CCAA plan applies to a release in an RVO. The Court must ask: (a) whether the parties to be released were necessary to the restructuring of the debtor; (b) whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; (c) whether the restructuring could succeed without the releases; (d) whether the parties being released contributed to the restructuring; and (e) whether the releases benefit the debtors as well as the creditors generally.[90] It is not necessary for each of these factors to apply in order for the proposed release to be granted.[91]

65. The releases in the Reverse Vesting Order are rationally connected to the restructuring and essential to its success. The Released Parties have made significant and often critical contributions

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86 *Blackrock Metals*, above at para. 128, citing *Re Green Relief Inc.*, 2020 ONSC 6837, paras. 23-25; *8640025 Canada Inc.*, 2021 BCSC 1826 at para. 43.

87 See for example, *Harte Gold*, above at paras. 78 to 86; Quest Approval and Vesting Order, para. 14; *Clearbeach*, above at para. 27(f); *Green Relief*, above at paras. 23 and 27-29.

88 See CCAA, s. 5.

89 *Green Relief*, above at para. 23.

90 *Blackrock Metals,* above at para. 130, citing *Harte Gold*, above at paras. 78-86 and the test established in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587. See also *Green Relief*, above at para. 27, citing *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54.

91 *Green Relief*, above at para. 28.

to the development and implementation of the Just Energy Entities' exit from these CCAA proceedings. If the Reverse Vesting Order is granted and the Transaction is consummated, the Just Energy Entities' businesses will continue, and their going-concern value will be preserved for the benefit of stakeholders.[92] In addition, many of the Released Parties could have indemnity claims against the Just Energy Entities that would erode the value of those businesses and jeopardize the restructuring.[93]

66. There can be no question that the directors and officers of the Just Energy Entities have made substantial contributions to the continuation of the business of the Just Energy Entities during these lengthy CCAA and Chapter 15 proceedings. A release of these individuals, in such circumstances, is typical in CCAA proceedings and should be granted here as well.

67. On the facts of this case, the D&O Release is also essential in order to release the amount represented by the D&O Charge. The cash portion of the Purchase Price, together with the Just Energy Entities' cash on hand, is sufficient only to satisfy priority and secured claims, assuming a December 31, 2022 Closing Date for the Transaction.[94] There are no available funds to maintain a reserve against potential future D&O liabilities. The D&O Release is critical to ensure that the funds represented by the D&O Charge can be used to close the Transaction, which cannot be implemented unless the D&O Release is granted.

68. The releases provided in the Reverse Vesting Order explicitly do not release or discharge: (a) any claim that is not permitted to be released under section 5.1(2) of the CCAA; or (b) any

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92 Carter Affidavit, para. 86.

93 See *Green Relief*, above at paras. 51 to 55.

94 Carter Affidavit, para. 44.

obligations of any of the Released Parties under the Transaction Agreement, the Closing Documents, the SISP Support Agreement, the Definitive Documents, and related agreements.[95]

69. Finally, the Reverse Vesting Order contains various exculpations for which the Just Energy Entities will seek approval by the U.S. Bankruptcy Court in the Vesting Recognition Order.[96]

(iv) Stay Extension

70. The Just Energy Entities seek an extension of the Stay Period until January 31, 2023 to allow the Transaction to close, and to accommodate the uncertain timing of certain regulatory approvals. Assuming the Transaction is approved and the Reverse Vesting Order granted, this time period is necessary to complete various matters involving the closing, as well as the recognition of the Reverse Vesting Order in the U.S. Bankruptcy Court.[97] The Just Energy Entities have been acting with diligence and in good faith to achieve a going-concern exit from these CCAA and Chapter 15 proceedings, and the requested stay extension is appropriate in the circumstances.

PART IV - NATURE OF THE ORDER SOUGHT

71. For all of the reasons submitted above, the Just Energy Entities submit that this Court should approve the Transaction and grant the Reverse Vesting Order and the related relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2022.

per Marc Wasserman / Michael De Lellis / Jeremy Dacks

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95 Carter Affidavit, para. 85.

96 Carter Affidavit, para. 87.

97 Carter Affidavit, para. 119.

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *8640025 Canada Inc.*, 2021 BCSC 1826
2. *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828
3. *Arrangement relatif à Nemaska Lithium inc.,* 2020 QCCA 1488 (CanLII)
4. *Arrangement relatif à Nemaska Lithium inc.,* 2020 QCCA 3218 (CanLII)
5. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
6. *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209
7. *Century Services Ltd. v. Canada (Attorney General),* 2010 SCC 60
8. *Clearbeach and Forbes (Re)*, 2021 ONSC 5564
9. *Green Relief (Re)*, 2020 ONSC 6837
10. *Harte Gold (Re),* 2022 ONSC 653
11. *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763
12. *Laidlaw (Re)*, 2003 CarswellOnt 787 (SCJ)
13. *Lydian International Limited (Re)*, 2020 ONSC 4006
14. *Quest University (Re)*, 2022 BCSC 1883
15. *Royal Bank v. Soundair Corp.,* 1991 CanLII 2727 (Ont. CA)
16. *White Birch Paper Holding Co. (Re).,* 2010 QCCA 1950
17. *White Birch Paper Holding Co. (Re).,* 2010 QCCS 4915

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Canada Business Corporations Act*, R.S.C., 1985, C. C-44**

Amendment of articles

173 (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(a) change its name;

(b) change the province in which its registered office is situated;

(c) add, change or remove any restriction on the business or businesses that the corporation may carry on;

(d) change any maximum number of shares that the corporation is authorized to issue;

(e) create new classes of shares;

(f) reduce or increase its stated capital, if its stated capital is set out in the articles;

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under paragraphs (j) and (k);

(m) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112;

(n) add, change or remove restrictions on the issue, transfer or ownership of shares; or

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

[…]

Class vote

176 (1) The holders of shares of a class or, subject to subsection (4), of a series are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (a), (b) and (e), entitled to vote separately as a class or series on a proposal to amend the articles to

(a) increase or decrease any maximum number of authorized shares of such class, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the shares of such class;

(b) effect an exchange, reclassification or cancellation of all or part of the shares of such class;

[…]

Definition of reorganization

191 (1) In this section, reorganization means a court order made under

(a) section 241;

(b) the Bankruptcy and Insolvency Act approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

Powers of court

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

[…]

No dissent

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

***Companies' Creditors Arrangement Act*, RSC, 1985, c C-36**

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[…]

Exception

5.1 (2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[…]

Court may order amendment

6 (2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

[…]

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[…]

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[…]

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

36 (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

> **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

> **(a)** a director or officer of the company;
>
> **(b)** a person who has or has had, directly or indirectly, control in fact of the company; and
>
> **(c)** a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party

continues to perform its obligations under the agreement in relation to the use of the intellectual property.

[…]

Act to be applied conjointly with other Acts

42 The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C. C-36, AS AMENDED;

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. ET AL.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM

OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Tel: 416.862.4908
Email: mwasserman@osler.com

Michael De Lellis (LSO# 48038U)
Tel: 416.862.5997
Email: mdelellis@osler.com

Jeremy Dacks (LSO# 41851R)

Tel: 416.862.4923
Email: jdacks@osler.com

Lawyers to the Applicants