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., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 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

(Motion for Approval of ecobee Inc. Support Agreement and Related Relief)

November 8, 2021

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PART I - NATURE OF THIS MOTION

1. On March 9, 2021 (the "**Filing Date**"), the Applicants obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**"). The Initial Order, among other things, extended the protections granted thereunder to the partnerships listed on Schedule "A" thereto (together with the Applicants, referred to below as the "**Just Energy Entities**").[1] The Initial Order has twice been amended and restated, and the CCAA Court granted an Amended and Restated Initial Order ("**ARIO**") and the Second ARIO (the "**SARIO**") on March 19, 2021, and May 26, 2021, respectively.[2]

2. One of the Applicants – Just Management Corp. ("**JMC**"), a wholly-owned subsidiary of Just Energy Group Inc. ("**Just Energy**") – holds certain shares (the "**ecobee Shares**") in ecobee Limited ("**ecobee**"), a corporation that is in the business of developing and marketing smart home devices. JMC does not currently carry on any active business, other than holding the ecobee Shares.

3. On November 8, 2021, ecobee obtained an interim order under section 192 of the *Canada Business Corporations Act* ("**CBCA**") in connection with a proposed arrangement (the "**Arrangement**"). The Arrangement will effect a transaction (the "**Transaction**") for the purchase of all of the issued and outstanding shares of ecobee by an affiliate of Generac Power Systems Inc. ("**Generac Power**"), as purchaser. The total consideration under the Arrangement will consist of cash and common shares of Generac Holdings Inc. ("**Generac Holdings**") (Generac Power's public company parent) (referred to as the "**Consideration Shares**" and described further below).

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1 Affidavit of Michael Carter, sworn November 8, 2021 [the "**Sixth Carter Affidavit**"], para. 4. Capitalized terms not otherwise defined have the same meaning as in the Sixth Carter Affidavit.

2 Sixth Carter Affidavit, para. 5.

4. It is in the best interests of JMC and of the Just Energy Entities as a whole to support the Arrangement. Other previous attempts by Just Energy to realize on the value of the ecobee Shares have been unsuccessful. The Arrangement provides the best opportunity to monetize the ecobee Shares and to maximize the value of this non-core asset for the benefit of all stakeholders.[3]

5. In connection with the Arrangement, the Applicants therefore seek an order (the "**Order**"), *inter alia*, (i) authorizing and empowering JMC to enter into a Support Agreement (the **"Support Agreement**") in which ecobee shareholders agree to be bound by the Arrangement Agreement and to dispose of their ecobee Shares pursuant to the Transaction; (ii) authorizing Just Energy to enter into the Wind-Up and Dissolution Transactions (described further below) prior to the approval of the Arrangement in order to realize upon the value of the ecobee Shares in the most tax efficient manner; (iii) authorizing Just Energy to sell the ecobee Shares held by it, following the completion of the Wind-Up and Dissolution Transactions, to the Purchaser, and vesting in the Purchaser, Just Energy's right, title and interest in and to the ecobee Shares, and (iv) authorizing Just Energy to sell the Consideration Shares free and clear upon approval of the Arrangement and closing of the Transaction.[4]

6. The Applicants submit that this Court has the jurisdiction under the CCAA to grant the requested order. No creditor will be prejudiced by any of the requested relief and all relevant stakeholders have received notice of this motion. It is anticipated that the Arrangement, together with the sale of the Consideration Shares, will generate value to the estate of the Just Energy Entities in the amount of at least approximately $61 million. A further approximate $6.6 million

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3 Sixth Carter Affidavit, paras. 41, 48.

4 Sixth Carter Affidavit, para. 2.

will be generated in the form of tax benefits, assuming the Wind-Up and Dissolution Transactions are authorized and implemented in the manner proposed.

7. The ecobee Shares are subject to "drag along" rights (the "**Drag-Along**") under a unanimous shareholder agreement ("**USA**") among ecobee and its shareholders. The Drag-Along is likely engaged by the Arrangement in any event, even without the support of JMC. Whether or not the Drag-Along applies, this Court can take comfort that the best price for the ecobee Shares available in the circumstances has been obtained. The value of the ecobee Shares has been determined by means of arm's length negotiations leading to the execution of the Arrangement Agreement. The transaction cannot close until after the CBCA Court has determined that the Arrangement is fair and reasonable.[5]

8. Certain technical aspects of the CBCA may arguably not be satisfied under the proposed Wind-Up and Dissolution Transactions. Viewed as a whole, however, the Arrangement, the Wind-Up and Dissolution Transactions and the sale of the Consideration Shares are beneficial to the estate of the Just Energy Entities. All of JMC's assets and liabilities have been duly provided for, in keeping with the spirit of the CBCA requirements. Moreover, the Just Energy Entities' estate will be enhanced to the extent of the monetization of the ecobee Shares, as well as the tax benefits realized on the Wind-Up and Dissolution Transactions.

9. For the reasons set out below, the Applicants submit that this Court can and should grant the requested Order.

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[5] CBCA, s. 192(4).

PART II - FACTS

10. The facts underlying this Motion are more fully set out in the Sixth Carter Affidavit and the Fourth Report of the Monitor.[6] Facts relevant to the requested relief are highlighted below.

A. ECOBEE

11. ecobee is a private company, incorporated under the CBCA and headquartered in Toronto. ecobee is engaged in the business of developing and selling smart home devices (including smart thermostats, room sensors, smart light switches and smart cameras) and providing related services to residential and commercial customers throughout North America.[7]

12. Prior to 2019, the Just Energy Entities ran a marketing campaign whereby ecobee smart thermostats were marketed by the Just Energy Entities by cross-selling to the Just Energy Entities' existing customer base in Ontario and Texas, as well as in a bundled product offering with commodity or air conditioner/furnace rentals.[8] The Just Energy Entities discontinued these cross-selling and bundled product offerings in or about 2019, and Just Energy has not sold any ecobee smart thermostats to its customer base since that time.[9]

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6 Fourth Report of FTI Consulting Canada Inc., in its capacity as Court-Appointed Monitor, dated November 5, 2021 [the "**Monitor's Fourth Report**"].

7 Sixth Carter Affidavit, para. 8.

8 Sixth Carter Affidavit, para. 13.

9 Sixth Carter Affidavit, para. 14.

B. JMC'S INTEREST IN ECOBEE

(a) *Acquisition of the ecobee Shares*

13. On August 10, 2012, Just Energy Ontario LP ("**JEOLP**"), a subsidiary of Just Energy and one of the Just Energy Entities subject to the CCAA Proceedings, acquired a 15% fully diluted interest in ecobee for approximately $6.4 million**.** Over the next several years, JEOLP acquired additional shares in ecobee through various capital raises conducted by ecobee. As a result of these capital raises, JEOLP's interest in ecobee was reduced to 8%, on a fully diluted basis.[10]

14. In 2018, the shares of ecobee held by JEOLP were transferred to JMC in consideration for two classes of preferred shares in JMC ("**JMC Preferred Shares**") and an election was filed for such transfer to occur on a tax-deferred basis.[11]

15. JMC's interest in ecobee consists of approximately 2.34% of the Common Shares, 19.33% of the Class A Preferred Shares and 13.48% of the Class B Preferred Shares. As at June 30, 2021, the fair value this interest was recorded on Just Energy's financial statements as $32.9 million.[12]

16. Just Energy has been actively attempting to sell its 8% interest in ecobee for several years. Just Energy also declined to participate in ecobee's most recent capital raises as this was no longer deemed a core asset of the Just Energy Entities. In January 2019, Just Energy retained National Bank Financial Inc., as investment advisor, in an effort to sell JMC's equity interest in ecobee.

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[10] Sixth Carter Affidavit, para. 10.

[11] Sixth Carter Affidavit, para. 10.

[12] Sixth Carter Affidavit, para. 11.

These efforts were ultimately unsuccessful, and the engagement with National Bank Financial Inc. was terminated by Just Energy in November 2020.[13]

(b) ***The Drag-Along***

17. ecobee, and all of its shareholders, including JMC, are parties to the USA.[14] The Common Shares, Class A Preferred Shares, Class B Preferred Shares and Class C Preferred Shares of ecobee (collectively, the "**Shares**") are held by approximately 130 different shareholders, most of whom are current or former employees or directors who reside in the Greater Toronto Area. All but one of the remaining ecobee shareholders, who hold a majority of the Shares, are institutional investors who are closely involved in the business and affairs of ecobee and are able to exercise their right to vote.[15]

18. The Shares are subject to the Drag-Along. The Drag-Along is triggered if ecobee receives a qualifying offer from a third party that it wishes to accept, which is approved by the ecobee Board and a majority of the votes cast by holders of Common Shares at a meeting of common shareholders, as well as approved in writing by the holders of a majority of the Class B Preferred Shares and Class C Preferred Shares voting together on an as-converted basis, and which will provide a specified return to Class C Investors (as defined in the USA).

19. If the Drag-Along is engaged, ecobee can require all shareholders, on 10 days' prior notice in writing, to sell their Shares to the third party for the amount set forth in the qualifying offer.[16]

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13 Sixth Carter Affidavit, para. 15.

14 Sixth Carter Affidavit, para. 16. A copy of the USA is attached to the Sixth Carter Affidavit as **Exhibit "C"**.

15 Sixth Carter Affidavit, para. 17.

16 Sixth Carter Affidavit, para. 18.

C. TRANSACTION WITH GENERAC

(a) *Prior Sales and Marketing Efforts by ecobee*

20. In March 2021, the ecobee Board began exploring strategic alternatives for ecobee. Ecobee considered, with the assistance of its financial advisor (BofA Securities, Inc.), potential financings with private equity firms, the potential sale to a strategic acquirer, as well as the potential acquisition by a U.S.-based Special Purpose Acquisition Fund ("**SPAC**").[17]

21. Initially, the ecobee Board favoured exploring a possible transaction with a U.S. SPAC whereby ecobee would become a publicly-traded company. On April 29, 2021, the ecobee Board signed a letter of intent with a NYSE-listed U.S. SPAC. That transaction ultimately did not proceed because the parties could not agree on a valuation as well as other issues.[18]

22. ecobee then pursued discussions with Generac Power, one of the potential strategic acquirers it had identified. Pursuant to a term sheet signed on August 19, 2021, ecobee agreed to negotiate exclusively with Generac Power in connection with a potential acquisition transaction.[19]

(b) *Structure of the Transaction*

23. On November 1, 2021, Just Energy issued a press release advising that ecobee has entered into an agreement with 13462234 Canada Inc. (the "**Purchaser**"), a wholly-owned subsidiary of Generac Power, itself a wholly owned subsidiary of Generac Holdings, to sell all of its issued and

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17 Sixth Carter Affidavit, para. 32.

18 Sixth Carter Affidavit, para. 33.

19 Sixth Carter Affidavit, para. 34.

outstanding Shares, including all of the ecobee Shares held by JMC, to the Purchaser. The Transaction is proposed to be effected pursuant to the Arrangement.[20]

24. The Transaction is valued at up to US$770 million, contingent on the achievement of certain performance targets. At closing, the Generac Purchaser will pay the sellers of the ecobee Shares an aggregate of US$200 million in cash, subject to customary adjustments and escrow/indemnity holdbacks, along with US$450 million in Generac Holding's common stock (the "**Generac Common Stock**"). Additionally, upon achievement of certain performance targets in the fiscal years ending June 30, 2022 and 2023, the selling ecobee shareholders may receive an "earnout" of up to an aggregate of US$120 million in additional shares of Generac Common Stock.[21]

25. Upon completion of the Arrangement, ecobee will become a wholly-owned subsidiary of the Purchaser and indirectly a subsidiary of Generac Power.[22] The Transaction and the Arrangement have the unanimous support of the ecobee Board and all senior officers of ecobee.[23]

26. At closing, and following the proposed Wind-Up and Dissolution Transactions (as described below) involving Just Energy and JMC, Just Energy anticipates receiving approximately $61 million, comprised of approximately $18 million cash and $43 million of Generac Common Stock. The Just Energy Entities can receive up to an additional approximate $10 million in Generac Common Stock over calendar years 2022 and 2023, subject to customary adjustments and

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[20] Sixth Carter Affidavit, para. 19. A copy of Just Energy's press release is attached as **Exhibit "D"** to the Sixth Carter Affidavit. A copy of Generac Holding's press release announcing the Transaction is attached as **Exhibit "E"** to the Sixth Carter Affidavit.

[21] Sixth Carter Affidavit, para. 20.

[22] Sixth Carter Affidavit, para. 22.

[23] Sixth Carter Affidavit, paras. 34, 46.

indemnity holdback amounts and provided that certain performance targets are achieved by ecobee (collectively, the "**Consideration Shares**"). Generac Common Stock trades on the New York Stock Exchange under the symbol GNRC.[24]

(c) ***Arrangement Agreement***

27. On November 1, 2021, the Purchaser, Generac Power, ecobee and Shareholder Representative Services LLC, in its capacity as Securityholder Representative (the "**Securityholder Representative**"), entered into the Arrangement Agreement.[25]

28. The details of the Arrangement Agreement are set out in detail in the Sixth Carter Affidavit.[26]

29. The Arrangement Agreement includes customary representations and warranties given by both ecobee and the Purchaser.[27] As a Company Securityholder, Just Energy will be subject to indemnification obligations in favour of the Purchaser and its Affiliates based on its Pro Rata Share of any and all Losses incurred (e.g. in relation to inaccuracies or breaches of the representations or warranties of ecobee, breaches or non-fulfillment of any covenant, agreement or obligation to be performed by ecobee prior to Closing, and certain other amounts).[28]

30. The indemnification obligations of the Purchaser and the Company Securityholders are limited in several respects. For example, an Indemnified Party must use commercially reasonable

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[24] Sixth Carter Affidavit, para. 21.

[25] Sixth Carter Affidavit, para. 23. A copy of the Arrangement Agreement is attached as **Exhibit "F"** to the Sixth Carter Affidavit.

[26] Sixth Carter Affidavit, paras. 23 to 30.

[27] Sixth Carter Affidavit, para. 25.

[28] Sixth Carter Affidavit, para. 26.

efforts to recover under insurance policies for any amounts subject to indemnification. The maximum claims for a single Loss are capped, a Deductible protects Company Securityholders from indemnification up to a certain amount and each Company Securityholder's liability cannot exceed the Company Securityholder's Pro Rata Share of each loss.[29]

31. There is also no subrogation against any Company Securityholder under the representation and warranty insurance policy being purchased by the Purchaser in favour of the Purchaser (the "**R&W Insurance Policy**"). The Company Securityholders are not liable for indemnification for breaches of representations and warranties beyond the remaining balance of the General Indemnification Escrow Fund except in the case of certain fundamental representations and warranties. Further, no Company Securityholder is liable for more than the amount actually paid to the Company Securityholder for such holder's securities.[30]

(d) ***Support Agreement***

32. The majority of ecobee's securityholders, including the majority of those closely involved in the business and affairs of ecobee, with the exception of JMC, have entered Support Agreements wherein each supporting shareholder acknowledged that they support and agree to be bound by the Arrangement Agreement and will vote in favour of the approval, ratification and adoption of the Arrangement.[31]

33. Each signatory also agrees to waive its dissent rights, refrain from inconsistent actions and appoint a securityholder representative.[32] Further, each signatory agrees to provide certain

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29 Sixth Carter Affidavit, para. 27.

30 Sixth Carter Affidavit, para. 28.

31 Sixth Carter Affidavit, para. 35.

32 Sixth Carter Affidavit, para. 37.

representations and warranties to the Purchaser and the securityholder representative, including ownership of undersigned's interests and authority and ability to convey title.[33]

34. In the case of JMC, in light of the ongoing CCAA Proceedings and the provisions of the SARIO, it was expressly agreed by the parties that JMC's execution of the Support Agreement would be conditional on approval by the CCAA Court. Separately, the Purchaser confirmed to Just Energy in writing that, notwithstanding section 1.4 (b) and (c) of the Support Agreement, it consents to (i) JMC transferring the ecobee Shares to Just Energy at any time at least five Business Days prior to the Closing upon Just Energy assuming all of the obligations of JMC under the Support Agreement, and (ii) Just Energy making such public announcements, filings and disclosures as it reasonably determines are required or advisable in connection with its obligations as a debtor in these CCAA Proceedings.[34]

35. Pursuant the Support Agreement, an ecobee securityholder in breach of a representation and warranty will have certain potential payment obligations pursuant to indemnification obligations under Article 8 of the Arrangement Agreement.[35] However, this indemnification obligation is mitigated by similar limiting factors to those that apply to the indemnity obligations under the Arrangement Agreement.[36]

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33 Sixth Carter Affidavit, para. 38.

34 Sixth Carter Affidavit, para. 36. A copy of the Support Agreement proposed to be executed by Just Energy is attached as **Exhibit "J"** to the Sixth Carter Affidavit (with supporting shareholder names redacted). A copy of the consent provided by the Purchaser is attached as **Exhibit "K"** to the Sixth Carter Affidavit.

35 Sixth Carter Affidavit, para. 39.

36 Sixth Carter Affidavit, para. 40.

(e) ***Approval Process for the Arrangement***

36. Under the Arrangement Agreement, ecobee is obligated to pursue a motion for an Interim Order and Final Order pursuant to section 192 of the CBCA. On November 8, 2021, ecobee obtained an Interim Order. A Final Order hearing has been scheduled on November 26, 2021.[37]

37. ecobee intends to hold a special meeting of shareholders (the "**Special Meeting**") on November 22nd, 2021 in connection with the Transaction. If 100% of ecobee shareholders provide written support of the Arrangement, the Special Meeting will not be necessary.[38]

D. THE WIND-UP AND DISSOLUTION TRANSACTIONS

38. In accordance with well-accepted tax planning, Just Energy intends to enter into a series of transactions (the "**Wind-Up and Dissolution Transactions**") in advance of the closing of the Arrangement, in order to give effect to the proposed monetization of the ecobee Shares on a tax-efficient basis. Specifically, as further detailed below, it is proposed that JMC will be wound up into Just Energy. The end result is that Just Energy will hold the ecobee Shares, which will then be sold to the Purchaser by Just Energy.

39. If completed as proposed, the Wind-Up and Dissolution Transactions will save approximately $6.6 million in tax that would otherwise arise from the sale of the ecobee Shares by JMC. Following the Wind-Up and Dissolution Transactions, the gain on the transfer of the ecobee Shares will be offset against Just Energy's available losses.[39]

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[37] Sixth Carter Affidavit, para. 29. A copy of the Affidavit filed by Stuart Lombard in support of the Interim Order is attached as **Exhibit "G"** to the Sixth Carter Affidavit. A copy of the Interim Order is attached as **Exhibit "H"** to the Sixth Carter Affidavit.

[38] Sixth Carter Affidavit, para. 30. A copy of the Plan of Arrangement is attached to the Arrangement Agreement. Once complete, the Plan of Arrangement will be attached to the Notice of Meeting and Management Information Circular for the Special Meeting (the "Circular"), attached as **Exhibit "I"** to the Sixth Carter Affidavit.

[39] Sixth Carter Affidavit, para. 48.

40. The Wind-Up and Dissolution Transactions will be comprised of the following steps:

(a) the stated capital of the common shares of JMC will be reduced to $0.00;

(b) JMC will purchase for cancellation its Preferred Shares from JEOLP for a note with a principal amount equal to their FMV, which Just Energy believes to be nominal (the "**JMC Note**").

(c) JEOLP will transfer the JMC Note to Just Energy Trading LP ("**JET LP**") as partial repayment of debt owing to JET LP;

(d) JET LP will transfer the JMC Note to Just Energy as partial repayment of debt owing to Just Energy; and

(e) the property of JMC will be transferred to Just Energy on the winding-up of JMC and, in due course, JMC will be dissolved.[40]

41. After the transfer of the ecobee Shares to Just Energy, Just Energy will sell the ecobee Shares to the Purchaser in accordance with the Arrangement.[41]

42. As required under the USA, the ecobee Board has approved the transfer of the ecobee Shares by JMC to Just Energy. To this end, Just Energy will enter into an adoption agreement pursuant to which Just Energy agrees to be a party to and bound by the USA as if Just Energy were

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[40] Sixth Carter Affidavit, para. 49.

[41] Sixth Carter Affidavit, para. 50.

an original party thereto. Just Energy will also sign a customary Joinder Agreement to the Corporation's Registration Rights Agreement dated February 20, 2018, as amended.[42]

PART III - ISSUES AND THE LAW

43. The principal issues on this Motion are whether:

(a) this Court should authorize the Applicants' participation in the Support Agreement;

(b) this Court should authorize the Wind-Up and Dissolution Transactions;

(c) this Court should authorize Just Energy to sell the ecobee Shares to the Purchaser on closing of the Arrangement, free and clear of all claims and encumbrances; and

(d) this Court should approve the sale of the Consideration Shares free and clear at any time following the closing of the Arrangement.

A. APPROVAL OF THE SUPPORT AGREEMENT, SHARE TRANSFERS, AND SALE OF THE CONSIDERATION SHARES

44. The Applicants request authorization from this court for Just Energy to (a) enter into the Support Agreement; (b) transfer the ecobee Shares free and clear to the Purchaser; and (c) sell the Consideration Shares free and clear following closing of the Transaction. Pursuant to the SARIO, this Court's authorization is required in order to undertake any material refinancing, restructuring, sale or reorganization of the Just Energy Entities' business.[43]

45. Additionally, pursuant to subsection 36(1) of the CCAA, this Court may authorize a debtor company to sell or otherwise dispose of assets outside of the ordinary course of business. Where

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[42] Sixth Carter Affidavit, para. 54.

[43] SARIO, para. 13(c).

the applicable statutory factors support it, this Court is entitled pursuant to its jurisdiction under subsection 36(6) and to its general discretion under section 11 of the CCAA to approve the transfer of assets free and clear of any security or other restriction. These provisions reflect the practical reality that absent clear title, purchasers would not be prepared to pay a fair price for a debtor's assets.[44]

46. Given that the Drag-Along in the USA may require JMC to transfer the ecobee Shares under the Arrangement in any event, it is not clear that subsection 36(1) of the CCAA is engaged in relation to the execution of the Support Agreement or the completion of the Arrangement, including the transfer of the ecobee Shares free and clear to the Purchaser. Similarly, following the completion of the Wind-Up and Dissolution Transactions, the sale of the Consideration Shares is, in the Applicants' submission, properly characterized as an ordinary course transaction. Just Energy is not in the business of holding shares and simply needs the flexibility to transfer the Consideration Shares at the appropriate time in order to maximize their value.

47. In the alternative, if subsection 36(1) of the CCAA does apply, its requirements are satisfied in these unique circumstances. The aspects of the requested Order that potentially engage subsection 36(1) include: (a) the approval of the execution of the Support Agreement (and by implication, therefore, the transfer of the ecobee Shares to the Purchaser in exchange for cash and the Consideration Shares pursuant to the Arrangement); and (b) the authorization of the sale by Just Energy of the Consideration Shares, following the completion of the Wind-Up and Dissolution Transactions.

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[44] *Re Comstock Canada Ltd.*, 2014 ONSC 493 [Commercial List], at para. 14 ["***Comstock***"].

48. In deciding whether to grant authorization under subsection 36(1) of the CCAA for a sale of assets outside the ordinary course of business, the CCAA court will consider the following non-exhaustive factors:

> (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 its 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.[45]

49. These factors are not exhaustive, nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA. The factors overlap to some degree with the *Soundair* factors applied in approving sale transactions before the codification of the factors in subsection 36(3) and that continue to inform the Courts' reasoning under section 36.[46]

50. It is well-established that there is no magic formula for demonstrating that the process by which a purchaser of assets is selected is fair and that the best price has been obtained. Court approval of the sale of assets does not require the debtor to undertake a formal solicitation and auction process in every case.[47] In *Soundair*, for example, which established the benchmark test for a sale of assets by an insolvent person, the assets in question were unique and there were only

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45 CCAA, s. 36(3).

46 *Re Target Canada Co.*, 2015 ONSC 1487, at paras. 16, 17, referencing *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) ["***Soundair***"].

47 See e.g. *Re Target Co.*, 2015 ONSC 2066 [Commercial List], at para. 17; see also *Elleway Acquisitions Ltd. v. 4358376*, 2013 ONSC 7009 [Commercial List], at para. 33 ["***Elleway***"].

limited potential purchasers for those assets. As a result, it was appropriate for the receiver to have canvassed only those potential purchasers when seeking to transfer the assets in question.[48]

51. The Applicants submit that many, if not all, of the subsection 36(3) factors are satisfied here, both in relation to the transfer of the ecobee Shares and the sale of the Consideration Shares, viewed in light of the specific circumstances of the Transaction:

(a) The assets at issue here are unique – the ecobee Shares represent a minority interest in a non-related company and are subject to the terms of the USA.

(b) The Just Energy Entities have been actively attempting to sell their 8% interest in ecobee for several years without success.[49] Similarly, ecobee has been unsuccessfully marketing itself to potential acquirors over a lengthy period of time, with the support of its advisers.[50] The Arrangement is the best – and likely the only – viable Transaction available.

(c) Given the already extensive efforts both by the Just Energy Entities and ecobee to identify a viable transaction, this Court can be confident that the best price has been obtained in the circumstances. Moreover, for the Transaction to close, the CBCA Court must first determine that the Arrangement is fair and reasonable, which should provide additional comfort in this regard. The consideration obtained under

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48 *Soundair*, above at paras. 46, 72.

49 Sixth Carter Affidavit, para. 15.

50 Sixth Carter Affidavit, paras. 31 to 34.

the Arrangement – including the Consideration Shares and the related valuation – will be approved by the CBCA Court as part of the Arrangement.[51]

(d) The ecobee Board has determined that the Arrangement is a qualifying offer under the USA. As a result, the Drag-Along is likely engaged, such that Just Energy could be forced to sell its equity interest as provided in the Arrangement.[52] Practically speaking, therefore, there is no other viable option for the Just Energy Entities to monetize this equity interest for the benefit of all stakeholders.

(e) Once the Consideration Shares are held by Just Energy, their value is determined by the market, since they are publicly traded. The Arrangement does not contain the customary "lock up" precluding the sale of the Consideration Shares for some period following the consummation of the Arrangement. As a result, Just Energy is requesting the flexibility to sell the Consideration Shares in the market at the appropriate time, in order to maximize their value.[53]

(f) The proposed Transaction enjoys broad support of the Just Energy Entities' stakeholders. Just Energy's Board of Directors unanimously supports the Transaction and agrees that it is in the best interest of the Company, and the Monitor and the DIP Agent, on behalf of the DIP Lenders, support this Transaction.[54]

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51 CBCA, s. 192(4).

52 Sixth Carter Affidavit, para. 45.

53 Sixth Carter Affidavit, para. 43.

54 Sixth Carter Affidavit, paras. 46, 47.

(g) All other relevant stakeholders will have received notice of this Motion and will have an ample opportunity to object, if they consider their interests to be prejudiced. However, the Applicants submit that there is no prejudice to any stakeholder.

52. The Transaction, once completed, will be beneficial to the Just Energy Entities. After adjustments and indemnity holdback amounts, Just Energy anticipates receiving at closing approximately $61 million, comprised of approximately $18 million cash and $43 million of Generac Common Stock. Just Energy can receive up to an additional approximate $10 million in Generac Common Stock in the fiscal years ending June 30, 2022 and 2023, provided that certain performance targets are achieved by ecobee.[55]

53. This represents an approximate $28.1 million premium from the Transaction, representing the difference between the value of the consideration payable under the Arrangement (excluding any upside from the earnout) and the value of the investment most recently recorded in Just Energy's financial statements as at June 30, 2021.[56]

54. For all of these reasons, this Court has the jurisdiction and the discretion to authorize Just Energy (a) to enter into the Support Agreement and to convey the ecobee Shares free and clear, pursuant to the Transaction and the Arrangement; and (b) to sell the Consideration Shares free and clear following completion of the Transaction and the Arrangement.

B. APPROVAL OF THE WIND-UP AND DISSOLUTION TRANSACTIONS

55. Just Energy also seeks this Court's approval of the Wind-Up and Dissolution Transactions. The basis for requesting this approval also derives from the provision in the SARIO restricting the

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[55] Sixth Carter Affidavit, para. 42.

[56] Sixth Carter Affidavit, para. 42.

Just Energy Entities from reorganizing the Business or Property, in whole or in part, without the approval of the CCAA Court.[57]

56. The Court has jurisdiction to approve the Wind-Up and Dissolution Transactions pursuant to the general power to make any order appropriate in the circumstances.[58] The proposed Wind-Up and Dissolution Transactions, which are to take place largely before Just Energy enters into the Support Agreement,[59] are ordinary course tax reorganizations to reallocate assets and liabilities within a corporate group. Internal reorganization transactions within corporate groups under CCAA protection have been approved by this court when they were aligned with overall restructuring aims and would result in a benefit for all stakeholders, as in this case. [60]

57. Such transactions are permitted by Canadian tax laws and could proceed without Court approval or oversight by the Canada Revenue Agency absent the ongoing CCAA and Chapter 15 proceedings and JMC's associated declaration of insolvency. All corporate steps to complete the proposed transaction are permitted under both the DIP Term Sheet and Credit Agreement.[61]

58. Discrete aspects of the Wind-Up and Dissolution Transactions require explanation, as they could potentially be viewed as failing to satisfy certain requirements of the CBCA.

(a) Step 1: under the first step, the stated capital of JMC will be reduced to $0. This reduction is permitted under corporate law, but is potentially subject to a corporate

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57 SARIO, para. 13(c).

58 Sixth Carter Affidavit, para. 51; CCAA, s. 11.

59 For clarity, the final step in the Wind-up and Dissolution Transactions (namely, the filing of articles of dissolution for JMC) can occur in due course, including after the execution of the Support Agreement.

60 See e.g. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7169 (S.C.J. [Commercial List]) at paras. 36-38.

61 Sixth Carter Affidavit, para. 51.

solvency test under subsection 38(3) of the CBCA. Subsection 38(1)(c) states that a corporation is permitted to reduce its stated capital by an amount that is not "represented by" realizable assets. If subsection 38(1)(c) applies, the solvency test under subsection 38(3), by its terms, does not have to be satisfied.[62]

It is not clear whether this provision supports the proposed reduction in stated capital without engaging the solvency test, since it is only after the Wind-Up Transaction is complete that JMC will no longer have any realizable assets. Arguably, this provision should be available, given that the reduction in stated capital is occurring as part of the larger Wind-Up Transaction.

(b) Step 2: under this second step, JMC will purchase for cancellation its Preferred Shares from JEOLP for the JMC Note with a principal amount equal to their FMV, which Just Energy believes to be nominal. Under subsection 34(1) of the CBCA, a corporation is permitted to purchase or otherwise acquire shares issued by it. However, such a repurchase is subject to a corporate solvency test in subsection 34(2). Given the liabilities owed by JMC in its capacity as co-obligor under guarantees of certain indebtedness of the Just Energy Entities (which were the basis for JMC's status as an Applicant in this proceeding), the corporate solvency test is likely not satisfied.

(c) Step 5: as the final stage of this last step, JMC will be voluntarily dissolved under subsection 210(3) of the CBCA, which requires that (a) the shareholders of the

[62] CBCA, s. 38. Subsection 38(3) states, in part: "A corporation shall not reduce its stated capital for any purpose other than the purpose mentioned in paragraph (1)(c) if there are reasonable grounds for believing that …(the corporate solvency test is not satisfied)".

> corporation have authorized the directors to cause the corporation to distribute any property and discharge the liabilities; and (b) the corporation have distributed any property and discharged any liabilities before it sends its articles of dissolution to the CBCA Director under subsection 210(4).[63] However, subsection 208(1) of the CBCA provides that this provision does not apply to a corporation that is an insolvent person, as defined under the *Bankruptcy and Insolvency Act*.[64]

59. There is limited, if any, case law or commentary explaining the rationale for the above requirements. However, it can be inferred that the purpose of such requirements is to protect vulnerable stakeholders (principally, creditors) from certain types of transactions that potentially favour shareholders ahead of creditors, leaving insufficient resources to satisfy prior-ranking creditor entitlements. Thus, for example, a share repurchase under subsection 34(1), which generally involves the corporation paying fair market value to reacquire its own shares, allows an equity investor to fully or partially recover on its investment and exit the corporation. In order to give effect to the subordinate right to recovery of a shareholder relative to creditors, in ordinary circumstances, such a transaction should not occur if the corporation is insolvent, or would be insolvent following the repurchase.

60. Similarly, the unavailability of the voluntary dissolution provisions to insolvent persons is plainly designed to ensure that a corporate dissolution, in circumstances where the corporation is insolvent, occurs under appropriate supervision. Such oversight ensures that the assets and

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63 CBCA, ss. 210(3) and (4).

64 CBCA, s. 208(1).

liabilities are appropriately distributed and/or accounted for, given that those assets are likely not sufficient to satisfy all such liabilities.

61. By inference, this purpose is apparent from the fact that subsection 208(1) provides that the unavailability of the dissolution provisions to insolvent persons does not apply to a dissolution that takes place pursuant to section 212 of the CBCA. Under that section, the CBCA Director can apply to court to dissolve a corporation, including an insolvent corporation. Such dissolution is subject to section 217, which sets out a court-supervised process for such dissolution.[65]

62. All of these considerations regarding the need to protect creditors or subordinate stakeholders, as well as the need to ensure that dissolution occurs under proper supervision, are fully addressed by the oversight of this Court, under the auspices of the CCAA. This Court's oversight ensures that the assets and liabilities of JMC are appropriately accounted for, and that creditors are not prejudiced.

63. The Applicants submit that the Wind-Up and Dissolution Transactions must be viewed in the aggregate. Certain steps of the Wind-Up and Dissolution Transactions may be technically non-compliant with requirements of the CBCA, when viewed in isolation and if they had been undertaken on a stand-alone basis. However, the end result of these Transactions creates a net benefit overall to the Just Energy Entities' estate and makes provision for all of JMC's assets and liabilities in a manner that is entirely consistent with the spirit, if not the letter, of the relevant CBCA provisions.

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[65] CBCA, ss. 208(1); 212(1)(b); 217.

64. The ecobee Shares are the only assets held by JMC.[66] Moreover, JMC's only liabilities consist of its obligations under the guarantee in the DIP Term Sheet and Credit Agreement, as well under the Court-ordered charges granted in these CCAA proceedings, including to applicable secured suppliers. No Proofs of Claim had been filed in the Claims Process against JMC by the Claims Bar Date of November 1, 2021, apart from those directly related to the foregoing.[67]

65. In respect of the Credit Facility, all of the Just Energy Entities are either borrowers or guarantors. In respect of the DIP Term Sheet, all of the Just Energy Entities are jointly and severally liable for such amounts, and the DIP Lenders' Charge (and all other Court-ordered charges) are secured against all present and future assets, property and undertakings of the Just Energy Entities, including JMC and Just Energy.[68]

66. In light of the above, the Wind-Up and Dissolution Transactions not only do not cause any prejudice, but are actually advantageous to the very stakeholders that the CBCA solvency requirements are intended to protect. They not only assist in monetizing non-core assets that have been historically difficult to sell, but at the same time, allow this to occur in a manner that generates a tax benefit in the amount of approximately $6.6 million.[69] The assets that would be available to satisfy JMC's liabilities will continue to exist in the hands of Just Energy, which is a co-obligor with JMC on the exact same liabilities for which JMC is responsible.

67. The requested Order therefore deems the Wind-Up and Dissolution Transactions to comply with sections 34 and 38 of the CBCA, in order (among other things) to provide protection to the

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66 JMC also holds an interest in a dormant partnership that has no value. Sixth Carter Affidavit, para. 52.

67 Sixth Carter Affidavit, para. 52.

68 Sixth Carter Affidavit, para. 52,

69 Sixth Carter Affidavit, paras. 48, 53.

directors of JMC against any future allegation regarding potential technical non-compliance with these provisions.[70] It also relies on this Court's general powers under section 11 of the CCAA to authorize the Wind-Up and Dissolution Transactions, notwithstanding any technical non-compliance with CBCA requirements.

68. The Applicants submit that the requested Order is entirely consistent with the objectives of the CCAA – namely, to maximize value of the debtor's assets for the benefit of all stakeholders. The contrary result – namely that the Just Energy Entities are not permitted to carry out the Wind-Up and Dissolution Transactions – would effectively preclude the Just Energy Entities from fully achieving that objective by denying them the intended tax benefit.

PART IV - NATURE OF THE ORDER SOUGHT

69. For all of the reasons above, the Applicants submit that this Court should grant the relief requested and issue an Order substantially in the form of the draft Order attached at Tab 3 of the Applicants' Motion Record**.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of November, 2021.

per Marc Wasserman / Michael De Lellis / Jeremy Dacks

[70] A director who authorizes a resolution that does not comply with s. 34 can be held personally liable: CBCA, s. 118(2)(a).

SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 7169 (S.C.J. [Commercial List])
2. *Comstock Canada Ltd., Re*, 2014 ONSC 493 [Commercial List]
3. *Elleway Acquisitions Ltd. v. 4358376*, 2013 ONSC 7009 [Commercial List]
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *Re Target Canada Co.*, 2015 ONSC 1487
6. *Re Target Co.*, 2015 ONSC 2066 [Commercial List]

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

***Canada Business Corporations Act*, RSC, 1985, c. C-44**

Acquisition of corporation's own shares

34 (1) Subject to subsection (2) and to its articles, a corporation may purchase or otherwise acquire shares issued by it.

Limitation

(2) A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that

> (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

[…]

Other reduction of stated capital

38(1) Subject to subsection (3), a corporation may by special resolution reduce its stated capital for any purpose including, without limiting the generality of the foregoing, for the purpose of

[…]

> (c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets.

[…]

38(3) A corporation shall not reduce its stated capital for any purpose other than the purpose mentioned in paragraph (1)(c) if there are reasonable grounds for believing that

> (a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

[…]

Further directors' liabilities

118 (2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation:

(a) a purchase, redemption or other acquisition of shares contrary to section 34, 35 or 36;

[…]

Powers of court

192 (4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

[…]

(e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

[…]

Application of Part

208 (1) This Part, other than sections 209 and 212, does not apply to a corporation that is an insolvent person or a bankrupt as those terms are defined in section 2 of the *Bankruptcy and Insolvency Act* .

[…]

Dissolution where property disposed of

210 (3) A corporation that has property or liabilities or both may be dissolved by special resolution of the shareholders or, where it has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote, if

(a) by the special resolution or resolutions the shareholders authorize the directors to cause the corporation to distribute any property and discharge any liabilities; and

(b) the corporation has distributed any property and discharged any liabilities before it sends articles of dissolution to the Director pursuant to subsection (4).

Articles of dissolution

(4) Articles of dissolution in the form that the Director fixes shall be sent to the Director.

[…]

Dissolution by Director

212 (1) Subject to subsections (2) and (3), the Director may

[…]

(b) apply to a court for an order dissolving the corporation, in which case section 217 applies.

[…]

Powers of Court

217 In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit including, without limiting the generality of the foregoing,

[…]

(o) after the liquidator has rendered a final account to the court, an order dissolving the corporation.

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

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.

[…]

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.

[…]

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.

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. ET AL.

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT Toronto

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