

**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., 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.

**REPLY FACTUM OF THE CREDIT FACILITY LENDERS
(Motion for Sale Process Approval Order)**

August 15, 2022

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TO: THE SERVICE LIST

PART I - OVERVIEW

1. The objections raised to the SISP Motion¹ by counsel to the plaintiffs in the Putative Class Actions (the “**Objecting Counsel**”) should be dismissed.
2. The proposed SISP: (i) is a fair and transparent process, with appropriate oversight by the Court-appointed Monitor and the Court; (ii) is consistent with typical sale and investor solicitation processes routinely approved by courts in other proceedings; and (iii) allows all investors, buyers, financiers and other interested parties to participate fully in the process, including any parties identified by Objecting Counsel or otherwise.
3. A critical element of the SISP is the Stalking Horse Transaction, which is the product of extensive negotiation between the Applicants and their key economic stakeholders, and has their support. This includes the support of the Credit Facility Lenders even though it does not fully repay them in cash on closing.
4. Altering the SISP in the manner proposed by Objecting Counsel would be inconsistent with customary CCAA processes, would undermine the efficacy and integrity of the court-supervised process and would be unfair to the key economic stakeholders of Just Energy, including the Credit Facility Lenders, by jeopardizing the Stalking Horse Transaction on which they rely and increasing uncertainty surrounding a going-concern outcome as well as associated time and costs. The objections raised by Objecting Counsel unnecessarily seek to deviate from a typical SISP structure and do so by attacking foundational elements of the Stalking Horse Transaction (and stalking horse bids generally), thereby unnecessarily placing the carefully negotiated structure at risk.

¹ Capitalized terms not defined herein have the meanings given to them in the Factum of the Credit Facility Lenders dated August 13, 2022 and in the Affidavit of Michael Carter, sworn August 4, 2022 (the “**Thirteenth Carter Affidavit**”), Motion Record of the Applicants dated August 4, 2022 (“**Applicants’ Motion Record**”), Tab 2.

PART II - THE FACTS

Background

5. The secured creditors of the Just Energy Entities – a diverse group that consists primarily of the Credit Facility Lenders, the DIP Lenders, CBHT Energy and Shell - hold secured claims totalling about \$1 billion. Those secured claims must be fully repaid in cash, or they must otherwise be addressed in manner acceptable to those secured creditors, before there can be any possible recovery for unsecured creditors.

6. The Applicants are unable to repay their secured creditors in full, so they developed and proposed a CCAA Plan that had the support of that diverse group of key economic stakeholders. However, Objecting Counsel raised objections to the CCAA Plan, creating unacceptable uncertainty for the secured creditors regarding creditor and court approval for, and implementation of, the CCAA Plan.

7. The Just Energy Entities then tried but failed to reach a consensual resolution with the Contingent Litigation Claimants and Pariveda.²

8. With no resolution that would enable the CCAA Plan to move forward, the Applicants engaged in extensive discussions with their key stakeholders regarding the terms on which the secured creditors would continue to support the Applicants' going concern restructuring efforts. Ultimately, the Credit Facility Lenders, the DIP Lenders, CBHT Energy and Shell agreed to support a going concern solution for the Just Energy Entities pursuant to the terms of the SISP Support Agreement. That path forward involves the implementation of the SISP and the Stalking Horse Transaction.³ The terms of the

² Thirteenth Carter Affidavit at paras. 18 and 19.

³ Thirteenth Carter Affidavit at para. 20.

SISP and the extensive prior efforts to market the business of the Just Energy Entities without success are described in greater detail in the Thirteenth Carter Affidavit.

9. The Credit Facility Lenders are supportive of the proposed SISP in the form negotiated, which the expert Financial Advisor has opined is “fair, reasonable and appropriate in the circumstances”, including that it will “provide sufficient time to allow interested parties to fully participate in the SISP.”⁴ The Credit Facility Lenders do not support the changes proposed by Objecting Counsel.

PART III - LAW AND ANALYSIS

A. The SISP is a Typical and Appropriate Process

10. The proposed SISP provides an appropriate and reasonable framework to obtain the best offer for the Applicants’ assets. Its structure – with a protective Stalking Horse Transaction followed by an open and transparent auction – is a typical process that is consistent with numerous SISPs approved in restructuring proceedings.⁵ Its terms are described by the Monitor as “generally customary for sales processes conducted under the CCAA”⁶ that will “serve to maximize recoveries to the benefit of all stakeholders and is a fair and transparent process with the appropriate level of supervision.”⁷

B. Objections to SISP Auction, Supervision and Timing Should be Dismissed

11. Objecting Counsel object to this typical SISP process. In their first two objections, Objecting Counsel seek to impose additional layers of Court involvement and uncertainty into the SISP, including a delay to determine whether an auction should take

⁴ *Ibid* at para. 83.

⁵ See *Nortel Networks Corporation (Re)*, [\[2009\] O.J. No. 3169 \(Ont. S.C.J. \[Commercial List\]\)](#); *Brainhunter., (Re)*, [62 CBR \(5th\) 41 \(Ont. S.C.J. \[Commercial List\]\)](#); *Green Growth Brands, (Re)*, [2020 ONSC 3565](#).

⁶ Eleventh Report of the Monitor dated August 13, 2022 at para. 34 (“**Eleventh Monitor’s Report**”).

⁷ *Ibid* at para. 40.

place if another Qualified Bid materializes. Such changes would create uncertainty for the participants and undermine the process.

12. The professed rationale to seek this unusual deviation from customary process is that Objecting Counsel say it “may be possible”⁸ to present a plan of arrangement (notwithstanding that they have not proposed a plan of arrangement or even a term sheet at any point since these proceedings began 18 months ago, including at any point during the three months that have passed since the Applicants’ proposed CCAA plan was first made public). The changes, they argue, are necessary to enable their plan of arrangement (if they actually have one that pays out the secured creditors) to move forward.

13. The argument being offered by Objecting Counsel is clearly flawed. Any plan of arrangement proposed by Objecting Counsel will need to provide for the full repayment, in cash, of about \$1 billion of secured claims. Unless Objecting Counsel, or the putative classes of Contingent Litigation Claimants, have \$1 billion of their own personal resources that they intend to invest, any such plan of arrangement will in substance be an investment or acquisition transaction funded by one or more third parties.

14. Soliciting proposals of that nature, in a manner that is fair and transparent for all participants and stakeholders, is the precise purpose of the SISP.

15. Nonetheless, Objecting Counsel argue that the SISP should be amended to enable them to short-circuit the fair and transparent SISP process by bringing forward a financier and having the financier’s plan approved outside the SISP, without participating in the auction process.

⁸ Responding Factum of U.S. Class Counsel dated August 13, 2022 (“**Objecting Counsel’s Factum**”) at para. 30.

16. This requested approach should not be countenanced. Allowing an interested bidder or “financier” to participate separately and to evade the approved process and auction would be akin to running a separate, shadow process.

17. Not only would that be contrary to the generally-accepted principles of fairness and transparency but also it would cause confusion for bidders who are legitimately participating in the SISP, potentially chilling the process.⁹ As the Monitor noted in confirming that it does not support this proposal from Objecting Counsel: “the uncertainty that would be introduced into the process by the proposed amendment may dissuade otherwise interested participants in the SISP from devoting the necessary resources to develop a bid for the Company.”¹⁰

18. There is no reason to permit such negative effects on the process when any potential financier that may be identified by Objecting Counsel can and should participate in the SISP.

19. The proposed SISP is a typical process. It permits parties to propose a sale or investment proposal – by way of an asset purchase, share purchase, plan of arrangement or otherwise – which will then be assessed in accordance with the terms of the SISP by the Applicants’ board of directors, with the assistance of the Financial Advisor and Monitor. If indeed the Objecting Counsel are aware of a financier, then that third party should participate in the SISP and be subject to the same rules and procedures as all other participants.

⁹ Affidavit of Michael Carter sworn August 11, 2022 at para. 20. (the “**Fourteenth Carter Affidavit**”), Responding Motion Record of the Applicants dated August 11, 2022 (“**Applicants’ Motion Record**”), Tab 1.

¹⁰ Eleventh Monitor’s Report at para. 34.

20. Similarly, there is no basis to diverge from the typical SISP to require additional Court scrutiny of other decision-points throughout the process. The SISP is already subject to appropriate supervision and oversight. First, the Court approves the SISP itself. Second, the process will be overseen by the Court's officer, the Monitor, who will report to the Court. The Monitor serves as the eyes and ears of the Court and, to the extent of any unfairness, the Monitor can be expected to raise the issue with the Court. Finally, and importantly, any successful transaction remains subject to Court approval. If the Objecting Counsel are concerned with any unfairness in the implementation of the SISP, then that concern can be raised before the Court at the hearing to approve and implement the successful transaction.

21. Imposing additional Court-approval requirements during the SISP would add additional uncertainty, time and cost to the process that the Applicants cannot afford and the key stakeholders do not support. While Objecting Counsel seek to characterize their desired changes as extending the timeline only "very slightly," their proposed changes not only extend the timeline well beyond the timeline that the Financial Advisor and the Monitor say is appropriate but also would create an uncertain timeframe with bulleted dates for the additional proposed hearings and no clear end date for the process.

22. It is important to remember that the Credit Facility Lenders are entitled to repayment of the Credit Facility in full ahead of unsecured creditors but have agreed to compromise their senior secured position to achieve the Stalking Horse Transaction.¹¹

23. As discussed further below, it would be unfair to the Credit Facility Lenders and other key stakeholders to put the Stalking Horse Transaction and therefore their

¹¹ In the Stalking Horse Transaction, the Credit Facility Lenders have agreed to leave a portion of their secured claims outstanding and to provide exit financing by way of the new credit facility.

recoveries at risk. In addition, during the course of the SISP, the Credit Facility Lenders' recoveries are being subjected to risks associated with ongoing CCAA costs, market volatility and business risk. These risks are being incurred to accommodate an additional opportunity – above and beyond the marketing performed by the company in recent years and despite no party coming forward after the “fiduciary out” was made public in connection with the proposed Plan – to determine if there is a better transaction that would benefit stakeholders.

24. The Credit Facility Lenders are willing to tolerate this ongoing risk for the duration of the SISP in the form presented, which is a fair, balanced and appropriate process. However, the Credit Facility Lenders do not support the amendments proposed by the Objecting Counsel, given the additional uncertainty, time and costs that they create unnecessarily.

C. Break Fee and Information Sharing Objections Should Also be Dismissed

25. With respect to the objections advanced by the Objecting Counsel regarding the break-fee and access to information provided to the DIP Lender pursuant to the SISP, the Credit Facility Lenders submit that such objections should also be dismissed.

26. Stalking horse agreements bring significant benefits to CCAA debtors and their stakeholders when pursuing a sale process. Among other things, they can help to facilitate a sale by establishing a baseline price and transactional structure for superior bids from interested parties, maximizing the value of a business for the benefit of all stakeholders, enhancing the fairness of the sale process, and assuring a going-concern result of the business.¹²

¹² *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) at para. 20; *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750 \(Ont. S.C.J. \[Commercial List\]\)](#) at para. 7.

27. The Stalking Horse Transaction in this case is an important element of the SISP and an important reason why the Applicants were able to obtain the support of their key stakeholders in the SISP Support Agreement. The Stalking Horse Transaction provides certainty and stability with respect to a going-concern restructuring outcome.

28. Given the importance of the Stalking Horse Transaction to the restructuring of the Just Energy Entities as well as the view of the Financial Advisor and Monitor that the break-fee is reasonable, the Credit Facility Lenders support it and do not support any revision that would imperil the security that the Stalking Horse Transaction provides to the going-concern restructuring.

29. The Objecting Counsel argue that the SISP can proceed as a blind bidding process if the stalking horse bidder is not prepared to act as such under their proposed amendments.¹³ However, this submission shows complete disregard for or disinterest in the negative impact this would have on creditors with an economic interest at stake and on the Applicants and their employees, suppliers, customers and other stakeholders. Those parties are relying on and will benefit from the certainty and stability provided by the Stalking Horse Transaction.

30. The Credit Facility Lenders also support the sharing of information as proposed in the SISP. Since the SISP proposed in this case is a transparent one, with the Stalking Horse Transaction disclosed to all parties, an auction process in which Qualified Bids will be disclosed, and oversight of the Monitor throughout, concerns regarding disclosure of information to another bidder do not arise in this case. Moreover, it is often important in a sale process for potential bidders to communicate with key stakeholders, making it

¹³ Objecting Counsel's Factum at para. 40.

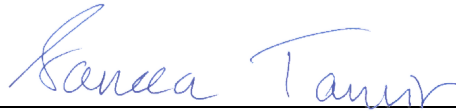
sensible to provide for disclosure to secured creditors such as the DIP Lender and Credit Facility Lenders.

31. With respect to the Objecting Counsel's request to continue a process to estimate their claims, the Credit Facility Lenders agree with the Applicants that such a process is premature and would be unnecessary in the absence of a proposed transaction that provides some form of recovery to unsecured creditors after satisfying secured claims in full.

PART IV - ORDER REQUESTED

32. The Credit Facility Lenders submit that this Court should dismiss the objections of the Objecting Counsel and issue the SISP Order substantially in the form attached at Tab 3 of the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2022.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Brainhunter., (Re)*, [62 CBR \(5th\) 41 \(Ont. S.C.J. \[Commercial List\]\)](#)
2. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750 \(Ont. S.C.J. \[Commercial List\]\)](#)
3. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
4. *Green Growth Brands, (Re)*, [2020 ONSC 3565](#)
5. *Nortel Networks Corporation (Re)*, [\[2009\] O.J. No. 3169 \(Ont. S.C.J. \[Commercial List\]\)](#)

**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

**REPLY FACTUM OF THE CREDIT FACILITY
LENDERS
(Motion for Sale Process Approval Order Returnable
August 17, 2022)**

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