Court File No.

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

March 9, 2021

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PART I - NATURE OF THIS APPLICATION

1. This factum is filed in support of an application by Just Energy Group Inc. ("**Just Energy**") and the other applicant companies listed above (together, the "**Applicants**") for an initial order (the "**Initial Order**") and other relief under the C*ompanies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"). In this Application, the Applicants seek a stay of proceedings (the "**Stay**"**)** for the permitted initial ten-day period (the "**Initial Stay Period**") under section 11.02(1) of the CCAA, together with related relief necessary to preserve the Applicants' business during the Initial Stay Period.

2. The Applicants and certain related entities (the "**Just Energy Group**") are retail energy providers of electricity and natural gas to both consumer and commercial customers. As a result of the unforeseeable financial impacts on their business of the extreme weather event that occurred in February 2021 in Texas (the Applicants' largest market), as well as the regulatory response to this event, the Applicants are in immediate need of the protection offered by the CCAA, together with DIP financing to pay amounts to regulators and others to ensure the business continues as a going concern during the Initial Stay Period.

3. The Applicants' business consists of a complex web of highly interdependent relationships. Without a stable relationship with upstream commodity suppliers that supply the energy to be delivered to Just Energy's customers, the business cannot function. Equally, without the necessary regulatory licences or permits that allow Just Energy to trade on applicable energy markets and to market and sell natural gas or electricity to its downstream commercial and consumer customers at the retail level, Just Energy's business cannot operate. Adverse events directly affecting one aspect of the business – such as the extreme Texas weather event and the response of the Texas

regulators –can have ripple effects in other aspects of the business. In extreme circumstances, such events can threaten the viability of the whole business, as they have here.

4. This Court has the broad jurisdiction to grant relief, including the Stay and related relief requested in this Applicant, to address the unique circumstances in which a debtor company finds itself. For the Initial Stay Period, section 11.001 of the CCAA limits the available relief to what is necessary to "keep the lights on" for the first ten days. What this will entail is inherently fact specific, and depends on the nature of the debtor's business and of the specific risks to that business in the near term.

5. All of the relief requested by the Applicants in this application meets the exigency standard established under section 11.001. The requested relief is also a fundamentally interconnected package of measures that reflects the significant interdependence of the Applicants' key stakeholder relationships both north and south of the border, and the detrimental impact of recent events on each of the critical inputs to the Applicants business. These measures must therefore be viewed holistically. Thus:

(a) The requested stay of regulatory actions by Canadian and foreign regulators is crucial to protect the downstream business from regulatory steps such as the revocation or suspension of licences, potentially resulting in a transfer of all customers to other providers. Such steps could effectively destroy the business in the Initial Stay Period, even before the Applicants have the opportunity to explore restructuring solutions and engage with the applicable regulators regarding a viable path forward.

(b) The requested court-ordered supplier charges are designed (and essential) to create incentives for certain key commodity suppliers to continue trading and supplying

the energy in the post-filing period that is required to serve the Applicants' customers. At least some key suppliers could otherwise be entitled to terminate their eligible financial contracts notwithstanding the Stay.

(c) The requested debtor-in-possession ("DIP") financing is critical to provide the Applicants with the liquidity to satisfy material regulatory and other demands that are immediately due in the Initial Stay Period. These demands must be satisfied to avoid devastating consequences to the Applicants' ability to operate in its regulated markets, particularly in Texas.

6. The other relief sought in this initial application – such as the Administration Charge and the FA Charge, the Director and Officer Charge (all as defined below), as well as the authority to pay pre-filing amounts – supports these critical measures. The extent of this supporting relief is also tailored to address only the likely requirements of the Applicants in the Initial Stay Period, with further needs to be addressed at the Comeback Hearing.

7. If granted, the requested relief will ensure that the Just Energy Group's business can continue as a going concern while it explores restructuring solutions. A successful restructuring will in turn allow the Just Energy Group to preserve enterprise value and employment, and continue to service a customer base of over 950,000 customers. All of these objectives are within the core of the purposes of the CCAA, which provides the flexibility needed to achieve this potentially complex cross-border restructuring.

PART II - FACTS

8. The facts regarding this Application are fully set out in the Affidavit of Michael Carter.[1]

A. CORPORATE STRUCTURE

9. Just Energy is incorporated under the *Canada Business Corporations Act* ("**CBCA**"). It is a public company listed on the Toronto Stock Exchange and the New York Stock Exchange. Its head offices are in Mississauga, Ontario and Houston, Texas. Just Energy's registered office is in Toronto, Ontario.[2]

10. Just Energy is the ultimate parent company of the Just Energy Group.[3] All of the other Applicants are direct or indirect subsidiaries of Just Energy.[4] Just Energy directly or indirectly wholly owns its Canadian subsidiaries and indirectly wholly owns its US subsidiaries.[5] The Just Energy Group also includes an Indian subsidiary that supports the Just Energy Group's operations in North America.[6]

B. THE JUST ENERGY GROUP'S BUSINESS

(a) *Nature of Business*

11. The Just Energy Group primarily supplies electricity and natural gas commodities to both consumer and commercial customers. These sales are made mainly under long-term fixed price

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1 Affidavit of Michael Carter, sworn March 9, 2021 [Carter Affidavit]. Capitalized terms not otherwise defined have the same meanings as in the Carter Affidavit. All references to monetary amounts in this affidavit are in Canadian dollars unless otherwise noted.

2 Carter Affidavit at para. 19.

3 Carter Affidavit at para. 16.

4 See Carter Affidavit at para. 16, Exhibit F (corporate organization chart as of November 10, 2020).

5 A description of the material Canadian and US subsidiaries is set out in the Carter Affidavit at paras. 20 to 22 .

6 Carter Affidavit at para. 23.

contracts, with some customers on month-to-month variable-price arrangements. As of December 31, 2020, the Just Energy Group had a total of 956,000 customers (859,000 consumer and 97,000 commercial customers).[7] The Just Energy Group also provides various green products[8] and offers home filtration systems through Filter Group Inc.[9]

12. As of March 1, 2021, the Just Energy Group employed approximately 979 full-time employees and 5 part-time employees.[10] The Just Energy Group also had contracts with 23 independent contractors.[11]

(b) ***Impact of Regulation***

13. The Canadian and US natural gas and electricity markets are highly regulated.[12] In most jurisdictions where the Just Energy Group operates, the applicable Just Energy entities are subject to oversight from public utility commissions or independent electricity system operators ("**ISOs**") responsible for ensuring the financial stability of market participants and continued supply to customers. Many of the applicable Just Energy entities operate under licenses or other permits that are critical to their ability to trade on energy markets and to market and sell natural gas and electricity to customers in particular jurisdictions.[13]

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7 Carter Affidavit at para. 24.

8 Carter Affidavit at paras. 25 and 26.

9 Carter Affidavit at para. 28. Further details regarding the Just Energy Group's retail business are set out at paras. 28 to 31. Details regarding the commercial business are at paras. 32 to 35.

10 See Carter Affidavit at para. 46.

11 Carter Affidavit at para. 47.

12 Carter Affidavit at para. 36.

13 Carter Affidavit at para. 38.

14. In Texas, which is the Just Energy Group's largest market, the Just Energy Group's electricity business is subject to oversight from the Electric Reliability Council of Texas ("**ERCOT"**), an ISO for most of the Texas electrical market, which is, in turn, overseen by the Public Utility Commission of Texas ("**PUCT**").[14] The Just Energy Texas Entities have electricity licences in relation to their operations in Texas.[15]

15. The Just Energy Group is required to post collateral or other forms of financial comfort with ERCOT in an amount determined pursuant to ERCOT's protocols. If the Just Energy Group is unable to provide such financial comfort or pay its invoices when due, ERCOT can suspend the Just Energy Group's market participation in as little as 2 days and transfer the Just Energy Group's customers to a Provider of Last Resort ("**POLR**") on 5 days' notice. Such actions would be devastating to the Just Energy Group's business.[16] The Texas market accounts for approximately 47% of Just Energy's embedded gross margin ("**EGM**").[17]

16. Other entities in the Just Energy Group are subject to regulation in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario, as well as in various U.S. states other than Texas.[18] Based on concerns about solvency, these regulators could also take steps, such as revocation or suspension of licences. Such steps could effectively shut down operations in that jurisdiction and

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[14] Carter Affidavit at para 7. Details regarding the manner in which the Texas market is regulated are set out at paras. 100 to 103.

[15] Carter Affidavit at para. 101.

[16] Carter Affidavit at para. 106.

[17] Carter Affidavit at para. 11.

[18] See Carter Affidavit at paras. 39 and 44, and Exhibit H.

potentially cause the transfer of all the customers in that jurisdiction to a default provider, with a devastating effect on the business.[19]

(c) ***Importance of Commodity Suppliers***

17. The Just Energy Group transacts with various upstream suppliers to purchase gas and electricity products (the "**Commodity Suppliers**") for delivery to its customers.[20] The key Commodity Supplier Agreements are eligible financial contracts.[21] The Just Energy Group cannot supply energy to its customers if these relationships are terminated and the effect of such steps would therefore be devastating to the viability of the business.

18. With respect to the physical supply of gas and electricity from the Commodity Suppliers, the Just Energy Group typically purchases gas and electricity for larger commercial customers when it executes the contract for that customer. For remaining customers, supplies are purchased based on forecasted consumption.[22]

19. The Just Energy Group enters into hedges with Commodity Suppliers in order to minimize commodity and volume risk. The Just Energy Group also purchases various weather derivatives to mitigate its exposure to variances in customer requirements that are driven by changes in expected weather conditions.[23] In its planning for current winter season (November 2020 – March

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19 Carter Affidavit at paras. 43 and 45.

20 Carter Affidavit at para. 57.

21 Carter Affidavit at para. 158.

22 Carter Affidavit at para. 57.

23 Carter Affidavit at para. 58.

2021), the Just Energy Group had positioned its portfolio under all known historical weather and commodity scarcity scenarios to not have its exposure exceed $10 million in the aggregate.[24]

20. In addition to supply agreements, the Just Energy Group is also party to ISO services agreements (the "**ISO Services Agreements**") with certain Commodity Suppliers (in such capacity, the "**ISO Services Providers**"). The most significant is an Independent Electricity System Operator Scheduling Agreement (the "**BP Agreement**") with BP Energy Company ("**BP**") under which BP provides a variety of services as well as working capital and credit support.[25]

21. The services provided under the BP Agreement are critical to the delivery of energy to the Just Energy Group's commercial customers. Absent this agreement, the Just Energy Group would be obligated to provide these services itself and would be subject to shorter payment terms for amounts owing to the ISOs.[26]

(d) ***Distribution Arrangements***

22. The Just Energy Group transacts with various third-party local distribution companies ("**LDCs**") to distribute electricity and natural gas to both commercial and consumer customers. The Just Energy Group also receives certain customer billing and customer collection services from LDCs in various markets. These LDC agreements are critical to the delivery of electricity and natural gas in the Just Energy Group's markets.[27]

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[24] Carter Affidavit at para. 59.

[25] See Carter Affidavit at para. 60 for a detailed description of this arrangement.

[26] Carter Affidavit at para. 61.

[27] Carter Affidavit at para. 62. Further details regarding these arrangements are found at paras. 64 to 65.

23. The Canadian counterparties to the LDC Agreements are incumbent public utilities in all of the Canadian provinces where the Licence-holders carry on business. They include both privately-owned entities (such as Enbridge Gas, Fortis BC, and ATCO Gas) and publicly-owned entities (such as Toronto Hydro, SaskEnergy, and City of Lethbridge). They are themselves regulated entities and, in most cases, the terms of the LDC Agreements with the Licensed Entity are established and approved by the Provincial Regulators.[28]

(e) ***Surety Bonds***

24. Several bonding agencies (the "**Sureties**") have issued surety bonds to states, regulatory bodies, utilities, and others in order for the Just Energy Group to operate in certain states or markets. The total surety bonds issued as at December 31, 2020 were $46.3 million.[29]

25. Most of the Sureties can require collateral on demand at any time; one Surety can do so on 30 days' notice. If the Just Energy Group does not discharge the liability or post the required collateral, the Sureties have right to cancel the underlying bond in as little as 10 days. Just Energy and various other members of the Just Energy Group have entered into indemnity agreements with the Sureties with respect to such surety bonds. Following the extreme weather event, the Sureties have demanded that the Just Energy Group post approximately $34M in additional collateral.[30]

26. The cancellation of certain bonds may, in turn, trigger the suspension or cancellation of licenses that the Just Energy Group requires in order to carry on its business in its highly regulated

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[28] Carter Affidavit at para. 63.

[29] Carter Affidavit at para. 66.

[30] Carter Affidavit at para. 67.

environment, leading to all of the devastating regulatory consequences to the business that are described above.[31]

C. FINANCIAL POSITION OF THE JUST ENERGY GROUP

27. The Just Energy Group's financial position is described in detail in the Carter Affidavit**.**[32] Just Energy's latest quarterly financial statement included a going concern note explaining that following the recent extreme cold weather in Texas, the Just Energy Group's ability to continue as a going concern for the next 12 months is dependent on the company meeting the potential liquidity challenges and potential non-compliance with debt covenants resulting from this event.[33]

(a) *Capital Structure*

28. The Just Energy Group's capital structure includes trade debt, the Credit Facility, the Term Loan, the Subordinated Note, and Common Shares, the nature of which are summarized below.[34]

(i) *Trade Debt*

29. The Just Energy Group's financial obligations to its primary Commodity Suppliers in North America, which include Shell, BP, Exelon, Bruce Power, EDF Trading North America, LLC, Nextera Energy Power Marketing, LLC, Macquarie and Morgan Stanley Capital Group Inc. (collectively, the "**Secured Suppliers**"), are secured under general security agreements, pledges of securities, and other security documents. As of January 31, 2021, the Just Energy Group owed

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31 Carter Affidavit at paras. 68.

32 Carter Affidavit at paras. 75, 77 to 79.

33 Carter Affidavit at para. 76.

34 Carter Affidavit at para. 80. Further details, including priorities of payment are set out in the Carter Affidavit.

its Secured Suppliers approximately $198.96 million. The Just Energy Group currently estimates this amount will increase to approximately $244 million as at March 31, 2021.[35]

30. The Just Energy Group has also posted letters of credit to secure its obligations to certain Commodity Suppliers other than the Secured Suppliers.[36] In addition, Filter Group is the borrower under an outstanding loan from Home Trust Company to finance the cost of rental equipment over a period of three to five years (the "**Filter Group Loan**"). As of December 31, 2020, there was approximately $5.5 million outstanding under the Filter Group Loan.[37]

(ii) *Credit Facility*[38]

31. Just Energy Ontario L.P. and Just Energy (U.S.) Corp. (collectively, the "**Credit Facility Borrowers**") are borrowers under a ninth amended and restated credit agreement (as amended from time to time, the "**Credit Agreement**") made as of September 28, 2020 with a syndicate of lenders (the "**Credit Facility Lenders**").[39] As at March 5, 2021, there was approximately $227.86 million in principal outstanding under the $335 million credit facility under the Credit Agreement, plus outstanding letters of credit amounting to $103.96 million. The letters of credit are issued to various counterparties, primarily utilities and suppliers.[40] Borrowing capacity under the Credit Facility is only $2.9 million as of March 5, 2021 as a result of recent draws, including following the Texas weather event.[41]

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35 Carter Affidavit at para. 83.

36 Carter Affidavit at para. 84.

37 Carter Affidavit at para. 85.

38 The relative priority of the Credit Facility and other non-trade debt is set out at para. 86 of the Carter Affidavit.

39 Carter Affidavit at para. 87 and Exhibit M**.**

40 Carter Affidavit at para. 89.

41 Carter Affidavit at para. 90.

32. The Credit Facility Borrowers' obligations are guaranteed by certain subsidiaries and affiliates and secured by general security agreements from the Credit Facility Borrowers and such subsidiaries and affiliates, pledges of their securities of the Credit Facility Borrowers, and other security documentation. The Applicants are all borrowers under the Credit Facility or have delivered a guarantee and a general security agreement in respect of the Credit Facility.[42]

33. The Secured Suppliers, the Credit Facility Borrowers, certain subsidiaries and affiliates of the Credit Facility Borrowers (including Just Energy), and the agent for the lenders under the Credit Agreement are party to an intercreditor agreement (the "**Intercreditor Agreement**") setting out the relative priority of the parties' security interests. The Secured Suppliers rank *pari passu* with the Credit Facility Lenders, subject to a waterfall.[43]

(iii) *Other Indebtedness*

34. As part of the CBCA Recapitalization,[44] Just Energy issued a U.S. $205.9 million principal note (the "**Term Loan Agreement**") maturing on March 31, 2024 to Sagard Credit Partners, LP and certain funds managed by a leading U.S.-based global fixed income asset manager (the "**Term Loan Lenders**"). As at December 31, 2020, approximately $273.48 million was drawn on the Term Loan.[45] Also as part of the Recapitalization, Just Energy issued $15 million principal of subordinated notes ("**Subordinated Notes**") (since reduced to $13.2 million) to holders of certain subordinated convertible debentures that were extinguished as part of the Recapitalization.[46]

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42 Carter Affidavit at para. 91.

43 Carter Affidavit at para. 96, Exhibit P.

44 Details regarding the Recapitalization are discussed in the Carter Affidavit at paras. 98 to 99.

45 Carter Affidavit at paras. 92 to 93.

46 Carter Affidavit at para. 95, Exhibit O.

D. NEED FOR URGENT RELIEF

35. Beginning on February 13, 2021, Texas experienced an unprecedented and catastrophic energy crisis when a powerful winter storm resulted in temperatures across the State that were well below 20°F.[47] For February 2021, the Just Energy Group had weather hedges in place to cover an incremental 50% increase in customer usage above normal February consumption. However, due to the extreme cold weather, customer usage increased significantly above the weather hedges for a sustained period.[48]

36. The financial impact of the storm was exacerbated by the actions of the Texas regulators. On February 15, the PUCT instructed ERCOT to set the Real Time Settlement Point Price at the high offer cap ("**HCAP**") of U.S. $9,000 per megawatt hour ("**MWh**"). This price was kept at these extreme levels for four days, even after the PUCT ordered ERCOT to return prices to normal levels. As a result, the Just Energy Group was forced to balance its power supply through ERCOT at artificially high electricity prices and significantly increased ancillary service costs.[49] The Just Energy Group estimates that it may have incurred losses and additional costs of up to $312 million as a result of the PUCT and ERCOT's actions and the winter storm.[50]

37. The Just Energy Group has disputed both the artificially high prices and the extraordinary ancillary costs charged by ERCOT. However, pursuant to ERCOT protocols, it must pay even disputed invoices within two days of receipt or risk suspension as a market participant and the

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47 See Carter Affidavit at paras. 108 to 109.

48 Carter Affidavit at para. 110.

49 Carter Affidavit at paras 8, 111 to 116.

50 Carter Affidavit at para. 8.

resulting transfer of all its Texas customers to a POLR.[51] Despite the historic nature of the winter storm and the unprecedented resulting costs incurred by energy retailers, both ERCOT and the PUCT have, to date, ignored the Just Energy Group's and other market players' requests to suspend ERCOT's usual protocols.[52]

38. The Just Energy Group has therefore been forced to pay its unexpected invoices to ERCOT. On March 5, 2021, the Just Energy Group received three invoices for approximately USD $123.21 million from ERCOT, of which approximately USD $96.24 million must be paid by the end of the day on March 9, 2021. On March 8, 2021, the Just Energy Group received from ERCOT (i) a notice that it must post approximately U.S. $25.7 million of additional collateral within two business days; and (ii) three invoices for approximately U.S. $ 25.46 million, of which approximately U.S. $18.86 million is due by March 10, 2021.[53]

39. The Just Energy Group does not have the liquidity to satisfy these obligations without the support of DIP financing. If it does not make such payment, ERCOT will almost immediately be in a position to suspend the Just Energy Group's market participant status and transfer all of the Texas customers to a POLR, with devastating effects on the Applicants' business.[54]

40. The Just Energy Group's financial challenges arising from the weather event have caused ripple effects with other business partners and regulators. Certain of the Sureties demanded that the Just Energy Group provide more than $30 million in additional collateral (over $20 million has already been provided and the rest expected by March 17). The Sureties threatened or had already

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51 Carter Affidavit at para. 117 to 122.

52 Carter Affidavit at para. 12.

53 Carter Affidavit at paras. 13 and 14, 125.

54 Carter Affidavit at para. 13, 125.

begun cancellation of the bonds already issued. Specific regulators have communicated with the Just Energy Group to express concern. On March 22, 2021, approximately $270 million owing to counterparties under the ISO Services Agreements (defined below) will come due.[55]

41. The combined effect of these and other factors gives rise to the urgent need to obtain the proposed Initial Order, together with all the interconnected relief, in order to preserve the business for the Initial Stay Period, maintain employment for almost 1,000 employees and to pave the way to explore longer term restructuring solutions.

PART III - ISSUES AND THE LAW

42. The principal issues on this Application are whether:

(a) the Applicants meet the criteria to obtain relief under the CCAA;

(b) this Court should grant the Stay, including in relation to set-off rights, should extend the stay to the Just Energy Partnerships, and grant the Regulatory Stay;

(c) this Court should grant the Priority Commodity/ISO Provider Charge and should authorize the payment of certain pre-filing amounts to critical suppliers;

(d) this Court should approve the Interim Financing and grant the DIP Lenders Charge;

(e) this Court should grant the Administration Charge, the FA Charge and the Director and Officer Charge; and

(f) this Court should issue a sealing order.

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[55] Carter Affidavit at para. 15 and 123.

A. THE APPLICANTS MEET THE THRESHOLD CRITERIA FOR CCAA RELIEF

(a) *The Applicants are Insolvent*

43. The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars.[56] The total claims against the Applicants are far in excess of this amount.

44. Pursuant to section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.[57] Whether a company is insolvent for the purposes of the definition of "debtor company" is evaluated by reference to the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*[58] and to the expanded concept of insolvency accepted by this Court in *Stelco.*[59]

45. In order to give effect to the CCAA objectives of allowing the debtor company breathing room to restructure, a debtor is insolvent under the *Stelco* approach if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured. [60]

46. The Just Energy Group is currently insolvent. Both the test under the BIA and the expanded *Stelco* test are satisfied. It faces a looming liquidity crisis as a result of the financial impacts caused by the extreme cold weather event in Texas, including the steps taken by the Texas regulators and

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56 CCAA, s. 2(1), "debtor company", 3(1).

57 CCAA, ss. 2, 3(1).

58 R.S.C. 1985, c. B-3 [*BIA*].

59 *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal to ONCA refused 2004 CarswellOnt 2936 (C.A.), leave to appeal to SCC refused 2004 CarswellOnt 5200 (SCC).

60 *Stelco*, above at para. 26. *Stelco* has been followed by this Court in a number of cases, including in *Re Target Canada Co.*, 2015 ONSC 303 at paras. 26–27 [*Target*] in which Morawetz J. (as he then was) concluded that the debtor company was insolvent either under the BIA test or the expanded *Stelco* test, and most recently, in *Laurentian University of Sudbury*, 2021 ONSC 659 [*Laurentian University*] at paras. 30 to 33.

the additional demands from creditors described above. If it does not pay its outstanding invoices to ERCOT on March 9, 2021 and March 10, 2021 (i.e. 2 days after receipt), ERCOT will be in a position shortly thereafter to shut down the Texas business and cause all of the Texas customers to revert to a POLR.[61]

47. The Just Energy Group has significant liabilities coming due that it cannot currently pay. Just Energy is therefore insolvent as it cannot meet its liabilities as they come due. In addition, the Just Energy Group continues to be exposed to financial risk as a result of the impacts of the Texas weather event and the Applicants' CCAA filing, including the risk of additional resettlement invoices from ERCOT.[62]

(b) Ontario court is the appropriate venue for these proceedings

48. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in (*inter alia*) the province in which the head office or chief place of business of the company in Canada is situated. The Applicants' chief place of business is in Ontario. One of the Applicant's head offices is located in Mississauga and its registered office is in Toronto.[63]

49. Although the Just Energy Group is a consolidated business, with offices and primary operations in both Canada and the United States, its center of main interest ("**COMI**") is in Canada.[64] Just Energy has assets in Canada. Its operations are directed, in part, from its head office

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61 Carter Affidavit at paras. 13, 106 and 121.

62 Carter Affidavit at para. 129.

63 Carter Affidavit at para. 19.

64 Carter Affidavit at para. 170. See also CCAA, s. 45(2): *Re Angiotech Pharmaceuticals Ltd.*, 2011 BCSC 115 [In Chambers], at para. 7.

in Toronto. Decisions regarding the Just Group's primary business (buying, selling and hedging energy) are primarily made in Canada. All other members of the Just Energy Group report to Just Energy. Just Energy Corp., a Canadian subsidiary, provides operational and administration functions for the Just Energy Group as a whole.[65]

50. In connection with the recent CBCA Recapitalization, which was recognized under Chapter 15 of the US *Bankruptcy Code*, Canada was determined to be the COMI for the Just Energy Group.

51. The Applicants consist of certain US affiliates of Just Energy. Subsection 3(1) of the CCAA states that it applies in respect of a debtor company or affiliated debtor companies, if the claims against such companies total more than $5 million.[66] The Applicants are all affiliated. The businesses of the Applicants both in Canada and the US are inextricably intertwined. Among other things, the Applicants are all borrowers under the Credit Facility or have delivered a guarantee and a general security agreement in respect of the Credit Facility.[67]

52. This Court has accepted that a multinational enterprise such as the Applicants' business must be restructured as a global unit. As a result, this Court refused the request of two Ghanian subsidiaries of a CCAA debtor for an order that the CCAA proceeding not apply to their Ghanian property. Central to the Court's reasoning was the finding that the COMI for the CCAA debtor

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65 Carter Affidavit at para. 170.

66 CCAA, s. 3(1).

67 Carter Affidavit at para. 91.

was Ontario. Moreover, it was critical to the restructuring that the entire group of applicants be included in the CCAA proceedings.[68]

53. If the proposed Initial Order and related relief is granted, Just Energy intends to commence a recognition proceeding under chapter 15 of the US Bankruptcy Code in Texas.[69] This relief will ensure that actions taken in relation to US entities and US property, including by US regulators, are overseen by the US courts.

B. PURPOSE AND SCOPE OF THE STAY

(a) *Purpose of the Stay*

54. The purpose of the CCAA is "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[70] Those costs extend beyond the immediate creditors and employees of the debtor company.[71] The flexibility of the CCAA is particularly well-suited to complex restructurings, like the case at bar.[72]

55. The stay of proceedings has been described as the "engine" that drives the broad and flexible statutory scheme of the CCAA.[73] As such, it has been broadly interpreted to apply to both judicial and extra judicial proceedings that could prejudice an eventual arrangement.[74] This Court

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68 *Re Ghana Gold Corp*, 2013 ONSC 3284 at paras. 55 to 56.

69 Carter Affidavit at paras. 134 and 168 to 170.

70 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para. 15.

71 *Century Services*, above at paras. 17 and 18. See also *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 at para. 40.

72 *Century Services*, above at para. 21.

73 *Nortel Networks Corp*., Re, 2010 ONSC 1304 at para. 34 [*Nortel* (UK Regulator)], citing *Re Stelco Inc*., 2005 CarswellOnt 1188 (C.A.) at para. 36.

74 *Nortel* (UK Regulator), above at para. 36.

also has broad jurisdiction under section 11 of the CCAA to grant any order that it thinks fit, subject to the limitations in the CCAA, including in the new section 11.001 of the CCAA.

(b) *Requested Stay and Related Relief Limited During Initial Stay Period*

56. Section 11.02(1) permits this Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the Applicants have acted with due diligence and in good faith.[75] Under new section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under section 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."[76]

57. In *Lydian*,[77] one of the first cases to interpret this provision, Morawetz C.J. stated that, "absent exceptional circumstances", the relief granted during the Initial Stay Period should be limited and where possible, the *status quo* should be maintained during that period.[78] The Initial Stay Period allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.[79]

58. Whether particular relief is necessary to stabilize a debtor company's operations during the Initial Stay Period is an inherently factual determination, based on all of the circumstances of the particular debtor.[80] Although Morawetz C.J. provided examples in *Lydian* of the types of relief that

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75 CCAA section 11.02(3)(a-b).

76 CCAA, section 11.001.

77 *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List] [*Lydian*].

78 *Lydian*, above at para. 26.

79 *Lydian*, above at para. 30.

80 See for example, *Laurentian University*, above, in which the CCAA Court granted a variety of relief during the Initial Stay Period that was particular to the debtor company's factual circumstances.

might be appropriate in the Initial Stay Period,[81] there are no "hard and fast" rules. Consistent with the objectives of the CCAA and its flexibility, it remains open to this Court, where circumstances dictate it, to grant relief during the Initial Stay Period in one CCAA restructuring that may not be appropriate in another.

59. The relief requested by the Applicants in the Initial Stay Period is extensive. However, each aspect of the relief is interdependent with other aspects, and is critical to respond to the extraordinary circumstances in which the Applicants find themselves, the unique urgency created by those circumstances and the fundamentally interconnected nature of the Applicants' business. In this sense, all of the requested relief– as submitted further below – consists of exactly the type of essential "keep the lights on" measures that are contemplated by section 11.001 of the CCAA.

C. THE REGULATORY STAY SHOULD BE GRANTED

60. The Regulatory Stay is one of the three central aspects of the package of measures (together with the supplier charges and the DIP financing) that are critical during the Initial Stay Period to address the impact on the Applicants' business of recent events. The Regulatory Stay is intended to prohibit Canadian provincial regulators (as described further below) from taking steps that could fundamentally undermine or even destroy the viability of the Applicants' business – and in particular, the downstream business involving the marketing and selling of gas or electricity to retail customers – before the Applicants have had a reasonable opportunity to explore restructuring solutions.

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81 *Lydian*, above at para. 27.

(a) ***Need for the Regulatory Stay***

61. The need for the Regulatory Stay derives, at first instance, from the fact that regulators are generally not caught by the "engine" that is the broad Stay under the CCAA. One of the express exceptions to the Stay applies to a "regulatory body", as defined in the CCAA:[82]

> In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

62. A "regulatory body" – namely, a person, entity or organization exercising regulatory powers at the provincial or federal level in Canada – is exempt from the application of the Stay in relation to investigations, actions and other proceedings, except where the proceeding relates to the enforcement of a payment ordered by the regulatory body or the court.[83]

63. A number of the Applicants and related entities (the "**Licence-holders**") hold licences (the "**Licences**") to carry out their energy retailer business in Canada. The Licences are granted by provincial regulatory bodies (the "**Provincial Regulators**") and are necessary for the Licence-holders to market and sell natural gas and/or electricity to consumers in the particular province.[84]

64. Additionally, one Just Energy entity – Hudson Energy Canada Corp. – is registered as a market participant with the Alberta Electricity System Operator (the "**ISO Regulator**"). This registration allows the purchase and sale of electricity in the wholesale electricity market in Alberta

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82 CCAA, s. 11.1(1), "regulatory body".

83 CCAA, s. 11.1(2).

84 Carter Affidavit at para. 39. Key licences and Regulators are set out in the Chart attached to the Carter Affidavit as Exhibit H.

and the import/export of electricity with neighbouring jurisdictions.[85] The ISO Regulator, together with the Provincial Regulators, are hereinafter referred to as the "**Regulators**".

65. In specific circumstances, on notice to the regulatory body and the persons likely to be affected by the order, the debtor company can apply to the CCAA court for an order requiring the Stay to apply to all proceedings or steps that may be taken by the regulatory body, despite the exemption in subsection 11.1(2). Although there are, as yet, no reported cases granting relief under section 11.1(3) of the CCAA, the Applicants submit that this is a clear case in which such relief is both justified and indispensable. The statutory two-part test for obtaining such relief is satisfied.[86]

(i) Necessary for Viable Compromise or Arrangement

66. The Licence-holders have sixteen Licences issued by five Provincial Regulators that allow them to market and sell gas or electricity to customers in these provinces. No business activities (either selling to new customers or delivering electricity to existing customers) can take place without these Licences.[87]

67. On grounds including concern regarding the Licence-holder's financial responsibility or solvency, the Provincial Regulators can suspend or cancel the Licences or impose new and more onerous terms of the Licence-holders. In most cases, such steps would (i) prevent any marketing or selling natural gas or electricity to potential new customers, and (ii) terminate the ability to serve

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85 Carter Affidavit at para. 40.

86 CCAA, s. 11.1(3).

87 See Carter Affidavit at para. 43 and Exhibit H.

existing customers under contract and force the transfer of those customers to other suppliers (usually the incumbent utility companies).[88]

68. Without the stable of customer contracts that the Licence-holders have invested many years developing, the Applicants will instantly lose vital revenue streams, threatening their viability before they have a reasonable opportunity to explore restructuring solutions.[89] Moreover, the Provincial Regulators can take steps against the Licence-holders even in the absence of any harm to customers or other participants in the energy sector (see next section).

69. At least two Provincial Regulators have initiated contact with the Just Energy Group to express concern about the Just Energy Group's ongoing viability. Subsequent to that, an incumbent utility in one of those jurisdictions has requested that the Provincial Regulator authorize the utility to no longer permit the Licence-holder to enrol new customers in Manitoba.[90]

70. With respect to the ISO Regulator, participation in the wholesale electricity market is essential to the Just Energy Group's ability to supply electricity to retail customers in Alberta and neighbouring jurisdictions. An insolvency event constitutes an event of default under the applicable Market Rules, which permit the ISO Regulator to suspend trades and participation in the market, and then terminate the market registration.[91]

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88 See Carter Affidavit at para. 42.

89 Carter Affidavit at para. 42.

90 Carter Affidavit at para. 41 and Exhibit G.

91 Carter Affidavit at para. 40.

71. The Regulatory Stay, if granted, will mitigate the material risk that steps taken by the Regulators will destroy the business, and any possibility of a viable compromise or arrangement along with it. This branch of the statutory test is clearly satisfied.

(i) Regulatory Stay Not Contrary to Public Interest

72. The fundamental purpose of the regulatory regime governing energy (gas and electricity) retailers can be traced back to energy sector reforms across much of North American that began in the 1980s and 1990s. Through these reforms, non-utility power generators and retailers/marketers gained access to many North American energy markets, which were previously served exclusively by traditional, monopoly public utilities. These regulatory regimes were reformed to facilitate and encourage companies like Just Energy to enter energy markets.[92]

73. The rationale for opening the energy commodity market to competition was to provide gas and electricity to consumers at lower cost, through price competition, as well as offering greater choice for customers. As a corollary to opening the market to greater competition for gas or electricity retailers like Just Energy, the regulatory regime encompasses two important public interest goals:

(a) To provide for consumer protection in the marketing of gas or electricity at the retail level; and

(b) To establish standard contractual terms and conditions governing the relationship between energy retailers and the incumbent utilities, largely to ensure that utilities

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92 Carter Affidavit at para. 36.

> do not utilize their dominant monopoly position to impair retailers from selling and contracting with retail customers.[93]

74. Viewed from the perspective of these goals, the Regulatory Stay is not contrary to the public interest. In relation to existing customers, there is no risk to the public if the Regulatory Stay precludes the Provincial Regulators from taking steps in relation to the Licenses for the period of the Regulatory Stay. The Licence-holders will continue supplying those customers in the ordinary course, in accordance with the contracts signed by the customers and at the price agreed upon by those customers. There is no risk of price fluctuation beyond what those customers have already agreed to. There will be no risk of interruption to the reliable supply of gas or electricity to those customers.

75. In relation to both existing and new customers, the Licence-holders will remain subject to all terms and conditions of their Licences, as well as applicable statutory and regulatory requirements, Rules, and Codes of Conduct regarding energy supply and marketing to consumers. Where applicable, the Provincial Regulators will continue to have security for the Licence-holders' obligations.

76. During the period of the Regulatory Stay, the Licence-holders will operate under the supervision of the CCAA Court and the court-appointed Monitor. In addition, if approved, the Just Energy Group will have the benefit of the additional liquidity provided through DIP financing to ensure ordinary course operations can continue while a solution to their current financial challenges is explored. The supplier charges (described below) will secure the continued supply by the Commodity Suppliers and the ISO Service Provider in the post-filing period.

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93 Carter Affidavit at para. 37.

77. By contrast, allowing the Provincial Regulators to take steps to suspend or cancel the Licences would, in most cases, result in the reversion of the Licence-holders' customers to a default supplier (usually the incumbent utility), and cause significant and unnecessary disruption to the market:

(a) It would be disruptive to customers, effectively overriding those customers' choice of energy supplier and potentially depriving them of the advantageous fixed pricing that they contracted to receive.

(b) It would be disruptive to other market participants, particularly upstream suppliers of gas or electricity whose contracts with the Licence-holders will be terminated and liquidated.

(c) It would be disruptive to the retail gas and electricity markets more generally, by removing a major retailer from the Canadian market – and undermining the fundamental public policy goal of greater competition in retail energy markets.

78. It would be premature to cause such disruption in circumstances where the Licence-holders do not yet know whether they can achieve a viable restructuring and continue their businesses under the Licenses. Given the safeguards inherent in this proceeding, the Applicants submit that there is no prejudice in postponing actions by the Provincial Regulators while the Licence-holders seek to restructure their businesses.

79. In relation to the ISO Regulator, the Just Energy Group has posted all required collateral.[94] In addition, the oversight of the Court and the Monitor, as well as the liquidity provided by the

[94] Carter Affidavit at para. 40.

DIP financing and the security of supply obtained through the supplier charges, if approved, should alleviate any concerns about permitting the Just Energy Group to maintain its market participant status, despite its insolvency filing.

80. Under the protection of the Regulatory Stay, the Applicants will have the breathing room to embark on ongoing engagement with the Regulators to ensure that applicable requirements are satisfied and that there is a viable path forward. If circumstances change and the Provincial Regulators perceive specific risks to the public interest, it will be open to them to seek to lift the Regulatory Stay and propose steps to address such concerns.

(b) ***Regulatory Stay Must Be Included in Initial Order***

81. The potential threat to the viability of the Applicants' entire business if regulatory steps are taken during the Initial Stay Period is so material that the Applicants request that this Court include the Regulatory Stay in the proposed Initial Order, should it be granted. The Applicants cannot risk waiting until the Comeback Hearing to obtain the Regulatory Stay as it is possible that there would be no business to restructure at that point. On this basis, granting the Regulatory Stay during the Initial Stay Period is entirely consistent with section 11.001 of the CCAA.

82. Given the urgency of the need for the Applicants to obtain the protection of the Stay, it was not feasible to provide notice to the Regulators and any other affected parties prior to seeking the proposed Initial Order, including the Regulatory Stay. However, if the Regulatory Stay is granted for the Initial Stay Period, the affected Regulators and other parties will be immediately notified and will have a full opportunity to make submissions at the Comeback Hearing, should they wish to do so.

(c) *Effect of Stay on Foreign Regulators*

83. The Stay presumptively applies to all persons who might bring proceedings or take both judicial or extra-judicial steps against the debtor or its property, unless there is an express exemption in the CCAA. Since the Stay is the "engine" of the CCAA, the exceptions to the Stay in the CCAA are limited. Such exemptions are interpreted strictly, consistent with the objective of allowing a debtor company the breathing room necessary to restructure its affairs.[95]

84. A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the CCAA. As such, foreign regulators do not benefit from the same exemption from the Stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian CCAA Court. The CCAA courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the CCAA court's jurisdiction.[96]

85. This result is consistent with the language of the model CCAA order, which stays "all rights and remedies of any individual, firm, corporation, governmental body or agency….". The reference to "governmental body" is subject to an express exemption for investigations, actions, suits or proceedings by a "regulatory body" (i.e. Canadian regulator) that are permitted under section 11.1 of the CCAA.[97]

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95 *Re Nortel Networks Corp*., 2009 CarswellOnt 3583 (S.C.J.) at para. 66, aff'd 2009 ONCA 833 at para. 17.

96 *Nortel* (UK Regulator), above, at paras. 41 and 42.

97 Model Order, para. 15.

86. The Applicants seek a broad Stay, consistent with the model Order, that applies to all persons, including foreign regulators.[98] The Just Energy Group's subsidiaries that operate in the United States are also subject to extensive regulation. As in Canada, energy regulators in the United States are empowered to take actions that could fundamentally undermine or even destroy the viability of the Applicants' business before they have a reasonable opportunity to explore restructuring solution.[99]

87. In order to give effect to the Stay as against parties in the United States, the Applicants intend to commence a proceeding to recognize this Canadian proceeding under Chapter 15 of the US *Bankruptcy Code.*[100] The extent to which the Stay will be recognized as against US regulators will be a matter for the US bankruptcy court to consider, under US law.

D. THE SUPPLIER PROTECTIONS SHOULD BE APPROVED

(a) *Priority Commodity/ISO Charge is Necessary and Appropriate*

88. The protection of the "upstream" supplier relationships is another core aspect of the relief requested in this application. Without stable relationships with upstream suppliers – including the Commodity Suppliers and the ISO Services Providers – the Just Energy Group cannot (among other things) acquire the energy it requires to supply the downstream business.[101] In particular, if the Commodity Suppliers and the ISO Services Providers are unwilling to enter into new

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98 In proposed Initial Order, the language of the Model Order has been modified to refer expressly to a "foreign regulatory body" for greater clarity: Draft Initial Order, para. 12.

99 Carter Affidavit at para. 134.

100 Carter Affidavit at para. 134.

101 Carter Affidavit at paras. 158 to 161.

transactions in the face of the financial challenges experienced by the Applicants, the Just Energy Group will be unable to continue as a going concern, let alone successfully restructure.[102]

89. The proposed protections for these suppliers are therefore essential to preserving the whole business, including the regulated aspects of the business that are proposed to be protected by the Regulatory Stay. Without both measures in place (together with the DIP financing discussed below), there are very material risks that the Applicants' operations cannot continue, even in the Initial Stay Period.

90. The Commodity Agreements are, for the most part, "eligible financial contracts" ("**EFC**") within the meaning of the CCAA.[103] There is a risk that other "upstream" supply agreements will also fall within this definition.

91. Typically, an EFC will contain rights for a counterparty to terminate, including on the basis of the other party's insolvency or filing under the CCAA. Although the Stay ordinarily prevents parties to contracts with a debtor company from exercising termination rights, including on the basis of a counterparty insolvency, EFCs are not subject to this prohibition and no order under the CCAA can have the effect of preventing an EFC counterparty from netting and setting off obligations or dealing with its financial collateral.[104] EFC counterparties may therefore be in an immediate position to terminate their agreements on the filing of the Applicants under the CCAA.

92. Since EFC counterparties cannot be precluded by the Stay from exercising termination and related rights, the Applicants submit that the Commodity Suppliers and the ISO Services Providers

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[102] Carter Affidavit at para. 160.

[103] Carter Affidavit at para. 158; CCAA, s. 2(1), "eligible financial contract"; *Eligible Financial Contract Regulations*.

[104] CCAA, s. 34(1), (7), (8) and (9).

must incentivized to continue transacting with the Just Energy Group in the post-filing period and to voluntarily refrain from exercising termination or other rights. It is proposed that any counterparty to a Commodity Agreement or ISO Agreement as of March 9, 2021 that has executed a Qualified Support Agreement with a Just Energy Entity and has not breached any of its obligations thereunder will be granted a court-ordered priority charge (the "**Priority Commodity/ISO Charge**") in an amount equal to the value of the amounts that are due and payable in connection with certain transactions with the Just Energy Entity.[105]

93. The CCAA provides this Court with considerable flexibility to design remedies that are necessary and appropriate to ensure that the debtor's operations can continue in the post-filing period without undue prejudice to affected stakeholders. For example, the CCAA expressly authorizes the debtor company to compel a critical supplier to continue supplying to the business in the post-filing period and to protect that supplier's potential economic exposure by means of a priority charge.[106]

94. The express statutory authority to grant a critical supplier declaration and to compel the supplier to supply during the post-filing period is, effectively, the "high water mark" of the Court's authority in relation to suppliers.[107] The Applicants do not propose to compel the beneficiaries of the Priority Commodity/ISO Charge to continue to supply in the post-filing period (and it is doubtful that they could legally do so). However, the authority of this Court to make such a coercive order supports this Court's authority to grant the less drastic relief requested here.

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105 Carter Affidavit at para. 159.

106 CCAA, section 11.4.

107 See *Re Soccer Express Trading Corp.*, 2020 BCSC 749.

95. Furthermore, as this Court has previously held, the express authority to compel a critical supplier to supply in the post-filing period and the requirement to grant a critical supplier charge in such circumstances, does not otherwise oust the Court's jurisdiction under section 11 of the CCAA to make any order that it considers appropriate (subject to the limits regarding the Initial Stay Period under section 11.001).[108]

96. The Applicants request that this Court exercise its broad authority under section 11 of the CCAA to grant the Priority Commodity/ISO Charges. As a general matter, court-ordered priority charges like a critical supplier or similar charge must be granted on notice to other secured parties whose position will be affected by the court-ordered charge.[109] There is no such express requirement in relation to the general powers of the CCAA Court under section 11 of the CCAA.

97. The Just Energy Group has entered into Qualified Support Agreements with Shell and BP,[110] its two most significant Secured Suppliers. In these Qualified Support Agreements, among other things, Shell and BP have agreed to not exercise any termination rights and to supply and deliver services under their existing agreements consistent with historical practice and perform such other acts that are required to satisfy all of their obligations. However, Shell and BP's obligation to continue supplying is conditional on the Court granting the Priority/Commodity ISO Charge.[111]

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[108] *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222 [*Canwest*] at para. 50.

[109] See for example, CCAA, s. 11.4(1); s. 11.51 and 11.52.

[110] The specific Shell and BP entities that are parties to these arrangements are identified in para. 159 of the Carter Affidavit.

[111] Carter Affidavit at para. 161.

(b) *Authorization to Pay Pre-filing Amounts*

98. In the draft Initial Order, the Applicants also seek authorization, with the consent of the Monitor, to make certain payments, including pre-filing amounts owing in arrears, to certain third parties that provide services that are integral to the Applicants' ability to operate.[112] This is a further measure designed to protect the Applicants' essential supplies and services during the post-filing period.

99. Such authorization is typically granted on the basis of this Court's jurisdiction to make orders that it thinks appropriate under section 11 of the CCAA. As noted above, this Court has confirmed that the express powers to grant a critical suppliers charge under section 11.4 does not oust the court's inherent jurisdiction to grant other critical supplier protections, including provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor.[113]

100. Case law demonstrates that a supplier is viewed as "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services and/or it would be difficult or impossible to secure an alternate supplier.[114]

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[112] Draft Initial Order, para. 7. See also Carter Affidavit at paras. 164 to 165.

[113] *Canwest*, above at para. 50

[114] See, for example, *Target*, above at paras. 62 to 65; *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 [*Clover Leaf*] at paras. 24 to 27.

E. APPROVAL OF INTERIM FINANCING

101. The DIP Facility and related DIP Lender's Charge (defined further below) are the third essential elements of the measures required during the Initial Stay Period to ensure the survival of the Applicants' business under the Comeback Hearing.

102. Section 11.2 of the CCAA gives the Court the statutory authority to grant a DIP financing charge. The Court may also make an order, on notice to secured creditors who are likely to be affected by the security, granting a priority charge to the DIP provider over the debtor's property. The security or charge may not secure a pre-filing obligation.[115]

103. Under the recent CCAA amendments, when an application for interim financing is made at the same time as an initial application, the applicant must satisfy the court that the terms of the loan are "limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period [i.e. the Initial Stay Period]."[116] These recent amendments substantially codify principles that have previously been expressed in CCAA case law.[117]

104. The recent amendments do not preclude DIP financing and a related DIP charge – including very material amounts – from being approved during the Initial Stay Period, as long as such amounts are required in order to "keep the lights on" during this time period. Several CCAA

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[115] CCAA, section 11.2(1).

[116] CCAA, section 11.2(5).

[117] See, for example, *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para. 24.

courts have granted applications for interim financing at the time of the initial order since this amendment came into force.[118]

105. Section 11.2(4) of the CCAA lists the factors to be considered by the Court in deciding whether to approve DIP financing and grant a DIP financing charge. These factors favour the requested relief.

106. The Just Energy Group urgently requires interim financing to provide stability, continue going concern operations, and to restructure its business.[119] After soliciting interest from five of its largest stakeholders and engaging with these parties, as well as certain external stakeholders,[120] the Applicants have accepted a commitment for DIP financing in the amount of USD $125 million (the "**DIP Facility**").[121]

107. The DIP Facility is proposed to be secured by a court-ordered priority charge (the "**DIP Lenders Charge**") over the Applicants property. It will have priority over all other security interests, charges and liens, except the Administration Charge, the FA Charge, the Directors' Charge and the KERP Charge. It will rank *pari passu* with the Priority Commodity/ISO Charge. It will not secure any pre-filing amounts.[122]

108. The funds available under the DIP Facility will be used to meet the Just Energy Group's funding requirements during the CCAA proceedings, in accordance with the Cash Flow

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[118] See *Clover Leaf*, above at paras. 20 to 24; *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234, at paras. 73 to 90; *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586, at para. 2.

[119] Carter Affidavit at para. 135.

[120] Carter Affidavit at para. 136.

[121] Carter Affidavit at para. 137 and Exhibit DD. The commercial terms for the DIP Facility are summarized at para. 138 of the Carter Affidavit.

[122] Carter Affidavit at para. 139.

Forecast.[123] The Applicants, with the assistance of the proposed Monitor, have sized the DIP to address the Just Energy Group's urgent liquidity needs over the first ten days of this proceeding.[124] The Applicants therefore seek approval for an initial draw of USD $100 million on March 9, 2021 to enable it to pay specified amounts that are known to be due during the Initial Stay Period. These amounts are specified in the Cash Flow Forecast.[125]

109. The balance of funds that will only be used if necessary to ensure that the Applicants have the flexibility to address additional unforeseen liquidity demands made during the Initial Stay Period, given the nature of the Applicants' business, including the continued risk of receipt of future resettlement invoices from ERCOT that are required to be paid within 2 business days of receipt. At the Comeback Hearing, the Applicants intend to request the authority to drawn down the remainder of the DIP Facility in accordance with the Cash Flow Forecast.[126]

110. The Applicants are acting in good faith in the face of their current financial challenges. They have engaged BMO (as described further below) to assist with restructuring solutions. The Applicants have engaged with most of their major stakeholders leading up to the filing. There has been no indication of any lack of confidence in the company's management.

111. No viable compromise or arrangement is possible without the DIP Facility. In fact, without the immediate liquidity provided by the initial DIP draw, the Applicants' business is in serious jeopardy and may not survive beyond the Initial Stay Period.

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123 Carter Affidavit at para. 140.

124 Carter Affidavit at para. 140.

125 Carter Affidavit at para. 140.

126 Carter Affidavit at para. 140.

112. DIP financing will be ordered where the benefits of financing to all stakeholders outweigh the potential prejudice to some creditors.[127] Even if it can be established that some creditor is materially prejudiced, this factor is only one factor to be considered in equal measure with the others listed in s. 11.2(4) of the CCAA.[128]

F. SET OFF RIGHTS SHOULD BE STAYED

113. To preserve the *status quo* in relation to their cash management system, the Applicants seek, in the Initial Order, to preclude present and future banks from exercising any "sweep" remedy under applicable documentation or from exercising any rights of set-off against any account in the Cash Management System (subject to certain exceptions).[129]

114. Section 21 of the CCAA preserves the right of set-off in a CCAA proceeding:

> The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

115. Although rights of set-off are preserved under the CCAA by section 21, the CCAA Court may, in appropriate circumstances, impose a temporal stay on the exercise of those rights.[130] There is no language in section 21 exempting set-off rights from the operation of the Stay. This is in contrast to other provisions of the CCAA, which expressly provide that certain rights cannot be subject to the Stay.[131] As the British Columbia Court has observed, the broad discretion accorded

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127 *Re AbitibiBowater Inc*, 2009 QCCS 6453 at para 16 [*AbitibiBowater*].

128 *Re League Assets Corp.*, 2013 BCSC 2043 at para. 57; *AbitibiBowater*, above at para 37.

129 Draft Initial Order, para. 5. See also Carter Affidavit at para. 131.

130 See *Air Canada (Re)*, 2003 CarswellOnt 4016 (S.C.J.) at para. 25.

131 *North American Tungsten Corp. (Re)*, 2015 BCSC 1382 at para. 28; leave to appeal to BCCA refused, 2015 BCCA 390 [*Tungsten* (Leave)], leave to appeal decision affirmed by Review Panel of the BCCA.

to the CCAA Court to make orders in furtherance of the objectives of the CCAA must, as a matter of logic, extend to set-off.[132]

116. In any event, due to the waterfall provisions of the Intercreditor Agreement, it is doubtful that any "sweep" of cash by the banks to apply to the Applicants' indebtedness under the Credit Facility would constitute true set-off. Proceeds of such a "sweep" would, in accordance with the waterfall, have to be turned over to higher ranking creditors, rather than being applied to retire indebtedness owed to the bank.[133] Such a "sweep" would, in substance, be a *de facto* enforcement proceeding in favour of higher ranking creditors, which would be contrary to the objective of preserving the *status quo* and a level playing field among creditors during the restructuring.

117. The Applicants will require all of the cash in the accounts in the Cash Management System to maintain going concern operations while they seek to restructure. Moreover, funding under the DIP Facility and post-filing receipts from the operation of the Applicants' business will be deposited into such accounts.[134] It would be contrary to fundamental principles of fairness under the CCAA if the bank could simply sweep such amounts in its own interests and it would entirely undermine the ability of the Applicants to restructure. It is therefore appropriate to impose a "temporal" Stay to defer the exercise of any rights of set-off by the banks.

G. ADMINISTRATION CHARGE AND D&O CHARGE ARE APPROPRIATE

(a) Administration Charge and Financial Advisor Charge

118. In addition, the Applicant proposes that the Monitor, its counsel, and counsel to the Applicant be granted a typical court-ordered charge on all of the present and future assets, property

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132 *Tungsten* (Leave), above at para. 16.

133 Carter Affidavit at para. 96.

134 Carter Affidavit at para. 131.

and undertaking of the Applicant as security for their respective fees and disbursements relating to services rendered in respect of the Applicant up to a maximum amount of $2.2 million for the Initial Stay Period, with a proposed increase to be addressed at the Comeback Hearing (the "**Administration Charge**").[135]

119. The Applicant seeks approval for its retention of BMO Nesbitt Burns ("**BMO**") as its financial advisor to assist in exploring and evaluating potential transactional alternatives. As part of the proposed Initial Order, the Applicants seek the approval of the related charge (the "**FA Charge**") up to a maximum amount of $1.8 million for the Initial Stay Period, with a proposed increase at the Comeback Hearing, to secure amounts payable to BMO.[136]

120. The FA Charge is proposed to rank *pari passu* with the Administration Charge, both of which will have first priority over all other charges.[137]

121. Section 11.52 of the CCAA gives this Court the jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts.[138] In determining whether to approve an administration charge, the Court will consider: (a) the size and complexity of the businesses under CCAA protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the

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135 Carter Affidavit at para. 142.

136 Carter Affidavit at para. 143.

137 Carter Affidavit at para. 143.

138 CCAA, section 11.52.

charge; and (f) the position of the Monitor.[139] These factors have been applied in numerous proceedings.[140]

122. The Proposed Monitor, its counsel, BMO and the Applicant's counsel are essential to the implementation of the CCAA Transaction. It is unlikely that these advisors will participate in the CCAA proceedings without the Administration Charge. Furthermore, the Initial Stay Period component of the Administration Charge is limited to what is "reasonably necessary" for the Initial Stay Period, given the intensive demands on the advisors leading up to the filing, together with the likely further demands prior to the Comeback Hearing.

(b) *Directors' and Officers' Protection*

123. A successful restructuring of the Just Energy Group will only be possible with the continued participation of its directors, officers, management, and employees. These personnel are essential to the viability of the Applicant's business and the preservation of enterprise value.[141]

124. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations. Such charge can rank in priority over the claims of any secured creditor of the debtor company.[142] Exposure to personal liability for directors and officers in the event of an insolvency exists both in Canada and in the US. The Applicants estimate, with the assistance of the Monitor, that the exposure to Canadian statutory

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139 *Canwest*, above, at para 54.

140 See for example *Target*, above, at paras 74 and 75; *Lydian*, above, paras 43 to 54; *Laurentian University*, above at paras. 48 to 59.

141 Carter Affidavit at para. 145.

142 CCAA, s. 11.51. See *Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.) at para 48. See also *Target*, above, at paras. 76 to 78; *Laurentian University*, above at paras. 54 to 59.

liabilities may amount to as much as approximately $5.8 million.[143] In the US, the exposure may amount to as much as approximately $30 million.[144]

125. Just Energy's present and former directors and officers are among the potential beneficiaries under insurance policies with an aggregate annual limit of U.S. $38.5 million. The D&O insurance has various exceptions, exclusions, and carve-outs where coverage may not be available and claims under the policy have already been made. Moreover, the sheer complexity of the overall enterprise creates risk and uncertainty such that there is concern that this insurance policy may not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this CCAA proceeding.[145]

126. The current D&O Insurance expires, by its own terms, on April 1, 2021. The Applicants are currently in the process of seeking a renewal of the existing policy, or a replacement policy with the purchase of a "tail" for the existing policy.[146] If replacement insurance is obtained, the available limits may be lower than those that are available under the existing policy.

127. The continued service and involvement of the Just Energy directors and officers in this proceeding is therefore conditional upon the granting of a charge in the amount of $30 million on the Property (the "**Directors' Charge**"). The Directors' Charge is proposed to be subordinate to the Administration Charge and the FA Charge, but to rank in priority to all other charges. The Directors' Charge is necessary so that the Applicant may benefit from its directors' and officers'

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143 Carter Affidavit at para. 146.

144 Carter Affidavit at para. 147.

145 Carter Affidavit at paras. 149.

146 Carter Affidavit at para. 148.

experience with the Applicant's business and industry, and so that its directors and officers can guide Just Energy's restructuring efforts.[147]

H. THE STAY SHOULD BE EXTENDED TO THE PARTNERSHIPS

128. The CCAA expressly applies, by its terms, to debtor companies, but not partnerships.[148] Where the operations of partnerships are integral and closely related to the operations of the Applicant, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted on multiple occasions.[149]

129. The limited partnerships listed in Schedule A of the Carter Affidavit (the "**Just Energy LP**s") are not applicants in this proceeding. However, the business and operations of the Applicants are heavily intertwined with the business of the Just Energy LPs. In particular, certain of the Just Energy LPs hold most of the gas and electricity licences granted by Canadian regulators pursuant to which the Just Energy Group conducts business in Canada.[150]

I. A SEALING ORDER IS APPROPRIATE

130. The Applicants request a sealing order in relation to the BMO Engagement Letter and the summary of the KERP**,** both of which are attached as confidential exhibits to the Carter Affidavit. These materials contain commercially sensitive information and/or personal information (in the case of the KERP). In the Applicants' submission, the test for such an order, as established by the

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147 Carter Affidavit at para. 149.

148 CCAA, s. 2, "debtor company".

149 See, for example, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 21; *Target*, above at paras 42 and 43; *4519922 Canada Inc., Re,* 2015 ONSC 124 at para. 37.

150 Carter Affidavit at para. 132.

Supreme Court of Canada, has been satisfied.[151] It is proposed that the confidential exhibits to the Carter Affidavit not form part of the court record pending further order of this court.

PART IV - NATURE OF THE ORDER SOUGHT

131. For all of the reasons above, the Applicant submits that this Court should grant the relief requested and issue an Order substantially in the form of the draft Order attached as **Schedule "A"** to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of March, 2021.

per Marc Wasserman / Michael De Lellis / Jeremy Dacks

[151] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Target* above at paras 28-30; *Laurentian University*, above at paras. 60 to 64.

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *4519922 Canada Inc., Re*, 2015 ONSC 124
2. *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10
3. *Air Canada (Re)*, 2003 CarswellOnt 4016 (S.C.J.)
4. *Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.)
5. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
6. *Laurentian University of Sudbury*, 2021 ONSC 659
7. *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234
8. *Nortel Networks Corp*., Re, 2010 ONSC 1304
9. *North American Tungsten Corp. (Re)*, 2015 BCSC 1382, leave to appeal to BCCA refused, 2015 BCCA 390
10. *Re AbitibiBowater Inc*, 2009 QCCS 6453
11. *Re Angiotech Pharmaceuticals Ltd*., 2011 BCSC 115 [In Chambers]
12. *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222
13. *Re Clover Leaf Holdings Company*, 2019 ONSC 6966
14. *Re Ghana Gold Corp*, 2013 ONSC 3284
15. *Re League Assets Corp.*, 2013 BCSC 2043
16. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])
17. *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List]
18. *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586
19. *Re Nortel Networks Corp*., 2009 CarswellOnt 3583 (S.C.J.), aff'd 2009 ONCA 833
20. *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List])
21. *Re Soccer Express Trading Corp.*, 2020 BCSC 749

Case Law

22. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]), leave to appeal to ONCA refused 2004 CarswellOnt 2936 (C.A.), leave to appeal to SCC refused 2004 CarswellOnt 5200 (SCC)

23. *Re Stelco Inc.*, 2005 CarswellOnt 1188 (C.A.)

24. *Re Target Canada Co.*, 2015 ONSC 303

25. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

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

***Bankruptcy and Insolvency Act*, RSC, 1985, c B-3**

Definitions

2. In this Act, …

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personne insolvable)

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

Definitions

2 (1) In this Act, …

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

…

eligible financial contract means an agreement of a prescribed kind; (contrat financier admissible)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Burden of proof on application

11.02 … (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Meaning of regulatory body

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

…

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

…

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Centre of debtor company's main interests

45… (2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Eligible Financial Contract Regulations, SOR/2007-257

2 The following kinds of financial agreements are prescribed for the purpose of the definition ***eligible financial contract*** in subsection 2(1) of the Companies' Creditors Arrangement Act:

(a) a derivatives agreement, whether settled by payment or delivery, that

(i) trades on a futures or options exchange or board, or other regulated market, or

(ii) is the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets;

(b) an agreement to

(i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents,

(ii) clear or settle securities, futures, options or derivatives transactions, or

(iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sellback agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

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-

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT Toronto

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