CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)
	)
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	) *Jeremy Dacks and Marc Wasserman*, Counsel to the Just Energy Group
	)
– and –	) *Tim Pinos, Ryan Jacobs and Alan Merskey*, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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,	) *David H. Botter and Sarah Link Schultz*, U.S. Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
	) *Heather L. Meredith and James D. Gage*, Canadian Counsel to the Agent and the Credit Facility Lenders
	) *Howard A. Gorman and Ryan E. Manns*, Counsel for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
	) *Danielle Glatt*, Counsel to U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.* and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
	) *David Rosenfeld and James Harnum*, Counsel for Haidar Omarali in his capacity as Representative Plaintiff in *Omarali v. Just Energy*

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.	)	*Robert Kennedy*, Counsel for BP Energy Company and certain of its affiliates
	)	*Jessica MacKinnon*, Counsel for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, Counsel for Chubb Insurance Co. of Canada
Applicants	)	
– and –	)	*Alexandra McCawley*, Counsel for Counsel to Fortis BC Energy Inc.
MORGAN STANLEY CAPITAL GROUP INC.	)	*Robert I. Thornton*, *Rebecca Kennedy*, *Rachel B. Nicholson* and *Puya Fesharaki*, Counsel to FTI Consulting Canada Inc., as Monitor
Respondents	)	
	)	*John F. Higgins*, U.S. Counsel to FTI Consulting Canada Inc., as Monitor
	)	*Ganesh Yadav*, self-represented
	)	*Mohammad Jaafari*, self-represented
	)	**HEARD:** November 2, 2022

ENDORSEMENT

MCEWEN J.

[1] The Applicants (collectively the "Just Energy Entities") bring a motion seeking approval of a going-concern sale transaction (the "Transaction") for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the "RVO") and other related relief.

[2] The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the "Monitor's Order") giving FTI Consulting Canada Inc. (the "Monitor") enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor's reports and fees and a sealing order.

[3] I granted the two orders with reasons to follow. I am now providing those reasons.

BACKGROUND

[4] Just Energy Group Inc. ("Just Energy") and its subsidiaries collectively form the Just Energy Entities. Just Energy is primarily a holding company that operates subsidiaries in Canada and the U.S.

[5] Just Energy is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"). It maintains dual headquarters in Ontario and Texas. Just Energy's shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.

[6] The Just Energy Entities are a retail energy provider. Their principal line of business consists of purchasing retail energy and natural gas commodities from large energy suppliers and reselling them to residential and commercial customers. The Just Energy Entities service over 950,000 residential and commercial customers across Canada and the U.S. and employ over 1,000 employees.

[7] The Just Energy Entities' business is highly regulated. This is because of its nature. The business depends on many licenses, authorizations and permits across multiple jurisdictions in both Canada and the U.S. Without these approvals the Just Energy Entities cannot market or sell energy to its customers.

[8] On March 9, 2022, the Just Energy Entities obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the "*CCAA*") pursuant to an Initial Order under the *CCAA*.

[9] The Just Energy Entities were forced to file for protection under the *CCAA* after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators' response to the storm, posed a significant liquidity challenge that precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN $1.069 billion, with an aggregate book value of liabilities around CDN $1.28 billion.

[10] There is a complicated array of secured creditors. Insofar as the Transaction is concerned, the Pacific Investment Management Company LLC ("PIMCO") manages a number of funds which comprise a portion of the secured creditors and/or the DIP Lenders. These entities constitute the purchaser in the Transaction (the "Purchaser").

[11] There are also several other secured creditors, including the Credit Facility Lenders and secured suppliers. They have reached an agreement with the Just Energy Entities and the Purchaser with respect to the Transaction.

[12] In September 2021, this court granted a Claims Process Order to establish a process to determine the nature, quantum and validity of the claims against the Just Energy Entities.

[13] In May 2022, the Just Energy Entities brought a motion (the "Meetings Order Motion") seeking, amongst other things, authorization to hold a creditors' meeting to vote on their proposed Plan of Compromise and Arrangement.

[14] Some unsecured litigation claimants opposed the Meetings Order Motion: primarily, two uncertified U.S. class actions (together the "U.S. Class Actions"), a certified Ontario class action (the "Omarali Class Action") and plaintiffs in four actions brought in Texas by approximately 250 claimants (the "Mass Tort Claims").

[15] Following my June 10, 2022 Endorsement, the Plan Sponsor—that consisted of the DIP Lenders, one of their affiliates and other stakeholders—withdrew their support for the proposed Plan of Compromise and Arrangement.

[16] Thereafter, the Just Energy Entities, the Plan Sponsor and other supporting stakeholders pivoted to implementing a sales and investment solicitation process (the "SISP") in accordance with the new Support Agreement dated August 4, 2022 (the "SISP Support Agreement"). The SISP included a stalking-horse bid by the Purchaser.

[17] On August 18, 2022, I granted an order (the "SISP Approval Order") that, amongst other things, approved the SISP and SISP Support Agreement with modest modifications.

[18] The SISP was conducted over a 10-week period. It was conducted in accordance with the SISP Approval Order and was well-publicized. The Just Energy Entities negotiated non-disclosure agreements with potential bidders, facilitated access to the data room for those parties, responded to numerous due diligence requests and offered management presentation meetings. Four written notices of intention to bid ("NOIs") were received. Ultimately, however, no bids were received; therefore, the Transaction was declared the successful bid, subject to court approval.

[19] It bears noting that, in addition to the SISP, the business of the Just Energy Entities was broadly and extensively marketed over the past approximately three years. No meaningful proposals were ever received.

[20] Also, at the time of the SISP Approval Order, the Just Energy Entities had been negotiating with their key stakeholders for roughly 1.5 years.

[21] Further, U.S. Class Actions were involved in the SISP but ultimately did not file a NOI or engage in further discussions with the Just Energy Entities in the SISP.

[22] The value that the Purchaser is paying for the Just Energy Entities is approximately U.S. $444 million plus the assumption of several liabilities, all of which provides recovery for the approximately CDN $1 billion in secured claims.

[23] Last, all equity interests of Just Energy and Just Energy (U.S.) Corp. ("JEUS") that exist prior to the proposed implementation of the RVO will be deemed to be terminated, cancelled or redeemed following the closing. The Purchaser will own all the issued and outstanding shares of JEUS. In turn, JEUS will own all of the issued and outstanding shares of Just Energy and the other

acquired entities. The Just Energy Entities will continue to control their own assets, other than the excluded assets, and will remain liable for their respective assumed liabilities.

THE ISSUES

[24] There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor's Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor's reports and fees and a sealing order.

[25] The secured creditors consent to the relief sought. Neither the U.S. Class Actions, the Omarali Class Action nor the Mass Tort Claims opposed the relief sought. The only opposition comes from Mr. Ganesh Yadav, a shareholder, and Mr. Mohammad Jaafari, a former employee of Just Energy who is pursuing a claim in the Tokyo District Court of Japan alleging wrongful termination.

[26] I will first deal with the issues surrounding the RVO and the Monitor's Order. Thereafter I will outline the two specific claims of Mr. Yadav and Mr. Jaafari and explain why I do not believe their claims affect the relief sought by the Just Energy Entities.

REVERSE VESTING ORDERS

[27] A reverse vesting order generally involves a series of steps, whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities.[1]

The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as "Residual Cos.") which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated

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[1] *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828, at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.

by s. 36(4) of the *CCAA*. The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

The Law relating to Reverse Vesting Orders

[28] I begin my analysis with a general review of the law.

[29] The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the *CCAA*. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the *CCAA* that prohibits a reverse vesting order structure: see *Quest University (Re)*, 2020 BCSC 1883, at para. 157.

[30] Some courts have also held that s. 36 of the *CCAA* confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company's assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

[31] In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the *CCAA* should also be considered on a motion to approve a sale, including one involving a reverse vesting order. Section 36(3) stipulates that the court is to consider, among other things,

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[32] In *Harte Gold Corp. (Re)*, 2022 ONSC 653, Penny J. held that the s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank of Canada v. Soundair Corp* (1991), 4 O.R. (3d) 1 (C.A) for the approval of the sale of assets in an insolvency. They are as follows:

- whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- the interests of all parties;

- the efficacy and integrity of the process by which offers have been obtained; and

- whether there has been unfairness in the working out of the process.

[33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)*, at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)*, at para. 168, *Harte Gold Corp. (Re)*, at para. 77 and *Black Rock Metals Inc.*, at para. 114.

[34] The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.

- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.

- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

[35] Given the supporting jurisprudence, I will now discuss why the RVO should be granted and why the Transaction should be approved.

The RVO should be granted

[36] The Just Energy Entities' business, as noted, is highly regulated and depends almost entirely on a substantial number of licenses, authorizations and permits in multiple jurisdictions in Canada and the U.S.

[37] As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

[38] Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial

markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.

- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.

- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.

- Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.

- Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.

- Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.

- Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

- Three separate export authorizations issued by the Department of Energy ("DOE") in the U.S., all of which may only be transferred with the prior authorization of the DOE's assistant secretary.

- Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission ("FERC") in the U.S. which may only be transferred with the prior authorization of FERC.

[39] As further deposed by Mr. Carter, all the provincial, state, market participation, export and import orders, licenses and authorizations held by the Just Energy Entities are either non-transferrable, capable of transfer only with the approval of the applicable regulator, or provide for no clear regulatory process for the transfer of such authorizations.

[40] On Mr. Carter's analysis, the RVO would not hamper the existing licenses, authorizations, orders and agreements. As such, he deposes that the RVO structure is the only feasible structure for the Transaction (at para. 59). Any other structure would risk exposing most of the 89 licenses upon which the Just Energy Entities' business is founded. Mr. Carter also deposes (at para. 75) that if a traditional vesting order was granted, the Purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and

certifications or the issuance of new licenses, authorizations and certifications. This risk and uncertainty would affect the value of a sale to any other purchaser. For this reason, the benefit of the RVO is clear: it preserves the necessary approvals to conduct business.

[41] Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities' ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

[42] No stakeholder disputes Mr. Carter's evidence. More specifically, no stakeholder disputes the importance of maintaining the 89 current licenses, authorizations and certifications listed above. And, no stakeholder disputes the fact that under a traditional asset sale and approval and vesting order structure, a purchaser would have to apply to the various agencies and regulators for transfers of the aforementioned licenses, etc.

[43] I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

[44] The fact that the Just Energy Entities has been operating for approximately 19 months since the *CCAA* filing is critical. As noted by Penny J. in *Harte Gold Corp. (Re)*, at para. 72, time is not on the side of a debtor company facing financial challenges. I agree.

[45] For all the reasons above, I am satisfied that the RVO is appropriate.

[46] I now turn to the s. 36(3) factors.

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

[47] The Transaction was developed by the Just Energy Entities in consultation with the Monitor and its financial advisor, Mr. Mark Caiger, the Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., as well as the Purchaser and other secured lenders. As noted, the SISP was approved by this court and thereafter conducted as per the provisions of the SISP Approval Order. As set out in Mr. Carter's affidavit, the SISP was undertaken in accordance with the SISP Approval Order in two stages.

[48] The overview of the SISP structure is well described in Mr. Caiger's October 19, 2022 affidavit. Amongst other things, in the first stage, the Just Energy Entities and Mr. Caiger prepared a list of potential bidders, established a data room and published a press release announcing the

SISP. Mr. Caiger contacted 41 potential bidders, non-disclosure agreements were negotiated and four NOIs were received.

[49] The process then moved into the second stage. The Just Energy Entities prepared a form of transaction agreement that included a form of approval and RVO for completion by bidders as part of receiving submissions of a qualified bid. Three of the four second stage participants eventually indicated that they were not going to proceed. The remaining party did not submit a bid. It advised the Monitor that it saw no value beyond the stalking-horse bid.

[50] The Transaction before this court is therefore the only going-concern Transaction available to the Just Energy Entities. I am satisfied in the circumstances that the market was thoroughly canvassed and, as noted, in addition to the SISP, the business of the Just Energy Entities has been marketed broadly and extensively for approximately three years. The U.S. Class Actions previously indicated that they may advance their own restructuring plan for consideration and voting by the Just Energy Entities creditors. During this process, they were allowed full participation but ultimately did not file a NOI or further engage in the SISP process.

The Monitor has approved the process

[51] As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly, the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

The Transaction is more beneficial to the creditors than a sale or disposition in bankruptcy

[52] The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

[53] As noted in this endorsement, extensive consultation was undertaken both with the secured creditors, the U.S. Class Actions, the Omarali Class Action and the Mass Tort Claims. There is no suggestion in the record that any creditors were ignored or overlooked.

The effect of the Transaction on creditors and other interested parties

[54] I am of the belief that the RVO is the only viable option for a going-concern exit from the *CCAA* proceedings.

[55] No other offers have been obtained, not only during the SISP but also in the past three years when the Just Energy Entities' business was being broadly and extensively marketed. No other plan or proposal has been put forward.

[56] The Transaction, in my view, provides a number of positive benefits, including:

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;
- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;
- satisfying or assuming in full all secured claims and priority payables;
- preserving U.S. tax attributes and tax pools; and
- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. $250 million new credit facility bringing an end to the *CCAA* proceedings aside from the limited matters related to the Residual Cos.

[57] As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

[58] There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)*, at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not

entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

[59] The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA*. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

[60] While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

[61] There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

[62] Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

[63] The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

[64] With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

[65] The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the *CBCA* recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at para. 61 (dealing with the equivalent provision of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16. (*OBCA*)).

[66] Pursuant to ss. 173, 176(1)(b) and 191(2) of the *CBCA*, courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate

reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

[67] There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the *Wage Earner Protection Program Act*, S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

- The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J. in *Harte Gold Corp. (Re)*, at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

- The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

- Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

- All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

[68] As outlined, I granted the Monitor's Order.

[69] First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

[70] Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

[71] I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

[72] Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

[73] At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

[74] The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively "BP") and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit "I" to the Affidavit of Mr. Carter sworn August 4, 2022 (the "ICA Term Sheet").

[75] To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

[76] I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

[77] As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

[78] Mr. Yadav is a shareholder.

[79] Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a "motion record" in which he attached various documents relating to the Just Energy Entities' financial performances and outlined his objections.

[80] Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities' 2022 annual report describing the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

[81] The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

[82] More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

[83] Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

[84] As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

[85] Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents.[2]

[86] Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha ("JEJKK"), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities' businesses in Japan.

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[2] Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

[87] Mr. Jaafari was terminated from his position in August 2018, allegedly for cause.

[88] In November 2018, he commenced litigation in the Tokyo District Court against Just Energy and JEJKK.

[89] In April 2020, the Just Energy Entities sold their Japanese business. Mr. Jaafari submitted a Proof of Claim in the *CCAA* proceeding that was disallowed by the Monitor.

[90] Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent endorsements by the Tokyo District Court which, if accurate, accept that Mr. Jaafari was an employee of Just Energy.

[91] Mr. Jaafari submits that as part of the RVO, I should order that money be paid in trust until the litigation in Tokyo is resolved. As I understand it, he is seeking a payment of approximately CDN $2 million.

[92] The Just Energy Entities submit that Mr. Jaafari's ongoing litigation is in violation of the Initial Order and that he was never an employee of Just Energy. Counsel also advises that they recently heard from their former Japanese counsel (although there is no evidence to support this) that Mr. Jaafari's action against Just Energy was dismissed.

[93] In any event, the Just Energy Entities submit that, at best, Mr. Jaafari has an unsecured claim that is incapable of recovery since unsecured creditors are receiving no money as a result of the Transaction. Therefore, even if he is successful, there is no recovery.

[94] The Monitor, in support of the Just Energy Entities' submissions, confirms that there is no recovery for Mr. Jaafari even if he is successful. The Monitor further submits that a payment into court or into some sort of trust would constitute a preference, which is inappropriate where other unsecured creditors are not receiving any money as a result of the Transaction.

[95] Based on the incomplete record in front of me, there is no meaningful way to determine the status and legitimacy of Mr. Jaafari's claim for wrongful dismissal.

[96] In any event, I accept the submissions of the Just Energy Entities, supported by the Monitor, that Mr. Jaafari's claim constitutes an unsecured claim for which there will be no recovery in the circumstances of this case.

[97] As the Monitor points out, Just Energy no longer has any assets or operations in Japan and no longer owns JEJKK. The stay of proceedings does not extend to JEJKK, which is now owned by another corporation. The Monitor submits that Mr. Jaafari is free to pursue such claims in Japan without the involvement of the Just Energy Entities. To allow Mr. Jaafari's claim to continue against the Just Energy Entities in Japan would require the Just Energy Entities to incur expenses, perhaps make a payment into court or into trust and would deplete the Just Energy Entities' estate to the detriment of the other stakeholders with no foreseeable benefits to Mr. Jaafari.

[98] I therefore accept the Monitor's submission that this court order that Mr. Jaafari's claim can be addressed by the Just Energy Entities, in consultation with the Monitor, in accordance with the terms of the Claims Procedure Order. I am specifically not making an order that any money be paid into court or into a trust account.

CONCLUSION

[99] For the reasons above, the RVO and the Monitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the *CCAA*. Given the nature of the Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the *CCAA* filing. It is currently the only option for a going-concern exit from the *CCAA* proceedings. The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISP.

[100] Overall, the Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. The fact that the Transaction provides no recovery for the general unsecured creditors or shareholders is a function of the market, not the RVO structure.

DISPOSITION

[101] For the reasons above, I grant both the RVO and the Monitor's Order.

McEwen, J.

Released: November 14, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDTORS 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., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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

ENDORSEMENT

Released: November 14, 2022 McEwen J.