

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants/Responding Parties

RESPONDING PARTIES' FACTUM
(Plaintiffs' Counsel's Motion for Leave to Appeal)

April 29, 2022

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

John MacDonald - LSO# 25884R
Tel: 416.862.5672 / Email: jmacdonald@osler.com

Marc Wasserman - LSO# 44066M
Tel: 416.862.4908 / Email: mwasserman@osler.com

Michael De Lellis - LSO# 48038U
Tel: 416.862. 5997 / Email: mdelellis@osler.com

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

Lawyers for the Applicants/Responding Parties

TO: THE SERVICE LIST

SERVICE LIST

(as at April 22, 2022)

| <u>PARTY</u> | <u>CONTACT</u> |
|--|---|
| <p>OSLER, HOSKIN & HARCOURT LLP Box 50, 1 First Canadian Place 100 King Street West, Suite 6200 Toronto, ON M5X 1B8</p> <p>Fax: 416.862.6666</p> <p>Counsel to the Applicants</p> | <p>Marc Wasserman Tel: 416.862.4908 Email: MWasserman@osler.com</p> <p>Michael De Lellis Tel: 416.862.5997 Email: MDeLellis@osler.com</p> <p>Jeremy Dacks Tel: 416.862.4923 Email: JDacks@osler.com</p> <p>Shawn Irving Tel: 416.862.4733 Email: SIrving@osler.com</p> <p>Dave Rosenblat Tel: 416.862.5673 Email: DRosenblat@osler.com</p> |
| <p>JUST ENERGY GROUP INC. 100 King Street West, Suite 2630 Toronto, ON M5X 1E1</p> <p>Applicant</p> | <p>Jonah T. Davids EVP, General Counsel and Corporate Secretary Tel: 416.367.2574 Email: JDavids@justenergy.com</p> <p>Michael Carter Chief Financial Officer Email: mcarter@justenergy.com</p> |

| | |
|--|---|
| <p>KIRKLAND & ELLIS LLP 601 Lexington Avenue New York, NY 10022</p> <p>Fax: 212.446.4900</p> <p>609 Main St, Houston TX 77002, United States</p> <p>Fax: 713.836.3601</p> <p>U.S. Counsel to the Applicants</p> | <p>Brian Schartz Tel: 212.446.5932 / 713.836.3755 Email: brian.schartz@kirkland.com</p> <p>Mary Kogut Brawley Tel: 713.836.3650 Email: mary.kogut@kirkland.com</p> <p>Neil Herman Tel: 212.446.4522 Email: neil.herman@kirkland.com</p> |
| <p>FTI CONSULTING CANADA INC. P.O. Box 104, TD South Tower 79 Wellington Street West Toronto Dominion Centre, Suite 2010 Toronto, ON, M5K 1G8</p> <p>Fax: 416.649.8101</p> <p>Monitor</p> | <p>Paul Bishop Tel: 416.649.8053 Email: paul.bishop@fticonsulting.com</p> <p>Jim Robinson Tel: 416.649.8070 Email: jim.robinson@fticonsulting.com</p> |
| <p>THORNTON GROUT FINNIGAN LLP 100 Wellington St W, Suite 3200 Toronto, ON M5K 1K7</p> <p>Fax: 416.304.1313</p> <p>Counsel to the Monitor</p> | <p>Robert Thornton Tel: 416.304.0560 Email: rthornton@tgf.ca</p> <p>Rebecca Kennedy Tel: 416.304.0603 Email: rkennedy@tgf.ca</p> <p>Rachel Nicholson Tel: 416.304.1153 Email: rnicholson@tgf.ca</p> <p>Puya Fesharaki Tel: 416.304.7979 Email: pfesharaki@tgf.ca</p> |
| <p>PORTER HEDGES LLP 1000 Main St, 36th Floor Houston, TX 77002</p> <p>Fax: 713.226.6248</p> <p>U.S. Counsel to the Monitor</p> | <p>John F. Higgins Tel: 713.226.6648 Email: JHiggins@porterhedges.com</p> |

| | |
|---|---|
| <p>CASSELS BROCK & BLACKWELL LLP Scotia Plaza, Suite 2100, 40 King St W Toronto, ON M5H 3C2</p> <p>Fax: 416.360.8877</p> <p>Canadian Counsel to the DIP Lenders</p> | <p>Ryan Jacobs Tel: 416.860.6465 Email: rjacobs@cassels.com</p> <p>Jane Dietrich Tel: 416.860.5223 Email: jdietrich@cassels.com</p> <p>Michael Wunder Tel: 416.860.6484 Email: mwunder@cassels.com</p> <p>Joseph Bellissimo Tel: 416.860.6572 Email: jbellissimo@cassels.com</p> <p>Alan Merskey Tel: 416.860.2948 Email: amerskey@cassels.com</p> <p>John M. Picone Tel: 416.640.6041 Email: jpicone@cassels.com</p> <p>Christopher Selby Tel: 416.860.6737 Email: cselby@cassels.com</p> <p>Jeremy Bornstein Tel: 416.869.5386 Email: jbornstein@cassels.com</p> |
| <p>AKIN GUMP STRAUSS HAUER & FELD LLP Bank of America Tower, 1 Bryant Park New York, NY 10036</p> <p>Fax: 212.872.1002</p> <p>111 Louisiana Street, 44th Floor Houston, TX 77002-5200</p> <p>Fax: 713.236.0822</p> <p>U.S. Counsel to the DIP Lenders</p> | <p>David Botter Tel: 212.872.1055 Email: dbotter@akingump.com</p> <p>Abid Qureshi Tel: 212.872.8027 Email: aqureshi@akingump.com</p> <p>Zach Wittenberg Tel: 212.872.1081 Email: zwittenberg@akingump.com</p> <p>Chad Nichols Tel: 713.250.2178 Email: cnichols@akingump.com</p> |

| | |
|--|---|
| <p>HOLLAND & KNIGHT LLP 150 N. Riverside Plaza, Suite 2700 Chicago, IL 60606</p> <p>Fax: 312.578.6666</p> <p>Counsel to the DIP Agent</p> | <p>Daniel Sylvester Tel: 312.715.5880 Email: daniel.sylvester@hklaw.com</p> <p>Phillip Nelson Tel: 312.578.6584 Email: phillip.nelson@hklaw.com</p> |
| <p>MCCARTHY TETRAULT LLP 66 Wellington Street West Suite 5300, TD Bank Tower Box 48 Toronto, ON M5K 1E6</p> <p>Fax: 416.868.8772</p> <p>Canadian Counsel to the Agent and the Credit Facility Lenders</p> | <p>Heather Meredith Tel: 416-601-8342 Email: hmeredith@mccarthy.ca</p> <p>James D. Gage Tel: 416.601.7539 Email: jgage@mccarthy.ca</p> <p>Justin Lapedus Tel: 416.601.8289 Email: jlapedus@mccarthy.ca</p> <p>D.J. Lynde Tel: 416.601.8231 Email: dlynde@mccarthy.ca</p> <p>Natasha Rambaran Tel: 416.601.8110 Email: nrambaran@mccarthy.ca</p> |
| <p>CHAPMAN AND CUTLER LLP 111 West Monroe Street Chicago, IL 60603-4080</p> <p>Fax: 312.701.2361</p> <p>U.S. Counsel to the Credit Facility Lenders</p> | <p>Stephen R. Tetro II Tel: 312.845.3859 Email: stetro@chapman.com</p> <p>Michael Reed Tel: 312.845.3458 Email: mmreed@chapman.com</p> |

| | |
|--|---|
| <p>NORTON ROSE FULBRIGHT CANADA LLP Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, AB T2P 4H2</p> <p>Fax: 403.264.5973</p> <p>NORTON ROSE FULBRIGHT US LLP 2200 Ross Avenue, Suite 3600 Dallas, Texas 75201-7932</p> <p>Fax: 214.855.8200</p> <p>Counsel to Shell Energy North America (Canada) Inc. and Shell Energy North America (US)</p> | <p>Howard Gorman Tel: 403.267.8144 Email: howard.gorman@nortonrosefulbright.com</p> <p>Ryan Manns Tel: 214.855.8304 Email: ryan.manns@nortonrosefulbright.com</p> |
| <p>DENTONS CANADA LLP 77 King St W Suite 400 Toronto, ON M5K 0A1</p> <p>Fax: 416.863.4592</p> <p>Canadian Counsel to BP Canada Energy Marketing Corp., BP Energy Company, BP Corporation North America Inc., and BP Canada Energy Group ULC</p> | <p>David Mann Tel: 403.268.7097 Email: david.mann@dentons.com</p> <p>Robert Kennedy Tel: 416.367.6756 Email: robert.kennedy@dentons.com</p> <p>Kenneth Kraft Tel: 416-863-4374 Email: kenneth.kraft@dentons.com</p> <p>Gordon Tarnowsky Tel: 1.403.268.3024 Email: gord.tarnowsky@dentons.com</p> <p>Mark A. Freake Tel: 416.863.4456 Email: mark.freake@dentons.com</p> <p>Michael D. Schafler Tel: 416.863.4457 Email: michael.schafler@dentons.com</p> |

| | |
|--|---|
| <p>HAYNES AND BOONE, LLP 1221 McKinney Street Suite 4000 Houston, TX 77010</p> <p>Fax: 713.547.2600</p> <p>HAYNES AND BOONE, LLP 1050 17th Street Suite 1800 Denver, CO 80265</p> <p>Fax: 303.382.6210</p> <p>U.S. Counsel to BP</p> | <p>Kelli Norfleet Tel: 713.547.2630 Email: kelli.norfleet@haynesboone.com</p> <p>Arsalan Muhammad Tel: 713.547.2257 Email: arsalan.muhammad@haynesboone.com</p> <p>Patrick L. Hughes Tel: 303.382.6221 Email: patrick.hughes@haynesboone.com</p> |
| <p>TORYS LLP 79 Wellington Street West, 30th Floor Box 270, TD South Tower Toronto, ON M5K 1N2</p> <p>Fax: 416.865.7380</p> <p>Counsel to the Term Loan Lenders (Sagard Credit Partners, LP, LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP)</p> | <p>Tony DeMarinis Tel: 416.865.8162 Email: tdemarinis@torys.com</p> <p>Scott Bomhof Tel: 416.865.7370 Email: sbomhof@torys.com</p> |
| <p>BORDEN LADNER GERVAIS LLP Barristers and Solicitors 22 Adelaide Street West Bay Adelaide Centre, East Tower Toronto, Ontario M5H 4E3</p> <p>Fax: 416.367.6749</p> <p>Counsel to Chubb Insurance Company of Canada</p> | <p>James W. MacLellan Tel: 416.367.6592 Email: jmaclellan@blg.com</p> <p>R. Bevan Brooksbank Tel: 416.367.6604 Email: brooksbank@blg.com</p> |

| | |
|--|---|
| <p>McMILLAN LLP Brookfield Place 181 Bay St, Suite 4400 Toronto ON M5J 2T3</p> <p>Counsel for Morgan Stanley Capital Group Inc.</p> | <p>Tushara Weerasooriya Tel: 416.865.7890 Email: tushara.weerasooriya@mcmillan.ca</p> <p>Shahen Mirakian Tel: 416.865.7238 Email: shahen.mirakian@mcmillan.ca</p> <p>Stephen Brown-Okruhlik Tel: 416.865.7043 Email: stephen.brown-okruhlik@mcmillan.ca</p> |
| <p>EXELON GENERATION COMPANY, LLC 100 Constellation Way, Suite 500C Baltimore, Maryland 21202</p> | <p>Patrick J. Woodhouse Assistant General Counsel Email: Patrick.Woodhouse@constellation.com</p> <p>Michael Strohmeier Email: Michael.Strohmeier@constellation.com</p> |
| <p>BRUCE POWER L.P. P.O. Box 1540, Building B10 177 Tie Road Municipality of Kincardine Tiverton, ON N0G 2T0</p> <p>Fax: 519.361.1845</p> | <p>Email: Bill.SCHNURR@brucepower.com</p> |
| <p>EDF TRADING NORTH AMERICA, LLC 4700 West Sam Houston Parkway North Suite 250 Houston, TX 77041</p> <p>Fax: 281.653.1454</p> | <p>Email: Gerald.Nemec@edfenergyna.com</p> <p>Email: Frank.Smejkal@edfenergyna.com</p> |

| | |
|---|---|
| <p>NEXTERA ENERGY POWER MARKETING, LLC 700 Universe Blvd. Juno Beach, FL 33408</p> <p>Fax: 561.625.7642</p> | <p>Email: ELLIOT.BONNER@nexteraenergy.com</p> <p>Email: Allison.Ridder@nexteraenergy.com</p> |
| <p>MACQUARIE BANK LIMITED 50 Martin Place Sydney, NSW 2000 Australia</p> <p>Fax: 61.2.8232.4540</p> <p>Copy to:</p> <p>Macquarie Bank Limited Representative Office 500 Dallas Street, Suite 3300 Houston, TX 77002</p> <p>Fax: 713.275.8978</p> | <p>Email: FICC.notices@macquarie.com</p> <p>Copy to:</p> <p>Email: FICClegalHouston@Macquarie.com</p> |
| <p>MACQUARIE ENERGY CANADA LTD. 500 Dallas Street, Suite 3300 Houston, TX 77002</p> <p>Fax: 713.275.8978</p> | <p>Email: FICClegalHouston@Macquarie.com</p> |
| <p>MACQUARIE ENERGY LLC 500 Dallas Street, Suite 3300 Houston, TX 77002</p> <p>Fax: 713.275.8978</p> | <p>Email: FICClegalHouston@Macquarie.com</p> |

| | |
|---|--|
| <p>MORGAN STANLEY CAPITAL GROUP Morgan Stanley & Co. LLC 1585 Broadway Avenue New York, NY 10036</p> <p>Fax: 718.233.2140</p> | <p>Email: msloanservicing@morganstanley.com</p> |
| <p>BRITISH COLUMBIA UTILITIES COMMISSION Suite 410, 900 Howe Street Vancouver, BC V6Z 2N3</p> <p>Fax: (604) 660-1102</p> <p>Copy to :</p> <p>BRIDGEHOUSE LAW LLP 9th Floor, 900 West Hastings Street Vancouver, BC V6C 1E5</p> <p>Fax: (604) 684-0916</p> | <p>Email: commission.secretary@bcuc.com</p> <p>Copy to:</p> <p>Benjamin La Borie Tel: (236) 521-6150 Email: blaborie@bridgehouselaw.ca</p> |
| <p>FORTIS BC ENERGY INC. 16705 Fraser Highway Surrey, BC V4N 0E8</p> | <p>Email: gas.regulatory.affairs@fortisbc.com</p> <p>Email: electricity.regulatory.affairs@fortisbc.com</p> |
| <p>ALBERTA ELECTRICITY SYSTEM OPERATOR Calgary Place 2500, 330 – 5th Avenue SW Calgary, AB T2P 0L4</p> <p>Fax: 403.539.2949</p> | <p>Email: info@aeso.ca</p> <p>Chun Seto <i>Credit Risk Analyst</i> Email: Chun.Seto@aeso.ca</p> |
| <p>ALBERTA GOVERNMENT Commerce Place, 3rd Floor 10155 – 102 Street NW Edmonton, AB T5J 4L4</p> | <p>Scott Hood Statute Administration - Consumer Programs E-mail: scott.hood@gov.ab.ca</p> |

| | |
|--|---|
| <p>ALBERTA UTILITIES COMMISSION Eau Claire Tower 1400, 600 Third Avenue S.W. Calgary, Alberta T2P 0G5</p> | <p>JP Mousseau General Counsel Tel : (403) 592-4452 Email : jp.mousseau@auc.ab.ca</p> |
| <p>ATCO GAS AND PIPELINES LTD. 10035 – 105 Street P.O. Box 2426 Edmonton, AB T5J 2V6s Fax: 780.420.7928 / 780.420.3839 Copy to: ATCO GAS AND PIPELINES LTD. 5302 Forand Street S.W. Calgary, AB T3E 1T9</p> | <p>Knox Davidson Senior Analyst, Credit Finance & Risk Email: Knox.Davidson@atco.com Email: RetailerContact@atcogas.com Email: Credit@ATCO.com</p> |
| <p>APEX UTILITIES INC. (formerly ALTAGAS UTILITIES INC.) 5509 – 45 Street Leduc, AB T9E 6T6 Fax: 780.986.5220</p> | <p>Kristen Lozynsky Senior Regulatory Counsel Email : klozynsk@apexutilities.ca Email: regulatory@apexutilities.ca</p> |
| <p>ATCO ELECTRIC LTD. 10035 – 105 Street P.O. Box 2426 Edmonton, AB T5J 2V6 Fax: 780.420.8984 / 780.420.7056 Copy to: ATCO ELECTRIC LTD. 5302 Forand Street S.W. Calgary, AB T3E 1T9</p> | <p>Knox Davidson Senior Analyst, Credit Finance & Risk Email: Knox.Davidson@atco.com Email: RetailerServices@atcoelectric.com Email: Credit@ATCO.com</p> |
| <p>BATTLE RIVER POWER COOP P.O. Box 1420 Camrose, AB T4V 1X3 Fax: 780.672.7969</p> | <p>Email: brpc@brpower.coop</p> |

| | |
|--|--|
| <p>TOWN OF CARDSTON 67 3rd Avenue West P.O. Box 280 Cardston, AB T0K 0K0</p> <p>Fax: 403.562.2499</p> | |
| <p>BLAKE, CASSELS & GRAYDON LLP 595 Burrard Street, Suite 2600 Vancouver, BC V7X 1L3</p> <p>Fax: 604.631.3309</p> <p>Counsel to ENMAX Power Corporation</p> | <p>Peter Bychawski Tel: 604.631.4218 Email: peter.bychawski@blakes.com</p> |
| <p>BLAKE, CASSELS & GRAYDON LLP 3500 Bankers Hall East 855 - 2nd Street S.W., Suite 3500 Calgary AB T2P 4J8</p> <p>Fax: 403.260.9700</p> <p>Counsel for Macquarie Energy LLC and Macquarie Energy Canada Ltd.</p> | <p>Kelly J Bourassa Tel : 1.403.260.9697 Email: kelly.bourassa@blakes.com</p> |
| <p>EPCOR DISTRIBUTION AND TRANSMISSION INC. 2000 – 10423 101 Street NW Edmonton, AB T5H 0E8</p> | <p>Teresa Crotty-Wong Senior Legal Counsel and Ethics Officer Email: Tcrotty-wong@epcor.com</p> <p>Copy to:</p> <p>Legal department: Email: legaldeptinqu@epcor.com</p> |
| <p>TOWN OF FORT MACLEOD P.O. Box 1420 Fort Macleod, AB T0L 0Z0</p> <p>Fax: 403.553.2426</p> | <p>Email: gloria@fortmacleod.com</p> <p>Copy to:</p> <p>Email: admin@fortmacleod.com</p> |

| | |
|---|--|
| <p>FORTIS ALBERTA INC. 320 – 17th Avenue SW Calgary, AB T2S 2V1</p> <p>Fax: : 403.514.4001</p> | <p>Email: sharon.wong@fortisalberta.com</p> |
| <p>EQUUS REA LTD. 5803 – 42 Street Innisfail, AB T4G 1S8</p> <p>Fax: 403.227.1007</p> | <p>Email: cglazer@equs.ca</p> |
| <p>LETHBRIDGE ELECTRIC UTILITY City of Lethbridge / Infrastructure Services 910 4th Avenue South Lethbridge, AB T1J 0P6</p> <p>Fax: 403.320.4195</p> | <p>Brian Loewen General Counsel - City of Lethbridge</p> <p>Tel: 403.320.3043 Email: brian.loewen@lethbridge.ca</p> |
| <p>CITY OF RED DEER Red Deer Electric Light and Power 4914 48 Avenue Red Deer, AB T4N 3T3</p> <p>CITY OF RED DEER Red Deer Electric Light and Power Bldg 300 7721 40 Avenue Red Deer, AB T4P 0K2</p> <p>Fax: 403.341.6806</p> | |
| <p>TOWN OF PONOKA 5102 – 48th Avenue Ponoka, AB T4J 1P7</p> <p>Copy to:</p> <p>TOWN OF PONOKA #200 5604 50 Street Ponoka, AB T4J 1G5</p> | <p>Email: utilities@ponoka.ca</p> |

| | |
|---|---|
| MUNICIPALITY OF CROWSNEST PASS Box 600 Blairmore, AB T0K 0E0 | Email: utilities@crowstpass.com |
| SASKATCHEWAN FINANCIAL AND CONSUMER AFFAIRS AUTHORITY Consumer Protection Division 500 – 1919 Saskatchewan Drive Regina, SK S4P 4H2 | Email: fcaa@gov.sk.ca |
| SASKENERGY INCORPORATED 1000 – 1777 Victoria Avenue Regina, SK S4P 4K5 Fax: 306.565.3332 | |
| PUBLIC UTILITIES BOARD 400 – 330 Portage Ave Winnipeg, MB R3C 0C4 Fax: 204.945.2643 | Email: Rachel.McMillin@gov.mb.ca Email: Kristen.Schubert@gov.mb.ca Copy to: Email: publicutilities@gov.mb.ca |
| MANITOBA HYDRO 360 Portage Avenue Winnipeg, MB R3C 0G8 | Email: dmartin@hydro.mb.ca Email: BACzarnecki@hydro.mb.ca |
| CENTRA GAS MANITOBA INC. 12th Floor – 360 Portage Avenue PO Box 815 Winnipeg, MB R3C 2P4 Fax: 204.360.6127 | Christine Foulkes Manager, Gas Market Operations Gas Supply Department Email: cdfoulkes@hydro.mb.ca Andrew Neil Senior Credit Risk Officer Email: aneil@hydro.mb.ca |

| | |
|--|---|
| <p>INDEPENDENT ELECTRICITY SYSTEM OPERATOR 1600 – 120 Adelaide Street West Toronto, ON M5H 1T1</p> <p>Fax: 416.506.2843</p> | <p>Victor Buza Email: victor.buza@ieso.ca</p> <p>Michael Lyle, GC Email: michael.lyle@ieso.ca</p> |
| <p>STIKEMAN ELLIOTT LLP Barristers & Solicitors 5300 Commerce Court West 199 Bay Street Toronto, Canada M5L 1B9</p> <p>Fax: 416.947.0866</p> <p>Counsel for the Independent Electricity System Operator</p> | <p>Maria Konyukhova Tel: 416.869.5230 Email: mkonyukhova@stikeman.com</p> |
| <p>ONTARIO ENERGY BOARD 2300 Yonge Street, 27th floor P.O. Box 2319 Toronto, ON M4P 1E4</p> <p>Fax: 416.440.7656</p> | <p>Email: registrar@oeb.ca</p> |
| <p>ALGOMA POWER INC. 2 Sackville Road, Suite A Sault Ste. Marie, ON P6B 6J6</p> <p>Fax: 705.253.6476</p> <p>Copy to:</p> <p>ALGOMA POWER INC. 1130 Bertie Street P.O. Box 1218 Fort Erie, ON L2A 5Y2</p> | <p>Email: peggy.lund@algomapower.com</p> <p>Copy to:</p> <p>Email: regulatoryaffairs@fortisontario.com</p> |

| | |
|--|---|
| <p>ATIKOKAN HYDRO INC. 117 Gorrie Street Atikokan, ON P0T 1C0</p> <p>Fax: 807.597.6988</p> <p>Copy to:</p> <p>ATIKOKAN HYDRO INC. P.O. Box 1480 Atikokan, ON P0T 1C0</p> | <p>Email: info@athydro.com</p> <p>Copy to:</p> <p>Email: jen.wiens@athydro.com</p> |
| <p>BLUEWATER POWER DISTRIBUTION CORPORATION 855 Confederation Street Sarnia, ON N7T 7L6</p> <p>Fax: 519.344.7303</p> | <p>Email: kgadsby@bluewaterpower.com</p> <p>Copy to:</p> <p>Email: regulatory@bluewaterpower.com</p> |
| <p>BRANT COUNTY POWER INC. 65 Dundas Street East Paris, ON N3L 3H1</p> <p>Fax: 519.442.3701</p> <p>Copy to:</p> <p>ENERGY+ INC. 1500 Bishop Street P.O. Box 1060 Cambridge, ON N1R 5X6</p> | <p>Email: regulatoryaffairs@energyplus.ca</p> |
| <p>BRANTFORD POWER INC. 150 Savannah Oaks Drive Box 308 Brantford, ON N3T 5N8</p> <p>Fax: 519.753.6130</p> | <p>Email: regulatory@brantford.ca</p> |

| | |
|---|---|
| <p>BURLINGTON HYDRO INC. 1340 Brant Street Burlington, ON L7R 3Z7</p> <p>Fax: 905.332.2133</p> | <p>Email: regulatoryaffairs@burlingtonhydro.com</p> <p>Adam Pappas Director, Regulatory Affairs Tel: (905) 332-2341 Email: apappas@burlingtonhydro.com</p> |
| <p>CAMBRIDGE & NORTH DUMFRIES HYDRO INC. C/O ENERGY+ INC. 1500 Bishop Street P.O. Box 1060 Cambridge, ON N1R 5X6</p> <p>Fax: 519.621.0383</p> | <p>Email: regulatoryaffairs@energyplus.ca</p> |
| <p>CANADIAN NIAGARA POWER INC. 1130 Bertie Street P.O. Box 1218 Fort Erie, ON L2A 5Y2</p> <p>Fax: 905.871.8818</p> | <p>Email: regulatoryaffairs@fortisontario.com</p> |
| <p>CENTRE WELLINGTON HYDRO LTD. 730 Gartshore Street P.O. Box 217 Fergus, ON N1M 2W8</p> <p>Fax: 519.843.7601</p> | <p>Email: regulatory@cwhydro.ca</p> |
| <p>CHAPLEAU PUBLIC UTILITIES CORPORATION 110 Lorne Street South Chapleau, ON P0M 1K0</p> <p>Fax: 705.864.1962</p> | <p>Email: chec@onlink.net</p> <p>Copy to:</p> <p>Email: jcyr.puc@chapleau.ca</p> |
| <p>COLLUS POWER CORP. C/O EPCOR ELECTRICITY DISTRIBUTION ONTARIO INC. 43 Steward Road P.O. Box 189 Collingwood, ON L9Y 3Z5</p> <p>Fax: 705.445.8267</p> | <p>Email: onreg.electricity@epcor.com</p> |

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| <p>COOPERATIVE HYDRO EMBRUN INC. 821 Notre-Dame Street, Suite 200 Embrun, ON K0A 1W1</p> <p>Fax: 613.443.0495</p> | <p>Email: benoit@hydroembrun.ca</p> |
| <p>E.L.K. ENERGY INC. 172 Forest Avenue Essex, ON N8M 3E4</p> <p>Fax: 519.776.5640</p> | |
| <p>ENERSOURCE HYDRO MISSISSAUGA INC. 3240 Mavis Road Mississauga, ON L5C 3K1</p> <p>Fax: 905.566.2727</p> <p>Copy to:</p> <p>ALECTRA UTILITIES CORPORATION 2185 Derry Road West Mississauga, ON L5N 7A6</p> | <p>Email: emuscat@enersource.com</p> <p>Copy to:</p> <p>Email: regulatoryaffairs@alecrautilities.com</p> |
| <p>ENTEGRUS POWERLINES INC. 320 Queen Street PO Box 70 Chatham, ON N7M 5K2</p> <p>Fax: 519.351.4059</p> | <p>Email: Tracy.Manso@entegrus.com</p> <p>Copy to:</p> <p>Email: regulatory@entegrus.com</p> |
| <p>ENTEGRUS POWERLINES INC. [MIDDLESEX] 351 Frances Street Strathroy, ON N7G 2L7</p> <p>Fax: 519.245.5384</p> | <p>Email: ana.couto@entegrus.com</p> <p>Copy to:</p> <p>Email: regulatory@entegrus.com</p> |

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| <p>ENWIN UTILITIES LTD. 787 Oulette Avenue Windsor, ON N9A 5T7</p> <p>Fax: 519.973.7812</p> <p>Copy to:</p> <p>ENWIN UTILITIES LTD. 4545 Rhodes Drive P.O. Box 1625, Station A Windsor, ON N8W 5T1</p> | <p>Email: retailerrelations@enwin.com</p> <p>Copy to:</p> <p>Email: regulatory@enwin.com</p> |
| <p>ERIE THAMES POWERLINES C/O ERTH POWER CORPORATION 143 Bell Street P.O. Box 157 Ingersoll, ON N5C 3K5</p> <p>Fax: 519.485.5838</p> | <p>Email: oeb@eriethamespower.com</p> |
| <p>ESPANOLA REGIONAL HYDRO DISTRIBUTION CORPORATION 598 Second Avenue Espanola, ON P5E 1C4</p> <p>Fax: 705.869.2433</p> <p>Copy to:</p> <p>ESPANOLA REGIONAL HYDRO DISTRIBUTION CORPORATION 500 Second Line East Sault Ste. Marie, ON P6B 4K1</p> | <p>Melissa Casson Email: mcasson@northbayhydro.com</p> <p>Gloria Sauve Email: GSauve@northbayhydro.com</p> |
| <p>ESSEX POWERLINES CORPORATION 2730 Highway 3 Oldcastle, ON N0R 1L0</p> <p>Fax: 519.737.7064</p> | <p>Email: jbarile@essexpowerlines.ca</p> |

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| <p>FESTIVAL HYDRO INC. 187 Erie Street PO Box 397 Stratford, ON N5A 6T5</p> <p>Fax: 519.271.7204</p> | <p>Megan Winchester Email: mwinchester@festivalhydro.com</p> <p>Copy to:</p> <p>Jeff Graham (CEO) Email: grahamj@festivalhydro.com</p> |
| <p>FORT FRANCES POWER CORPORATION 320 Portage Avenue Fort Frances, ON P9A 3P9</p> <p>Fax: 807.274.9375</p> | <p>Email: info@ffpc.ca</p> |
| <p>GREATER SUDBURY HYDRO INC. 500 Regent Street PO Box 250 Sudbury, ON P3E 4P1</p> <p>Fax: 705.671.1413</p> | <p>Email: jodiek@shec.com</p> <p>Copy to:</p> <p>Email: regulatoryaffairs@gsuinc.ca</p> |
| <p>GRIMSBY POWER INC. 231 Roberts Road Grimsby, ON L3M 5N2</p> <p>Fax: 905.945.9933</p> | <p>Email: regulatoryaffairs@grimsbypower.com</p> |
| <p>GUELPH HYDRO ELECTRIC SYSTEMS INC. 395 Southgate Drive Guelph, ON N1G 4Y1</p> <p>Fax: 519.822.0960</p> <p>Copy to:</p> <p>ALECTRA UTILITIES CORPORATION 2185 Derry Road West Mississauga, ON L5N 7A6</p> | <p>Christina Koren Email: christina.koren@alectrautilities.com</p> <p>Copy to:</p> <p>Email: regulatoryaffairs@alectrautilities.com</p> |

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| <p>HALDIMAND COUNTY HYDRO INC. 1 Greendale Drive Caledonia, ON N3W 2J3</p> <p>Fax: 905.765.8211</p> <p>Copy to:</p> <p>HYDRO ONE NETWORKS INC. 483 Bay Street, South Tower, 7th Floor Toronto, ON M5G 2P5</p> <p>Fax: (416) 345-6972</p> | <p>Email: paul.harricks@hydroone.com</p> |
| <p>HALTON HILLS HYDRO INC. 43 Alice Street Acton, ON L7J 2A9</p> <p>Fax: 519.853.5592</p> | <p>Tracy Rehberg-Rawlingson Regulatory Affairs Officer Tel: 519.853.3700 x257</p> <p>Email: tracyr@haltonhillshydro.com</p> |
| <p>HEARST POWER DISTRIBUTION COMPANY LTD. 925 rue Alexander Street P.O. Bag 5000 Hearst, ON P0L 1N0</p> <p>Fax: 705.362.5092</p> | <p>Email: jrichard@hearstpower.com</p> |
| <p>HORIZON UTILITIES CORPORATION 55 John Street North PO Box 2249, Stn LCD 1 Hamilton, ON L8N 3E4</p> <p>Fax: 905.522.5670</p> <p>Copy to:</p> <p>ALECTRA UTILITIES CORPORATION 2185 Derry Road West Mississauga, ON L5N 7A6</p> | <p>Email: regulatoryaffairs@alecrautilities.com</p> |
| <p>HYDRO 2000 INC. 440 St. Philippe Street Alfred, ON K0B 1A0</p> <p>Fax: 613.679.0452</p> | <p>Email: lisewilkinson@hydro2000.ca</p> |

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| <p>HYDRO HAWKESBURY INC. 850 Tupper Street Hawkesbury, ON K6A 3S7</p> <p>Fax: 613.632.8603</p> | <p>Email: service@hydrohawkesbury.ca</p> |
| <p>HYDRO ONE NETWORKS INC. 483 Bay Street, TCT14 Toronto, ON M5G 2P5</p> <p>Fax: 416.345.5957</p> <p>Copy to:</p> <p>HYDRO ONE NETWORKS INC. 483 Bay Street, South Tower, 7th Floor Toronto, ON M5G 2P5</p> | <p>Email: regulatory@hydroone.com</p> |
| <p>HYDRO ONE BRAMPTON NETWORKS INC. 175 Sandalwood Parkway West Brampton, ON L7A 1E8</p> <p>Fax: 905.840.1915</p> <p>Copy to:</p> <p>ALECTRA UTILITIES CORPORATION 2185 Derry Road West Mississauga, ON L5N 7A6</p> | <p>Email: regulatoryaffairs@alectrautilities.com</p> |
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| <p>KINGSTON HYDRO CORPORATION 1211 John Counter Boulevard P.O. Box 790 Kingston, ON K7L 4X7</p> | <p>Email: rmurphy@utilitieskingston.com</p> <p>Copy to:</p> <p>Email: regulatory@kingstonhydro.com</p> |
| <p>KITCHENER-WILMOT HYDRO INC. 301 Victoria Street South P.O. Box 9010 Kitchener, ON N2G 4L2</p> <p>Fax: 519.745.3631</p> | <p>Email: jvanooteghem@kwhydro.ca</p> <p>Margaret Nanninga Vice-President Finance & CFO Tel: 519.749.6177 Email: MNanninga@KWHydro.ca</p> <p>Denise Michaud Email: dmichaud@kwhydro.ca</p> |

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| <p>LAKEFRONT UTILITY SERVICES INC. 207 Division Street PO Box 577 Cobourg, ON K9A 4L3</p> <p>Fax: 905.372.2581</p> | <p>Email: dpaul@lusi.on.ca</p> <p>Copy to:</p> <p>Email: regulatory@lusi.on.ca</p> |
| <p>LONDON HYDRO INC. 111 Horton Street East P.O. Box 2700 London, ON N6B 3N9</p> <p>Fax: 519.661.5838</p> | <p>Email: regulatoryaffairs@londonhydro.com</p> |
| <p>MIDLAND POWER UTILITY CORPORATION 16984 Highway 12 PO Box 820 Midland, ON L4R 4P4</p> <p>Fax: 705.526.7890</p> <p>Copy to:</p> <p>NEWMARKET-TAY POWER DISTRIBUTION LTD. 590 Steven Court Newmarket, ON L3Y 6Z2</p> | <p>Email: chuma@midlandpuc.on.ca</p> <p>Copy to:</p> <p>Email: regulatory@nmhydro.ca</p> |
| <p>MILTON HYDRO DISTRIBUTION INC. 8069 Lawson Road Milton, ON L9T 5C4</p> <p>Fax: 905.876.2044</p> <p>Copy to:</p> <p>MILTON HYDRO DISTRIBUTION INC. 200 Chisholm Drive Milton, ON L9T 3G9</p> | <p>Email: igor.rusic@miltonhydro.com</p> <p>Copy to:</p> <p>Email: regulatory@miltonhydro.com</p> |
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| <p>NIAGARA ON THE LAKE HYDRO INC. 8 Henegan Road P.O. Box 460 Virgil, ON L0S 1T0</p> <p>Fax: 905.468.3861</p> | <p>Email: tcurtis@notlhydro.com</p> |
| <p>NIAGARA PENINSULA ENERGY 7447 Pin Oak Drive Box 120 Niagara Falls, ON L2E 6S9</p> <p>Fax: 905.356.0118</p> | <p>Email: Margaret.battista@npei.ca</p> |
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| <p>NORTHERN ONTARIO WIRES INC. 153 Sixth Avenue Box 640 Cochrane, ON P0L 1C0</p> <p>Fax: 705.272.2311</p> | <p>Email: sandras@nowinc.ca</p> <p>Copy to:</p> <p>Email: regulatory@nowinc.ca</p> |

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| <p>OAKVILLE HYDRO-ELECTRIC DISTRIBUTION INCORPORATED 861 Redwood Square P.O. Box 1900 Oakville, ON L6J 5E3 Fax: 905.825.4460</p> | <p>Maryanne Wilson Email: mwilson@oakvillehydro.com Copy to: Email: regulatoryaffairs@oakvillehydro.com</p> |
| <p>ORANGEVILLE HYDRO LIMITED 400 C Line Road Orangeville, ON L9W 2Z7 Fax: 519.941.6061</p> | <p>Email: regulatoryaffairs@orangevillehydro.on.ca</p> |
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| <p>OTTAWA RIVER POWER CORPORATION 283 Pembroke Street West Pembroke, ON K8A 6Y6 Fax: 613.732.8199</p> | <p>Email: jallen@orpowercorp.com</p> |

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| <p>SIoux LOOKOUT HYDRO INC. 25 Fifth Avenue PO Box 908 Sioux Lookout, ON P8T 1B3</p> <p>Fax: 807.737.2832</p> | <p>Email: slhydro@tbaytel.net</p> <p>Copy to:</p> <p>Email: dkulchyski@siouxlookouthydro.com</p> |
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| <p>TILLSONBURG HYDRO INC. 200 Broadway Street Tillsonburg, ON N4G 5A7</p> <p>Fax: 519.842.9431</p> <p>Copy to:</p> <p>TILLSONBURG HYDRO INC. 10 Lisgar Avenue Tillsonburg, ON N4G 5A5</p> | <p>Ravi Baichan General Manager Email: rbaichan@tillsonburg.ca</p> |

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| <p>TORONTO HYDRO-ELECTRIC SYSTEM LIMITED 5800 Yonge Street, 2nd Floor Toronto, ON M2M 3T3</p> <p>Fax: 416.542.3445 / 416.542.3452</p> <p>Copy to:</p> <p>TORONTO HYDRO-ELECTRIC SYSTEM LIMITED 14 Carlton Street Toronto, ON M5B 1K5</p> | <p>Email: epage@torontohydro.com</p> <p>Copy to:</p> <p>Email: regulatoryaffairs@torontohydro.com</p> |
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| <p>WATERLOO NORTH HYDRO INC. 526 Country Squire Road P.O. Box 640 Waterloo, ON N2J 4A3</p> <p>Fax: 519.746.0133</p> | <p>Email: retinfo@wnhydro.com</p> |

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| <p>WELLAND HYDRO-ELECTRIC SYSTEM CORP. 950 Main Street East P.O. Box 280 Welland, ON L3B 5P6 Fax: 905.732.0123</p> | <p>Perry Orosz Director of Customer Service and Employee Relations Tel: 905.732.1381 ext. 241 Email: porosz@wellandhydro.com</p> |
| <p>WELLINGTON NORTH POWER INC. 290 Queen Street West P.O. Box 359 Mount Forest, ON N0G 2L0 Fax: 519.323.2425</p> | <p>Email: rbucknall@wellingtonnorthpower.com</p> |
| <p>WEST COAST HURON ENERGY INC. 57 West Street Goderich, ON N7A 2K5 Fax: 519.524.7209 Copy to: ERTH POWER CORPORATION 143 Bell Street P.O. Box 157 Ingersoll, ON N5C 3K5</p> | <p>Email: oeb@eriethamespower.com</p> |
| <p>WESTARIO POWER INC. 24 Eastridge Road RR#2 Walkerton, ON N0G 2V0 Fax: 519.507.6777</p> | <p>Malcolm McCallum Vice President Finance/CFO Email: Malcolm.McCallum@westario.com</p> |

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| <p>WHITBY HYDRO ELECTRIC CORPORATION 100 Taunton Road East P.O. Box 59 Whitby, ON L1N 5R8</p> <p>Fax: 905.668.9379</p> <p>Copy to:</p> <p>ELEXICON ENERGY INC. 55 Taunton Road E. PO 59 Whitby, ON L1N 5R8</p> | <p>Email: sreffle@whitbyhydro.on.ca</p> <p>Copy to:</p> <p>Email: llombardi@elexiconenergy.com</p> |
| <p>WOODSTOCK HYDRO SERVICES INC. P.O. Box 1598 Woodstock, ON N4S 0A8</p> <p>Fax: 519.537.5081</p> <p>Copy to:</p> <p>HYDRO ONE NETWORKS INC. 483 Bay Street, South Tower, 7th Floor Toronto, ON M5G 2P5</p> | <p>Email: regulatory@hydroone.com</p> |
| <p>CORPORATION OF THE CITY OF KITCHENER City Hall, Utilities Division, 5th Floor 200 King Street West Kitchener, ON N2G 4G7</p> | <p>Email: KU-sups@kitchener.ca</p> |
| <p>UTILITIES KINGSTON PO Box 790 1211 John Counter Boulevard Kingston, ON K7L 4X7</p> | <p>Email: ntaylor@utilitieskingston.com</p> |
| <p>GAZ METRO LIMITED PARTNERSHIP C/O ENERGIR 1717 du Havre Street Montreal, QC H2K 2X3</p> <p>Fax: 514.598.3678</p> | <p>Email: info@energir.com</p> |

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| <p>TRAVELERS Travelers Bond & Specialty Insurance 215 Shuman Blvd Naperville, IL 60563</p> | <p>MJ Robinson Email: mrobin20@travelers.com</p> |
| <p>ZURICH SURETY 600 Red Brook Blvd. Fourth Floor, Suite 600 Owings Mills, MD 21117</p> | <p>Email: Howard.uniman@zurichna.com</p> |
| <p>SISKINDS LLP 680 Waterloo Street London, ON N6A 3V8</p> <p>Fax: 519.672.6065</p> <p>SISKINDS LLP 100 Lombard Street, Suite 302 Toronto, ON M5C 1M3</p> <p>Fax: 416.594.4589</p> <p>Counsel to the Plaintiff, Stephen Gilchrist (in proposed securities class proceeding in SCJ at Toronto, File No. CV-19-627174-00CP)</p> | <p>Michael G. Robb Tel: 519.672.2121 Email: michael.robb@siskinds.com</p> <p>Tyler Planeta Tel: 416.594.4588 Email: tyler.planeta@siskinds.com</p> |
| <p>KIM SPENCER McPHEE BARRISTERS P.C. 1200 Bay Street, Suite 1203 Toronto, ON M5R 2A5</p> <p>Fax: 416.598.0601</p> <p>Counsel to the Plaintiff, Stephen Gilchrist (in proposed securities class proceeding in SCJ at Toronto, File No. CV-19-627174-00CP)</p> | <p>Albert Pelletier Tel: 416.596.1414 Email: ap@complexlaw.ca</p> <p>Charlotte K.B. Harman Tel: 416.596.1414 Email: ckbh@complexlaw.ca</p> |

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| <p>MICHIGAN PUBLIC SERVICE COMMISSION 7109 W. Saginaw Highway Lansing, MI 48917</p> | <p>Stephanie Haney Resource Adequacy and Retail Choice Section Energy Resources Division</p> <p>Tel: 517.284.8267 Email: HaneyS1@michigan.gov</p> |
| <p>SHIPMAN & GOODWIN LLP One Constitution Plaza Hartford, Connecticut 06103 USA</p> <p>Fax: 860.251.5218</p> <p>SHIPMAN & GOODWIN LLP 300 Atlantic Street, 3rd Floor Stamford, Connecticut 06901 USA</p> <p>Fax: 203.324.8199</p> <p>U.S. Counsel to ISO New England Inc.</p> | <p>Eric Goldstein Tel: 860.251.5059 Email: EGoldstein@goodwin.com</p> <p>Copy to: Email: bankruptcy@goodwin.com</p> <p>Jessica M. Signor Tel: 203.324.8138 Email: JSignor@goodwin.com</p> |
| <p>BENNETT JONES LLP 3400 One First Canadian Place P.O. Box 130 Toronto, Ontario M5X 1A4</p> <p>Fax: 416.863.1716</p> <p>Counsel to Red Ventures, LLC</p> | <p>Aiden Nelms Tel: 416.777.4642 Email: nelmsa@bennettjones.com</p> |

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|---|---|
| <p>LONGVIEW COMMUNICATIONS AND PUBLIC AFFAIRS Suite 2200 – 161 Bay Street PO Box 231 Toronto ON Canada M5J 2S1</p> <p>Communications Advisor</p> | <p>Joel Shaffer Partner Tel: 416.649.8006 Email: jshaffer@longviewcomms.ca</p> <p>Boyd Erman Email: berman@longviewcomms.ca</p> <p>Peter Block Email: pblock@longviewcomms.ca</p> |
| <p>KOSKIE MINSKY LLP 20 Queen Street West, Suite 900, Box 52 Toronto, ON M5H 3R3</p> <p>Fax: 416.204.2894</p> <p>Counsel for Haidar Omarali in his capacity as Representative Plaintiff in <i>Omarali v. Just Energy</i></p> | <p>David Rosenfeld Tel: 416.595.2700 Email: drosenfeld@kmlaw.ca</p> <p>James Harnum Tel: 416.542.6285 Email: jharnum@kmlaw.ca</p> <p>Aryan Ziaie Tel: 416.595.2104 Email: aziaie@kmlaw.ca</p> |
| <p>GOWLING WLG (CANADA) LLP Barristers & Solicitors 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, ON M5X 1G5</p> <p>Fax: 416.862.7661</p> <p>Counsel for NextEra Energy Marketing, LLC</p> | <p>Virginie Gauthier Tel: 416.844.5391 Email: Virginie.Gauthier@gowlingwlg.com</p> |
| <p>WEISZ FELL KOUR LLP 100 King Street West, Suite 5600 Toronto, ON M5X 1C9</p> <p>Fax: 416.613.8290</p> <p>Counsel for the Ontario Energy Board</p> | <p>Pat Corney Tel: 416.613.8287 Email: pcorney@wfkllaw.ca</p> <p>Steven Weisz Tel: 416.613.8281 Email: sweisz@wfkllaw.ca</p> |

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| <p>JENSEN SHAWA SOLOMON DUGUID HAWKES LLP 800, 304-8 Avenue SW Calgary, Alberta T2P 1C2</p> <p>Fax: 403.571.1528</p> <p>Counsel for Alberta Electric System Operator</p> | <p>Christa Nicholson Tel: 403.571.1053 Email: nicholsonc@jssbarristers.ca</p> |
| <p>BLANEY McMURTRY LLP Barristers and Solicitors Suite 1500 - 2 Queen Street East Toronto, ON M5C 3G5</p> <p>Counsel for PJM Interconnection, L.L.C. and PJM Settlement, Inc.</p> | <p>Mervyn D. Abramowitz Tel: 416.5974887 Email: mabramowitz@blaney.com</p> <p>Eric Golden Tel: 416.593.3927 Email: egolden@blaney.com</p> |
| <p>SCHNADER HARRISON SEGAL & LEWIS LLP 1600 Market Street, Suite 3600 Philadelphia, PA 19103-7286 U.S.A.</p> <p>U.S. counsel for PJM Interconnection, L.L.C. and PJM Settlement, Inc.</p> | <p>Nicholas J. LePore, III Tel: 215.751.2286 Email: nlepore@schnader.com</p> <p>Richard A. Barkasy Tel: 215.751.2526 Email: rbarkasy@schnader.com</p> |
| <p>GOODMANS LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7</p> <p>Counsel for ICE NGX Canada Inc.</p> | <p>Brian F. Empey Tel: 416.597.4194 Email: bempey@goodmans.ca</p> |

| | |
|---|---|
| <p>PUBLIC UTILITIES COMMISSION OF NEVADA 1150 East William Street Carson City, NV 89701 U.S.A.</p> | <p>David Noble Assistant Staff Counsel Tel: 775.684.6194 Email: davidnoble@puc.nv.gov</p> <p>Don Lomoljo Staff Counsel Email: dlomoljo@puc.nv.gov</p> |
| <p>LIPMAN, ZENER & WAXMAN PC 100 Sheppard Avenue East, Suite 850 Toronto, ON M2N 6N5</p> <p>Fax: 416.789-9015</p> <p>Lawyers for the Creditor, Jordan Hutchinson</p> | <p>Anthony J. O'Brien Tel: 416.789.0656 Email: tobrien@lzwlaw.com</p> |
| <p>ENERGY BANK INCORPORATED 4466 Custer Street Manitowoc, Wisconsin 54220</p> <p>Fax: 920.682.6228</p> | <p>Becky Verfuert Manager-operations Tel: 920.682.6220 Email: bm@energybankinc.com</p> |
| <p>ELEVATION ENERGY GROUP 2305 E. Cesar Chavez Austin, Texas 78702</p> <p>Fax: 866.593.9771</p> | <p>Ben Huff Tel: 317.333.7281 Email: ben.huff@elevationeg.com</p> |

| | |
|--|--|
| <p>EMPIRE AR MANAGEMENT INC. 365 Evans Ave, Suite#L5 Toronto, ON M8Z 1K2</p> <p>Fax: 416.734.0006</p> | <p>Michael Biasiucci President Tel: 416.303.2663 Email: michael.b@empirearmi.com</p> |
| <p>AMERICAN CAPITAL RECOVERY LLC 5220 Spring Valley Road Suite 408 Dallas, TX 75254</p> <p>Fax: 972.661.2504</p> | <p>Paul Fagan Email: paul.fagan@amcapr.com</p> |
| <p>LECKER & ASSOCIATES Hullmark Corporate Centre 4789 Yonge St., Suite 514 Toronto, ON M2N 0G3</p> <p>Fax: 416.223.9492</p> <p>Counsel for John Roche and Hampstead Company</p> | <p>Ian D. Hurley Tel: 416.223.5391, ext. 325 E-mail: ihurley@leckerslaw.com</p> <p>Tina Yaghoubi Email: tina@leckerslaw.com</p> |
| <p>CDW CANADA 1700-185 The West Mall Etobicoke, ON M9C 5L5</p> | <p>Maribeth Halls Accounts Receivable Manager Email: Maribeth.Halls@cdw.ca</p> |

| | |
|--|---|
| <p>ATTORNEY GENERAL OF CANADA DEPARTMENT OF JUSTICE Ontario Regional Office, Tax Law Section 120 Adelaide Street West, Suite 400 Toronto, Ontario M5H 1T1</p> <p>Fax: 416.973.0810</p> <p>Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue</p> | <p>Diane Winters General Counsel Email: diane.winters@justice.gc.ca</p> |
| <p>HER MAJESTY IN RIGHT OF ONTARIO REPRESENTED BY THE MINISTER OF FINANCE - INSOLVENCY UNIT Ontario Ministry of Finance – Legal Services Branch 11-777 Bay Street Toronto, ON M5G 2C8</p> <p>Fax: 416.325.1460</p> | <p>Leslie Crawford Email: leslie.crawford@ontario.ca</p> <p>Copy to: Email: insolvency.unit@ontario.ca</p> |
| <p>CANADA REVENUE AGENCY 1 Front Street West Toronto, ON M5J 2X6</p> <p>Fax: 416.964.6411</p> | <p>Pat Confalone Tel: 416.954.6514 Email: pat.confalone@cra-arc.gc.ca</p> |
| <p>MINISTRY OF FINANCE (ALBERTA) The Tax and Revenue Administration 9811 – 109 Street Edmonton, AB T5K 2L5</p> | <p>Travis Toews Minister Tel: 780.427.2711 Email: tbf.minister@gov.ab.ca</p> <p>Grant Hunter Associate Minister Tel: 780 427-0240 Email: associateminister-rtr@gov.ab.ca</p> |

| | |
|---|--|
| <p>LOGIX COMMUNICATIONS LOGIX FIBER NETWORKS 2950 North Loop West Houston, TX 77092 Tel: 800.999.8105</p> | <p>Emails: Monique.Sampson@Logix.com Credit@Logix.com tonie.bloomingberg@logix.com</p> |
| <p>CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9</p> <p>Counsel for Elevation Energy Group, LLC</p> | <p>Harvey Chaiton Tel: 416.218.1129 Email: harvey@chaitons.com</p> |
| <p>CBTS TECHNOLOGY SOLUTIONS LLC 221 East Fourth Street Cincinnati, OH 45202</p> | <p>Don Verdon Director - Compliance Tel: 513.484.6775 Email: Don.Verdon@cbts.com</p> |

| | |
|--|--|
| <p>COMPUTERSHARE TRUST COMPANY OF CANADA 100 University Avenue, 11th Floor Toronto, ON M5J 2Y1</p> <p>Fax: 416.981.9777</p> <p>Indenture Trustee under a Trust Indenture dated September 28, 2020</p> <p>COMPUTERSHARE TRUST COMPANY OF CANADA 1500 Robert-Bourassa Boulevard, 7th Floor Montreal, Quebec H3A 3S8</p> <p>Fax: 514.982.7677</p> | <p>Yana Nedyalkova, J.D. Corporate Trust Officer, Corporate Trust Tel: 416.263.9559 Email: Yana.Nedyalkova@computershare.com</p> <p>John Poolman Counsel Email: John.Poolman@computershare.com</p> <p>Jonathan Champoux Cadoche Corporate Trust Officer, Corporate Trust Services Tel: 514.982.7632</p> <p>Email: Jonathan.ChampouxCadoche@computershare.com</p> |
| <p>MILLER THOMSON LLP Pacific Centre, 400 – 725 Granville Street Vancouver, BC V7Y 1G5</p> <p>Fax: (604) 643-1200</p> <p>Scotia Plaza 40 King Street West, Suite 5800 P.O. Box 1011 Toronto, ON M5H 3S1</p> <p>Fax: (416) 595-8695</p> <p>Counsel for Computershare Trust Company as Indenture Trustee</p> | <p>Mike Weinczok Tel: (604) 628-3684 Tel: (416) 595-8530 (DL – Toronto) Email: mweinczok@millერთhompson.com</p> |
| <p>WILD GOOSE STORAGE LLC 400 - 607 8th Ave SW Calgary, AB T2P 0A7</p> | <p>James Bartlett Legal Counsel Tel: 403.513.8680 Email: james.bartlett@rockpointgs.com</p> |

| | |
|--|---|
| <p>ENERGY OPTIMIZATION SERVICES LTD. c/o Strategic Group Suite 400, Strategic Centre 630 - 8 Ave SW Calgary AB T2P 1G6</p> <p>Tel. (main): 403.770.2300 Fax: 403.770.2289</p> | <p>Beamer Comfort General Counsel Tel: 587.747.0360 Email: bcomfort@strategicgroup.ca</p> <p>Jayne Gradishar Litigation Paralegal Tel: 403.770.2294 Email: jgradishar@strategicgroup.ca</p> |
| <p>LANIER PARKING SOLUTIONS c/o Lincoln Property Company 5333 Westheimer Rd., Suite 850 Houston, TX 77056</p> <p>Tel: 713.960.1713</p> | <p>Lillie L. Norton Sr. Property Manager Tel. 713.766.7487 Email: lnorton@lpc.com</p> <p>Brooke Caravela Assistant Property Manager Email: bcaravela@LPC.com</p> |
| <p>FOGLER, RUBINOFF LLP 77 King Street West Suite 3000, P.O. Box 95 TD Centre North Tower Toronto, ON M5K 1G8</p> <p>Tel (main): 416.864.9700 Fax: 416.941.8852</p> <p>Counsel for Binnj Inc.</p> | <p>Robert B. Macdonald Tel: 647.729.0754 Email: rmacdonald@foglers.com</p> |
| <p>DICKINSON WRIGHT LLP Barristers & Solicitors 199 Bay Street Suite 2200, P.O. Box 447 Commerce Court Postal Station Toronto, ON M5L 1G4</p> <p>Counsel for Sitel Operating Corporation</p> | <p>John D. Leslie Tel: 416.646.4603 Email: jleslie@dickinsonwright.com</p> <p>Lisa S. Corne Tel: 416.646-4608 Email: lcorne@dickinsonwright.com</p> |

| | |
|--|--|
| <p>BORDEN LADNER GERVAIS LLP 1000 de la Gauchetière West, Suite 900 Montréal, QC H3B 5H4</p> <p>Counsel for Bell Canada</p> | <p>Gabrielle Tremblay Tel: 514.954.2560 Email: gtremblay@blg.com</p> |
| <p>CAMELINO GALESSIERE LLP Barristers & Solicitors 6 Adelaide St. E., Suite 220 Toronto, Ontario, M5C 1H6</p> <p>Fax: (416) 306-3820</p> <p>Counsel for Brookfield Properties (PI) Inc.</p> | <p>Linda Galessiere Tel: (416) 306-3827 Email: lgalessiere@cglegal.ca</p> <p>Jessica Wuthmann Tel: (416) 306-3827 Email: jwuthmann@cglegal.ca</p> |
| <p>MINDEN GROSS LLP 2200 - 145 King Street West Toronto, ON M5H 4G2</p> <p>Fax: (416) 864-9223</p> <p>Counsel for Hoop Realty Inc. and Landlord of 80 Courtney Park Drive, Mississauga, Ontario</p> | <p>Timothy R. Dunn Tel: (416) 369-4335 Email: tdunn@mindengross.com</p> <p>Stephen Skorbinski Tel: (416) 369-4286 Email: sskorbinski@mindengross.com</p> |
| <p>SILVERCREEK MANAGEMENT INC. 1670 Bayview Avenue, Suite 308 Toronto, ON M4G 3C2</p> <p>Fax: (416) 485-0640</p> | <p>Louise Morwick, <i>President</i> Tel: (416) 485-7797 Email: lmorwick@silvercreekmanagement.com</p> <p>Bryn Joynt, <i>Vice President</i> Email: bjoynt@silvercreekmanagement.com</p> |

| | |
|---|--|
| <p>DLA PIPER (CANADA) LLP Suite 2800, Park Place 666 Burrard St. Vancouver, BC V6C 2Z7</p> <p>Fax: (604) 605-4875</p> <p>Counsel for FortisBC Energy Inc.</p> | <p>Colin D. Brousson Tel: (604) 643-6400 Email: colin.brousson@dlapiper.com</p> <p>Alexandra McCawley Tel: (604) 643-2957 Email: alexandra.mccawley@dlapiper.com</p> |
| <p>WeirFoulds LLP 4100 - 66 Wellington St. W. PO Box 35, TD Bank Tower Toronto, ON M5K 1B7</p> <p>Fax: (416) 365-1876</p> <p>Counsel for Microsoft</p> | <p>Philip Cho Tel: (416) 619-6296 Email: pcho@weirfoulds.com</p> <p>Macdonald Allen Tel: (416) 947-5027 Email: mallen@weirfoulds.com</p> |
| <p>CRABTREE LAW 1018-650 West Georgia Street Vancouver, BC V6B 4N8</p> <p>Counsel for Amazon Web Services, Inc.</p> | <p>Andrew Crabtree Tel: (778) 242-6797 Email: andrew@crabtreelaw.ca</p> |
| <p>NIXON PEABODY LLP 70 W. Madison Street Suite 3500 Chicago, IL 60602-4224</p> <p>Fax: 1 (844) 566-1442</p> <p>Counsel for TR Galleria Place Corp. (landlord)</p> | <p>R. Scott Alsterda Tel: (312) 977-9203 Email: rsalsterda@nixonpeabody.com</p> |

| | |
|---|---|
| <p>STREUSAND, LANDON, OZBURN & LEMMON, LLP 1801 S. MoPac Expressway Suite 320 Austin, TX 78746</p> <p>Fax: (512) 236-9904</p> <p>Counsel for Dell Financial Services LLC</p> | <p>Sabrina L. Streusand Tel: (512) 236-9901 Email: streusand@slollp.com</p> |
| <p>Mr. Jordan Steiner (on behalf of shareholders) LionGuard Capital Management 1010 rue Sherbrooke Ouest, Bureau 2350 Montréal, QC H3A 2R7</p> | <p>c/o Jordan Steiner, CFA Portfolio Manager Email: jsteiner@lionguardcapital.com</p> |
| <p>ALVAREZ & MARSAL DSIPUTES AND INVESTIGATIONS, LLC 700 Louisiana St, Suite 3300 Houston, TX 77002</p> <p>ALVAREZ & MARSAL 600 Madison Ave, 8th Floor New York, NY 10022</p> | <p>Ben Edmiston, CPA, CFE Senior Director Tel: 1 (713) 547-3696 Email: bedmiston@alvarezandmarsal.com</p> <p>Scott R. Coleman General Counsel - Operating Companies Email: scoleman@alvarezandmarsal.com</p> |
| <p>OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL State Capital Complex Building 1, Room W-435 Charleston, WV 25305</p> | <p>Elizabeth Baker Assistant Attorney General Tel: 1 (304) 558-2522 Email: beth.baker@wvago.gov</p> |

| | |
|--|---|
| <p>BLAKE, CASSELS & GRAYDON LLP Barristers and Solicitors 199 Bay Street Suite 4000, Commerce Court West Toronto, ON M5L 1A9</p> <p>Fax: (416) 863-2653</p> <p>Counsel for WNS North America Inc.</p> | <p>Chris Burr Tel: (416) 863-3261 Email: chris.burr@blakes.com</p> |
| <p>KELLEY DRYE & WARREN LLP 3 World Trade Centre 175 Greenwich Street New York, NY 10007</p> <p>Counsel for WNS North America Inc.</p> | <p>Eloy Peral Tel: 1 (212) 808-7945 Email: eperal@kelleydrye.com</p> |
| <p>GOWLING WLG (Canada) LLP One Main Street West Hamilton, ON L8P 4Z5</p> <p>Fax: (905) 528-5833</p> <p>Counsel for EXL Services Holdings, Inc.</p> | <p>Emma Dalziel Tel: (905) 540-2477 Email: emma.dalziel@gowlingwlg.com</p> |
| <p>BENNETT JONES LLP One First Canadian Place Suite 3400, P.O. Box 130 Toronto, ON M5X 1A4</p> <p>Fax: (416) 863-1716</p> <p>Special Litigation Counsel to Shell Energy North America (US), L.P.</p> | <p>Kevin Zych Email: zychk@bennettjones.com</p> <p>Richard Swan Email: swanr@bennettjones.com</p> <p>Preet Bell Email: bellp@bennettjones.com</p> <p>Joshua Foster Email: fosterj@bennettjones.com</p> <p>Tel: (416) 863-1200</p> |

| | |
|---|---|
| <p>METZ LEWIS BRODMAN MUST O'KEEFE LLC 535 Smithfield St., Suite 800 Pittsburgh, PA 15222 U.S.A.</p> <p>Fax: 1 (412) 918-1199</p> <p>Counsel for National Fuel Gas Distribution Corp. and various affiliates thereof</p> <p>Copy to:</p> <p>NATIONAL FUEL GAS DISTRIBUTION CORPORATION 6363 Main Street Williamsville, NY 14221 U.S.A.</p> <p>Fax: 1 (716) 857-7206</p> | <p>John R. O'Keefe, Jr. Tel: 1 (412) 918-1133 Email: jokeefe@metzlewis.com</p> <p>Nicholas A. Didomenico Tel: 1(412)918-1155 Email: ndidomenico@metzlewis.com</p> |
| <p>RATELLE 481, rue de Lanaudière Joliette, QC J6E 3M3</p> <p>Fax: (450) 755-2170</p> <p>Counsel to Asphalte Générale Inc.</p> | <p>Thomas Roussy Tel: (450) 759-5151 Email: thomas.roussy@avocatsratelle.com</p> |
| <p>KANE RUSSELL COLEMAN LOGAN PC 901 Main Street, Suite 5200 Dallas, Texas 75202</p> <p>Fax: (214) 777-4299</p> <p>Counsel to Pariveda Solutions Inc.</p> | <p>S. Kyle Woodard Tel: (214) 777-4200 Email: kwoodard@krcl.com</p> |

| | |
|---|--|
| <p>BLAKE, CASSELS & GRAYDON LLP 199 Bay Street, Suite 4000 Commerce Court West Toronto, ON M5L 1A9</p> <p>Counsel to JPMorgan Chase Bank, N.A.</p> | <p>Linc Rogers Tel: (416) 863-4168 Email: linc.rogers@blakes.com</p> <p>Alexia Parente Tel: (416) 863-2417 Email: alexia.parente@blakes.com</p> |
| <p>DUNDON ADVISERS LLC 440 Mamaroneck Avenue, Fifth Floor Harrison, NY 10528 USA</p> <p>Fax: 1 (212) 202-4437</p> <p>Copy to:</p> <p>TYR LLP 488 Wellington Street West Suite 300-302 Toronto, ON M5V 1E3</p> | <p>Matthew Dundon Tel: 1 (917) 838-1930 Email: md@dundon.com</p> <p>Eric Reubel Tel: 1 (917) 626-4051 Email: er@dundon.com</p> <p>Copy to:</p> <p>Jason Wadden Tel: (416) 627-9815 Email: jwadden@tyrllp.com</p> |
| <p>FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP One North Broadway, Suite 900 White Plains, NY 10601 Tel: (914) 298-3290</p> <p>SHUB LAW FIRM LLC 134 Kings Highway East, 2nd Floor Haddonfield, NJ 08033 Tel: (856) 772-7200</p> <p>US Counsel for Trevor Jordet, in his capacity as proposed class representative in <i>Jordet v. Just Energy Solutions Inc.</i></p> <p>STOCKWOODS LLP Barristers Toronto-Dominion Centre TD North Tower, Box 140 77 King Street West, Suite 4130 Toronto, ON M5K 1H1</p> | <p>Greg Blankinship Tel: (914) 298-3290 Email: gblankinship@fbfglaw.com</p> <p>Jonathan Shub Email: jshub@shublawyers.com</p> <p>Kevin Laukaitis Email: klaukaitis@shublawyers.com</p> <p>Stephen Aylward Tel: (416) 593-2496 Email: stephena@stockwoods.ca</p> |

| | |
|--|--|
| <p>Agent for US Counsel for Trevor Jorget</p> | |
| <p>WITTELS MCINTURFF PALIKOVIC 18 Half Mile Road Armonk, NY 10504 Tel: (914) 775-8862</p> <p>Fax: (914) 273-2563</p> <p>US Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in <i>Donin et al. v. Just Energy Group Inc. et al.</i></p> <p>STOCKWOODS LLP Barristers Toronto-Dominion Centre TD North Tower, Box 140 77 King Street West, Suite 4130 Toronto, ON M5K 1H1</p> <p>Agent for US Counsel for Fira Donin and Inna Golovan</p> | <p>Steven L. Wittels Tel: (914) 775-8862 Email: slw@wittelslaw.com</p> <p>J. Burkett McInturff Tel: (910) 476-7253 Email: jbm@wittelslaw.com</p> <p>Steven D. Cohen Tel: (914) 775-8862 ext 109 Email: sdcc@wittelslaw.com</p> <p>Stephen Aylward Tel: (416) 593-2496 Email: stephena@stockwoods.ca</p> |
| <p>PALIARE ROLAND ROSENBERG ROTHSTEIN LLP 155 Wellington Street West, 35th Floor Toronto, ON M5V 3H1 Tel: (416) 646-4300</p> <p>Fax: (416) 646-4301</p> <p>Counsel to US counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in <i>Donin et al. v. Just Energy Group Inc. et al.</i></p> | <p>Ken Rosenberg Tel: (416) 646-4304 Email: ken.rosenberg@paliareroland.com</p> <p>Jeffrey Larry Tel: (416) 646-4330 Email: jeff.larry@paliareroland.com</p> <p>Danielle Glatt Tel: (416) 646-7440 Email: danielle.glatt@paliareroland.com</p> |

| | |
|---|--|
| <p>Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in <i>Jordet v. Just Energy Solutions Inc.</i></p> | |
| <p>AMERICAN EXPRESS World Financial Center 200 Vesey St. New York, NY 10285-1000</p> | <p>Ina Thonfeld Tel: 1 (212) 640-2216 Email: ina.thonfeld@aexp.com</p> <p>Matthew Heimann Tel: 1 (908) 208-9438 Email: matthew.heimann@aexp.com</p> |
| <p>AMERICAS CORE CREDIT - Reorg 11 East 26th Street, 12th Floor New York, NY 10010</p> <p>(212) 588-8890</p> | <p>Bri Bilter Email: bbilter@reorg.com</p> |
| <p>STIKEMAN ELLIOTT LLP 4300 Bankers Hall West 888 - 3rd Street S.W. Calgary, AB T2P 5C5</p> <p>Fax: (403) 266-9034</p> <p>Counsel for Alectra Utilities Corporation</p> | <p>Karen Fellowes, Q.C. Tel: (403) 724-9469 (Calgary) (604) 631-1468 (Vancouver) Email: kfellowes@stikeman.com</p> |

| | |
|---|---|
| <p>SULAIMAN LAW GROUP, LTD. 2500 South Highland Ave., Suite 200 Lombard, Illinois 60148</p> <p>Fax: 1 (630) 575-8188</p> <p>Counsel for the Plaintiff in <i>Williams v. Fulcrum Retail Energy LLC</i> (Case No. 3:22-cv-00460-S, U.S. District Court – Northern District of Texas)</p> | <p>Nathan C. Volheim Tel: 1 (630) 568-3056 Email: nvolheim@sulaimanlaw.com</p> <p>Eric D. Coleman Email: ecoleman@sulaimanlaw.com</p> <p>Alejandro E. Figueroa Email: alejandrof@sulaimanlaw.com</p> |
| <p>TORYS LLP 79 Wellington St. W., Suite 3000 Box 270, TD Centre Toronto, ON M5K 1N2</p> <p>Fax: (416) 865-7380</p> <p>Counsel to Calpine Corporation</p> | <p>Adam M. Slavens Tel: (416) 865-7333 Email: aslavens@torys.com</p> <p>Mike Noel Tel: (416) 865-7378 Email: mnoel@torys.com</p> |
| <p>OFFICE OF THE ILLINOIS ATTORNEY GENERAL 100 West Randolph Street, 11th Floor Chicago, Illinois 60601</p> | <p>Darren Kinkead Deputy Chief, Special Litigation Bureau Tel: 1 (773) 590-6967 Email: darren.kinkead@ilag.gov</p> |

PPSA REGISTRANTS

| | |
|--|---|
| <p>ICE NGX CANADA INC. 225 6th Avenue SW, Suite 2610 Calgary, AB</p> | <p>Email: maggie.xu@theice.com</p> <p>Copy to:</p> <p>Email: Operations-ICENGX-Clearing@TheIce.com</p> |
| <p>CISCO SYSTEMS CAPITAL CO. 170 West Tasman Drive San Jose, CA 95134</p> | <p>Email: csc-america-notice@cisco.com</p> |
| <p>WELLS FARGO EQUIPMENT FINANCE COMPANY 1290 Central Parkway West, Suite 1100 Mississauga, ON L5C 4R3</p> <p>Fax: 416.498.9240</p> | |
| <p>HEWLETT-PACKARD FINANCIAL SERVICES CANADA COMPANY 5150 Spectrum Way 3rd Fl Mississauga, ON, L4W 5G1</p> | |

| | |
|---|--|
| <p>ENBRIDGE GAS INC. 500 Consumers Road Toronto, ON M2J 1P8</p> <p>Fax: 416.495.5994</p> <p>ENBRIDGE GAS INC. Suite 200, 425 1st Street SW Fifth Avenue Place, East Tower Calgary, AB T2P 3L8</p> | <p>Armanda Pinho Associate General Counsel Tel: 416.428.8944 Email: Armanda.pinho@enbridge.com</p> <p>Joseph Marra Senior Legal Counsel Tel: 403.612.5117 Email: Joseph.marra@enbridge.com</p> <p>Rob DiMaria Tel: 416.523.9629 Email: Rob.DiMaria@enbridge.com</p> <p>Shawn McClacherty Tel: 519.365.8945 Email: Shawn.McClacherty@enbridge.com</p> <p>Terry Laframboise Tel: 519.567.3587 Email: Terry.Laframboise@enbridge.com</p> <p>Amir Hasan Tel: (416) 450 0253 Email: Amir.Hasan@enbridge.com</p> |
| <p>XEROX CANADA LTD. 20 York Mills Rd #5 North York, ON M2P 2C2</p> | |

| | |
|---|--|
| <p>CANADIAN IMPERIAL BANK OF COMMERCE 199 Bay Street, Commerce Court Toronto, ON, CA, M5L 1A2</p> <p>Fax: 416.980.7012</p> | <p>Email: wendy.maragh@cibc.com</p> |
|---|--|

Email List:

MWasserman@osler.com; MDeLellis@osler.com; JDacks@osler.com; SIrving@osler.com;
DRosenblat@osler.com; brian.schartz@kirkland.com; mary.kogut@kirkland.com;
neil.herman@kirkland.com; paul.bishop@fticonsulting.com; jim.robinson@fticonsulting.com;
rthornton@tgf.ca; rnicholson@tgf.ca; pfesharaki@tgf.ca; rkennedy@tgf.ca;
tdemarinis@torys.com; hmeredith@mccarthy.ca; jgage@mccarthy.ca; jlapedus@mccarthy.ca;
dlynde@mccarthy.ca; stetro@chapman.com; mmreed@chapman.com;
howard.gorman@nortonrosefulbright.com; rjacobs@cassels.com; jdietch@chappell.com;
mwunder@cassels.com; daniel.sylvester@hkclaw.com; dbotter@akingump.com;
aqureshi@akingump.com; zwittenberg@akingump.com; cnichols@akingump.com;
howard.gorman@nortonrosefulbright.com; ryan.manns@nortonrosefulbright.com;
david.mann@dentons.com; robert.kennedy@dentons.com; patrick.hughes@haynesboone.com;
kelli.norfleet@haynesboone.com; Patrick.Woodhouse@constellation.com;
Bill.SCHNURR@brucepower.com; Gerald.Nemec@edfenergyna.com;
Frank.Smejkal@edfenergyna.com; ELLIOT.BONNER@nexteraenergy.com;
Allison.Ridder@nexteraenergy.com; FICC.notices@macquarie.com;
FICClegalHouston@Macquarie.com; FICClegalHouston@Macquarie.com;
FICClegalHouston@Macquarie.com; msloanservicing@morganstanley.com;
commission.secretary@bcuc.com; info@aeso.ca; Chun.Seto@aeso.ca; scott.hood@gov.ab.ca;
jp.mousseau@auc.ab.ca; RetailerContact@atcogas.com; regulatory@apexutilities.ca;
brpc@brpower.coop; gloria@fortmacleod.com; admin@fortmacleod.com;
sharon.wong@fortisalberta.com; gas.regulatory.affairs@fortisbc.com;
electricity.regulatory.affairs@fortisbc.com; cglazer@equs.ca; utilities@ponoka.ca;
utilities@crownsnestpass.com; fcaa@gov.sk.ca; Rachel.McMillin@gov.mb.ca;
Kristen.Schubert@gov.mb.ca; publicutilities@gov.mb.ca; dmartin@hydro.mb.ca;
BACzarnecki@hydro.mb.ca; cdfoulkes@hydro.mb.ca; registrar@oeb.ca;
peggy.lund@algomapower.com; regulatoryaffairs@fortisontario.com; info@athydro.com;
jen.wiens@athydro.com; kgadsby@bluewaterpower.com; regulatory@bluewaterpower.com;
regulatoryaffairs@energyplus.ca; regulatory@brantford.ca;
regulatoryaffairs@burlingtonhydro.com; regulatoryaffairs@energyplus.ca;
regulatoryaffairs@fortisontario.com; regulatory@cwhydro.ca; chec@onlink.net;
jcyr.puc@chappleau.ca; onreg.electricity@epcor.com; benoit@hydroembrun.ca;
emuscat@enersource.com; regulatoryaffairs@alecrautilities.com; Tracy.Manso@entegrus.com;
regulatory@entegrus.com; ana.couto@entegrus.com; retailerrelations@enwin.com;
regulatory@enwin.com; oeb@erithamespower.com; jbarile@essexpowerlines.ca; info@ffpc.ca;
jodiek@shcc.com; regulatoryaffairs@gsuinc.ca; regulatoryaffairs@grimsbypower.com;
christina.koren@alecrautilities.com; regulatoryaffairs@alecrautilities.com;
paul.harricks@hydroone.com; tracyr@haltonhillshydro.com; jrichard@hearstpower.com;
regulatoryaffairs@alecrautilities.com; lisewilkinson@hydro2000.ca;
service@hydrohawkesbury.ca; regulatory@hydroone.com;
regulatoryaffairs@alecrautilities.com; regulatoryaffairs@hydroottawa.com;
regulatoryaffairs@innpower.ca; jrobertson@kenora.ca; regulatory@synergynorth.ca;
rmurphy@utilitieskingston.com; regulatory@kingstonhydro.com; jvanooteghem@kwhydro.ca;
dpaul@lusi.on.ca; regulatory@lusi.on.ca; regulatoryaffairs@londonhydro.com;
chuma@midlandpuc.on.ca; regulatory@nmhydro.ca; igor.rusic@miltonhydro.com;
regulatory@miltonhydro.com; tcurtis@notlhydro.com; Margaret.battista@npei.ca;
regulatory@hydroone.com; gsauve@northbayhydro.com; sbomhof@torys.com;

regulatoryaffairs@northbayhydro.com; sandras@nowinc.ca; regulatory@nowinc.ca;
mwilson@oakvillehydro.com; regulatoryaffairs@oakvillehydro.com;
regulatoryaffairs@orangevillehydro.on.ca; phurley@orilliapower.ca;
regulatory@hydroone.com; sbeckstead@opuc.on.ca; regulatory.affairs@opuc.on.ca;
jallen@orpowercorp.com; jstephenson@peterboroughutilities.ca; regulatory@hydroone.com;
regulatoryaffairs@alecrautilities.com; Jennifer.uchmanowicz@ssmpuc.com;
regulatory@ssmpuc.com; regulatory@renfrewhydro.com; jwalsh@rslu.ca; slhydro@tbaytel.net;
dkulchyski@siouxlookouthydro.com; regulatory@entegrus.com; regulatory@nmhydro.ca;
twilson@tbhydro.on.ca; regulatory@synergynorth.ca; rbaichan@tillsonburg.ca;
epage@torontohydro.com; regulatoryaffairs@torontohydro.com;
llombardi@elexiconenergy.com; d.stavinga@wasagadist.ca; retinfo@wnhydro.com;
porosz@wellandhydro.com; rbucknall@wellingtonnorthpower.com;
oeb@erithamespower.com; Malcolm.McCallum@westario.com; sreffle@whitbyhydro.on.ca;
llombardi@elexiconenergy.com; regulatory@hydroone.com; KU-sups@kitchener.ca;
ntaylor@utilitieskingston.com; info@energir.com; mrobin20@travelers.com;
Howard.uniman@zurichna.com; wendy.maragh@cibc.com; maggie.xu@theice.com;
csc-america-notice@cisco.com; Shakeel.Arshed@enbridge.com;
RetailerServices@atcoelectric.com Knox.Davidson@atco.com; jerickson@osler.com;
EPaplawski@osler.com; Michael.Strohmeier@constellation.com; peter.bychawski@blakes.com;
JHiggins@porterhedges.com; Armanda.pinho@enbridge.com; Joseph.marra@enbridge.com;
Rob.DiMaria@enbridge.com; Shawn.McClacherty@enbridge.com;
Terry.Laframboise@enbridge.com; Amir.Hasan@enbridge.com; tyler.planeta@siskinds.com;
michael.robb@siskinds.com; ap@complexlaw.ca; ckbh@complexlaw.ca; jmaclellan@blg.com;
bbrooksbank@blg.com; tushara.weerasooriya@mcmillan.ca; shahen.mirakian@mcmillan.ca;
stephen.brown-okruhlik@mcmillan.ca; TCrotty-Wong@epcor.com; legaldeptinqu@epcor.com;
Credit@ATCO.com; Brian.Loewen@lethbridge.ca; victor.buza@ieso.ca; michael.lyle@ieso.ca;
kenneth.kraft@dentons.com; gord.tarnowsky@dentons.com; mark.freake@dentons.com;
arsalan.muhammad@haynesboone.com; HaneySI@michigan.gov; EGoldstein@goodwin.com;
JSignor@goodwin.com; bankruptcy@goodwin.com; NelmsA@bennettjones.com;
klozynsk@apexutilities.ca; phillip.nelson@hkllaw.com; MNanninga@KWHydro.ca;
jshaffer@longviewcomms.ca; berman@longviewcomms.ca; pblock@longviewcomms.ca;
nrambaran@mccarthy.ca; drosenfeld@kmlaw.ca; jharnum@kmlaw.ca; aziaie@kmlaw.ca;
Virginie.Gauthier@gowlingwlg.com; pcorney@wfkllaw.ca; sweisz@wfkllaw.ca;
nicholsonc@jssbarristers.ca; mabramowitz@blaney.com; egolden@blaney.com;
kelly.bourassa@blakes.com; aneil@hydro.mb.ca; bempey@goodmans.ca;
nlepore@schnader.com; rbarkasy@schnader.com; mkonyukhova@stikeman.com;
davidnoble@puc.nv.gov; dlomoljo@puc.nv.gov; tobrien@lzwllaw.com;
bmv@energybankinc.com; ben.huff@elevationeg.com; dmichaud@kwhydro.ca;
michael.b@empirearmi.com; diane.winters@justice.gc.ca; leslie.crawford@ontario.ca;
insolvency.unit@ontario.ca;
paul.fagan@amcapr.com; ihurley@leckerslaw.com; tina@leckerslaw.com;
Maribeth.Halls@cdw.ca; pat.confalone@cra-arc.gc.ca; tbf.minister@gov.ab.ca;
associateminister-rtr@gov.ab.ca; Monique.Sampson@Logix.com; Credit@Logix.com;
tonie.bloomingberg@logix.com; harvey@chaitons.com; Don.Verdon@cbts.com;
Yana.Nedyalkova@computershare.com; John.Poolman@computershare.com;
Jonathan.ChampouxCadoche@computershare.com;

james.bartlett@rockpointgs.com; bcomfort@strategicgroup.ca; jgradishar@strategicgroup.ca;
lnorton@lpc.com; bcaravela@LPC.com; rmacdonald@foglars.com;
jleslie@dickinsonwright.com; lcorne@dickinsonwright.com;
gtremblay@blg.com; lgalessiere@cglegal.ca; jwuthmann@cglegal.ca; tdunn@mindengross.com;
sskorbinski@mindengross.com; lmorwick@silvercreekmanagement.com;
bjoynt@silvercreekmanagement.com; colin.brousson@dlapiper.com;
alexandra.mccawley@dlapiper.com; pcho@weirfoulds.com; mallen@weirfoulds.com;
andrew@crabtreelaw.ca; rsalsterda@nixonpeabody.com; streusand@slollp.com;
michael.schafler@dentons.com; jsteiner@lionguardcapital.com;
bedmiston@alvarezandmarsal.com; beth.baker@wvago.gov; chris.burr@blakes.com;
eperal@kelleydrye.com; emma.dalziel@gowlingwlg.com; scoleman@alvarezandmarsal.com;
zychk@bennettjones.com; swanr@bennettjones.com; bellp@bennettjones.com;
fosterj@bennettjones.com; thomas.roussy@avocatsratelle.com; kwoodard@krcl.com;
linc.rogers@blakes.com; Operations-ICENGX-Clearing@TheIce.com; md@dundon.com;
er@dundon.com; mwinchester@festivalhydro.com; grahamj@festivalhydro.com;
blaborie@bridgehouselaw.ca; stephena@stockwoods.ca; gblankinship@fbfglaw.com;
jshub@shublawyers.com; klaukaitis@shublawyers.com; slw@wittelslaw.com;
jbm@wittelslaw.com; sdcc@wittelslaw.com; jbellissimo@cassels.com; jdavids@justenergy.com;
mccarter@justenergy.com; jeff.larry@paliaroland.com; ken.rosenberg@paliaroland.com;
ina.thonfeld@aexp.com; matthew.heimann@aexp.com; alexia.parente@blakes.com;
amerskey@cassels.com; jpicone@cassels.com; cselby@cassels.com; jbornstein@cassels.com;
bbilter@reorg.com; danielle.glatt@paliaroland.com; mcasson@northbayhydro.com;
gsauve@northbayhydro.com; kfellowes@stikeman.com; nvolheim@sulaimanlaw.com;
ecoleman@sulaimanlaw.com; alejandrof@sulaimanlaw.com; jwadden@tyrllp.com;
mweinczok@millertomson.com; apappas@burlingtonhydro.com; jokeefe@metzlewis.com;
ndidomenico@metzlewis.com; aslavens@torys.com; mnoel@torys.com;
darren.kinhead@ilag.gov;

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PART I - OVERVIEW

1. The Responding Parties (also referred to below as the “**Just Energy Entities**”) file this factum opposing a motion for leave to appeal an order dated February 9, 2022 (the “**February Order**”) granted by Justice McEwen (the “**CCAA Judge**”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”). The February Order was issued in response to a Motion for Advice and Direction (the “**Motion**”) brought by counsel to the proposed representative plaintiffs (the “**Putative Class Claimants**”) in two uncertified US class actions—the Donin Action¹ and the Jordet Action² (the “**Putative Class Claims**”).

2. In their Motion, Counsel to the Putative Class Claimants (“**Plaintiffs’ Counsel**”) sought an order from the Ontario Superior Court of Justice (Commercial List) (the “**CCAA Court**”) imposing their preferred schedule and process for the adjudication in the CCAA proceeding of the Putative Class Claims. Balancing the relevant interests and making key findings of fact on the evidence, the CCAA Judge denied this relief on a number of grounds, including the prematurity of the order sought, the utterly unrealistic and unachievable six-week schedule proposed by Plaintiffs’ Counsel, and the need to ensure that limited management resources remained dedicated at a critical time to the negotiation of a going-concern restructuring solution for the benefit of all stakeholders.

3. Plaintiffs’ Counsel now seek leave to appeal the February Order on the grounds that the CCAA Judge erred in law by failing to impose their proposed schedule.³ However, there is no

¹ *Donin v. Just Energy Group Inc. et al.*, No. 17 Civ.5787 (WFK) (SJB)(E.D.N.Y.).

² *Trevor Jordet v. Just Energy Solutions Inc.*, No. 18 Civ. 953 (WMS) (W.D.N.Y.).

³ While Plaintiffs’ Counsel seeks leave to appeal the entire February Order, their submissions with respect to their motion for leave to appeal are solely focused on the CCAA Judge’s decision not to impose their requested schedule.

legal error at issue in this proposed appeal, let alone a legal issue warranting the attention of this Court. Nor do Plaintiffs' Counsel establish or even allege any palpable or overriding error of fact. The February Order is the result of an exercise of discretion of the CCAA Judge, in his capacity as the supervising judge with carriage of this complex cross-border CCAA proceeding. It is well-established that such an exercise of discretion by a supervising CCAA Judge is to be accorded the highest degree of deference.

4. Plaintiffs' Counsel seek to manufacture issues of importance regarding the treatment of contingent claims in the context of an "imminent plan" and the right of creditors to vote to approve a restructuring plan. However, none of these issues were resolved by the CCAA Judge in the February Order, as no plan had been presented to the Court or the creditors at the time the Motion was heard. At that time, the proposed treatment of any contingent claimants under any plan proposed by the Just Energy Entities – let alone the Putative Class Claimants – was entirely hypothetical. Even if such issues were of potential interest to the practice (which is denied), there is no foundation in the record on which this Court could address them.

5. The February Order did not deprive the Putative Class Claimants of any procedural or substantive rights, let alone "disenfranchise" them. Nor did it deprive the Putative Class Claimants of a future opportunity to object, at the appropriate time, to the fairness of their treatment under a proposed plan of compromise and arrangement, once it is filed with the Court and presented to creditors for their approval.

6. By contrast, the CCAA Judge was alive to the fact that the relief requested by Plaintiffs' Counsel would be fundamentally disruptive to the Just Energy Entities' efforts to present and conclude a restructuring transaction and could derail the restructuring entirely. If leave is granted, the uncertainty created by any such appeal would be similarly disruptive.

7. In fact, Plaintiffs' Counsel are pursuing this motion for leave to appeal, despite the fact (not mentioned by Plaintiffs' Counsel) that, since the date of the February Order, a Claims Officer has been appointed under the Claims Procedure Order on the consent of the parties to adjudicate the Putative Class Claims. A process is now underway to reach a fair resolution of the Putative Class Claims. A number of steps in this process have already been taken, with the full participation of the Putative Class Claimants. Any proposed appeal would interfere with this process and potentially disrupt the restructuring.

8. The Just Energy Entities respectfully submit that leave to appeal should be denied.

PART II - SUMMARY OF FACTS

A. Status of the CCAA proceedings

9. On March 9, 2021, the Just Energy Entities obtained protection under the CCAA pursuant to an initial order of the CCAA Court.⁴ On September 15, 2021, the CCAA Court granted an Order approving a process (the "**Claims Process**") for the identification, quantification and resolution of claims against the Just Energy Entities and their respective directors and officers and establishing a Claims Bar Date of November 1, 2021 (the "**Claims Procedure Order**").⁵ The Putative Class Claimants did not seek leave to appeal the Claims Procedure Order.

10. Since the Claims Bar Date, the Just Energy Entities have been working diligently with the Monitor to review, record, dispute and, where appropriate, finally determine the amount and

⁴ Affidavit of Michael Carter, sworn February 2, 2022 (the "**Seventh Carter Affidavit**"), para. 6, Motion Record of the Moving Parties dated April 5, 2022 ("**MR**"), Tab 7, pp. 386-387. The Initial Order was which was subsequently amended and restated on March 19, 2021, and May 26, 2021. Capitalized terms not otherwise defined have the same meaning as in the Seventh Carter Affidavit.

⁵ Seventh Carter Affidavit, at para. 9, MR, Tab 7, p. 387.

characterization of Claims submitted.⁶ Where a Claim is disputed, the Claims Process contemplates that the Just Energy Entities (not the Putative Class Claimants) will determine whether to appoint a Claims Officer to resolve particular claims, and contemplates that the Claims Officer will establish the process and the schedule for resolving the particular Claim.⁷

11. The Just Energy Entities have also been working in earnest with the most significant participants in their capital structure,⁸ to develop a going concern restructuring plan (the “**Plan**”) which, among other things, preserves the value of the Just Energy Entities’ businesses for the benefit of stakeholders (including the company’s approximately 950,000 customers, more than 1000 employees, and significant trading partners) and supports the long-term viability of the business upon emergence from these CCAA and Chapter 15 proceedings. These negotiations have been complex due to the nature of the company’s business and financial arrangements.⁹

12. At the time of the Motion, the Just Energy Entities intended to appear before the CCAA Court on March 3, 2022 to seek the authority from the CCAA Court to file the Plan and to place the Plan before its creditors at a Creditors’ Meeting. However, the possibility that this Court hearing could be delayed if the Plan negotiations were not complete was disclosed to the Court and was specifically noted in the CCAA Judge’s Endorsement. Ultimately, the anticipated timeline

⁶ Seventh Carter Affidavit, at para. 9, MR, Tab 7, p. 387.

⁷ Claims Procedure Order dated September 15, 2021, Seventh Carter Affidavit, Exhibit A, at paras. 39 and 43-44 MR, Tab 7, pp. 443-445.

⁸ Such stakeholders include: the DIP Lenders (who are also Term Loan Lenders and the assignee of a significant secured supplier claim from BP), the Credit Facility Lenders and Shell (a significant secured supplier).

⁹ Seventh Carter Affidavit, at paras. 11-12, MR, Tab 7, pp. 388-389.

proved to be unachievable. The CCAA Court therefore granted three extensions of the CCAA stay of proceedings, the latest on April 21, 2022.¹⁰

B. The Putative Class Claims

13. The Jordet Action was commenced on April 6, 2018 solely against Just Energy Solutions, Inc. (“**Just Energy Solutions**”) on behalf of a putative class of “customers charged a variable rate for residential natural gas services... from April 2012 to the present”.¹¹

14. The Donin Action was commenced on October 3, 2017 against Just Energy Group Inc. (“**JEGI**”), Just Energy New York Corp. (“**Just Energy NY**”), and John Does 1-100, which the plaintiffs alleged included “shell companies and affiliates” through which JEGI did business in New York and elsewhere. The Donin Action was brought on behalf of a putative class of customers “who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment.”¹²

15. Following successful motions to dismiss both actions, which were fully briefed prior to the CCAA filing, the only claims that remain are allegations (yet unproven) that the applicable Just Energy Entities’ actions breached contractual provisions to consider “business and market conditions” and breached the implied covenant of good faith when they charged rates that were more than the local utility rate for natural gas and (in the case of the Donin Action only) electricity. All other causes of action asserted in the Donin and Jordet Actions – including unjust enrichment, fraud, and various statutory claims – were dismissed by the US Courts. Additionally, all claims

¹⁰ [Stay Extension Order](#) of Justice McEwen, dated April 21, 2022.

¹¹ A copy of the plaintiff’s complaint in the Jordet Action is attached as Exhibit “D” to the affidavit of Robert Tannor sworn January 17, 2022 (the “**Tannor Affidavit**”), MR, Tab 6, pp. 191-211.

¹² A copy of the plaintiffs’ complaint in the Donin Action is attached as Exhibit “B” to the Tannor Affidavit, MR, Tab 6, pp. 100-172.

against John Does 1-100 in the Donin Action were dismissed by the US Court for lack of jurisdiction and all claims for breach of contract prior to April 6, 2014, were held by the US Court to be time-barred in the Jordet Action.¹³

16. Factual discovery in the Donin Action was closed as of January 10, 2020.¹⁴ No discovery had occurred in the Jordet Action at the time the Motion was decided.¹⁵

C. Disallowance of the Putative Class Claims

17. On November 1, 2021, Plaintiffs' Counsel filed two substantively identical Proofs of Claim in respect of the Putative Class Claims, each in the unsecured amount of approximately USD\$3.66 billion.¹⁶ On January 11, 2022, the Monitor delivered Notices of Revision or Disallowance (the "**Disallowances**") denying the Putative Class Claims in full as part of the Claims Process.¹⁷

18. The Disallowances rejected the Putative Class Claims as, among other things, contingent, uncertified, speculative, and remote, and outlined a number of legal and factual shortcomings of the Putative Class Claims. They included a detailed critique of the Putative Class Claimants' purported expert report. The Disallowances highlighted the improper attempts of the Putative Class

¹³ Seventh Carter Affidavit, at paras. 22 and 27, MR, Tab 7, pp. 393-395. A copy of the EDNY Court's decision on the motion to dismiss dated September 24, 2021 is attached as Exhibit "C" to the Tannor Affidavit MR, Tab 6, pp. 174-189. A copy of the WDNY Court's decision on the motion to dismiss dated December 7, 2020 is attached as Exhibit "E" to the Tannor Affidavit, MR, Tab 6, pp. 213-245.

¹⁴ Seventh Carter Affidavit, at para. 30, MR, Tab 7, p. 396.

¹⁵ Seventh Carter Affidavit, at para. 56, MR, Tab 7, pp. 409-410.

¹⁶ Seventh Carter Affidavit, at para. 31, MR, Tab 7, p. 396. The damages calculation purports to be a joint, composite damages claim encompassing both lawsuits, notwithstanding the fundamental differences in terms of the defendants, scope of the claim and potential class members in the two actions.

Copies of the Donin Proof of Claim, the Jordet Proof of Claim and the Claim Documentation included in both Proofs of Claim (excluding Exhibits 2-5, which are copies of the pleadings and motions to dismiss for both Putative Class Actions) are attached to the Tannor Affidavit as Exhibits "F", "G" and "H", respectively, MR, Tab 6, pp. 246-301.

¹⁷ Notices of Disallowance are at Exhibits "Q" and "R" of the Tannor Affidavit, MR, Tab 6, pp. 353-373.

Claimants to use the CCAA proceeding to expand their claims well beyond those claims that remained following the resolution of the motions to dismiss, including by adding further Just Energy Entities as defendants, adding new customer groups within the plaintiff class, and extending the class periods.¹⁸

D. Proposed adjudication schedules

19. Despite the express terms of the Claims Procedure Order, Plaintiffs' Counsel sent a proposed schedule and process for resolving the Putative Class Claims to counsel to the Just Energy Entities on December 13, 2021 (the "**December Proposed Schedule**") which suggested: (a) the appointment of a tripartite panel of arbitrators from JAMS (U.S.); (b) the application of the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures to pre-hearing discovery and the hearing; (c) "[S]ufficient disclosure" from the Just Energy Group; (d) "circumscribed" depositions; and (e) a hearing lasting approximately 5-7 days to be scheduled for the first week of February 2022.¹⁹

20. The December Proposed Schedule was not remotely achievable and ignored significant steps in the adjudication process, including summary judgment and class certification.²⁰

21. Plaintiffs' Counsel subsequently put forward a largely identical proposed schedule in their motion record on January 19, 2022. This second schedule still sought a hearing on the merits of

¹⁸ Seventh Carter Affidavit, at paras. 32-39, MR, Tab 7, pp. 397-400.

¹⁹ Seventh Carter Affidavit, at para. 52, MR, Tab 7, pp. 407-408.

²⁰ Seventh Carter Affidavit, at paras. 53-54, MR, Tab 7, p. 408.

the Putative Class Claims in February 2022 and continued to ignore significant steps required for the adjudication process that were outlined in the Disallowances.²¹

22. On February 1, 2022, the Just Energy Entities provided their proposed adjudication schedule to Plaintiffs' Counsel (the "**JE Proposed Schedule**").²² The JE Proposed Schedule, which was supported by the Monitor,²³ would have seen both Putative Class Claims adjudicated over the course of twelve months. This compressed schedule provided for the hearing of the certification and summary judgment motions almost a year and a half before such motions would be heard in the Jordet Action in the ordinary course.²⁴

23. On February 4, 2022, Plaintiffs' Counsel proposed a new adjudication schedule (the "**February Proposed Schedule**"). Counsel noted that they were originally "prepared to send a proposal for a process that resulted in a decision on the merits in May 2022". However, they instead proposed a schedule that would require the Putative Class Action Claims to be determined no later than three days before the meeting of creditors – i.e. March 27, 2022, given that the DIP Term Sheet at that time required the Creditors' Meeting be held by March 30, 2022.²⁵ The six-and-a-half-week timeframe proposed by Plaintiffs' Counsel did not provide sufficient time to address certification, let alone any other step.²⁶

²¹ Seventh Carter Affidavit, at para. 57, MR, Tab 7, p. 410; Plaintiffs' Notice of Motion and Cross-Motion dated January 19, 2022, para. 3(a), MR Tab 5, pp. 50-51.

²² A copy of the communication to Plaintiffs' Counsel, including the JE Proposed Schedule is attached to the Seventh Carter Affidavit as Exhibit "M", MR, Tab 7, pp. 695-699.

²³ Fifth Report of FTI Consulting Canada Inc., in its capacity as Court-Appointed Monitor, dated February 4, 2022, at paras. 57 and 60 [**Fifth Report**], MR, Tab 8, pp. 722-723.

²⁴ Seventh Carter Affidavit, at para. 59, MR, Tab 7, pp. 410-411.

²⁵ Schedule "C" to Factum of Class Counsel, MR, Tab 9, pp. 769-790.

²⁶ Schedule "C" to Factum of Class Counsel, MR, Tab 9, pp. 769-790.

E. The decision below

24. The Motion was heard on February 9, 2022. The Motion was opposed by the Just Energy Entities, who were supported by the Monitor, the DIP Lenders, the Agent/Credit Facility Lenders, and Shell. It was dismissed by the CCAA Judge at the conclusion of the hearing. In the interest of expediency, reasons supporting this dismissal were delivered in the form of handwritten Endorsement on February 23, 2022.²⁷

25. The CCAA Judge provided a number of reasons for refusing to impose the February Proposed Schedule.²⁸ On this issue, the CCAA Judge found that:²⁹

- (a) the Just Energy Entities had not been dilatory in responding to the Putative Class Claimants;
- (b) the Putative Class Claimants had not yet contested the Disallowances, which was a pre-condition to triggering the adjudication process in the Claims Procedure Order;
- (c) the February Proposed Schedule was not viable, given the significant number of hearings which would be required to resolve the Putative Class Claims, none of which had been completed in the 3 to 4 year time period since the Putative Class Claims had been commenced;

²⁷ Unofficial Transcript of the Handwritten Endorsement of Justice McEwen dated February 23, 2022 [“**Endorsement Transcript**”], MR, Tab 4, pp. 45-46.

²⁸ The CCAA Judge also denied Plaintiffs’ Counsel’s requests for, *inter alia*: (i) a declaration they be deemed to be unaffected by the CCAA proceedings; (ii) access to any data room regarding the restructuring proceedings; (iii) the appointment of a mediator/arbitrator to resolve disputes about access to restructuring information; (iv) a direction that the Just Energy Entities meet with Plaintiffs’ Counsel and their advisors within 7 days of production of the requested restructuring information to answer additional questions. The submissions of Plaintiffs’ Counsel in this motion for leave to appeal focus exclusively on the CCAA Judge’s refusal to impose the February Proposed Schedule.

²⁹ Endorsement Transcript, pp. 3-4, MR, Tab 4, pp. 45-46.

- (d) the extremely abridged process proposed by the February Proposed Schedule would be a “tremendous distraction from the restructuring which is at a critical juncture;”
- (e) the relief sought was premature, as the CCAA process had yet to sufficiently progress—no plan had yet been offered to the CCAA Court, and the issue of a meeting order had yet to be addressed; and
- (f) there was no reason for the Putative Class Claims to be adjudicated prior to other claims and prior to the next contemplated steps in the CCAA proceeding.

PART III - ISSUES

26. The sole issue is whether to grant leave to appeal from the February Order.

PART IV -LAW AND ARGUMENT

A. Test for Leave to Appeal from a CCAA Order

27. An order made under the CCAA may only be appealed with leave.³⁰ The test for obtaining leave to appeal is stringent.³¹ Leave to appeal should be granted only “sparingly,” owing to the “real time dynamic” of CCAA proceedings and the “generally discretionary character” of the orders made within them.³²

³⁰ *Companies' Creditors Arrangement Act*, RSC 1986, c C-36 at s. 13.

³¹ *Timminco Ltd., Re*, 2012 ONCA 552 at paras. 2-3.

³² *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478 at para. 19.

28. Leave to appeal is granted only where there are serious and arguable grounds of appeal that are of real and significant interest to the parties and the practice.³³ In determining whether leave should be granted, the court applies the following test:

- (a) Whether the proposed appeal is *prima facie* meritorious or frivolous;
- (b) Whether the points on the proposed appeal are of significance to the practice;
- (c) Whether the points on the proposed appeal are of significance to the action; and
- (d) Whether the proposed appeal will unduly hinder the progress of the action.³⁴

29. The stringency of this test accords with the legislative purpose underlying s. 13, which is to ensure that most CCAA decisions are made by the supervising judge, with appellate interference occurring in only the clearest cases.³⁵ The requirement for leave to appeal furthers the objects and purpose of the CCAA by facilitating the resolution of disputes with minimal delay and reinforcing the finality of orders made by the supervising judge.³⁶

30. The test is particularly stringent where the subject matter of the appeal is an exercise of discretion by the supervising judge which seeks to balance the competing interests of the various

³³ *Laurentian University of Sudbury (Re)*, 2021 ONCA 199 at para. 19 [*“Laurentian University”*].

³⁴ *Laurentian University*, at para. 23.

³⁵ *Cineplex Odeon Corp. (Re)*, 2001 CanLII 32746 (ON CA) at paras. 7-8, citing *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.).

³⁶ *Essar Steel Algoma Inc., Re*, 2016 ONCA 138 at para. 20, citing *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361 at paras. 14-15.

stakeholders within the CCAA proceeding.³⁷ The Supreme Court of Canada recently emphasized the “high degree of deference” owed to the CCAA judge’s discretionary decisions:

A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably [...] Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's [...] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.³⁸

31. Contrary to the submissions of Plaintiffs’ Counsel, this deference applies regardless of when precisely the matter had been assigned to the supervising judge.³⁹ No CCAA case law suggests otherwise and Plaintiffs’ Counsel cite none.

(a) The appeal is not prima facie meritorious

32. The starting point is whether the appeal is “prima facie meritorious.”⁴⁰ Where a proposed appeal raises no error of law or palpable or overriding error of fact, it has no realistic possibility of success and leave to appeal should be denied.⁴¹ The requirement for an appellate court to accord substantial deference to exercises of the supervising judge’s discretion must “necessarily, inform the determination of whether the proposed appeal is *prima facie* meritorious.”⁴²

33. In discussing this branch of the test, the Alberta Court of Appeal in *Canadian Airlines* held:

³⁷ *CanaSea PetroGas Group Holdings Ltd., Re.*, 2014 ONCA 824 at para. 18.

³⁸ *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 53-54 (emphasis added).

³⁹ Factum of Plaintiffs’ Counsel, at footnote 59.

⁴⁰ *Ravelston Corp., Re.*, 2007 ONCA 268 at para. 12 [“*Ravelston*”].

⁴¹ *Ravelston*, at paras. 12, 18.

⁴² *Ravelston*, at para. 14.

... there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.⁴³

34. The reasons of the CCAA Judge clearly demonstrate that his decision was a fact-based exercise of judicial discretion which sought to balance the interests of the various stakeholders, taking into account the specific context of this restructuring and the stage of the proceeding. His decision was informed by his experience with the intricacies of this complex CCAA proceeding. There is no basis on which this Court could second-guess his exercise of discretion.

35. The CCAA Judge's decision is based in large part on his finding of fact that the Proposed February Schedule was unrealistic and unworkable⁴⁴ – a finding that was entirely reasonable in the circumstances. The Proposed February Schedule contemplated a mere six-and-half-weeks to resolve two uncertified US class proceedings. The Putative Class Claims sought damages in a vastly overstated amount of over USD\$3 billion and they had significantly expanded in scope relative to their pre-filing status, as determined by the US Courts.⁴⁵

36. Although Plaintiffs' Counsel seek to give the impression that the Putative Class Claims are "straightforward" and "strong",⁴⁶ this is far from accurate. There was no basis on which the CCAA Judge could reach this conclusion. To the contrary, as the CCAA Judge held, the resolution of the Putative Class Claims would require a number of procedural steps—including a motion for

⁴³ *Canadian Airlines Corp., Re.*, 2000 ABCA 149, at para. 35 (emphasis added) ["*Canadian Airlines*"].

⁴⁴ Endorsement Transcript, p. 3, MR, Tab 4, p. 45.

⁴⁵ See the Appendix to this Factum for a chart that outlines the expansion of the Putative Class Claims.

⁴⁶ Factum of Plaintiffs' Counsel, at para. 11.

certification, possible summary judgement, outstanding discovery (in the Jordet Action only), preparation of expert reports, procedural motions, pre-trial conference, and trial.

37. Given that these steps had not been completed in the 3 to 4 year period since the putative class actions were commenced, it was reasonable to conclude that they could not be completed in a mere six weeks. Imposing such a compressed schedule would not have allowed for a full and fair consideration of the merits of the Putative Class Claims, to the potential prejudice of unsecured creditors with competing claims.

38. This determination was entirely justified on the facts and there is no palpable or overriding error in this determination. As a threshold matter, and among other issues, it is far from clear whether the Putative Class Claims would survive summary judgment or are amenable to certification at all, and therefore whether these Claims represent merely the assertions of the three individual proposed representative plaintiffs or Claims that can be asserted by the full proposed class of plaintiffs. The issue of providing sufficient time in the adjudication schedule to determine certification (which Plaintiffs' Counsel has sought to avoid in presenting their proposed schedules to the Just Energy Entities and the CCAA Court) has importance not only to the Putative Class Claimants, viewed in isolation, but also to other stakeholders in the CCAA proceedings.

39. The CCAA Judge further held that Plaintiffs' Counsel's aggressively expedited adjudication schedule would be a "tremendous distraction from the restructuring which is at a critical juncture".⁴⁷ To be clear, he did not say that the Putative Class Claims themselves were a distraction, nor did he characterize them as "frivolous".⁴⁸ Instead, he balanced Plaintiffs'

⁴⁷ Endorsement Transcript, p. 3, MR, Tab 4, p. 45.

⁴⁸ Factum of Plaintiffs' Counsel, at paras. 5-7.

Counsel's request for expedited adjudication ahead of all other Claimants, against the risk such an excessively accelerated schedule would pose to the interests of all stakeholders in achieving a going concern outcome in these CCAA proceedings. Taking these factors into account, he denied the requested relief.

40. The balancing of the interests of stakeholders as a whole against the interests of a particular stakeholder, including a determination that the scarce resources of the company should not be diverted to the resolution of isolated stakeholder claims at the expense of the restructuring as a whole, is at the heart of the CCAA stay of proceedings and the discretion of the CCAA Judge.⁴⁹

41. In substance, the requested relief would have required the CCAA Judge to declare in the abstract, without having seen the Just Energy Entities' proposed Plan, that the resolution of the Putative Class Claims had to be complete before the anticipated date of the Meeting Order hearing. The CCAA Judge was alive to the fact that such relief would effectively harness the timeline of the entire restructuring to the resolution of the two highly contingent, uncertified Putative Class Claims. It would allow those highly contingent claimants to hold the entire restructuring and all its stakeholders for ransom.

42. The CCAA Judge was aware that the requested order could materially delay the restructuring and even jeopardize the ability of the Just Energy Entities to negotiate a going-concern restructuring for the benefit of all stakeholders. Given the critical stage of the restructuring negotiations and the stage of the CCAA proceeding, the CCAA Judge therefore determined that the requested relief was premature. In reaching this conclusion, he did not foreclose any future right of the Putative Class Claimants to object, at the appropriate time, to their proposed treatment,

⁴⁹ *Nortel Networks Corporation (Re)*, 2009 CanLII 43427 (ON SC) at para. 36; *Triton Électronique inc., Re*, 2009 QCCS 1202 at paras. 36-40.

including for voting purposes, under the proposed Plan, once it was filed with the Court and presented to creditors.

43. All of these determinations were open to the CCAA Judge on the facts and arguments presented to him, were amply supported by the record and by the Monitor,⁵⁰ and reveal no error of law or palpable and overriding error of fact. In substance, Plaintiffs' Counsel is unhappy with the way in which the CCAA Judge exercised his discretion and would like this Court to exercise it differently, which it cannot do. Even if leave were to be granted, the proposed appeal is therefore doomed to fail.

(b) The appeal is of significance neither to the practice nor the proceeding

44. Plaintiffs' Counsel's attempt to elevate the issues raised in their Motion to matters of legal significance to the insolvency practice or to this restructuring. However, none of the issues raised were actually decided by the CCAA Judge. Plaintiffs' Counsel frame their issues as relating to "how contingent claims are addressed in the context of an imminent plan"⁵¹ (*i.e.* a plan that had yet to be filed with the Court or presented to creditors) or in "anticipation of the filing of a plan and a meeting of creditors"⁵² – a formulation that on its face reveals the fundamental flaws with the basis for their leave application.

45. The CCAA Judge made no determination regarding the treatment of contingent creditors under any plan. Equally, he did not determine the ultimate voting rights of the Putative Class Claimants, instead specifically noting that the issue of a meeting order had not yet been addressed,

⁵⁰ Fifth Report, at paras. 57-60, MR, Tab 8, pp. 722-723.

⁵¹ Factum of Plaintiffs' Counsel, at para. 38, emphasis added.

⁵² Factum of Plaintiffs' Counsel, at para. 46.

and that the CCAA Proceeding should be permitted to progress further.⁵³ There is therefore no sense in which the CCAA Judge “disenfranchised” the Putative Class Claimants, or “undermined” the voting requirement.⁵⁴

46. Plaintiffs’ Counsel’s reliance on certain decisions of the Ontario Superior Court of Justice establishing that contingent claims “often play a material role” in CCAA proceedings is of no assistance and does not create a legal issue to be considered by this Court.⁵⁵ The CCAA Judge’s decision does not make any finding that is inconsistent with this principle. He merely exercised his discretion, based on the facts, to determine that the requested relief could not be granted at the particular stage of the proceeding, and on the basis requested by Plaintiffs’ Counsel. He made no substantive determinations regarding the treatment of contingent claimants under the CCAA, either generally or in the context of this proceeding.

47. Where the decision appealed from amounts to a fact-specific exercise of a supervising judges’ discretion, it is not and cannot be of broader significance to the insolvency practice.⁵⁶ Moreover, given the discretionary and fact-specific nature of the CCAA Judge’s decision, it can be of no precedential value whatsoever in future proceedings, much less the “worrisome precedent” prophesized by Plaintiffs’ Counsel.⁵⁷

⁵³ Endorsement Transcript, p. 3, MR, Tab 4, at p. 45.

⁵⁴ Factum of Plaintiffs’ Counsel, at paras. 8, 51-52.

⁵⁵ Factum of Plaintiffs’ Counsel, at para. 39. Plaintiffs’ Counsel relies on *Rothmans, Benson & Hedges Inc. Re*, 2019 CarswellOnt 24229 (SCJ); *JTI-Macdonald Corp., Re*, 2019 ONSC 1625; *Arrangement relatif à 9323-7055 Québec inc.*, 2019 QCCS 5904; *Montreal, Maine & Atlantic Canada Co./Montreal, Maine & Atlantic Canada Cie, Re.*, 2015 CarswellQue 5917 (SC); *CannTrust Holdings Inc. et al., Re*, 2021 ONSC 4408; *Sino-Forest Corp. Re*, 2012 ONSC 7050; *Poseidon Concepts Corp., Re*, 2018 CarswellAlta 951.

⁵⁶ *U.S. Steel Canada Inc., Re*, 2017 ONCA 99 at para. 7.

⁵⁷ Factum of Plaintiffs’ Counsel, at para. 43.

48. Similarly, the proposed appeal is not of significance to this proceeding, as the CCAA Judge's refusal to impose the unachievable Proposed February Schedule did not finally determine any of the Putative Class Claimants' rights. Where there will be an opportunity to revisit an issue in the future, courts have found that the issue is not of sufficient significance to the action to justify granting leave to appeal.⁵⁸

49. Plaintiffs' Counsel's suggestions that US courts might take issue with the recognition of the Plan based on its treatment of contingent claimants⁵⁹ are both speculative and irrelevant. Even if the Just Energy Entities' proposed Plan had been filed at the time of the Motion, its recognition would be an issue for the US Court, not the CCAA Court.

50. A further reason why this proposed appeal has no significance to this proceeding or the practice is not mentioned by Plaintiffs' Counsel. Since the date of the February Order, the Putative Class Claims are being adjudicated before Justice O'Connor, who was appointed as Claims Officer on consent of the parties on March 3, 2022.⁶⁰ Pursuant to the Claims Procedure Order, Justice O'Connor is authorized to determine all procedural matters before him – including setting an appropriate schedule for the fair and efficient determination of the Putative Class Claims. Justice O'Connor is in fact doing precisely what Plaintiffs' Counsel seeks – adjudicating the claims in an expeditious manner, with regards to the interests of all parties. The proposed appeal would create uncertainty in this process, create wastage of resources, and potentially disrupt the process entirely.

⁵⁸ *Laurentian University*, at para. 40.

⁵⁹ Factum of Plaintiffs' Counsel, at para. 49.

⁶⁰ [Order Appointing Claims Officer](#), dated March 3, 2022.

51. Finally, even if this proposed appeal had some significance to the practice in general, or to this proceeding (which is denied), one factor, taken in isolation, cannot support granting of leave to appeal where the other elements are not satisfied.⁶¹

(c) The appeal would unduly hinder the progress of the action

52. Even where all other criteria are satisfied (which they are not here), this Court should still deny leave to appeal where granting leave would unduly hinder the progress of the action. The onus is on the party seeking leave to demonstrate, through affirmative evidence, that no undue hinderance will result.⁶² Plaintiffs' Counsel has not done so, because they cannot.

53. This factor refers not only to the delay involved in prosecuting, hearing and deciding the appeal,⁶³ but all hinderances which distract from the restructuring itself, and which could adversely affect the ability of the debtor to reorganize its affairs.⁶⁴ It is necessary to consider the interests of all stakeholders, along with the underlying objectives of the CCAA:

Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA... There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers.⁶⁵

⁶¹ *Laurentian University*, at para. 41. *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at para. 95.

⁶² *Canadian Airlines*, at para. 42.

⁶³ *Canadian Airlines*, at paras. 41-42.

⁶⁴ *Laurentian University*, at paras. 22, 39; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 426 at paras. 44-45.

⁶⁵ *Consumers Packaging Inc. (Re)*, 2001 CanLII 6708 (ON CA) at para. 5.

54. The Just Energy Entities have already spent, and continue to spend, an inordinate amount of time dealing with the Putative Class Claims.⁶⁶ The restructuring remains at a critical stage, requiring significant management time and resources. The process for resolving the Putative Class Claims is now underway before the Claims Officer, within the Claims Process already approved by the CCAA Court, which was not appealed by the Putative Class Claimants.

55. Any proposed appeal would further consume limited management resources in addressing the interests of certain contingent claimants, at the expense of the ability to achieve a going-concern restructuring for the benefit of all stakeholders. Given the nature of the business, the length of time the Just Energy Entities have been in the CCAA proceeding, the complexities and time-consuming nature of the ongoing multiparty negotiations, and the volatility of the energy market, any significant delays in the conclusion of the restructuring could have damaging effects on the outcome for stakeholders and the support of the financial participants for the proposed restructuring.⁶⁷

PART V - ORDERS SOUGHT

56. The Just Energy Entities respectfully submit that leave to appeal should be denied and this motion be dismissed with costs awarded to the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April, 2022.

OH

OSLER, HOSKIN & HARCOURT LLP

⁶⁶ Seventh Carter Affidavit, at para 4, MR, Tab 7, p. 386. Plaintiffs' Counsel have received confidential information and documents (subject to the terms of an NDA) and attended multiple meetings with the Just Energy Entities' advisors and the Monitor. A full chronology of the extensive engagement and communications with Plaintiffs' Counsel is included in the Seventh Carter Affidavit, para. 43, MR, Tab 7, pp. 401-404.

⁶⁷ Seventh Carter Affidavit, at para. 14, MR, Tab 7, p. 389.

Appendix – Expansion of Putative Class Claims

| | Donin Complaint/ Motion to Dismiss | Donin POC | Jordet Complaint/ Motion to Dismiss | Jordet POC |
|---|---|---|---|---|
| Defendants | JEGI, Just Energy NY Claims against other JEGI affiliates dismissed | All “Just Energy Entities” | Just Energy Solutions | All “Just Energy Entities” |
| Defendants’ Customer Base⁶⁸ | New York | California Delaware Georgia Illinois Indiana Maryland Massachusetts, Michigan Nevada New Jersey New York Ohio Pennsylvania Texas | California Georgia Illinois Maryland Nevada Ohio Pennsylvania Virginia | California Delaware Georgia Illinois Indiana Maryland Massachusetts, Michigan Nevada New Jersey New York Ohio Pennsylvania Texas |
| Defendants’ Customer Type | Largely Residential | Residential and Commercial | Largely Residential | Residential and Commercial |
| Product Type | Electricity and Natural Gas | Electricity and Natural Gas | Natural Gas Only | Electricity and Natural Gas |
| Class Period | October 3, 2011 based on applicable statute of limitations period for NY contract claims | 2011-2020 | WDNY Court held claims prior to April 6, 2014 are time-barred. | 2011-2020 |

⁶⁸ The customer base in the “Jordet Complaint/ Motion to Dismiss” column reflects the states where natural gas was marketed by Just Energy Solutions. Just Energy Solutions marketed natural gas in these various states for different lengths of time.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10.
2. *Canadian Airlines Corp., Re.*, 2000 ABCA 149.
3. *CanaSea PetroGas Group Holdings Ltd., Re.*, 2014 ONCA 824.
4. *Consumers Packaging Inc. (Re)*, 2001 CanLII 6708 (ON CA).
5. *Cineplex Odeon Corp. (Re)*, 2001 CanLII 32746 (ON CA).
6. *Essar Steel Algoma Inc., Re*, 2016 ONCA 138.
7. *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478.
8. *Laurentian University of Sudbury (Re)*, 2021 ONCA 199.
9. *Nortel Networks Corporation (Re)*, 2009 CanLII 43427 (ON SC).
10. *Nortel Networks Corporation (Re)*, 2016 ONCA 332.
11. *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 426.
12. *Ravelston Corp., Re*, 2007 ONCA 268.
13. *Timminco Ltd., Re*, 2012 ONCA 552.
14. *Triton Électronique inc., Re*, 2009 QCCS 1202.
15. *U.S. Steel Canada Inc., Re*, 2017 ONCA 99.

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY – LAWS

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

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

**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/Responding Parties

Court of Appeal File No.: M53250
Superior Court No.: CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT Toronto

RESPONDING PARTIES' FACTUM

OSLER, HOSKIN & HARCOURT LLP

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

John MacDonald (LSO# 25884R)

Tel: 416.862.5672

Email: jmacdonald@osler.com

Marc Wasserman (LSO# 44066M)

Tel: 416.862.4908

Email: mwasserman@osler.com

Michael De Lellis (LSO# 48038U)

Tel: 416.862.5997

Email: mdelellis@osler.com

Jeremy Dacks (LSO# 41851R)

Tel: 416.862.4923

Email: jdacks@osler.com

Lawyers for the Applicants/Responding Parties