

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

**FACTUM OF THE CREDIT FACILITY LENDERS**

**(Motion for Authorization Order and for Creditors' Meetings Order)**

May 20, 2022

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**TO: THE SERVICE LIST**

## PART I - OVERVIEW

1. The senior secured lenders under the Credit Agreement (defined below) (the “**Credit Facility Lenders**”) support the Applicants’ motion for a Meeting Order<sup>1</sup> and Authorization Order (collectively, the “**Orders**”).
2. The Applicants are not seeking approval of the Plan at this stage. Rather, they are seeking to file the Plan for consideration by the Affected Creditors at the Creditors’ Meetings.
3. There is a low threshold imposed on debtor companies to take this step. The Applicants easily meet this threshold for the reasons set out by the Applicants in their factum on this motion, which the Credit Facility Lenders support.
4. In addition, the Credit Facility Lenders note the following:
  - (a) The Restructuring is a heavily negotiated solution that delivers numerous benefits to stakeholders;
  - (b) To deliver these benefits, the Restructuring relies on concessions and ongoing contributions from key stakeholders and parties providing “new money”, such as the Credit Facility Lenders. The Credit Facility Lenders are entitled to be repaid before general unsecured creditors and were to have been paid down to \$230 million by now and paid out in full on or

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<sup>1</sup> Capitalized terms not defined herein have the meanings given to them in the Affidavit of Michael Carter, sworn May 12, 2022 (the “**Eleventh Carter Affidavit**”), Motion Record of the Applicants dated May 12, 2022 (“**Applicants’ Motion Record**”), Tab 2.

before the end of December 2023. However, instead of repaying the Credit Facility Lenders in full, the Applicants have asked for substantial concessions and ongoing support from the Credit Facility Lenders, including \$250 million in exit financing;

- (c) The concessions and support from the Credit Facility Lenders and other key stakeholders were achieved after months of extensive negotiations and were agreed upon in the context of the unsuccessful formal and informal marketing processes by the Applicants in recent years;
- (d) Such concessions and support are conditional on the delicate balance of terms in the Restructuring documents. Reflecting the ongoing risks associated with the Applicants' business and the Restructuring, one of the key conditions in the Support Agreement is that the Restructuring proceed in accordance with prescribed milestones;
- (e) Putative class action representatives and their counsel should not be permitted to hold the restructuring process hostage merely by asserting inflated, unproven, unsecured claims. This would fail to reflect a proper balancing of interests and would be contrary to the remedial purposes of the CCAA since:
  - (i) Allowing purported claimants with unproven, unsecured claims to delay the restructuring process puts the entire restructuring at risk, including all the benefits of the restructuring for employees, customers, suppliers and other stakeholders;

- (ii) unsecured creditors with valid Proven Claims will be voting on the CCAA Plan, giving the Court the benefit of their business judgment as it relates to the proposed treatment of unsecured creditors under the Plan and the proposed Meetings Order provides mechanisms to allow creditors with Disputed Claims to vote their claims;
- (iii) the purported claimants will not be denied participation in distributions under the CCAA Plan if they are ultimately able to prove valid claims; and
- (iv) any concern about whether the CCAA Plan is fair and reasonable that may remain after the Creditors' Meetings can be addressed at the sanction hearing.

## **PART II - THE FACTS**

5. The key facts are set out in the Applicants' factum and the Eleventh Carter Affidavit.

## **PART III - THE LAW**

6. The remedial purpose of the CCAA is to permit the debtor company to continue to carry on business and avoid the devastating social and economic consequences of liquidating its assets.<sup>2</sup> This purpose guides the exercise of all judicial discretion under the CCAA, including the decision of whether to direct a meeting of creditors and the classification of creditors at those meetings.<sup>3</sup>

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<sup>2</sup> *Century Services Ltd, Re*, [2010 SCC 60](#) at para 15; *9354-9186 Québec inc v Callidus Capital Corp*, [2020 SCC 10](#) at paras 40-42.

<sup>3</sup> *Nova Metal Products Inc v Comiskey (Trustee of)*, [1990 CarswellOnt 139](#) [“*Comiskey*”] at para 64.

7. The threshold to be satisfied in order to file a plan and call a meeting of creditors pursuant to section 4 of the CCAA is low.<sup>4</sup> At this stage, the Court is not required to address the overall fairness and reasonableness of the CCAA Plan or the appropriateness of specific provisions of the CCAA Plan.<sup>5</sup> These issues are more appropriately raised at the sanction hearing.<sup>6</sup>

8. In order to refuse to grant the Meeting Order, the Court must find that there is no reasonable chance that the Plan would be approved by the Affected Creditors or the Court or that the Plan would be successfully implemented.<sup>7</sup>

9. That threshold has not been met in this case and it would be contrary to the remedial purpose of the CCAA to put the Restructuring at risk by delaying the process and failing to allow Affected Creditors to vote on the carefully negotiated Plan.

**A. Heavily-Negotiated Restructuring Plan Reflects Significant Contributions from Key Stakeholders and a Delicate Balancing of Complex Interests**

10. In this case, the Plan is part of a Restructuring that delivers numerous benefits to stakeholders. Such benefits include: recapitalizing the business; preserving the going-concern value of the business; ensuring uninterrupted supply of energy for customers; preserving employment; maintaining critical regulatory and licensing relationships; and

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<sup>4</sup> *Federal Gypsum Co (Re)*, [2007 NSSC 384](#) at para 12; *Comiskey*, *ibid* at para 90.

<sup>5</sup> *Quest University Canada (Re)*, [2020 BCSC 1845](#) [*“Quest University”*] at para 32.

<sup>6</sup> *T Eaton Co, Re*, [1999 CanLII 15024](#) at para 6 (ONSC); *Jaguar Mining Inc (Re)*, [2014 ONSC 494](#) at para 48.

<sup>7</sup> *ScoZinc Ltd (Re)*, [2009 NSSC 163](#) at paras 6-7; *Quest University*, *supra note 5* at para 32; *Bargain Harold's Discount Ltd v Paribas Bank of Canada*, [1992 CanLII 7611](#), [1992 CarswellOnt 159](#) (Gen Div) at paras 35-39.

sustaining relationships with vendors and other critical stakeholders (the “**Key Objectives**”).<sup>8</sup>

11. To deliver such benefits, the Restructuring relies on concessions and ongoing contributions from key stakeholders, including secured creditors and parties providing “new money” such as the Credit Facility Lenders.

12. The Credit Facility Lenders are senior secured lenders in respect of the \$335 million credit facility (the “**Credit Facility**”) advanced pursuant to the ninth amended and restated credit agreement dated as of September 28, 2020 (the “**Credit Agreement**”)<sup>9</sup> in which each Applicant is either a borrower or guarantor.

13. Prior to the Applicants obtaining CCAA protection on March 9, 2021, the Credit Facility exposure was to be reduced pursuant to the mandatory repayment provisions in the Credit Agreement to \$230 million (or less) by May, 2022, with a full payout of the Credit Facility in December, 2023.<sup>10</sup>

14. Such terms were already an accommodation arising from the Applicants’ CBCA restructuring in 2020. However, instead, the Credit Facility commitment remains at approximately \$335 million as a result of the CCAA stay.<sup>11</sup>

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<sup>8</sup> Eleventh Carter Affidavit at para 16, Applicants’ Motion Record at 89-90.

<sup>9</sup> Eleventh Carter Affidavit at para 14, Applicants’ Motion Record at 87.

<sup>10</sup> New Credit Facility Term Sheet dated May 12, 2022, Eleventh Carter Affidavit Exhibit “1” to Exhibit “C”, Support Agreement dated May 12 2022 (“**Support Agreement**”), Applicant’s Motion Record at 428.

<sup>11</sup> Affidavit of Michael Carter sworn March 9, 2021, Exhibit “M”, Ninth Amended and Restated Credit Agreement dated September 28, 2020 at 83, s. 6.09, Application Record of the Applicants dated March 9, 2021, Tab 2.

15. Moreover, as senior secured creditors, the Credit Facility Lenders are entitled to repayment of the Credit Facility in full ahead of unsecured creditors such as the general unsecured creditors and unsecured term lenders. However, the proposed Restructuring does not provide that result. Instead, the Restructuring contemplates that the Credit Facility Lenders will provide additional concessions and support including:

- (a) providing ongoing financing to the Applicants in the form of a \$250 million exit facility that does not mature until June, 2025;<sup>12</sup>
- (b) permitting up to \$20 million of the Current Credit Facility Claim to remain outstanding and continue under the New Credit Agreement as initial outstanding principal;<sup>13</sup> and
- (c) allowing cash payments to be made to subordinate creditors, including approximately \$10 million to general unsecured creditors pursuant to the Plan.<sup>14</sup>

16. Such concessions and support were extensively negotiated over more than 11 months between the parties to the Support Agreement (who, together, account for more than \$1 billion of the Applicants' secured and unsecured debt) and are subject to the terms and conditions set out in the Support Agreement, the New Credit Facility Term Sheet and

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<sup>12</sup> Eleventh Carter Affidavit at para 58(e), Exhibit "C", Support Agreement, s. 7(k), Applicants' Motion Record at 261.

<sup>13</sup> Eleventh Carter Affidavit at para 58(e), Applicants' Motion Record at 111.

<sup>14</sup> Eleventh Carter Affidavit at para 58(d); Support Agreement, s. 7(a)-(b); Just Energy Entities' Plan of Compromise and Arrangement dated May 26, 2022 ("**CCA Plan**") at s. 3.4, Applicants' Motion Record at 110.



the other Restructuring documents. The applicable terms and conditions include the following:

- (a) The Applicants must raise new common equity of \$192.55 million pursuant to the New Equity Offering, which is backstopped by the Backstop Parties;<sup>15</sup>
- (b) The BP Commodity/ISO Services Claim (secured claim of approximately US\$229.5 million and C\$0.2 million presently held by CBHT, an affiliate of the DIP Lenders) must be converted to preferred equity;<sup>16</sup>
- (c) The US\$208.6 million of unsecured term debt must be converted to equity;<sup>17</sup>
- (d) The other pre-filing unsecured claims must be extinguished;<sup>18</sup>
- (e) Other secured debt (including the DIP Facility and pre-filing secured claims payable to Shell and other commodity suppliers) must be paid or satisfied in full;<sup>19</sup> and

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<sup>15</sup> Eleventh Carter Affidavit at para 58(d) , Applicants' Motion Record at 110.

<sup>16</sup> Eleventh Carter Affidavit at paras 18, 76, Applicants' Motion Record at 90, 128.

<sup>17</sup> Eleventh Carter Affidavit at paras 58(k)(i), 59, Applicants' Motion Record at 112-113, 115-116.

<sup>18</sup> Eleventh Carter Affidavit at paras 58(n), 81, 85, Applicants' Motion Record at 115, 130, 137-138.

<sup>19</sup> CCAA Plan, s. 10.1(h) , Applicants' Motion Record at 224.

(f) The Restructuring must move forward with alacrity (and in particular, subject to the milestones set out in the Support Agreement).<sup>20</sup>

17. Given the volatility of the energy market and the ongoing uncertainty, costs and risk associated with the Applicants' business, assumptions and projections,<sup>21</sup> one of the key conditions reflected in the Support Agreement is that the Restructuring proceed in accordance with the defined Milestones.<sup>22</sup> In other words, the Plan must be implemented in a timely manner or the Restructuring will be at risk.

18. The Restructuring provides significant benefits to stakeholders, including meeting the Key Objectives described above that will preserve and recapitalize the Applicants' business for the benefit of its customers, employees, vendors and other stakeholders. It should not be jeopardized.

19. Moreover, it is important to recognize that the Credit Facility Lenders and other key stakeholders agreed to the Restructuring – including the various significant concessions made by them relative to their legal rights and priorities – against the backdrop of the unsuccessful formal and informal marketing processes by the Applicants in recent years.<sup>23</sup> This supports the view expressed in the Carter Affidavit that:

“Absent receipt of a Superior Proposal during the Voting Period, the Plan provides the best available result for the Just Energy Entities' stakeholders

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<sup>20</sup> Plan Support Agreement, s. 4(a) and 12(c)(xix), Applicants' Motion Record at 265, 289.

<sup>21</sup> Eleventh Carter Affidavit at para 62, Applicants' Motion Record at 116-117.

<sup>22</sup> Eleventh Carter Affidavit at para 38; Plan Support Agreement, s. 4(a), Applicants' Motion Record at 265.

<sup>23</sup> Eleventh Carter Affidavit at para 36, Applicants' Motion Record at 100-101; Tenth Report of the Monitor dated May 18, 2022 (“**Monitor's Tenth Report**”) at para 44.

in all of the circumstances and is better than the alternatives available to the Just Energy Entities, including a forced liquidation of their assets.”<sup>24</sup>

20. Accordingly, the Applicants should be authorized to file the Plan and conduct the Creditors’ Meetings without delay. The Restructuring was extensively negotiated and carefully balanced, and it represents a positive outcome for stakeholders with contributions and concessions from secured and prior-ranking creditors. There is at least a reasonable chance that the carefully-negotiated Plan will be approved by the Affected Creditors and the Court and that it will be successfully implemented. The Restructuring and the benefits provided thereby should not be put at risk by unnecessary delay.

**B. Objections by Unproven, Unsecured Purported Claimants Should Not be Permitted to put the Entire Restructuring at Risk**

21. Earlier in these proceedings, putative class action representatives and counsel in two class actions sought to gain a strangle-hold over prior-ranking stakeholders (and other creditors generally) and hold the restructuring hostage merely by asserting fantastically large, unproven claims. They argued that they should either be unaffected or the process should be delayed until after their claims are adjudicated.<sup>25</sup>

22. Their motion was dismissed, although they have sought leave to appeal.<sup>26</sup>

23. It is possible that such purported claimants will also attempt to oppose the Orders. Such attempts should not be countenanced.

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<sup>24</sup> Eleventh Carter Affidavit at para 60, Applicants’ Motion Record at 116.

<sup>25</sup> Eleventh Carter Affidavit, Exhibit “B”, Endorsement of Justice McEwen (23 February 2022) at para 1-2, Applicants’ Motion Record at 244.

<sup>26</sup> Eleventh Carter Affidavit at paras 10-11, Applicants’ Motion Record at 86.

24. The restructuring process must continue to advance, and it is crucial that the process not be sidetracked or held hostage by a few individuals asserting unproven claims, some of which are ostensibly for an uncertified class of unidentified individuals. This is particularly important when such purported claims are hotly contested and, according to the relevant Notices of Revision and Disallowance, are considered “devoid of merit”<sup>27</sup> and/or “vastly overstated.”<sup>28</sup>

25. It would be contrary to the remedial purpose of the CCAA to permit these very large but unsubstantiated claims, which the Applicants consider meritless, to vote down or delay a vote on the Plan. Doing so would disrupt the restructuring and put the entire Restructuring at risk before the invalidity of the purported claims can be finally proven.<sup>29</sup>

26. There would be substantial prejudice to the Applicants, the Credit Facility Lenders and other true stakeholders of the Applicants if the restructuring is delayed and/or becomes impossible to implement, leading to the devastating social and economic consequences of a liquidation, because of allegations raised by parties with inflated claims that are considered “devoid of merit” but cannot be finally assessed before the time of the creditor vote.

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<sup>27</sup> Eleventh Carter Affidavit, Exhibit “P”, Notice of Revision or Disallowance (Jordet), Applicants’ Motion Record at 1146.

<sup>28</sup> Eleventh Carter Affidavit, Exhibit “K”, Notice of Revision or Disallowance (Omarali), Applicants’ Motion Record at 920.

<sup>29</sup> *Re Port Chevrolet Oldsmobile Ltd.*, [2002 BCSC 1874](#) at para 45, aff’d [2004 BCCA 37](#).

27. Conversely, to the extent the Contingent Litigation Claims are ultimately able to prove valid claims against the Applicants, the claimants will still be able to share in any recovery distributed under the Plan.

28. In addition, the Plan does not prevent the proposed representative claimants from voting on the Plan but rather sets the vote value at \$1. To the extent that the claimants believe any unfairness has occurred after viewing the results of the vote, this is a matter that can be raised before the court at the sanction hearing.

29. Finally, since unsecured creditors with valid proven claims will also be voting on the Plan, the Court will have the benefit of their business judgment as it relates to the proposed treatment of unsecured creditors when it ultimately considers sanctioning the Plan.

30. Since it is not feasible to finally determine the purported claims prior to the Creditors' Meeting, it is appropriate to give a nominal value to the Contingent Litigation Claims for voting purposes. This is consistent with the remedial purposes of the CCAA and reflects an appropriate balancing of interests of all stakeholders.

#### **PART IV - ORDER REQUESTED**

31. For the reasons set out herein and in the factum of the Applicants in support of this motion, the Credit Facility Lenders submit that it is appropriate to grant the Orders and to allow the Plan to be voted upon at the Creditors' Meetings without further delay.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of May, 2022.



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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *9354-9186 Québec inc v Callidus Capital Corp*, [2020 SCC 10](#).
2. *Bargain Harold's Discount Ltd v Paribas Bank of Canada*, [1992 CanLII 7611](#), [1992 CarswellOnt 159](#) (Gen Div).
3. *Century Services Ltd, Re*, [2010 SCC 60](#).
4. *Federal Gypsum Co (Re)*, [2007 NSSC 384](#).
5. *Jaguar Mining Inc (Re)*, [2014 ONSC 494](#).
6. *Nova Metal Products Inc v Comiskey (Trustee of)*, [1990 CarswellOnt 139](#).
7. *Quest University Canada (Re)*, [2020 BCSC 1845](#).
8. *Re Port Chevrolet Oldsmobile Ltd*, [2002 BCSC 1874](#), aff'd [2004 BCCA 37](#).
9. *ScoZinc Ltd (Re)*, [2009 NSSC 163](#).
10. *T Eaton Co, Re*, [1999 CanLII 15024](#) (ON SC).

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST  
ENERGY GROUP INC. ET AL.

Applicants

**ONTARIO  
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COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE CREDIT FACILITY LENDERS  
(Authorization Order and Meetings Order Motion  
Returnable May 26, 2022)**

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