

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

APPLICANTS

FACTUM OF THE APPLICANTS

(Motion for Stay Extension, Amended DIP, Second KERP and other relief)

November 5, 2021

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PART I - NATURE OF THIS MOTION

1. The Applicants obtained relief under the *Companies' Creditors Arrangement Act*¹ by an initial order dated March 9, 2021 (the “**Initial Order**”). The Initial Order, among other things, appointed the Monitor, granted a stay of proceedings (the “**Stay**”), and extended the Stay and other protections in the Initial Order to the partnerships listed on Schedule A (together with the Applicants, the “**Just Energy Entities**”). The CCAA Court granted an Amended and Restated Initial Order (“**ARIO**”) and the Second ARIO (“**SARIO**”) on March 19, 2021, and May 26, 2021, respectively.²

2. Since the granting of the Initial Order, the Stay has been extended on a number of occasions. By Order of the Court granted September 15, 2021, the Stay was extended to December 17, 2021.³ The Applicants now seek an order extending the Stay to February 17, 2022.

3. The Applicants also seek additional relief, including (i) authorizing the Just Energy Entities to enter into the Fifteenth Amendment to the CCAA Interim Debtor-in-Possession Financing Term Sheet (the “**Amended DIP Term Sheet**”), (ii) approving a transaction allowing for the wind-up of JE Finance into Just Energy to achieve certain tax benefits (the “**JE Finance Transaction**”) and the eventual dissolution of JE Finance; and (iii) approving a second key employee retention plan (the “**Second KERP**”).⁴

¹ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [“**CCAA**”].

² Affidavit of Michael Carter, sworn November 3, 2021 [the “**Fifth Carter Affidavit**”]. Capitalized terms not otherwise defined have the same meaning as in the Fifth Carter Affidavit.

³ Fifth Carter Affidavit, para. 8.

⁴ Fifth Carter Affidavit, para. 2.

4. All of the requested relief is within this Court's jurisdiction and discretion to grant under the CCAA and is consistent with the objectives of the CCAA. The Applicants have been proceeding in good faith and with due diligence to achieve a going-concern restructuring for the benefit of all stakeholders. The proposed order has been developed in consultation with and is supported by the Monitor.

5. All of the relief sought by the Applicants in this motion will further the CCAA restructuring. The extension of the Stay and the approval of the Amended DIP Term Sheet will provide the Applicants with the additional breathing space needed to move this restructuring forward, with the continued support of the DIP Lenders, with a view to achieving a going-concern solution.

6. The Second KERP will further the same objectives as the first KERP approved by this Court on March 19, 2021. It will ensure that employees who are critical to the ongoing viability of the business and the restructuring are appropriately rewarded for their loyalty and do not resign, which could be particularly damaging to the Applicants' businesses and their restructuring efforts, given the currently challenging labour market.

7. The JE Finance Transaction will simplify one aspect of the Applicants' organization structure. At the same time, the JE Finance Transaction will generate tax benefits to the advantage of the Applicants' stakeholders. The proposed JE Finance Transaction is accepted by the tax authorities as part of legitimate tax planning strategy. The JE Finance Transaction could be completed in the ordinary course, without any corporate, regulatory or judicial approval, outside the CCAA proceeding. Completion of the JE Finance Transaction will cause no prejudice to any stakeholder and the assets of the Applicants' estate will increase upon realization of the resulting tax benefits.

8. For the reasons set out below, therefore, the Applicants submit that the requested relief should be granted.

PART II - SUMMARY OF FACTS

9. The facts underlying this Motion are more fully set out in the Fifth Carter Affidavit and the Fourth Report of the Monitor.⁵ Facts relevant to the requested relief are highlighted below.

A. UPDATE ON THE ACTIVITIES OF THE JUST ENERGY ENTITIES

10. Since the Stay Period was last extended by Order of this Court on September 15, 2021, the Just Energy Entities have been engaged in ongoing efforts to canvass viable restructuring options with key stakeholders, including exchanges of iterations of a draft Recapitalization Term Sheet (the “**Recapitalization Term Sheet**”) with the DIP Lenders⁶, the Credit Facility Lenders and, more recently, Shell. In addition, the Just Energy Entities have been acting in good faith and with due diligence to move this restructuring forward, as outlined in greater detail below.⁷

11. The Claims Bar Date established under the Claims Procedure Order was November 1, 2021. The Just Energy Entities and the Monitor have accordingly begun recording and reviewing all Claims received prior to the Claims Bar Date, and will be considering next steps with respect to such Claims, over the coming weeks.⁸

⁵ Fourth Report of FTI Consulting Canada Inc., in its capacity as Court-Appointed Monitor, dated November 5, 2021 [the “**Monitor’s Fourth Report**”].

⁶ Separate affiliates of the DIP Lender entities are the holders and assignees of all pre-filing Claims held by BP, and lenders under the Term Loan.

⁷ Fifth Carter Affidavit, paras. 9 and 15-16.

⁸ Fifth Carter Affidavit, para. 10.

B. AMENDED DIP TERM SHEET

12. In order to accommodate the additional time required to advance and broaden discussions around the Recapitalization Term Sheet, the DIP Lenders have agreed in the Amended DIP Term Sheet to extend both the deadline in the DIP Facility Commitment Letter for delivery of an agreed upon Recapitalization Term Sheet from October 7, 2021, to November 30, 2021, as well as all subsequent milestone dates, if and as applicable.⁹ The Just Energy Entities are working diligently to finalize the Recapitalization Term Sheet and satisfy all other milestones.¹⁰

13. Notwithstanding the significant efforts expended by the Just Energy Entities and their key stakeholders since the Filing Date to stabilize their business and develop a restructuring plan, discussions amongst key stakeholders have taken longer than expected in light of (i) the size and complexity of the Just Energy Entities' business and (ii) the ongoing regulatory proceedings before the Public Utility Commission of Texas ("PUCT") relating to House Bill 4492 ("HB 4492").¹¹ Thus, in light of the expected continuance of the CCAA and Chapter 15 proceedings into 2022, the Just Energy Entities determined that, in addition to the extension of the milestone dates, two additional amendments to the DIP Term Sheet were required.¹²

14. First, the Just Energy Entities require an extension to the current December 31, 2021 maturity date of the DIP Facility. Such an extension is necessary to: (a) ensure the Just Energy Entities' continued stability into 2022 as a restructuring solution is negotiated and implemented; and (b) provide assurances to employees, commodity suppliers, regulators, and other stakeholders

⁹ The amended milestone dates are set out in the Fifth Carter Affidavit, para. 17.

¹⁰ Fifth Carter Affidavit, para. 18.

¹¹ Fifth Carter Affidavit, para. 19.

¹² Fifth Carter Affidavit, para. 20.

that the Just Energy Entities remain stable and committed to emerging from the CCAA and Chapter 15 proceeding as a long-term, financially viable enterprise.¹³

15. Second, the Just Energy Entities require an increase to the cash collateral posting limitations in the DIP Term Sheet. Since the Filing Date, the Just Energy Entities have focused on expanding their suite of business-critical commodity supply arrangements beyond the three counterparties which continued to trade with the Just Energy Entities after commencement of these CCAA proceedings. A diversified suite of Commodity Agreements is viewed to be advantageous to alleviate the risk of single source or limited source supply arrangements, thereby supporting the long-term viability and security of the Just Energy Group's business.¹⁴

16. Since the Filing Date, the Just Energy Entities have, among other things, negotiated and finalized new or amended supply arrangements with Mercuria Energy America, LLC, Hartree Partners, LP and J. Aron & Company LLC.¹⁵ Each of the relevant Commodity Agreements require that credit support be posted for mark-to-market ("MtM") and accounts payable exposure.¹⁶

17. When power and gas prices decrease, the Just Energy Entities' MtM obligation to post collateral under these Commodity Agreements increases. The quantum of such collateral can be significant. While, to date, the Just Energy Entities have provided \$45 million of collateral to these new Commodity Suppliers, the Just Energy Entities continue to add significant volumes to their supply portfolio to support their ongoing businesses. Consistent with activity levels since May, the

¹³ Fifth Carter Affidavit, para. 21.

¹⁴ Fifth Carter Affidavit, para. 22.

¹⁵ Fifth Carter Affidavit, para. 23.

¹⁶ Independent systems operators and other parties also have the right to require the Just Energy Entities to post immediate collateral to support the balancing of daily supply requirements.

Just Energy Entities expect to add 1.5 to 2.0 terawatt/hour equivalents each month to their supply portfolio in accordance with the business plan.¹⁷

18. The Just Energy Entities therefore determined that an increase to the collateral posting limitations in the DIP Term Sheet was required.¹⁸ The Just Energy Entities accordingly negotiated an Amended DIP Term Sheet with the DIP Agent to extend the maturity date of the DIP Facility to September 30, 2022, increase collateral posting limits, and amend the restructuring milestones. In exchange for these benefits, the Amended DIP Term Sheet grants the DIP Lenders certain additional rights: (a) an amendment and extension fee; (b) a consent right in relation to material contract disclaimers; and (c) a consent right if Claims with a value in excess of \$15 million are to be settled, except Claims subject to the Intercreditor Agreement. On November 3, 2021, the Amended DIP Term Sheet was finalized.¹⁹

C. JUST ENERGY HUNGARY

19. The Just Energy Entities maintain a centralized cash management system to consolidate and track funds generated by the operations of Just Energy and its subsidiaries. Certain intercompany loans have been advanced among various of the Applicants, as described in greater detail in the Fifth Carter Affidavit.²⁰ Under one such arrangement, Just Energy U.S. remains indebted to Just Energy Hungary in the amount of US\$235 million under the IB Loan, and Just

¹⁷ Fifth Carter Affidavit, para. 24.

¹⁸ Fifth Carter Affidavit, para. 25.

¹⁹ Fifth Carter Affidavit, paras. 26-27. A copy of the Amended DIP Term Sheet is attached as **Exhibit “A”** to the Fifth Carter Affidavit. A copy of the original DIP Term Sheet is attached as **“Exhibit K”** to the Fifth Carter Affidavit. A summary of the amended terms incorporated into the Amended DIP Term Sheet is found in the Fifth Carter Affidavit, para. 27.

²⁰ Fifth Carter Affidavit, para. 29.

Energy Hungary remains indebted to JE Finance in the amount of US\$213 million under the Convertible Loan.²¹

20. As part of ordinary course tax and corporate planning to utilize available tax attributes, Just Energy intends to implement the JE Finance Transaction to wind up its wholly-owned subsidiary, JE Finance, and complete certain loan settlements as between JE Finance, Just Energy Hungary (JE Finance's wholly owned subsidiary) and Just Energy U.S. in order to (i) realize certain tax losses in Just Energy Hungary, (ii) simplify redundancies in Just Energy's corporate structure, and (iii) settle/transfer the various intercompany loans as between the foregoing entities so as to result in one loan from Just Energy to Just Energy U.S. All of this is subject to the approval of the CCAA Court.²²

21. Two proposed structures are proposed for the JE Finance Transaction.²³ The structure selected will depend on whether the transaction can close on or before November 30, 2021. If the transaction is not expected to close until after November 30, 2021, then the Just Energy Entities propose to complete the wind-up and settlement by means of an alternative transaction structure.²⁴

22. The difference between the First Transaction Structure and the Second Transaction Structure is the order of the transaction steps to be undertaken by the Just Energy Entities.²⁵ In both cases, Just Energy becomes the ultimate holder of the IB Loan, the shares of Just Energy Hungary, the right of Just Energy Hungary to receive tax installment refunds, and other incidental property

²¹ Fifth Carter Affidavit, paras. 29-30.

²² Fifth Carter Affidavit, para. 31.

²³ These two structures are explained in greater detail in the Fifth Carter Affidavit, at paragraphs 32 to 34, and at Schedules A and B.

²⁴ Fifth Carter Affidavit, para. 32.

²⁵ Fifth Carter Affidavit, para. 33.

held by JE Finance.²⁶ Following the wind-up of JE Finance into Just Energy, JE Finance will be dissolved.²⁷

D. PROPOSED SECOND KERP

23. On March 19, 2021, the CCAA Court approved a key employee retention plan (the “**KERP**”) and granted a Court-ordered charge (the “**KERP Charge**”) as security for payments under the KERP.²⁸ On September 15, 2021, the Court issued an order clarifying the allocation of the KERP payments.

24. As of December 4, 2021, the Just Energy Entities will have paid 80% of the total KERP entitlements to non-executive KERP recipients, and 50% of the total KERP entitlements to executive KERP recipients, leaving only a small sum payable in June 2022 to non-executive KERP recipients, and a single success-based payment to executive KERP recipients.²⁹

25. The KERP was developed by the Just Energy Entities based on the expectation that the Just Energy Entities’ restructuring would largely be concluded (apart from potential regulatory approvals) by the end of 2021. The timing of payments under the KERP was accordingly structured to provide both executive and non-executive KERP participants with payments in September and December 2021 to encourage continuance of their employment throughout the main portion of the proceeding. However, the sheer size and complexity of the Just Energy Entities’ business, among

²⁶ Fifth Carter Affidavit, para. 34.

²⁷ Fifth Carter Affidavit, para 2(b)(iii).

²⁸ Further details of the KERP are provided in the Fifth Carter Affidavit, para. 42.

²⁹ Fifth Carter Affidavit, para. 43.

other factors, has meant the Just Energy Entities are now not expected to emerge from the CCAA and Chapter 15 proceedings in early 2022.³⁰

26. Since the Filing Date, all key employees have been required to accept increased workloads and demands in managing all aspects of the restructuring process, including increased reporting and forecasting under the DIP Term Sheet, administration of the Claims Process in conjunction with the Monitor and the Claims Agent, development of a proposed restructuring plan, and negotiation of the securitization under HB 4492 in Texas. At the same time, they continue to run the day-to-day operations of the business. Burnout amongst key employees is a significant, and increasing, risk.³¹

27. The Just Energy Entities are also concerned that key employees are becoming fatigued by the continuing uncertainty created by the ongoing CCAA and Chapter 15 proceedings, and may look for alternative employment opportunities in a more stable environment. The extension of the CCAA and Chapter 15 proceedings into 2022 only heightens this risk.³²

28. Moreover, the labour market has changed dramatically since the KERP was initially approved in March 2021. As has been well publicized, both the United States and Canada have experienced dramatic changes in the workforce since the beginning of the COVID-19 pandemic in March 2020. Most recently, there have been mass employee resignations from companies at levels not experienced in recent history.³³

³⁰ Fifth Carter Affidavit, para. 44.

³¹ Fifth Carter Affidavit, para. 46.

³² Fifth Carter Affidavit, para. 47.

³³ Further details of recent labour market shifts in the United States and Canada are found in the Fifth Carter Affidavit, paras. 48-49.

29. The original KERP has largely been effective in providing financial motivation for the Just Energy Entities' key employees to continue their employment. To date, only 4 key employees named in the original KERP have resigned for various reasons. Such high retention rates have allowed the Just Energy Entities to retain the vast majority of employees with significant experience and/or expertise necessary to the continued operation of the business and to guide the business through the restructuring process.³⁴

30. However, the Just Energy Entities are concerned that, unless incremental KERP funds are approved and made available for payment to key employees in 2022, they will not be able to sustain this high level of key employee retention. The loss of key employees may also result in additional resignations by employees not covered by the KERP.³⁵ The Applicants are accordingly requesting approval of the Second KERP. Under the proposed Second KERP:

- (a) non-executive KERP recipients will receive two installment payments in March and September 2022 in the same amounts as made or that will be made to each non-executive KERP recipient under the original KERP in September and December 2021. If a Successful Restructuring occurs prior to September 2022, the final KERP payment would be made at such earlier date; and
- (b) executive KERP recipients will receive one installment payment in March 2022, and one success-based payment upon the completion of a Successful Restructuring,

³⁴ Fifth Carter Affidavit, para. 50.

³⁵ Fifth Carter Affidavit, para. 51.

again in the amounts as made or that will be made to each executive KERP recipient under the original KERP in September and December 2021.³⁶

31. Payments under the Second KERP take into account the timing of the payments remaining to be made under the original KERP, which contemplates the final payment to non-executive KERP recipients in June 2022. As a result, there are no payments scheduled to be made under the Second KERP in June 2022 unless a Successful Restructuring occurs during that month.³⁷

32. The payments proposed to be made by the Just Energy Entities under the Second KERP are incremental to all payments approved by the CCAA Court under the original KERP. However, no increase to the KERP Charge is required as the payments under the Second KERP simply replicate the payments that will have been made to each KERP participant by December 2021.³⁸

PART III - ISSUES AND THE LAW

33. The principal issues on this Motion are whether:

- (a) this Court should grant the requested Stay extension;
- (b) this Court should approve the Amended DIP Term Sheet;
- (c) this Court should authorize the Applicants to enter into the JE Finance Transaction;
and
- (d) this Court should approve the Second KERP.

³⁶ Fifth Carter Affidavit, para. 51. A breakdown of the payments which have been made under the original KERP, and which are proposed to be made under the Second KERP, is found at para. 52 of the Fifth Carter Affidavit.

³⁷ Fifth Carter Affidavit, para. 53.

³⁸ Fifth Carter Affidavit, para. 54.

A. THE STAY EXTENSION SHOULD BE GRANTED

34. The Stay is due to expire on December 17, 2021.³⁹ With the support of the Monitor, the Applicants now seek to extend the Stay up to and including February 17, 2022.⁴⁰

35. On an application other than an initial application, the Court may make a stay order for any period that the Court considers necessary if the applicant satisfies the Court that: a) circumstances exist that make the order appropriate; and b) the applicant has acted, and is acting, in good faith and with due diligence.⁴¹ The Applicants satisfy both branches of this test.

36. The extension of the Stay is necessary and appropriate in the circumstances to provide the Just Energy Entities with the necessary breathing room to continue to focus on their restructuring and going concern operations as part of these proceedings, finalize a proposed restructuring plan, and satisfy all other milestone dates under the DIP Term Sheet.⁴² Further, the extension of the Stay is necessary to allow the Just Energy Entities, in consultation with the Monitor, to continue the process of reviewing and determining all necessary Claims received as of the Claims Bar Date, in accordance with the Claims Procedure Order.⁴³

37. Since September, the Applicants have acted and continue to act in good faith and with due diligence in these CCAA proceedings with a view to achieving a going concern restructuring. Among other things, the Applicants have:

³⁹ Fifth Carter Affidavit, para. 57.

⁴⁰ Fifth Carter Affidavit, para. 58.

⁴¹ CCAA, ss. 11.02(2) to 11.02(3).

⁴² Fifth Carter Affidavit, para. 58.

⁴³ Fifth Carter Affidavit, para. 59.

- (a) in conjunction with the Monitor, administered the Claims Process pursuant to the Claims Procedure Order granted by this Court on September 15, 2021;⁴⁴
- (b) maintained regular communications with various regulators across Canada and the United States; satisfied all obligations to regulators that license one or more of the Just Energy Entities in the ordinary course, including renewing 23 licenses since the Filing Date; and posted all financial assurances required under applicable legislation or regulation. All licenses and registrations which the Just Energy Entities held as of the Filing Date remain valid and in full force and effect;⁴⁵
- (c) continued to actively participate in the proceedings before the PUCT to consider and settle the details of the Electricity Reliability Council of Texas (“ERCOT”) financing mechanism and the process to receive recovery of costs under HB 4492.⁴⁶ While the Just Energy Entities currently expect to receive at least US \$100 million from ERCOT, the total recoverable amount may change materially based on a number of factors, including the entities that opt-out of the ERCOT financing, and the outcome of any dispute resolution process initiated by the Just Energy Entities with ERCOT;⁴⁷
- (d) entered an order with the U.S. Court in the Chapter 15 proceedings allowing a bond previously posted by Fidelity and Deposit Company of Maryland on behalf of the

⁴⁴ Further information regarding the administration of the Claims Process is found at para. 9(a) of the Fifth Carter Affidavit.

⁴⁵ Fifth Carter Affidavit, para. 9(b).

⁴⁶ The details of HB 4492 are discussed at length in the Fourth Carter Affidavit, sworn September 8, 2021.

⁴⁷ Fifth Carter Affidavit, para. 9(d).

Just Energy Entities in the amount of US\$5.6 million to be reduced to US\$600,000;⁴⁸

- (e) continued to report, as required, to the DIP Lenders and the Qualified Commodity/ISO Suppliers in accordance with the ARIO, Commitment Letter and Qualified Support Agreements, as applicable, and negotiated changes to certain milestone dates under the DIP Term Sheet, as necessary, to facilitate ongoing restructuring discussions;⁴⁹
- (f) continued to attend regular meetings with the DIP Lenders and Credit Facility Lenders, together with their professional advisors, and other key creditors, such as Shell and BP (prior to BP assigning its right, title and interest in all pre-filing claims to certain affiliates of the DIP Lender entities);⁵⁰ and
- (g) operated the business in the normal course with a view to developing a restructuring transaction to maximize the value of the Just Energy Entities for all stakeholders.⁵¹

38. The Monitor's cash flow forecast demonstrates that, subject to certain assumptions, the Just Energy Entities will have sufficient funds to continue their operations and fund these CCAA proceedings until February 17, 2022. The Monitor recommends that the Stay Period be extended.⁵²

⁴⁸ Fifth Carter Affidavit, para. 9(e). A copy of the Bond Reduction Stipulation is attached as **Exhibit "H"** to the Fifth Carter Affidavit.

⁴⁹ Fifth Carter Affidavit, para. 9(f).

⁵⁰ Fifth Carter Affidavit, para. 9(g).

⁵¹ Fifth Carter Affidavit, para. 9(h).

⁵² Fifth Carter Affidavit, para. 60; Monitor's Fourth Report, para. 77.

B. THE AMENDED DIP TERM SHEET SHOULD BE APPROVED

39. The Just Energy Entities are seeking this Court's approval of the Amended DIP Term Sheet.⁵³ The Amended DIP Term Sheet, which was negotiated between the Just Energy Entities and the DIP Lenders with the support of the Monitor, will allow the Just Energy Entities to effectively manage their business for the benefit of all stakeholders and ensure their continued stability into 2022 while their restructuring is completed.⁵⁴

40. This Court has already approved the DIP facility on the basis that it satisfies the criteria in section 11.2 of the CCAA.⁵⁵ Case law suggests that the section 11.2(4) criteria provide the statutory basis for the Court to approve an amendment to a DIP facility that has already been approved.⁵⁶ Section 11.2(4) lists the non-exhaustive factors to be considered by the Court in deciding whether to make such an order.⁵⁷

41. The DIP amendment case law supporting the application of the section 11.2(4) criteria involves increases in the amount borrowed under a DIP facility. Thus, for example, the amendment proposed in the *Laurentian* decision, although it also extended the DIP maturity date and involved a loan amendment fee, involved an increase in both the principal amount of the facility, as well as

⁵³ Fifth Carter Affidavit, para 28. Previous amendments to the Original DIP Term Sheet have been largely administrative in nature, including previous extensions to certain milestone dates.

⁵⁴ Fifth Carter Affidavit, para. 28.

⁵⁵ *Re Just Energy Corp.*, [2021 ONSC 1793](#) at paras. 52 to 71.

⁵⁶ *Re Laurentian University of Sudbury*, [2021 ONSC 3545](#) [*"Laurentian DIP Amendment"*], at para. 39

⁵⁷ See *Laurentian DIP Amendment*, at paras. 41, 44; see also *Re PCAS Patient Care Automation Services Inc.*, [2012 ONSC 2423](#) [Commercial List], at para. 9.

an increase in the DIP charge.⁵⁸ Similarly, in *PCAS*, the debtor was requesting an increase in the amount of the DIP facility.⁵⁹

42. No such increase in the amount of the DIP facility or the DIP Charge is proposed in the Amended DIP Term Sheet. A side-by-side comparison of the key terms of the original and the Amended DIP Term Sheet is provided in the Carter Affidavit.⁶⁰

43. In any event, even if the section 11.2(4) factors apply, they favour the requested relief. The Applicants have been acting with due diligence and in good faith, in regular communication with the DIP Lenders, to move the restructuring forward. The length of time of this proceeding is due to the complexity of the business, not any failure of the Applicants to act with appropriate alacrity. The Applicants' business has been managed in the ordinary course throughout this proceeding, under the supervision of the Monitor, and will continue to be appropriately managed for the remainder of this proceeding.

44. There is no suggestion that management does not have the confidence of major creditors, all of whom have received notice of this Motion. Since there is no change to the amount of the DIP facility or the DIP Charge, no creditor is prejudiced to any greater extent than has already been approved by this Court. Finally, the Monitor supports the approval of the Amended DIP Term Sheet.

45. The Amended DIP Term Sheet will enhance the prospect of a successful restructuring by providing the flexibility necessary for the Just Energy Entities to implement their business plan as

⁵⁸ *Laurentian DIP Amendment*, at para. 36.

⁵⁹ *PCAS*, at para. 4.

⁶⁰ Fifth Carter Affidavit, para. 27.

part of a restructuring transaction. Specifically, the Amended DIP Term Sheet provides the flexibility to satisfy future collateral requirements associated with the Just Energy Entities' new or amended supply arrangements and the corresponding increases in the volume of their business.⁶¹ In addition, the extension of the maturity date contained in the Amended DIP Term Sheet will ensure continued stability while the restructuring is consummated.⁶²

46. As this Court noted in *Laurentian*, the commercial position of the DIP Lenders is a relevant factor in determining whether to approve amendments to terms of a DIP facility.⁶³ Viewed in this light, the provisions in the Amended DIP Term Sheet, including the extension fee, are fair and reasonable.

47. In particular, as this Court previously recognized in addressing the consultation rights provided in the Claims Procedure Order,⁶⁴ the requirement that the Applicants obtain DIP Lender consent before settling claims greater than \$15 million⁶⁵ does not suffer from the deficiencies that caused certain consultative rights requested by the pre-filing lenders to be rejected recently by this court in the *Laurentian* proceeding.⁶⁶ In *Laurentian*, it was proposed to provide consultation or consent rights to a potentially large number of parties holding claims in excess of \$5 million, giving rise to concern that this would hamper the debtor's restructuring efforts and make them more costly.⁶⁷ The Amended DIP Term Sheet provides only the DIP Lender with such rights, and only

⁶¹ Fifth Carter Affidavit, at paras. 24-25 and 28.

⁶² Fifth Carter Affidavit, para. 28.

⁶³ *Laurentian DIP Amendment*, at para. 43.

⁶⁴ Endorsement of Koehnen J. dated September 15, 2021, paras. 3 to 7.

⁶⁵ Fifth Carter Affidavit, para. 27.

⁶⁶ *Re Laurentian University of Sudbury*, [2021 ONSC 3885](#), at paras. 23 and 38 [*“Laurentian Claims Process”*].

⁶⁷ *Laurentian Claims Process* at paras. 23 and 40.

in relation to relatively sizeable claims. Furthermore, unlike in *Laurentian*,⁶⁸ the Monitor supports the Amended DIP Term Sheet, including this provision.

C. THE JE FINANCE TRANSACTION SHOULD BE APPROVED

48. The Just Energy Entities are seeking this Court's approval to enter into and undertake the steps required to execute the JE Finance Transaction, including winding up JE Finance into Just Energy and subsequently filing articles of dissolution in respect of JE Finance.⁶⁹ Upon completion of the JE Finance Transaction and the dissolution of JE Finance, the Applicants seek this Court's authorization to remove JE Finance as an Applicant in this proceeding.⁷⁰ The proposed Order has been structured to provide the Just Energy Entities with the flexibility to implement the structure of the JE Finance Transaction in the most tax efficient manner.⁷¹

49. The Applicants are seeking this Court's authorization to carry out the JE Finance Transaction in light of the fact that both JE Finance and Just Energy Hungary are Applicants in this proceeding. Additionally, paragraph 13(c) of the SARIO precludes the Applicants from reorganizing a material portion of their businesses without the approval of this Court.

50. The JE Finance Transaction is a tax reorganization transaction that is intended to realize upon certain tax benefits, while simplifying certain aspects of Just Energy's corporate structure.⁷² The corporate steps involved in the JE Finance Transaction, in the absence of this CCAA proceeding, could be implemented in the ordinary course, without corporate, regulatory or Court

⁶⁸ *Laurentian Claims Process* at paras. 22 to 23.

⁶⁹ Fifth Carter Affidavit, para 37.

⁷⁰ Fifth Carter Affidavit, para. 2(b)(iii).

⁷¹ Fifth Carter Affidavit, para. 37.

⁷² Fifth Carter Affidavit, para. 31.

approval. Such transactions are permitted under Canadian tax laws and are recognized as legitimate by the Canada Revenue Agency.⁷³ All corporate steps to complete the proposed JE Finance Transaction are permitted under both the Credit Agreement and the DIP Term Sheet.⁷⁴

51. JE Finance is incorporated under the *Ontario Business Corporations Act* (“OBCA”).⁷⁵ There is no applicable approval requirement under the OBCA for the steps proposed in order to execute the JE Finance Transaction. However, section 238(1) of the OBCA, which addresses the circumstances in which an OBCA company can be dissolved, requires (among other things) that the dissolving corporation either have no debts, liabilities or obligations, or that its debts, liabilities or obligations have been “provided for” in accordance with subsection 238(3) of the OBCA. The Applicants take the position that, once the JE Finance Transaction is complete, this requirement will, in substance, be satisfied.

52. Subsection 238(3) of the OBCA addresses circumstances where there are unknown creditors of the dissolving corporation. This is not the case here. All known creditors have been identified and noticed as part of the Claims Process. Moreover, the Claims Bar Date (November 1, 2021) has now passed. Despite the comprehensive notice requirements under the Claims Procedure Order, which was approved by this Court, the Monitor has confirmed that no unknown creditors have filed claims against JE Finance or Just Energy Hungary.⁷⁶

53. Apart from the intercompany indebtedness, neither JE Finance nor Just Energy Hungary have any liabilities other than under the Credit Facility, the DIP Facility, the Court-ordered charges

⁷³ Fifth Carter Affidavit, para. 36.

⁷⁴ Fifth Carter Affidavit, para. 36.

⁷⁵ *Business Corporations Act*, RSO 1990, c B.16.

⁷⁶ Fifth Carter Affidavit, para. 38.

granted in these CCAA proceedings and to applicable secured suppliers. JE Finance also has liability under the Term Loan. In the case of Just Energy Hungary, it has liability under the Convertible Loan, at the same time that it is owed money from Just Energy US under the IB Loan. It is not proposed that Just Energy Hungary be wound up or dissolved. As a result of the JE Finance Transaction, some or all of the Convertible Loan will be settled in accordance with the proposed transaction steps by means of a transfer of the IB Loan to JE Finance (under the First Transaction Structure) or to Just Energy directly (under the Second Transaction Structure). Moreover, all of the assets of JE Finance will be transferred to Just Energy when JE Finance is wound up into Just Energy.⁷⁷

54. In respect of the Credit Facility, all Just Energy Entities are either borrowers or guarantors. In respect of the DIP Facility, all of the Just Energy Entities are jointly and severally liable for such amounts, and the DIP Lenders' Charge (and all other Court-ordered charges) are secured against all present and future assets, property and undertakings of the Just Energy Entities, including JE Finance and Just Energy Hungary.⁷⁸ In other words, each of JE Finance and Just Energy Hungary is a co-borrower and/or a co-guarantor that is jointly and severally liable to the Credit Facility Lenders and the DIP Lenders with all the other Just Energy Entities.

55. Although the liabilities of JE Finance under the Credit Facility and in relation to the DIP Facility, the applicable secured suppliers and the court-ordered charges will not technically be assumed by Just Energy, this is irrelevant because Just Energy is already a co-obligor or a co-guarantor in relation to the exact same obligations. Moreover, as a result of the wind-up of JE

⁷⁷ Fifth Carter Affidavit, para. 38. The JE Finance Transaction steps are set out in Schedules A and B to the Fifth Carter Affidavit.

⁷⁸ Fifth Carter Affidavit, para. 38.

Finance into Just Energy, Just Energy will have all of the assets of JE Finance that would have been otherwise available to satisfy JE Finance's obligations as co-obligor or co-guarantor. In this sense, all of JE Finance's debts, obligations and liabilities will, in substance, have been provided for in keeping with the requirements of section 238(1) of the OBCA.

56. As such, regardless of which of the two transaction structures is adopted (which are essentially identical apart from the sequencing of the steps), the JE Finance Transaction will not cause prejudice to any stakeholder, including the Credit Facility Lenders, the DIP Lenders, the applicable secured suppliers, or any beneficiary of the court-ordered Charges. JE Finance's assets and liabilities will all simply reside in Just Energy, without any leakage of assets or any change in the liabilities already owed.

57. Moreover, the JE Finance Transaction is expected to result in a net positive benefit to Just Energy and its stakeholders by:

- (a) allowing the Just Energy Entities to realize a very substantial capital loss (potentially well over \$100M) on the settlement of the Convertible Loan; and
- (b) allowing Just Energy Hungary to realize both the loss on the disposition of the IB Loan and a gain from the settlement of the Convertible Loan in the same tax period, resulting in an overall net loss for Hungarian tax purposes. As such, no Hungarian income tax is expected to result, and Just Energy Hungary should be entitled to a refund of all amounts paid in tax installments in respect of the 2021 taxation year which is expected to be approximately US\$1.5 million.⁷⁹

⁷⁹ Fifth Carter Affidavit, para. 35.

58. Permitting the Applicants to implement the JE Finance Transaction is consistent with the objectives of the CCAA, including the maximization of the value of the debtors' assets for the benefit of all stakeholders. By contrast, it would be counter-intuitive if a CCAA Applicant were not permitted to engage in ordinary course tax reorganization transactions intended to realize on tax benefits or tax savings during the pendency of a CCAA proceeding, which could be very lengthy. Albeit in a somewhat different context, internal reorganization transactions within corporate families under CCAA protection have been approved by this court when they were aligned with overall restructuring aims and would result in a benefit for stakeholders.⁸⁰

59. For all of the above reasons, the Applicants submit that this Court can and should exercise its broad jurisdiction under section 11 of the CCAA to make any order it thinks fit to authorize the Applicants to implement the JE Finance Transaction, including the dissolution of JE Finance and the removal of JE Finance as an Applicant in these proceedings.

60. To address the consequences of the JE Finance Transaction, the Applicants also seek an amendment to the order granted May 26, 2021 (the "**May Order**"), to account for the mechanics by which the Just Energy Entities may repatriate funds to the Canadian Just Energy Entities.⁸¹

D. THE SECOND KERP SHOULD BE APPROVED

61. The Applicants request approval of the Second KERP.⁸² The jurisdiction to approve a KERP is grounded in the court's general power under section 11 of the CCAA to make any order

⁸⁰ See e.g. *Re Canwest Global Communications Corp.*, [2009 CarswellOnt 7169](#) (S.C.J. [Commercial List]), at paras. 36-38

⁸¹ Fifth Carter Affidavit, paras. 40-41. A copy of the May Order is attached as **Exhibit "L"** to the Fifth Carter Affidavit.

⁸² Fifth Carter Affidavit, para. 51. The amount and details of the Second KERP are set out in Confidential Exhibit Q to the Fifth Carter Affidavit, filed under seal.

it considers appropriate in a CCAA proceeding. Approving a KERP, which may be accompanied by a KERP charge, is a matter of the Court's discretion to be exercised on a case-by-case basis.⁸³

62. Factors supporting a KERP and a related KERP charge have been held to include (a) the approval of the Monitor; (b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved; (c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (e) the business judgment of the board of directors of the debtor.⁸⁴ This Court has already concluded that these factors were satisfied when approving the original KERP.⁸⁵ These factors are equally relevant when determining whether to amend an existing KERP or to approve a new KERP.

63. The Second KERP is a fair and reasonable response to the evolving timeline of the Applicants' restructuring process and the accompanying issues of employee fatigue and the uncertain labour market. The Just Energy Entities are of the view that the Second KERP is critical to their ongoing stability, retention of key employees, and ongoing efforts to restructure for the benefit of all stakeholders.⁸⁶ The Second KERP was developed in consultation with the Monitor and incorporates the Monitor's feedback.⁸⁷ It was approved by the Board of Directors of Just

⁸³ *Re Canwest Global Communications Corp.* (2009), [59 C.B.R. \(5th\) 72](#) (Ont. S.C.J. [Commercial List]), at para. 49.

⁸⁴ *Re Grant Forest Products* (2009), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J. [Commercial List]) at para. 19. See also *Re Walter Energy Canada Holdings Inc.*, [2016 BCSC 107](#), at para. 59; *Re Mountain Equipment Co-operative*, [2020 BCSC 1586](#), at para. 68.

⁸⁵ Endorsement of Koehnen J., dated March 19, 2021, para. 7.

⁸⁶ Fifth Carter Affidavit, para. 56.

⁸⁷ Fifth Carter Affidavit, para. 55.

Energy on October 24, 2021, in accordance with the recommendation of all of the members of Just Energy's Human Resources, Environmental, Health & Safety Committee.⁸⁸

64. The Applicants also seek an ancillary order that Confidential Exhibit Q to the Fifth Carter Affidavit, which summarizes the Second KERP, be sealed and not form part of the court record pending further order of the Court. The summary contains commercially sensitive information as well as personal information relating to certain of the Just Energy Entities' employees.⁸⁹ The same sensitive information was filed under seal and a sealing order was granted in relation to the first KERP.

65. As this Court has recently noted, the decision to grant a sealing order must take into account the test recently articulated by the Supreme Court of Canada in *Sherman Estate v. Donovan*, which was decided after this Court approved the original KERP.⁹⁰ The substance of the applicable test for obtaining a sealing order did not materially change under the *Sherman Estate* framework. As the Supreme Court held, discretionary limits on presumptive court openness require the applicant to establish that: a) court openness poses a serious risk to an important public interest, b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk, and c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁹¹

⁸⁸ Fifth Carter Affidavit, para. 56.

⁸⁹ Fifth Carter Affidavit, para. 55.

⁹⁰ [2021 SCC 25](#), at paras. 37 and 38 [*"Sherman Estate"*]; see *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#), at para. 22 [*"Bridging"*].

⁹¹ *Sherman Estate*, at para 37 and 38.

66. Applying this framework, this Court recently granted a sealing order over the details of an insolvent company's KERP, on the basis that the KERP contained confidential and personal information with respect to the compensation of each eligible employee.⁹²

67. Making the details of the Second KERP public would pose a serious risk to two important public interests: the ability of the Just Energy Entities to successfully restructure for the benefit of all stakeholders, and the privacy interests of the Just Energy Entities' employees. There is no reasonable alternative measure to protecting these interests. Finally, the benefits of a sealing order in promoting these interests outweighs the effect of making public the details of the Second KERP at this time, as no stakeholders will be materially prejudiced by such an order.

PART IV - NATURE OF THE ORDER SOUGHT

68. For all of the reasons above, the Applicants submit that this Court should grant the relief requested and issue an Order substantially in the form of the draft Order attached at Tab 3 of the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2021.



per Marc Wasserman / Michael De Lellis / Jeremy Dacks

⁹² *Bridging*, at paras. 24-25

SCHEDULE “A” – LIST OF AUTHORITIES

Case Law

1. *Canwest Global Communications Corp., Re* (2009), [59 C.B.R. \(5th\) 72](#) (Ont. S.C.J. [Commercial List])
2. *Canwest Global Communications Corp., Re*, [2009 CarswellOnt 7169](#) (S.C.J. [Commercial List])
3. *Grant Forest Products, Re* (2009), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J. [Commercial List])
4. *Just Energy Corp., Re*, [2021 ONSC 1793](#)
5. *Laurentian University of Sudbury, Re*, [2021 ONSC 3545](#)
6. *Laurentian University of Sudbury, Re*, [2021 ONSC 3885](#)
7. *Mountain Equipment Co-operative, Re*, [2020 BCSC 1586](#)
8. *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#)
9. *PCAS Patient Care Automation Services Inc., Re*, [2012 ONSC 2423](#) [Commercial List]
10. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
11. *Walter Energy Canada Holdings Inc., Re*, [2016 BCSC 107](#)

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

[Business Corporations Act, RSO 1990, c B.16](#)

Articles of dissolution where corporation active

238 (1) For the purpose of bringing the dissolution authorized under clause 237 (a) or (b) into effect, articles of dissolution must set out,

- (a) the name of the corporation;
- (b) that its dissolution has been duly authorized under clause 237 (a) or (b);
- (c) that it has no debts, obligations or liabilities or its debts, obligations or liabilities have been duly provided for in accordance with subsection (3) or its creditors or other persons having interests in its debts, obligations or liabilities consent to its dissolution;
- (d) that after satisfying the interests of creditors in all its debts, obligations and liabilities, if any, it has no property to distribute among its shareholders or that it has distributed its remaining property rateably among its shareholders according to their rights and interests in the corporation or in accordance with subsection (4) where applicable;
- (d.1) if it was at any time a registered owner of land in Ontario, that it is no longer a registered owner of land in Ontario; and
- (e) that there are no proceedings pending in any court against it.
- (f) Repealed: 1994, c. 27, s. 71 (25).

[...]

Where creditor unknown

(3) Where a corporation authorizes its dissolution and a creditor is unknown or a creditor’s whereabouts is unknown, the corporation may, by agreement with the Public Guardian and Trustee, pay to the Public Guardian and Trustee an amount equal to the amount of the debt due to the creditor to be held in trust for the creditor, and such payment shall be deemed to be due provision for the debt for the purposes of clause (1) (c).

[Companies’ Creditors Arrangement Act, RSC, 1985, c C-36](#)

General power of court

11 Despite anything in the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

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

[...]

Interim Financing

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

[...]

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge;
and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

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

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

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

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT Toronto

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