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

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.

APPLICANTS

REPLY FACTUM OF THE APPLICANTS

(Motion for Authorization Order and for Creditors Meetings Order)

June 5, 2022

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TO: THE SERVICE LIST

PART I - OVERVIEW

1. The Applicants file this Factum by way of reply to the objections to the Creditors Meetings Order of three groups of unsecured contingent litigation claimants (together, the "**Objecting Parties**") with unliquidated and unproven claims (the "**Contingent Litigation Claims**").[1]

2. The Objecting Parties challenge certain aspects of the proposed Creditors Meetings Order:

(a) Classification: The Objecting Parties object to the Applicants' classification of the Contingent Litigation Claims in the same class as the unsecured claims of the Term Lenders and the Convenience Class Creditors. They seek the right to vote in a separate class, and therefore the power to veto the Plan.

(b) Voting: The Objecting Parties argue that the CCAA requires the Applicants to grant individual votes to each individual claimant underlying the representative proofs of claim filed by the Objecting Parties. This is a different route to the same end – an attempt to use the "numerosity" of these claims within the unsecured creditor class to swamp the proven claims of other unsecured creditors and vote down the Plan.

(c) Dispute Resolution/Valuation: The Objecting Parties further complain about the absence of a process to value the Contingent Litigation Claims in advance of the Creditors' Meetings. This is simply misconceived and unachievable.

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[1] The Objecting Parties consist of: (a) Haidar Omarali ("**Omarali**"), as representative plaintiff in the certified Omarali class action ; (b) counsel ("**US Plaintiffs' Counsel**") to the proposed representative plaintiffs in the uncertified Donin and Jordet actions (the "**Putative US Class Actions**"); and (c) counsel for a group of claimants asserting tort claims in connection with power disruptions caused by the Texas winter storm in February 2021 (the "**Texas Power Interruption Claims**").

Terms that are not specifically defined in this Reply Factum have the same meaning as in the second Affidavit of Michael Carter in support of the Meetings Order, sworn May 29, 2022, ("**Twelfth Carter Affidavit**").

(d) Representation Order: US Plaintiffs Counsel seeks a Representation Order, ostensibly to allow them to vote on the Plan on behalf of the proposed class of US Customers, as well as to, if necessary, appoint the proposed US representative plaintiffs as representatives for the US Customers and US Plaintiffs Counsel as their lawyers for this proceeding. This relief is unnecessary.

3. Despite the Objecting Parties' accusation that the Applicants are seeking impermissibly to "gerrymander" the vote in favour of the Plan, all of the objections and the relief sought by the Objecting Parties are designed to create voting leverage for these highly contingent unsecured claimants in this proceeding, despite the fact that they are not proven creditors and have contributed nothing to the restructuring. None of the Objecting Parties has come forward with a different or superior restructuring solution, despite having had ample opportunity to do so. They say only that the Applicants should continue indefinitely under the CCAA until the Contingent Litigation Claims are fully and finally adjudicated.

4. This Court must decide whether highly contingent and unproven litigation claimants, whose claims are disputed in all respects by the Applicants in consultation with the Monitor, and who may be determined to have no claim at all, should be permitted to direct the course of this entire restructuring. In particular, this Court must decide whether these claimants should be given the means to override the wishes of the other stakeholders who are owed over a billion dollars of funded debt, not to mention the employees, suppliers and other stakeholders, all of whom have very strong interests in ensuring that this going-concern restructuring can succeed.

5. For the reasons submitted in the Applicants' main factum in support of the Authorization and Creditors Meetings Orders (the "**Main Factum**"), and for the additional reasons set out below, this Court should not give effect to any of the objections of the Objecting Parties.

PART II - RESPONSES OF THE APPLICANTS

(a) *Challenge to Classification is Unfounded*

6. The only purpose for the Objecting Parties' challenge to classification of their unsecured claims together with the unsecured claims of the Term Lenders and the Convenience Class Creditors is to give the Objecting Parties the power to vote "no" in a separate class. The Objecting Parties argue that the form of compensation to be received by the Term Lenders (namely, equity in the New Just Energy Parent) is "vastly" different from (or "grossly disparate to") the type and value of the consideration available to the other unsecured creditors.[2]

7. The Applicants' evidence before this Court is that the value provided to the Term Lenders is "equivalent", though not necessarily equal, to the value provided to the other unsecured creditors.[3] US Plaintiffs Counsel submitted affidavit evidence that purports to question the Applicants' evidence on this point.[4] However, the Objecting Parties chose not to challenge the Applicants' evidence on cross-examination, despite having been granted a full opportunity to do so, including an adjournment of the initial hearing date for that very purpose. All of the Objecting Parties' complaints about the alleged "gross disparity" in consideration within the unsecured class should therefore be discounted, or at least viewed with considerable skepticism.

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[2] Factum of the Respondents, Texas Power Interruption Claimants dated June 2, 2022 ("**Texas Power Interruption Factum**"), para. 5; Factum of U.S. Class Counsel dated June 2, 2022 ("**US Plaintiffs' Counsel Factum**"), para. 3(b). The US Plaintiffs' Counsel Factum also ties its objections to classification to the potential of the Term Lenders to benefit from the "upside" represented by the so-called "Undisclosed Assets". However, as the Monitor's Supplemental Report explains, there are no "Undisclosed Assets", nor is there any foundation to US Plaintiffs' Counsel's allegation at para. 38 of its factum that the so-called "Undisclosed Assets" were not considered in the Plan or the Applicants' analysis.

[3] Affidavit of Mark Caiger, sworn May 12, 2022, para. 11, Applicants' Motion Record dated May 12, 2022 ("**Applicants' MR**"), Tab 3, p. 1780.

[4] Affidavit of Robert Tannor, sworn May 26, 2022, paras. 17-22, Responding Motion Record and Motion Record of U.S. Class Counsel dated May 26, 2022, Tab 2, pp. 18-20.

8. The Objecting Parties ignore some very basic facts. The Term Lenders, who are owed hundreds of millions of funded debt in that capacity, have agreed to take equity, not cash, for their Claims. They are making material contributions to the feasibility of this Plan and have been instrumental in ensuring that the Just Energy Entities' businesses were able to survive to this stage.

9. The Objecting Parties ignore the risks that are being assumed by the Term Lenders in agreeing to take equity instead of cash. To state the obvious, while the Term Lenders could benefit if the business is successful, they are also assuming the risk that it may not be, especially given the volatility of the energy market and the challenging state of the current market.[5]

10. In any event, the test for classification, as fully articulated in the Main Factum, is based on commonality, not identity of legal interest, and the avoidance of excess fragmentation that could hamstring the ability to restructure at all at an early stage of considering a proposed Plan. The Objecting Parties have failed to demonstrate that their legal interests as unsecured creditors *vis-à-vis* the Applicants are so materially different from those of the unsecured Term Lenders that they should be allowed to vote in a separate class, thereby giving effect to their only possible objective in seeking such fragmentation – the power to veto the Plan and/or to extract more value.

11. The Objecting Parties refer to a number of classification decisions made in other contexts.[6] Classification is a fact-specific exercise within a particular restructuring. The fact that a separate classification of contingent or other creditors was proposed by a debtor or even ordered by the

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5 Twelfth Carter Affidavit, para. 6; see also Affidavit of Michael Carter, sworn May 12, 2022 ("**Eleventh Carter Affidavit**"), para. 62, Applicants' MR, Tab 2, pp. 116-117.

6 See for example US Plaintiffs' Counsel Factum at para. 46, footnote 50, citing *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386; see also US Plaintiffs' Counsel Factum, para. 51, footnote 53, citing *Re Woodward's Ltd.*, 1993 CanLII 870 (BCSC). The latter case cannot be read as establishing a hard and fast rule. In any event, it is an older decision that appears to have been focused on the economic incentives of particular creditors to vote in favour of the plan, a consideration that Paperny J. later rejected for classification purposes in *Canadian Airlines Corp. (Re),* 2000 CanLII 28185 (AB QB) at para. 31.

CCAA Court in a different restructuring is irrelevant. In the circumstances of this case, there is no "confiscation" or "injustice" in classifying all the unsecured creditors together. By contrast, the separate classification of the Contingent Litigation Claimants would provide them with unwarranted leverage and would work injustice on other unsecured creditors with proven claims.

12. The low threshold for granting the requested Creditors Meetings Order is more than satisfied here. The creditors as a whole should be provided the opportunity to consider the Plan and this Court should have the opportunity to consider whether this Plan, in the particular circumstances, is fair and reasonable. Any unfairness alleged by the Objecting Parties is properly addressed at the Sanction Hearing, if the Plan receives the requisite creditor approval.

(b) ***One Vote for Every Individual Claimant is Not Required or Appropriate***

13. The Objecting Parties argue that each and every individual alleged to be in the certified Omarali class, in the uncertified "class" of "US Customers", and in the group of Texas Power Interruption Claimants should be given one vote. Taken at the highest, that would constitute approximately 7,723 individual votes in the Omarali proceeding, an unspecified number (stated to be at least in the hundreds of thousands) in the Putative US Class Actions, and 364 for the Texas Power Interruption Claims (without taking into account the withdrawal of 92 of these claims).[7]

14. The Objecting Parties take this position despite the fact that the very status of these individuals in this proceeding – i.e. whether have any claim at all – is in dispute. Their status as creditors cannot simply be assumed and, as noted by the Monitor, the actual number of claimants

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[7] Eleventh Carter Affidavit, para. 71(b)(ii), Applicants' MR, Tab 2, p. 123; Responding Factum of Haidar Omarali in his capacity as Representative Plaintiff *Omarali v. Just Energy* dated June 2, 2022 ("**Omarali Factum**"), para. 27; US Plaintiffs' Counsel Factum, para. 1.

will not be established until the claims are fully and finally adjudicated.[8] It therefore does not avail the US Plaintiffs Counsel to seek a declaration that "each U.S. Customer is a creditor in their own right", as if this declaration could be given in the absence of adjudication of the nascent Putative US Class Actions (or any of the other Contingent Litigation Claims).

15. The Monitor confirms that granting each of the purported individual claimants a separate vote would confer a veto on these claimants[9] and that the Contingent Litigation Claims, given their complexity, cannot be resolved by means of a summary process prior to the Creditors Meetings.[10]

(i) Only Creditors with Provable Claims Can Vote

16. It is well established that only creditors that have a proven or provable claim are entitled to vote[11] – a principle which is acknowledged by the Objecting Parties.[12] Regardless of whether the value of the claim for voting purposes can be estimated (discussed below), the basic question of who is entitled to vote depends on a determination that the particular claimant either has an accepted, proven claim or a claim that has been provisionally accepted for voting purposes by the Applicants in accordance with the CCAA.[13] Neither condition is satisfied here.

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8 Supplement to the Tenth Report of the Monitor dated June 1, 2022 ("**Supplemental Report of the Monitor**"), para. 29.

9 Supplemental Report of the Monitor, para. 29.

10 Tenth Report of the Monitor dated May 18, 2022 ("**Tenth Report of the Monitor**"), paras. 53 and 54.

11 See s. 2(1), "claim": "any indebtedness, liability or obligation or any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*." While there is no standalone definition of "creditor" in the CCAA, the definition of "creditor" in the BIA refers to "a person having a claim provable as a claim under this Act." Section 6(1) of the CCAA refers to the voting rights of "creditors". Similarly, section 20(1) of the CCAA refers to provable claims.

12 Omarali Factum, paras. 43 and 67.

13 Section 20(2) of the CCAA provides that the debtor company may admit the amount of a claim for voting purposes under reserve of the right to contest liability for other purposes.

17. In fact, it is exactly this factor that distinguishes the purported individual claimants underlying the Contingent Litigation Claims from those fewer than 35 creditors who have proven De Minimis Claims[14] and who are deemed to vote in favour of the Plan despite their lack of entitlement to distributions because of the very small size of their claims (under $10).[15]

18. The Objecting Parties argue that section 6(1) of the CCAA gives each of the potential individual claimants a separate voting entitlement and that those individual claimants are being disenfranchised under the Plan contrary to the CCAA.[16] However, nothing in section 6(1) of the CCAA requires individual members of a class or group of highly contingent litigation claimants with unproven claims to each have a separate vote, particularly in circumstances in which many such individual claimants – perhaps all – may not even have a claim at all.

19. Nor does section 6(1) preclude such claims from being voted on a representative basis, as contemplated under the Plan. A representative vote is still a vote for CCAA purposes, as long as it is appropriate in light of the particular claim and the Plan to address voting in this manner.[17]

20. The Objecting Parties cite several cases for the proposition that a representative who files a class proof of claim is entitled to exercise the number of votes that represents the number of underlying individual claimants. However, those cases are distinguishable on their facts on the

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14 See the Supplemental Report of the Monitor, para. 27.

15 See the objection raised in the Omarali Factum, paras. 35 and 36.

16 Omarali Factum, para. 41; Texas Power Interruption Factum, para. 27; US Plaintiffs' Counsel Factum, para. 39.

17 In *9354-9186 Quebec Inc. v. Callidus Capital Corp*., 2020 SCC 10 at para. 56, the Supreme Court of Canada affirmed the principle that a "creditor" can generally vote on a plan of arrangement that affects its rights. However, this principle was stated to be subject to specific provisions of the CCAA that may restrict voting. It is also subject to the proper exercise of the supervising judge's discretion to "constrain or bar the creditor's right to vote" in appropriate circumstances. Contrary to Omarali's Factum, para. 43, a decision to bar a creditor from voting for an improper purpose is only one example of an exercise of discretion by a CCAA judge in relation to voting. The Court's language is broad enough to support the general discretion of a CCAA judge to provide for (or approve) particular voting entitlements in a plan where that voting provision is appropriate to the circumstances of that Plan and consistent with the objectives of the CCAA.

basis that they involved *creditors* that had accepted claims, claims that had been provisionally accepted by the debtor company for voting purposes, or voting that had been agreed upon in the specific context of the restructuring. Specifically:

(a) *Cline Mining Corporation (Re)*:[18] certain uncertified class action claimants were entitled to vote individually in a separate class. However, the treatment of their votes or their status as creditors was not a disputed issue that had to be resolved by the Court and the recoveries were ultimately resolved consensually.[19]

(b) *Arrangement relatif a Bloom Lake*:[20] the claims in this case were those of employees and retirees to pension benefits and OPEBs and there was no issue that the employees who were to vote through a deemed proxy mechanism did not have provable (or even proven) claims.

(c) *New Home Warranty of British Columbia Inc. (Bankruptcy of)*:[21] this case involved contingent claimants whose status as creditors with "proven" (or provable) claims could be reasonably ascertained prior to the vote.

(d) *Sears*:[22] the individual claimants who were entitled to vote separately in this case through a proxy mechanism were all employees or pensioners with proven claims.[23]

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[18] 2014 ONSC 6998, cited in US Plaintiffs' Counsel Factum at para. 43(a).

[19] 2015 ONSC 622 at paras. 15-16, cited in US Plaintiffs' Counsel Factum at footnote 45.

[20] 2018 QCCS 1657, cited in US Plaintiffs' Counsel Factum at para. 43(b).

[21] 1999 CanLII 6751 (BCSC), cited in US Plaintiffs' Counsel Factum at para. 43(c).

[22] See Omarali Factum at para. 56.

[23] Note that footnote 41 to the Omarali Factum appears to refer to the wrong Representation Order. The Pension and Employment Representation orders were granted on July 13, 2017.

21. By contrast, the Claims of the Objecting Parties have all been disallowed in their entirety by the Just Energy Entities, in consultation with the Monitor, on the basis (*inter alia*) that they are speculative, remote, have no basis in law, and/or are incapable of proof.[24] The Objecting Parties have disputed these disallowances, but the disputes are complex. The statement by counsel to the Texas Power Interruption Claimants that the Just Energy Entities have "not disputed that [these claims] are 'provable'" is therefore patently incorrect on the face of the record,[25] as is the assertion of US Plaintiffs Counsel that "each US Customer is a creditor in their own right."[26]

22. In substance, the Objecting Parties' objection is not that the individual claimants are genuinely being disenfranchised by being accorded one representative vote under the Plan. If the Plan were modified to provide for multiple voting for each individual underlying these representative proofs of claim, there is no suggestion that the representatives of each claimant group or their counsel intend to canvas the individual putative claimants – if it could even be determined exactly who these individuals are, at this stage – to determine whether they would agree to support the Plan or not. Nor is there any suggestion that those votes might differ depending on the wishes of the particular individual.

23. Quite the opposite. It is clear that each of the representatives is seeking the power to multiply their "no" votes against the Plan by the number of putative individual claimants in order to swamp the unsecured class on numerosity grounds and defeat the Plan, all without determining

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[24] Eleventh Carter Affidavit, Exhibits K, L, P, S, and U-X, Applicants' MR, Tab 2, and pp. 914-928, 1141-1151, 1387-1397, 1431-1544.

[25] Texas Power Interruption Factum, para. 27.

[26] US Plaintiffs' Counsel Factum, para. 3(a).

that any or all of the individual claimants have a proven claim.[27] It is this result that would unduly skew the vote and would constitute gerrymandering, not the approach adopted in the Plan.

(ii) No Means of Determining Individual Entitlements Before the Meeting

24. Each of the Contingent Litigation Claims is highly complex, and each faces very material hurdles that must be overcome in order to determine whether any (let alone all) of the individual claimants have a proven claim. Assertions that the Contingent Litigation Claims are "strong and viable" or as "straightforward as they are strong" simply are not borne out by the record.[28] They are subject to multiple layers of contingencies and very material disputes at each level.

25. As the Monitor has confirmed, there is no means, under any scenario, by which these claims can be finally adjudicated to determine individual entitlements for voting prior to the Creditors Meetings. The remaining hurdles required in order to establish liability (if any) at an individual level are apparent on the face of each of the Notices of Revision and Disallowance.[29]

26. Specifically, with respect to Omarali:

(a) Numerous procedural steps remain to be completed before this claim could be ready for adjudication on the merits. For example, discoveries of the representative plaintiff and potentially other class members, as well as undertakings, remain outstanding. Expert reports have not even been exchanged.[30]

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[27] This objective is apparent from US Plaintiffs' Counsel's request for a representation order entitling them to vote on behalf of the US Customers, together with their request for each underlying individual claimant to be accorded one vote.

[28] US Plaintiffs' Counsel Factum, paras. 2 and 7.

[29] Twelfth Carter Affidavit, paras. 12-15; Eleventh Carter Affidavit, paras. 71(b)(i) and (ii); Exhibits K, L, P, S, and U-X, Applicants' MR, Tab 2, pp. 122- 123, 914-928, 1141-1151, 1387-1397, 1431-1544.

[30] Twelfth Carter Affidavit, para. 12.

(b) Just Energy disputes liability on the common issues – including that any or all of the putative class members were misclassified as independent contractors and should have been treated as employees.[31] There is also an open issue as to whether those individuals are excluded from the claimed protections under employment standards legislation as "salespersons" that are not "route salespersons".[32] These issues were intended to be the subject of a 20-day trial.

(c) Even if it could be determined that there is liability on the common issues, aggregate damages were not certified as a common issue.[33] Liability to individual claimants is not a mathematical exercise to divide a lump sum by the number of putative class members. Individual assessments, including evidence of the individual's history working for Just Energy – dates and hours worked, sales made, compensation received, etc. – are required in order to establish liability to and therefore the voting entitlement of individual class members.[34]

(d) In fact, despite the statements of Omarali,[35] there is good reason to believe that a finding of liability on the common issues would not translate into universal individual entitlements across the class:

(i) Certain purported class members signed up for the independent contractor program but did no work, or immediately resigned;

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31 Twelfth Carter Affidavit, para. 13(a).

32 Twelfth Carter Affidavit, para. 13(b) and (c).

33 Twelfth Carter Affidavit, paras. 14(c) and 15.

34 Twelfth Carter Affidavit, para. 15.

35 Omarali Factum, para 5: "If the Class Members' claims were accepted at the previously scheduled common issues trial or when their claim is successful through a dispute resolution process through this CCAA proceeding, each of the 7,723 Class Members would be creditors of Just Energy, each entitled to vote on a plan…".

(ii) Certain individuals may have earned commissions that exceeded any minimum wage entitlement that they could have received under the *Employment Standards Act* (Ontario) if they had been treated as employees;

(iii) Since the class period spans from 2012 to present and the claim was only initiated in 2015, a significant portion of the individual claims are statute-barred; and

(iv) The independent contractor program ceased in 2017. No liability can be owed to individuals who only worked for Just Energy after this time.[36]

27. With respect to the Putative US Class Actions:

(a) Multiple steps are required to adjudicate the Putative US Class Actions on their merits. As this Court stated in its decision of February 23, 2022: "This would, of necessity, require a motion for certification, possible summary judgment, outstanding discovery (to date there has been no discovery in the Jordet Action), preparation of expert reports, procedural motions, PTC and trial."[37]

(b) The Putative US Class Actions have not been certified and the Just Energy Entities dispute that they are capable of certification.[38] Until they are certified, there is no means to determine whether this Contingent Litigation Claim represents the alleged entitlements of three claimants (and therefore three votes under US Plaintiffs Counsel's approach), or hundreds of thousands of claimants (with a corresponding number of votes, under US Plaintiffs Counsel's theory).

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[36] Twelfth Carter Affidavit, para. 13(d); Eleventh Carter Affidavit, Exhibit L, Applicants' MR, Tab 2, p. 928.

[37] *Re Just Energy Group Inc.* (23 February 2022), Toronto, CV-21-00658423-00CL (Ont Sup Ct) (Endorsement regarding plaintiffs' counsel's motion for advice and directions).

[38] Eleventh Carter Affidavit, Exhibits P and S, Applicants' MR, Tab 2, pp. 1149 and 1394; Assertions by US Plaintiffs' Counsel, relying on US law, that these proceedings are "perfectly suited for certification" (US Plaintiffs' Counsel Factum, para. 18) are of no assistance here. This question must be decided by the Claims Officer based on a proper record and full legal submissions.

(c) Even if certification is granted, liability is very much in dispute. For example, the operative agreements contained express disclosures that customers were not guaranteed to receive financial savings.[39]

(d) Additionally, liability may depend, among other things, on comparing the price paid under the variable rate energy contracts to another benchmark price. The parties dispute what the appropriate comparator should be, including whether it should be local utility rates (which Just Energy strongly disputes) or some other benchmark, including the rates charged by other ESCOs.[40] This issue is complex. Moreover, a different comparator may be appropriate for different customers, depending on the contract entered into and the prior energy supplier used.

28. In summary, it cannot simply be assumed that each putative class member was party to the same contract, with the same contractual terms, that the same comparator would apply, and the same breach of contract established such that each putative class member should be treated as having a proven claim against Just Energy. All of these matters are the subject of dispute that must be resolved before any individual entitlement to vote their claim could be established.

29. With respect to the Texas Power Interruption Claims:

(a) The number of potential individual claimants remains uncertain. The Texas Power Interruption Claims were initially filed on behalf of 364 individuals, which is the number of votes that counsel to the Texas Power Interruption Claimants proposes

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[39] Eleventh Carter Affidavit, Exhibits P and S, Applicants' MR, Tab 2, pp. 1146-1147 and 1392-1393.

[40] Eleventh Carter Affidavit, Exhibits P and S, Applicants' MR, Tab 2, pp. 1147-1149 and 1393-1394. Though such pricing comparison would, of course, not be determinative of liability, given the myriad of other business and market conditions the Just Energy defendants were permitted to consider in exercising their discretion to set their rates.

to exercise for these claimants. However, counsel inexplicably fails to mention that 92 of these claims have been withdrawn. The Just Energy Entities believe that 141 of the 364 individuals were also not Just Energy customers at the relevant times. Therefore, although this is not a representative claim, the entitlements of the alleged claimants are so uncertain and the paucity of evidence submitted in relation to these claims is such that they cannot be accorded individual votes at this stage.

(b) If this Court grants the amendment to the Claims Procedure Order to provide for the determination of the Texas Power Interruption Claims in the US Bankruptcy Court, Just Energy intends to move to have all of the Texas Power Interruption Claims dismissed on the basis (among other things) that: (i) the Applicants are not responsible for generation or delivery of electricity under applicable Texas law; (ii) the Applicants' contractual provisions exclude liability with respect to these claims; (iii) none of the claimants provided sufficient documentation to support their claims; and (iv) many of the alleged claimants were not customers of the Applicants during the time period in which the alleged damages occurred.[41]

30. The Objecting Parties' approach, if accepted, would accord notional votes to putative claimants who may not have a claim against the Just Energy Entities at all. The result would be to allow individuals with no provable claim under the CCAA to effectively override the votes of creditors with proven claims, including those of the Term Lenders whose contributions have ensured that there is a Plan at all. The Plan would thereby be defeated – prior to any determination

[41] See Foreign Representative's Motion for Entry of (I) an Order (A) Applying Section 502 of the Bankruptcy Code to These Chapter 15 Cases, (B) Scheduling a Hearing and Related Deadlines for the Adjudication of Certain Claims, and (C) Granting Related Relief and (II) An Order (A) Disallowing Certain Claims Pursuant to Section 502 of the Bankruptcy Code and (B) Granting Related Relief.

by this Court regarding the merits of the Plan – to the detriment of all of the supporting creditors, as well as all other creditors with proven or accepted claims and stakeholders who are in favour of the Plan because it preserves the going-concern business of the Just Energy Entities.

31. The Objecting Parties have pointed to no authority requiring the Applicants to accept the claims of the individual claimants for voting purposes, or requiring the Applicants to give those individual claimants a separate vote, as opposed to the proposed representative vote, in the absence of any determination that they have a claim at all.

32. Finally, there is no sense in which the Applicants somehow misled the representatives that filing their claims on a representative basis pursuant to the Claims Procedure Order would entitle each of the underlying individual claimants to a vote.[42] The Claims Procedure Order said nothing about voting and provided for the filing of representative proofs as a matter of administrative expediency for all parties. The Claims Procedure Order contemplated that the claims would be subsequently evaluated, including for the purpose of determining appropriate treatment for voting purposes under the Plan. It is the highly contingent, unproven nature of the claims that is the basis for the treatment under the Plan, not the filing of the representative proofs of claim.

(iii) Alleged Absence of Dispute Resolution Process

33. In an attempt to avoid the implications of the fact that they cannot show that their clients have proven or provable claims for voting purposes, counsel to the Objecting Parties seek to attribute the inability to make this determination to some fault of the Applicants.

34. It is obvious that the Claims Procedure Order – which was not challenged or appealed – provides for the type of expedited dispute resolution process, including the referral of Disputed

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[42] See Omarali Factum, paras. 60-64.

Claims to a Claims Officer for resolution, that is contemplated under section 20 of the CCAA. Moreover, the Putative US Class Action Claims were referred on March 3, 2022 to Claims Officer O'Connor on consent for adjudication.[43] The Omarali claim will similarly be dealt with according to the Claims Procedure Order. And since the Texas Power Interruption Claims involve inherently US regulatory issues related to the distribution of power in Texas, the Applicants are seeking this Court's authorization to have these Claims determined by the US Bankruptcy Court.

35. The Objecting Parties' objection is therefore not that there is "no" court-approved dispute resolution process for valuing claims; it is that the process cannot be completed fast enough to allow their voting entitlement to be finally determined prior to the Creditors Meeting. However, this is not an absolute requirement. Section 20(1)(iii) of the CCAA, which is cited by the Objecting Parties in support of their position, does not require it.[44] Nor is there any requirement in the CCAA for final valuation to occur prior to classification.[45]

36. In fact, the *Algoma* decision, which is cited by US Plaintiffs Counsel for the proposition that there must be a "genuine attempt" to value the US Customers' claims, involved the valuation of a contingent creditor claim. The claim had been initially attributed a value of $1 because it had not been resolved prior to the plan having been voted upon and sanctioned, subject to the resolution of the appeal. In agreeing to allow the claimant to proceed against the debtor only for the purpose of accessing insurance proceeds, the Court of Appeal in *Algoma* interpreted section 12(2)(iii) of

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43 Twelfth Carter Affidavit, para. 7.

44 See for example, Texas Power Interruption Factum, paras. 23 and 25.

45 Texas Power Interruption Factum, para. 24 and the cases cited therein.

the CCAA (now section 20(1)(iii)), stating that the reference to a "summary application" in that section did not compel the court to determine the valuation summarily.[46]

37. Even if (for the sake of argument) the Contingent Litigation Claims had been referred to a Claims Officer for determination at an earlier date, it would have made no difference. The complexity involved and the multi-layered contingencies that would have to be determined in favour of the individual claimants (including individualized assessments) before they could assert a claim (and therefore a voting entitlement) are such that there is no scenario in which this could occur prior to the date of the Creditors Meetings.

38. In February 2022, this Court ruled that in light of the need to devote the resources of the Applicants to the complex negotiations involved in developing the Plan, it was not feasible for the Applicants to undertake the requested expedited adjudication of the Putative US Class Actions prior to the anticipated date of the Creditors Meetings.[47] The Applicants equally could not, at that time, have assumed the additional burdens and individual assessments associated with an expedited adjudication of the Texas Power Interruption Claims and the Omarali claim as well.

39. It is true that the Creditors Meeting Date is now several months later than was anticipated as a result of the unanticipated length of time required to negotiate the Plan. However, this does not change the basic fact that it would be impossible to determine the individual entitlements of hundreds of thousands of claimants in the space of several months.[48]

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[46] *Algoma Steel Corp. v. Royal Bank of Canada*, 1992 CanLII 7413 (ONCA) at para. 5, cited in US Plaintiffs' Counsel Factum at para. 56.

[47] *Re Just Energy Group Inc.* (23 February 2022), Toronto, CV-21-00658423-00CL (Ont Sup Ct) (Endorsement regarding plaintiffs' counsel's motion for advice and directions).

[48] Tenth Report of the Monitor, paras. 52-55.

40. The Objecting Parties' own conduct also belies their assertion that all of the issues required to establish individual voting entitlements could be addressed before the Creditors Meetings.

41. The conduct of US Plaintiffs Counsel before Claims Officer O'Connor is a case in point. Despite having been subject to adjudication for three months, the resolution of the merits of the Putative US Class Action Claim has not materially advanced. This is largely as a result of the determination by US Plaintiffs Counsel to dispute procedural matters and to relitigate both procedural and substantive issues already determined by this Court or the US Courts:[49]

(a) US Plaintiffs Counsel spent much of March 2022 seeking the appointment of two additional Claims Officers to adjudicate the Putative US Class Actions – a request that was dismissed by the Claims Officer on April 5, 2022. The Claims Officer held that the requested relief was premature, that the Claimants had failed to demonstrate that expert evidence regarding US law would not be more effective and efficient, and reiterated the concerns expressed in this Court's prior ruling dismissing a similar request by US Plaintiffs Counsel.[50]

(b) US Plaintiffs Counsel then made submissions about whether discovery should proceed before the resolution of the scope of the claims to be adjudicated in the CCAA process. This dispute was necessitated by the fact that the Putative US Class Action Claims were filed with a much broader scope (in terms of named defendants,

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[49] Each of the steps that has occurred to date is set out in the Twelfth Carter Affidavit, para. 8.

[50] Twelfth Carter Affidavit, para. 8, Exhibits B-F.

scope of the putative class, and timing of the relevant class period) than had been established in the US Courts following motions to dismiss.[51]

Again, the Applicants prevailed in their position that it would be more efficient to resolve the scope of the claims before proceeding with discovery.[52]

(c) The scope issues were subsequently determined in the context of US Plaintiffs Counsel's motion to compel the Just Energy Entities to produce certain documents. As part of this motion, US Plaintiffs Counsel sought to re-litigate matters that had already been determined by the US Courts, including the determination that discovery in the Donin action had been terminated and that the Plaintiffs' remaining contractual claims were limited to the named defendants (and therefore the limited jurisdictions in which they contract for the relevant products).

Ultimately, the Claims Officer ruled against US Plaintiffs Counsel in substantially all respects. He held that he had broad discretion with respect to procedure, with the objective being to "conduct a timely summary process that is fair and expeditious" including "by avoiding re-litigating issues that could cause delay, expense and potentially inconsistent results."[53]

42. In relation to the Texas Power Interruption Claims, counsel simultaneously argues in favour of an expedited valuation and takes positions that are fundamentally inconsistent with this

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[51] US Plaintiffs' Counsel repeatedly insist that Just Energy's motions to dismiss were "unsuccessful" (see, for example, US Plaintiffs' Counsel Factum at paras. 10 and 14), but have continually ignored the fact that Just Energy was successful in limiting the scope of the claims that could be asserted. US Plaintiffs' Counsel sought unsuccessfully to have the Claims Officer revisit those determinations to expand the scope of the claims.

[52] Twelfth Carter Affidavit, para. 8, Exhibits G-J.

[53] Twelfth Carter Affidavit, para. 8, Exhibits K-R.

argument. For example, despite the fact that the Chapter 15 Disallowance Motion could determine relatively quickly that none of the Texas Power Interruption Claimants has a provable claim at all, counsel to the Texas Power Interruption Claimants states that "In the ordinary course, one would expect that the requested hearing date for the Chapter 15 Disallowance Motion will be pushed back very significantly to permit discovery and pre-trial motion practice."[54] At the same time, counsel seeks to have these claims valued on a preliminary basis in advance of the Creditors' Meeting.

43. Moreover, despite the fact that the Texas Power Interruption Claimants were required under the Claims Procedure Order to provide all supporting material in relation to their Claims, there are still many claims with no supporting documentation at all. Where documentation has been provided, it remains underdeveloped and, in many cases, materially deficient and incapable of providing a basis for expeditious adjudication of any individual claimant's claim. The assertion that the Applicants are somehow delinquent, in these circumstances, for not seeking to value the Texas Power Interruption Claims at an earlier stage is completely unfounded.[55]

44. In fact, it continues to be unclear how many individual claimants should even be part of this group for the purposes of such adjudication – with counsel to these claimants continuing to assert that they are to be accorded 364 votes,[56] despite 92 of the claims having been withdrawn, and 141 of the 364 not having been customers of Just Energy at any relevant time.

45. And, finally, in relation to the Omarali claim, counsel repeatedly represents this claim as "ready for trial" in November 2021, such that it would have gone ahead except for the CCAA stay

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54 Texas Power Interruption Factum, para. 3.

55 Texas Power Interruption Factum, paras. 3, 30.

56 Texas Power Interruption Factum, paras. 14(a), 15, 27; Eleventh Carter Affidavit, para. 71(b)(ii), Applicants' MR, Tab 2, p. 123.

of proceedings.[57] However, several crucial steps had not yet been completed, including the completion of discoveries and exchange of expert reports.[58] In light of these outstanding matters, the assertion that liability at the level of individual entitlement in relation to the Omarali claim could realistically be established within any reasonable timeframe is simply not credible.

46. The Applicants' proposed approach in the Plan – i.e. that each representative is entitled to exercise only one vote – is the only one that is fair and reasonable and that reflects the doubtful entitlements of each individual claimant. Any other approach that provides individual voting entitlements to persons who potentially have no claim at all would be contrary to law and established principle and would be fundamentally unfair to the other stakeholders.

(c) *Estimation Process for Voting Purposes is Unworkable and Unnecessary*

47. As a further alternative path to their veto position, the US Plaintiffs Counsel and counsel to the Texas Power Interruption Claimants argue for some form of estimation or provisional valuation process prior to the Creditors Meetings, presumably with a view to obtaining a valuation for voting purposes that is high enough to affect the outcome of the Plan, even if they cannot do so through a plurality of votes. This estimation process is presented as a form of shortcut to a voting valuation – i.e. as an alternative to the full adjudication of the value (if any) of the Contingent Litigation Claims, which cannot realistically occur ahead of the Creditors Meetings.

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57 Omarali Factum, para. 72.

58 Twelfth Carter Affidavit, para. 12.

48. The Applicants submit that there is no Canadian precedent for such an estimation exercise. The Objecting Parties point to none.[59] The Objecting Parties refer only to one US case – *Adelphia*[60] -- which is based on express provisions under Chapter 11 of the US Bankruptcy Code and is patently inapplicable in this proceeding.[61] While the Applicants are free, pursuant to the terms of the CCAA,[62] to accept the value of a disputed claim for voting purposes where appropriate, this provision is not mandatory. It does not authorize the CCAA Court to order the debtor to take this step,[63] let alone require "estimation".

49. Even if such an "estimation" process were an option, any such estimate must be fair to all stakeholders. Given the potential jeopardy to the Plan if the requested "estimate" is materially overstated, such estimate must generate a reasonable facsimile of the ultimate value of the claim.

50. However, these complex, highly contingent claims do not lend themselves to "estimation." Every estimation must be based on appropriate inputs and assumptions. Unless the material contingencies that constitute key inputs into such an estimation process are resolved, any estimate will, at best, generate a value that is meaningless and arbitrary, especially where the debtor, in consultation with the Monitor, has valued the claims at zero.

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59 Neither *Air Canada, Re,* 2004 CanLII 6674 (ON SC), nor *AbitibiBowater inc. (Arrangement relatif à),* 2010 QCCS 1261,, which are cited to support this request actually involve estimation. They refer instead to the need to value contingent claims within a CCAA process – which is exactly what will occur here – and they say nothing about the need to do so ahead of a creditor vote. See US Plaintiffs' Counsel Factum, para. 61.

60 *In re Adelphia Comm. Corp*., 359 BR 54 (2006), cited in US Plaintiffs' Counsel Factum at para. 66.

61 See also the Texas Power Interruption Factum at para. 32, which also invokes Chapter 11 of the US Bankruptcy Code in support of this approach.

62 CCAA, s. 20(2).

63 The Texas Power Interruption Claimants seek to compel the Applicants to attribute a provisional value to their claims for voting purposes (see Texas Power Interruption Factum, para. 6(a)). See also Omarali Factum at para. 75. The Applicants have, in fact, done so – the provisional value for voting purposes is $1, given the highly contingent nature of these claims and the inability to value them in advance of the Creditors Meeting.

51. The parties are in fundamental disagreement about key issues that would be critical inputs into any estimate of the value of the claim. Take the Putative US Class Action Claim, which is uncertified. Certification determines whether the value of the claim could be zero (because it is a claim of only three individuals and Just Energy is not liable to those individuals), or materially higher (because it is a claim involving a class of individuals, the size of which is not yet determined). Certification has to be properly determined – it cannot be "estimated".

52. Even if it could be determined that the Putative US Class Action Claim should be certified, the parties' outstanding disputes regarding the elements that must be proven in order to establish the voting entitlement of any or all individual claimants (referenced above in dealing with voting entitlement) also make an estimation process completely unworkable.

53. Similar issues arise in relation to the Omarali claim and the Texas Power Interruption Claims. In Omarali, aggregate liability for damages is not a certified common issue. Any estimate requires individual assessments, which are themselves subject to multiple contingencies. It is no answer for Omarali's counsel to suggest that the Court could simply take the mathematical entitlements of all Class members to CPP and EI as a proxy for value, as if a determination that misclassification occurred would automatically translate into liability to all class members.[64]

54. Finally, such estimation process would require a dual-track process that could impair the existing adjudication of the Putative US Class Actions underway before the Claims Officer.

(d) ***The Contingent Litigation Claimants Bring Nothing to the Table***

55. The Objecting Parties raise numerous objections to the Plan, but do not suggest any alternative. They simply want the Creditors Meetings and the entire CCAA Proceedings to be

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64 Omarali Factum, para. 74.

delayed indefinitely while their Claims are resolved. Thus, for example, US Plaintiffs Counsel requests that the "Applicants' Plan must be halted at this stage."[65]

56. However, the Objecting Parties have not put forward any money to support the continuation of this proceeding, or any alternative restructuring options that would generate better recoveries. In such circumstances, it does not lie in their mouths to complain that the Plan Sponsor's/DIP Lender's time constraints are artificial or arbitrary, that the Applicants' business is "stable" and that these proceedings should be allowed to continue until their Claims are resolved.

57. The DIP Lenders have already extended the milestones under the DIP Facility on multiple occasions, including most recently to accommodate the longer timeline for this hearing. Such extensions were approved on the basis that none of the other milestone dates under the DIP Term Sheet were to be extended, as it was critical that the timeline leading to emergence from these CCAA and Chapter 15 proceedings be preserved, given market conditions and risk.[66]

58. The DIP Lenders, and the other creditors holding funded debt, are owed over a billion dollars. There is no basis on which highly contingent litigation claimants could require such parties to continue funding this proceeding and/or to indefinitely defer their entitlements to recovery.

59. Nor would it be advisable to continue these proceedings any longer than absolutely necessary, given the volatility of the energy retail business and the dependence of the Plan, for its feasibility, on certain material assumptions predicated on the current economic climate.[67] The

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65 US Plaintiffs' Counsel Factum, para. 5. See also Omarali Factum, para. 81, in which it is stated that the "proposed Meetings Orders cannot be granted until the issues described above are determined" and para. 82, in which the requested relief is limited simply to rejecting the filing of the Plan and the proposed Creditors Meetings Order.

66 Twelfth Carter Affidavit, para. 5.

67 Twelfth Carter Affidavit, para. 6; see also Eleventh Carter Affidavit at para 62, Applicants' MR, Tab 2, p. 116.

evidence has been repeatedly presented to this Court that the Just Energy Entities urgently need to emerge from these CCAA proceedings, given the nature of the business, the length of the proceedings, and the volatility of the energy market.[68] No Objecting Party has challenged this evidence on cross-examination.

(e) ***Request for Representation Order***

60. US Plaintiffs Counsel's request for a representation order should not be granted. It is not necessary. The Applicants – as well as the Claims Procedure Order and the Plan – already recognize the ability of US Plaintiffs Counsel to represent the interests of the Putative US Class Action Claimants in this proceeding and to vote on the Plan.

61. Moreover, such an order cannot constitute a substitute for a determination whether the Putative US Class Action can be certified. This matter must be fully adjudicated, in accordance with applicable legal principles, before Claims Officer O'Connor.

PART III - NATURE OF THE ORDER SOUGHT

62. The Applicants submit that this Court should deny the relief requested by US Plaintiffs Counsel and the objections raised by the Objecting Parties and issue Orders substantially in the form attached at Tab 4 and Tab 5 of the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2022.

per Marc Wasserman / Michael De Lellis / Jeremy Dacks

[68] Seventh Carter Affidavit, at para 14, Applicants' Motion Record dated February 2, 2022, Tab 2, at p. 13.

SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *9354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10.
2. *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1261.
3. *Air Canada, Re,* 2004 CanLII 6674 (ON SC).
4. *Algoma Steel Corp. v. Royal Bank of Canada*, 1992 CanLII 7413 (ONCA).
5. *Arrangement relatif a Bloom Lake,* 2018 QCCS 1657.
6. *Canadian Airlines Corp. (Re),* 2000 CanLII 28185 (AB QB).
7. *Cline Mining Corporation (Re),* 2014 ONSC 6998.
8. *Cline Mining Corporation (Re),* 2015 ONSC 622.
9. *New Home Warranty of British Columbia Inc. (Bankruptcy of),* 1999 CanLII 6751 (BCSC).
10. *Re Woodward's Ltd.*, 1993 CanLII 870 (BCSC).
11. *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386.

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

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

Definitions

2 (1) In this Act,

[…]

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (réclamation)

[…]

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> **(a)** on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> **(b)** in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

[…]

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

> **(a)** the amount of an unsecured claim is the amount
>
> > **(i)** in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

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

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

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT Toronto

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