

CITATION: Re Just Energy Corp., 2021 ONSC 1793
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20210309

SUPERIOR COURT OF JUSTICE – ONTARIO

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

BEFORE: Koehnen J.

COUNSEL:

Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt and Justine Erickson, for the Applicants

Robert Thornton, Rebecca Kennedy and Rachel Bengino, Puya Fesharaki, for the Proposed Monitor

Scott Bomhof, for the Term Loan Lenders

Heather Meredith and James D. Gage, for the Credit Facility Lenders

Ryan Jacobs, Jane Dietrich and Michael Wunder, for the DIP Lender

Howard Gorman, for Shell

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John Higgins

HEARD: March 9, 2021

ENDORSEMENT

Overview

[1] The applicant, Just Energy Group Inc. (“Just Energy”) seeks protection under *the Companies’ Creditors Arrangement Act*, (the “CCAA”)¹ by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

¹ R.C.C. 1985, c. c-36, as amended

- [2] Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.
- [3] Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.
- [4] Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the *CCAA* application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.
- [5] Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.
- [6] The issue before me today is whether to grant *CCAA* protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the “DIP”) of \$125 million for the initial 10 day period.
- [7] For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the *CCAA* is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.
- [8] A number of critical parties were given notice of today’s hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to “reserve their rights” to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are “reserving their rights” are of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial order when the recipients of those rights will be relying on them to their detriment over the next 10 days and when the parties “reserving their rights” have not opposed the relief I am granting.

I. Background to the Liquidity Crisis

- [9] Just Energy Group Inc. (“Just Energy”) is incorporated under the *Canada Business Corporations Act*. Its shares are publicly traded on the Toronto Stock Exchange and the New York Stock Exchange. Its registered office is in Toronto, Ontario. Just Energy is primarily a holding company that directly or indirectly owns the other companies in the Just Energy Group, including operating subsidiaries.
- [10] At the risk of oversimplifying, it sells energy to customers under long-term fixed-price contracts and then purchases energy in the market to fulfil those contracts. It has over 950,000 customers, for the most part in Canada and the United States, approximately 979 full-time employees and debts estimated at \$1.25 billion.
- [11] In recent years Just Energy has suffered challenges that it has sought to remedy by way of a recapitalization through a plan of arrangement under section 192 of the *CBCA* which was approved by this court on September 2, 2020.
- [12] Just Energy’s largest market in the United States is in the state of Texas.
- [13] Just Energy faces a sudden and unexpected liquidity crisis as a result of an extreme winter storm that hit Texas on February 12, 2021. The storm caused a surge in demand for electrical power. In response, natural gas prices jumped from US \$3.00 to over US \$150/mmBTU on February 12.
- [14] The demand for power was exacerbated by the fact that much of the Texas electrical grid began to shut down because it was not equipped to deal with cold weather. As a result, critical components necessary for the generation and transmission of electricity froze thereby increasing demand even further on the limited resources that remained available. By the early morning hours of February 15, 2021, the stress on the electrical grid was so great that it came within minutes of a catastrophic failure.
- [15] In response, the Electric Reliability Council of Texas (“ERCOT”) which is responsible for managing the Texas electrical grid ordered transmission operators to implement deep cuts in the form of rotating outages to avoid a complete collapse of the grid.
- [16] In an apparent effort to stimulate more power production, ERCOT’s regulator, the Texas Public Utility Commission (“PUCT”) increased the real-time settlement price of power from approximately US \$1,200 per megawatt hour to US \$9,000 per megawatt hour. It appears that this price was set by a computer program that was supposed to adjust prices to help match supply and demand. The increase in price to \$9,000 per megawatt hour did not, however, increase supply because supply was blocked by frozen equipment. The price remained at \$9,000 MWh for four days. The real time settlement price did not reach \$9,000 even for a single 15 minute interval in all of 2020.
- [17] In addition, Just Energy pays ERCOT a fee referred to as the Reliability Deployment Ancillary Service Imbalance Revenue Neutrality. It ranges between U.S. \$0 to U.S. \$23,500 per day. Between June 2015 and February 16, 2021, Just Energy paid

approximately \$504,000 in respect of this charge. For February 17, 18 and 19, 2021, the aggregate charge was over U.S. \$53 million.

- [18] ERCOT and PUCT have issued additional invoices of US \$55 billion to wholesale energy purchasers as a result of the storm. Just Energy's share of that is approximately \$250 million.
- [19] These additional fees pose a severe liquidity challenge for Just Energy because it is required to pay them within two days of being imposed. Although Just Energy has a means to dispute ERCOT's invoices, it must pay them before it can initiate the dispute resolution process. ERCOT has already barred two electricity sellers from the Texas power market for failing to make timely payments arising out of the storm.
- [20] There is considerable controversy surrounding these fees. PUCT and ERCOT have been subject to severe criticism for their actions. The chair of PUCT and several of ERCOT's board members have resigned. The board of ERCOT terminated the employment of its CEO.
- [21] Others in the Texas electrical market have also suffered. The largest power generation and transmission cooperative in Texas, Brazos Electric Power Cooperative, filed for Chapter 11 bankruptcy protection on March 1, 2021.
- [22] Although Just Energy hedges for weather risks, its hedging and pricing models did not, however, take into account the extraordinary power demands caused by the storm and the unprecedented fees that ERCOT and PUCT imposed during and after the storm. By way of example, Just Energy's weather hedges contemplate a 50% increase in power usage above average consumption for the month of February. During the storm, usage was 200% above the previous week.
- [23] As a result of the additional payments it has had to make to date because of the storm, Just Energy's liquidity facilities are down to approximately \$2.9 million. By the end of day on March 9, 2021 it will have to pay ERCOT an additional US \$96.24 million.
- [24] On March 22, 2021 Just Energy expects to have to pay \$250,000,000 to counterparties for purchases at inflated prices during the storm and its aftermath. Sudden and unexpected obligations of that magnitude have a cascading effect on Just Energy's financial stability.
- [25] In response to the dramatically increased charges by ERCOT, companies that have issued surety bonds in Just Energy's favour have demanded \$30 million in additional collateral of which \$10 million remains outstanding. Just Energy was obligated to provide additional collateral because the bonding companies had threatened to cancel their surety bonds if Just Energy did not do so. The cancellation of the bonds may have resulted in the revocation of licenses necessary for the Just Energy group to carry on business in certain jurisdictions.
- [26] On March 8, 2021, the Just Energy group received another invoice from ERCOT for US \$30.92 million, of which U.S. \$23.89 million will be due by March 10, 2021.

- [27] While Just Energy had sufficient liquidity to pay the obligations that it expected, it does not have enough liquidity to pay the additional fees charged by ERCOT, PUCT and creditors who have demanded more stringent terms in response to the ERCOT and PUCT fees. If Just Energy does not pay the fees to ERCOT, the latter can simply transfer all of the Just Energy Group's customers in Texas to another service provider. That would be devastating to Just Energy's business.
- [28] In addition to the foregoing financial stresses, at least three provincial regulators have expressed concern about Just Energy's viability. Two regulators made inquiries as a result of media reports arising from Just Energy's disclosure about its storm related financial challenges. The third inquiry was prompted by a formal petition by another market participant who seeks to prevent the Just Energy operating entity in Manitoba from selling to new customers.

II. General Principles

- [29] At a high level, this is precisely the sort of situation that the *CCAA* is designed for.
- [30] The policy underlying the *CCAA* is that the best commercial outcomes are achieved when stays of proceedings provide debtors with breathing space during which solvency is restored or a reorganization of liabilities is explored. The *CCAA* offers a flexible mechanism to make it more responsive to the commercial needs of complex reorganizations. The overriding object is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating the business.²
- [31] This will be a complex restructuring. It involves balancing the interests of various types of debt including secured debt, unsecured term loans, working capital provided by service providers, trade debt to commodities providers, ongoing obligations to customers, just shy of 1000 employees all overlaid with varying regulatory requirements of several different Canadian provinces and American states.
- [32] Today's application invites me to make a number of rulings on a variety of discretionary issues. The Supreme Court of Canada provided guidance about whether and how to exercise that discretionary authority in *Century Services Inc. v. Canada (Attorney General)*.³ It described the guiding principles as follows:

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness

² *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 14-15.

³ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379

under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

- [33] Three principles emerge from this passage: good faith, diligence and appropriateness. There is no suggestion that Just Energy is not proceeding in good faith or with diligence. I will return to the issue of appropriateness in my review of the individual forms of relief.
- [34] Today I am being asked for a 10 day stay of proceedings, including a stay of proceedings by regulatory authorities. Such relief is appropriate in the circumstances of this case.
- [35] To have Just Energy fail would cause severe hardship to 979 employees and their families and cause losses of up to \$1.25 billion for creditors all because
- (i) Just Energy is being forced to pay unprecedented fees that ERCOT and PUCT imposed,
 - (ii) which fees Just Energy is challenging,
 - (iii) which fees are highly controversial,
 - (iv) and which fees were imposed in circumstances where ERCOT's and PUCT's overall management of the crisis has led to the departure of their CEOs and the resignation of several of their board members.
- [36] In granting the relief I ask myself, as the Supreme Court of Canada did in *Century Services* whether granting a stay will usefully further efforts to achieve the remedial purpose of the *CCAA*. If I apply that principle to the circumstances before me today, the question becomes whether a 10 day stay will avoid the social and economic losses resulting from the liquidation of Just Energy and give participants a chance to achieve common ground while treating all stakeholders as advantageously and fairly as the circumstances permit.

- [37] I am satisfied that it does. This is precisely the sort of situation that demands breathing space for all actors involved, including regulators, to begin to sort things out in a calmer, more rational, orderly fashion than has been possible to date.
- [38] I underscore that in making these comments I am not intending to criticize the Texas regulators. Whether there is anything to be criticized in their conduct or whether their imposition of dramatically higher fees is appropriate will be for another day and another forum. I frame the issue in this way only to demonstrate that there is a genuine issue about the circumstances giving rise to Just Energy's liquidity crisis and a genuine issue about how best to sort out that crisis. Working out those issues in a manner that is as advantageous and fair to all stakeholders as the circumstances permit requires the calm deliberation and reflection that a *CCAA* stay will afford.

III. Specific Issues

- [39] This application requires me to address the following specific issues:
- A. Is Ontario the Centre of Main Interest?
 - B. Does Just Energy meet the insolvency requirements of the *CCAA*?
 - C. Should the DIP be approved?
 - D. Should the regulatory actions be stayed?
 - E. Should suppliers' charges and pre-filing payments be authorized?
 - F. Should set off rights be stayed?
 - G. Should administrative and directors and officers charges be granted?
 - H. Should noncorporate entities be captured by the stay?
 - I. Should third-quarter bonuses be paid?
 - J. Should a sealing order be granted?

A. Is Ontario the Centre of Main Interest?

- [40] Just Energy has operations primarily in Canada and the United States. It has advised that it intends to commence a recognition proceeding under chapter 15 of the *US Bankruptcy Code* in Texas. This will ensure that actions taken in relation to US entities and US property or by US regulators are overseen by the US courts.

- [41] The presence of significant business activities in the United States and the intention to commence a chapter 15 proceeding, engages the principle of the Centre of Main Interest or COMI.
- [42] Section 45 (2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its centre of main interest.
- [43] The registered office of Just Energy is located in Toronto.
- [44] Other evidentiary factors can displace the presumption of the registered office being the COMI. These include the location of the debtor's headquarters or head office functions, location of the debtor's management and the location that significant creditors recognize as being the centre of the company's operations.⁴
- [45] Here, the parent company, Just Energy Group Inc. is a CBCA corporation. Although it has offices in Mississauga and Houston, its registered office is in Toronto. Its common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange. Just Energy is primarily a holding company although it is also the primary debtor or guarantor on substantially all of the obligations of its subsidiaries, including licenses granted by regulators to members of the Just Energy group. Just Energy has a number of subsidiaries throughout Canada, the United States and India. It has 333 Employees in Canada, 381 in the United States and 265 in India.
- [46] The following additional factors point to Canada as the COMI:
- a. During the recent *CCAA* plan of arrangement which was recognized under Chapter 15 of the US Bankruptcy Code, Canada was recognized as the COMI for the Just Energy group.
 - b. The operations of the Just Energy group are directed in part from its head office in Toronto. In particular, decisions relating to the Just Energy's primary business (buying, selling and hedging energy) are primarily made in Canada.
 - c. All other members of the Just Energy group report to Just Energy.
 - d. Just Energy Corp. (a Canadian subsidiary) acts as a centralized entity providing operational and administrative functions for the Just Energy group as a whole. These functions are performed by Canadian Just Energy employees and include, among other things:
 - i. most enterprise-wide IT services;
 - ii. enterprise-wide support for finance functions, including working capital management, credit management (including credit checks for customers),

⁴ *Re Massachusetts Elephant & Castle Group* 2011 ONSC 4201

payment processing, financial reconciliations, managing business expenses, insurance, and taxation;

- iii. oversight for the legal, regulatory, and compliance functions across the entire Just Energy Group;
- iv. certain enterprise-wide HR functions, such as designing in-house learning and development programs;
- v. financial planning and analysis services, including customer enrollment, billing, customer service, and load forecasting;
- vi. supply planning services, including creating demand models which predict the amount of energy that each entity needs to purchase from suppliers and determining the proper distributor and pipeline necessary to get the gas to the end-consumer; and
- vii. internal audit services.

[47] In the foregoing circumstances I am satisfied Canada is the appropriate COMI.

B. Does Just Energy Meet the Insolvency Requirements?

[48] There is no doubt that Just Energy meets the threshold required by s. 3(1) of the *CCAA* that it be a company with liabilities in excess of \$5,000,000.

[49] A company must be “insolvent” to obtain protection under the *CCAA*.⁵ Although the *CCAA* does not define “insolvent,” the definition of insolvent under the *Bankruptcy and Insolvency Act* (“*BIA*”)⁶ is usually referred to meet this criteria.⁷ Section 2 of the *BIA* defines “insolvent person” as meaning (i) one who is unable to meet his obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

⁵ *CCAA* s. 2(1)(a) definition of a debtor company.

⁶ R. S. C. 1985, c. B-3

⁷ *Laurentian University of Sudbury* 2021 ONSC 659

- [50] In addition, Ontario courts have also held that a financially troubled Corporation that is “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring” should also be considered to be insolvent for purposes of seeking *CCAA* protection.⁸
- [51] I am satisfied from the affidavit of Michael Carter sworn March 9, 2021 that the liabilities of Just Energy exceed the value of its assets, that it will imminently cease to be able to meet its obligations as they become due, and will run out of liquidity in very short order.

C. Should a Priming DIP be Approved?

- [52] Section 11.2(1) of the *CCAA* authorizes the court to approve debtor-in-possession financing (the “DIP”) that primes existing debt.

- [53] However, section 11.2 (5) provides that, on an initial application:

(5) no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

- [54] In other words, I have no jurisdiction to authorize a priming DIP except for that amount of debt and on those terms as are required to see the debtor through the next 10 days.
- [55] The object is to put those measures in place that are necessary to avoid an immediate liquidation and thereby improve the ability of all players to participate in a more orderly resolution of the company’s affairs.⁹ The objective is to preserve the status quo the company for those 10 days but to go no further.¹⁰
- [56] As Morawetz J. (as he then was) pointed out in para. 27 of *Lydian International Limited*,¹¹ a 10 day stay allows a number of other steps to occur including notification of parties who could not be consulted before the initial application as well as further consultations with key stakeholders.
- [57] This is a material limitation on the court’s jurisdiction on an initial application. It is a recent amendment introduced by Parliament which restricts the powers the court had

⁸ *Laurentian University* 2021 ONSC 659 at para. 32; *Stelco Inc., Re*, 2004 CanLII 24933 at para. 26.

⁹ *Re Lydian International Limited*, 2019 ONSC 7473 at para. 25.

¹⁰ *Lydian* at para. 26

¹¹ 2019 ONSC 7473.

previously. Before the amendment, initial applications were granted for a period of 30 days. That length of time often required more substantial DIPS which had the potential to prejudice other creditors without giving those creditors a meaningful opportunity to make submissions to the court. The 10 day rule is designed to correct that issue. I take that as a direct message from Parliament that is meant to be enforced seriously.

[58] Even before the amendment limiting initial orders to 10 days, the policy of courts was to limit DIP financing in initial orders to what was required to meet the company’s “urgent needs over the sorting out period.”¹² As Farley J. Noted in *Re Royal Oak Mines Inc.*

...the object should be to “keep the lights [of the company] on” and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.¹³

[59] Several *CCAA* courts have approved interim financing as part of the initial order since the 10 day rule came into effect.¹⁴

[60] The distinguishing factor in this case is that even the 10 day DIP that Just Energy requests is large. It seeks a DIP of \$125,000,000 almost all of which will be drawn in the initial 10 day period. Interest accrues at 13% annually. There is a 1% commitment fee and 1% origination fee.

[61] Section 11.2(4) of the *CCAA* lists some of the factors the Court should consider when deciding whether to approve DIP financing. These include:

- (a) The period during which the Applicants are expected to be subject to the *CCAA* proceeding;
- (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;

¹² *Re Royal Oak Mines Inc.* (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.

¹³ *Re Royal Oak Mines Inc.* (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.

¹⁴ *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at para. 21; *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234, at para. 90; *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586, at para. 2.

- (e) The nature and value of the company's property;
- (f) Whether any creditor would be materially prejudiced as a result of the DIP charge; and
- (g) The Monitor's pre-filing report (if any).

- [62] In *Re AbitibiBowater Inc.*,¹⁵ Gascon J.S.C., as he then was, described the analysis as having the court satisfy itself that the benefits of DIP financing to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.
- [63] Although the amount of the DIP for the initial 10 day stay is high, it is nevertheless necessary to "keep the lights on." Just Energy is required to pay ERCOT US \$96.24 million by the end of today (March 9, 2021) or risk losing its licences. It will have to pay a further \$54 million by March 14, 2021. Texas represents approximately 47% of Just Energy's margin. Without its Texas licenses, Just Energy would likely collapse.
- [64] Just Energy's secured creditors do not oppose the DIP. Although they wish to "reserve their rights" on the comeback hearing, I take that to mean that they may wish to make arguments about the existence or the terms of the DIP from the comeback hearing onward. As noted earlier, they would be hard-pressed to challenge any priority given to the DIP for advances during the 10 day period the absence of any opposition today.
- [65] The DIP lender is a consortium of Just Energy's largest unsecured lenders. For unsecured lenders to offer a DIP of that size to cover a 10 day stay suggests that they believe their prospects for recovery on their unsecured loan are better with a significant 10 day DIP than without.
- [66] The loan clearly enhances the prospects of a viable compromise or arrangement. Without the loan, Just Energy cannot continue. Regulators will quickly take steps to suspended licenses. Even with the stay of regulatory proceedings, it would be difficult to allow Just Energy to continue to operate if it has no working capital and no means of purchasing power to sell to customers.
- [67] Just Energy's business is capital-intensive. It requires the expenditure of large amounts of money to buy power and the subsequent receipt of large amounts from the sale of power. That requires substantial liquidity.
- [68] In addition, the regulated nature of Just Energy's business can lead to unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern. The added charges by PUCT and ERCOT are prime examples of that. Those charges must be paid within as short a period as 2 business days. While those charges may ultimately be reversed through the dispute resolution process and while additional

¹⁵ *Re AbitibiBowater Inc.*, 2009 QCCS 6453 at para 16.

collateral that has been required may ultimately be released, those steps will take time to work out. Even if the charges are not reversed, it may well be possible to absorb those price shocks if given the time. Financing Just Energy at least through an interim period allows for greater insight into those possibilities.

- [69] I am also mindful of the need to keep essential suppliers and regulators comfortable. Even though I am staying provincial regulatory proceedings, I do that knowing that I am treading on public policy territory that Parliament and provincial legislatures have chosen to ascribe to specialized bodies with specialized knowledge. A larger 10 day DIP decreases the risk that I am harming the public policy objectives they have been mandated to pursue than would a smaller DIP.
- [70] The Monitor points out that, after netting out cash receipts and expenditures, approximately \$33,000,000 of the DIP will remain at the end of day 10. One could see that as grounds to pare back the DIP by an equivalent amount I do not think it would be appropriate to do. As noted, the Just Energy business is unpredictable. It requires large amount of liquidity and liquidity buffers to take into account unexpected charges from regulators. The regulators who impose those charges do so to protect other interests. As a result, they cannot simply be dismissed. It strikes me that providing a business of this sort with a buffer is appropriate. The Monitor recommends allowing the buffer to continue. None of the other stakeholders object.
- [71] In the foregoing circumstances, I am satisfied that the DIP should be approved as requested.

D. Should Regulatory Actions be Stayed?

- [72] Just Energy is subject to a wide variety of provincial and state regulators in Canada and the United States. By way of example, in Canada five different provincial regulators have issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity. Power cannot be sold to new customers or delivered to existing customers without these licenses.
- [73] Concerns about a licensee's solvency can lead provincial regulators to suspend or cancel licenses or impose more onerous terms on license holders. Such steps can include prohibitions on sales to new customers, termination of the ability to sell to existing customers and the forced transfer of customers to other suppliers. This would cause a licensee to instantly lose revenue streams and threaten their long-term viability. Regulators have the power to impose such terms in extremely short order.
- [74] The filing of this *CCAA* application could lead to such adverse steps by regulators.
- [75] As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

[76] With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

[77] In my view it is appropriate to stay the conduct of provincial regulators in Canada.

[78] Section 11.1 of the *CCAA* provides:

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[79] More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a

regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

- [80] In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.
- [81] As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.
- [82] It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.
- [83] One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.
- [84] Section 11.1 (3) of the *CCAA* allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.
- [85] Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.
- [86] Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.
- [87] In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just

Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

- [88] I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.
- [89] A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the *CCAA*. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction.¹⁶
- [90] This result is consistent with the language of the model *CCAA* order which stays, among other things, all rights and remedies of any "governmental body or agency"
- [91] Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

E. Should Supplier Charges and Prefiling Payments be Authorized?

- [92] Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within two days. In certain cases, Just Energy uses an ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended

¹⁶ *Nortel Networks Corp., Re*, 2010 ONSC 1304 at para. 41 and 42.

time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

- [93] Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*.¹⁷ Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.
- [94] Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.
- [95] No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.
- [96] I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.
- [97] This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate.¹⁸
- [98] The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.
- [99] Certain pre-filing obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make pre-filing payments with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

¹⁷ *CCAA* s. 34 (1), (7), (8) and (9).

¹⁸ *Re CanWest Publishing Inc.*, 2010 ONSC 222 at para. 50.

F. Should Set off Rights to Be Stayed?

- [100] As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any “sweep” remedies under their arrangements with Just Energy.
- [101] The concern is that the financial institutions would empty Just Energy’s accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.
- [102] Although s. 21 of the *CCAA* preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the *CCAA*, which provide that certain rights are immune from the stay.¹⁹ As Savage J.A. of the British Columbia Court of Appeal observed, the broad discretion accorded to the *CCAA* Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off.²⁰
- [103] Allowing banks to exercise a self-help remedy of sweeping the accounts by claiming set-off would in effect give them a preferred position over other creditors and deprive Just Energy of working capital. That would be contrary to the remedial purpose of the *CCAA* because it would ultimately shut down Just Energy and allow the banks to advantage themselves to the detriment of others in the process.
- [104] Just Energy had consulted widely with various stakeholder groups had before today’s hearing. Those included the banks with sweep rights, at least some of whom were represented at today’s hearing and did not object.
- [105] In the foregoing circumstances it is appropriate to at least temporarily stay the exercise of any rights of set-off by the banks.

G. Should Administrative and D & O Charges be Granted?

- [106] The Applicants propose that an Administration Charge for the first ten days be set at \$2.2 million.
- [107] The largest expenditures in the administration charge involve the retainer of counsel in Canada and the United States for Just Energy and the retainer of the Monitor and its counsel.

¹⁹ *North American Tungsten Corp. (Re)*, 2015 BCSC 1382 at para. 28; leave to appeal to BCCA refused, 2015 BCCA 390 [*Tungsten (Leave)*], leave to appeal decision affirmed by Review Panel of the BCCA.

²⁰ *Tungsten (Leave)*, above at para. 12-16; see also *Air Canada (Re)*, 2003 CarswellOnt 4016 at para. 25.

- [108] In addition, the company seeks a financial advisor charge of \$1.8 million to retain BMO Nesbitt Burns as a financial advisor to assist in exploring potential alternative transactions.
- [109] The directors and officers charge sought is in the amount of \$30 million.
- [110] The Monitor estimates that director liabilities in the United States for sales taxes, wages, source deductions and accrued vacation come to approximately \$13.1 million. Director and officer exposure in Canada may be as high as \$5.8 million.
- [111] While insurance with an aggregate limit of \$38.5 million is in place, the complexity of the overall enterprise creates the risk that it might not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this *CCAA* proceeding.
- [112] In determining whether to approve administration charges, the Court will consider: (a) the size and complexity of the businesses under *CCAA* protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.²¹
- [113] The Just Energy business is large and complex. The proposed beneficiaries are essential to the success of the *CCAA*. No *CCAA* proceeding can advance without a Monitor or counsel. The addition of a financial advisor would appear to be a prudent step given the complexity of the business. Monetizing or restructuring all or portions of the Just Energy business is substantially more complicated than a sale of hard assets. It would appear to make good sense to have a financial advisor involved. The Monitor agrees to the appointment of a financial advisor. I infer from the Monitor's agreement that Nesbitt Burns will bring to the table a skill set or attributes that the Monitor either does not have or cannot exercise given its role as Monitor.

H. Should Noncorporate Entities Be Captured by The Stay?

- [114] Many of the gas and electricity licences pursuant to which the Just Energy group conducts business in Canada are granted to limited partnerships.
- [115] On its face, the *CCAA* applies to corporations, not partnerships.²²
- [116] Where, however, the operations of partnerships are integral and closely related to the operations of the *CCAA* debtor, it is well-established that the Court has jurisdiction to

²¹ *Canwest 2010*, , at para 54. *Target*, , at paras 74 and 75; *Lydian*, , paras 43 to 54; *Laurentian*, at paras. 48 to 59.

²² *CCAA*, s. 2, definition of "Debtor company."

extend the protection of the stay to partnerships in order to ensure that the purposes of the *CCAA* can be achieved. Relief of that sort has been granted on several occasions.²³

[117] Here, it would be illusory to grant a stay in favour of the Just Energy corporate entities but not extend its benefit to the partnership entities. That would defeat the entire purpose of the exercise. As a result, is appropriate to extend *CCAA* protection to the Just Energy partnership entities.

I. Should Third Quarter Bonuses be Paid?

[118] The applicant seeks approval from the initial order for payment of third Quarter bonuses for fiscal 2021 on April 2, 2021. The bonuses were approved by the Compensation Committee on February 9, 2021 after it was reported that the third quarter base EBITDA result was \$55.785 million compared to a target of \$42 million.

[119] The Compensation Committee approved and asked the Board to approve a third-quarter bonus pool in the amount of \$3.23 million. The Board approved the bonus on February 10, 2021.

[120] I am disinclined to approve the bonus payment on an initial order. The relief on the initial order is limited to the amount to keep the company afloat for 10 days. The bonus does not fit into that category. Even on the applicant's view of events, the bonuses are not payable until April 2, 2021. That is well after the comeback date.

[121] In addition, the Monitor has not yet had an opportunity to review and comment on the employee bonus and intends to do so in a further report to the court.

[122] Whether bonuses should or should not be paid will depend on a variety of factors that are not in the evidence before me. By way of example, I would want a better understanding of whether the beneficiaries of the bonuses are also intended beneficiaries of the key employee retention plan that Just Energy will be asking for on the comeback date. In addition, I will want a better sense of who the recipients of the bonuses are. If they are relatively modest income earners for whom the bonus is a key source of income, such as, for example, retail sales people, I would probably be inclined to pay the bonuses without question. If, however, they are high income earners, the intended beneficiaries of the KERP, or if they are executives who make decisions about risk allocation, what Just Energy should insure against, to what extent it should hedge against weather risks and so on, I would want a more granular understanding about why the bonuses should be paid.

²³ See, for example, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 21; *Re Target Canada Co.*, 2015 ONSC 303 at paras 42 and 43; *4519922 Canada Inc., Re*, 2015 ONSC 124 at para. 37.

J. Should a Sealing order be Granted?

[123] Just Energy requests a sealing order in relation to the BMO Engagement Letter and the summary of the KERP, both of which are attached as confidential exhibits to the affidavit of Michael Carter sworn March 9, 2021.

[124] I am satisfied that the applicants have met the test established by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*.²⁴ The materials contain commercially sensitive information and/or personal information (in the case of the KERP). The order is necessary to prevent a serious risk to an important personal or commercial interest and the benefits of a sealing order outweigh the rights of others to a fair determination of the issues. No one advanced any need to see the information that is proposed to be sealed nor can I see any need for anyone to access such information in order to assert their rights fully within this proceeding.

Disposition

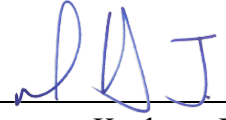
[125] In view of the foregoing, I granted an initial order in the form requested with the exception of authorization for bonus payments which will be addressed at the comeback hearing.

[126] The order will in effect provide that:

- (a) Ontario is the Centre of Main Interest for the *CCAA* proceeding.
- (b) Just Energy meets the insolvency requirements of the *CCAA*.
- (c) The proposed DIP financing is approved.
- (d) Any regulatory actions should be stayed.
- (e) Commodity suppliers and ISO Service Providers who sign qualified service agreements will benefit from a charge.
- (f) Set off rights of banks which may allow them to sweep accounts will be stayed.
- (g) The administrative, financial advisor and directors and officers charges are granted.
- (h) Noncorporate entities will be captured by the stay.
- (i) A sealing order will be granted.

²⁴ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Target* above at paras 28-30; *Laurentian University*, above at paras. 60 to 64.

[127] The comeback date for the continuation of any CCAA relief is set for 10 AM on Friday, March 19, 2021.

A handwritten signature in blue ink, appearing to be 'J. Koehnen', written over a horizontal line.

Koehnen J.

Date: March 9, 2021