

Court of Appeal File No. COA-24-OM-0342  
Superior Court File No. CV-21-00658423-00CL

**COURT OF APPEAL FOR ONTARIO**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 14487893 CANADA INC.

Respondent  
Moving Party

**MOTION RECORD OF THE PROPOSED APPELLANT, HAIDAR OMARALI**

**(Motion for Leave to Appeal, Returnable in Writing)**

**VOLUME 1 OF 3**

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B602121HCCGFM, Proposed Respondent

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Court of Appeal File No. COA-24-OM-0342  
Superior Court File No. CV-21-00658423-00CL

**COURT OF APPEAL FOR ONTARIO**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 14487893 CANADA INC.

Respondent  
Moving Party

**NOTICE OF MOTION FOR LEAVE TO APPEAL  
(RETURNABLE IN WRITING)**

Haidar Omarali will make a motion to a panel of the Court of Appeal for Ontario on a date to be fixed by the Registrar at 130 Queen Street West, Toronto,

**THE MOTION IS FOR:**

1. **AN ORDER** granting leave to appeal to the Court of Appeal from the Endorsement of Justice Cavanagh of the Superior Court, dated September 20, 2024; and
2. Such further and other relief as counsel may request and this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

3. Haidar Omarali in his capacity as representative plaintiff of the certified class in *Omarali v. Just Energy*, Court File No. CV-15-527493-00CP, seeks leave to appeal from the Endorsement of Justice Cavanagh made within this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") denying the relief sought in Mr. Omarali's Notice of Motion, dated August 25, 2023;



## Background

4. Haidar Omarali is the representative plaintiff in a class action against Just Energy (Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P.) on behalf of roughly 7700 sales-people employed by Just Energy in Ontario from 2012 until 2016, when Just Energy began to pay its sales-people their entitlements under the ESA;
5. The class action alleges that Just Energy failed to pay class members the wages and benefits that they were owed as employees under the *Employment Standards Act* ("ESA");
6. Before the scheduled trial of the class action commenced, on March 9, 2021, Just Energy filed for protection under the CCAA as a result of an extreme adverse weather event in Texas that resulted in \$315 million in losses, including an estimated \$250 million demanded by the Electric Reliability Council of Texas;
7. On the same day, March 9, 2021, XL Specialty Insurance Company and two other insurers (the "**Insurers**") issued policies providing coverage to the Directors and Officers of Just Energy (the "**Policies**");
8. The Policies specifically provide coverage for losses resulting from statutory claims for unpaid wages;
9. Pursuant to s. 81 of the *Employment Standards Act*, 2000, SO 2000, c 41 ("ESA"); s. 119 of the *Canada Business Corporations Act*, RSC 1985, c C-44 ("**CBCA**"); and s. 131 of the *Business Corporations Act*, RSO 1990, c B.16 ("**OBCA**"), Just Energy's Directors and Officers became liable to Class Members for unpaid wages and benefits upon Just Energy's insolvency;

10. Mr. Omarali filed a proof of claim in the CCAA proceedings on October 9, 2021, as against the Directors and Officers, seeking the unpaid wages and benefits owed to Class Members under the ESA;
11. In approving a sale transaction in the CCAA proceedings on November 3, 2022, the court ordered, as a carve-out to the release provided to Just Energy and its Directors and Officers, that Mr. Omarali's Claim could be maintained but was limited to seeking relief from applicable insurance policies;
12. Mr. Omarali brought a motion on August 25, 2023, for, among other things, an order directing the Insurers to pay the amounts owed to the Class Members under the Policies;
13. In response, the Insurers brought a motion seeking a declaration that the Prior Acts Exclusion, contained in the Policies, barred coverage for the Claims of Mr. Omarali and the Class Members and asked that the relief sought by Mr. Omarali in his motion be denied;

#### **The Motion Judge's Endorsement**

14. The motion judge granted the Insurers' motion finding that while the risks covered by the Policies specifically included the risk of statutory claims for unpaid wages not paid by Just Energy, the Prior Acts Exclusion barred coverage for all claims for wages that were unpaid prior to March 9, 2021;
15. To reach that conclusion, the motion judge interpreted the Prior Acts Exclusion as barring coverage for claims that relate to the acts or omissions of any person or entity prior to the effective date of the Policies;

16. The Prior Acts Exclusion reads:

In consideration of the premium charged, no coverage will be available for any Claim, Interview or Investigation Demand based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed prior to March 09, 2021.

All other conditions and limitations of this Policy shall remain unchanged.

17. The motion judge rejected Mr. Omarali's reading of the exclusion, as barring coverage only for claims that relate to the prior acts or omissions of a person or entity insured under the Policies;

18. The motion judge's interpretation of the Prior Acts Exclusion is the sole issue on the proposed appeal. The motion judge erred in interpreting the Prior Acts Exclusion:

- (a) In an unprecedentedly broad manner that eliminates an entire category of coverage specifically provided by the Policies and all coverage for claims that bear any relation to prior acts or omissions of any person or entity;
- (b) In a manner that is inconsistent with the Policies as a whole and renders significant parts of the Policies redundant;
- (c) In a manner that is inconsistent with the surrounding circumstances of the CCAA proceedings; and
- (d) In a manner that nullifies coverage for the most obvious risks that the Policies were intended to cover;

19. This erroneous decision denies relief to the class, and also results in a lack of protection for Directors and Officers under these and similar insurance policies, who are left open to statutory claims brought against them personally for the pre-filing conduct of the companies they serve;

**Leave Ought to be Granted**

20. Leave ought to be granted in this case;
21. Federal and provincial legislation specifically and purposefully provides recourse to employees to recover unpaid wages from a company's Directors and Officers in the event of the company's insolvency, regardless of whether the company became liable to pay for the wages before or after the date of insolvency;
22. The motion judge's erroneous decision results in the loss of this, or any, recourse for over 7700 class members who were denied their entitlements under the ESA;
23. The motion judge's decision, and the proposed appeal raises several points that are of significance to the interwoven practices of insolvency and employment law including:
  - (a) The manner in which the statutory liability of Directors and Officers during insolvency under the ESA and other statutes interacts with CCAA proceedings, and insurance policies provided in the context of such proceedings;
  - (b) The manner in which the rights of current and former employees to recover unpaid wages in the event of an insolvency are to be protected and recognized within CCAA proceedings;
  - (c) The interpretation, within the context of CCAA proceedings, of insurance policies providing coverage to Directors and Officers for periods of insolvency; and
  - (d) The availability in law of broad interpretations of exclusions in claims-based insurance policies that operate to remove coverage specifically provided.
24. The proposed appeal will not unduly hinder the progress of the action. The sale transaction in the CCAA proceedings has already been approved. The stay of proceedings has already been extended to January 31, 2025, and can be extended further if necessary to fairly determine Mr. Omarali's claim;

25. At this stage, all that remains of the proceeding is Mr. Omarali's claim: the points raised in the appeal are of paramount significance to that claim, which will otherwise be dismissed;
26. The well-established test for granting leave to appeal in matters under the CCAA is readily met in this case:
  - (a) The appeal is *prima facie* meritorious and is not frivolous;
  - (b) Several points on appeal are of significance to the practice;
  - (c) The points raised are of significance to the proceeding; and
  - (d) The appeal will not unduly hinder the progress of the action;
27. Sections 11, 13 and 14 of the CCAA;
28. Section 81 of the ESA;
29. Section 119 of the CBCA;
30. Section 131 of the OBCA; and
31. Rule 61.03.1 of the *Rules of Civil Procedure*.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) The Motion Record of Haidar Omarali, dated August 25, 2023;
- (b) The Motion Record of the Insurers on the Prior Acts Exclusion, dated June 10, 2024;
- (c) Such further and other materials as counsel may advise and this Honourable Court may permit.

October 11, 2024

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B0146ERINT2100865 by their coverholder  
Hiscox

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 14487893 CANADA INC.

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

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**COURT OF APPEAL FOR ONTARIO**

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**NOTICE OF MOTION FOR  
LEAVE TO APPEAL**

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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 14487893  
CANADA INC.

Applicant

THE HONOURABLE MR.

)

FRIDAY, THE 20<sup>TH</sup>

)

JUSTICE PETER J. CAVANAGH

)

DAY OF SEPTEMBER, 2024

**ORDER  
(Motion on Prior Acts Exclusion)**

**THIS MOTION**, made by (1) XL Specialty Insurance Company ("**XL**") under its primary policy no. ELU173707-21, (2) Tokio Marine HCC – D&O Group ("**Tokio**"), the Coverholder by HCC Underwriting Agency Ltd, HCC Syndicate 4141 trading as Tokio Marine HCC International via Agreement No. B602121HCCGFM under its Excess Indemnity Policy no. 34-MGU-20-A49117, and (3) Certain Underwriters at Lloyd's London Subscribing to Excess Insurance Policy No. B0146ERINT2100865 by their authorized Coverholder Hiscox (collectively, the "**Insurers**"), for (a) a declaration that the Prior Acts Exclusion in the Insurers' primary and excess insurance policies ("**Policies**") applies to bar coverage for and (b) an order dismissing the motion brought by the class representative Plaintiff Haidar Omarali ("**Omarali**") by way of his Notice of Motion dated

August 25, 2023 (“**Omarali Motion**”), was heard on Monday September 9<sup>th</sup>, 2024, at the courthouse at 330 University Avenue, Toronto, Ontario, M5G 1R8.

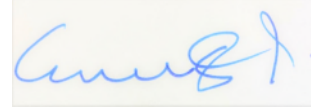
**WHEREAS** the Insurers seek a declaration that the Prior Acts Exclusion, being Endorsement No. 4 to XL Policy No. ELU173707-21 (the “**Policy**”), applies to bar coverage for the claim Omarali makes against the directors of Just Energy Group Inc., Just Energy Corp., and/or Just Energy Ontario L.P. (collectively, “**Just Energy**”) asserting that they are personally liable for Just Energy’s conduct and the unpaid wages claim as alleged and described in the Omarali Motion Record, the Class Action pleaded in Court File No. CV-15-527493-00CP, and Omarali’s October 29, 2021 D&O Proof of Claim filed with FTI Consulting Canada Inc., the Court-appointed Monitor in this proceeding (the “**Omarali Claim**”);

**ON READING** the Insurers’ Motion Record dated June 10, 2023, the Omarali Motion Record, and the Facta, Books of Authorities and Compendia filed by the Insurers and Omarali, and upon hearing the submissions of the lawyers for same;

**NOW, THEREFORE**, this Court orders and declares as follows:

1. **THIS COURT DECLARES** that the Omarali Claim is based upon, arises out of, directly or indirectly results from, is in consequence of and/or involves an act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act that was committed or allegedly committed prior to March 9, 2021.
2. **THIS COURT DECLARES** that the Prior Acts Exclusion applies to bar coverage for the Omarali Claim under the Policy.

3. **THIS COURT ORDERS** that the Omarali Claim is dismissed.
  
4. **THIS COURT ORDERS** that costs for this motion are payable to the Insurers, as agreed by the parties or as further ordered by this Court.



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**MR. JUSTICE P. CAVANAGH**

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**ORDER**  
**(Motion on Prior Acts Exclusion)**

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**CITATION:** In the Matter of the Companies' Creditors Arrangement Act and a Plan of Compromise or Arrangement of 14487893 Canada Inc., 2024 ONSC 5220  
**COURT FILE NO.:** CV-21-00658423-00CL  
**DATE:** 20240920

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-26, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 14487893 CANADA INC.

**BEFORE:** Cavanagh J.

**COUNSEL:** *Vlad Calina and Caitlin Leach*, for Haidar Omarali in his capacity as representative plaintiff of the certified class in *Omarali v. Just Energy*, Court File No. CV-15-527493-00CP

*Nina Bombier and Evan Linn*, for XL Specialty Insurance Company

*Jason Mangano and David Ullman*, for Tokio Marine HCC Syndicate 4141

*Marcus Snowden and Pearl Rombis*, for Lloyd's Underwriters (Hiscox D&O Consortium 4632))

*Jeremy Dacks*, for the Just Energy Group

*Rebecca Kennedy*, for the Court-appointed Monitor, FTI Consulting Canada Inc.

**HEARD:** September 9, 2024

**ENDORSEMENT**

**Introduction**

[1] Haidar Omarali is the representative plaintiff in a class action against Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P. (collectively, "Just Energy") in which claims are made for unpaid wages and benefits under the *Employment Standards Act* resulting from a misclassification by Just Energy of sales agents as independent contractors instead of employees during 2012 to 2016.

[2] On March 9, 2021, before commencement of the scheduled trial of the class action, Just Energy filed for protection under the *Companies' Creditors Arrangement Act* ("CCAA") and an order was made staying all proceedings against Just Energy, including the class action.

- [3] On the same day as the *CCAA* filing, XL Specialty Insurance Company (“XL”) issued a primary insurance policy and two other insurers (together with XL, the “Insurers”) issued excess policies (together, the “Policies”) providing coverage to directors and officers of Direct Energy. The Policies specifically provide coverage for loss resulting from a statutory claim for unpaid wages.
- [4] The Policies include an endorsement called the “Prior Acts Exclusion”. The interpretation of this endorsement is at issue on this motion.
- [5] On October 9, 2021, Mr. Omarali filed a proof of claim (the “Claim”) asserting that the directors are jointly and severally liable for CAD \$105,854,794.52 claimed to be owed to class members in the class action for unpaid wages and benefits pursuant to statutory provisions. The Monitor in the *CCAA* proceeding disallowed this claim.
- [6] On November 3, 2022, this Court approved a sale transaction and made an order that Just Energy and the directors and officers are not released from the Claim to the limited extent of maintaining claims against insurance policies that may be available to pay insured claims.
- [7] By Notice of Motion dated August 25, 2023, Mr. Omarali as representative plaintiff in the class action moved for, among other things, an order directing the Insurers to pay amounts owed under the Policies.
- [8] On this motion, the Insurers move for a declaration that under the Policies, the Prior Acts Exclusion applies to bar coverage for the Claim asserted against the D&Os, and related relief. Mr. Omarali opposes the Insurers’ motion.
- [9] For the following reasons, the Insurers’ motion is granted.

### **Background Facts**

- [10] On May 4, 2016, a statement of claim in a proposed class action was issued. On November 13, 2015, the statement of claim was amended to name Mr. Omarali as the representative plaintiff.
- [11] The class members allege that Just Energy misclassified each of them as independent contractors and that the structure imposed on them as sales agents was an employment relationship. They claim entitlement to unpaid wages and benefits, relying principally on the *Employment Standards Act*.
- [12] On July 27, 2016, the action was certified as a class action (the “Class Action”). The certification order defines the class to include “[a]ny person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement”.
- [13] On November 28, 2016, Just Energy formally adjusted its own classification of its then current sales agents from “independent contractors” to “employees”. On June

20, 2017, the opt-out deadline for potential class members of the class occurred. The class consists of 7,723 individuals.

- [14] On November 20, 2019, the court ordered that the Class Action be tried beginning on November 15, 2021.
- [15] On March 9, 2021, before the scheduled trial of the Class Action, Just Energy filed for protection under the *CCAA*. An Order was issued staying all proceedings against Just Energy, including the class action. This stay was in effect until September 30, 2024 and was extended by Order made on the Monitor’s motion until January 31, 2025.
- [16] Also on March 9, 2021, the Insurers issued the Policies. The excess policies follow form to the XL Policy in the relevant parts. The Policies specifically provide coverage for loss resulting from a statutory claim for unpaid wages.
- [17] On October 29, 2021, in the *CCAA* claims process, class counsel filed the Claim for unpaid wages on behalf of the Class against Just Energy’s directors and officers (the D&Os”).
- [18] On November 3, 2022, this Court approved a sale transaction in this *CCAA* proceeding and granted an approval and vesting order. The vesting order includes a general release and provides, among other things, that Just Energy and the D&Os are not released from the class action claims to the limited extent of maintaining claims against insurance policies that may be available to pay insured claims.

### **Analysis**

- [19] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, the Supreme Court of Canada set out general principles of insurance policy interpretation taken from the jurisprudence:

The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole [citation omitted].

Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction [citation omitted]. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties [citations omitted], so long as such an interpretation can be supported by the text of the policy. Court should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded [citations omitted]. Courts should also strive to ensure that similar insurance policies are construed consistently [citation omitted]. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in first place.



When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* - against the insurers [citations omitted]. One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly [citation omitted].

- [20] The terms of the policy must be examined in light of the surrounding circumstances in order to determine the intent of the parties and the scope of their understanding. The factual matrix is gleaned from the context of the transaction and extends to the genesis of the policy, its purpose, and the commercial context in which the policy was made. In cases of insurance contracts, the evidence of the factual matrix may be of more assistance when the contract is an individually negotiated contract rather than a standard form contract resulting from a routine purchase of an insurance policy. See *Onex Corporation v. American Home Assurance Company*, 2013 ONCA 117, at paras. 102-105, citing *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, [2006] 1 S.C.R. 744, at paras. 27-30.
- [21] Even a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy. See *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729, at para. 41, citing *Sam's Auto Wrecking Co. Ltd. v. Lombard General Insurance Company of Canada*, 2013 ONCA 186, at para. 37.
- [22] In *Progressive Homes*, at paras. 26-28, the Supreme Court of Canada observed that the type of insurance policy before it (a comprehensive general liability or CGL policy) typically sets out the types of coverage contained in the agreement, followed by specific exclusions to coverage which preclude coverage when the claim otherwise falls within the initial grant of coverage. The Court held that exclusions should be read in light of the initial grant of coverage. The Court noted that a policy may also contain exceptions to exclusions. Exceptions bring an otherwise excluded claim back within coverage, where the claim fell within the initial grant of coverage in the first place. The Court held that because of this alternating structure of a CGL policy, it is generally advisable to interpret the policy in the order described above: coverage, exclusions and then exceptions.
- [23] The Insurers and Mr. Omarali accept that the Prior Acts Exclusion is not ambiguous. Each of the Insurers and Mr. Omarali argues in support of a different interpretation of the Prior Acts Exclusion when the Policies are read as a whole in light of surrounding circumstances.

***Assumption that the Claim falls within the initial grant of coverage in the Policies***

- [24] The XL Policy is a claims made policy that applies to claims first made during the policy period. Coverage is provided from March 9, 2021, the date that Just Energy filed for protection under the *CCAA*. Endorsement No. 6 provides that upon Just Energy's "[e]mergence from bankruptcy", coverage under the Policy will cease with respect to any claim described in paragraph 1 of this endorsement.

[25] The XL Policy includes a number of endorsements, including the “Prior Acts Exclusion”, an endorsement deleting insuring agreements (B) to (F), and an endorsement amending “Insured” to mean “the Insured Persons” and amending the definition of the term “Wrongful Act”.

[26] The XL Policy provides:

In consideration of the payment of the premium, and in reliance on all statements made and information furnished to the Insurer identified in the Declarations (hereinafter the “Insurer”), including the Application, and subject to all of the terms, conditions and limitations of all of the provisions of this Policy, the Insurer, the Insured Persons, and the Company agree as follows:

I. INSURING AGREEMENTS

(A) The Insurer shall pay on behalf of the **Insured Persons Loss** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period** for a **Wrongful Act**, except for **Loss** which the **Company** is permitted or required to pay on behalf of the **Insured Persons** as indemnification.

[27] The “Insured Persons” as defined in the XL Policy means “any past, present or future natural person director or officer” of Just Energy and those persons serving in a functionally equivalent role for the Parent Company or any Subsidiary operating or incorporated outside the United States or Canada (including any *de facto* director). Subject to exclusions, the D&Os are covered for any “Loss” not indemnified by the Company.

[28] The term “Loss” to which Insuring Agreement (A) applies is defined to “specifically include ... salary, wages and related amounts such as vacation pay or holiday pay that are or were payable by the Company to an employee for services performed if an **Insured Person** has become personally liable to make such payment under any applicable federal, provincial, territorial or municipal statutory provision; that an **Insured Person** is obligated to pay if such ... payments are ... imposed in connection with such **Insured Person’s** service with an insolvent **Company**;”.

[29] I accept Mr. Omarali’s submission that the risks covered for the D&Os during Just Energy’s insolvency specifically include the risk of statutory claims brought against the D&Os for wages that were not paid by Just Energy. This is the basis in the Policies for an initial grant of coverage for Mr. Omarali’s claim.

[30] As the Insurers request, I assume for the purposes of this motion, without deciding, that the Claim falls within the Policies’ insuring agreement (subject to the application of exclusions under the Policies).

***Prior Acts Exclusion***

[31] Once it is held that a claim falls within a policy’s initial grant of coverage, the onus shifts to the insurer to show that coverage of the claim is precluded by an exclusion clause. See *Progressive Homes*, at para. 51.

[32] The Insurers rely on the Prior Acts Exclusion for their submission that coverage for Mr. Omarali’s claim is excluded. The Prior Acts Exclusion reads:

In consideration of the premium charged, no coverage will be available for any Claim, Interview or Investigation Demand based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed prior to March 09, 2021.

All other, conditions and limitations of this Policy shall remain unchanged.

[33] In *Non-Marine Underwriters, Lloyds of London v. Scalera*, 2000 SCC 24, the Supreme Court of Canada, at para. 50, explained that in determining whether or not a given claim could trigger indemnity under an insurance policy, a court must decide, based on the pleadings, the true nature of the claims. See also *Papapetrou v. 1054422 Ontario Limited*, 2012 ONCA 506, at para. 44.<sup>1</sup>

[34] The Claim is a statutory claim by class members against the D&Os for unpaid wages where their employer, Just Energy, failed to pay these wages during 2012 to 2016. The insolvency of Just Energy is the precipitating event for the Claim against the D&Os. Mr. Omarali accepts that the Claim arises from Just Energy’s failure to pay class members’ wages under the *Employment Standards Act*.

[35] The Insurers submit that the clear and unambiguous meaning of the language in the Prior Acts Exclusion excludes coverage for any Claim “based upon”, “arising out of”, “directly or indirectly resulting from”, “in consequence of or in any way involving” any act or omission that occurred, or allegedly occurred, before March 9, 2021. The Insurers submit that coverage for the Claim is excluded when the words used in the Prior Act Exclusion are given their clear and unambiguous meaning.

[36] In support of this submission, the Insurers cite *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729; leave to appeal to Supreme Court of Canada granted,

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<sup>1</sup>In both cases, the analysis was needed to determine whether an insurer’s duty to defend arose in relation to the claims made.

2024 CanLII 61126. In *Trillium*, an exclusion referred to “any law”. The Court of Appeal, at para. 67, held, citing *Epp School District v. Park (Rural Municipality)*, 1936 CanLII 151 (SK CA), that “[t]he term ‘any’ is all-embracing and without limitation or qualification”.

[37] Mr. Omarali relies on the fact that Just Energy is not an Insured Person. He submits that the Claim does not involve any prior act or omission of an Insured Person under the Policies and, therefore, coverage for the Claim is not excluded by the Prior Acts Exclusion.

[38] Mr. Omarali submits that to capture the Claim, the Prior Acts Exclusion must be interpreted such that it is triggered by any prior act or omission, regardless of the entity or person responsible. He submits that (i) this broad interpretation is inconsistent with the balance of the Policies and the commercial context within which they were issued; (ii) the position of the Insurers on the scope of the Prior Acts Exclusion finds no support in the jurisprudence; and (iii) the interpretation of the Prior Acts Exclusion advanced by the Insurers, if accepted, would offend the nullification of coverage doctrine.

***Consideration of the Prior Acts Exclusion reading the Policies as a whole***

[39] Mr. Omarali submits that on the face of the Prior Acts Exclusion, the Claim is not excluded because unpaid wages were an obligation owed by Just Energy prior to March 9, 2021, which obligation the D&Os only became liable for on that date, due to Just Energy’s insolvency. Mr. Omarali submits that prior to March 9, 2021, the D&Os – the only Insured Persons – were not liable for unpaid wages and, based on that fact, there cannot have been an act or omission of a person covered by the Policies involved in statutory claims for prior unpaid wages, including the Claim. Mr. Omarali submits that, as a result, the acts and omissions of Just Energy do not trigger the Prior Acts Exclusion.

[40] I do not accept this submission. The timing of the liability imposed on D&Os for unpaid wages does not assist me to interpret the scope of the Prior Acts Exclusion. The fact that Just Energy is not an Insured Person under the Policies does not lead to the conclusion that the Prior Acts Exclusion does not apply to exclude coverage for prior acts by a non-insured person. The question remains whether the words “any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act” as they are used in the Prior Acts Exclusion mean any such act etc. committed or allegedly committed by anyone, as the Insurers contend, or whether they mean any such act etc. committed or allegedly committed by an Insured Person, as Mr. Omarali contends.

[41] Mr. Omarali relies on the definition of the term “Loss” as used in Insuring Agreement (A) which specifically includes wages that “are or were payable by the Company” and that the D&Os “have become personally liable” to pay under statute (emphasis added). He submits that this language makes it clear that coverage is specifically provided for prior unpaid wage claims (before the insolvency of Just

Energy) and that the Prior Acts Exclusion cannot be read in a manner that excludes coverage for such past unpaid wages.

- [42] I have assumed for purposes of this motion that the Policies provide an initial grant of coverage for the claim for loss in the amount of the statutory liability of Insured Persons for past wages (before Just Energy's insolvency). I do not accept that because a claim is, specifically, initially covered by an insuring agreement, this means that an exclusion clause cannot be read to exclude coverage. Although exclusions should be read in light of the initial grant of coverage, exclusions in an insurance policy preclude coverage when the claim otherwise falls within the initial grant of coverage. That is the very nature of an exclusion. See *Progressive*, at para. 27.
- [43] In addition, the Policies cover liability of D&Os for statutory claims for unpaid wages after March 9, 2021 and the Prior Acts Exclusion does not exclude coverage for a claim based on such liability. If, after March 9, 2021, Just Energy were to fail to pay wages and D&Os were to become statutorily liable for such unpaid wages, the Policies would provide coverage. The use of the past tense in the definition of the term "Loss" in the Policies does not necessarily refer only to loss resulting from unpaid wage claims before the insolvency of Just Energy.
- [44] Mr. Omarali relies on the definition of "Insured Person" in the Policies which includes "any past, present or future natural person director or officer ... of the Company" (emphasis added). Mr. Omarali submits that under the Insurers' interpretation of the Prior Acts Exclusion, no claim could ever be made against a past director as that claim would, necessarily, have a nexus in the pre-*CCAA* filing past. He submits that, for this reason, the Insurers' interpretation of the Prior Acts Exclusion, if accepted, would result in this exclusion lacking coherence with the balance of the policy.
- [45] I do not accept this submission. Whether or not the Policies cover loss from an unpaid wages claim before March 9, 2021, they cover loss resulting from claims based on statutory liability of D&Os for unpaid wages after March 9, 2021 and the Prior Acts Exclusion does not exclude coverage for a loss based on such liability. If a director or officer of Just Energy were to cease being a director or officer after March 9, 2021, this person could still be statutorily liable for unpaid wages after this date and would have coverage under the Policies, even as a "past" director or officer. The definition of "Insured Person" has meaning, and the terms of the Policies cohere in this respect, even if the Insurers' interpretation of the Prior Acts Exclusion is accepted.
- [46] Mr. Omarali submits that if the Insurers' interpretation of the Prior Acts Exclusion is accepted, the "prior/pending litigation exclusion" (III(B)(1) of the XL Policy) and the "prior notice exclusion" (III(B)(2) of the XL Policy) would not be needed because coverage for loss from every claim that would be excluded under these provisions would be excluded under the Prior Acts Exclusion. Mr. Omarali submits, citing *Progressive Homes*, at para. 37, that a Court should decline to accept an

interpretation of an insurance policy that “would leave little or no work” for an exclusion.

- [47] The Prior Acts Exclusion is included in the XL Policy as Endorsement No. 3 attached to the XL Policy at issuance. The “prior/pending litigation exclusion” and the “prior notice exclusion” are not included in the XL Policy as added endorsements but are in the form of the XL Policy as issued, subject to endorsements. It may be so that the Prior Acts Exclusion, if given the interpretation advanced by the Insurers, would leave the other exclusions with little work to do. However, given the manner in which the Prior Acts Exclusion became part of the XL Policy, it was not necessary to remove the other exclusions, even if they may not have been needed.
- [48] Where the language of an exclusion is unambiguous, the court should give effect to clear language, reading the contract as a whole. I do not regard the fact that there are two exclusions in the Policies that may overlap with the Prior Acts Exclusion, which was added to the XL Policy as an endorsement, as a reason not to give effect to the clear language of the Prior Acts Exclusion.
- [49] Mr. Omarali refers to the language of the “prior/pending litigation exclusion” and the “prior notice exclusion” which both include the words “any fact, circumstance, situation, transaction, event or Wrongful Act” to describe the circumstances that - if alleged in litigation against an Insured or the subject of notice under a prior policy - result in an exclusion. Mr. Omarali submits that this language clearly requires no connection between the prior circumstance and the Insured Person and, had the parties intended the Prior Acts Exclusion to be similarly broad, they would have used this language. Mr. Omarali submits that the interpretation of the Prior Acts Exclusion advanced by the Insurers is not consistent with the Policy as a whole and should be rejected.
- [50] The Prior Acts Exclusion differs from the other two exclusions in that it excludes coverage for any claim based upon or arising out of “any act, error, omission” etc. which is committed [by a person] prior to March 9, 2021, as opposed to “any fact, circumstance, situation” etc. The words used in the Prior Acts Exclusion are broad and it is not necessary for this exclusion to track the broad language of another exclusion for it to be given effect, especially where the language is clear and unambiguous.

#### ***Commercial Context of the Policies***

- [51] The effective date of the Policies is the commencement date of the *CCAA* proceeding. The *CCAA* proceeding and the issuance of the Policies in connection therewith provides the essential, overall, commercial context and purpose for the Policies.
- [52] The Insurers submit that the Policies, which include the Prior Acts Exclusion and the prior litigation and prior notice exclusions, carefully delineate the scope of the

risk the Insurers agreed to insure and thereby expressly inform the purpose of the Policies. The claim by Mr. Omarali in the class action was known when Just Energy filed for *CCAA* protection. They submit that in this insolvency context, the Insurers did not agree to assume the risk of exposure to claims based on pre-filing conduct because it would make no commercial sense for them to do so.

- [53] The Insurers submit that these exclusions allowed them to issue policies providing coverage for losses that they may not otherwise have been willing to cover at all, or only for a much higher price. The Insurers submit that the Prior Acts Exclusion and the prior litigation and prior notice exclusions operated to ensure that coverage for claims existing at the time of the *CCAA* filing were excluded.
- [54] The Insurers submit that the exclusion of claims based upon or arising from any act or omission committed or allegedly committed by anyone before March 9, 2021 aligns with the other exclusions and the overall commercial context within which the Policies were issued to provide coverage only for the going forward, post-insolvency, risk.
- [55] Mr. Omarali submits that the purpose of the Policies, as reflected in the grant of coverage in particular, was to allow Just Energy to retain D&Os while insolvent. He submits that the factual matrix, together with the language of the Policies, strongly suggest that they were intended to cover personal liability for the D&Os so that they would remain with the company in order for it to be restructured.
- [56] Mr. Omarali submits that a policy that failed to do so by excluding coverage for all statutory claims related to prior conduct by anyone, and not just the prior conduct of the D&Os, would have provided no comfort to the D&Os and would not have allowed Just Energy to continue to operate. Mr. Omarali submits that the Insurer's interpretation of the Prior Acts Exclusion is inconsistent with the factual matrix.
- [57] I do not accept that the evidence of the surrounding circumstances when the Policies were issued at the time of Just Energy's *CCAA* filing supports the conclusion that the Policies, if they excluded coverage for prior acts or omissions, by anyone, before March 9, 2021, would have provided no comfort to the D&Os such that they would have refused to continue to serve and Just Energy would not have continued to operate. The protection that the D&Os would reasonably need for them to serve during the period of Just Energy's insolvency would be for their exposure to risk of liability during this period of insolvency.
- [58] When the language of the Prior Acts Exclusion is read with the Policies as a whole and in the context of the surrounding circumstances, particularly Just Energy's *CCAA* filing, I accept the Insurers' submissions and conclude that the surrounding circumstances are consistent with the interpretation of the Prior Acts Exclusion advanced by the Insurers.
- [59] I conclude that the language of the Prior Acts Exclusion is clear and unambiguous when read in the context of the Policies as a whole and having regard to the

surrounding circumstance of the issuance of the Policies at the time of Just Energy's CCAA filing. Having reached this conclusion, I should give effect to the clear and unambiguous language of the Prior Acts Exclusion, subject to the nullification of coverage doctrine.

***Nullification of coverage doctrine***

- [60] In *Cabell v. The Personal Insurance Company*, 2011 ONCA 105, the Court of Appeal addressed the doctrine of nullification of coverage. The Court reviewed jurisprudence concerning this doctrine and held that the passages cited from this jurisprudence suggest that the nullification of coverage doctrine is an independent doctrine that applies even in the absence of ambiguity. The Court of Appeal, at para. 17, cited with approval the following passage from *Zurich Insurance Co. v. 686234 Ontario Ltd.*, 2002 CanLII 33365 (ON CA), at para. 28:

From *Weston Ornamental Iron Works* it is clear that this court has concluded that even though an exclusion clause may be clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

- [61] Evidence from which a determination could be made about nullification of coverage and reasonable expectations of the parties is not necessarily needed for the court to determine the reasonable expectations of the parties. If the court is able to determine on an objective basis that the insurer's position would render nugatory coverage for the most obvious risk for which the policy is issued, it will be for the insurer to show that the effect of its interpretation would not virtually nullify the coverage and would not be contrary to the reasonable expectations of the parties as to the coverage purchased. See *Cabell*, at paras. 24-28.
- [62] Mr. Omarali submits that Just Energy purchased the Policies to protect the D&Os from personal liability in order to retain those D&Os through the insolvency process and that liability for pre-filing wage claims is a common risk for directors and a live issue in any insolvency. He submits that an interpretation of the Prior Acts Exclusion that excludes the Claim would render the Policies incapable of protecting the D&Os from an obvious risk they faced such that, under the nullification of coverage doctrine, such an interpretation should be rejected.
- [63] The Policies cover the Insured Persons for loss resulting from a claim made during the policy period for unpaid wages accruing after the CCAA filing and during the period of Just Energy's insolvency while it continues to operate and attempts to emerge from insolvency.
- [64] When the language of the Prior Acts Exclusion Policies, read in the context of the Policies as a whole and having regard to surrounding circumstances, is given its



clear and unambiguous meaning, it is clear that protection of D&Os for their post-filing liability during Just Energy's insolvency is the main purpose of the insurance coverage provided by the Policies. The interpretation of the Prior Acts Exclusion advanced by the Insurers is not inconsistent with this purpose of insurance coverage. Given this main purpose of the insurance coverage, it would not be contrary to the reasonable expectations of the ordinary person as to the coverage purchased to exclude coverage for loss resulting from claims based upon or arising out of any act or omission, committed by anyone, prior to Just Energy's filing for protection under the *CCAA* on March 9, 2021.

[65] I conclude that the nullification of coverage doctrine does not apply to preclude the application of the Prior Acts Exclusion to bar the Claim.

**Disposition**

[66] For these reasons:

- a. I declare that the Prior Acts Exclusion bars coverage for the Claim; and
- b. I order that the relief sought against the Insurers in Mr. Omarali's Notice of Motion dated August 25, 2023 is denied.

[67] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable (and with reasonable page limits) to be agreed upon by counsel and approved by me.



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Cavanagh J.

**Date:** September 20, 2024

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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|--------------------|---|-------------------------------|
| THE HONOURABLE MR. | ) | THURSDAY, THE 3 <sup>RD</sup> |
|                    | ) |                               |
| JUSTICE MCEWEN     | ) | DAY OF NOVEMBER               |

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., 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.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**APPROVAL AND VESTING ORDER**

**THIS MOTION**, made by the Applicants (together, the Applicants and the partnerships listed on **Schedule “A”** hereto, the “**Just Energy Entities**”), pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCA**”), for an order, *inter alia*, (i) approving the Transaction Agreement (as amended, the “**Transaction Agreement**”) between Just Energy Group Inc. (“**Just Energy**”) and LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the “**Sponsor**”)

dated as of August 4, 2022 and attached as Exhibit “A” to the affidavit of Emily Paplawski sworn October 31, 2022 (the “**Paplawski Affidavit**”) and the transactions contemplated therein (collectively, the “**Transactions**”), including the Implementation Steps (as defined in the Transaction Agreement), (ii) adding 14487893 Canada Inc. (“**Residual Co. 1**”) and 11368, LLC (“**Residual Co. 2**”) as Applicants to these CCAA proceedings, (iii) vesting in and to Residual Co. 1 and/or Residual Co. 2, as applicable, absolutely and exclusively, all of the right, title and interest of the Just Energy Entities not listed on Schedule 2.2(f) of the Transaction Agreement (the “**Acquired Entities**”) in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities (each as defined in the Transaction Agreement), (iv) discharging Claims and Encumbrances, other than the Permitted Encumbrances, against the Acquired Entities and the Retained Assets (each as hereinafter defined), (v) authorizing and directing Just Energy (U.S.) Corp. (“**JEUS**”) to issue the Purchased Interests (as defined in the Transaction Agreement), and vesting all of the right, title and interest in and to the Purchased Interests absolutely and exclusively in and to the Sponsor, free and clear of any Encumbrances, (vi) authorizing and directing Just Energy to file the Articles of Reorganization (as defined in the Transaction Agreement), (vii) terminating and cancelling or redeeming the Subject Interests (as hereinafter defined) for no consideration (as provided for in the Implementation Steps), and (viii) granting certain related relief, was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

**ON READING** the Notice of Motion of the Applicants, the affidavit of Michael Carter sworn October 17, 2022, the Paplawski Affidavit, the Twelfth Report of FTI Consulting Canada Inc. (“**FTI**”), in its capacity as monitor (the “**Monitor**”), dated October 27, 2022, and on hearing the submissions of counsel for the Just Energy Entities, the Monitor, the Sponsor, the Credit Facility Agent, as administrative agent for the Credit Facility Lenders, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Emily Paplawski, sworn October 17, 2022; the affidavit of service of Matthew Eliseo Cressatti, sworn October 18, 2022; the affidavit of service of Emily Paplawski, sworn October 20, 2022; and the affidavit of service of Elena Pratt, sworn October 31, 2022:

## **SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Second Amended and Restated Initial Order of this Court dated May 26, 2021 (the “**Initial Order**”), that certain support agreement approved by this Court pursuant to the SISP Approval Order (as hereinafter defined) (the “**Support Agreement**”), or the Transaction Agreement, as applicable.

## **APPROVAL AND VESTING**

3. **THIS COURT ORDERS AND DECLARES** that, without derogating in any way from the relief contained in the SISP Approval Order of this Court dated August 18, 2022 (the “**SISP Approval Order**”), the Transaction Agreement and the Transactions (including the Implementation Steps) are hereby approved and the execution of the Transaction Agreement by Just Energy is hereby authorized and approved, with such minor amendments as Just Energy and the Sponsor may deem necessary, with the approval of the Monitor and subject to the terms of the Support Agreement. The Just Energy Entities are hereby authorized and directed to perform their obligations under the Transaction Agreement, including the filing of the Articles of Reorganization, the issuance of the Purchased Interests and the termination and cancellation or redemption of the Subject Interests (as provided for in the Implementation Steps), and to take such additional steps and execute such additional documents (including the Closing Documents) as may be necessary or desirable for the completion of the Transactions.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Just Energy Entities to proceed with the Transactions and that no shareholder or other approval shall be required in connection therewith.

5. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of the Monitor's certificate (the "**Monitor's Certificate**") to the Sponsor, substantially in the form attached as **Schedule "B"** hereto, the following shall occur and shall be deemed to have occurred in the sequence set out in the Implementation Steps:

- (a) the Just Energy Entities shall be and are hereby forever released and discharged from the BP Commodity/ISO Services Claim, including all amounts and obligations owing by the Just Energy Entities in connection therewith, and all related Claims and Encumbrances are hereby expunged and discharged;
- (b) (i) with respect to the Acquired Entities not formed or incorporated under the laws of the United States (the "**Non-US Acquired Entities**"), all of the Non-US Acquired Entities' right, title and interest in and to their respective Excluded Assets shall vest absolutely and exclusively in Residual Co. 1, and (ii) with respect to the Acquired Entities formed or incorporated under the laws of the United States (the "**US Acquired Entities**"), all of the US Acquired Entities' right, title and interest in and to their respective Excluded Assets shall vest absolutely and exclusively in Residual Co. 2, and, in each case, all applicable Claims and Encumbrances shall continue to attach to such Excluded Assets with the same nature and priority as they had immediately prior to their transfer; provided that, for certainty, the Excluded Assets transferred hereby shall not include the Priority Payments Amount, which

shall be used to satisfy the Priority Payments (as hereinafter defined) in accordance with paragraph 18 hereof;

- (c) all Excluded Contracts and Excluded Liabilities (which, for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) of the Non-US Acquired Entities and the US Acquired Entities (in each case, other than the Assumed Liabilities) shall be transferred to, assumed by and vest absolutely and exclusively in, Residual Co. 1 and Residual Co. 2, respectively, such that all Excluded Contracts and Excluded Liabilities shall become obligations of Residual Co. 1 and Residual Co. 2, as applicable, and shall no longer be obligations of any of the Acquired Entities, and the Acquired Entities and all of their remaining assets, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (collectively, the “**Retained Assets**”) shall be and are hereby forever released and discharged from all Excluded Contracts and Excluded Liabilities, and all related Claims and Encumbrances, other than the permitted encumbrances, easements and restrictive covenants affecting or relating to the Retained Assets listed on Schedule “C” (the “**Permitted Encumbrances**”), are hereby expunged and discharged as against the Retained Assets; provided that, for certainty, the Excluded Liabilities transferred hereby shall not include the obligations of the Just Energy Entities in respect of the Priority Payments, which shall be satisfied pursuant to paragraph 18 hereof;

- (d) all right, title and interest in and to the Purchased Interests issued by JEUS to the Sponsor shall vest absolutely and exclusively in the Sponsor free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (x) any encumbrances or charges created by the Initial Order, the SISP Approval Order, or any other Order of this Court, and (y) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the Permitted Encumbrances) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Interests are hereby expunged and discharged as against the Purchased Interests;
- (e) all equity interests of Just Energy and JEUS existing prior to the commencement of the Implementation Steps (for greater certainty, other than the Purchased Interests), as well as all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as hereinafter defined) and are convertible or exchangeable for any securities of Just Energy or JEUS or which require the issuance, sale or transfer by Just Energy or JEUS, of any shares or other securities of Just Energy or JEUS, as applicable, or otherwise evidencing a right to

acquire the Purchased Interests and/or the share capital of Just Energy or JEUS, or otherwise relating thereto (collectively, the “**Subject Interests**”), shall be deemed terminated and cancelled or redeemed as provided in the Implementation Steps and the Articles of Reorganization, as applicable; and

- (f) the Acquired Entities shall and shall be deemed to cease to be Applicants in these CCAA proceedings, and the Acquired Entities shall be deemed to be released from the purview of the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings, save and except for this Order the provisions of which (as they relate to the Acquired Entities) shall continue to apply in all respects.

6. **THIS COURT ORDERS AND DIRECTS** the Monitor to (a) provide a copy of the Monitor’s Certificate to the parties to the Support Agreement at the same time as its delivery to the Sponsor; and (b) file with this Court a copy of the Monitor’s Certificate forthwith after delivery thereof in connection with the Transactions as well as a copy of the final form of Transaction Agreement and all related schedules.

7. **THIS COURT ORDERS** that the Monitor may rely on written notice from Just Energy and the Sponsor regarding the satisfaction or waiver of conditions to closing under the Transaction Agreement and shall have no liability with respect to delivery of the Monitor’s Certificate.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, from and after the Effective Time (as defined in the Monitor’s Certificate), subject to the payment of the Priority Payments and the funding of the Administrative Expense Amount, all Claims and Encumbrances released, expunged and discharged pursuant to paragraph 5 hereof, including as against the Acquired Entities, the Retained Assets and the Purchased Interests, shall



attach to (a) the net proceeds remaining (the “**Remaining Proceeds**”), if any, realized from the Cash Purchase Price and transferred to Residual Co. 1 or Residual Co. 2 and (b) the Excluded Assets, in each case, with the same nature and priority as they had immediately prior to the Transactions, as if the Transactions had not occurred.

9. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Just Energy Entities or the Monitor, as the case may be, are authorized, permitted and directed to, at the Effective Time, disclose to the Sponsor all human resources and payroll information in the Acquired Entities’ records pertaining to past and current employees of the Acquired Entities. The Sponsor shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Just Energy Entities prior to the Effective Time.

10. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, the Sponsor and the Acquired Entities shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, the Just Energy Entities (provided, as it relates to the Sponsor and the Acquired Entities, such release shall not apply to (a) Taxes in respect of the business and operations conducted by the Acquired Entities after the Effective Time; or (b) Taxes expressly assumed as Assumed Liabilities pursuant to the Transaction Agreement), including, without limiting the generality of the foregoing, all Taxes that could be assessed against the Sponsor or the Acquired Entities (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada) (the “**Tax Act**”), or proposed section 160.01 of the Tax Act, including as a result of any

future amendments or proposed amendments to such provisions or related provisions, or any provincial equivalent, in connection with the Just Energy Entities.

11. **THIS COURT ORDERS** that (a) to the extent Electric Reliability Council of Texas, Inc. (“**ERCOT**”) has a valid claim, cause of action, right, or remedy against the Just Energy Entities or the Acquired Entities, whether in connection with, or as a result of, any final order in the litigation commenced by the Just Energy Entities against ERCOT in the United States Bankruptcy Court for the Southern District of Texas under the caption *Just Energy Texas LP, et al. v. Electric Reliability Council of Texas, Inc. and the Public Utility Commission of Texas Inc.*, Adv. Pro. No. 21-04399 (“**ERCOT Claim**”), nothing in this Order or in any document in connection with the Transactions shall be deemed to preclude ERCOT from being paid on account of, or enforcing its rights with respect to, such ERCOT Claim from the applicable Just Energy Entities or Acquired Entities following the closing of the Transactions, and any rights, remedies and defenses of the Just Energy Entities, the Acquired Entities, and ERCOT with respect to any such ERCOT Claim, including, but not limited to, the validity, amount and priority of any such ERCOT Claim, are fully preserved and reserved; (b) nothing in this Order or the Transaction Agreement shall be deemed to impact, alter or impair ERCOT’s rights and remedies with respect to obligations of the Just Energy Entities or the Acquired Entities, or the rights and remedies of the Just Energy Entities or the Acquired Entities with respect to obligations of ERCOT, pursuant to the ERCOT Protocols or the operative Standard Form Market Participant Agreement by and between ERCOT and the applicable Just Energy Entities or Acquired Entities; and (c) to the extent there is any market repricing or other reduction in the amount due from the Just Energy Entities or the Acquired Entities to ERCOT as a result of, without limitation, the litigation pending in Texas state court under the caption *Luminant Energy Co. LLC v. Public Utility Commission of Texas Inc.*, Case No.

03-21-00098-CV, or any other litigation in the Texas state or federal courts, nothing contained herein shall preclude (i) the applicable Just Energy Entities or Acquired Entities from seeking an adjustment of any amounts paid to ERCOT by the Just Energy Entities or the Acquired Entities, or (ii) any rights, remedies and defenses of ERCOT in connection thereto.

12. **THIS COURT ORDERS** that, except to the extent expressly contemplated by the Transaction Agreement (and, for greater clarity, excluding Continuing Contracts relating to Assumed Liabilities, including the Credit Facility Documents), all Continuing Contracts to which any of the Acquired Entities are a party upon delivery of the Monitor's Certificate will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

- (a) any event that occurred on or prior to the Effective Time and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any Just Energy Entity);
- (b) the insolvency of any Just Energy Entity or the fact that the Just Energy Entities sought or obtained relief under the CCAA;

- (c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Transaction Agreement, the Transactions or the provisions of this Order, or any other Order of this Court in these CCAA proceedings; or
- (d) any transfer or assignment, or any change of control of the Acquired Entities arising from the implementation of the Transaction Agreement, the Transactions or the provisions of this Order.

13. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 12 hereof shall waive, compromise or discharge any obligations of the Acquired Entities or the Sponsor in respect of any Assumed Liabilities; (b) the designation of any Claim as an Assumed Liability is without prejudice to the Acquired Entities' and the Sponsor's right to dispute the existence, validity or quantum of any such Assumed Liability; and (c) nothing in this Order or the Transaction Agreement shall affect or waive the Acquired Entities' or Sponsor's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

14. **THIS COURT ORDERS** that, from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Just Energy Entity then existing or previously committed by any Just Energy Entity, or caused by any Just Energy Entity, directly or indirectly, or noncompliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Continuing Contract, existing between such Person and any Acquired Entity directly or indirectly from the filing by the Applicants under the CCAA and the implementation of the Transactions, including without

limitation any of the matters or events listed in paragraph 12 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a Continuing Contract shall be deemed to have been rescinded and of no further force or effect; provided that, nothing herein shall be deemed to excuse the Sponsor or the Just Energy Entities from performing their obligations under, or be a waiver of defaults by the Sponsor or Just Energy under, the Transaction Agreement and the related agreements and documents, or affect the validity of the Implementation Steps.

15. **THIS COURT ORDERS** that, from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against the Sponsor or the Acquired Entities relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters which are waived, released, expunged or discharged pursuant to this Order; provided that, nothing herein shall affect the validity of the Implementation Steps.

16. **THIS COURT ORDERS** that, from and after the Effective Time:

- (a) the nature of the Assumed Liabilities assumed by the Sponsor or retained by the Acquired Entities, including, without limitation, their amount and their secured or

unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

- (b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residual Co. 1 and Residual Co. 2, as applicable;
- (c) any Person that prior to the Effective Time had a valid right or claim against the Acquired Entities under or in respect of any Excluded Contract or Excluded Liability (each an “**Excluded Liability Claim**”) shall no longer have such right or claim against the Acquired Entities but will have an equivalent Excluded Liability Claim against Residual Co. 1 or Residual Co. 2, as applicable, in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residual Co. 1 and/or Residual Co. 2; and
- (d) the Excluded Liability Claim of any Person against Residual Co. 1 and/or Residual Co. 2 following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the applicable Acquired Entities prior to the Effective Time.

17. **THIS COURT ORDERS AND DECLARES** that, as of the Effective Time:

- (a) Residual Co. 1 and Residual Co. 2 shall be companies to which the CCAA applies; and

- (b) Residual Co. 1 and Residual Co. 2 shall be added as Applicants in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to (i) an “Applicant” or the “Applicants” shall refer to and include Residual Co. 1 and Residual Co. 2, *mutatis mutandis*, and (ii) “Property” shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, of Residual Co. 1 and Residual Co. 2, including the Remaining Proceeds (the “**Residual Co. Property**”), and, for greater certainty, each of the Charges, shall constitute charges on the Residual Co. Property.

#### **PRIORITY PAYMENTS**

18. **THIS COURT ORDERS AND DIRECTS** that the Priority Payments Amount and the Cash Purchase Price, as necessary and as permitted by the Transaction Agreement, shall be distributed by Just Energy, on behalf of one or more of the Just Energy Entities, on the Closing Date consistent with the Implementation Steps, to satisfy the following obligations (collectively, the “**Priority Payments**”):

- (a) first, to the beneficiaries of the Administration Charge and the FA Charge, the amounts necessary to satisfy the Just Energy Entities’ obligations secured thereby up to the maximum respective amounts secured by such charges, in full and final satisfaction thereof;
- (b) second, to the beneficiaries of the KERP Charge, the amounts necessary to satisfy the Just Energy Entities’ obligations secured thereby (if any) up to the maximum amount secured by such charge, in full and final satisfaction thereof;

- (c) third, on a *pari passu* basis:
  - (i) to the DIP Agent, for the benefit of the beneficiaries of the DIP Lenders' Charge, an amount necessary to satisfy the Just Energy Entities' obligations secured by such charge, in full and final satisfaction thereof, and
  - (ii) to each Commodity Supplier, an amount necessary to satisfy such Commodity Supplier's Commodity Supplier Claim that is an Accepted Claim (as defined in the Claims Procedure Order), in full and final satisfaction thereof;
- (d) fourth, to each Government Entity, an amount necessary to satisfy such Government Entity's Government Priority Claim, in full and final satisfaction thereof; and
- (e) fifth, to the Credit Facility Agent, in the currency that such Credit Facility Claim was originally denominated, an amount equal to the Credit Facility Claim (less the Credit Facility Remaining Debt, if any), in full and final satisfaction thereof.

19. **THIS COURT ORDERS** that, subject to completion of the Priority Payments set out in paragraph 18 hereof, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge shall be and are hereby terminated, released and discharged.

20. **THIS COURT ORDERS** that the Administrative Expense Amount held by the Monitor shall be subject to the Administration Charge, and any remaining portion thereof after payment of the Administrative Expense Costs shall be paid to Just Energy in accordance with the terms of the Transaction Agreement.



**RELEASES AND OTHER PROTECTIONS**

21. **THIS COURT ORDERS** that, effective as of the Effective Time, (a) the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities, Residual Co. 1 and Residual Co. 2 (or any of them); (b) the Monitor and its legal counsel; (c) the Sponsor and their respective current and former directors, officers, employees, legal counsel and advisors; and (d) the Credit Facility Agent and the Credit Facility Lenders, and their respective current and former directors, officers, employees, legal counsel and advisors (in such capacities, collectively, the “**Released Parties**”) shall be deemed to be forever irrevocably released by the Releasing Parties (as hereinafter defined) and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Time or undertaken or completed in connection with or pursuant to the terms of this Order in respect of, relating to, or arising out of (i) the Just Energy Entities, the business, operations, assets, property and affairs of the Just Energy Entities wherever or however conducted or governed, the administration and/or management of the Just Energy Entities, these CCAA proceedings and/or the Chapter 15 Cases, or (ii) the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents (when used in this Order, as defined in the Support Agreement), any agreement, document, instrument, matter or transaction

involving the Just Energy Entities arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions (collectively, subject to the excluded matters below, the “**Released Claims**”), which Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; provided that, nothing in this paragraph shall waive, discharge, release, cancel or bar (x) any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA or claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence, or (y) any obligations of any of the Released Parties under or in connection with the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents, and/or any agreement, document, instrument, matter or transaction involving the Just Energy Entities arising in connection with or pursuant to any of the foregoing. “**Releasing Parties**” means any and all Persons (besides the Just Energy Entities and their respective current and former affiliates), and their current and former affiliates’ current and former members, directors, managers, officers, investment committee members, special committee members, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, participants, subsidiaries, affiliates, partners, limited partners, general partners, affiliated investment funds or investment vehicles, managed accounts or funds, and each of their respective current and former members, equity holders, officers, directors, managers, principals, members, management companies, advisory board members, investment fund advisors or managers, employees, agents, trustees, investment managers, financial advisors, partners, legal counsel, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

22. **THIS COURT ORDERS** that, effective as of the Effective Time, the Released Parties shall be deemed to be forever irrevocably released by each of the Just Energy Entities and their respective current and former affiliates, and discharged from, any and all Released Claims held by the Just Energy Entities and such current and former affiliates as of the Effective Time, which Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; provided that, nothing in this paragraph shall waive, discharge, release, cancel or bar (a) any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA or claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence; or (b) any obligations of any of the Released Parties under or in connection with the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents, and/or any agreement, document, instrument, matter or transaction involving the Just Energy Entities arising in connection with or pursuant to any of the foregoing; provided further that, the releases set forth in this paragraph shall not include, nor limit or modify in any way, any claim (or any defenses) which any of the Just Energy Entities may hold or be entitled to assert against any Released Party as of the Effective Time relating to any contracts, leases, agreements, licenses, bank accounts or banking relationships, accounts receivable, invoices, or other ordinary course obligations which are remaining in effect following the Effective Time.

23. **THIS COURT ORDERS** that, without affecting or limiting the releases set forth in paragraphs 21 and 22 hereof, effective as of the Effective Time, none of (a) the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities, Residual Co. 1 and Residual Co. 2 (or any of them); (b) the Monitor and its legal counsel; (c) the Sponsor and

their respective current and former directors, officers, employees, legal counsel and advisors; and (d) the Credit Facility Agent and the Credit Facility Lenders, and their respective current and former directors, officers, employees, legal counsel and advisors (in such capacities, collectively, the “**Exculpated Parties**”), shall have or incur, and each Exculpated Party is released and exculpated from, any Causes of Action (as hereinafter defined) against such Exculpated Party for any act or omission in respect of, relating to, or arising out of the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents and/or the consummation of the Transactions, these CCAA proceedings, the Chapter 15 Cases, the formulation, preparation, dissemination, negotiation, filing or consummation of the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents and all related agreements and documents, any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Transactions, the pursuit of approval and consummation of the Transactions or the recognition thereof in the United States, and/or the transfer of assets and liabilities pursuant to this Order, except for Causes of Action related to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence. “**Causes of Action**” means any action, claim, cross-claim, third-party claim, damage, judgment, cause of action, controversy, demand, right, action, suit, obligation, liability, debt, account, defense, offset, power, privilege, license, lien, indemnity, interest, guaranty, or franchise of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, matured or unmatured, suspected or unsuspected, in contract or in tort, at law or in equity, or pursuant to any other theory of law or otherwise.

24. **THIS COURT ORDERS** that all Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all claims or Cause of Actions released pursuant to this Order (including but not limited to the Released Claims), from (a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any of the Released Parties or Exculpated Parties; (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against any of the Released Parties, the Exculpated Parties, or their respective property; (c) commencing, conducting, continuing or making in any manner, directly or indirectly, any action, suit, claim, demand or other proceeding of any nature or kind whatsoever (including any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes a claim or might reasonably be expected to make a claim, in any manner or forum, including by way of contribution or indemnity or other relief, against one or more of the Released Parties or the Exculpated Parties; (d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Encumbrance of any kind against the Released Parties, the Exculpated Parties, or their respective property; or (e) taking any actions to interfere with the consummation of the Transactions; and any such proceedings will be deemed to have no further effect against such parties and will be released, discharged or vacated without cost.

25. **THIS COURT ORDERS** that, without affecting or limiting the releases set forth in paragraphs 21 and 22 hereof, effective as of the Effective Time, each Consenting Party (as hereinafter defined) shall be deemed to have consented and agreed to paragraphs 21 through 25

hereof. “**Consenting Parties**” means any Person who is, at the Effective Time, a party to the Support Agreement.

26. **THIS COURT ORDERS** that, notwithstanding paragraphs 5, 21 and 22 hereof but subject to paragraphs 27 to 31 hereof, neither Just Energy, Just Energy Corp. nor Just Energy Ontario L.P. (collectively, the “**Specified JE Entities**”), nor any of their current or former officers and/or directors, shall be released from any claim or potential claim, whether at law or in equity, known or unknown, existing up to the Effective Time, in any way connected with, arising out of or relating to the matters raised, or which might have been raised, in the action commenced in the Ontario Superior Court of Justice on May 4, 2015 titled *Haidar Omarali v Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P.*, Court File No. CV-15-52749300 CP, against the Specified JE Entities or any of their current or former officers and/or directors, including, without limitation, the claims filed by Haidar Omarali, as representative plaintiff, in the Claims Process (as defined in the Claims Procedure Order) conducted by the Just Energy Entities in these CCAA proceedings, being (a) a Proof of Claim (as defined in the Claims Procedure Order) for CAD\$108,854,794.52 against the Specified JE Entities; and (b) a D&O Proof of Claim for CAD\$108,854,794.52 against the Directors (each as defined in the Claims Procedure Order) of Just Energy and Just Energy Corp. listed in schedules A and B to such D&O Proof of Claim (collectively, such claims, the “**Class Action Claim**”), solely to the extent it is necessary with respect to maintaining any claims as against the insurance policies of the Specified JE Entities that may be available to pay insured claims in respect of the Specified JE Entities or their current or former directors and officers (such policies set forth in **Schedule “D”** hereto, the “**Insurance Policies**”) and, solely for the purpose of recovery against the Insurance Policies, such Class Action Claim shall be deemed not to be transferred to Residual Co. 1 or Residual Co. 2.

27. **THIS COURT ORDERS** that, from and after the Effective Time, any Person having a Class Action Claim (a “**Class Action Claimant**”) shall only be entitled to recover from proceeds under the Insurance Policies, to the extent available in respect of any such Class Action Claim, and the recovery of such Class Action Claimants shall be solely limited to such proceeds, without any additional rights of enforcement or recovery as against the Just Energy Entities (including, for certainty, the Acquired Entities) or the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities (or any of them) (in such capacities, collectively, the “**Protected JE Parties**”). The Specified JE Entities will not be required to incur any costs or expenses or to participate in the proceeding with respect to the Class Action Claim, except to the extent reasonably necessary to provide information or evidence reasonably necessary for the determination of such claim solely to seek recovery from proceeds under the Insurance Policies.

28. **THIS COURT ORDERS** that all Class Action Claimants shall be irrevocably and forever limited solely to recovery from the proceeds of the Insurance Policies payable on behalf of the Specified JE Entities or their directors and officers in respect of any such Class Action Claim, and such Class Action Claimants shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any of the Protected JE Parties in respect of any Class Action Claim, other than enforcing their rights to be paid from the proceeds of the applicable Insurance Policies available to the Specified JE Entities.

29. **THIS COURT ORDERS** that nothing contained in this Order prejudices, compromises, releases or otherwise affects (a) any right, defence or obligation of any insurer in respect of an Insurance Policy; or (b) any Class Action Claimant from recovering against the Specified JE Entities’ current and former directors and officers for any liabilities or claims attributable to any such director or officer’s fraud, wilful misconduct, criminal act or criminal omission, as

determined by the final, non-appealable judgment of a court of competent jurisdiction; provided that, there shall be no claim over against any other Protected JE Party. Notwithstanding any other provision of this Order, nothing in this Order shall restrict, release or in any way compromise any Class Action Claim or recovery thereunder against any Person other than the Protected JE Parties.

30. **THIS COURT ORDERS** that any proceedings with respect to the Class Action Claim, including with respect to any recovery sought by the Class Action Claimants as against the Insurance Policies, may continue in these CCAA proceedings following the closing of the Transactions (notwithstanding the fact that the Acquired Entities will be released from the purview of these CCAA proceedings at that point in time pursuant to paragraph 5(f) hereof).

31. **THIS COURT ORDERS** that any approval required, including pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“CPA”), to give effect to the inclusion of provisions 26 to 30 hereto in this Order is hereby granted, and any notice that may be required pursuant to the CPA is dispensed with.

32. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these CCAA proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Just Energy Entities, Residual Co. 1 or Residual Co. 2, and any bankruptcy order issued pursuant to any such applications;
- (c) any assignment in bankruptcy made in respect of any of the Just Energy Entities, Residual Co. 1 or Residual Co. 2; or



(d) any foreign law equivalent of (b) or (c).

the Transaction Agreement, the Closing Documents, the consummation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, the Excluded Contracts and the Excluded Liabilities in and to Residual Co. 1 and Residual Co. 2, as applicable, the transfer and vesting of the Purchased Interests in and to the Sponsor, the payment of the Priority Payments, and any payments by or to the Sponsor, the Just Energy Entities or the Monitor authorized herein or pursuant to the Transaction Agreement and the Closing Documents) shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Just Energy Entities, Residual Co. 1 and/or Residual Co. 2, and shall not be void or voidable by creditors of the Just Energy Entities, Residual Co. 1 or Residual Co. 2, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

33. **THIS COURT ORDERS** that nothing in this Order, including the release of the Acquired Entities from the purview of these CCAA proceedings pursuant to paragraph 5(f) hereof and the addition of Residual Co. 1 and Residual Co. 2 as Applicants in these CCAA proceedings, shall affect, vary, derogate from, limit or amend, and FTI shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, this Order, any other Orders in these CCAA proceedings or otherwise, including all approvals, protections and stays of proceedings in favour of FTI in its capacity as Monitor, all of which are expressly continued and confirmed.

**EMPLOYEES**

34. **THIS COURT ORDERS** that Residual Co. 1 shall be deemed to be the former employer of any former employees of the Just Energy Entities who were terminated between September 9, 2020 and the Effective Time whose claims against the Just Energy Entities are transferred to Residual Co. 1 pursuant to this Order, provided that such deeming: (i) shall be effective immediately after the Effective Time; and (ii) will solely be for the purposes of termination pay and severance pay pursuant to the *Wage Earners Protection Program*.

**GENERAL**

35. **THIS COURT ORDERS** that, having been advised of the provisions of Multilateral Instrument 61-101 “Protection of Minority Security Holders in Special Transactions” relating to the requirement for “minority” shareholder approval in certain circumstances, no meeting of shareholders or other holders of Equity Claims (as defined in the CCAA) in the Just Energy Entities is required to be held in respect of the Transactions and accordingly, there is no requirement to send any disclosure document related to the Transactions to such holders.

36. **THIS COURT ORDERS** that, following the Effective Time, the Sponsor shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances (other than the Permitted Encumbrances) as against the Purchased Interests, the Acquired Entities and the Retained Assets.

37. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings shall be hereby changed by removing the current Applicants that are not Excluded Entities and adding Residual Co. 1 and Residual Co. 2.

38. **THIS COURT DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

39. **THIS COURT DECLARES** that the Just Energy Entities shall be authorized to apply as they may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States or elsewhere, for orders which aid and complement this Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and the Monitor as may be deemed necessary or appropriate for that purpose.

40. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court for the Southern District of Texas overseeing the Just Energy Entities' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 21-30823 (MI), to give effect to this Order and to assist the Just Energy Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.

41. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof; provided that, the transaction steps set out in

paragraph 5 hereof shall be deemed to have occurred in the order set out in the Implementation Steps.

McE. T.

**SCHEDULE "A"**  
**PARTNERSHIPS**

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

**SCHEDULE “B”  
FORM OF MONITOR’S CERTIFICATE**

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., 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.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**MONITOR’S CERTIFICATE**

**RECITALS**

1. Pursuant to the Initial Order of the Honourable Justice Koehnen of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated March 9, 2021, the Applicants were granted protection from their creditors pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and FTI Consulting Canada Inc. was appointed as the monitor (the “**Monitor**”).

2. Pursuant to an Approval and Vesting Order of the Court dated ●, 2022 (the “**Order**”), the Court approved the transactions (collectively, the “**Transactions**”) contemplated by the Transaction Agreement (as amended, the “**Transaction Agreement**”) between Just Energy Group Inc. (“**Just Energy**”) and LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the “**Sponsor**”) dated as of August 4, 2022, and ordered, *inter alia*, (a) that all of the Acquired Entities’ right, title and interest in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities shall vest absolutely and exclusively in and to Residual Co. 1 and/or Residual Co. 2, as applicable; (b) Just Energy (U.S.) Corp. to issue the Purchased Interests, and the vesting of all of the right, title and interest in and to the Purchased Interests absolutely and exclusively in and to the Sponsor, free and clear of any Encumbrances; (c) Just Energy to file the Articles of Reorganization; and (d) the termination and cancellation or redemption of the Subject Interests for no consideration (as provided for in the Implementation Steps).

3. Capitalized terms used but not defined herein have the meanings ascribed to them in the Order.

**THE MONITOR CERTIFIES** the following:

1. The Monitor has received written confirmation from Just Energy, in form and substance satisfactory to the Monitor, that it has received the Cash Purchase Price from the Sponsor.

2. The Monitor has received written confirmation from the Sponsor and Just Energy, in form and substance satisfactory to the Monitor, that all conditions to closing have been satisfied or waived by the parties to the Transaction Agreement.

3. This Monitor's Certificate was delivered by the Monitor at \_\_\_\_\_ on \_\_\_\_\_, 202●  
(the "Effective Time").

**FTI CONSULTING CANADA INC., in its  
capacity as Monitor of the Just Energy  
Entities, and not in its personal capacity**

Per: \_\_\_\_\_

Name:

Title:



**SCHEDULE “C”  
PERMITTED ENCUMBRANCES**

- Encumbrances securing Assumed Liabilities to the extent that such Assumed Liabilities are secured by Encumbrances as of the Closing Time
- Encumbrances securing obligations under the New Credit Agreement
- Encumbrances which are the subject of the New Intercreditor Agreement
- “Permitted Encumbrances” as defined in the Credit Agreement, subject to those amendments to such definition provided for in Exhibit 1 of the Stalking Horse Term Sheet, except to the extent that they relate to an Excluded Liability or Excluded Asset

*Capitalized terms in this Schedule “C” shall have the meanings ascribed thereto in the Transaction Agreement or, where expressly indicated, the Credit Agreement.*

**SCHEDULE “D”  
INSURANCE POLICIES**

- Policy Term April 1 2020 – April 1, 2021:
  - XL Special Insurance Company – Policy No. B0146ERINT2000452
  - Hiscox – Policy No. B0146ERINT2000453
  - Sompo – Policy No. B0146ERINT2000454
  - AWAC & Starr – Policy No. B0146ERINT2000455
  - Tokio Marine – Policy No. 34-MGU-20-A49117/20G19646000
  - (Llyods Syndicate) – Policy No. B0146ERINT2000768
  - CNA Canada Continental Casualty Company – Policy No. MEX 665412022
  - Beazley – Policy No. B0146ERINT2000774
  - XL Catlin – Policy No. B0146ERINT2000775
  
- Policy Term March 9, 2021-March 9, 2022:
  - XL Special Insurance Company – Policy No. ELU173707-21
  - Tokio Marine HCC – Policy No. 21G196460101
  - Hiscox - Policy No. B0146ERINT2100865

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al.

3 Nov 22

Order to go as per the draft filed and signed.  
Reasons will shortly follow.



*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**APPROVAL AND VESTING ORDER**

**OSLER, HOSKIN & HARCOURT, LLP**

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Lawyers for the Just Energy Entities



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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

THE HONOURABLE )  
JUSTICE CAVANAGH )  
TUESDAY, THE 10TH  
DAY OF SEPTEMBER, 2024

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 14487893 CANADA INC.

APPLICANT

**ORDER  
(Stay Extension)**

**THIS MOTION**, made by FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the Applicant (in such capacity, the "**Monitor**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order extending the stay of proceedings to January 31, 2025, was heard this day by judicial video-conference at 330 University Avenue, Toronto, Ontario.

**ON READING** the Notice of Motion and the Seventeenth Report of the Monitor dated August 30, 2024 (the "**Seventeenth Report**"), and on hearing the submissions of counsel for the Monitor and such other counsel that were present, no one else appearing for any party although duly served as appears from the Affidavit of Service of Puya Fesharaki sworn August 30, 2024.

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the Monitor's Report.

### STAY EXTENSION

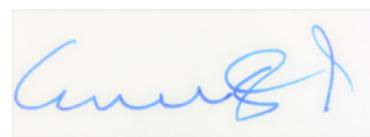
3. **THIS COURT ORDERS** that the Stay of Proceedings is hereby extended until and including January 31, 2025.

### GENERAL

4. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

5. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada, the United States of America or in any other foreign jurisdiction, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

6. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.



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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 **14487893 CANADA INC.**

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

Proceedings commenced at Toronto, Ontario

**ORDER**  
**(Stay Extension)**

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Lawyers for the Court-appointed Monitor,  
FTI Consulting Canada Inc.

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 14487893 CANADA INC., 11368, LLC, 12175592 CANADA INC., DRAG MARKETING LLC, JUST SOLAR HOLDINGS CORP., JUST ENERGY CONNECTICUT CORP., AND JUST ENERGY (FINANCE) HUNGARY ZRT. (each, an "**Applicant**", and collectively, the "**Applicants**")

(each, an "**Applicant**", and collectively, the "**Applicants**")

**MOTION RECORD OF HAIDAR OMARALI IN HIS CAPACITY AS REPRESENTATIVE PLAINTIFF IN *OMARALI V. JUST ENERGY***

**KOSKIE MINSKY LLP**

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Counsel for Haidar Omarali in his capacity  
as Representative Plaintiff Omarali v. Just  
Energy

**TO: SERVICE LIST**

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 14487893 CANADA INC., 11368, LLC, 12175592 CANADA INC., DRAG MARKETING LLC, JUST SOLAR HOLDINGS CORP., JUST ENERGY CONNECTICUT CORP., AND JUST ENERGY (FINANCE) HUNGARY ZRT.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**SERVICE LIST**

(as at January 4, 2023)



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| <p><b>KITCHENER-WILMOT HYDRO INC.</b><br/> 301 Victoria Street South<br/> P.O. Box 9010<br/> Kitchener, ON N2G 4L2</p> <p>Fax: 519.745.3631</p>  | <p>Email: <a href="mailto:jvanooteghem@kwhydro.ca">jvanooteghem@kwhydro.ca</a></p> <p><b>Margaret Nanninga</b><br/> Vice-President Finance &amp; CFO<br/> Tel: 519.749.6177<br/> Email: <a href="mailto:MNanninga@KWHydro.ca">MNanninga@KWHydro.ca</a></p> |

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| <p><b>MIDLAND POWER UTILITY CORPORATION</b><br/> 16984 Highway 12<br/> PO Box 820<br/> Midland, ON L4R 4P4</p> <p>Fax: 705.526.7890</p> <p>Copy to:</p> <p><b>NEWMARKET-TAY POWER DISTRIBUTION LTD.</b><br/> 590 Steven Court<br/> Newmarket, ON L3Y 6Z2</p> | <p>Email: <a href="mailto:chuma@midlandpuc.on.ca">chuma@midlandpuc.on.ca</a></p> <p>Copy to:</p> <p>Email: <a href="mailto:regulatory@nmhydro.ca">regulatory@nmhydro.ca</a></p>                   |
| <p><b>MILTON HYDRO DISTRIBUTION INC.</b><br/> 8069 Lawson Road<br/> Milton, ON L9T 5C4</p> <p>Fax: 905.876.2044</p> <p>Copy to:</p> <p><b>MILTON HYDRO DISTRIBUTION INC.</b><br/> 200 Chisholm Drive<br/> Milton, ON L9T 3G9</p>                             | <p>Email: <a href="mailto:igor.rusic@miltonhydro.com">igor.rusic@miltonhydro.com</a></p> <p>Copy to:</p> <p>Email: <a href="mailto:regulatory@miltonhydro.com">regulatory@miltonhydro.com</a></p> |
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| <p><b>GAZ METRO LIMITED PARTNERSHIP C/O ENERGIR</b><br/> 1717 du Havre Street<br/> Montreal, QC H2K 2X3</p> <p>Fax: 514.598.3678</p>  | <p>Email: <a href="mailto:info@energir.com">info@energir.com</a></p>                           |

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|  | Exhibit V - Eleventh Report of the Monitor August 13, 2022              | 660  |
|  | Exhibit W -Endorsement of Justice McEwen August 18, 2022                | 699  |
|  | Exhibit X - Affidavit of M. Carter May 12, 2021                         | 741  |
|  | Exhibit Y - Twelfth Report of the Monitor October 27, 2022              | 806  |
|  | Exhibit Z - Reverse Approval and Vesting Order November 3, 2022         | 844  |
|  | Exhibit AA - XL Special Insurance Company – B0146ERINT2000452           | 879  |
|  | Exhibit BB - Hiscox – B0146ERINT2000453                                 | 940  |
|  | Exhibit CC - Sompo – B0146ERINT2000454                                  | 971  |
|  | Exhibit DD - AWAC _ Starr – B0146ERINT2000455                           | 1002 |
|  | Exhibit EE - Tokio Marine 34-MGU-20-A49117_20G19646000                  | 1032 |
|  | Exhibit FF - Llyods Syndicate – B0146ERINT2000768                       | 1035 |
|  | Exhibit GG - CNA Canada Continental Casualty Company - MEX<br>665412022 | 1095 |
|  | Exhibit HH -Beazley– B0146ERINT2000774                                  | 1100 |
|  | Exhibit II - XL Catlin – B0146ERINT2000775                              | 1131 |
|  | Exhibit JJ - XL Special Insurance Company - ELU173707-21                | 1161 |
|  | Exhibit KK - Tokio Marine HCC – Policy No. 21G196460101                 | 1187 |
|  | Exhibit LL - Hiscox - Policy No. B0146ERINT2100865                      | 1214 |
|  | Exhibit MM - Notice Letter Policy No ELU173707-21                       | 1235 |
|  | Exhibit NN - Notice Letter Policy No 21G196460101                       | 1237 |
|  | Exhibit PP - December 16_ 2021 Letter from AXA XL to JE                 | 1240 |
|  | Exhibit QQ -December 23_ 2021 Letter from JE to D_O Insurers (20-21)    | 1243 |
|  | Exhibit RR - December 23_ 2021 Letter from JE to D_O Insurers (21-22)   | 1240 |

|           |   |      |
|-----------|---|------|
|           | Exhibit SS - June 15_ 2022 Letter from AXA XL to JE | 1256 |
| <b>3.</b> | <b>Draft Order re Insurance Claims</b>              | 1264 |

**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 14487893 CANADA INC., 11368, LLC, 12175592 CANADA INC., DRAG  
MARKETING LLC, JUST SOLAR HOLDINGS CORP., JUST ENERGY  
CONNECTICUT CORP., AND JUST ENERGY (FINANCE) HUNGARY ZRT.  
(each, an "**Applicant**", and collectively, the "**Applicants**")

(each, an "**Applicant**", and collectively, the "**Applicants**")

**NOTICE OF MOTION**

**THE MOVING PARTY**, Haidar Omarali in his capacity as representative plaintiff of the certified class (the "**Class**" or the "**Class Members**") in *Omarali v. Just Energy* (the "**Class Action**"), will make a motion before the Honourable Justice Cavanagh at a date and time to be set at a case conference.

**PROPOSED METHOD OF HEARING:** The motion is to be heard by videoconference.

**THE MOTION IS FOR:**

1. With respect to the certified Common Issues (as that term is defined below), a declaration that:
  - a. Class Members are "employees" of Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P. (collectively, "**Just Energy**") pursuant to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("**ESA**");
  - b. Class Members are not exempt from Parts VII, VIII, IX, X and XI of the ESA

because the Class Members are "route salespersons" pursuant to section 2(1)(h) of O. Reg. 285/0;

- c. minimum requirements of the ESA with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay are express or implied terms of the contracts with the Class Members;
  - d. Just Energy failed to make the prescribed employer CPP or EI contributions on behalf of Class Members;
2. A declaration that:
- a. all CPP and EI payments that Just Energy failed to make on the wages actually paid to Class Members is an unpaid debt for services performed for the corporation owed to Class;
  - b. all employment expenses paid by Class Members in the course of their employment, which were not reimbursed by Just Energy is an unpaid debt for services performed for the corporation owed to Class;
  - c. the unpaid minimum wage, overtime pay, vacation and public holiday and premium pay for the hours the Class Members worked is an unpaid debt for services performed for the corporation owed to the Class; and
  - d. the CPP and EI contributions on the wages owed to the Class are an unpaid debt for services performed for the corporation owed to the Class.
3. An aggregate determination of the amount of damages on account of minimum wage,

overtime pay, vacation pay, public holiday pay, and premium pay owed to the Class in an amount that this Court deems appropriate, to be distributed to Class Members on an average or proportional basis in accordance with s. 24 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6;

4. A declaration that the average or proportionate amount to be paid to each Class Member determined in paragraph 3 is a debt owed to each Class Member within the meaning of section 131 of the *Business Corporations Act*, R.S.O. 1990, c. B. 16 ("**OBCA**") and section 119 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("**CBCA**");
5. A declaration that the average or proportionate amounts determined in paragraph 3 and referenced in paragraph 4 are a loss covered under the Insurance Policies (as that term is defined below);
6. To the extent necessary, an order that the Insurers (as that term is defined below) are a necessary and proper party to this motion and proceeding;
7. An order directing the Insurers to pay the amounts owed under the Insurance Policies described in paragraph 4, pursuant to and in accordance with the coverage and deductibles set out in the Insurance Policies;
8. To the extent necessary, relief from forfeiture pursuant to the *Insurance Act* R.S.Q. 1990, c. I.8 and/or the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, should the Court find imperfect compliance with the terms of the Insurance Policies;
9. To the extent necessary, to determine any claim related to any of the relief contained in paragraph 1 to 8 within the CCAA Proceedings (as that term is defined below); and

10. Such further and other relief as counsel may advise and this Court may permit.

**THE GROUNDS FOR THIS MOTION ARE:**

**A. Just Energy Misclassified Thousands of Employees**

1. On July 27, 2016, this Court certified this Class Action. The Court appointed Mr. Omarali as the Representative Plaintiff and Koskie Minsky LLP as counsel for the Class. The then-current directors and officers of Just Energy were not named as parties to the Class Action.
2. This certified Class Action concerns Just Energy's misclassification of 7,723 employees as "independent contractors". There were 13 certified common issues, set out in Appendix A (the "**Common Issues**").
3. Just Energy is an independent energy retailer. Rather than distributing or producing gas or electricity, it buys it and resells it to consumers at a markup. To recruit customers, Just Energy relied on door-to-door marketers whom it referred to as "Sales Agents".
4. Just Energy misclassified these Sales Agents as "independent contractors" despite the true nature of the engagement. In doing so, Just Energy denied Sales Agents minimum wage, overtime pay, vacation pay, holiday pay and minimum working hours and conditions.
5. The structure that Just Energy imposed on its Sales Agents was fundamentally inconsistent with an independent contractor relationship because Just Energy:
  - a. controlled when, where, and how Class Members worked, down to verbatim scripts;



- b. required Class Members to work out of its branded offices in branded clothing, exclusively for its benefit;
- c. required Class Members to market exclusively for it;
- d. required Class Members to undergo extensive standardized training created by it and administer by its employees or agents;
- e. retained supervisors who monitored class members "on the clock" in real- time – including using iPads and text messaging;
- f. centrally recruited Class Members through workers it conceded were its employees;
- g. limited Class Members to fixed commissions it could unilaterally change and "claw back" at any time;
- h. established a pyramidal commission structure that incentivised control and direction from supervisors retained by Just Energy;
- i. had an extensive department devoted to supervision and discipline of Class Member performance through a uniform Compliance Matrix;
- j. retained supervisors who directed on where Class Members were to market by driving the Class Members to the assigned locations in vans, providing maps of territory to market, monitoring locations through iPads and providing direction by text messages; and

- k. directly handled all customer complaints and unilaterally determined to accept to reject customer contracts.
6. These misclassified Sales Agents were fundamental to the business of Just Energy – signing up Just Energy's customers.
7. On November 28, 2016, shortly after this Class Action was certified, Just Energy formally reclassified its Sales Agents from "independent contractors" to employees.
8. Former "Sales Agents" are now called "Energy Advisors", doing the same job but now being paid hourly wages. Just Energy did not compensate Class Members for minimum wage, overtime, holiday pay and vacation pay that was not paid prior to Just Energy's internal reclassification.

#### **B. Just Energy's CCAA Filing Stayed the Class Action**

9. On November 20, 2019, the Class Action was scheduled for a 20-day common issues trial starting on November 15, 2021 (the "**Common Issues Trial**"). The Common Issues trial never took place.
10. On March 9, 2021, the Applicants, including Just Energy, filed for protection from their creditors and obtained an order commencing these proceedings ("**CCAA Proceedings**").
11. In support of its filing, the Applicants stressed that "unprecedented and catastrophic" events resulted in over \$315 million dollars of losses, and making it impossible for Just Energy to pay its existing creditors.
12. Throughout the CCAA Proceedings, the Applicants emphasized that there was no prospect

of meaningful financial recovery for unsecured class members and that Just Energy had no funds and, significant to this motion, no ability to pay debts owing to employees.

### **C. Class Members Participate in Claims Process**

13. On September 15, 2021, Just Energy sought and received court approval for a claims' procedure order and process (the "**Claims Process**").
14. On September 21, 2021, Class Counsel wrote to Just Energy to advise that as a result of Just Energy's inability to pay its debts Class Members had valid claims for unpaid wages against Just Energy's directors and officers, and would be pursuing those claims.
15. On October 29, 2021, Class Counsel filed proof of claim forms on behalf of Class Members against Just Energy and their current directors and officers, who are statutorily liable for unpaid wage debts pursuant to the OBCA and CBCA (the "**Statutory Wage Claim**").
16. On February 2, 2022, Just Energy disallowed Class Members' claims, including claims against its current directors and officers. On February 24, 2022, Class Counsel filed a Notice of Dispute for all Class Members.

### **D. Insurance Proceeds Available to the Class**

17. On November 3, 2022, the Applicants sought and obtained an approval and vesting order (the "**Approval and Vesting Order**"), approving a restructuring transaction of all of the Applicants. Although the Approval and Vesting Order released claims against current directors and officers, the Statutory Wage claim was explicitly carved out with respect to seeking recovery against any applicable insurance policies:

...to the extent it is necessary with respect to maintaining any claims as against the insurance policies of the [Just Energy] that may be available to pay insured claims in respect of [Just Energy] or their current or former directors and officers...and, solely for the purpose of recovery against the Insurance Policies and, solely for the purpose of recovery against the Insurance Policies, such Class Action Claim shall be deemed not to be transferred...

18. The Approval and Vesting Order revised the Claims Process, permitting Class Members to pursue the Statutory Wage Claim in this CCAA Proceeding and, to the extent necessary, join any applicable insurers:

...any proceedings with respect to the Class Action Claim, including with respect to any recovery sought by the Class Action Claimants as against the Insurance Policies, may continue in these CCAA proceedings following the closing of the Transactions (notwithstanding the fact that the Acquired Entities will be released from the purview of these CCAA proceedings at that point in time pursuant to paragraph 5(f) hereof).

19. The Approval and Vesting Order also made clear that Just Energy would not incur any costs with respect to the litigation of the Statutory Wage Claim, other than "to the extent reasonably necessary to provide information or evidence reasonably necessary for the determination of such claim...".

#### **E. D&Os Indemnified for Statutory Wage Claims**

20. Just Energy Corp. is an OBCA company. Section 131 of the OBCA renders directors of a corporation to statutorily liable for all debts not exceeding six months wages and for vacation accrued to the corporation's employees:

##### **Directors' liability to employees for wages**

131 (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are

directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the Employment Standards Act, and the regulations thereunder, or under any collective agreement made by the corporation.

21. Just Energy Group Inc. is a CBCA company. Section 119 of the CBCA renders directors of a corporation liable for all debts not exceeding six months wages to the corporation's employees:

**Liability of directors for wages**

119 (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

22. On March 9, 2021, the same day that Just Energy filed for creditor protection, XL Specialty Insurance Company issued insurance policy ELU173707-21 (the "**XL Policy**"). Excess coverage was issued by Tokio Marine HCC through Policy No. 21G196460101 (the "**TM Policy**") and by Hiscox through Policy No. B0146ERINT2100865 (the "**Hiscox Policy**", and collectively with the XL Policy and TM Policy, the "**Insurance Policies**").
23. The XL Policy indemnifies D&Os for liability for "salary, wages and related amounts such as vacation pay or holiday pay that are or were payable by [Just Energy] to an employee for services performed if [the D&O] has become personally liable to make such payment under any applicable federal, provincial, territorial or municipal statutory provision".
24. As excess insurance, the Hiscox Policy and the TM Policy mirrors the XL Policy coverage.
25. There is no applicable exclusion. In particular, any prior act or litigation exclusion would render nugatory coverage for the most obvious, and explicitly indemnified, risk for which

the Insurance Policies were issued: liability for debts prescribed by corporate statute.

#### **F. Class Entitled to Insurance Proceeds**

26. Class Members, who were misclassified as employees by Just Energy, are entitled to wages and benefits pursuant to section 119 of the CBCA and section 131 of the OBCA. Directors of Just Energy, in turn, are indemnified for such amounts pursuant to the Insurance Policies.
27. For that reason, XL Specialty Insurance Company, Tokio Marine HCC and Hiscox (collectively, "**Insurers**") are a necessary and proper party to the proceeding and motion.
28. The CCAA, as reinforced through the Approval and Vesting Order, is a flexible statute designed to facilitate creditors claims in a sensible and commercially sound manner. These purposes are best achieved through a single proceeding designed to determine the value of Class Members' claims, directors' statutory liability for these claims, and any Insurers' duty to indemnify the directors for those claims.

#### **G. Statutory and Other Grounds**

29. Rules 1.04, 1.05, 2.01, 5.03, 16.01, 22.01(2) of the *Rules of Civil Procedure*.
30. Sections 2, 6, 11, 18.6, 20 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36.
31. Section 131 of the *Business Corporations Act*, R.S.O. 1990, c. B. 16.
32. Section 119 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.
33. Sections 24, 25 and 26 of the *Class Proceedings Act*, 1992, S.O. 1992

34. Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. The orders and endorsements made in the CCAA Proceedings;
2. The Affidavit of Jamie Shilton, dated August 18, 2023;
3. The Motion Records and Transcripts filed in the motion heard June 11-12, 2019; and
4. Such further and other evidence as counsel may advise and as this Court may permit.

**August 25, 2023**

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**Counsel for Haidar Omarali in his  
capacity as Representative Plaintiff  
*Omarali v. Just Energy***

**TO: CCAA SERVICE LIST**



## Appendix A – Certified Common Issues

### *Statutory Claim*

- (1) Are the Class Members "employees" of the Defendants pursuant to the *Employment Standards Act, 2000* ("ESA")?
- (2) If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants pursuant to the *Canada Pension Plan* ("CPP")?
- (3) If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants pursuant to the *Employment Insurance Act* ("EI")?
- (4) If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?
- (5) If the answers to (1) and (4) are "yes", do the minimum requirements of the *ESA* with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?

### *Breach of Contract*

- (6) If the answers to questions (1) and (4) are "yes", do the Defendants owe contractual duties and/or a duty of good faith to:
  - a. Ensure that the Class Members were compensated with the minimum wage?
  - b. Ensure that the Class Members' hours of work were monitored and accurately recorded?
  - c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
  - d. Ensure that the Class Members were compensated with vacation pay?

- e. Ensure that the Class Members were compensated with public holiday and premium pay?
- (7) Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?
  - (8) If the answers to (1) and (4) are "yes", did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the *ESA*?
  - (9) If the answers to (2) and/or (3) are "yes", did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

***Negligence***

- (10) Alternatively, did the Defendants owe a duty of care to the Class Members to:
  - a. ensure that Class Members are properly classified as employees;
  - b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;
  - c. ensure that the Class Members hours of work are monitored and accurately recorded; and
  - d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.
- (11) Did the Defendants breach any of the duties of care found to exist above? If so, how?

***Unjust Enrichment***

- (12) Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay owed to them, in accordance with the *ESA*, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Limitation Period Issue*

- (13) Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

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

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

AND IN THE MAATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST  
ENERGY GROUP INC., *et al.*

*Applicants*

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**NOTICE OF MOTION**

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**Counsel for Haidar Omarali in his  
capacity as Representative Plaintiff  
*Omarali v. Just Energy***

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 14487893 CANADA INC., 11368, LLC, 12175592 CANADA INC., DRAG MARKETING LLC, JUST SOLAR HOLDINGS CORP., JUST ENERGY CONNECTICUT CORP., AND JUST ENERGY (FINANCE) HUNGARY ZRT. (each, an "Applicant", and collectively, the "Applicants")

Applicants

**AFFIDAVIT OF JAMIE SHILTON  
(Affirmed August 18, 2023)**

I, Jamie Shilton, of the City of Toronto, in the Province of Ontario, AFFIRM and say:

1. I am a lawyer with Koskie Minsky LLP, Class Counsel in the class proceeding styled *Omarali v Just Energy* bearing Court File No. CV-15-527493-00CP (the "**Omarali Action**") and, as such, I have knowledge of the matters hereinafter deposed. I have also been provided information by David Rosenfeld, the lawyer with primary carriage of the Omarali Action, and James Harnum, a lawyer with Koskie Minsky LLP involved in this proceeding, which I believe to be true.

**A. Nature of the Omarali Action**

2. The Omarali Action was commenced by Statement of Claim against Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario LP (collectively, "**Just Energy**") on May 4, 2015. The Statement of Claim was amended on November 13, 2015. A copy of the Amended Statement of Claim is attached as **Exhibit "A"**.

3. As set out in the Amended Statement of Claim, the Omarali Action concerns Just Energy's misclassification of just over 7,700 employees as "independent contractors", and its failure to comply with the minimum protections of the *Employment Standards Act, 2000* ("ESA") – including minimum wage, overtime pay, vacation pay, public holiday and premium pay.

**B. Summary of the basis of the Class Members' claims**

4. This section provides a summary description of the evidence submitted by the Representative Plaintiff in support of the proofs of claim filed in this proceeding on behalf of all Class Members (defined below) in the Omarali Action.

5. In support of the proofs of claim, Class Counsel provided: (i) the Amended Statement of Claim; (ii) the Representative Plaintiff's motion record in support of his summary judgment motion hearing in June 2019 ("**Summary Judgment Motion**"); (iii) the transcript brief filed in support of the Summary Judgment Motion; and (iv) the Representative Plaintiff's moving factum for the Summary Judgment Motion. Copies of the supporting documents have been provided to Just Energy and the Monitor, and I reviewed those documents prior to affirming this affidavit.

6. The Representative Plaintiff's moving factum on the Summary Judgment Motion (a copy which is attached as **Exhibit "B"**) summarizes the extensive evidence submitted by the Plaintiff in support of the proofs of claim relating to the historical business practices of Just Energy, including the following:

- (a) Just Energy does not produce or distribute gas and electricity – rather it buys and resells it to consumers and profits on the difference;<sup>1</sup>

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<sup>1</sup> Representative Plaintiff's moving factum at para. 7.

- (b) To get customers to sign these contracts, Just Energy sends an army of marketers door-to-door seeking to get customers to sign Just Energy contracts – called "Sales Agents";<sup>2</sup>
- (c) To organize this army of marketers, Just Energy set up a hierarchical sales division:
  - (i) Just Energy owns or leases regional offices;
  - (ii) The regional offices have Just Energy signs on the front, Just Energy signs inside, and maintain only Just Energy promotional materials;
  - (iii) These offices are partly staffed by Just Energy "employees" (as deemed by Just Energy) and run by "independent contractors" called "National" or "Regional Distributors";
  - (iv) Regional Distributors operate the Just Energy offices and manage the "independent contractors" at that office on behalf of Just Energy (including "Crew Coordinators" and Sales Agents);
  - (v) Crew Coordinators help supervise Sales Agents and take direction from Regional Distributors; and
  - (vi) All Sales Agents must operate out of a Just Energy office;<sup>3</sup>
- (d) Just Energy imposes a commission-based compensation structure for this sales channel:
  - (i) Sales Agents only get paid fixed commission for contracts they originate;
  - (ii) Crew Coordinators get paid on commission on contracts they originate and receive commissions on contracts originated by Sales Agents they supervise; and
  - (iii) National/Regional Distributors receive commissions on contracts originated by all Sales Agents and Crew Coordinators out of their offices;<sup>4</sup>
- (e) Just Energy centrally recruit[s] Sales Agents using employees (as deemed by Just Energy) whose job it is to recruit Sales Agents on a daily basis. Those responding [to the recruiters] speak to Just Energy and are directed to a particular Just Energy office. Then, Just Energy recruiters at each office (employees as deemed by Just Energy) conduct "interviews" and sign the Independent Contractor Agreements ("ICA") with the Sales Agents;<sup>5</sup>

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<sup>2</sup> Representative Plaintiff's moving factum at para. 8.

<sup>3</sup> Representative Plaintiff's moving factum at paras. 10-11.

<sup>4</sup> Representative Plaintiff's moving factum at para. 12.

<sup>5</sup> Representative Plaintiff's moving factum at para. 13.

- (f) The ICA provides:
- (i) Sales Agents were to "market" and "solicit" contracts for the benefit of Just Energy LP;<sup>6</sup>
  - (ii) Sales Agents had to agree to abide by the terms and conditions delivered by Just Energy;<sup>7</sup>
  - (iii) Sales Agents were forbidden from working with any other company that competes with Just Energy during the course of the contract and for three years following termination;<sup>8</sup>
  - (iv) Sales Agents were compensated by way of a commission schedule<sup>9</sup> that Just Energy can unilaterally change in their sole discretion without advanced notice;<sup>10</sup>
  - (v) Just Energy unilaterally "claw backs" Sales Agents' commission when a consumer cancels or Just Energy deems the contract to be not "Effective";<sup>11</sup>
  - (vi) Just Energy had an unfettered and unilateral right to amend the contract at any time by posting the amended contract at the office where the Sales Agent's commissions are received.<sup>12</sup>
- (g) Sales Agents take part in an orientation process [that is] standard and dictated by Just Energy:
- (i) After signing the ICA, Regional Distributors or recruiters administer Just Energy's training through its 5-module training program;
  - (ii) Sales Agents are also provided with an Ontario Energy Board ("**OEB**") training module and have to pass an OEB examination;
  - (iii) Then Sales Agents are provided with their badge and sent into the field for more direct training and to market for Just Energy.<sup>13</sup>
- (h) Just Energy's centralized training directs Sales Agents on how to do their job for Just Energy including: when and how long to market; how to dress; how to approach customers; how to explain Just Energy products; how to handle questions; and how to explain and sign a contract;<sup>14</sup>

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<sup>6</sup> Representative Plaintiff's moving factum at para. 18.

<sup>7</sup> Representative Plaintiff's moving factum at para. 18.

<sup>8</sup> Representative Plaintiff's moving factum at para. 18.

<sup>9</sup> Representative Plaintiff's moving factum at para. 18.

<sup>10</sup> Representative Plaintiff's moving factum at para. 25.

<sup>11</sup> Representative Plaintiff's moving factum at para. 27.

<sup>12</sup> Representative Plaintiff's moving factum at para. 18.

<sup>13</sup> Representative Plaintiff's moving factum at para. 14.

<sup>14</sup> Representative Plaintiff's moving factum at para. 16.



- (i) Just Energy provides direction on how Sales Agents perform their work:
  - (i) daily morning meetings are held where best practices are explained;
  - (ii) daily role playing i[s] conducted before heading to the field;
  - (iii) a "Sales Binder" provides direction to [Sales Agents] on how to perform their work, including sales scripts and objection handling scripts;
  - (iv) job shadowing is conducted in the field; and
  - (v) supervision and direction is provided by Crew Coordinators in the field;<sup>15</sup>
- (j) Just Energy also directs Sales Agents on when and where they should market:
  - (i) marketing locations are determined by the Regional Distributors and Crew Coordinators during daily morning meetings;
  - (ii) Sales Agents are then driven to the field in vans by Crew Coordinators;
  - (iii) iPads are used to monitor and track Sales Agents in real time and then direct resources accordingly;
  - (iv) Crew Coordinators or Sales Agents are threatened with termination if they don't market in the approved areas;<sup>16</sup>
- (k) Just Energy has an extensive system to monitor and track Sales Agents' performance and discipline non-compliance including: a dedicated department that monitors Sales Agents' compliance with their work requirements; and a "Compliance Matrix" directing the discipline to be imposed for various conduct, including suspensions, fines and termination.<sup>17</sup>
- (l) Sales Agents "have no contemporaneous or ongoing relationship with customers, the relationship is exclusive to Just Energy":
  - (i) all energy contracts are made between Just Energy and the consumer;
  - (ii) Just Energy performs finalization and confirmation of all contracts;
  - (iii) Just Energy has sole discretion on whether to accept or reject a potential contract;
  - (iv) Just Energy handles customer complaints;

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<sup>15</sup> Representative Plaintiff's moving factum at para. 19.

<sup>16</sup> Representative Plaintiff's moving factum at para. 20.

<sup>17</sup> Representative Plaintiff's moving factum at para. 21.

- (v) Just Energy addresses renewals of consumer contracts; and
- (vi) when a Sales Agent leaves Just Energy they get no residual commission from that consumer contract.<sup>18</sup>

**i. The Omarali Action is Certified**

7. On July 27, 2016, Justice Belobaba certified the Omarali Action as a class proceeding with 13 common issues. A copy of the certification decision and certification order ("**Certification Order**") are attached as **Exhibit "C"** and **Exhibit "D"** respectively.<sup>19</sup>

8. Mr. Omarali was appointed as the "Representative Plaintiff" and Koskie Minsky was appointed as "Class Counsel" for the following class of people certified in the Certification Order: "[a]ny person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement" (the "**Class**" or "**Class Members**").

9. In accordance with the Certification Order, Just Energy provided a list of all known Class Members and their contact information on February 28, 2017 ("**Class List**"). Just Energy identified 7,914 Class Members in the Class List.

10. The opt out deadline was June 20, 2017. A total of 191 Class Members opted out. As a result, the Class consists of 7,723 members.

**ii. Just Energy Reclassifies Sales Agents as Employees**

11. Through discovery it was confirmed that on November 28, 2016 Just Energy formally adjusted its own classification of its then current Sales Agents from "independent contractors" to employees. They called it the "Nov 28, 2016 Ontario Employee conversion". In oral discoveries it

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<sup>18</sup> Representative Plaintiff's moving factum at para. 23 and footnote 43.

<sup>19</sup> Just Energy's motion for leave to appeal the certification decision was dismissed by the Divisional Court on November 17, 2016.

was confirmed that the same formal adjustment of Just Energy's classification of Sales Agents from "independent contractors" to employees occurred in the United States. Through discovery it was confirmed that the new title for Sales Agents after the classification adjustment was "Energy Advisor". It was also confirmed that the Sales Agents whose classification was adjusted were to be paid "hourly wages with overtime..." The discovery evidence for the forgoing includes:

- (a) Role Description: Sales, Exhibit "12" of the Affidavit of Michelle Alexander sworn, September 5, 2018 ("**Alexander Affidavit**"), Plaintiff's Summary Judgment Motion Record ("**Plaintiff's MR**"), p. 724, a copy of which is attached as **Exhibit "E"**; and
- (b) Email exchange between Rosalba Gullo, Richard Teixeira and Ryan Parnell, Exhibit "13" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, p. 728, a copy of which is attached as **Exhibit "F"**;
- (c) Transcripts of the examination for discovery of Ravi Maharaj on behalf of Just Energy Group Inc., January 25, 2018, Q. 1134-1138, 1190-1194, Exhibit "16" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H16, p. 922-923, 927-928, a copy of which is attached as **Exhibit "G"**.

### iii. Discoveries and Summary Judgment

12. After certification the parties proceeded to exchange productions in summer 2017 and conducted examinations for discovery in late January 2018.

13. Thereafter the Representative Plaintiff moved for summary judgment on the 13 common issues certified in the Certification Order. The Representative Plaintiff served motion records including 7 volumes of evidence from 7 affiants. Just Energy responded by submitting evidence from 4 affiants. Cross-examinations of 8 affiants were conducted. Facta were exchanged. Copies of the Representative Plaintiff's motion record, the Transcript Brief and the Representative Plaintiff's factum were attached to the Representative Plaintiff's proofs of claim submitted on behalf of all 7,723 Class Members in this proceeding.

14. On June 21, 2019, Justice Belobaba directed that all 13 common issues shall proceed to trial and reserved the costs of the summary judgment motion to the trial judge. A copy of the summary judgment decision is attached as **Exhibit "H"**.

**iv. The Omarali Action was Set for Trial**

15. On November 20, 2019, Justice Chalmers scheduled the Omarali Action for a 20-day trial starting on November 15, 2021. A copy of the endorsement of Justice Chalmers is attached at **Exhibit "I"**.

**C. Impact of the CCAA Proceedings**

16. On March 9, 2021, the Applicants (including Just Energy) filed for protection from their creditors, and obtained an order from this Court (the "**Initial Order**") commencing these proceedings (the "**CCAA Proceedings**"). A copy of the Initial Order is attached at **Exhibit "J"**.

17. On September 8, 2021, Just Energy served its motion record in support of its motion seeking approval of a claims process. On September 10, 2021 Class Counsel wrote to counsel for Just Energy seeking confirmation that the claims process order sought by Just Energy would allow for the Representative Plaintiff to submit a single proof of claim on behalf of all Class Members instead of being required to file separate proofs of claim for each Class Member. A copy of the September 10, 2021 correspondence is attached as **Exhibit "K"**.

18. On September 15, 2021, this Court granted an order approving a claims process.

19. On September 21, 2021, Class Counsel wrote to Just Energy's insolvency counsel and the Monitor's counsel to address the impact of the CCAA Proceedings, as the trial scheduled for

November 2021 could not move ahead due to the stay of proceeding. A copy of the September 21, 2021 letter (without attachment) is attached at **Exhibit "L"**.

20. Class counsel stressed in its September 21, 2021 letter that class members have valid claims for unpaid wages against Just Energy's directors under the ESA, the *Business Corporation Act (Ontario)* ("**OBCA**") or the *Canada Business Corporation Act* ("**CBCA**") and that those claims would be asserted in the CCAA Proceedings as part of the claims process.

21. On October 29, 2021, Class Counsel submitted proof of claim forms against Just Energy and their directors on behalf of all Class Members.

22. On February 2, 2022, Just Energy, in consultation with the Monitor, disallowed all the Class Members' claims. On February 24, 2022, Class Counsel filed a Notice of Dispute on behalf of all Class Members in the Omarali Action.

**D. Just Energy Cannot Satisfy Debts Owed to the Class Members**

23. There were two grounds on which Just Energy justified its filing for creditor protection:

- (a) because its total liabilities are greater than its total assets, referred to as "balance sheet insolvency"; and
- (b) because it could not meet demand for payments as and when they fall due, referred to as "cash flow insolvency".

24. In its Pre-Filing Report dated March 9, 2021, the Monitor explained that Just Energy "faces a material and immediate risk to its ability to continue as a going concern, which is a direct consequence of the unprecedented and catastrophic effects of an extreme weather event that

crippled the Texas Energy system in February of [2021]." This included a payment owed to ERCOT [the **Electronic Reliability Council for Texas**] for an estimated \$250 million. The Monitor estimated Just Energy would "be in a negative liquidity position on March 9, 2021". For that reason, among others, the Monitor explained Just Energy was "urgently seeking the Court-ordered relief described [in the Pre-Filing Report] to avoid the near-certain demise of its operations." A copy of the Pre-Filing Report (attached as Appendix B of the Monitor's First Report) is attached as **Exhibit "M"**.

25. In the affidavit of Michael Carter, sworn March 9, 2021 (the "**First Carter Affidavit**"), submitted by Just Energy in support of the Initial Order, Just Energy explained that,

- (a) it is facing "severe short-term liquidity challenges due to the recent unprecedented and catastrophic winter storm in Texas";
- (b) it "may have incurred losses and additional costs currently totalling over \$315 million over a seven-day period as a result of the actions of PUCT [the "**Texas Public Utility Commission**"] and ERCOT and the winter storm";
- (c) on March 9 and 10, 2021, Just Energy had to pay several ERCOT invoices for \$96.24 million and \$18.86 million, which it "does not have enough liquidity to pay... without access to the DIP ["**Debtor in Possession**"] facility";
- (d) it is facing additional liquidity pressures because of "demands from certain of its bonding companies for more than \$30 million in additional collateral" including "\$20 million of additional collateral [that] has already been provided" with the balance "expected to be provided by March 17, 2021";

- (e) it has "significant liabilities coming due that it cannot pay" on March 22, 2021 ("approximately \$270 million owing to counterparties under the ISO Services Agreements") and on March 25, 2021 ("over \$75 million owing to Commodity Suppliers") and is "therefore insolvent"; and
- (f) the aggregate book value of its assets was approximately \$1.069 billion, and the aggregate book value of its liabilities was approximately \$1.28 billion as of December 20, 2020.

A copy of the First Carter Affidavit, without exhibits, is attached as **Exhibit "N"**.

26. In its Second Report dated May 21, 2021, the Monitor explained that Just Energy "received and paid invoices from ERCOT totalling more than US\$366 million relating to the weather event, of which approximately US\$48 million in resettlement invoices were received and paid after the date of the First Report." The Monitor also detailed a series of disputes with commodity suppliers relating to, among other things, amounts owed to Just Energy and the relative priority of security interests. Finally, the Monitor confirmed Just Energy had fully drawn down on the DIP Facility (which had totally US\$125 million). A copy of the Second Report, without appendixes, is attached as **Exhibit "O"**.

27. In its Second Report dated May 21, 2021, and its Third Report dated September 8, 2021, the Monitor also detailed a series of contract disclaimers by the Just Energy entities, which were stated to be done to have "benefited the Just Energy Entities and enhanced the prospect of a viable restructuring." A copy of the Third Report, without appendixes, is attached as **Exhibit "P"**.

28. In its Fourth Report dated November 5, 2021, the Monitor explained, among other things, that the Just Energy entities extended the DIP Facility maturity date to September 30, 2022. The DIP Facility amendment, among other things, also prohibited "the Just Energy Entities from... settling any Claims in an amount greater than \$15 million... without the prior consent of the DIP Lenders." A copy of the Fourth Report, without appendixes, is attached as **Exhibit "Q"**.

29. In its Fifth Report dated February 4, 2022, the Monitor provided an update on the Claims Procedure. The Monitor reported that, as of January 31, 2022, Just Energy received \$6.096 billion of unsecured claims (excluding estimated duplicated or erroneous claims). A copy of the Fifth Report, without appendixes, is attached as **Exhibit "R"**.

30. In its Seventh Report dated March 22, 2022, the Monitor provided a further update on the Claims Procedure. As of the date of the Tenth Report, the Monitor noted that the "Claims Pool" excluding "Duplicative Claims or Claim Value Reductions" totalled \$6.269 billion. A copy of the Seventh Report, without appendixes, is attached as **Exhibit "S"**.

31. On May 12, 2022, Just Energy sought, among other things, to call, hold and conduct a meeting of Just Energy's secured and unsecured creditors to vote on resolutions to approve a Plan of Compromise and Arrangement (the "**Plan**"). The supporting affidavit of Michael Carter, sworn May 12, 2022 (the "**Second Carter Affidavit**"), described the treatment of "General Unsecured Creditors", which included Class Members. General Unsecured Creditors would receive a *pro rata* share of the "General Unsecured Creditor Cash Pool", but only after "Convenience Creditors" were paid from it. A copy of the Second Carter Affidavit, without exhibits, is attached as **Exhibit "T"**.

32. In its Tenth Report dated May 19, 2022, the Monitor provided a further update on the Claims Procedure. As of the date of the Tenth Report, the Monitor noted that the "Claims Pool"



for "Unsecured Claims" excluding "Duplicative Claims or Claim Value Reductions" totalled \$5.395 billion. A copy of the Tenth Report, without appendixes, is attached as **Exhibit "U"**.

33. In its Eleventh Report dated August 13, 2022, the Monitor reported that the DIP Lenders (as Plan Sponsor) withdrew support for the Plan. The Monitor reported that,

The Just Energy Entities, in consultation with the Monitor, have engaged in extensive discussions with the Sponsor/DIP Lenders, Supporting Secured CF Lenders and Shell (each as defined in the SISP Support Agreement, as defined below), to discuss the terms upon which such parties would be willing to support the pursuit of a going concern solution for the Just Energy Entities. These discussions have culminated in the SISP, SISP Support Agreement and Stalking Horse Transaction Agreement, each as defined below.

A copy of the Eleventh Report, without appendixes, is attached as **Exhibit "V"**.

34. On August 18, 2022, the Court approved the Sale and Investment Solicitation Process ("**SISP**"). A handwritten copy of the endorsement, and the unofficial transcribed copy provided on the Monitor's case website, is attached as **Exhibit "W"**. With respect to recovery for unsecured creditors, including Class Members, the Court stated:

Currently, the only transaction before the Court is the Stalking Horse Transaction which would not result in any recoveries to general unsecured creditors...

I further accept the submissions of the Monitor that a valuation can be considered, if and when, a transaction is likely to provide recovery for unsecured creditors. Otherwise it is a costly distraction.

35. On October 17, 2022, Just Energy sought, among other things, an order approving a sale transaction resulting from the SISP (the "**Reverse Vesting Order**"). The supporting affidavit of Michael Carter, sworn October 17, 2022 (the "**Third Carter Affidavit**") reiterated the "acute and unforeseen liquidity challenge caused by the unprecedented winter storm in February 2021 in Texas and Texas regulatory response to same" and explained that "no recoveries will be available

for General Unsecured Creditors." A copy of the Third Carter Affidavit, without exhibits, is attached as **Exhibit "X"**.

36. In its Twelfth Report dated October 27, 2022, the Monitor reviewed the sale transaction and concluded that "[t]he Transaction does not provide for any recoveries for General Unsecured Creditors." A copy of the Twelfth Report, without appendixes, is attached as **Exhibit "Y"**.

**E. Just Energy and its Director and Officers' Insurance Coverage for Unpaid Wages**

37. On November 3, 2022, the Court approved the sale transaction and granted the Reverse Vesting Order. A copy of the Reverse Vesting Order is attached at **Exhibit "Z"**. The Reverse Vesting Order permits Class Members to pursue their claims against Just Energy, their current and former directors and officers, solely to the extent of their insurance policies. It also requires Just Energy "to provide information or evidence reasonably necessary for the determination of such claim":

**26. THIS COURT ORDERS** that...neither Just Energy, Just Energy Corp. nor Just Energy Ontario L.P. (collectively, the "Specified JE Entities"), nor any of their current or former officers and/or directors, shall be released from any claim or potential claim, whether at law or in equity, known or unknown, existing up to the Effective Time, in any way connected with, arising out of or relating to the matters raised, or which might have been raised, in the action commenced in the Ontario Superior Court of Justice on May 4, 2015 titled Haidar Omarali v Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P., Court File No. CV-15-52749300 CP, against the Specified JE Entities or any of their current or former officers and/or directors, including, without limitation, the claims filed by Haidar Omarali, as representative plaintiff, in the Claims Process (as defined in the Claims Procedure Order) conducted by the Just Energy Entities in these CCAA proceedings, being (a) a Proof of Claim (as defined in the Claims Procedure Order) for CAD\$108,854,794.52 against the Specified JE Entities; and (b) a D&O Proof of Claim for CAD\$108,854,794.52 against the Directors (each as defined in the Claims Procedure Order) of Just Energy and Just Energy Corp. listed in schedules A and B to such D&O Proof of Claim (collectively, such claims, the "Class Action Claim"), solely to the extent it is necessary with respect to maintaining any claims as against the insurance policies of the Specified JE Entities that may be available to pay insured claims in respect of the Specified JE Entities or their current or

former directors and officers (such policies set forth in Schedule “D” hereto, the “Insurance Policies”) and, solely for the purpose of recovery against the Insurance Policies, such Class Action Claim shall be deemed not to be transferred to Residual Co. 1 or Residual Co. 2.

**27. THIS COURT ORDERS** that, from and after the Effective Time, any Person having a Class Action Claim (a “**Class Action Claimant**”) shall only be entitled to recover from proceeds under the Insurance Policies, to the extent available in respect of any such Class Action Claim, and the recovery of such Class Action Claimants shall be solely limited to such proceeds, without any additional rights of enforcement or recovery as against the Just Energy Entities (including, for certainty, the Acquired Entities) or the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities (or any of them) (in such capacities, collectively, the “**Protected JE Parties**”). The Specified JE Entities will not be required to incur any costs or expenses or to participate in the proceeding with respect to the Class Action Claim, except to the extent reasonably necessary to provide information or evidence reasonably necessary for the determination of such claim solely to seek recovery from proceeds under the Insurance Policies.

**28. THIS COURT ORDERS** that all Class Action Claimants shall be irrevocably and forever limited solely to recovery from the proceeds of the Insurance Policies payable on behalf of the Specified JE Entities or their directors and officers in respect of any such Class Action Claim, and such Class Action Claimants shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any of the Protected JE Parties in respect of any Class Action Claim, other than enforcing their rights to be paid from the proceeds of the applicable Insurance Policies available to the Specified JE Entities.

**29. THIS COURT ORDERS** that nothing contained in this Order prejudices, compromises, releases or otherwise affects (a) any right, defence or obligation of any insurer in respect of an Insurance Policy; or (b) any Class Action Claimant from recovering against the Specified JE Entities’ current and former directors and officers for any liabilities or claims attributable to any such director or officer’s fraud, wilful misconduct, criminal act or criminal omission, as determined by the final, non-appealable judgment of a court of competent jurisdiction; provided that, there shall be no claim over against any other Protected JE Party. Notwithstanding any other provision of this Order, nothing in this Order shall restrict, release or in any way compromise any Class Action Claim or recovery thereunder against any Person other than the Protected JE Parties.

**30. THIS COURT ORDERS** that any proceedings with respect to the Class Action Claim, including with respect to any recovery sought by the Class Action Claimants as against the Insurance Policies, may continue in these CCAA

proceedings following the closing of the Transactions (notwithstanding the fact that the Acquired Entities will be released from the purview of these CCAA proceedings at that point in time pursuant to paragraph 5(f) hereof).

**31. THIS COURT ORDERS** that any approval required, including pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“CPA”), to give effect to the inclusion of provisions 26 to 30 hereto in this Order is hereby granted, and any notice that may be required pursuant to the CPA is dispensed with.

38. Just Energy had a series of insurance policies providing coverage for the policy periods April 1, 2020 to April 1, 2021 (the "**Pre-Filing Policies**") and March 9, 2021 to March 9, 2022 (the "**Post-Filing Policies**") as follows:

**Pre-Filing Policies – Policy Term April 1 2020 to April 1, 2021:**

- (a) XL Special Insurance Company – Policy No. B0146ERINT2000452
- (b) Hiscox – Policy No. B0146ERINT2000453
- (c) Sompo – Policy No. B0146ERINT2000454
- (d) AWAC & Starr – Policy No. B0146ERINT2000455
- (e) Tokio Marine – Policy No. 34-MGU-20-A49117/20G19646000
- (f) (Lloyd's Syndicate) – Policy No. B0146ERINT2000768
- (g) CNA Canada Continental Casualty Company – Policy No. MEX 665412022
- (h) Beazley – Policy No. B0146ERINT2000774
- (i) XL Catlin – Policy No. B0146ERINT2000775

**Post-Filing Policies – Policy Term March 9, 2021 to March 9, 2022:**

- (j) XL Special Insurance Company – Policy No. ELU173707-21
- (k) Tokio Marine HCC – Policy No. 21G196460101
- (l) Hiscox - Policy No. B0146ERINT2100865

39. Copies of the Pre-Filing and Post-Filing insurance policies are attached at **Exhibit "AA"** to **"LL"**.

40. On November 1, 2021, Just Energy provided notice to the XL Special Insurance Company, Tokio Marine HCC, and Hiscox as follows:

On October 8, 2021, Just Energy received correspondence from counsel for the representative plaintiff in the Class Action stating that the Proof of Claim to be filed on behalf of the class members will include claims on behalf of the class members against Just Energy's directors on the basis that the damages claimed in the Class Action constitute unpaid wages. Should the class members proceed to file a Proof of Claim against any directors of Just Energy on or prior to the Claims Bar Date we will supplement this notice at that time.

41. Copies of the letters from Just Energy to XL Special Insurance Company, Tokio Marine HCC, and Hiscox are attached at **Exhibits "MM"** and **"NN"**.

42. On December 16, 2021, XL Specialty Insurance Company provided a preliminary coverage position under Post-Filing Policy No. ELU173707-21 to Just Energy. A copy of the covering letter with respect to that coverage position is attached at **Exhibit "PP"**.

43. On December 23, 2021, Just Energy provided an update to its November 1, 2021 letters to its insurers, including the claims made by Class Members against Just Energy's directors and officers for unpaid wages. Copies of the letters are attached at **Exhibits "QQ"** and **"RR"**.

44. On June 15, 2022, XL Special Insurance Company provided its preliminary coverage position under Pre-Filing Policy No. B0146ERINT2000452. A copy of the covering letter with respect to that coverage position is attached at **Exhibit "SS"**. XL Special Insurance Company requested additional information to assess the asserted claims:

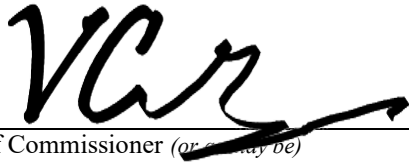
At this time, AXA XL does not have sufficient information to confirm which matters in the D&O Claims Notice the Insured believes may “may reasonably give rise to a Claim.” For each matter the Insured believes may reasonably give rise to a Claim, please provide us with: (1) the Proof of Claim; (2) the reasons why the Insured reasonably anticipates the Proof of Claim may give rise to a covered Claim under the AXA XL Policy, including “full particulars of the dates, acts, and persons involved.” AXA XL will review this information and provide you with its updated coverage position in due course.

45. To date, no insurance claims have been paid in connection with Class Members' claims against Just Energy and its current and former directors and officers for unpaid wages.

**AFFIRMED BEFORE ME:**  in person  by video conference

by Jamie Shilton at the City of Toronto, in the Province of Ontario, before me on August 18, 2023, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits *(or as may be)*

  
\_\_\_\_\_  
Signature of Commissioner *(or as may be)*

  
\_\_\_\_\_  
Signature of Deponent

**THIS IS EXHIBIT A REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

Court FileNo.CV-15-52749300 CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**KIA KORDESTANI Haidar Omarali**

Plaintiff

-and-

**JUST ENERGY GROUP INC., JUST ENERGY CORP.  
and JUST ENERGY ONTARIO L.P.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

AMENDED THIS  
 MODIFIED  
 RULE 1A REG. 26.02 (1)  
 THE ORDER OF  
 L'ORDONNANCE DU  
 DATED / FAIT LE

JUSTICE Belobaba  
 NOV 17/15  
 POURSUANT TO  
 CONFORMEMENT A

AGOSTINIA  
 SUPERIOR COURT OF JUSTICE  
 COUR SUPÉRIEURE DE JUSTICE

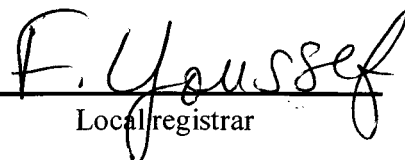


IF YOU PAY THE PLAINTIFF'S CLAIM, and \$25,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date May 4, 2015

Issued by

  
Local registrar

Address of court office 393 University Avenue,  
10<sup>th</sup> Floor,  
Toronto, ON

TO: JUST ENERGY CORP.  
2630-100 King St. West  
Toronto, ON M5X 1E1

AND TO: JUST ENERGY GROUP INC.  
2630-100 King St. West  
Toronto, ON M5X 1E1

AND TO: JUST ENERGY ONTARIO L.P.  
2630-100 King St. West  
Toronto, ON M5X 1E1

**CLAIM**

1. The Plaintiff claims:
  - (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class (defined below);
  - (b) \$100 million in ~~general~~ damages for the Class, or such other sum as this Honourable Court deems just;
  - (c) a declaration that the provisions of the *Employment Standards Act, 2000* (“*ESA*”), as applicable, are express or implied terms of the contracts of employment of the Class Members (defined below);
  - (d) a declaration that the Class Members are employees of the Defendants who are operating as a common employer, for the purposes of the *ESA*;
  - (e) a declaration that the Defendants violated the terms of the *ESA*, breached the Class Members’ contracts of employment and duty of good faith owed to the Class Members, and/or breached the duty of care owed to the Class Members by:
    - (i) failing to ensure that Class Members were properly classified as employees;
    - (ii) failing to advise class members of their entitlement to compensation equal to or above the minimum wage as stipulated by the *ESA* (the “Minimum Wage”);
    - (iii) failing to compensate Class Members at a rate equal to or above the Minimum Wage;
    - (iv) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week in accordance with the *ESA* (the “Overtime Threshold”);

- (v) requiring and/or permitting the Class Members to work overtime hours but failing to compensate the Class Members as required for hours worked in excess of the Overtime Threshold (“Overtime Pay”);
  - (vi) failing to ensure that the Class Members’ hours of work were monitored and accurately recorded;
  - (vii) failing to advise Class Members of their entitlement to vacation pay at a rate of 4 percent of wages in accordance with the *ESA* (“Vacation Pay”);
  - (viii) failing to compensate Class Members for Vacation Pay;
  - (ix) failing to advise Class Members of their entitlement to public holiday pay and premium pay in accordance with the *ESA* (the “Public Holiday and Premium Pay”); and
  - (x) failing to compensate Class Members for Public Holiday and Premium Pay.
- (f) an interlocutory and a final mandatory order for specific performance directing that the Defendants comply with the *ESA* and/or the contracts of employment with the Class Members, in particular, to:
- (i) ensure that Class Members are properly classified as employees;
  - (ii) advise Class Members of their entitlement to the Minimum Wage, Overtime Pay for hours worked in excess of the Overtime Threshold, Vacation Pay and Public Holiday and Premium Pay;
  - (iii) ensure that the Class Members’ hours of work are monitored and accurately recorded; and

- (iv) ensure that Class Members are appropriately compensated at a rate equal to or above the Minimum Wage, for Overtime Pay, for Vacation Pay and for Public Holiday and Premium Pay.
- (g) a declaration that the provisions of any applicable independent contractor agreement which may purport to exclude the Class Members from eligibility for the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay are void and unenforceable;
- (h) a declaration that the Defendants are liable for any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors;
- (i) a declaration that the Defendants are liable for any adverse tax liability sustained by the Class Members resulting from a determination that the Class Members are/were employees of the Defendants and not independent contractors;
- (j) a declaration that the Defendants are liable, and must reimburse Class Members, for any *Canada Pensions Plan* (“CPP”) or *Employment Insurance Act* (“EI”) contributions which may have been paid or are owed resulting from a determination that the Class Members are/were employees of the Defendants and not independent contractors;
- (k) a declaration that the Defendants were unjustly enriched, to the deprivation of the Class Members, in that they received the value of compensating class members at rates below the Minimum Wage, without paying Overtime Pay, without paying Vacation Pay and without paying Public Holiday and Premium Pay, and an order requiring the Defendants to disgorge to the Class Members all amounts withheld by them in respect of such unpaid hours and entitlements;
- (l) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;

- (m) an order directing the Defendant to preserve and disclose to the Plaintiff all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;
- (n) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (o) punitive, aggravated and exemplary damages in the amount of \$10 million, or such other amount as this Honourable Court deems just;
- (p) costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;
- (q) the costs of administering the plan of distribution of the recovery in this action; and
- (r) such further and other relief as this Honourable Court may deem just.

## THE PARTIES

~~2. The Plaintiff, Kia Kordestani (“Kordestani”), resides in Ontario. He was a “Sales Agent” retained by one or more of the Defendants (“Just Energy”) from June 2012 until June 2013. Kordestani worked as a Sales Agent at the Ottawa sales office of Just Energy.~~

2. The Plaintiff, Haidar Omarali (“Omarali”), resides in Ontario. He was a “Sales Agent” retained by Just Energy starting in August 2012 until September 2013. Omarali worked as a Sales Agent at the Dundas sales office of Just Energy.

3. Just Energy is one of the largest independent energy retailers in North America, and serves 21 markets across North America (6 Canadian provinces and 15 U.S. states) and the U.K. market, providing energy products to approximately 2 million homes and businesses. It annually generates revenues of hundreds of millions of dollars.

4. Within Ontario, Just Energy has 12 regional offices and approximately 130 Sales Agents at any given time. Sales Agents are employed by Just Energy to market Just Energy’s fixed price energy contracts and other energy products related to the supply of natural gas and

electricity in Ontario. Sales Agents market Just Energy contracts at designated times and at designated locations to residential and commercial customers by traveling door-to-door to the residences of energy consumers and potential customers.

5. The Defendants carry on business in common in respect of the hiring, training, supervision and control of the Class Members. The Defendants are headquartered at the same address and represent to the public and to Sales Agents as a single entity.

6. The marketing activities of Just Energy, and the activities of the Sales Agents, are provincially regulated and therefore governed by the *ESA*.

### **THE CLASS**

7. The Plaintiff brings this action pursuant to the *Class Proceedings Act, 1992* on his own behalf and on behalf of the following class of persons:

“Any person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement.”

(the “Class” or “Class Members”)

### **EMPLOYMENT RELATIONSHIP**

8. The duties performed by the Class Members and the supervision and control imposed on the Class Members by Just Energy creates an employment relationship with Just Energy. In particular:

- (a) Just Energy trains all the Class Members in their marketing duties;
- (b) Class Members are told how they can market Just Energy contracts, in the form of sales scripts, booklets, manuals and sales presentations;
- (c) Class Members were told where and when they can market Just Energy contracts;
- (d) Class Members are taken to specific locations and areas in which they could market door-to-door contracts and require permission to change any location;

- (e) Class Members all must wear Just Energy clothing and represent as working for Just Energy;
- (f) Class Members must use the tools of Just Energy in the form of brochures, contracts, informational sheets and mandatory Just Energy branded clothing;
- (g) All prices and Sales Agent commissions are fixed by Just Energy;
- (h) Class Members do not complete contract renewals or the finalization and confirmation of any contract with potential customers, which is all done directly by Just Energy through a Just Energy call centre after the Class Members' home marketing;
- (i) Just Energy maintains sole discretion whether to accept or reject any potential contract generated by the Class Members;
- (j) All potential contracts generated by Class Members must be reported to Just Energy on a daily basis;
- (k) Only Just Energy handles customer complaints about the Class Members;
- (l) Just Energy assumes responsibility for alleged misconduct of the Class Members while marketing of Just Energy contracts to the public;
- (m) As a result of the work demands and explicit working restrictions placed on Class Members by Just Energy, Class Members cannot work for any other business while also working for Just Energy;
- (n) Class Members cannot sub-contract or independently employ other individuals to market Just Energy contracts on the Class Members' behalf;
- (o) The contracts generated by the Class Members form a substantial amount of Just Energy's revenue; and
- (p) Class Members are paid directly by Just Energy.

**ESA AND CLASS MEMBERS' CONTRACTS OF EMPLOYMENT**

9. The provisions of the *ESA* are implied terms, in fact or by law, as minimum terms of the contracts of employment of the Class Members.

10. Therefore, the contracts of employment of the Class Members expressly or impliedly provide that Class Members shall be compensated

- (a) at a rate equal to, or greater than, the Minimum Wage;
- (b) with Overtime Pay for hours worked in excess of the Overtime Threshold;
- (c) with Vacation Pay on all amounts paid; and
- (d) with Public Holiday and Premium Pay.

**CONTRACTUAL DUTIES OWED TO CLASS MEMBERS**

11. As low skilled employees under the direct control and supervision of the Defendants, the Class Members relied on the Defendants to advise them properly regarding their employee status and eligibility for Minimum Wage, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members at, or above, the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay. Just Energy is/was in a position of power and direct control over the Class Members and the Class members were in a vulnerable position *vis-a-vis* the Defendants.

12. The Defendants owe contractual duties to the Class Members, including its contractual duty of good faith, all of which required, and continue to require, the Defendants to:

- (a) ensure that Class Members are properly classified as employees;
- (b) advise Class Members of their entitlement to the Minimum Wage, Overtime Pay and Vacation Pay;



- (c) ensure that the Class Members' hours of work are monitored and accurately recorded; and
- (d) ensure that Class Members are appropriately compensated at, or above, the Minimum Wage, for Overtime Pay , for Vacation Pay and for Public Holiday and Premium Pay.

### **DUTY OF CARE**

13. Just Energy owed the Class Members a duty of care based upon the special relationship that developed between them as a consequence of Just Energy retaining the Class Members to perform marketing services on Just Energy's behalf.

14. Just Energy owed the Class Members a duty to take reasonable steps to properly characterize the employment relationship when retaining the Class Members to market Just Energy contracts.

15. The Defendants' duty of care required the Defendants to:

- (a) ensure that Class Members are properly classified as employees;
- (b) advise Class Members of their entitlement to the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay;
- (c) ensure that the Class Members hours of work are monitored and accurately recorded; and
- (d) ensure that Class Members are appropriately compensated at, or above, the Minimum Wage, for Overtime Pay , for Vacation Pay and for Public Holiday and Premium Pay.

**RESPONSIBILITIES OF SALES AGENT AND TREATMENT BY JUST ENERGY**

16. ~~From June 2012 until June 2013, Kordestani worked for Just Energy as a Sales Agent out of a sales office located in Ottawa, Ontario. From August 2012 until September 2013, Omarali worked for Just Energy as a Sales Agent out of the Dundas sales office.~~

17. Kordestani's Omarali's duties and responsibilities as a Sales Agent included:

- (a) attending the Just Energy regional sales office between 9:00 a.m. and 9:30 a.m. to start work;
- (b) collecting blank contracts and promotional material at the regional sales office;
- (c) from approximately 9:30 a.m. to 12:00 p.m. each day, attend a meeting with other Sales Agents and the Just Energy Regional Director at the regional sales office to review sales statistics, sales scripts, sales tactics, sales role playing, marketing locations and sales targets for the day;
- (d) being assigned to a crew coordinator by the Regional Director and taken by the crew coordinator, by van, to a location with other Sales Agents to begin door-to-door marketing of Just Energy contracts;
- (e) between approximately 1:00 p.m. to 9:00 p.m., market Just Energy contracts door-to-door in a designated area using materials provided by Just Energy;
- (f) report all potential contracts to the regional sales office and Regional Director;
- (g) obey the direction of the Regional Director if directed to change marketing locations and report to the Regional Director on present locations; and
- (h) conclude the day at 9:00 p.m. by reporting to the assigned crew coordinator, who picked him up from his assigned location and dropped him back off at the regional sales office.

18. The Defendants required ~~Kordestani~~ Omarali to work between 60-72 hours per week without receiving the Minimum Wage, contrary to his contractual terms.

19. ~~Kordestani~~ Omarali relied on the Defendants in good faith and was unaware while working for the Defendants or afterwards that he was an employee and entitled to the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay. At the time, ~~Kordestani~~ Omarali relied on the Defendants to properly classify him regarding his status as an employee and his entitlement to Minimum Wage, Overtime Pay, Vacation Pay, and Public Holiday and Premium Pay and was misled by the Defendants that he was not an employee of the Defendants.

20. ~~Kordestani~~ Omarali did not become aware that he was eligible as an employee for Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay because the Defendants had continually misrepresented to him his actual eligibility and entitlement to such pay.

21. ~~Kordestani's~~ Omarali's duties are consistent with the duties of all Sales Agents in the Class and the operations of Just Energy and the controls imposed by Just Energy on the Sales Agents.

22. The Defendants required explicitly, and/or implicitly, that ~~Kordestani~~ Omarali and the other Class Members work exclusively for Just Energy.

23. At all material times, ~~Kordestani,~~ Omarali and the other Class Members were explicitly directed how, where and when they could perform marketing duties for Just Energy.

24. The Defendants required that all Sales Agents attend at the regional sales office to begin work between 9:00 a.m. and 9:30 a.m. and perform marketing between 1:00 p.m. to 9:00 p.m., 5-6 days per week.

25. The Defendants required that Sales Agents travel to other cities during "Push Weeks" to market Just Energy contracts in new locations and that Sales Agents cover all costs related to travel, food and accommodation during those "Push Weeks".

26. As a Sales Agent, ~~Kordestani,~~ Omarali and all other Class Members worked between 60-72 hours per week including weekends. The Defendants were aware of, and encouraged ~~Kordestani,~~ Omarali and all other Class Members, to work those hours in excess of the

Overtime Threshold, which were necessary in order to comply with the enforced hours and structure of a Sales Agent workday. The Defendants required and/or permitted ~~Kordestani~~, Omarali and the other Class Members, to work hours in excess of the Overtime Threshold and failed or refused to provide them with Overtime Pay.

27. At all material times, ~~Kordestani~~, Omarali and the other Class Members were explicitly and incorrectly informed they were not employees of Just Energy.

28. The Defendants required ~~Kordestani~~, Omarali and the other Class Members to work hours in excess of the Overtime Threshold without Overtime Pay, contrary to their contractual terms.

29. The Defendants failed to compensate ~~Kordestani~~, Omarali and the other Class Members for Vacation Pay, contrary to their contractual terms.

30. The Defendants failed to compensate ~~Kordestani~~, Omarali and the other Class Members for Public Holiday and Premium Pay, contrary to their contractual terms.

#### **SYSTEMIC CLASSIFICATION AS “INDEPENDENT CONTRACTORS”**

31. The Defendants systemically classified all Sales Agents as “independent contractors” and required and/or permitted the Class Members to regularly work hours without receiving the Minimum Wage, Overtime Pay, Vacation Pay or Public Holiday and Premium Pay, under the misrepresentation from Just Energy that Sales Agents were independent contractors.

32. The Defendants were aware that the Class Members relied on the Defendants to advise them properly of their employment status and eligibility for Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay, and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members for their hours worked.

33. The Defendants exerted pervasive pressure on Class Members to work hours in excess of the Overtime Threshold. If Class Members did not work the overtime as required to

complete their employment responsibilities, such Class Members were terminated because the Defendants would “cancel” their “independent contractor” agreement.

### **SYSTEMIC BREACH OF THE *ESA***

34. The Defendants have systemically breached the provisions of the *ESA* with respect to all Class Members by :

- (a) failing to ensure that Class Members were properly classified as employees;
- (b) failing to advise Class Members of their entitlement to Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay;
- (c) failing to ensure that the Class Members’ hours of work were monitored and accurately recorded;
- (d) requiring and/or permitting the Class Members to work hours for which it failed to compensate at a rate equal to, or above, the Minimum Wage;
- (e) requiring and/or permitting the Class Members to work hours in excess of the Overtime Threshold but failing to ensure that Class Members were compensated for Overtime Pay;
- (f) failing to compensate Class Members for Vacation Pay; and
- (g) failing to compensate Class Member for Public Holiday and Premium Pay.

35. Just Energy’s misclassification of Sales Agents as purported independent contractors and denial of Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay to Class Members is in violation of the *ESA* and is unlawful.

36. To the extent that any contracts purport to designate the Class Members as independent contractors and exclude the Class Members from eligibility for the Minimum Wage, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay or any other minimum requirement of the *ESA*, such contracts and or provisions are void and unenforceable.

**SYSTEMIC BREACH OF CONTRACT AND BREACH OF DUTY OF GOOD FAITH**

37. The Defendant systemically breached the contracts with the Class Members and the contractual duty of good faith owed to the Class Members by:

- (a) improperly and arbitrarily misclassifying the Class Members as independent contractors;
- (b) misrepresenting to the Class Members that the Class Members were independent contractors;
- (c) failing to monitor and keep track of the hours worked by the Class Members; and
- (d) requiring and/or permitting the Class Members to work regular hours and hours in excess of the Overtime Threshold but failing to compensate the Class Members as required for the Minimum Wage, Overtime Pay, Vacation Pay or Public Holiday and Premium Pay.

38. There was no legitimate basis for the Defendants' arbitrary designation of the Class Members as independent contractors and ineligibility for Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay, which was contrary to the employees' express or implied terms of contract with the Defendants. Such classification and exclusion is contrary to the terms of the *ESA*, which are incorporated as express or implied terms of the contracts.

39. Such breaches are ongoing and continuous in respect of the Class Members since at least 2012.

**SYSTEMIC NEGLIGENCE**

40. Just Energy owed ~~Kordestani~~, Omarali and the Class Members a duty to take reasonable steps to properly characterize the employment relationship when retaining the Class Members to market Just Energy contracts. Just Energy systemically breached that duty by:

- (a) improperly and arbitrarily misclassifying the Class Members as independent contractors;
- (b) misrepresenting to the Class Members that the Class Members were independent contractors;
- (c) failing to monitor and keep track of the hours worked by the Class Members; and
- (d) requiring and/or permitting the Class Members to work regular hours and hours in excess of the Overtime Threshold but failing to compensate the Class Members as required for the Minimum Wage, Overtime Pay, Vacation Pay or Public Holiday and Premium Pay.

41. As a result of Just Energy's negligence in mischaracterizing the relationship between Just Energy and the Class Members, the Class Members have suffered damages and losses, including lost Minimum Wages, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay, and any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors, all of which were reasonably foreseeable to Just Energy.

#### **UNJUST ENRICHMENT**

42. The Defendant has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members.

43. The Class Members have suffered a corresponding deprivation, in the form of the Minimum Wages, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay that is owed to them.

44. There is no juristic reason for the Defendants' unjust enrichment and the Class Members' corresponding deprivation. The systemic exclusion of the Class Members from their contractual and statutory entitlements is unlawful.

45. The Defendants' unjust enrichment has been continuous and ongoing since at least 2013.

### **DAMAGES**

46. As a result of the Defendants' breaches of the *ESA*, breaches of contract, negligence, and/or unjust enrichment, the Class Members have suffered damages and losses, including lost Minimum Wages, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay, and any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors.

47. Furthermore, the Defendants' arbitrary and incorrect misclassification of the Class Members as independent contractors and exclusion from Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay, coupled with the Defendants' requirement that the Class Members work hours in excess the Overtime Threshold, was high handed and callous. The Defendants were in a position of power over low skilled and vulnerable employees and owed them a duty of good faith, which the Defendants flagrantly breached to increase its profits at the expense of the Class Members. Such conduct warrants an award of punitive damages.

48. Moreover, the Defendants' arbitrary and incorrect misclassification of the Class Members as independent contractors caused the Class Members to erroneously pay the employer component of CPP and/or EI contributions on their income. Such employer contributions ought to have been made by Just Energy on their behalves, instead the Class Members paid those contributions directly. The Defendants' misclassification thereby caused compensable damages to the Class Members for which sufficient reimbursement should be awarded.

49. The Plaintiff pleads and relies on upon the following statutes and regulations:

- (a) *Employment Standards Act, 2000*, S.O. 2000, c. 41;
- (b) *Class Proceedings Act, 1992*, S.O. 1992, c. 6.



- (c) Canada Pension Plan, R.S.C. 1985, c. C-8; and
  - (d) Employment Insurance Act, S.C. 1996, c. 23;
50. The Plaintiff proposes that this action be tried in Toronto.

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**PLAINTIFF**

and

**JUST ENERGY GROUP INC., ET AL**  
**DEFENDANTS**

Court File No: CV-15-52749300CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at **TORONTO**

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED STATEMENT OF CLAIM**

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**THIS IS EXHIBIT B REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal flourish extending to the right.

---

**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

Court File No.: CV-15-527493-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**Haidar Omarali**

Plaintiff

- and -

**JUST ENERGY GROUP INC., JUST ENERGY CORP.  
and JUST ENERGY ONTARIO L.P.**

Defendants

Proceeding under the *Class Proceedings Act*, 1992

**FACTUM OF THE MOVING PLAINTIFF  
(Summary Judgment Motion Returnable June 11-13, 2019)**

May 10, 2019

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Court File No.: CV-15-527493-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**Haidar Omarali**

Plaintiff

- and -

**JUST ENERGY GROUP INC., JUST ENERGY CORP.  
and JUST ENERGY ONTARIO L.P.**

Defendants

Proceeding under the *Class Proceedings Act*, 1992

**FACTUM OF THE MOVING PLAINTIFF  
(Summary Judgment Motion Returnable June 11-13, 2019)**

**PART I - OVERVIEW**

1. The proposition that 8,000 low-skilled workers without any previous marketing experience, who can only market one set of products, and who are directed on how, when and where to market such products, are operating 8,000 individual "independent" businesses and excluded from the minimum protections of the *Employment Standards Act, 2000* ("ESA"), is not fathomable.

2. This is what the Just Energy<sup>1</sup> has been asserting to the army of 8,000 vulnerable, low-skilled workers, of limited means, it sends out to market its products. As a result Just Energy has avoided the basic and decent responsibility of paying its workers a minimum wage and other mandated minimum requirements.

---

<sup>1</sup> Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P. together referred to herein as Just Energy.



3. The unilateral classification as "independent contractors" by Just Energy is contrary to the true nature of the relationship. The fundamental question to be determined in this case is: whose business is it? What is clear from the true nature of the relationship is that the business does not belong individually to 8,000 class members, it belongs to Just Energy.

4. In particular, Just Energy's sales structure and organization is entirely inconsistent with the existence of 8,000 independent "sales" businesses as Just Energy:

- (a) designed and implements a consistent hierarchical structure of regional offices;
- (b) centrally recruits class members for all regional offices;
- (c) provides uniform training and direction on how to market for Just Energy;
- (d) provides direction on when and where to market;
- (e) transports class members to their marketing locations;
- (f) provides direction on what to wear while marketing;
- (g) imposes a comprehensive compliance and discipline system on the class;
- (h) mandates that class members can only market Just Energy products; and
- (i) exclusively provides all the tools for class members' marketing.

5. As class members have no ability to change the price of any of Just Energy's products and are only paid a fixed commission, the class has no chance to profit other than being paid for their work. Finally, as Just Energy's business is the sale of the products marketed by the class, the class' work is not a secondary or complimentary component of Just Energy's business – it is Just Energy's business.

6. In these circumstances, the 8,000 members of the class cannot be said to be operating independent "sales" businesses. They are truly employees of Just Energy entitled to the minimum wage, overtime and other minimum requirements of the *ESA*, and otherwise. The fundamental

question of employment status should be determined in favour of the class and summary judgment should be granted on all of the certified common issues following that determination.

## PART II - STATEMENT OF FACTS

### A. Just Energy's business

7. Just Energy is one of the largest independent energy retailers in North America, operating in Canada, the United States and also the United Kingdom.<sup>2</sup> Just Energy is a retailer of gas and electricity contracts. Just Energy does not produce or distribute gas and electricity - rather it buys and resells it to consumers and profits on the difference.<sup>3</sup> Therefore Just Energy's business is in the gas and electricity contracts it enters into with consumers.<sup>4</sup>

### B. Just Energy's door-to-door sales channel

8. To get customers to sign these contracts, Just Energy sends an army of marketers door-to-door seeking to get customers to sign Just Energy contracts – called "Sales Agents". Between 2012 and 2016, Just Energy sent over 8,000 Sales Agents to knock on doors in Ontario.<sup>5</sup>

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<sup>2</sup> Affidavit of Richard Teixeira, sworn January 10, 2019 ["**Teixeira Affidavit**"], para. 5, Responding Motion Record ("**Responding MR**"), Tab 1A, p. 45. Just Energy Group Inc. is a publicly traded corporation with its headquarters in Ontario. Just Energy Corp. and Just Energy Ontario LP are entities wholly owned by Just Energy Group Inc. The Defendants carry on business in common, are headquarter in the same place and are represented to the public and the class as one entity: Just Energy. Throughout this factum the Defendants shall be referred to collectively as "Just Energy". At no time have the Defendants taken the position that any of the named Defendants are not liable or are improperly named.

<sup>3</sup> Excerpts from Transcript of Ravi Maharaj dated January 24, 2019 ("**JE Discovery Transcripts, January 24, 2018**"), Q. 1069-1072, Exhibit "15" to the Affidavit of Michelle Alexander sworn September 5, 2018 ("**Alexander Affidavit**"), Plaintiff's Motion Record ("**Plaintiff's MR**"), Vol. 2, Tab H15 at p. 907-908.

<sup>4</sup> JE Discovery Transcripts, January 24, 2018, Q. 1058-1064 Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15 at p. 905-906.

<sup>5</sup> Alexander Affidavit, para. 5, Plaintiff's MR, Vol. 1, Tab H, p. 91; Email exchange between David Rosenfeld and Paul Martin dated August 2019, Exhibit "20" to the Alexander Affidavit, Plaintiff's MR, Vol. 3, Tab H 20, p. 1539.

9. This door-to-door marketing generates substantial revenue for Just Energy: In 2009, door-to-door marketing made up approximately 95% of Just Energy's sales revenue, in 2016 it was 21%.<sup>6</sup>

**i. Hierarchical structure**

10. To organize this army of marketers, Just Energy set up a hierarchical sales division.

11. Just Energy owns or leases regional offices.<sup>7</sup> The regional offices have Just Energy signs on the front, Just Energy signs inside, and maintain only Just Energy promotional materials.<sup>8</sup> These offices are partly staffed by Just Energy "employees" (as deemed by Just Energy) and run by "independent contractors" called "National" or "Regional Distributors."<sup>9</sup> Regional Distributors operate the Just Energy offices and manage the "independent contractors" at that office on behalf of Just Energy<sup>10</sup> including "Crew Coordinators" and Sales Agents. Crew Coordinators help supervise Sales Agents and take direction from Regional Distributors.<sup>11</sup> All

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<sup>6</sup> Exhibit "A" to the Teixeira Affidavit, sworn January 10, 2019, para. 8, Responding MR, Tab 1A, p. 46.

<sup>7</sup> JE Discovery Transcripts, January 24, 2018, Q. 269, 270, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, pp. 797.

<sup>8</sup> JE Discovery Transcripts, January 24, 2018, Q. 275-284, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 798, 789; Just Energy Memo dated November 22, 2012, Exhibit "53" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H53, p. 2381.

<sup>9</sup> JE Discovery Transcripts, January 24, 2018, Q. 285, 305-306, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15 at pp. 800, 805; Cross-Examination Transcript of Brian Marsellus ("**Marsellus Cross**"), dated March 6, 2019, Q. 14-16, 27-39 Responding MR, Tab 1, pp. 5, 7-9.

<sup>10</sup> Marsellus Cross, Q.27-39, Transcript Brief, p. 7-9; Teixeira Cross, Q. 221-223, Transcript Brief, Tab 2, pp 96-97; Affidavit of Katlyn Schwantz sworn August 29, 2018 ("**Schwantz Affidavit**") at paras.9-11, 15, Plaintiff's MR, Vol. 1, Tab B, pp. 14-15; Affidavit of Jennifer Borg sworn August 29, 2018 ("**Borg Affidavit**") at para. 14, Plaintiff's MR, Vol. 1, Tab C, pp. 56-58; Affidavit of Jamie Acton sworn August 29, 2018 ("**Acton Affidavit**") at para. 14, Plaintiff's MR, Vol. 1, Tab D, pp. 63-64; Affidavit of Roland Lavigne sworn August 30, 2018 ("**Lavigne Affidavit**") at para. 14, Plaintiff's MR, Vol. 1, Tab E, pp. 70-71; Affidavit of Behram Nemati sworn August 30, 2018 ("**Nemati Affidavit**") at para. 14, Plaintiff's MR, Vol. 1, Tab F, pp. 77-78; Cross-Examination Transcript of Katlyn Schwantz Cross, March 21, 2019 ("**Schwantz Cross**"), Q. 97, Transcript Brief, pp. 178-179; Cross-Examination Transcript of Jennifer Borg, dated March 28, 2019 ("**Borg Cross**"), Q. 510-511, Transcript Brief, p. 713.

<sup>11</sup> Marsellus Cross, Q. 27-39, Responding MR, Tab 1, p. 7-9; JE Discovery Transcripts, January 24, 2018, Q. 285, 305-306, 359, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 800, 805, 817.

Sales Agents must operate out of a Just Energy office.<sup>12</sup>

12. Just Energy imposes a commission-based compensation structure for this sales channel:

- (a) Sales Agents only get paid fixed commission for contracts they originate;
- (b) Crew Coordinators get paid on commission on contracts they originate and receive commissions on contracts originated by Sales Agents they supervise; and
- (c) National/Regional Distributors receive commissions on contracts originated by all Sales Agents and Crew Coordinators out of their offices.<sup>13</sup>

**ii. Uniform recruitment, training and orientation dictated by Just Energy**

13. All Sales Agent are centrally recruited by Just Energy.<sup>14</sup> Just Energy has employees (as deemed by Just Energy) whose job it is to recruit Sales Agents on a daily basis.<sup>15</sup> Those responding speak to Just Energy and are directed to a particular Just Energy office.<sup>16</sup> Just Energy recruiters at each office (employees as deemed by Just Energy) conduct "interviews" and sign the Independent Contractor Agreements ("ICA") with the Sales Agents.<sup>17</sup>

14. The orientation process is standard and dictated by Just Energy.<sup>18</sup> After the ICA, Regional Distributors or recruiters administer Just Energy's training through its 5-module training program. Sales Agents are also provided with an Ontario Energy Board ("OEB")

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<sup>12</sup> JE Discovery Transcripts, January 24, 2018, Q. 257, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 794.

<sup>13</sup> Teixeira Cross, Q. 66-70, Transcript Brief, p. 55-56; Marsellus Cross, Q. 52-53, Transcript Brief, p. 11.

<sup>14</sup> JE Discovery Transcripts, January 24, 2018, Q. 70, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 763.

<sup>15</sup> JE Discovery Transcripts, January 24, 2018, Q. 70, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 763; Teixeira Affidavit, paras. 29-31, Responding MR, Tab 1, pp. 9-10.

<sup>16</sup> Teixeira Affidavit, paras. 32-33, Responding MR, Tab 1, p. 10.

<sup>17</sup> JE Discovery Transcripts, January 24, 2018, Q. 387, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 822; Teixeira Affidavit, paras. 33-34, 38-39, Responding MR, Tab 1, pp. 10-12.

<sup>18</sup> Just Energy Ontario LP Door to Door Recruiting and Orientation Process, Exhibit "35" to the Alexander Affidavit, Plaintiff's MR, Vol. 3, Tab H35, p. 2237; Ontario OEB Module/Orientation Process, Exhibit "79" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H79, pp. 2813-2815; Guidebook – Independent Contractor Orientation – Ontario – Part I, Exhibit "81" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H81, pp. 2820-2934; Guidebook – Independent Contractor Orientation – Ontario – Part 3, Exhibit "82" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H82, pp. 2936-2967.

training module and have to pass an OEB examination. Then Sales Agents are provided with their badge and sent into the field for more direct training and to market for Just Energy.<sup>19</sup>

15. The orientation and training process takes 1-2 days and is undertaken at every Just Energy office for every Sales Agent.<sup>20</sup>

16. This centralized training directs Sales Agents on how to do their job for Just Energy including: when and how long to market; how to dress; how to approach customers; how to explain Just Energy products; how to handle questions; and how to explain and sign a contract.<sup>21</sup>

### **iii. The "Independent Contractor" Agreement**

17. All Sales Agents are required to sign the ICA.<sup>22</sup> Sales Agents are not permitted to make changes to the ICA or negotiate terms, and signing the agreement is mandatory to start the job.<sup>23</sup>

18. The ICA provided as follows:

- (a) Sales Agents were to "market" and "solicit" contracts for the benefit of Just Energy LP;<sup>24</sup>
- (b) Sales Agents had to agree to abide by the terms and conditions delivered

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<sup>19</sup> Teixeira Affidavit, paras. 41-60, Responding MR, Tab 1, pp. 12-17; Schwantz Affidavit at paras. 4-8, Plaintiff's MR, Vol. 1, Tab B, p. 12; Borg Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab C, p. 55; Acton Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab D, p. 62; Lavigne Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab E, p. 69; Nemati Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab F, pp. 76.

<sup>20</sup> JE Discovery Transcripts, January 24, 2018, Q. 1047, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 904; Schwantz Affidavit at para. 6, Plaintiff's MR, Vol. 1, Tab B, p. 12; Borg Affidavit at para. 6, Plaintiff's MR, Vol. 1, Tab C, p. 55; Acton Affidavit at para. 6, Plaintiff's MR, Vol. 1, Tab D, p. 62.

<sup>21</sup> Training Module 4, Exhibit "66" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 66 at p. 2540, 2542; Training Module 5, Exhibit "69" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H69 at p. 2575, 2577, 2578.

<sup>22</sup> JE Discovery Transcripts, January 24, 2018, Q. 79-82, 387, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 136, at pp. 765-766, 822; Teixeira Affidavit, paras. 29-31, Responding MR, Tab 1, pp. 9-10.

<sup>23</sup> JE Discovery Transcripts, January 24, 2018, Q. 745, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, p. 870.

<sup>24</sup> Independent Contractor Agreement ("IC Agreement"), (Preamble and para. 1), – Answers arising from discovery related documents ("Responses to Undertakings"), Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1313.

by Just Energy;<sup>25</sup>

- (c) Sales Agents were compensated by way of a commission schedule;<sup>26</sup>
- (d) Just Energy rather than Sales Agents had an unfettered and unilateral right to amend the contract at any time by posting the amended contract at the office where the Sales Agent's commissions are received;<sup>27</sup>
- (e) Sales Agents were forbidden from working with any other company that competes with Just Energy during the course of the contract and for three weeks following termination;<sup>28</sup>
- (f) Just Energy could compel a contractor to cease marketing and undergo retraining if concerns are raised regarding their performance.<sup>29</sup>

**iv. Direction on when, where and how to work**

19. Thereafter Just Energy's direction on how Sales Agents perform their work continues:

- (a) daily morning meetings are held where best practices are explained;<sup>30</sup>
- (b) daily role playing is conducted before heading to the field;<sup>31</sup>
- (c) a "Sales Binder" provides direction on how to perform their work, including sales scripts and objection handling scripts;<sup>32</sup>

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<sup>25</sup> IC Agreement (Preamble), – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1313.

<sup>26</sup> IC Agreement (Independent Contractor Commission Schedule for Effective Contracts) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1319.

<sup>27</sup> IC Agreement (at para. 1) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1313.

<sup>28</sup> IC Agreement (at paras. 7-8) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, pp. 1315-1316.

<sup>29</sup> IC Agreement (at para. 9) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p.

<sup>30</sup> Teixeira Affidavit, paras. 62-63, Responding MR Tab 1, p. 18; Affidavit of Brian Marsellus sworn January 11, 2019 ("**Marsellus Affidavit**") at paras. 45-47, Responding MR Tab 2, p. 854; Schwantz Affidavit at para. 15(c), Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab D, pp. 63-64; Lavigne Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab F, pp. 78.

<sup>31</sup> Teixeira Affidavit, paras. 62-63, Responding MR, Tab 1, p. 18; Marsellus Affidavit, paras. 45-47, Responding MR, Tab 2, p. 854; Schwantz Affidavit at para. 14 and 15(c), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab D, p. 63; Lavigne Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 77; Nemati Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab F, p. 84.

<sup>32</sup> Including Marketing in Hot and Cold Weather Conditions, customer interaction scripts, objection handling scripts how to interact with disabled customers, and acceptable marketing practices: JE Discovery Transcripts, January 24, 2018, Q. 536-539, 542, 552-553, 560-563, 591-593, 607-609, 620, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 15, at p. 841-842, 844, 846-847, 851-852, 854-855, 857; Marketing in Hot and Cold Weather Conditions, Exhibit "41" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 41, p. 2319; The

- (d) job shadowing is conducted in the field;<sup>33</sup> and
- (e) supervision and direction is provided by Crew Coordinators in the field.<sup>34</sup>

20. Just Energy also directs Sales Agents on when and where they should market. Marketing locations are determined by the Regional Distributors and Crew Coordinators during daily morning meetings.<sup>35</sup> Sales Agents are then driven to the field in vans by Crew Coordinators.<sup>36</sup> iPads are used to monitor and track Sales Agents in real time and then direct resources accordingly.<sup>37</sup> Crew Coordinators or Sales Agents are threatened with termination if they don't

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Customer Interaction, Exhibit "42" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab 42, p. 2324; Objection Handling Scripts – Ontario (JECF), Exhibit "44" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 47, p. 2364; What you need while marketing, Exhibit "46" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 46, p. 2362; Interacting with Customers with Disabilities, Exhibit "47" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 47, p. 2364; Acceptable Marketing Practice: Code of Compliance - Ontario, Exhibit "48" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 48, p. 2366.

<sup>33</sup> Teixeira Affidavit, para. 54, Responding MR, Tab 1, p. 16.

<sup>34</sup> Schwantz Affidavit at para. 12 and 15(j), Plaintiff's MR, Vol. 1, Tab B, p. 13, 15; Borg Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab C, p. 56, 57; Acton Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab D, p. 63, 64; Lavigne Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab E, p. 77, 78; Nemati Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab F, p. 84, 85.

<sup>35</sup> Locations are determined by the use of maps, do not solicit lists, availability of installation technicians, discussions with other crew coordinators. Marsellus Affidavit, paras. 61-65, Responding MR, Tab 2, p. 858-859; Schwantz Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab D, p. 63; Lavigne Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab F, p. 78; Cross-Examination Transcript of Bahram Nemati dated March 22, 2019 ("**Nemati Cross**"), Q. 15, 203, Transcript Brief, pp. 353, 402; Schwantz Cross, Q. 271-272, 669, Transcript Brief, pp. 221-222, 334.

<sup>36</sup> Teixeira Affidavit, para. 88, Responding MR Tab 1, p. 24; Affidavit of Daniel Gadoua sworn January 11, 2019 ("**Gadoua Affidavit**") at para. 51, Responding MR, Tab 3, p. 883; Schwantz Affidavit at para. 15(f), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 97, Transcript Brief, Tab 5, p. 370; Marsellus Cross, Q. 131, Transcript Brief, Tab 1, p. 28; Schwantz Cross, Q. 128, Transcript Brief, Tab 4, pp. 185-186; Cross-Examination Transcript of Roland Lavigne, dated March 22, 2019 ("**Lavigne Cross**"), Q. 194-199, Transcript Brief, Tab 7, pp. 459-460; Cross-Examination Transcript of Jamie Acton, dated March 28, 2019 ("**Acton Cross**"), Q. 163-165, Transcript Brief, Tab 7, pp. 553-554; Borg Cross, Q. 368-374, 459-462, Transcript Brief, Tab 8, pp. 682-683, 700-701.

<sup>37</sup> Schwantz Cross, Q. 544-55, Transcript Brief, Tab 4, p. 299; Just Energy Mobile Presentation, Exhibit "118" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H118, pp. 4654-4700; Live Energy Application – iPad, Exhibit "130" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H130, pp. 4821-4839; Just Energy Mobile Management Portal – Presentation, Exhibit "122" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H122, pp. 4708-4735.

market in the approved areas.<sup>38</sup>

21. In addition, Just Energy has an extensive system to monitor and track Sales Agents' performance and discipline non-compliance including: a dedicated department that monitors Sales Agents' compliance with their work requirements;<sup>39</sup> and a "Compliance Matrix" directing the discipline to be imposed for various conduct, including suspensions, fines and termination.<sup>40</sup>

**v. Exclusivity to Just Energy**

22. Just Energy mandates in its ICAs that Sales Agents cannot market for other businesses "that compete directly with the business carried on by Just Energy corp. or its affiliates during the term of the Agreement and for a period of three (3) weeks following the termination of this Agreement".<sup>41</sup> In addition, given the extensive control exerted over Sales Agents, and the time commitment of six days per week, it is not possible for Sales Agents to work anywhere else.<sup>42</sup>

23. Sales Agents have no contemporaneous or ongoing relationship with customers, the relationship is exclusive to Just Energy.<sup>43</sup> The business at issue is Just Energy's business.

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<sup>38</sup> Schwantz Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab B, p. 16; Borg Affidavit at paras. 18, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab D, p. 65; Lavigne Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab F, p. 79.

<sup>39</sup> Just Energy Ontario L.P.'s Response to Ontario Energy Board Staff Supplementary Information Request ("JE Response to OEB Supp. Request"), Exhibit "94" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 94, pp. 3321-3322.

<sup>40</sup> Compliance Matrix, Exhibit "101" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 101, pp. 3488-3491.

<sup>41</sup> IC Agreement (para. 6) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1315.

<sup>42</sup> Schwantz Affidavit at para. 17 and 21, Plaintiff's MR, Vol. 1, Tab B, p. 15; Borg Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab D, pp. 65; Lavigne Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab F, p. 79; Schwantz Cross, Q. 36, Transcript Brief, Tab 4, p. 164.

<sup>43</sup> All energy contracts are made between Just Energy and the consumer, Just Energy performs finalization and confirmation of all contracts, Just Energy has sole discretion on whether to accept or reject a potential contract; Just Energy handles customer complaints, Just Energy addresses renewals of consumer contracts and when a Sales Agent



**vi. Just Energy provides the tools of work**

24. Just Energy creates and provides all the "tools", without which the Sales Agents cannot complete their work for Just Energy, including contracts, marketing materials, identification badges, and clothing.<sup>44</sup>

**vii. Compensation of Sales Agents**

25. Just Energy only provides Sales Agents with a fixed commission for contracts finalized between Just Energy and customers. The commission schedule applicable to all Sales Agents is dictated by Just Energy and all payments are from Just Energy directly.<sup>45</sup> Just Energy can unilaterally change the commission schedule for all Sales Agents in their sole discretion without advance notice.<sup>46</sup> Similarly, no Sales Agent has control over the structure of commissions or how they may be charged through to consumers.<sup>47</sup>

26. There are three (3) basic commissions paid to Sales Agents set out in all ICAs: "Initial" commission;<sup>48</sup> "Reconciliation" commission;<sup>49</sup> and a "Residual" commission.<sup>50</sup> When a Sales

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leaves Just Energy they get no residual commission from that consumer contract. IC Agreement (Preamble, para. 1) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1313.

<sup>44</sup> Just Energy Memo dated November 22, 2012, Exhibit "53" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H53, p. 2381; Teixeira Affidavit, para 104, Responding MR Tab 1, p. 29; Schwantz Affidavit at para. 15(d), Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab F, p. 78; Schwantz Cross, Q. 355-356, Transcript Brief, Tab 4, p. 246; Teixeira Affidavit, para 106, Responding MR, Tab 1, p. 29; The Customer Interaction, Exhibit "50" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 50, p. 2373.

<sup>45</sup> IC Agreement (Independent Contractor Commission Schedule for Effective Contracts) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1319.

<sup>46</sup> IC Agreement (para. 4) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1314.

<sup>47</sup> IC Agreement (para. 4) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1314; IC Agreement (Independent Contractor Commission Schedule for Effective Contracts) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1319.

<sup>48</sup> This is the commission paid for contracts that are not canceled or deemed not to be "Effective" by Just Energy. IC Agreement (Independent Contractor Commission Schedule for Effective Contracts at para. 1) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1319.

Agent stops working for Just Energy they do not receive Residual payments in respect of any contracts which were a product of their marketing.<sup>51</sup>

27. Just Energy also unilaterally "claw backs" Sales Agents' commissions when a consumer cancels or Just Energy deems the contract to be not "Effective". Claw backs can result in a Sales Agent owing money to Just Energy if commissions are less than the claw back for that period.<sup>52</sup>

28. Just Energy does not pay Sales Agents compensation for overtime, vacation pay, minimum wage, or public holiday and premium pay.<sup>53</sup> Similarly, Just Energy does not pay any Canada Pension Plan ("CPP") or Employment Insurance ("EI") contributions on behalf of the Sales Agents they employ.<sup>54</sup>

**C. Change in characterization of Sales Agents – Just Energy now treats them as employees**

29. In 2016, following certification, Just Energy opted to officially "convert" Sales Agents to employees by providing certain Sales Agents with offers of employment.<sup>55</sup>

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<sup>49</sup> A Reconciliation commission is a further commission that can be paid after a consumer has had a flow of gas or electricity for at least 60 days, this amount is always smaller than the Initial commission. IC Agreement (Independent Contractor Commission Schedule for Effective Contracts at para. 2) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, pp. 1319-1320.

<sup>50</sup> This requires a Sales Agent to be an active Sales Agents for at least a year, has submitted at least 65 residential customer contracts in the 3 month period preceding the Residual payment, has submitted Effective Contracts 30 days prior to the Residual payment and has not provided services to a competitor of Just Energy. IC Agreement (Independent Contractor Commission Schedule for Effective Contracts at para. 5) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1320.

<sup>51</sup> IC Agreement (Independent Contractor Commission Schedule for Effective Contracts at para. 5) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1320.

<sup>52</sup> IC Agreement (Independent Contractor Commission Schedule for Effective Contracts at para. 2) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1320-1321.

<sup>53</sup> JE Discovery Transcripts, January 24, 2018, Q. 376-385, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 820-821.

<sup>54</sup> JE Discovery Transcripts, January 24, 2018, Q. 382-383, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 821.

<sup>55</sup> Excerpts from transcript of Ravi Maharaj dated January 25, 2018 ("**JE Discovery Transcripts, January 25, 2018**"), Q. 1137, Exhibit "16" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, p. 922; Email exchange between

30. Following the 2016 conversion, Sales Agents are now called "Energy Advisors".<sup>56</sup> They are responsible for the marketing of Just Energy products – they are Sales Agents.<sup>57</sup> Importantly, unlike Sales Agents, Energy Advisors are now paid hourly wages with overtime pay.<sup>58</sup>

31. Sales Agents should properly be classified as employees, just as the courts in Ohio found that they ought to be.<sup>59</sup>

## ISSUES AND THE LAW

### D. Certified Common Issues

32. This class proceeding was certified on behalf of the following class:

Any person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an Independent Contractor Agreement.<sup>60</sup>

33. The Plaintiff moves for summary judgment in respect of the following twelve (12) certified common issues:

1. Are the Class Members "employees" of the Defendants pursuant to the Employment Standards Act, 2000 ("ESA")?
2. If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants pursuant to the Canada Pension Plan ("CPP")?

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Rosalba Gullo, Richard Teixeira and Ryan Parnell, Exhibit "13" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, p. 728.

<sup>56</sup> JE Discovery Transcripts, January 25, 2018, Q. 1134-1138, 1170-1180, 1191-1194, Exhibit "16" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H16, p. 922, 924-928.

<sup>57</sup> Role Description: Sales, Exhibit "12" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, p. 720; JE Discovery Transcripts, January 25, 2018, Q. 1134-1138, 1170-1180, 1191-1194, Exhibit "16" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H16, p. 922, 924-928

<sup>58</sup> Role Description: Sales, Exhibit "12" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, p. 724.

<sup>59</sup> *Hurt v. Commerce Energy, Inc.*, Case No. 1:12-CV-758, Doc. No. 808 (October 6, 2014), PBOA, Vol 1, Tab 1; *Hurt v. Commerce Energy, Inc.*, Case No. 1:12-CV-758, Doc. No. 853 (August 3, 2015) PBOA, Vol 1, Tab 2; *Hurt v. Commerce Energy, Inc.*, 2013 WL 4427257 (August 15, 2013) PBOA, Vol 1, Tab 3; *Hurt v. Commerce Energy, Inc.*, Case No. 1:12-CV-758 (Gwin J.) (January 29, 2018) PBOA, Vol 1, Tab 4; *Hurt v. Commerce Energy, Inc.*, 2018 WL 4204541 (September 4, 2018) PBOA, Vol 1, Tab 5.

<sup>60</sup> Exhibit "4" to the Alexander Affidavit, Plaintiff's MR, Vol. 1, Tab H4, pp. 170-176.

3. If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants pursuant to the Employment Insurance Act ("EI")?
4. If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the ESA, or do the Class Members fall within the exception to this exemption as route salespersons?
5. If the answers to (1) and (4) are "yes", do the minimum requirements of the ESA with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?
6. If the answers to questions (1) and (4) are "yes", do the Defendants owe contractual duties and/or a duty of good faith to:
  - a. Ensure that the Class Members were compensated with the minimum wage?
  - b. Ensure that the Class Members' hours of work were monitored and accurately recorded?
  - c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
  - d. Ensure that the Class Members were compensated with vacation pay?
  - e. Ensure that the Class Members were compensated with and public holiday and premium pay?
7. Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?
8. If the answers to (1) and (4) are "yes", did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the ESA?
9. If the answers to (2) and/or (3) are "yes", did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?
10. Alternatively, did the Defendant owe a duty of care to the Class Members to:
  - a. ensure that Class Members are properly classified as employees;
  - b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;
  - c. ensure that the Class Members hours of work are monitored and accurately recorded; and
  - d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.
11. Did the Defendants breach any of the duties of care found to exist above? If so, how?
12. Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay

owed to them, in accordance with the ESA, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?<sup>61</sup>

### **E. Summary Judgment Should be Granted on All Common Issues**

34. The Supreme Court of Canada in *Hryniak v. Mauldin* provided guidance with respect to summary judgment motions as follows:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.<sup>62</sup>

35. Summary judgment would be appropriate in this case as:

- (a) the factual evidence is before this court in a paper-based record which will allow for necessary findings of fact in a summary fashion;<sup>63</sup>
- (b) the credibility of witnesses to ascertain what happened in an event is not an issue;
- (c) the focus of the common issues is on the impact that Just Energy's systemic organizational structure and approach to all class members has on the characterization of their status, which structure and approach is not factually disputed only the characterization is;
- (d) there is no expert evidence to weigh or assess; and
- (e) a trial wouldn't provide anything more than what this well-briefed motion can.

36. In his recent decision in *Brazeau v. Canada (AG)*, Justice Perell considered a voluminous and complex evidentiary record comprised of approximately 31,000 pages, not counting compendiums, when he addressed whether the charter rights of some 6,000 inmates were violated by the practice of solitary confinement.<sup>64</sup> He found in that case, while there were numerous difficult issues to be determined, there was no paucity of evidence to resolve them on

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<sup>61</sup> Certification Order, Exhibit "4" to the Alexander Affidavit, Plaintiff's MR, Vol. 1, Tab H4, pp. 170-176.

<sup>62</sup> *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49, 50, PBOA, Vol 1, Tab 6.

<sup>63</sup> *Brazeau v. Canada (Attorney General)*, 2019 ONSC 1888 at para. 270, PBOA, Vol 1, Tab 7.

<sup>64</sup> *Brazeau v. Canada (Attorney General)*, 2019 ONSC 1888 at para. 159, PBOA, Vol 1, Tab 7.

such a fulsome record.<sup>65</sup> As was the case in *Brazeau*, this Court may order summary judgment on the common issues leaving individual issues determinations for individual issues trials.<sup>66</sup>

## F. Sales Agents are employees of Just Energy – Common issue 1

### i. Employee status: An objective test

37. In *671122 Ontario Ltd. v. Sagaz Industries Canada*<sup>67</sup> ("*Sagaz*"), the Supreme Court of Canada provided guidance on determining the true nature of an employment relationship. The central question is whether the person is performing services "as a person in business on his own account" - in other words "whose business is it"?<sup>68</sup>

38. Following *Sagaz*, the Court of Appeal for Ontario in *Belton v. Liberty Insurance Co. of Canada*,<sup>69</sup> and then again in *Braiden v. La-Z-Boy Canada Limited*<sup>70</sup> adopted and applied a specific five (5) part test for determining the status of *commissioned salespeople*:

1. Whether or not the agent was limited exclusively to the service of the principal;
2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;

<sup>65</sup> *Brazeau v. Canada (Attorney General)*, 2019 ONSC 1888 at paras. 277, 280, PBOA, Vol 1, Tab 7.

<sup>66</sup> *Brazeau v. Canada (Attorney General)*, 2019 ONSC 1888 at para. 282, PBOA, Vol 1, Tab 7.

<sup>67</sup> *671122 Ontario Ltd. v. Sagaz Industries Canada*, 2001 SCC 59, PBOA, Vol 1, Tab 8 ["*Sagaz*"].

<sup>68</sup> *Sagaz* at para. 47, PBOA, Vol 1, Tab 8. The Court set out a list of non-exhaustive factors that should be considered which include: (1) the level of control the employer has over the worker's activities; (2) whether the worker provides his or her own equipment; (3) whether the worker hires his or her own helpers; (4) the degree of financial risk taken by the worker; (5) what the degree of responsibility for investment and management held by the worker; and (6) what the worker's opportunity for profit in the performance of his risks is. ("**Sagaz Factors**")

<sup>69</sup> *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. No. 3358 (C.A.) at para. 11, PBOA, Vol 1, Tab 9 ["*Belton*"].

<sup>70</sup> *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464 at paras. 33-35, PBOA, Vol 1, Tab 10 ["*Braiden*"].

5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. *In other words, whose business is it?*<sup>71</sup>

**("Belton/Braiden Factors")**

39. Courts in Ontario have repeatedly applied the *Belton/Braiden* factors to find commissioned salespersons who were subject to the control of their principal as "employees":<sup>72</sup>

40. Other relevant principles on determinations of employment status include:

- (a) an interpretation of the *ESA* that encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not;<sup>73</sup>
- (b) Any doubt arising from difficulties in the language of the *ESA* should be resolved in favour of the claimant;<sup>74</sup>
- (c) the wording of any agreement and purported intent cannot be determinative of an employment relationship;<sup>75</sup>
- (d) employees cannot "consent" to work in violation of the *ESA*;<sup>76</sup>
- (e) There is no basis pursuant to the *ESA* or the common law to workers paid only by commission are independent contractors;<sup>77</sup>

<sup>71</sup> *Belton* at para. 11, PBOA, Vol 1, Tab 9, citing the British Columbia Court of Appeal in *Doyle v. London Life Insurance Co*, [1985] B.C.J. No. 2561 (C.A.) [*Doyle*], PBOA, Vol 1, Tab 11.

<sup>72</sup> See *Cormier v. 1772887 Ontario Limited c.o.b. as St Joseph's Communications*, 2019 ONSC 587 for the most recent adoption of the *Belton/Braiden* Factors by the Ontario Superior Court, PBOA, Vol 1, Tab 12. See also Schedule "C" – Chart of Analogous Cases: *Moseley-Williams v. Hansler Industries Ltd.*, [2008] O.J. No. 4457 (S.C.) at paras. 29-42, PBOA, Vol 1, Tab 13; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 at paras. 47-50, PBOA, Vol 1, Tab 14; *King v. Merrill Lynch Canada Inc.*, [2005] O.J. No. 5028 (S.C.), PBOA, Vol 1, Tab 15; *Jaremko v. A.E. LePage Real Estate Services Ltd.*, [1987] O.J. No. 506 (H.C.), PBOA, Vol 1, Tab 16, aff'd [1989] O.J. No. 996 (C.A.), PBOA, Vol 1, Tab 17; *Sooters Studios Ltd., Re*, 1991 CarswellOnt 7806 (Ont. E.S.B. (Adj.)) at paras. 8, 28, 51, PBOA, Vol 1, Tab 18; *Key Fund Raising Ltd. v. British Columbia (Director of Employment Standards)*, 2001 CarswellBC 4136 (Employment Standards Tribunal) at paras. 21, 31, PBOA, Vol 1, Tab 19; *Big Picture Home Entertainment Ltd. v. MacDonald*, 2016 CarswellOnt 18808 (Ont. L.R.B.), PBOA, Vol 1, Tab 20, varied 2016 CarswellOnt 20591 (Ont. L.R.B.); *Baker v. 9111140 Canada Inc.*, 2017 CarswellOnt 5875 (Ont. L.R.B.); PBOA, Vol 1, Tab 21; *R. v. Pereira*, 1988 CarswellAlta 88 (Q.B.), PBOA, Vol 1, Tab 22.

<sup>73</sup> *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at pp. 1002-1003, PBOA, Vol 1, Tab 23.

<sup>74</sup> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 36, PBOA, Vol 1, Tab 24.

<sup>75</sup> *Braiden* at para. 21, PBOA, Vol 1, Tab 10; *Belton* at para. 11, PBOA, Vol 1, Tab 9.

<sup>76</sup> *Wood v. CTS of Canada Co.*, 2018 ONCA 758 at para. 95, PBOA, Vol 1, Tab 25.

<sup>77</sup> Courts have repeatedly considered and determined commissioned salespeople to be employees: see *Belton* and *Braiden* as examples. In addition, the *ESA* Policy on Overtime Pay specifically provides a guide for determining overtime pay for employees paid solely by commission - Ministry of Labour, *Employment Standards Act, 2000*

- (f) 'mandatory employment requirements' can be inferred by conduct;<sup>78</sup> and
- (g) an employer choosing to manage its employees through what it classifies as "independent" contractors is still bound by those agents' actions on its behalf.<sup>79</sup>

**ii. Sales Agents are employees of Just Energy**

41. Just Energy's organizational structure, centralized recruitment, direction of Sales Agents' method, manner and location of work, the limited tools provided to Sales Agents by Just Energy, and the integral role of Sales Agents to Just Energy's business militate heavily in favour of a finding that Sales Agents are "employees" of Just Energy.

**(1) Sales Agents are subject to the control of Just Energy**

**(a) Just Energy's organizational structure is inconsistent with independence**

*(i) Organizational structure of door-to-door sales at Just Energy*

42. Despite claiming to have "independent contractors" running their own businesses while marketing Just Energy's products, Just Energy's door-to-door marketing channel through those "independent contractors" is highly structured across Ontario:

**(a) Just Energy establishes marketing offices throughout Ontario;<sup>80</sup>**

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*Policy and Interpretation Manual*, 2019, Release 1 (last updated March 22, 2019) at p. 241-242, PBOA, Vol 2, Tab 52..

<sup>78</sup> *Mazraani c. Industrielle Alliance*, 2016 TCC 65 at paras. 162, 169, 177, 239, 249, PBOA, Vol 1, Tab 26, rev'd on other grounds 2017 FCA 80; *Truong v. British Columbia*, 1999 BCCA 513 at paras. 28-29, PBOA, Vol 1, Tab 27; *MacDonald v. Richardson Greenshields of Canada Ltd.*, [1985] B.C.J. No. 2865 (S.C.), PBOA, Vol 2, Tab 28; *Sistema Toronto Academy Inc. v. Minister of National Revenue*, 2016 TCC 193 at paras. 29, 30 and 36, PBOA, Vol 2, Tab 29.

<sup>79</sup> *Sooters Studios Ltd., Re*, 1991 CarswellOnt 7806 (Ont. E.S.B.) at paras. 8, 28, 51, PBOA, Vol 1, Tab 18; *Key Fund Raising Ltd. v. British Columbia (Director of Employment Standards)*, 2001 CarswellBC 4136 (Employment Standards Tribunal) at paras. 21, 31, PBOA, Vol 1, Tab 19. See principal/agency test in *Rockland Industries Inc. v. Amerada Minerals Corp. of Canada Ltd.*, [1980] 2 S.C.R. 2 at pp. 13-14, PBOA, Vol 2, Tab 30, and *Hav-A-Kar Leasing Ltd v. Vekselshtein*, 2012 ONCA 826 at para. 42, PBOA, Vol 2, Tab 31.

<sup>80</sup> JE Discovery Transcripts, January 24, 2018, Q. 269, 275, 278, 281, 282, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Tab H15, Vol. 2, at pp. 797, 798, 799; Marsellus Cross, Q. 15, 22-23, Transcript Brief, Tab 1, p. 5-6; Transcript of Cross-Examination of Daniel Gadoua dated March 6, 2019 ("**Gadoua Cross**"), Q. 58, Responding MR, Tab 3, p. 142.



- (b) in addition to an office administrator and recruiter who are employed by Just Energy, Just Energy offices are run by Regional Distributors;<sup>81</sup>
  - (c) Regional Distributors operate the Just Energy offices and manage the other "independent contractors" operating at the office on behalf of Just Energy;<sup>82</sup>
  - (d) Of those "independent contractors" are Crew Coordinators, who supervise Sales Agents and take direction from Regional Distributors;<sup>83</sup>
  - (e) All Sales Agents must operate out of one of the Just Energy offices;<sup>84</sup>
  - (f) All Sales Agents, Crew Coordinators, Regional Distributors and National Distributors are all "independent contractors" of Just Energy;<sup>85</sup> and
  - (g) Just Energy imposes a commission-based compensation structure for this sales channel:
    - (i) Sales Agents get paid a fixed commission for contracts they originate;
    - (ii) Crew Coordinators get paid a fixed commission for contract they originate and received commissions on contracts originated by Sales Agents they supervise; and
    - (iii) Regional Distributors receive commissions on contracts originated by all Sales Agents and Crew Coordinators out of their offices.<sup>86</sup>
- (ii) *Hierarchical structure is implemented by Just Energy*

43. This structure was designed and created by Just Energy, exists in all Just Energy offices in Ontario, and is directed to Sales Agents in the Just Energy orientation and training process.<sup>87</sup>

This structure is implemented by Just Energy by, among other ways, Just Energy deciding who

<sup>81</sup> JE Discovery Transcripts, January 24, 2018, Q. 285, 305-306, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Tab H15, Vol. 2, at pp. 800, 805; Marsellus Cross, Q. 14-16, 27-39 Transcript Brief, Tab 1, pp. 5, 7-9.

<sup>82</sup> Marsellus Cross, Q. 27-39, Transcript Brief, Tab 1, p. 7-9; JE Discovery Transcripts, January 24, 2018, Q. 285, 305-306, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 800, 805; Distributor Agreement (at 3.1), Exhibit "24" to the Alexander Affidavit, Plaintiff's MR, Vol. 3, p. 1572.

<sup>83</sup> Marsellus Cross, Q. 27-39, Transcript Brief, Tab 1, p. 7-9; JE Discovery Transcripts, January 24, 2018, Q. 285, 305-306, 359, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Tab H15, Vol. 2, at pp. 800, 805, 817.

<sup>84</sup> JE Discovery Transcripts, January 24, 2018, Q. 257, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 794.

<sup>85</sup> JE Discovery Transcripts, January 24, 2018, Q. 305-306, 355, 356, 362, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 805, 816-818.

<sup>86</sup> Teixeira Cross, Q. 66-70, Transcript Brief, p. 55-56; Marsellus Cross, dated March 6, 2019, Q. 52-53, Transcript Brief, p. 11.

<sup>87</sup> Training Module 1 – Your Opportunity at Just Energy, Exhibit "56" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, p. 2401; Marsellus Cross, Q. 33-37; Transcript Brief, p. 11; Schwantz Affidavit at para. 8, Plaintiff's MR, Vol. 1, Tab B, p. 12; Borg Affidavit at para. 7, Plaintiff's MR, Vol. 1, Tab C, p. 55; Acton Affidavit at para. 7, Plaintiff's MR, Vol. 1, Tab D, p. 62; Lavigne Affidavit at para. 7, Plaintiff's MR, Vol. 1, Tab E, pp. 69; Nemati Affidavit at para. 7, Plaintiff's MR, Vol. 1, Tab F, p. 76.

can become a National or Regional Distributor, deciding what Just Energy offices are opened in Ontario, and deciding which National/Regional Distributor is permitted to run which office.<sup>88</sup>

44. The compensation structure established and implemented by Just Energy reinforces and promotes this hierarchical system. Just Energy goes so far as to suggest to Sales Agents that if they work hard, some day they might be able to become Crew Coordinators or Regional Distributors with their own offices and get to receive commissions off the backs of the Sales Agents they would then be supervising.<sup>89</sup>

45. It is no coincidence that all Just Energy offices are operated in this hierarchical structure – Just Energy directed that to ensure a consistent marketing effort on its behalf across Ontario.

*(iii) Just Energy's sales offices*

46. Sales Agents must operate out of Just Energy offices owned or operated by Just Energy:
- (a) The office space is owned or leased by Just Energy – not Regional Distributors;<sup>90</sup>
  - (b) The offices have Just Energy signs outside and inside marking them as Just Energy offices;<sup>91</sup>
  - (c) Just Energy staffs these offices with Just Energy employees (as characterized by Just Energy) such as an "administrator" and a "recruiter" who assist the Regional Distributor in the management of the office;<sup>92</sup> and

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<sup>88</sup> Teixeira Affidavit, para. 16, Responding MR, p. 0048; JE Discovery Transcripts, January 24, 2018, Q. 269, 275, 278, 281, 282, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 797, 798, 799; Marsellus Cross, Q. 15, 22-23, Transcript Brief, Tab 1, p. 5-6; Gadoua Cross, Q. 58, Responding MR, Tab 3, p. 142.

<sup>89</sup> Teixeira Affidavit, para. 9, Responding MR, p. 0003; Marsellus Affidavit, para. 19, Responding MR, p. 0848; Training Module 1, Exhibit "56" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 56 at p. 2402; Training Module 3, Exhibit "62" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 62 at p. 2545

<sup>90</sup> JE Discovery Transcripts, January 24, 2018, Q. 269, 270, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, pp. 797.

<sup>91</sup> JE Discovery Transcripts, January 24, 2018, Q. 275-284, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 798, 789.

<sup>92</sup> JE Discovery Transcripts, January 24, 2018, Q. 285, 305-306, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 800, 805; Marsellus Cross, Q. 14-16, 27-39 Transcript Brief, Tab 1, pp. 5, 7-9.

(d) Just Energy provides all promotional materials, promoting Just Energy, for use in the offices.<sup>93</sup>

(iv) *Regional Distributors manage offices and agents for Just Energy*

47. The Regional Distributors are the ones who manage the office and Sales Agents for Just Energy. Just Energy expressly assigns these duties to the Regional Distributor:

#### Section 3.1 Service Retainer

(1) JUST ENERGY hereby retains the Service Provider and the Service Provider hereby agrees to provide the services described below (the "Services") in the Province of Ontario, or in such province that JEC, or an Affiliate thereof, may designate from time to time, in accordance with the terms of this Services Agreement and consistent with the highest standards of integrity with respect to representations to the public on behalf of JUST ENERGY and its affiliates:

- (a) with the approval of JUST ENERGY, to advertise for and interview, recruit, educate, motivate and guide the activities of Independent Contractors;
- (b) through the Independent Contractors, to solicit Contracts using forms and solicitation material approved and supplied by JUST ENERGY or its Affiliates;
- (c) to ensure that each Independent Contractor executes an Independent Contractor Agreement;
- (d) to submit to JUST ENERGY completed contract forms for Contracts obtained by the Independent Contractors on a weekly basis in accordance with JUST ENERGY's practice as determined from time to time;
- (e) to ensure that Independent Contractors use the highest standards of integrity in soliciting Contracts;
- (f) to regularly report to JUST ENERGY any material breach by Independent Contractors with respect to the Independent Contractor obligations set out in each of their Independent Contractor Agreements;
- (g) to ensure that the Independent Contractors orally advise each customer of the material terms of the Contract prior to it being signed by the customer; and
- (h) to implement the compliance materials provided to the Service Provider by JUST ENERGY from time to time.

(2) The Service Provider agrees to read, and to ensure that all Independent Contractors read and, where required, sign, any applicable Code of Conduct.

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<sup>93</sup> Just Energy Memo dated November 22, 2012, Exhibit "53" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H53, p. 2381

- (3) The Service Provider, the Principal and JUST ENERGY agree that:
- (a) the Independent Contractors are independent contractors of JUST ENERGY or an Affiliate thereof, as the case may be, and not independent contractors of the Service Provider or the Principal;
  - ...
  - (e) the Service Provider and the Principal will comply with all directions of JUST ENERGY or its Affiliates with respect to the marketing of Contracts, including a decision by JUST ENERGY or any Affiliate thereof that the Service Provider and/or the Principal cease or limit such marketing for any specified: (i) period of time, (ii) area, (iii) number of Contracts, (iv) number of residential customer equivalents, or (v) number of Independent Contractors.

(4) The Service Provider shall communicate, at least weekly, and immediately where a matter material to JUST ENERGY arises, with the Executive Vice President, Sales or the Senior Vice President, Regional General Manager, Canada of JUST ENERGY, or with such person designated by such persons from time to time, respecting the Service Provider's obligations pursuant to this Agreement.<sup>94</sup>

48. Just Energy contracts with Regional Distributors to act as its agent in the supervision and direction of Sales Agents. In doing so, Regional Distributors' actions bind Just Energy.<sup>95</sup>

49. Regional Distributors direct Sales Agents and Crew Coordinators on a daily basis.<sup>96</sup> To Sales Agents and Crew Coordinators in the day-to-day operations the Regional Distributor **was** Just Energy. The Regional Distributors held themselves out to Sales Agents and Crew Coordinators has having control over them, including the ability to discipline, hire and terminate

<sup>94</sup> Distributor Services Agreement (Undertaking 10), July 5, 2018 – Responses to Undertakings, Exhibit "18" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, pp. 1261-1262.

<sup>95</sup> *Sooters Studios Ltd., Re*, 1991 CarswellOnt 7806 (Ont. E.S.B.), at paras. 8, 28, 51, PBOA, Vol 1, Tab 18; *Key Fund Raising Ltd. v. British Columbia (Director of Employment Standards)*, 2001 CarswellBC 4136 (Employment Standards Tribunal) at paras. 21, 31, PBOA, Vol 1, Tab 19. See principal/agency test in *Rockland Industries Inc. v. Amerada Minerals Corp. of Canada Ltd.*, [1980] 2 S.C.R. 2 at para. 32, PBOA, Vol 2, Tab 30, and *Hav-A-Kar Leasing Ltd v. Vekselshtein*, 2012 ONCA 826 at para. 42, PBOA, Vol 2, Tab 31.

<sup>96</sup> 27-39, Transcript Brief, p. 7-9; Maresellus Cross, Q., Teixeira Cross, Q. 221-223, Transcript Brief, Tab 2, pp 96-97; Schwantz Affidavit at paras.9-11, 15, Plaintiff's MR, Vol. 1, Tab B, pp. 14-15; Borg Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab C, pp. 56-58; Acton Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab D, pp. 63-64; Lavigne Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab E, pp. 70-71; Nematı Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab F, pp. 77-78; Schwantz Cross, Q. 97, Transcript Brief, pp. 178-179; Borg Cross, Q. 510-511, Transcript Brief, p. 713.

the employment of the Sales Agents and Crew Coordinators.<sup>97</sup> Sales Agents and Crew Coordinators simply understood that the Regional Distributors were acting as or on behalf of Just Energy and had the authority they exuded.<sup>98</sup>

(v) *Sales Agents and sales offices are the door-to-door sales division of Just Energy*

50. Just Energy conducted its door-to-door residential marketing of gas and electricity contracts by Sales Agents through the above-noted hierarchical structure. The Regional Distributors report to the Executive Vice President, Sales (an employee as deemed by Just Energy) who in turn reports to Senior Vice President, Regional Manager, Canada (an "employee" as deemed by Just Energy). This structure is no different than any sales division within any typical sales-dependent company. If one simply changes the Just Energy-imposed "names" of positions the organizational structure would look no different than any other company with an employee structure:

Vice President, Regional Manager, Canada >> Executive Vice President, Sales >> Regional Sales or Office Manager (Regional Distributor) >> Sales Supervisor (Crew Coordinator) >> Salesperson (Sales Agent)

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<sup>97</sup> Schwantz Cross, Q. 103, 111-113, Transcript Brief, pp. 180-183; Nemati Cross, Q. 182-183, Transcript Brief, p. 392, 393; Lavigne Cross, Q. 255-257, Transcript Brief, p. 469; Acton Cross, Q. 201-203, Transcript Brief, p. 562; Borg Cross, Q. 471-475, Transcript Brief, p. 703.

<sup>98</sup> Schwantz Cross, Q. 103, 111-113, Transcript Brief, pp. 180-183; Nemati Cross, Q. 182-183, Transcript Brief, p. 392, 393; Lavigne Cross, Q. 255-257, Transcript Brief, p. 469; Acton Cross, Q. 201-203, Transcript Brief, p. 562; Borg Cross, Q. 471-475, Transcript Brief, p. 703.

51. In fact, this is what the organizational structure looked like at Just Energy just after it stopped calling its Sales Agents "independent contractors" and started treating them as employees effective November 28, 2016:<sup>99</sup>

Vice President, Regional Manager, Canada >> Executive Vice President, Sales >> Territory Sales Manager (Regional Distributor) >> Field Sales Manager (Crew Coordinator) >> Just Energy Advisor (Sales Agent).<sup>100</sup>

52. Change the names and artificial employer-imposed characterization, and you have a basic structure of an employee sales division.

**(b) Just Energy's centralized recruitment of Sales Agents**

53. All Sales Agent are centrally recruited by Just Energy.<sup>101</sup> Just Energy has employees (as deemed by Just Energy) whose job it is to recruit Sales Agents on a daily basis.<sup>102</sup> Just Energy's own evidence is that it "... provided its recruiters with standardized recruitment materials" that "ensured that a consistent message was conveyed to recruits."<sup>103</sup> Just Energy's policy on the recruitment of "independent contractors" seeks to ensure that "all Regional offices meets all Just Energy requirements" by, among other things, requiring that all recruitment placements come from Just Energy Sales Operations.<sup>104</sup>

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<sup>99</sup> JE Discovery Transcripts, January 25, 2018, Q. 1134-1138, 1170-1180, 1a91-1194, Exhibit "16" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H16, p. 922, 924-928; Email exchange between Rosalba Gullo, Richard Teixeira and Ryan Parnell, Exhibit "13" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, p. 728.

<sup>100</sup> JE Discovery Transcripts, January 25, 2018, Q. 1134-1138, 1170-1180, 1191-1194, Exhibit "16" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H16, p. 922, 924-928.

<sup>101</sup> JE Discovery Transcripts, January 24, 2018, Q. 70, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 763.

<sup>102</sup> JE Discovery Transcripts, January 24, 2018, Q. 70, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 763; Teixeira Affidavit, paras. 29-31, Responding MR, Tab 1, pp. 9-10.

<sup>103</sup> Teixeira Affidavit, para. 30, Responding MR, Tab 1, pp. 10.

<sup>104</sup> Independent Contractor and Employee Recruitment Policy dated November 10, 2014, Exhibit "136" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 136 at p. 4876.

54. Ads are placed by Just Energy.<sup>105</sup> Those answering the ads speak to Just Energy and are directed to a particular Just Energy sales office.<sup>106</sup> The Just Energy recruiters there (employees as deemed by Just Energy) conduct "interviews" and sign the ICAs with the Sales Agents.<sup>107</sup>

55. Just Energy did all of this to maintain control of this door-to-door sales channel.

**(c) Just Energy Directs Sales Agents on Method of Work**

**(i) Uniform training and orientation dictated by Just Energy**

56. The orientation process is standard and dictated by Just Energy.<sup>108</sup> The orientation process follows the same pattern:

- (a) "interview" of recruits at the Just Energy offices by Regional Distributors or recruiters;
- (b) Sales Agents are provided with their ICA to review and execute;
- (c) Regional Distributors or recruiters administer Just Energy's training through its five (5) module training program;
- (d) Regional Distributors or recruiters administer the OEB's training module;
- (e) Recruiters administer an OEB examination;
- (f) After passing the OEB examinations, Sales Agents are provided with their badge and sent into the field for more direct training and to market for Just Energy.<sup>109</sup>

<sup>105</sup> Teixeira Affidavit, paras. 27-28, Responding MR, Tab 1, p. 9.

<sup>106</sup> Teixeira Affidavit, paras. 32-33, Responding MR, Tab 1, p. 10.

<sup>107</sup> JE Discovery Transcripts, January 24, 2018, Q. 387, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 822; Teixeira Affidavit, paras. 33-34, 38-39, Responding MR, Tab 1, pp. 10-12.

<sup>108</sup> Just Energy Ontario LP Door to Door Recruiting and Orientation Process, Exhibit "35" to the Alexander Affidavit, Plaintiff's MR, Vol. 3, Tab H35, p. 2237; Ontario OEB Module/Orientation Process, Exhibit "79" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H79, pp. 2813-2815; Guidebook – Independent Contractor Orientation – Ontario – Part I, Exhibit "81" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H81, pp. 2820-2934; Guidebook – Independent Contractor Orientation – Ontario – Part 3, Exhibit "82" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H82, pp. 2936-2967.

<sup>109</sup> Teixeira Affidavit, paras. 41-60, Responding MR, Tab 1, pp. 12-17; Schwantz Affidavit at paras. 4-8, Plaintiff's MR, Vol. 1, Tab B, p. 12; Borg Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab C, p. 55; Acton Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab D, p. 62; Lavigne Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab E, p. 69; Nemati Affidavit at paras. 4-7, Plaintiff's MR, Vol. 1, Tab F, pp. 76.

57. The orientation and training process takes 1-2 days and is undertaken at every Just Energy Office for every Sales Agent.<sup>110</sup> Just Energy provides central training to all Regional Directors and recruiters on how to conduct these orientation and training sessions.<sup>111</sup>

**(ii) Training directs Sales Agents how to perform their jobs for Just Energy**

58. Just Energy trains all Sales Agents in the same manner using a centralized and standard training course.<sup>112</sup> The five (5) module course is all-encompassing and instructs Sales Agents on how to do their job for Just Energy.<sup>113</sup> In particular, Sales Agents are trained on:

- (a) Just Energy and its group of companies;<sup>114</sup>
- (b) Just Energy's sales hierarchy;<sup>115</sup>
- (c) Just Energy's products;<sup>116</sup>
- (d) the market for Just Energy's products;<sup>117</sup>
- (e) acceptable marketing practices;<sup>118</sup>
- (f) when and how long to market;<sup>119</sup>
- (g) how to dress;<sup>120</sup>

<sup>110</sup> JE Discovery Transcripts, January 24, 2018, Q. 1047, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 15, at p. 904; Schwantz Affidavit at para. 6, Plaintiff's MR, Tab B, p. 12; Borg Affidavit at para. 6, Plaintiff's MR, Vol. 1, Tab C, p. 55; Acton Affidavit at para. 6, Plaintiff's MR, Vol. 1, Tab D, p. 62.

<sup>111</sup> JE Discovery Transcripts, January 24, 2018, Q. 399, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 825; Ontario OEB Module/Orientation Process, Exhibit "79" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H79, pp. 2813-2815; Guidebook – Independent Contractor Orientation – Ontario – Part I, Exhibit "81" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H81, pp. 2820-2934; Guidebook – Independent Contractor Orientation – Ontario – Part 3, Exhibit "82" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H82, pp. 2936-2967.

<sup>112</sup> Teixeira Affidavit, paras. 45, Responding MR, Tab 1, p. 13; JE Discovery Transcripts, January 24, 2018, Q. 500-509, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 836-838.

<sup>113</sup> Training Modules 1-5, Exhibits "56", "59", "62", "66", and "69" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 56, 59, 62, 66, and 69 at pp. 2395-2407, 2434-2455, 2477-2485, 2537-2547, 2570-2586.

<sup>114</sup> Training Module 1, Exhibit "56" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 56 at p. 2398.

<sup>115</sup> Training Module 1, Exhibit "56" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 56 at p. 2402.

<sup>116</sup> Training Module 2, Exhibit "59" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 59 at p. 2435-2444.

<sup>117</sup> Training Module 2, Exhibit "59" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 59 at p. 2437-2444.

<sup>118</sup> Training Module 4, Exhibit "66" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 66 at p. 2545-2546.

<sup>119</sup> Training Module 4, Exhibit "66" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 66 at p. 2540.



- (h) how to sell to customers including:
  - (i) the sales process;
  - (ii) how to approach customers;
  - (iii) how to convince a customer to provide their energy bill;
  - (iv) how to explain Just Energy products;
  - (v) how to handle questions;
  - (vi) how to explain and sign an agreement; and
  - (vii) how to address the verification call.<sup>121</sup>

**(d) Just Energy directs Sales Agents when they work**

59. Thereafter Just Energy's direction on how the Sales Agents perform their work continues:
- (a) daily morning meetings are held where best practices are stressed to Sales Agents by Regional Distributors and Crew Coordinators;<sup>122</sup>
  - (b) Sales Agents undergo daily role playing with Regional Distributors and/or Crew Coordinators before heading to the field;<sup>123</sup>
  - (c) Sales Agents are provided with a "Sales Binder" created by Just Energy that provides direction to Sales Agents on topics such as:<sup>124</sup>
    - (i) how to market in hot & cold weather conditions;<sup>125</sup>
    - (ii) customer interaction scripts;<sup>126</sup>

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<sup>120</sup> Training Module 4, Exhibit "66" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 66 at p. 2542.

<sup>121</sup> Training Module 5, Exhibit "69" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tabs H 69 at p. 2574-2586.

<sup>122</sup> Teixeira Affidavit, paras. 62-63, Responding MR, Tab 1, p. 18; Marsellus Affidavit, paras. 45-47, Responding MR, Tab 2, p. 854; Schwantz Affidavit at para. 15(c), Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab D, pp. 63-64; Lavigne Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab F, pp. 78.

<sup>123</sup> Teixeira Affidavit, paras. 62-63, Responding MR, Tab 1, p. 18; Marsellus Affidavit, paras. 45-47, Responding MR, Tab 2, p. 854; Schwantz Affidavit at para. 14 and 15(c), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab D, p. 63; Lavigne Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 77; Nemati Affidavit at para. 13 and 14(b), Plaintiff's MR, Vol. 1, Tab F, p. 84.

<sup>124</sup> JE Discovery Transcripts, January 24, 2018, Q. 539-543, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 842-843.

<sup>125</sup> Marketing in Hot and Cold Weather Conditions, Exhibit "41" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H41, p. 2319; JE Discovery Transcripts, January 24, 2018, Q. 620-626, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 856-858;

<sup>126</sup> The Customer Interaction, Exhibit "42" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab 42, p. 2324; JE Discovery Transcripts, January 24, 2018, Q. 591-593, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 851-852.

- (iii) objection handling scripts;<sup>127</sup>
  - (iv) what a Sales Agent needs while marketing;<sup>128</sup>
  - (v) how to interact with disabled customers;<sup>129</sup> and
  - (vi) acceptable marketing practices.<sup>130</sup>
- (d) job shadowing of Sales Agents is conducted by Crew Coordinators in the field;<sup>131</sup>
  - (e) supervision and direction of Sales Agents is provided by Crew Coordinators in the field;<sup>132</sup> and
  - (f) weekly calls are conducted between Just Energy and Regional Distributors as to various operational matters.<sup>133</sup>
- (e) Just Energy monitors, tracks and disciplines non-compliance**

60. Just Energy also established an extensive system to monitor and track Sales Agents performance and discipline non-compliance:

- (a) Just Energy trains Sales Agents on OEB requirements;<sup>134</sup>

<sup>127</sup> Objection Handling– Ontario (JECF), Exhibit "44" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 44, p. 2335; JE Discovery Transcripts, January 24, 2018, Q. 607-612, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 854-855.

<sup>128</sup> What you need while marketing, Exhibit "46" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 46, p. 2362; JE Discovery Transcripts, January 24, 2018, Q. 536-539, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 15, at pp. 841-842.

<sup>129</sup> Interacting with Customers with Disabilities, Exhibit "47" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 47, p. 2364J; E Discovery Transcripts, January 24, 2018, Q. 552-553, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 15, at p. 844.

<sup>130</sup> Acceptable Marketing Practice: Code of Compliance - Ontario, Exhibit "48" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 48, p. 2366; JE Discovery Transcripts, January 24, 2018, Q. 560-863, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 15, at pp. 846-847.

<sup>131</sup> Teixeira Affidavit, para. 54, Responding MR, Tab 1, p. 16.

<sup>132</sup> Schwantz Affidavit at para. 12 and 15(j), Plaintiff's MR, Vol. 1, Tab B, p. 13, 15; Borg Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab C, p. 56, 57; Acton Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab D, p. 63, 64; Lavigne Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab E, p. 77, 78; Nemati Affidavit at para. 11, 14(i), Plaintiff's MR, Vol. 1, Tab F, p. 84, 85.

<sup>133</sup> Teixeira Affidavit, para. 64, Responding MR Tab 1, p. 18; Bi-weekly Renewal Emails, Exhibits "112(AA)", "112(BB)", "112(CC)", "112(DD)", "112(EE)", "112(FF)" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 112AA-FF, pp. 4279-4524.

<sup>134</sup> JE Discovery Transcripts, January 24, 2018, Q. 643-676, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 15, at pp. 861-867; Ontario Energy Board - Code of Conduct for Gas Marketers, Exhibit "83" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 83, pp. 2969-3008; Ontario Energy Board - Electricity Retailer Code of Conduct, Exhibit "84" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 84, pp. 3010-3051; Just Energy – Ontario Industry Training Assessment Booklet, Exhibit "86" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 86, pp. 3055-3072; Quiz Slide for LMS Users, Exhibit "87" to the Alexander Affidavit, Plaintiff's

- (b) Just Energy has a dedicated compliance department established to monitor the Sales Agents compliance with Just Energy directions and regulations including;<sup>135</sup>
  - (i) daily reporting to Just Energy offices regarding complaints;
  - (ii) bi-weekly conference calls with Sales Offices about compliance issues;
  - (iii) conducting in-person audits of Just Energy offices;
  - (iv) tracking complaints for each Sales Agents;<sup>136</sup>
- (c) Just Energy imposes a "Compliance Matrix" for Sales Agents directing the type of discipline to be imposed for various conduct, including suspensions, fines and termination of employment;<sup>137</sup> and
- (d) Just Energy imposes fines or deducts money from Sales Agents' compensation for contracts that are later deemed invalid.<sup>138</sup>
- (f) Just Energy directs Sales Agents on where to work**

61. Just Energy also directs Sales Agents on where they should market:

- (a) During the daily morning meetings the marketing locations for the day are determined by the Regional Distributors and Crew Coordinators, which locations are determined by:<sup>139</sup>
  - (i) the use maps to keep track of areas previously marketed;<sup>140</sup>
  - (ii) do-not-solicit lists provided by Just Energy;<sup>141</sup>

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MR, Vol. 5, Tab H 87, pp. 3074-3179; Just Energy (JE) and Ontario Energy Board (OEB) Training Proctor Step by Step, Exhibit "89" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 89, pp. 3183-3187.

<sup>135</sup> JE Response to OEB Supp. Request, Exhibit "94" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 94, pp. 3321-3322.

<sup>136</sup> JE Response to OEB Supp. Request, Exhibit "94" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 94, p. 3323, 3331.

<sup>137</sup> Compliance Matrix, Exhibit "101" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 101, pp. 3488-3491.

<sup>138</sup> JE Response to OEB Supp. Request, Exhibit "94" to the Alexander Affidavit, Plaintiff's MR, Vol. 5, Tab H 94, p. 3333.

<sup>139</sup> Marsellus Affidavit, paras. 61-65, Responding MR, Tab 2, p. 858-859; Schwantz Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab D, p. 63; Lavigne Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 15, 203, Transcript Brief, pp. 353, 402; Schwantz Cross, Q. 271-272, 669, Transcript Brief, pp. 221-222, 334.

<sup>140</sup> Marsellus Affidavit, at paras. 74-75, Responding MR, Tab 2, p. 861; Marsellus Cross, Q. 154-167, Transcript Brief, Tab 1, pp. 35-37; Schwantz Cross, Q. 271, Transcript Brief, Tab 4, p. 222; Nemati Cross, Q. 218, Transcript Brief Tab 5, p. 406; Borg Cross, Q. 397-401, Transcript Brief, Tab 8, p. 688-689.

<sup>141</sup> Marsellus Affidavit at paras. 74-75, Responding MR, Tab 2, p. 861; Do Not Solicit Report, Exhibit "127" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 127, p. 4811; Email from Rosalba Gulbo to Just Energy Recruiters and Administrators dated 01/10/2014, Exhibit "128" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 128, p. 4813.

- (iii) coordination with Just Energy's installation technicians;<sup>142</sup>
- (iv) discussions among Crew Coordinators on pervious marketing areas;<sup>143</sup> and
- (v) discussions between Just Energy sales offices;<sup>144</sup>
- (b) Sales Agents are driven to the field in vans by Crew Coordinators;<sup>145</sup>
- (c) Sales Agents are dependent on Just Energy for transportation to the various marketing locations, which are often a significant distance from the office;<sup>146</sup>
- (d) Just Energy provided vans to the sales offices to transport Sales Agents;<sup>147</sup>
- (e) Crew Coordinators or Sales Agents are threatened with termination if they don't market in the approved areas;<sup>148</sup>
- (f) iPads are used to monitor and track the locations of Sales Agents in real time;<sup>149</sup>
- (g) Just Energy provides updates to offices about regulatory issues in various areas;<sup>150</sup>
- (h) Just Energy facilitates the application for and receipt of permits for Sales Agent to marketing in certain areas, which must be done in advance;<sup>151</sup> and

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<sup>142</sup> Teixeira Affidavit, at para. 67, Responding MR, Tab 1, p. 19.

<sup>143</sup> Gadoua Cross, Q. 85, Transcript Brief, Tab 3, p. 149; Borg Cross, Q. 400, Transcript Brief, Tab 8, p. 688.

<sup>144</sup> Gadoua Cross, Q. 102, Transcript Brief, Tab 3, p. 154.

<sup>145</sup> Teixeira Affidavit, para. 88, Responding MR tab 1, p. 24; Gadoua Affidavit, para. 51, Responding MR, Tab 3, p. 883; Schwantz Affidavit at para. 15(f), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 97, Transcript Brief, Tab 5, p. 370; Marsellus Cross, Q. 131, Transcript Brief, Tab 1, p. 28; Schwantz Cross Q. 128, Transcript Brief, Tab 4, pp. 185-186; Lavigne Cross, Q. 194-199, Transcript Brief, Tab 7, pp. 459-460; Acton Cross, Q. 163-165, Transcript Brief, Tab 7, pp. 553-554; Borg Cross, Q. 368-374, 459-462, Transcript Brief, Tab 8. pp. 682-683, 700-701.

<sup>146</sup> Teixeira Affidavit, para. 88, Responding MR, Tab 1, p. 24; Gadoua Affidavit, para. 51, Responding MR, Tab 3, p. 883; Schwantz Affidavit at para. 15(f), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 97, Transcript Brief, Tab 5, p. 370; Marsellus Cross, Q. 131, Transcript Brief, Tab 1, p. 28.

<sup>147</sup> Marsellus Cross, Q. 117-122, Transcript Brief, Tab 1, p. 25-26.

<sup>148</sup> Schwantz Affidavit at para. 120, Plaintiff's MR, Vol. 1, Tab B, p. 16; Borg Affidavit at paras. 18, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab D, p. 65; Lavigne Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab F, p. 79.

<sup>149</sup> Schwantz Cross, Q. 544-55, Transcript Brief, Tab 4, p. 299; Just Energy Mobile Presentation, Exhibit "118" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H118, pp. 4654-4700; Live Energy Application – iPad, Exhibit "130" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H130, pp. 4821-4839; Just Energy Mobile Management Portal – Presentation, Exhibit "122" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H122, pp. 4708-4735.

<sup>150</sup> Email from Ravi Maharaj to Regional Distributors dated February 17, 2015, Exhibit "113" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H113, pp. 4526-4527.

<sup>151</sup> Email from Ravi Maharaj to Regional Distributors dated September 18, 2014, Exhibit "114" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H114, pp. 4529-4530; Just Energy – Permit Handbook, Exhibit "124" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H124, pp. 4772-4786.

- (i) regular road trip or push weeks are organized where Sales Agents travel to specific distant locations for a full week.<sup>152</sup>

**(2) Exclusivity to Just Energy**

62. In marketing for Just Energy the Sales Agents are unable to work for others in the same industry or at all. Just Energy mandates its ICAs that Sales Agents cannot provide services to other businesses "that compete directly with the business carried on by Just Energy corp. or its affiliates during the term of the Agreement and for a period of three (3) weeks following the termination of this Agreement".<sup>153</sup> Even if they wanted to, given the extensive control exerted over Sales Agents, and the time commitment of 6 days per week, it is impossible for Sales Agents to work anywhere else.<sup>154</sup>

63. It is both a tacit requirement and explicit requirement that the employment of all Sales Agents is exclusive to Just Energy.

**(3) Just Energy provides the tools of work**

64. Just Energy creates and provides all the "tools" for the job, without which the Sales Agents cannot complete their work for Just Energy:

- (a) all gas and electricity contracts are provided by Just Energy;

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<sup>152</sup> Teixeira Affidavit, paras. 135, 137, Responding MR, Tab 1, pp. 37-38; Gadoua Affidavit, para. 67, Responding MR, Tab 3, p. 887; Schwantz Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab B, p. 16; Borg Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab D, p. 65; Lavigne Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab F, p. 79; Schwantz Cross, Q. 270-271, Transcript Brief, Tab 4, pp. 221-222; Nemati Cross, Q. 230-231, Transcript Brief, Tab 5, p. 410; Lavigne Cross, Q. 247, Transcript Brief, Tab 6, p. 467.

<sup>153</sup> IC Agreement (para. 6) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1315.

<sup>154</sup> Schwantz Affidavit at para. 17 and 21, Plaintiff's MR, Vol. 1, Tab B, p. 15; Borg Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab D, pp. 65; Lavigne Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 16 and 19, Plaintiff's MR, Vol. 1, Tab F, p. 79; Schwantz Cross, Q. 36, Transcript Brief, Tab 4, p. 164.

- (b) all marketing materials must be created and approved of by Just Energy;<sup>155</sup>
- (c) Just Energy name tags and badges are provided by Just Energy;<sup>156</sup>
- (d) Just Energy branded clothing is provided for purchase;<sup>157</sup>
- (e) Just Energy provides the verification call centre and process;<sup>158</sup>
- (f) Just Energy registers the Sales Agents with the OEB;<sup>159</sup> and
- (g) do-not-solicit lists are provided by Just Energy.<sup>160</sup>

**(4) Sales Agents have no chance at profit, other than being paid their wages**

65. Just Energy pays the Sales Agents a fixed commission based on the type of contract they successfully marketed. Just Energy's business is to buy gas and electricity wholesale and resell that gas and electricity retail to consumers. It makes money based on the spread between the price it pays for the gas and electricity and the price it receives from its customers. That is Just Energy's business. The Sales Agents have no ability or opportunity to profit in this business, or even their own "sales businesses" (as is to be asserted by Just Energy) as Sales Agents:

- (a) do not purchase gas and electricity wholesale;
- (b) have no ability to change the price of any contract marketed to customers;
- (c) do not make any profit based on the price Just Energy can buy the gas and electricity and the price it can sell that gas and electricity; and
- (d) only receive fixed (not variable) commissions on contracts successfully marketed for Just Energy; and

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<sup>155</sup> Just Energy Memo dated November 22, 2012, Exhibit "53" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H53, p. 2381.

<sup>156</sup> Teixeira Affidavit, para 104, Responding MR Tab 1, p. 29.

<sup>157</sup> Schwantz Affidavit at para. 15(d), Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(c), Plaintiff's MR, Vol. 1, Tab F, p. 78; Schwantz Cross, Q. 355-356, Transcript Brief, Tab 4, p. 246; Teixeira Affidavit, para 106, Responding MR, Tab 1, p. 29.

<sup>158</sup> The Customer Interaction, Exhibit "50" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H 50, p. 2373.

<sup>159</sup> Teixeira Affidavit, para 104, Responding MR. Tab 1, p. 29.

<sup>160</sup> Marsellus Affidavit at paras. 74-75, Responding MR, Tab 2, p. 861; Do Not Solicit Report, Exhibit "127" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 127, p. 4811; Email from Rosalba Gulbo to Just Energy Recruiters and Administrators dated 01/10/2014, Exhibit "128" to the Alexander Affidavit, Plaintiff's MRR, Vol. 7, Tab H 128, p. 4813.

(e) have no ability to change or negotiate the commission schedule.<sup>161</sup>

66. No different than any commission-based employee, Sales Agents do not get a chance at profit - they only earn their set wages.

**(5) Sales Agents are Integral Part of Just Energy's Business**

*(a) Sales Agents are not secondary or complimentary to Just Energy's business*

67. Just Energy's business is the profiting on gas and electricity contracts. Sales Agents market those contracts for Just Energy. In 2009, door-to-door marketing made up approximately 95% of Just Energy's sales revenue, presently 21%.<sup>162</sup> Their work is not secondary or complementary to the primary business of Just Energy – it is the business of Just Energy.

*(b) "Sales" is not an independent business*

68. It is not clear what independent business Just Energy asserts that 8,000 Sales Agents undertook while working for Just Energy. By its own ICA, Sales Agents were not permitted to market for any competitors<sup>163</sup> – therefore, Sales Agents could not have been in the gas and electricity marketing business, because they could only market for Just Energy. In addition, Sales Agents can only market for Just Energy because they don't have any time to do anything else. Additionally, Sales Agents have no power to change any gas and electricity contract terms or pricing – they have no independent control of their alleged business.

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<sup>161</sup> JE Discovery Transcripts, January 24, 2018, Q. 1069-1072, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 907-908; IC Agreement (para. 4 and commission schedule) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H19, p. 1314, 1319.

<sup>162</sup> Affidavit of Richard Teixeira sworn January 25, 2016, Exhibit "A" to the Teixeira Affidavit, sworn January 10, 2019, para. 8, Responding MR, Tab 1A, p. 46.

<sup>163</sup> IC Agreement (para. 6) – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Responding MR, Vol. 2, Tab H19, pp. 1315.

69. What is left is the business of "sales". However, "sales" is not an independent business – one must have something to sell,<sup>164</sup> here Sales Agents could only sell Just Energy products.

**(6) Unilateral title and characterization by Just Energy is not determinative**

70. Just Energy makes much of the ICA and their repeated statements that Sales Agents knew they were "independent contractors" who were not provided with any of the benefits or minimum protections of the *ESA*, or otherwise.

71. The Sale Agents had no ability to make changes to the ICA. The ICA makes convenient self-serving statements about the legal nature of the relationship that do not accord with the actual working relationship. Those self-serving statements, which simply deter vulnerable workers from asserting their minimum employment rights, are not determinative and simply should not be considered – one cannot "consent" to violate the *ESA*.<sup>165</sup> Sales Agents simply wanted a job and thought they had one working for Just Energy.

**(7) Conclusion on employment status**

72. The hierarchical organizational structure, the control and direction asserted by Just Energy on the manner and location in which Sales Agents were to perform their work, the exclusivity of the relationship, and the nature of the Sales Agents' "business", is entirely inconsistent with the existence of 8,000 independent businesses all happening to sell only Just Energy products – Sales Agent are clearly employees of Just Energy.

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<sup>164</sup> *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, PBOA , Vol 1, Tab 14; *Big Picture Home Entertainment Ltd. v. MacDonald*, 2016 CarswellOnt 18808 (Ont. L.R.B.), PBOA , Vol 1, Tab 20, varied on other grounds 2016 CarswellOnt 20591 (Ont. L.R.B.), *Baker v. 9111140 Canada Inc.*, 2017 CarswellOnt 5875 (Ont. L.R.B.); PBOA , Vol 1, Tab 21; *R. v. Pereira*, 1988 CarswellAlta 88 (Q.B.), PBOA , Vol 1, Tab 22.

<sup>165</sup> *Braidon* at para. 21, PBOA , Vol 1, Tab 10; *Belton* at para. 11, PBOA , Vol 1, Tab 9; *Wood v. CTS of Canada Co.*, 2018 ONCA 758 at para. 95, PBOA , Vol 1, Tab 25.



**G. Exemptions under the *ESA* do not Apply to Sales Agents – Common issue 4**

**i. O. Reg 285/01: Exemption from *ESA* and the "Route Salesperson" exception**

73. O. Reg 285/01, s. 2(1)(h) exempts certain salespeople from *ESA* protections:

2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,...

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer's place of business.<sup>166</sup>

74. The exemption does not apply to Sales Agents.

**ii. Sales Agents do not make "offers to purchase" or "sales"**

75. There is ample evidence that Class members are not making "offers to purchase" or "sales", and therefore, section 2(1)(h) of O.Reg 285/01 has no applicability.<sup>167</sup>

76. The Ontario *Sale of Goods Act*, provides this on when an agreement becomes a sale:

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.<sup>168</sup>

77. The Sales Agents only market gas and electricity contracts to potential Just Energy customers.<sup>169</sup> Sales Agents cannot vary terms of contracts while at the door. The agreements with Just Energy are not even completed while at the door with a potential customer – only Just Energy can complete a contract through a "confirmation call" with the consumer.<sup>170</sup> Just Energy

<sup>166</sup> O. Reg. 285/01 at s. 2(1)(h), Plaintiff's Factum, Schedule B, Tab B.

<sup>167</sup> *Wilkins v Just Energy Marketing Corp*, 308 F.R.D. 170 (Ill. Dist. Ct. 2015) at 180, PBOA, Vol 2, Tab 32.

<sup>168</sup> *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 2(4), Plaintiff's Factum, Schedule B, Tab B.

<sup>169</sup> IC Agreement, (para. 1), – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 19, p. 1313.

<sup>170</sup> Training Module 5, Exhibit "69" to the Alexander Affidavit, Plaintiff's MR, Vol. 4, Tab H69, p. 2579.

retains sole discretion as to whether a contract is ultimately accepted.<sup>171</sup> Before any contract is completed the following steps must be completed, which are all overseen by Just Energy:

- A Just Energy confirmation call must take place, in which a Just Energy employee goes over all the terms of the contract and confirms the contents of the contract with the potential customer;
- The potential customer must clear a credit check with Just Energy;
- The potential customer must be accepted by the utility company that will be providing the actual flow of energy; and
- Just Energy always maintains sole discretion over whether to accept any customer.<sup>172</sup>

78. At best, Sales Agents marketed *potential contracts* for services to *potential customers*.

### iii. Sales Agents are "route salespersons"

#### (1) What is a "route salesperson"?

79. The *ESA* does not define a "route salesperson". Case law and the *ESA* interpretation manual define it to include those who are subject to significant control over scheduling.<sup>173</sup>

80. As such, the key consideration governing the exemption is the degree of control exercised by the employee relative to the employer.<sup>174</sup> Related questions such as whether the "routes" are determined by the employer or the employee, the capacity for chance of profit/risk of loss, and

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<sup>171</sup> IC Agreement, (para. 4), – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 19, p. 1314.

<sup>172</sup> IC Agreement, (para. 4), – Responses to Undertakings, Exhibit "19" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H 19, p. 1314.

<sup>173</sup> *VanGrootel v. Advance Beauty Supply Ltd.*, 2016 CarswellOnt 5069 (Ont. L.R.B.) at paras. 12-14, PBOA, Vol 2, Tab 33, citing *Hayat v. Clegg Campus Marketing*, [2006] O.E.S.A.D. No. 606 (Ont. L.R.B.) PBOA, Vol 2, Tab 34; *Kognitive Marketing Inc. v. Ontario (Director of Employment Standards)*, [2015] O.E.S.A.D. No. 1129 (Ont. L.R.B.), PBOA, Vol 2, Tab 35; *Crestway Electronics Ltd., Re*, [1992] O.E.S.A.D. No. 132 (Ont. E.S.B. (Adjud.)); PBOA, Vol 2, Tab 36; *Wright, Re*, [1992] O.E.S.A.D. No. 91 (Ont. E.S.B. (Adjud.)), PBOA, Vol 2, Tab 37; and *Orlov v. Amato*, [2003] O.E.S.A.D. No. 590 (Ont. L.R.B.), PBOA, Vol 2, Tab 38.

<sup>174</sup> Ministry of Labour, *Employment Standards Act, 2000 Policy and Interpretation Manual*, 2019, Release 1 (last updated March 22, 2019) at p. 971, PBOA, Vol 2, Tab 52.

entrepreneurial activity by the employee are also relevant.<sup>175</sup> This analysis is similar to the *Belton/Braiden* factor analysis above at paragraphs 37-72 above which overwhelmingly reveals Just Energy's control over Sales Agents.

**(2) Just Energy's control and direction on locations is overwhelming**

81. There is ample evidence that Just Energy controlled and directed the marketing locations of its Sales Agents such that they could not be considered independent salespeople exercising a high degree of independence and entrepreneurial initiative to locate customers for Just Energy:

- (a) Sales Agents' marketing locations for the day are determined by the Regional Distributors and Crew Coordinators at daily morning meetings;<sup>176</sup>
- (b) Locations are determined by:
  - (i) the use maps to keep track of areas previously marketed;<sup>177</sup>
  - (ii) do-not-solicit lists provided by Just Energy;<sup>178</sup>
  - (iii) coordination with Just Energy's installation technicians;<sup>179</sup>
  - (iv) discussions among Crew Coordinators on pervious marketing areas;<sup>180</sup> and
  - (v) discussions between Just Energy sales offices;<sup>181</sup>
- (c) Sales Agents are dependent on Just Energy for transportation to the various marketing locations, which are often a significant distance from the office;<sup>182</sup>

<sup>175</sup> Ministry of Labour, *Employment Standards Act, 2000 Policy and Interpretation Manual*, 2019, Release 1 (last updated March 22, 2019) at p. 971, PBOA, Vol 2, Tab 52.

<sup>176</sup> Marsellus Affidavit, paras. 61-65, Responding MR Tab 2, p. 858-859; Schwantz Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab C, p. 56; Acton Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab D, p. 63; Lavigne Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(b), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 15, 203, Transcript Brief, pp. 353, 402; Schwantz Cross, Q. 271-272, 669, Transcript Brief, pp. 221-222, 334.

<sup>177</sup> Marsellus Affidavit, at paras. 74-75, Responding MR, Tab 2, p. 861; Marsellus Cross, Q. 154-167, Transcript Brief, Tab 1, pp. 35-37; Schwantz Cross, Q. 271, Transcript Brief, Tab 4, p. 222; Nemati Cross, Q. 218, Transcript Brief Tab 5, p. 406; Borg Cross, Q. 397-401, Transcript Brief, Tab 8, p. 688-689.

<sup>178</sup> Marsellus Affidavit at paras. 74-75, Responding MR, Tab 2, p. 861; Do Not Solicit Report, Exhibit "127" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 127, p. 4811; Email from Rosalba Gulbo to Just Energy Recruiters and Administrators dated 01/10/2014, Exhibit "128" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H 128, p. 4813.

<sup>179</sup> Teixeira Affidavit, at para. 67, Responding MR, Tab 1, p. 19.

<sup>180</sup> Gadoua Cross, Q. 85, Transcript Brief, Tab 3, p. 149; Borg Cross, Q. 400, Transcript Brief, Tab 8, p. 688.

<sup>181</sup> Gadoua Cross, Q. 102, Transcript Brief, Tab 3, p. 154.

- (d) Sales Agents are driven to the field in vans by Crew Coordinators;<sup>183</sup>
- (e) Just Energy provided vans to the Sales offices to transport Sales Agents;<sup>184</sup>
- (f) Crew Coordinators or Sales Agents are threatened with termination if they don't market in the approved areas;<sup>185</sup>
- (g) iPads are used to monitor and track the locations of Sales Agents in real time;<sup>186</sup>
- (h) Just Energy provides updates to offices about regulatory issues in various areas;<sup>187</sup>
- (i) Just Energy facilitates the application for and receipt of permits for Sales Agent to marketing in certain areas, which must be done in advance;<sup>188</sup>
- (j) regular road trips or push weeks are organized where Sales Agents travel to specific distant locations for a full week.<sup>189</sup> Sales Agents perform these duties six (6) days per week every week;<sup>190</sup> and

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<sup>182</sup> Teixeira Affidavit, para. 88, Responding MR, Tab 1, p. 24; Gadoua Affidavit, para. 51, Responding MR, Tab 3, p. 883; Schwantz Affidavit at para. 15(f), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 97, Transcript Brief, Tab 5, p. 370; Marsellus Cross, Q. 131, Transcript Brief, Tab 1, p. 28.

<sup>183</sup> Teixeira Affidavit, para. 88, Responding MR tab 1, p. 24; Gadoua Affidavit, para. 51, Responding MR, Tab 3, p. 883; Schwantz Affidavit at para. 15(f), Plaintiff's MR, Vol. 1, Tab B, p. 13; Borg Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(e), Plaintiff's MR, Vol. 1, Tab F, p. 78; Nemati Cross, Q. 97, Transcript Brief, Tab 5, p. 370; Marsellus Cross, Q. 131, Transcript Brief, Tab 1, p. 28; Schwantz Cross, Q. 128, Transcript Brief, Tab 4, pp. 185-186; Lavigne Cross, Q. 194-199, Transcript Brief, Tab 7, pp. 459-460; Acton Cross, Q. 163-165, Transcript Brief, Tab 7, pp. 553-554; Borg Cross, Q. 368-374, 459-462, Transcript Brief, Tab 8, pp. 682-683, 700-701.

<sup>184</sup> Marsellus Cross, Q. 117-122, Transcript Brief, Tab 1, p. 25-26.

<sup>185</sup> Schwantz Affidavit at para. 120, Plaintiff's MR, Vol. 1, Tab B, p. 16; Borg Affidavit at paras. 18, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab D, p. 65; Lavigne Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 18, Plaintiff's MR, Vol. 1, Tab F, p. 79.

<sup>186</sup> Schwantz Cross, Q. 544-55, Transcript Brief, Tab 4, p. 299; Just Energy Mobile Presentation, Exhibit "118" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H118, pp. 4654-4700; Live Energy Application – iPad, Exhibit "130" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H130, pp. 4821-4839; Just Energy Mobile Management Portal – Presentation, Exhibit "122" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H122, pp. 4708-4735.

<sup>187</sup> Email from Ravi Maharaj to Regional Distributors dated February 17, 2015, Exhibit "113" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H113, pp. 4526-4527.

<sup>188</sup> Email from Ravi Maharaj to Regional Distributors dated September 18, 2014, Exhibit "114" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H114, pp. 4529-4530; Just Energy – Permit Handbook, Exhibit "124" to the Alexander Affidavit, Plaintiff's MR, Vol. 7, Tab H124, pp. 4772-4786.

<sup>189</sup> Teixeira Affidavit, paras. 135, 137, Responding MR, Tab 1, pp. 37-38; Gadoua Affidavit, para. 67, Responding MR, Tab 3, p. 887; Schwantz Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab B, p. 16; Borg Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab D, p. 65; Lavigne Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 19, Plaintiff's MR, Vol. 1, Tab F, p. 79; Schwantz Cross, Q. 270-271, Transcript Brief, Tab 4, pp. 221-222; Nemati Cross, Q. 230-231, Transcript Brief, Tab 5, p. 410; Lavigne Cross, Q. 247, Transcript Brief, Tab 6, p. 467.

- (k) Sales Agents has a standard daily regimen of: attending the Just Energy regional office, attending daily meetings and role playing, getting transported by Crew Coordinators to their marketing locations to start marketing by 1:00pm, get picked up by the Crew Coordinator and 9:00pm and return to the office.<sup>191</sup>

**(3) The "route salesperson" exemption applies to Sales Agents**

82. The ESA Interpretation Manual refers to the following example in reference to meeting the definition of "route salesperson":

Another case on the question of what is a route salesperson, *Schiller v P & L Corporation Ltd.*, 2012 CanLII 12611 (ON LRB), concerned **an employee selling newspaper subscriptions door-to-door who was picked up by the employer with other employees each day and dropped off in an assigned neighbourhood. She was provided with a list of non-subscribers on particular streets within the neighbourhood to solicit and she could not increase her ability to earn more by working at times or in neighbourhoods other than those assigned to her by the employer.** The Board held that she was a route salesperson because sales in this case were conducted on the basis of "routes" which were established and determined by the employer.<sup>192</sup>

83. This case might as well be styled *Omarali v Just Energy*.

84. Just as in that case, Sales Agents do not choose their marketing locations. Those decisions are made and directed by Just Energy through its Regional Distributors. Sales Agent are therefore provided with a "route" by Just Energy and are therefore "route salesperson[s]" as defined in s. 2(1)(h) of O. Reg. 285/01 and are thereby not exempt from the *ESA*.

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<sup>190</sup> Schwantz Affidavit at para. 16, Plaintiff's MR, Vol. 1, Tab B, p. 15; Borg Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab D, pp. 65; Lavigne Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 20, Plaintiff's MR, Vol. 1, Tab F, p. 79; Schwantz Cross, Q. 36, Transcript Brief, Tab 4, p. 164.

<sup>191</sup> Schwantz Affidavit at para. 15, Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14, Plaintiff's MR, Vol. 1, Tab F, p. 78.

<sup>192</sup> Ministry of Labour, *Employment Standards Act, 2000 Policy and Interpretation Manual*, 2019, Release 1 (last updated March 22, 2019) at p. 971 [emphasis added], PBOA, Vol 2, Tab 52.

**H. The provisions of the *ESA* are Express or Implied Terms of the Contracts of Class Members – Common issue 5**

85. The *ESA* applies to employees and provides legislative minimum employment standards which cannot be contracted out of:

**No contracting out**

5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.<sup>193</sup>

85. Recently, in *Wood v. CTS of Canada Co.*, the Ontario Court of Appeal affirmed that employees cannot "consent" to work in violation of the *ESA*.<sup>194</sup> As such, if an individual is found to be an "employee", that individual is owed statutory benefits under the *ESA* regardless of what that individual implicitly or explicitly "consented" to by signing an employment contract or agreement - the minimum employment standards set out by the *ESA* apply.<sup>195</sup> By operation of law the provisions of the *ESA* are terms of the class members' "contracts" with Just Energy.

**I. Just Energy did not Pay Minimum Wage, Overtime, Vacation, Public Holiday or Premium Pay to Sales Agents – Common issue 8**

86. The *ESA* provides the following for employees: (i) minimum wage;<sup>196</sup> (ii) overtime pay;<sup>197</sup> vacation pay;<sup>198</sup> and public holiday and premium pay.<sup>199</sup> Just Energy admits that it did not pay Sales Agents any of those minimum requirements.<sup>200</sup>

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<sup>193</sup> *ESA* at ss. 3 and 5(1), Plaintiff's Factum, Schedule B, Tab B.

<sup>194</sup> *Wood v. CTS of Canada Co.*, 2018 ONCA 758 at para. 95, PBOA, Vol 1, Tab 25, leave to appeal to SCC denied, 2019 CarswellOnt 6052 (S.C.C.).

<sup>195</sup> *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at p. 1005, PBOA, Vol 1, Tab 23; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 137, PBOA, Vol 2, Tab 39.

<sup>196</sup> *ESA* at s. 23, Plaintiff's Factum, Schedule B, Tab B.

<sup>197</sup> *ESA* at s. 22, Plaintiff's Factum, Schedule B, Tab B.

<sup>198</sup> *ESA* at s. 35.2, Plaintiff's Factum, Schedule B, Tab B.

<sup>199</sup> *ESA* at s. 24, Plaintiff's Factum, Schedule B, Tab B.

**J. Failure to make CPP and EI contributions – Common issues 2, 3 and 9**

87. Section 9 of the *Canada Pension Plan*, and sections 68 and 82(1) of the *Employment Insurance Act* require employers to contribute CPP and EI remittances on behalf of "employees" employed in "pensionable" and "insurable employment".<sup>201</sup>

88. Section 6(1) of the *Canada Pension Plan* statute defines "pensionable employment" as "employment in Canada that is not excepted employment", whereas section 5(1) of the *Employment Insurance Act* stipulates that "insurable employment" is "employment in Canada by one or more employers under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise".<sup>202</sup>

89. Although neither statute defines "employment", it is well-settled that the *Sagaz* factors apply to that determination.<sup>203</sup> Once it is found that Sales Agents are employees of Just Energy as per common issue 1, it follows that Just Energy is obligated to pay CPP and EI contributions.

90. Just Energy has admitted it has not paid CPP or EI contributions for any Sales Agent.<sup>204</sup>

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<sup>200</sup> JE Discovery Transcripts, January 24, 2018, Q. 376-385, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at pp. 820-821.

<sup>201</sup> *Canada Pension Plan*, R.S.C., 1985, c. C-8, s. 9, Plaintiff's Factum, Schedule B, Tab B; *Employment Insurance Act*, S.C. 1996, c. 23, ss. 68 and 82(1), Plaintiff's Factum, Schedule B, Tab B.

<sup>202</sup> *Canada Pension Plan*, R.S.C., 1985, c. C-8, s. 6(1), Plaintiff's Factum, Schedule B, Tab B; *Employment Insurance Act*, S.C. 1996, c. 23, s. 5(1), Plaintiff's Factum, Schedule B, Tab B.

<sup>203</sup> *Dynamic Industries Ltd v. R.*, 2005 FCA 211, PBOA, Vol 2, Tab 40; *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85 at para. 23, PBOA, Vol 2, Tab 41; *Porotti v. Canada (National Revenue)*, 2014 TCC 267 at para. 5, PBOA, Vol 2, Tab 42, aff'd 2016 FCA 29, PBOA, Vol 2, Tab 43.

<sup>204</sup> JE Discovery Transcripts, January 24, 2018, Q. 382-383, Exhibit "15" to the Alexander Affidavit, Plaintiff's MR, Vol. 2, Tab H15, at p. 821.

**K. Just Energy breached its contractual duties or was otherwise negligent – Common issues 6, 7, 10 and 11**

**i. Just Energy owes a duties of care**

91. Employers owe a common law duty of care and duty of good faith and fair dealing towards its employees.<sup>205</sup> This includes a duty of good faith in the performance of contractual obligations.<sup>206</sup> As such, in the course of the employer/employee relationship, the parties must not lie or mislead their interests.<sup>207</sup>

92. Just Energy imposed self-serving ICAs and a pay structure on Sales Agents. Sales Agents had no authority or power to make any changes to the ICAs or commission structure. They had no ability to change how they were to do their work or where they were to do it for Just Energy. In their relationship, they were at the mercy of Just Energy – all they wanted was a job. Just Energy itself states that Sales Agents are mostly of little means and have little or no sales experience before working for Just Energy.<sup>208</sup>

93. As a result of the closeness of this relationship, the nature of the power imbalance, and the vulnerability of the class, Just Energy owed the Sales Agents a duty of care and duty of good faith to properly characterize their employment, to ensure they were compensated with the minimum wage, ensure their hours were monitored and recorded, to advise them of their correct status and entitlement to overtime, and to ensure they were compensated by the minimum

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<sup>205</sup> *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 63, PBOA, Vol 2, Tab 44; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 98, PBOA, Vol 2, Tab 45. See also the SCC's most recent discussion on duty of care in *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at paras. 16-24, PBOA, Vol 2, Tab 46.

<sup>206</sup> *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 62, 73, PBOA, Vol 2, Tab 47.

<sup>207</sup> *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 125, PBOA, Vol 2, Tab 44; *Antunes v. Limen Structures Ltd.*, 2015 ONSC 2163 at para. 64, PBOA, Vol 2, Tab 48, aff'd 2016 ONCA 509, PBOA, Vol 2, Tab 49.

<sup>208</sup> Teixeira Affidavit, para. 88, Responding MR, Tab 1, p. 24.



requirements of the *ESA*.<sup>209</sup>

**ii. Just Energy breached its duties**

94. The evidence that Sales Agents are employees of Just Energy is overwhelming, and there should be, and should have been, no question as to whether Sales Agents should have properly been considered as such by Just Energy. Instead, Just Energy forced the "independent contractor" characterization on Sales Agents for years. In doing so they have consciously avoided the minimum requirements of the *ESA* and deterred Sales Agents from enforcing their rights.

95. In the case of the Class they have done so since at least 2012. Over that time period, there were over 8,000 Sales Agents. Of that approximately 2/3 were not able to successful market a contract for Just Energy.<sup>210</sup> Since they were only paid on commission for contracts they originated and not on the basis of a minimum wage, they worked for Just Energy for free. This didn't bother Just Energy as it wasn't required to pay those Sales Agents anything - they just took advantage of their labour on behalf of Just Energy without any risk.

96. Just Energy did not exercise reasonable care to ensure that Sales Agents were classified as employees before or during their employment with Just Energy. Instead, Just Energy took advantage of the vulnerability of its Sales Agents by providing all Sales Agents with a self-serving ICA which unlawfully deemed those individuals "independent contractors". This unlawful practice allowed Just Energy to forego paying its Sales Agents their statutory entitlements under the *ESA* in further of its own business interests.

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<sup>209</sup> *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at paras. 16-24, PBOA, Vol 2, Tab 46.

<sup>210</sup> Teixeira Affidavit, para. 121, Responding MR, Tab 1, p. 33.

**iii. Resulting damage**

97. As a result of the breach of the duties owed, Just Energy failed to pay and facilitate the payment of minimum wage, overtime, vacation pay, public holiday and premium pay and CPP/EI contributions to or on behalf of the Plaintiff and Class – all of which is now owing.

98. However, Just Energy has impaired the Class' ability to prove their entitlements to these damages. In particular, Just Energy failed and refused to keep track of the hours of the Sales Agents, despite ample ability and requirement to do so.<sup>211</sup> This may impact Class Member's ability to prove damages. An adverse inference against any argument by Just Energy that damages are not determinable should be applied to all class members' claims.

**L. Just Energy was unjustly enriched by misclassifying sales agents – Common issue 12**

99. In *Garland v. Consumers' Gas Co.*, the Supreme Court of Canada stated that the test for unjust enrichment has three (3) elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.<sup>212</sup> This test is easily satisfied.

100. By misclassifying the Sales Agents, Just Energy has been enriched as a result of avoiding the payment of the minimum requirements of the *ESA* and the payment of CPP and EI contributions for all Sales Agents, in addition to the costs of facilitating a system to accurately account and make such payments. The Class has suffered a corresponding deprivation in the form of unpaid minimum *ESA* requirements and having to pay, or not getting the benefit of, the employer portion of CPP or EI contributions. As there can be no contracting out of the *ESA* and

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<sup>211</sup> *ESA* at s. 15(1), Plaintiff's Factum, Schedule B, Tab B.

<sup>212</sup> *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at para. 30, PBOA, Vol 2, Tab 50.

the employees are properly classified as employees, there is no juristic reason for Just Energy's enrichment and the Class members' corresponding deprivation. This entitles the Class to equitable remedies for the unjust enrichment.

### **M. Appropriate common remedies and declarations**

101. After determining the liability common issues, it is entirely within the purview of the trial judge to order an appropriate remedy whether or not they are certified as a common issue.<sup>213</sup>

The failures by Just Energy as noted above cry out for a just remedy before any individual assessment process is required, or to assist that process.

#### **i. Declarations and findings**

102. In addition to the declarations of employment status, entitlement to the protections of the *ESA* and determinations of the common issues, the Plaintiff seeks the following declarations or finds that have ample support in the evidence:

- (a) a finding that Agents worked a standard work week of six (6) days per week;<sup>214</sup>
- (b) a finding that standard work hours per day of at least 1:00pm to 9:00pm.<sup>215</sup>
- (c) a finding that job training of at least 1 day was required of all Sales Agents;<sup>216</sup> and
- (d) a finding that the job training time is compensable.<sup>217</sup>

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<sup>213</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 134, PBOA, Vol 2, Tab 51.

<sup>214</sup> Schwantz Affidavit at para. 16, Plaintiff's MR, Vol. 1, Tab B, p. 15; Borg Affidavit at para. 15, Plaintiff's MR, Vol. 1, Tab C, p. 58; Acton Affidavit at para. 15, Plaintiff's MR, Vol. 1, Tab D, p. 65; Lavigne Affidavit at para. 15, Plaintiff's MR, Vol. 1, Tab E, p. 72; Nemati Affidavit at para. 15, Plaintiff's MR, Vol. 1, Tab F, p. 79.

<sup>215</sup> Teixeira Affidavit, para. 116, Responding MR, Tab 1, p. 32; Schwantz Affidavit at para. 15(f), Plaintiff's MR, Vol. 1, Tab B, p. 14; Borg Affidavit at para. 14(f), Plaintiff's MR, Vol. 1, Tab C, p. 57; Acton Affidavit at para. 14(f), Plaintiff's MR, Vol. 1, Tab D, p. 64; Lavigne Affidavit at para. 14(f), Plaintiff's MR, Vol. 1, Tab E, p. 71; Nemati Affidavit at para. 14(f), Plaintiff's MR, Vol. 1, Tab F, p. 78.

<sup>216</sup> Independent Contractor Orientation Guidebook, Exhibit "45" to the Alexander Affidavit, Vol. 4, Tab H45, p. 2346; Schwantz Affidavit at para. 5, Plaintiff's MR, Vol. 1, Tab B, p. 12; Borg Affidavit at para. 5, Plaintiff's MR, Vol. 1, Tab C, p. 55; Acton Affidavit at paras. 5-6, Plaintiff's MR, Vol. 1, Tab D, p. 62; Lavigne Affidavit at paras. 5-6, Plaintiff's MR, Vol. 1, Tab E, p. 69; Nemati Affidavit at paras. 5-6, Plaintiff's MR, Vol. 1, Tab F, p. 76.

**ii. Damages orders**

103. In addition to any amount to be recovered through an individual assessment process, and given the findings on the common issues and the uncontroverted evidence, the following damages orders can be made and are sought by the Plaintiff:

- (a) that Just Energy pay 4% vacation pay on all amounts already paid to the Class;
- (b) that Just Energy pay the Class for all CPP and EI contributions on amounts already paid to the Class;
- (c) that Just Energy pay each class member for one day of training at the applicable minimum wage.

104. None of these orders require any individual evidence and are effectively automatically required by a finding of employment status in this case.

**PART III - ORDER REQUESTED**

105. The Plaintiff requests that this Honourable Court grant summary judgment on all common issues, and the declarations, findings and orders noted in paragraphs 103 and 104 above, and costs of this motion and the action up to this date.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of May, 2019.<sup>218</sup>



Koskie Minsky LLP  
Lawyers for the Plaintiff

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<sup>217</sup> Ministry of Labour, *Employment Standards Act, 2000 Policy and Interpretation Manual*, 2019, Release 1 (last updated March 22, 2019) at p. 961, PBOA, Vol 2, Tab 52.

<sup>218</sup> A 48 page factum was initially served on May 2, 2019.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

| <b>Tab No.</b> | <b>Case</b>  |
|----------------|--|
| 1.             | <i>Hurt v. Commerce Energy, Inc.</i> , Case No. 1:12-CV-758, Doc. No. 808 (October 6, 2014)  |
| 2.             | <i>Hurt v. Commerce Energy, Inc.</i> , Case No. 1:12-CV-758, Doc. No. 853 (August 3, 2015)   |
| 3.             | <i>Hurt v. Commerce Energy, Inc.</i> , 2013 WL 4427257 (August 15, 2013)   |
| 4.             | <i>Hurt v. Commerce Energy, Inc.</i> , Case No. 1:12-CV-758, Doc. No. 887 (January 29, 2018)   |
| 5.             | <i>Hurt v. Commerce Energy, Inc.</i> , 2018 WL 4204541 (September 4, 2018)   |
| 6.             | <i>Hryniak v. Mauldin</i> , 2014 SCC 7   |
| 7.             | <i>Brazeau v. Canada (Attorney General)</i> , 2019 ONSC 1888   |
| 8.             | <i>671122 Ontario Ltd. v. Sagaz Industries Canada Inc.</i> , 2001 SCC 59   |
| 9.             | <i>Belton v. Liberty Insurance Co. of Canada</i> , [2004] O.J. No. 3358 (C.A.)   |
| 10.            | <i>Braiden v. La-Z-Boy Canada Limited</i> , 2008 ONCA 464  |
| 11.            | <i>Doyle v. London Life Insurance Co.</i> , [1985] B.C.J. No. 2561 (C.A.)  |
| 12.            | <i>Cormier v. 1772887 Ontario Limited c.o.b. as St Joseph's Communications</i> , 2019 ONSC 587   |
| 13.            | <i>Moseley-Williams v. Hansler Industries Ltd.</i> , [2008] O.J. No. 4457 (S.C.)   |
| 14.            | <i>McKee v. Reid's Heritage Homes Ltd.</i> , 2009 ONCA 916   |
| 15.            | <i>King v. Merrill Lynch Canada Inc.</i> , [2005] O.J. No. 5028 (S.C.)   |
| 16.            | <i>Jaremko v. A.E. LePage Real Estate Services Ltd.</i> , [1987] O.J. No. 506 (H.C.)   |
| 17.            | <i>Jaremko v. A.E. LePage Real Estate Services Ltd.</i> , [1989] O.J. No. 996 (C.A.)   |
| 18.            | <i>Sooters Studios Ltd., Re</i> , 1991 CarswellOnt 7806 (O.E.S.B. (Adjud.))  |
| 19.            | <i>Key Fund Raising Ltd. v. British Columbia (Director of Employment Standards)</i> , 2001 CarswellBC 4136 (Employment Standards Tribunal) |

| Tab No. | Case   |
|---------|--|
| 20.     | <i>Big Picture Home Entertainment Ltd. v. MacDonald</i> , 2016 CarswellOnt 18808 (Ont. L.R.B.)                           |
| 21.     | <i>Baker v. 9111140 Canada Inc.</i> , 2017 CarswellOnt 5875 (Ont. L.R.B.)  |
| 22.     | <i>R. v. Pereira</i> , 1988 CarswellAlta 88 (Q.B.)   |
| 23.     | <i>Machtiger v. HOJ Industries Ltd.</i> , [1992] 1 S.C.R. 986  |
| 24.     | <i>Rizzo &amp; Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27  |
| 25.     | <i>Wood v. CTS of Canada Co.</i> , 2018 ONCA 758   |
| 26.     | <i>Mazraani c. Industrielle Alliance</i> , 2016 TCC 65   |
| 27.     | <i>Truong v. British Columbia</i> , 1999 BCCA 513  |
| 28.     | <i>MacDonald v. Richardson Greenshields of Canada Ltd.</i> , [1985] B.C.J. No. 2865 (S.C.)                               |
| 29.     | <i>Sistema Toronto Academy Inc. v. Minister of National Revenue</i> , 2016 TCC 193                                       |
| 30.     | <i>Rockland Industries Inc. v. Amerada Minerals Corp. of Canada Ltd.</i> , [1980] 2 S.C.R. 2                             |
| 31.     | <i>Hav-A-Kar Leasing Ltd v. Vekselshtein</i> , 2012 ONCA 826   |
| 32.     | <i>Wilkins v. Just Energy Corp., Inc.</i> , 308 F.R.D. 170 (I11. Dist. Ct. 2015)   |
| 33.     | <i>VanGrootel v. Advance Beauty Supply Ltd.</i> , 2016 CarswellOnt 5069 (Ont. L.R.B.)                                    |
| 34.     | <i>Hayat v. Clegg Campus Marketing</i> , [2006] O.E.S.A.D. No. 606 (Ont. L.R.B.)   |
| 35.     | <i>Kognitive Marketing Inc. v. Ontario (Director of Employment Standards)</i> , [2015] O.E.S.A.D. No. 1129 (Ont. L.R.B.) |
| 36.     | <i>Crestway Electronics Ltd., Re</i> , [1992] O.E.S.A.D. No. 132 (O.E.S.B. (Adjud.))                                     |
| 37.     | <i>Wright, Re</i> , [1992] O.E.S.A.D. No. 91 (O.E.S.B. (Adjud.))   |
| 38.     | <i>Orlov v. Amato</i> , [2003] O.E.S.A.D. No. 590 (Ont. L.R.B.)  |
| 39.     | <i>Wilson v. Atomic Energy of Canada Ltd.</i> , 2016 SCC 29  |
| 40.     | <i>Dynamic Industries Ltd v. R.</i> , 2005 FCA 211   |

| <b>Tab No.</b> | <b>Case</b>  |
|----------------|--|
| 41.            | <i>1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)</i> , 2013 FCA 85  |
| 42.            | <i>Porotti v. Canada (National Revenue)</i> , 2014 TCC 267   |
| 43.            | <i>Porotti v. Canada (National Revenue)</i> , 2016 FCA 29  |
| 44.            | <i>Queen v. Cognos Inc.</i> , [1993] 1 S.C.R. 87   |
| 45.            | <i>Wallace v. United Grain Growers Ltd.</i> , [1997] 3 S.C.R. 701  |
| 46.            | <i>Rankin (Rankin's Garage &amp; Sales) v. J.J.</i> , 2018 SCC 19  |
| 47.            | <i>Bhasin v. Hrynew</i> , 2014 SCC 71  |
| 48.            | <i>Antunes v. Limen Structures Ltd.</i> , 2015 ONSC 2163   |
| 49.            | <i>Antunes v. Limen Structures Ltd.</i> , 2016 ONCA 509  |
| 50.            | <i>Garland v. Consumers' Gas Co.</i> , [2004] 1 S.C.R. 629   |
| 51.            | <i>Pro-Sys Consultants Ltd. v Microsoft Corporation</i> , 2013 SCC 57  |
| 52.            | Ministry of Labour, <i>Employment Standards Act, 2000 Policy and Interpretation Manual</i> , 2019, Release 1 (last updated March 22, 2019) |

**SCHEDULE "B"**  
**RELEVANT STATUTES**

1. ***Employment Standards Act, 2002, S.O. 2000, c. 41***

**To whom Act applies**

**3 (1)** Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

- (a) the employee's work is to be performed in Ontario; or
  - (b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.
- [...]

**No contracting out**

**5 (1)** Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

**Records**

**15 (1)** An employer shall record the following information with respect to each employee, including an employee who is a homemaker:

[...]

**3.1** The dates and times that the employee worked.

[...]

**4.** The number of hours the employee worked in each day and each week.

**Overtime threshold**

**22 (1)** Subject to subsection (1.1), an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold.

**Same, two or more regular rates**

**(1.1)** If an employee has two or more regular rates for work performed for the same employer in a work week,

- (a) the employee is entitled to be paid overtime pay for each hour of work performed in the week after the total number of hours performed for the employer reaches the overtime threshold; and
- (b) the overtime pay for each hour referred to in clause (a) is one and one-half times the regular rate that applies to the work performed in that hour.

**Averaging**

**(2)** An employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks for the purpose of determining the employee's entitlement, if any, to overtime pay if,

- (a) the employee has made an agreement with the employer that his or her hours of work may be averaged over periods of a specified number of weeks; and



(b) the averaging period does not exceed four weeks or the number of weeks specified in the agreement, whichever is lower.

(2.1) Repealed: 2019, c. 4, Sched. 9, s. 8 (1).

**Transition: certain agreements**

(2.2) For the purposes of this section, each of the following agreements shall be treated as if it were an agreement described in clause (2) (a):

1. An agreement to average hours of work made under a predecessor to this Act.
2. An agreement to average hours of work made under this section as it read on February 28, 2005.
3. An agreement to average hours of work that complies with the conditions prescribed by the regulations made under paragraph 7 of subsection 141 (1) as it read on February 28, 2005.

**Term of agreement**

(3) Subject to subsections (3.1) and (3.2), an averaging agreement is not valid unless it provides for a start date and an expiry date.

**Limit on agreement, not represented by trade union**

(3.1) If the employee is not represented by a trade union, the averaging agreement's expiry date shall not be more than two years after the start date.

**Limit on agreement, collective agreement applies**

(3.2) If the employee is represented by a trade union and a collective agreement applies to the employee, an averaging agreement shall expire no later than the day a subsequent collective agreement that applies to the employee comes into operation.

**Agreement may be renewed or replaced**

(4) For greater certainty, an averaging agreement may be renewed or replaced if the requirements set out in this section are met.

**Existing agreement**

(5) Any averaging agreement that was made before the day the Restoring Ontario's Competitiveness Act, 2019 received Royal Assent in accordance with this section, as it read at the time, and that was approved by the Director under section 22.1, as it read at the time, is deemed to have met the requirements set out in subsections (2), (3), (3.1) and (3.2) and continues to be valid until the earlier of,

- (a) the day the agreement is revoked under subsection (6);
- (b) the day the Director's approval expires; or
- (c) the day the Director's approval is revoked.

(5.1) Repealed: 2019, c. 4, Sched. 9, s. 8 (4).

**Agreement irrevocable**

(6) No averaging agreement referred to in this section may be revoked before it expires unless the employer and the employee agree to revoke it.

**Time off in lieu**

(7) The employee may be compensated for overtime hours by receiving one and one-half hours of paid time off work for each hour of overtime worked instead of overtime pay if,

- (a) the employee and the employer agree to do so; and
- (b) the paid time off work is taken within three months of the work week in which the overtime was earned or, with the employee's agreement, within 12 months of that work week.

**Where employment ends**

(8) If the employment of an employee ends before the paid time off is taken under subsection (7), the employer shall pay the employee overtime pay for the overtime hours that were worked in accordance with subsection 11 (5).

**Changing work**

(9) If an employee who performs work of a particular kind or character is exempted from the application of this section by the regulations or the regulations prescribe an overtime threshold of other than 44 hours for an employee who performs such work, and the duties of an employee's position require him or her to perform both that work and work of another kind or character, this Part shall apply to the employee in respect of all work performed by him or her in a work week unless the time spent by the employee performing that other work constitutes less than half the time that the employee spent fulfilling the duties of his or her position in that work week.

**Minimum wage**

**23 (1)** An employer shall pay employees at least the minimum wage.

**Room or board**

(2) If an employer provides room or board to an employee, the prescribed amount with respect to room or board shall be deemed to have been paid by the employer to the employee as wages.

**Determining compliance**

(3) Compliance with this Part shall be determined on a pay period basis.

**Hourly rate**

(4) Without restricting the generality of subsection (3), if the minimum wage applicable with respect to an employee is expressed as an hourly rate, the employer shall not be considered to have complied with this Part unless,

- (a) when the amount of regular wages paid to the employee in the pay period is divided by the number of hours he or she worked in the pay period, other than hours for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to the minimum wage; and

(b) when the amount of overtime pay and premium pay paid to the employee in the pay period is divided by the number of hours worked in the pay period for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to one and one half times the minimum wage.

**Public holiday pay**

**24 (1)** An employee's public holiday pay for a given public holiday shall be equal to, (a) the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation.

(1.1), (1.2) Repealed: 2018, c. 14, Sched. 1, s. 7 (2).

**Premium pay**

**(2)** An employer who is required under this Part to pay premium pay to an employee shall pay the employee at least one and one half times his or her regular rate.

**Vacation pay**

**35.2** An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 or 34, equal to at least,

(a) 4 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is less than five years; or

(b) 6 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is five years or more.

2. **O. Reg. 285/01: WHEN WORK DEEMED TO BE PERFORMED, EXEMPTIONS AND SPECIAL RULES**

**Exemptions from Parts VII to XI of Act**

**2. (1)** Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed, [...]

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer's place of business.

3. ***Sale of Goods Act, R.S.O. 1990, c. S.1***

**When agreement becomes sale**

**2 (4)** An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

4. *Canada Pension Plan, R.S.C., 1985, c. C-8*

**Pensionable employment**

**6 (1)** Pensionable employment is

- (a) employment in Canada that is not excepted employment;
- (b) employment in Canada under Her Majesty in right of Canada that is not excepted employment; or
- (c) employment included in pensionable employment by a regulation made under section 7.

**Employer's base contribution**

**9 (1)** Every employer shall, in respect of each employee employed by the employer in pensionable employment, make an employer's base contribution for the year in which remuneration in respect of the pensionable employment is paid to the employee of an amount equal to the product obtained when the contribution rate for employers for the year is multiplied by the lesser of

- (a) the contributory salary and wages of the employee for the year paid by the employer, minus such amount as or on account of the employee's basic exemption for the year as is prescribed, and
- (b) the maximum contributory earnings of the employee for the year, minus the amount, if any, that is determined in the prescribed manner to be the employee's salary and wages on which a base contribution has been made for the year by the employer with respect to the employee under a provincial pension plan.

**Employer's first additional contribution**

**(1.1)** For 2019 and each subsequent year, an employer referred to in subsection (1) shall also, in respect of each employee employed by the employer in pensionable employment, make an employer's first additional contribution for the year in which remuneration in respect of the pensionable employment is paid to the employee of an amount equal to the product obtained when the first additional contribution rate for employers for the year is multiplied by the lesser of

- (a) the employee's contributory salary and wages for the year paid by the employer, minus the amount as or on account of the employee's basic exemption for the year that is prescribed, and
- (b) the employee's maximum contributory earnings for the year, minus the amount, if any, that is determined in the prescribed manner to be the employee's salary and wages on which a first additional contribution has been made for the year by the employer with respect to the employee under a provincial pension plan.

**Employer's second additional contribution**

**(1.2)** For 2024 and each subsequent year, an employer referred to in subsection (1) shall also, in respect of each employee employed by the employer in pensionable employment, make an employer's second additional contribution for the year in which remuneration in respect of the pensionable employment is paid to the employee of an amount equal to the

product obtained when the second additional contribution rate for employers for the year is multiplied by the amount equal to

- (a) the amount by which the employee's contributory salary and wages for the year paid by the employer — not exceeding the employee's additional maximum pensionable earnings for the year — exceeds the employee's maximum pensionable earnings for the year, minus
- (b) the amount, if any, that is determined in the prescribed manner to be the employee's salary and wages on which a second additional contribution has been made for the year by the employer with respect to the employee under a provincial pension plan.

### **Succession of employers**

(2) If one employer immediately succeeds another as the employer of an employee as a result of the formation or dissolution of a corporation or the acquisition — with the agreement of the former employer or by operation of law — of all or part of a business of the former employer, the successor employer may, for the application of subsections (1), (1.1) and (1.2) and 8(1), (1.1) and (1.2) and section 21, take into account the amounts paid, deducted, remitted or contributed under this Act by the former employer in respect of the year in relation to the employment of the employee as if they had been paid, deducted, remitted or contributed by the successor employer. If the employer takes those amounts into account with respect to the employer's contributions, the employer shall also take them into account with respect to the employee's contributions.

### **Self-employment succeeded by employment**

(3) For the application of subsections (1), (1.1) and (1.2) and 8(1), (1.1) and (1.2) and section 21, if a person, in a year, is self-employed, ceases to be self-employed and becomes an employee of a corporation that is controlled by the person, the corporation may

- (a) take into account the amount of contributory self-employed earnings of the person in the year as contributory salary and wages paid by the corporation to the employee in that year; and
- (b) take into account one half of the contributions by the person in respect of self-employed earnings in the year as an amount deducted, remitted or contributed in relation to employee's contributions for that year, and one half of that amount as an amount remitted or contributed in relation to employer's contributions for that year.

## **5. *Employment Insurance Act, S.C. 1996, c. 23***

### **Types of insurable employment**

**5 (1)** Subject to subsection (2), insurable employment is

- (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and

whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

(b) employment in Canada as described in paragraph (a) by Her Majesty in right of Canada;

(c) service in the Canadian Forces or in a police force;

(d) employment included by regulations made under subsection (4) or (5); and

(e) employment in Canada of an individual as the sponsor or co-ordinator of an employment benefits project.

### **Employer's premium**

**68** Subject to sections 69 and 70, an employer shall pay a premium equal to 1.4 times the employees' premiums that the employer is required to deduct under subsection 82(1).

### **Deduction and payment of premiums**

**82 (1)** Every employer paying remuneration to a person they employ in insurable employment shall

(a) deduct the prescribed amount from the remuneration as or on account of the employee's premium payable by that insured person under section 67 for any period for which the remuneration is paid; and

(b) remit the amount, together with the employer's premium payable by the employer under section 68 for that period, to the Receiver General at the prescribed time and in the prescribed manner.

**SCHEDULE "C"**  
**CHART OF ANALOGOUS CASES**

| CASE  | SUMMARY OF PERTINENT FACTS AND FINDINGS  |
|---|--|
| <p><i>Belton v. Liberty Insurance Co. of Canada</i>, [2004] O.J. No. 3358 (C.A.)</p> <p>Position: Commissioned life insurance sales agent</p> | <p>A call centre had eliminated direct contact between agents and customers with respect to policy changes and renewals, and further, all salespersons had managers, could not sell other insurance, and had no legal entitlement to the customers to which they sold.<sup>219</sup></p>   |
| <p><i>Braiden v. La-Z-Boy Canada Limited</i>, 2008 ONCA 464</p> <p>Position: Salesperson for a furniture retailer</p>                         | <p>The employee worked exclusively for La-Z-Boy; was subject to control and monitoring by the employer in terms of territory, promotional methods, price, and manner of sale; was paid only on commission at prices established by the employer; and worked on a sales force which was a central to the manner in which La-Z-Boy distributed and sold its products.<sup>220</sup></p>  |
| <p><i>Moseley-Williams v. Hansler Industries Ltd.</i>, [2008] O.J. No. 4457 (S.C.)</p> <p>Position: Commissioned equipment salesperson</p>    | <p>The employee was expected to devote his efforts exclusively to selling products on behalf of the employer; the employee was assigned a geographic territory in which to solicit which was altered by the employer; the employee only used a car and his phone as "tools" to perform his job which he received a car allowance and business gas reimbursement; the employee did not take on any business risk, only earned commissions, and was entirely financially-dependent on the employer including for his "operating costs" such as gas and phone bills; and the employer worked as a part of a group of sales representatives.<sup>221</sup></p> |
| <p><i>McKee v. Reid's Heritage Homes Ltd.</i>, 2009 ONCA 916</p> <p>Position: Commissioned residential home salesperson</p>                   | <p>The employee worked exclusively for the employer's company; was subject to the employer's control with respect to where she was to sell, the promotion methods she was to use, what she was to sell, and how much she had to sell for; the employer supplied the employee with stationary and forms; the employee profited solely through fixed commissions; the employee did not risk significant capital in her sales operation; the employer provided the employee with necessary facilities and tools; and the sales force that the employee worked for was a crucial element of the employer's business organization.<sup>222</sup></p>            |
| <p><i>King v Merrill Lynch Canada</i></p>   | <p>The employees were limited to selling investments exclusively</p>   |

<sup>219</sup> *Belton* at para. 11, PBOA, Vol 1, Tab 9.

<sup>220</sup> *Braiden* at para. 35, PBOA, Vol 1, Tab 10.

<sup>221</sup> *Moseley-Williams v. Hansler Industries Ltd.*, [2008] O.J. No. 4457 (S.C.), at paras. 30-41, PBOA, Vol 1, Tab 13.

<sup>222</sup> *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 at paras. 47-50, PBOA, Vol 1, Tab 14.

|  |  |
|--|--|
| <p><i>Inc</i>, [2005] O.J. No. 5028 (S.C.)</p> <p>Position: Commissioned stock/investment salesperson</p>  | <p>through the employer; were treated as employees for income tax purposes; were subject to control through the policy manuals of the employer, approval of any advertising use, approval before speaking to media, monitoring of trading activity through compliance department, complaints process, filling out new account application for new clients. Although their hours of work and remuneration were not controlled these factors were not given much weight as the employees were paid solely on commission.<sup>223</sup></p> |
| <p><i>Jaremko v. A.E. LePage Real Estate Services Ltd.</i>, [1987] O.J. No. 506 (H.C.), aff'd [1989] O.J. No. 996 (C.A.)</p> <p>Position: Commissioned real estate salesperson</p>           | <p>The employee was subject to substantial control of his operations, through use of the employer's office, and secretarial assistance, the employer's policy and company discipline, receiving memoranda, ability to apply for promotions within the company, and inclusion in the company bonus and profit sharing plan. Although the employee had substantial freedom to operate from the point of view of arranging his time, a master-servant relationship was found to exist.<sup>224</sup></p>                                    |
| <p><i>Sooters Studios Ltd., Re</i>, 1991 CarswellOnt 7806 (Ont. E.S.B. (Adj.))</p> <p>Position: Commissioned managers overseeing film and photography sales</p>                              | <p>Nine "managers" employed at the defendant's various retail locations, each owned or leased by franchisees or the defendant, were supervised by regional "supervisors" who were labelled independent contractors. Employees were subject to substantial control in that only products approved by the defendant could be offered for sale (although managers had some discretion to give discounts). Although they hired and paid others, this was no necessarily inconsistent with the manager's being an employee.<sup>225</sup></p> |
| <p><i>Key Fund Raising Ltd. v. British Columbia (Director of Employment Standards)</i>, 2001 CarswellBC 4136 (Employment Standards Tribunal)</p> <p>Position: Fundraising canvass person</p> | <p>The employee worked under the direction and control of a "crew manager" who was an independent contractor, who could bind the employer in contracts. The employee was subject to substantial control in that he did the work requested of him; he not able to hire others and go into business for himself (as he tried to do that once and the company rejected his proposal); his contract was for specific work and the company provided the materials.<sup>226</sup></p>  |
| <p><i>Big Picture Home Entertainment Ltd. v. MacDonald</i>, 2016 CarswellOnt</p>   | <p>Although the employee had significant flexibility in determining hours of work and business opportunities, she was subject not in business for herself as the employer determined the neighbourhoods</p>  |

<sup>223</sup> *King v. Merrill Lynch Canada Inc*, [2005] O.J. No. 5028 (S.C.) at paras. 38-39, PBOA, Vol 1, Tab 15.

<sup>224</sup> *Jaremko v. A.E. LePage Real Estate Services Ltd.*, [1987] O.J. No. 506 (H.C.) at para. 3, PBOA, Vol 1, Tab 16, aff'd [1989] O.J. No. 996 (C.A.), PBOA, Vol. 1, Tab 17.

<sup>225</sup> *Sooters Studios Ltd., Re*, 1991 CarswellOnt 7806 (Ont. E.S.B.), at paras. 8, 28, 51, PBOA, Vol 1, Tab 18.

<sup>226</sup> *Key Fund Raising Ltd. v. British Columbia (Director of Employment Standards)*, 2001 CarswellBC 4136 (Employment Standards Tribunal) at paras. 21, 31, PBOA, Vol 1, Tab 19.



|   |   |
|---|---|
| <p>18808 (Ont. L.R.B.), varied on other grounds 2016 CarswellOnt 20591 (Ont. L.R.B.)</p> <p>Position: Commissioned salesperson of home entertainment systems</p>        | <p>where claimant would conduct business; the employer determined the contents of brochures and business cards; employer tracked her while she worked; and the employer provided transportation, fuel, training, etc.<sup>227</sup></p>   |
| <p><i>Baker v. 9111140 Canada Inc.</i>, 2017 CarswellOnt 5875 (Ont. L.R.B.)</p> <p>Position: Commissioned door-to-door salesperson selling home and cooling systems</p> | <p>The employee was not engaged in business on his own account as he was driven to the areas where he did door-to-door sales, he was provided with worksheets to fill out about his efforts, and he was provided with blank contracts and never filled out a contract completely on his own. Although the employee could profit, it was only through commissions from the employer.<sup>228</sup></p>   |
| <p><i>R. v. Pereira</i>, 1988 CarswellAlta 88 (Q.B.)</p> <p>Position: Commissioned salespersons</p>   | <p>The accused company hired eight children under the age of 15 to sell chocolate bars, contrary to the age restriction for employment under Alberta's <i>ESA</i>. The accused company provided the chocolate bars, provided transportation, and determined where the bars would be sold, approved any price variations. Although the sellers paid for their own meals and were responsible for lost or broken bars and dishonoured cheques, it could not be found that they were engaged in business as the accused company retained control throughout.<sup>229</sup></p> |

<sup>227</sup> *Big Picture Home Entertainment Ltd. v. MacDonald*, 2016 CarswellOnt 18808 (OLRB) at para. 33, varied on other grounds 2016 CarswellOnt 20591 (Ont. L.R.B.), PBOA, Vol 1, Tab 20.

<sup>228</sup> *Baker v. 9111140 Canada Inc.*, 2017 CarswellOnt 5875 (Ont. L.R.B.) at para. 10, PBOA, Vol 1, Tab 21.

<sup>229</sup> *R. v. Pereira*, 1988 CarswellAlta 88 (Q.B.) at para. 35, PBOA, Vol 1, Tab 22.

Haidar Omarali v. Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P.

Court File No.: CV-15-527493-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act*, 1992

**FACTUM OF THE MOVING PLAINTIFF  
(Summary Judgment Motion  
Returnable June 11-13, 2019)**

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**THIS IS EXHIBIT C REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

CITATION: Omarali v. Just Energy, 2016 ONSC 4094  
COURT FILE NO.: CV-15-527493-CP  
DATE: 20160727

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Haidar Omarali / Plaintiff

**AND:**

Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario LP /  
Defendants

**BEFORE:** Justice Edward P. Belobaba

**COUNSEL:** *David Rosenfeld and Jody Brown* for the Plaintiff / Moving Party

*Paul J. Martin, Laura F. Cooper and Janna L. Young* for the Defendants /  
Responding Parties

**HEARD:** June 21 and June 28, 2016

Proceeding under the *Class Proceedings Act, 1992*

**CERTIFICATION DECISION**

**Introduction**

[1] This is a motion to certify a proposed class action of some 7000 sales agents who were hired by the defendants as independent contractors and worked door-to-door selling their products. The plaintiff says the sales agents were misclassified - that they are not independent contractors but employees and are therefore entitled to the benefits and protections of the *Employment Standards Act*<sup>1</sup> such as minimum wage, overtime pay, and vacation and public holiday pay.

[2] Class counsel says this is “the archetypal misclassification case.” He says this to suggest that the proposed class action should be easily certified. The reality, of course, is

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<sup>1</sup> *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”).

otherwise. Misclassification cases are generally difficult to certify because individualized assessments are often required and commonality cannot be established.<sup>2</sup>

[3] Misclassification cases have been certified in two situations: one, where the issue was job function but the class was carefully defined to ensure class-wide job function similarity;<sup>3</sup> and two, where the common issues were focused on the systemic nature of the defendant company's policies and practices rather than on class member entitlements.<sup>4</sup> Otherwise, most misclassification cases that ask whether the class member is an employee (rather than say a manager) collapse under the weight of an "it depends" reality.<sup>5</sup> I am not saying that an "archetypal misclassification case" can never be certified,<sup>6</sup> only that the challenge in doing so should not be underestimated.

[4] That is why the defendants in this action argue that the determination whether the sales agents herein are independent contractors or employees can only be made on an individualized basis and, because there is no commonality, the matter cannot proceed as a class action. The defendants submit that the motion for certification must therefore be dismissed.

[5] When I first reviewed the parties' submissions, I was inclined to agree with the defendants. However, as I considered the matter further, and reviewed the applicable case law and the actual record before me, I realized that the evidence in this case was quite different from what was before the court in *Brown*<sup>7</sup> and *McCracken*<sup>8</sup>. More specifically, I realized that the defendants really had little in the way of "it depends" evidence and the plaintiff, on the other hand, had significant evidence of systemic commonality. I therefore came to the conclusion that the plaintiff has satisfied the commonality as well as the other

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<sup>2</sup> See, for example, *McCracken v. Canadian National Railway*, 2012 ONCA 445, and *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677.

<sup>3</sup> *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144.

<sup>4</sup> *Baroch v. Canada Cartage*, 2015 ONSC 40. Also see *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 and *Fresco v. Canadian Bank of Commerce*, 2012 ONCA 444.

<sup>5</sup> *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, at para. 175.

<sup>6</sup> Indeed, in *McCracken*, *supra*, note 2, at para. 44, the Court of Appeal agreed that "there is no rule that misclassification cases are automatically incapable of raising common issues." As in every certification motion, it depends on the evidence.

<sup>7</sup> *Brown*, *supra*, note 2.

<sup>8</sup> *McCracken*, *supra*, note 2.

requirements under s. 5(1) of the *Class Proceedings Act*<sup>9</sup> and that the proposed action should be certified as a class proceeding.

[6] The defendants may well prevail on the merits whether by way of summary judgment or a common issues trial. But overall merits are not relevant at certification. On a motion for certification, which is primarily a procedural decision, the plaintiff simply has to show a cause of action and some basis in fact for the four remaining s. 5(1) requirements: an identifiable class, common issues that will advance the litigation, procedural preferability and a suitable representative plaintiff.

[7] In my view, for the reasons set out below, the plaintiff has satisfied each of these requirements. The motion for certification is granted. The common issues, as proposed and certified, are attached in the Appendix.

### **Outline of decision**

[8] To explain why this “archetypal misclassification case” has been certified as a class action on the evidence herein, I will proceed as follows. First, I will describe the defendants’ ‘independent contractor’ sales structure. Next, I will provide a brief overview of how the law decides who is an “employee” and a summary of the key provisions of the *Employment Standards Act* as they apply here. I will then discuss the commonality requirement in detail because this is the core issue on the motion. I will end by considering the certification requirements in s. 5(1) of the CPA.

### **Background**

#### **Just Energy’s sales structure**

[9] Just Energy is a “family of companies” that provide electricity and natural gas supply to residential and commercial customers across North America. They commenced operations in Ontario in 1997, initially marketing fixed price natural gas contracts. After the provincial market for electricity was deregulated in 2002, Just Energy began to market electricity in addition to natural gas. Just Energy currently carries on business in six provinces and fifteen American states.

[10] From the time it began operating in Ontario, Just Energy has hired what it believes are independent sales agents to solicit customer contracts for natural gas and electricity. The sales agents work door-to-door and are paid entirely by commission. In 2009 about 95 per cent of the company’s sales revenues came from door-to-door selling. Today, on-

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<sup>9</sup> *Class Proceedings Act*, 1992, S.O. 1992, c.6 (“CPA”).

line sales generate most of the company's revenue and about 21 per cent of the revenue comes from door-to-door selling. Nonetheless, even at 21 per cent, door-to-door selling remains a significant component of the defendants' business. As the company's vice president explained in his affidavit, "Our success has been built one door at a time."

[11] Just Energy has about 130 sales agents working in Ontario as independent contractors ("ICs"). However, because of the high turn-over rate in the door-to-door workforce (close to 18 times a year) the defined class over the four-year class period includes some 7000 former and current sales agents.

[12] Each of these putative class members work or worked in a team or "crew" supervised by a crew coordinator. The crew coordinators are supervised, in turn, by regional distributors who run the regional sales office. The crew coordinators and regional distributors are also IC's and are also paid on commission, drawing "over-rides" from the commissions earned by the door-to-door sales agents under their supervision. The sales agents can become crew coordinators and regional distributors. Some of the latter have been hired by Just Energy as senior employees.

[13] The regional distributors are trained by Just Energy and report to the national distributors employed by the company. Every regional distributor signs an agreement with Just Energy which provides that the sales agents are ICs working for Just Energy, that the regional distributor must recruit, educate, motivate and guide the activities of the ICs, solicit customer contracts using forms and solicitation material approved and supplied by Just Energy, implement the compliance materials provided by Just Energy and generally comply with "all directions" provided by the company. Every sales agent is recruited and hired by Just Energy. All sales agents must wear a Just Energy identification badge.

[14] As an independent energy retailer, Just Energy is regulated by the Ontario Energy Board ("OEB"). Just Energy is responsible for the training, monitoring and conduct of its sales agents and must ensure that all sales agents adhere to internal and external codes of conduct.

### **The independent contractor agreement**

[15] Every sales agent is required to execute an IC agreement. The plaintiff signed his IC agreement in July, 2012 and worked as a sales agent until December, 2013.

[16] In their submissions, the defendants go to great lengths to identify the many provisions in the IC agreement that assert that the sales agents are not employees. Let me simplify this part of the analysis by agreeing with the defendants that, except for clause 2 of the agreement (which requires the sales agents to "follow all instructions or directions" provided by Just Energy), there is no doubt, based on the IC agreement alone, that the defendants intended to hire the sales agents as ICs and not as employees.

[17] The IC agreement provides that the sales agents are generally on their own to do as they please. They must, of course, comply with applicable provincial regulations, such as the codes of conduct promulgated by the OEB and they are required to wear the prescribed identification badge and not engage in any misleading or deceptive sales practices. Otherwise, they can pursue sales as they wish.

[18] According to the IC agreement, there is no requirement to attend the morning meetings at the regional office or wear the defendants' clothing or use the defendants' suggested sales scripts or work door-to-door in any particular location. The IC agreement provides that the sales agents are free to choose when, where and how they will solicit contracts. Thus, I say again, if the IC agreement alone was determinative, it is reasonably clear (except for clause 2) that sales agents were being hired as ICs and not as employees.

[19] But the hiring agreement alone is not determinative.<sup>10</sup>

### **Who is an employee - the “economic realities” test**

[20] Little weight is given by courts as to how the parties describe their relationship in the contractual agreement because this is often self-serving.<sup>11</sup> Nor does the ESA provide any assistance in this regard. The ESA applies to employees.<sup>12</sup> But “employee” is not defined. Thus, both courts and administrative adjudicators have had to look beyond the labels and examine the “economic realities” of the parties' relationship in practice.<sup>13</sup> It is in the common law that one finds the factors that must be considered. A leading Canadian text summarizes the key factors as follows:

Canadian courts and administrative tribunals use various formulations of the test for determining employee status, but three elements are common: (1) the employer must exercise a relatively high degree of bureaucratic control over the when and the where of employment; (2) the worker must be economically dependent on the employer; and (3) the worker must not be an entrepreneur operating a business as a going concern but must form part of the employer's business.<sup>14</sup>

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<sup>10</sup> England, *Individual Employment Law* (2008) at 22.

<sup>11</sup> *Ibid.*

<sup>12</sup> ESA, s. 3.

<sup>13</sup> England, *supra*, note 10, at 22.

<sup>14</sup> *Ibid.*, at 19.



[21] The application of this common law test is invariably fact-specific and more often than not requires a nuanced analysis. Different courts or agencies in different regulatory contexts can come to different conclusions. A worker can simultaneously be an employee under the ESA and an IC under, say, the *Income Tax Act*.<sup>15</sup> Rulings by the CRA or the WSIB or other administrative agencies that the Just Energy sales agents are ICs and not employees are interesting and to a point relevant, but they are not determinative.<sup>16</sup> What counts, and the only thing that counts here, is whether the ICs are employees under the ESA as determined by the application of the common law test set out above.

[22] I pause here to note that of the three primary factors that are typically considered, the one that is the most determinative on the facts herein is the “control” factor, that is, the degree of control over the how, when and where of what’s being sold.

[23] The other two factors are not seriously contested by the defendants:

- There is no serious dispute about the fact that the sales agents are economically dependent on Just Energy. Other than one example of a sales agent in the Ottawa area who also tries to sell LED lights while going door-to-door, the bulk of the evidence is that the sales agents sell only Just Energy products and are economically dependent on the defendants.
- There is also no serious dispute about the fact that the sales agents are not operating stand-alone businesses that service Just Energy as just one of several clients. The evidence is uncontroverted that the sales agents put in full days working exclusively for Just Energy and in doing so form a significant part of the defendants’ business. (Recall the fact that door-to-door sales account for more than 20 per cent of Just Energy’s total revenues.)

[24] Thus, when we come to consider whether there is “some basis in fact” or “some evidence” for the proposed common issues - for example, whether the sales agents are employees rather than ICs - the question will really be whether the plaintiff has presented some evidence that Just Energy exercises a degree of control over the how, where and when of the sales agent’s job – because, as discussed, this is the determinant factor on the facts herein.

[25] I recognize that the Court of Appeal listed five factors in *Belton*<sup>17</sup> not three. The two that were added were these: whether the sales agent is limited exclusively to the

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<sup>15</sup> England, *supra*, note 10, at 18 and cases cited therein.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. No. 3358 (C.A.)

service of the principal; and the cost and ownership of any tools required for the job. Neither factor, on the facts herein, is significant. In practice, virtually all of the sales agents work exclusively for Just Energy (except for the individual working out of the Ottawa office who also sells LED lights); and both sides agree that no special tools are needed to do door-to-door sales. Thus, the three-factor test outlined above is more than sufficient.

[26] A final point before turning to the applicable ESA provisions. “Control” is not defined either in the ESA or in the case law. One must therefore resort to the definition of “control” that can be found in most on-line and in-print dictionaries: “the power to influence or direct people’s behavior.” Note that “control” does not mean ‘compel at gunpoint’ but simply “*influence or direct*” people’s behavior. I will return to this definition later in these reasons.

### **The applicable ESA provisions**

[27] As already noted, because the ESA does not define “employee” it is necessary to apply the “economic realities” test described above. If the IC sales agents are found to be employees, then (unless they fall within a statutory exemption) they are entitled to a range of benefits and protections as set out in Parts VII to XI of the Act, such as minimum hourly wages, overtime pay and vacation and public holiday pay. These benefits and protections, as already noted, cannot be waived. One cannot contract out of the ESA.<sup>18</sup>

[28] A number of exemptions are set out in the legislation. The exemption that applies here is found in s. 2(1)(h) of O. Reg. 285/01:

*Exemptions from Parts VII to XI of Act*

2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed...

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer’s place of business.

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<sup>18</sup> ESA, s. 5(1).

[29] In other words, a sales agent who is found to be an “employee” under the common law test is exempted from receiving ESA benefits if she is a sales person who is paid in commission and works outside the employer’s place of business. Thus, because Just Energy’s door-to-door sales agents are outside salespersons they would fall within this exemption<sup>19</sup> and would not be entitled to minimum wage, overtime pay, or vacation or public holiday pay, *unless* they were found to be “route salespersons”. If they come within the “route salesperson” exception to the general exemption, then they would be entitled to minimum wage and related benefits already noted.

[30] The ESA does not define “route salesperson.” However, according to the Act’s interpretation manual and related case law, the key consideration is the degree of control exercised by the employee relative to the employer.<sup>20</sup> Whether the “routes” are determined by the employer or the employee, the chance of profit or risk of loss and the level of entrepreneurial activity by the employee are also relevant questions.<sup>21</sup>

[31] The case law follows suit. “The key characteristics driving the conclusion that a person is either a salesperson or a route salesperson are the degree of control the employer exercises over the scheduling and order of sales calls and the degree of entrepreneurial initiative the employee at issue exercises.”<sup>22</sup> The adjudicator typically considers such facts as whether the employees were given scripts, were pre-assigned work locations, were driven to the assigned locations, were given direction and coaching on how to perform sales, wore a uniform provided by the employer and were subjected to supervisory phone calls.<sup>23</sup>

[32] It is important to remember as we begin to consider whether there is some evidence of commonality for the two key issues – that is, whether there is some evidence that the sales agent is an employee or route salesperson – that the most important evidence for each of these determinations is evidence about the defendants’ degree of control over the how, when and where of what is being sold.

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<sup>19</sup> The plaintiff argues that the sales agents do not fall within the exemption because they are not paid commissions with respect to “offers to purchase or sales.” I explain below why this is not a reasonable interpretation of the s. 2(1)(h) provision.

<sup>20</sup> *Employment Standards Act 2000 Policy and Interpretation Manual*, at 31-18.2.

<sup>21</sup> *Ibid.*

<sup>22</sup> *VanGrootel v. Advance Beauty Supply Limited*, 2016 CanLII 17209 (OLRB).

<sup>23</sup> *Schiller v. P & L Corporation Ltd*, 2012 CanLII 12611 (OLRB); *Kognitive Marketing Inc. v. Director of Employment Standards*, 2015 CanLII 61657 (OLRB); and *Orlov v. Amato*, 2003 CanLII 2984 (OLRB).

### Commonality

[33] As already noted, this motion for certification turns on commonality – whether the proposed common issues can be answered on a class-wide basis. In *Brown and McCracken*, the defendant adduced extensive evidence to show that individualized inquiries were needed (to decide whether the employee was also a manager). And the plaintiff, in turn was unable to adduce sufficient evidence of systemic, class-wide commonality. Here however, the defendants’ “individualized inquiries” evidence was surprisingly weak and the plaintiff’s “systemic commonality” evidence was quite compelling.

[34] The proposed common issues (“PCIs”) are set out in the attached Appendix. The key issues are PCI No. 1 (are the sales agents employees?) and PCI No. 4 (are they route salespersons?). In both cases, as already noted, the most relevant evidence is evidence about the degree of control that Just Energy has over the how, when and where of what is being sold.

[35] I will therefore take some time discussing the s. 5(1)(c) commonality requirement. I will set out the reasons why in my view commonality has been established for PCI Nos. 1 and 4, and I will then go on to consider the other certification requirements and the remaining PCIs.

[36] The law of commonality is well established. Under s. 5(1)(c) of the CPA, the plaintiff must show that his claim raises common issues. In order to satisfy the commonality requirement, the plaintiff only needs to adduce some basis in fact for the existence of the common issue.<sup>24</sup> This has been generally interpreted in the case law as involving two-steps - some evidence that the proposed common issue actually exists and some evidence that the proposed issue can be answered in common on a class-wide basis.<sup>25</sup> This must be coupled with the over-arching proposition that an issue cannot be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant.<sup>26</sup>

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<sup>24</sup> *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at para. 79 (“...some evidentiary basis indicating that a common issue *exists* beyond a bare assertion in the pleadings.”)

<sup>25</sup> *Dine v Biomet*, 2015 ONSC 7050 at paras. 15-19; *affd*, 2016 ONSC 4039 (Div.Ct.).

<sup>26</sup> *Fehring v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.), *affd*, [2003] O.J. No. 3918 (Div. Ct.).

**Step one: Some evidence that the “employee” and “route salesperson” issues exist**

[37] The first step, some evidence that the proposed common issue actually exists, is typically satisfied with affidavit evidence from the plaintiff about his or her own experience. Here the plaintiff has adduced more than enough evidence to show that PCI Nos. 1 and 4 exist – that is, some evidence that Just Energy controls the how, where and when of the door-to-door sales and that the questions about whether the sales agents are “employees” and “route salespersons” are legitimate questions.

[38] I refer specifically to the evidence presented by sales agents Omarali, Awal, Nazerally and Filipovic. They make the following points. They work twelve-hour days, the morning portion dedicated to meetings and role-playing, and the balance of the day, 12 noon to 9 p.m., to door-to-door selling. They are required to wear Just Energy clothing. They are given sales scripts. They are driven in vans to pre-assigned locations, picked up at day’s end and returned to the regional sales office. They cannot change their pre-assigned work areas without explicit permission. They are reprimanded if they take time off work and sanctioned if they breach internal or external codes of conduct. In short, say the affiants, they are told how, when and where to sell the defendants’ products.

[39] The plaintiff has therefore satisfied the first step of the commonality analysis by showing some basis in fact that the “employee” and “route salesperson” issues exist.

**Step two: Some evidence of systemic or class-wide commonality**

[40] This is always the more difficult challenge in misclassification cases. The plaintiff may well have some evidence that the PCI exists at least for one or more class members. But now, under the second step of the analysis, he must present some evidence that the PCI is common to the entire class. To do this, the plaintiff typically must find evidence of systemic commonality, ideally in the defendants’ own practices and policies.

[41] Here the plaintiff does just that. He relies not only on the defendants’ own documentation (such as Just Energy’s training materials) but also on the representations made on behalf of the company to the OEB. The plaintiff provides the following evidentiary support for the proposition that the defendants influence or direct (that is, control) the sales agents’ behavior on a class-wide basis.

[42] There is evidence in the company’s own documentation that the completion of the sales agent’s five-part training program is not optional but “must” be completed in its entirety. There is evidence that the morning meetings provide an opportunity “to practice the sales presentation and receive coaching and suggestions from the crew coordinator.” There is evidence that a detailed sales script is provided and that the sales agents are trained in “what must and must not be said at each door.”

[43] There is evidence in the defendants' documentation that the sales agents "will be dropped off by the crew coordinator at the location you will be working in for the day." The sales agents "will work from early afternoon to early evening in one area, contacting customers." There is evidence that they are provided with "do not solicit" lists for the assigned area and must "use only current and approved Just Energy sales and marketing materials."

[44] Customer contracts are finalized by Just Energy. All customer complaints are handled by Just Energy. There is evidence of ongoing quality-control supervision on the part of Just Energy with daily and weekly reports detailing sales agent productivity and customer complaints. The OEB was told by the defendants' legal counsel that "... Just Energy's Ontario operations and compliance teams commit more than 80 person hours per week on quality assurance and monitoring activities."

[45] There is evidence that the sales agents must comply with the company's internal Code of Business Conduct. Just Energy advises its sales agents that it "may discipline and/or terminate its relationship or affiliation with any representative who breaches this Code or related policies." There is evidence that violations of either the OEB or the Just Energy code of conduct can result in "progressive discipline" - from warning letters to monetary penalties, suspensions and terminations.

[46] Last but not least, Clause 2 of the IC agreement (executed by every sales agent) requires every IC to "follow all instructions or directions provided by JEC from time to time." Note the language: all "instructions and directions."

[47] In sum, I have no difficulty concluding that the plaintiff has presented some evidence that the defendants control (that is, influence or direct) the "how, when and where" behavior of the sales agents and do so on a class-wide basis.

**Why this is not *Brown* or *McCracken***

[48] In *Brown* and *McCracken*, the plaintiff failed to provide some evidence that the job functions of class members were "sufficiently similar" that the misclassification claim could be resolved without considering the individual circumstances of class members.<sup>27</sup> In both cases, the defendants presented extensive evidence showing a "wide variability"<sup>28</sup> in the duties and responsibilities of employees having the same job title or

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<sup>27</sup> *McCracken*, *supra*, note 2, at para. 104.

<sup>28</sup> *Brown*, *supra*, note 2, at para. 44.

classification. Some had managerial duties; other did not. The court concluded that individual inquiries were required and thus there was no commonality.<sup>29</sup>

[49] Here, however, the issue is not whether the job functions of class members are “sufficiently similar” but whether the level or degree of control over the how, when and where of what is being sold is “sufficiently similar” that the misclassification claim can be resolved without considering the individual circumstances of class members.

[50] Here, the defendants did not present any evidence of wide variation in the nature or extent of control over the sales agents. The defendants pointed to the IC agreement which, as I have already noted, is not determinative. They pointed to several broad assertions in their affidavit evidence that the sales agents were under no obligation to attend the morning meetings, were not required to wear Just Energy branded clothing and were “at liberty” to work “at any time and at any location.” But these highly generalized assertions are akin to the “bald, sweeping and conclusory assertions” that were rejected by the Court of Appeal in *McCracken*.<sup>30</sup>

[51] The defendants also tried to suggest there were variations in job functions and related degrees of control by noting that not all of the class members worked door-to-door selling energy supply contracts to first-time residential customers. Some of the sales agents sometimes worked on residential “renewal” sales and others on commercial customers, both new and renewal.<sup>31</sup>

[52] However, the defendants presented no evidence showing any variation in the level of control relating to the residential renewal sales, or commercial new or renewal sales. There was no evidence, for example, that sales agents selling to commercial customers worked their own hours, used their own sales scripts, wore their own clothing, drove their own cars or finalized their own contracts.

[53] Instead, there is evidence to the contrary. Every sales agent was hired to perform just one job: door-to-door selling. Indeed, Just Energy instructed its recruiters that, “We can't tell people we have multiple positions as multiple positions imply different jobs. We have *one job* with multiple openings.”

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<sup>29</sup> *McCracken*, *supra*, note 2, at para. 128.

<sup>30</sup> *McCracken*, *supra*, note 2, at para. 104.

<sup>31</sup> I note that some of the sales agents also sold water heaters at one time. However, no further information has been provided about the water heater sales.

[54] Also, the company's VP noted in his affidavit that the sales agents working the residential renewal or the commercial customers were still selling 'door-to-door':

While these sales agents may sell different products to differing customer bases, the one constant is that each and every door-to-door sales person is an Independent Contractor and it is this business model that has remained constant at Just Energy since 1997.

[55] In short, unlike in *Brown* and *McCracken*, here the evidence adduced by the defendants does not show a "wide variability"<sup>32</sup> or "lack of core commonality"<sup>33</sup> in the nature or extent of control exercised by the company over its door-to-door sales agents.

[56] I am satisfied that there is some basis in fact for both the existence and the commonality of the key common issues, "employee" and "route salesperson."

### **Certification requirements**

[57] I can now turn to the certification requirements as set out in s. 5(1) of the CPA - cause of action, identifiable class, common issues, preferable procedure and a suitable representative plaintiff. I will consider each of these in turn.

#### **(1) Cause of action**

[58] Section 5(1)(a) requires that the pleadings disclose a cause of action. I am satisfied that the pleadings disclose the following causes of action: breach of the ESA, breach of contract and the duty of good faith, negligence, and unjust enrichment.

[59] The defendants' complain that more facts should have been pleaded. However, Rule 25.06(1) requires "a concise statement of the material facts but not the evidence by which those facts are to be proved." In my view, there is nothing deficient or improper about the pleadings.

[60] The defendants also argue that because the pleadings refer to the IC agreement, and the IC agreement is clear that the sales agents were independent contractors, it follows that no cause of action is disclosed in the pleadings. However, as already noted, the contractual agreement is not determinative. The application of the so-called *Belton* factors may well result in a finding that the sales agents were actually employees even though they signed an IC agreement. The primary issue in this analysis is "control" and

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<sup>32</sup> *Brown, supra*, note 2, at para. 44.

<sup>33</sup> *Ibid.*



that issue is not decided by the content of the IC agreement but the “economic realities” of the parties’ relationship in practice.<sup>34</sup> The fact that the pleadings refer to the IC agreement is simply not determinative.

[61] In short, the pleadings disclose the causes of action as noted above. The first requirement under s. 5(1)(a) is satisfied.

**(2) Identifiable class**

[62] The plaintiff, Haidar Omarali, signed the Just Energy IC agreement in July, 2012 and worked in Toronto as a Just Energy door-to-door sales agent from approximately August 2012 to December 2013. In his first month of employment, the plaintiff worked about 288 hours and made \$956.40 or the equivalent of \$3.32 per hour. The plaintiff’s commission income in 2012 was \$8,851 and in 2013 it was \$23,515.

[63] To satisfy the section 5(1)(b) requirement of the CPA, there must be an identifiable class of two or more persons. The class must also be objectively defined and limited by rational criteria bearing a relationship to the common issues.<sup>35</sup> In my view, this second requirement has been satisfied.

[64] The plaintiff proposes the following class definition:

Any person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement.

[65] The defendants say the class definition should be narrowed to exclude claims that are, on the face of the pleadings, statute-barred. The statement of claim was issued on May 4, 2015. Therefore, all claims in respect of services provided prior to May 4, 2013 (or services for which commission payments were made prior to May 4, 2013) are barred by the two-year limitation period set out in the *Limitations Act, 2002*.<sup>36</sup> Every class member, say the defendants, would have known upon the receipt of his or her first commission payment, if not sooner, that he or she was not being paid a minimum wage or receiving any other benefits under the ESA. In other words, the class period should begin on May 4, 2013 not January 1, 2012.

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<sup>34</sup> *Supra*, note 13.

<sup>35</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 38.

<sup>36</sup> S.O. 2002, c. 24, Sch. B, ss. 4-5.

[66] I am not persuaded that the class should be narrowed at this stage of the proceeding. The defendants may well prevail on the limitations point but more evidence on the issue of reasonable discoverability is needed, particularly where the defendants themselves were continually representing to the sales agents through words and actions (e.g. pay slips) that they were ICs and not employees. On these facts, I prefer to follow the case law as summarized in the leading text on class actions, that “the limitations issue should not be resolved on a pleadings motion or on a motion for certification.”<sup>37</sup>

[67] The better approach, in my view, is to allow the defendants to add the limitations question as a common issue<sup>38</sup> and I have done so herein. On the defendants’ motion, I have added Common Issue 15 to deal with the limitations argument.

[68] Returning then to the s. 5(1)(b) requirement. The class consists of an identifiable group of door-to-door sales agents who are recruited and trained in common, have the same job, and are all classified as independent contractors. The term "sales agent" is an objective term that is used by Just Energy and readily understood by the class members. The class definition is rationally connected to the common issues because the class members were allegedly misclassified as independent contractors in violation of the ESA.

[69] The “identifiable class” requirement is satisfied.

### (3) Common issues

[70] I will now consider each of the PCIs in turn and decide whether the PCI should be certified as a common issue.

#### *PCI No.1: Are the class members employees?*

[71] PCI No. 1 asks if the class members are employees under the ESA. I have already found in my discussion of the commonality question<sup>39</sup> that there is some basis in fact that the issue exists and has class-wide commonality.

[72] PCI No. 1 is certified as a common issue.

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<sup>37</sup> Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 294.

<sup>38</sup> *Ibid.*

<sup>39</sup> See above, at paras. 37-47.

***PCI Nos. 2, 3 and 9: CPP and EI contributions***

[73] PCI Nos. 2 and 3 ask about CPP and EI contributions. PCI No. 9 asks if the defendants failed to make these contributions on behalf of the class members. There is certainly some evidence that the issues exist and, because they focus on the defendants' conduct, they can be answered on a class-wide and common basis.

[74] I suggested to the plaintiff that because the answers to these PCIs were self-evident (obviously no such contributions were made) there was little to be gained in having these questions certified as common issues. But counsel on both sides insisted that there was value in doing so. I will yield to their joint request.

[75] PCI Nos. 2, 3 and 9 are certified as common issues.

***PCI No. 4: Are the class members route salespersons?***

[76] This is the second core common issue. If the answer to PCI No. 1 is "yes" and the class members are found to be employees, PCI No. 4 asks whether they are exempt from Parts VII, VIII, IX, X and XI of the ESA as outside salespersons or fall within the exception to this exemption as route salespersons? I have already found in my discussion of commonality above,<sup>40</sup> that there is evidence in the plaintiff's affidavit material that the issue exists and has class-wide commonality.

[77] There is one problem, however, with this common issue as drafted by the plaintiff. The first dozen or so words of PCI No. 4 suggest that s. 2(1)(h) of O. Reg. 285/01 should be interpreted as meaning that "class members are making offers to purchase" rather than the customer.<sup>41</sup> In my view, it is plain from the language in the Regulation that it is the customer that is making the offer to purchase not the sales agent. I therefore agree with the defendants that the opening language in PCI No. 4 should be revised to simply read, "If the answer to (1) is "yes", are the class members ... [etc]."

[78] With this revision, PCI No. 4 is certified as a common issue.

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<sup>40</sup> Recall above at paras.37-47.

<sup>41</sup> The plaintiff's PCI No. 4 reads as follows: "*If the Class Members are making offers to purchase or sales pursuant to s. 2(1)(h) of O. Reg. 285/01, are the class members exempt from Parts VII, VIII, IX, X and XI of the ESA, or do the Class Members fall within the exception to this exemption as route salespersons?*"

***PCI No. 5: ESA requirements as express or implied terms***

[79] PCI No. 5 asks the following: if the class members are employees and route salespersons, do the ESA requirements regarding minimum pay and related benefits form express or implied terms of the class members' contracts?

[80] Here again, I suggested to the plaintiff that very little would be gained by adding this question to the common issues list. The answer is self-evident. If the ESA applies, and one cannot contract out of the ESA, then it follows that the ESA benefits and protections are payable and these requirements can be characterized as an implied term of the class member employment contracts.

[81] But here again, counsel for both sides requested that this question be added as a common issue. And here again, as I did with PCI Nos. 2, 3 and 9, I acceded to the joint request. I note that a similar issue was certified in *Rosen, Fulawka* and *Fresco*.

[82] PCI No. 5 is certified as a common issue.

***PCI Nos. 6 and 7: Breach of contractual and good faith duties***

[83] PCI No. 6 asks if the defendants owed contractual duties or a duty of good faith to ensure that the class members paid the minimum wage, that the hours of work were monitored and accurately recorded, that the class members were properly classified and advised of their rights to overtime pay and that they were compensated with vacation and public holiday pay.

[84] There is certainly some evidence that none of this was done and that the questions posed can be answered on a class-wide basis. The basis of the duties alleged are informed by the requirements of the ESA and the Supreme Court's decision in *Bhasin v Hrynew*<sup>42</sup> that requires honesty in contractual performance. I also note that similar questions have been certified in other employment class actions, including *Rosen, Fulawka, Fresco* and *Baroch*.

[85] PCI No. 7 is certified as a common issue.

***PCI No. 8: Failure to comply with ESA requirements***

[86] If the class members are found to be employees and route salespersons, PCI No. 8 asks if the defendants failed to pay minimum wage, overtime pay, and vacation and

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<sup>42</sup> *Bhasin v Hrynew*, [2014] S.C.R. 494.

public holiday pay. Here again, the answer is self-evident. But here again, because both sides requested that this issue be added, I will accede to the joint request.

[87] PCI No. 8 is certified as a common issue.

***PCI Nos. 10 and 11: Negligence***

[88] PCI Nos. 10 and 11 ask, in the alternative, if the various failures alleged under the contractual claim in PCI Nos. 6 and 7 can constitute breaches of a duty of care in negligence and if so, whether the defendants breached such a duty. As with PCI Nos. 6 and 7, there is sufficient evidence for PCI Nos. 10 and 11. I also note that negligence as a common issue was certified in other ESA cases such as *Fresco*, *Fulawka* and *Baroch*.

[89] PCI Nos. 10 and 11 are certified as common issues.

***PCI No. 12: Unjust enrichment***

[90] PCI No. 12 asks if the defendants were unjustly enriched by failing to make the payments required under the ESA or the contributions required under the CPP and EI legislation.

[91] I agree with the plaintiff that unjust enrichment is well suited to certification as a common issue because the focus is on the defendant's actions and not on the actions of individual class members. An unjust enrichment issue has been certified by the court in numerous employment class actions, such as *Rosen*, *Fulawka*, *Fresco* and *Baroch*.

[92] PCI No. 12 is certified as common issue

***PCI No. 13: Aggregate damages***

[93] PCI No. 13 asks if the damages sustained by class members should be assessed on an aggregate basis. Aggregate damages under s. 24(1) of the CPA may be certified as a common issue if there is a reasonable likelihood that the damages can be determined without proof by individual class members.

[94] If the class members are found to be employees and route salespersons, the bulk of the loss would consist of the unpaid ESA benefits, in particular minimum hourly wages and overtime pay. But the defendants kept no records of hours worked. Therefore, these losses cannot be determined without proof by individual class members. Aggregate damages are not appropriate.

[95] Further, to properly assess each sales agent's "loss" the court would likely have to subtract the 'commissions received' amount from the 'ESA benefits that should have been paid' amount – again, requiring individualized inquiries.

[96] I therefore conclude that for the bulk of the damages sustained, an aggregate damages common issue should not be certified. However, I recognize that the Court of Appeal in *Good*<sup>43</sup> concluded that aggregate damages can be certified as a common issue where it can be established that the class members are entitled to “a base amount” that does not depend on individualized proof.<sup>44</sup> Here, says the plaintiff, the amounts owing for CPP and EI contributions can be determined by reviewing the income records in the defendants’ possession.

[97] I accept the plaintiff’s submission about the CPP and EI amounts. But this action is not about CPP and EI. So, on balance, I prefer to leave the entire aggregate damages question to the common issues trial judge who will be able to decide on his or her own whether aggregate damages can or should be awarded.

[98] PCI No. 13 is not certified as a common issue.

***PCI No. 14: Punitive damages***

[99] PCI No. 14 asks if the class members are entitled to an award of aggravated, exemplary or punitive damages based on the defendants’ conduct.

[100] A punitive damages common issue (asking about entitlement rather than amount<sup>45</sup>) is often certified because the focus is on the defendants’ conduct and thus the commonality requirement is satisfied. But one still needs to adduce some evidence that the issue exists - that there is conduct that would justify a punitive damages question.<sup>46</sup>

[101] Punitive damages are awarded when the defendant’s wrongful acts are “harsh, vindictive, reprehensible and malicious”, indeed “so malicious and outrageous that they are deserving of punishment on their own.”<sup>47</sup> There is no evidence in the record that the defendants’ conduct in classifying and hiring sales agents as ICs rather than as employees was in any way “harsh, vindictive, reprehensible and malicious.”

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<sup>43</sup> *Good v. Toronto (Police Services Board)*, 2016 ONCA 250.

<sup>44</sup> *Ibid.*, at para. 75.

<sup>45</sup> See the discussion in *Dine v Biomet*, *supra*, note 25, at paras. 58-60.

<sup>46</sup> *Ibid.*, at para. 55.

<sup>47</sup> See the case law as discussed most recently by the Court of Appeal in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras. 110-112.

[102] Instead, the evidence shows that over the years the ‘independent contractor’ issue was adjudicated before various administrative agencies including the CRA, the WSIB, and on at least one occasion, before an employment officer of the ESA. With each decision the defendants were reassured that their sales agents were indeed ICs not employees. This does not mean that the same result will necessarily follow in this case. But it does mean that the defendants’ actions in the design and implementation of their IC sales structure cannot be characterized as “so malicious and outrageous that they are deserving of punishment on their own.” In any event, and to repeat, there is no evidence of conduct that would support a punitive damages issue.

[103] PCI No. 14 is not certified as a common issue.

***PCI No. 15: Limitations period***

[104] As I have already explained in my discussion of the “identifiable class” requirement, I will add and certify a common issue dealing with the limitations question. There is some evidence that the class definition should be narrowed to confine the class period to the two years preceding the issuance of the statement of claim. The resolution of the limitations issue will have a common impact on all those affected.

[105] I will therefore add and certify the following issue:

Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

[106] This completes my analysis of the proposed common issues. In sum, for the reasons set out above, PCI Nos. 1 to 12 are certified, PCI Nos. 13 and 14 are not certified, and a new PCI No. 15 has been added.

**(4) Preferability**

[107] Section 5(1)(d) of the CPA requires that a class proceeding be the preferable procedure for the resolution of the common issues in the context of the claim as a whole.<sup>48</sup> Preferability is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii)

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<sup>48</sup> *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 67.

whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.<sup>49</sup>

[108] Here, in my view, a class proceeding is the preferable procedure and would provide a fair, efficient and manageable method of advancing the claim. The individual claims of the class members may be small and not warrant the commencement of individual lawsuits. A common determination in a class proceeding about their employment status will significantly advance the litigation and provide meaningful access to justice some 7000 class members.

[109] One would still need individual damage assessments if the common issues are resolved in favour of the class members. However, this does not detract from the overall preferability of the class action. In any event, s. 6(1) of the CPA makes clear that the court shall not refuse certification just because individual damage assessments will be required after the conclusion of the common issues trial.

#### **(5) Suitable representative plaintiff**

[110] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) will fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members. The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.<sup>50</sup>

[111] Mr. Omarali has proven to be a conscientious representative plaintiff by retaining and instructing class counsel, reviewing the evidence filed to date, providing his own evidence, being cross-examined and attending in court for the certification hearing. He shares interests in common with the other class members and has produced a workable litigation plan. He is more than suitable as a representative plaintiff.

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<sup>49</sup> *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at paras. 28-31; *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, at paras. 16 and 22.

<sup>50</sup> *Campbell v. Flexwatt*, 98 B.C.A.C. 22 (C.A.) at paras. 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.




### Conclusion

[112] For the reasons set out above, I find that the requirements in s. 5(1) of the CPA have been satisfied. The proposed action is certified as a class proceeding.<sup>51</sup>

[113] As noted in the attached Appendix, proposed common issues Nos. 1 to 12 are certified; Nos. 13 and 14 are not certified; and a new common issue dealing with limitations has been added. I would ask that counsel prepare a draft Order in the form contemplated by s. 8 of the CPA.

[114] If the parties are unable to agree on the costs, I would be pleased to receive brief written submissions from the plaintiff within 14 days and from the defendants within 14 days thereafter. Counsel are urged to review my costs awards in previous certification cases.<sup>52</sup>

[115] My thanks to counsel for their co-operation and for their additional written submissions.

  
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Belobaba J.

**Date:** July 27, 2016

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<sup>51</sup> I note that a similar class action was certified in 2013 by the U.S. District Court for the Northern District of Ohio: see, *Hurt et al v. Commerce Energy Inc.*, (Case No. 1:12-CV-00758). The defendant Commerce Energy is a Just Energy company. I also note that when another similar class action was litigated on the merits, the U.S. District Court for the Northern District of California granted Just Energy's motion for summary judgment finding that the IC's were "outside sales persons" under the California Labour Code and thus fell within the exemption: see *Dailey v. Just Energy Marketing Corp.*, (Case No. 14-CV-02012-HSG).

<sup>52</sup> See any of *Dugal v Manulife Financial*, 2013 ONSC 4083; *Rosen v BMO Nesbitt Burns*, 2013 ONSC 2144; *Crisante v DePuy Orthopaedics*, 2013 ONSC 5186; *Brown v. Canada (Attorney General)* 2013 ONSC 5637; or *Sankar v Bell Mobility*, 2013 ONSC 5916.

Appendix

Revised Proposed Common Issues

[Issues 1 to 12 are certified. Issues 13 and 14 are not certified. Issue 15 dealing with Limitation Periods has been added and certified.]

*Statutory Claim*

1. Are the Class Members “employees” of the Defendants pursuant to the *Employment Standards Act, 2000* (“ESA”)?
2. If the answer to (1) is “yes”, are the Class Members in “pensionable employment” of the Defendants pursuant to the *Canada Pension Plan* (“CPP”)?
3. If the answer to (1) is “yes”, are the Class Members in “insurable employment” of the Defendants pursuant to the *Employment Insurance Act* (“EI”)?
4. If the answer to (1) is “yes”, are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?
5. If the answers to (1) and (4) are “yes”, do the minimum requirements of the *ESA* with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?

*Breach of Contract*

6. If the answers to questions (1) and (4) are “yes”, do the Defendants owe contractual duties and/or a duty of good faith to:
  - a. Ensure that the Class Members were compensated with the minimum wage?
  - b. Ensure that the Class Members’ hours of work were monitored and accurately recorded?
  - c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
  - d. Ensure that the Class Members were compensated with vacation pay?
  - e. Ensure that the Class Members were compensated with and public holiday and premium pay?

7. Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?
8. If the answers to (1) and (4) are “yes”, did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the *ESA*?
9. If the answers to (2) and/or (3) are “yes”, did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Negligence*

10. Alternatively, did the Defendant owe a duty of care to the Class Members to:
  - a. ensure that Class Members are properly classified as employees;
  - b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;
  - c. ensure that the Class Members hours of work are monitored and accurately recorded; and
  - d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.
11. Did the Defendants breach any of the duties of care found to exist above? If so, how?

*Unjust Enrichment*

12. Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay owed to them, in accordance with the *ESA*, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Aggregate Damages*

13. If the Defendants breached the *ESA*, or its contracts with Class Members, or its duties of good faith or duties of care owed to the Class Members, or was unjustly enriched, should damages be assessed on an aggregate basis?

*Punitive Damages*

14. Are the Class Members entitled to an award of aggravated, exemplary, or punitive damages based on the Defendants' conduct?

*Limitation Period Issue* (added at the request of the defendants)

15. Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

\*\*\*

**THIS IS EXHIBIT D REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

Court File No. CV-15-527493-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE ) THURSDAY, THE 27<sup>TH</sup>  
MR. JUSTICE BELOBABA ) DAY OF JULY, 2016

B E T W E E N:

**Haidar Omarali**

**Plaintiff**

- and -

**JUST ENERGY GROUP INC., JUST ENERGY CORP.  
and JUST ENERGY ONTARIO L.P.**

**Defendants**

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION** for certification brought by the Plaintiff was initially heard on June 21, 2016 at Osgoode Hall, 130 Queen St. West, Toronto, Ontario, and was continued on June 28, 2016 at 361 University Ave., Toronto, Ontario.

**ON READING** the motion records, the facts of the parties, the revised list of common issues, and the subsequent written submissions of the parties, and all other written submissions and materials filed by the parties, and on hearing submissions of counsel,

**1. THIS COURT ORDERS** that this action be and hereby is certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

### Class Definition

2. **THIS COURT ORDERS AND DECLARES** that the Class Members are defined as:

Any person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement.

### Common Issues

3. **THIS COURT ORDERS AND DECLARES** that the common issues be and hereby are certified as:

#### *Statutory Claim*

- (1) Are the Class Members "employees" of the Defendants pursuant to the *Employment Standards Act, 2000* ("ESA")?
- (2) If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants pursuant to the *Canada Pension Plan* ("CPP")?
- (3) If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants pursuant to the *Employment Insurance Act* ("EI")?
- (4) If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?
- (5) If the answers to (1) and (4) are "yes", do the minimum requirements of the *ESA* with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?

#### *Breach of Contract*

- (6) If the answers to questions (1) and (4) are "yes", do the Defendants owe contractual duties and/or a duty of good faith to:

- a. Ensure that the Class Members were compensated with the minimum wage?
  - b. Ensure that the Class Members' hours of work were monitored and accurately recorded?
  - c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
  - d. Ensure that the Class Members were compensated with vacation pay?
  - e. Ensure that the Class Members were compensated with public holiday and premium pay?
- (7) Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?
- (8) If the answers to (1) and (4) are "yes", did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the *ESA*?
- (9) If the answers to (2) and/or (3) are "yes", did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Negligence*

- (10) Alternatively, did the Defendants owe a duty of care to the Class Members to:
- a. ensure that Class Members are properly classified as employees;
  - b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;
  - c. ensure that the Class Members hours of work are monitored and accurately recorded; and



d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.

- (11) Did the Defendants breach any of the duties of care found to exist above? If so, how?

*Unjust Enrichment*

- (12) Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay owed to them, in accordance with the *ESA*, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Limitation Period Issue*

- (13) Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

**Representative Plaintiff and Class Counsel**

4. **THIS COURT ORDERS AND DECLARES** that Haidar Omarali be and hereby is appointed as the representative Plaintiff for the Class and that Koskie Minsky LLP be and hereby are appointed as class counsel ("Class Counsel").

**Relief Sought and Nature of Claims Asserted**

5. **THIS COURT ORDERS AND DECLARES** that the Class seeks damages, declarations and orders related to claims for breach of the *ESA*, breach of CPP and EI, breach of contract, breach of the duty of good faith, negligence, and unjust enrichment.

**Notice of Certification**

6. **THIS COURT ORDERS** that the form of notice of this certification Order, the manner of giving notice and all other related matters shall be determined by further order of this Court.

Costs

7. **THIS COURT ORDERS** that the costs of this motion are payable by the Defendants within thirty (30) days of this order becoming final, to the Plaintiff in the all-inclusive amount of \$135,000.

*Eden Bellack J.*

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ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.

SEP 20 2016

PER / PAR:



KM-2306191v3

**Haidar Omarali**  
Plaintiff

**JUST ENERGY GROUP INC., et al.**  
Defendant

and

Court File No.: CV-15-527493-00CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
Proceeding commenced at TORONTO

**ORDER**

**KOSKIE MINSKY LLP**  
900-20 Queen Street West  
Toronto, ON M5H 3R3

**David Rosenfeld LSCU #51143A**  
Tel: 416.595.2117  
Fax: 416.204.2889

**Jody Brown LSUC #58844D**  
Tel: 416.595.2117  
Fax: 416.204.2889

**Lawyers for the Plaintiff**

**THIS IS EXHIBIT E REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', written over a horizontal line.

**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

# Role Description: Sales Representative/Energy Advisor

## POSITION OVERVIEW

The Energy Advisor is responsible for door-to-door sales of Just Energy products, services and offerings. They will demonstrate the required knowledge and sales techniques necessary to successfully interact with customers.

Energy Advisors will strive to achieve daily and weekly targets. A successful candidate will execute daily and weekly routing plans.

Energy Advisors must drive sales, be performance driven and dedicated to achieving goals in order to achieve success at Just Energy while receiving little to no negative customer/consumer feedback.

## MINIMUM REQUIREMENTS

|                      |  |
|----------------------|--|
| Education            | Highschool diploma or equivalent   |
| Experience           | Direct sales experience preferred however not required however experience with customers in any platform; i.e. retail, customer service, hospitality is an asset |
| Knowledge and Skills | Strong verbal skills and the ability to be coachable and take direction  |
| Other                | Applicants must be authorized to work in the country where position resides  |

## JOB LEVEL

|       |         |
|-------|---------|
| Level | Level 1 |
|-------|---------|

## ORGANIZATION STRUCTURE

[justenergy.com](http://justenergy.com)

|          |       |
|----------|-------|
| Function | Sales |
|----------|-------|

## REPORTING RELATIONSHIPS

|            |             |
|------------|-------------|
| Reports To | Team Leader |
|------------|-------------|

## AUTHORITIES AND KEY DECISION MAKING

- Individuals must use judgment to determine appropriate product and service offerings and presentation techniques during interaction with clients
- Individuals must be able to determine when to disengage or avoid customer interactions to prevent and mitigate against negative consumer feedback

## WORKING CONDITIONS

- The Energy Advisor will be required to work outside ~ 90% of the time and will be exposed to the elements including at times unpredictable inclement weather; must dress appropriately for weather conditions with Just Energy provided apparel
- Will need to walk ~ 90% of the time, and in transit ~ 10% of the time in a vehicle, travelling to the assigned local territory marketing area
- The job requires local travel ~ 90% of the time into a variety of geographic areas that may have unpredictable environmental conditions; may be required to travel outside of the assigned territory ~10% of the time, including overnight stays
- Will be required to deal with a variety of prospective and current customers and may at times be subject to difficult situations with customers, which may lead to stressful working conditions.
- The Energy Advisor will be required to adapt thinking and verbal responses quickly to respond to customer objections; this requires considerable mental processing and verbalization to influence and communicate and utilization of Just Energy approved sales scripts and objection handling documents
- Must be able to maintain composure, professionalism, and focus while interacting with confrontational customers
- Responsible for achieving positive consumer interactions and a high level of consumer satisfaction in their interactions with consumers
- Job environment is subject to change and candidates must be able to adapt and support changes

May be required to work overtime as defined by the needs of the office and production levels

- The incumbent will be required to work evenings and, weekends (Saturday or Sunday), and holidays throughout the year as defined by the needs of the office

## CORE COMPETENCIES

| Competency Name                              | Competency Definition  |
|--|--|
| JE Products, Policies & Procedures Knowledge | <ul style="list-style-type: none"> <li>• Trained For</li> </ul>  |
| Energy Market Knowledge                      | <ul style="list-style-type: none"> <li>• Trained For</li> </ul>  |
| Sales Routing and Call Planning              | <ul style="list-style-type: none"> <li>• Trained For</li> </ul>  |
| Professionalism                              | <ul style="list-style-type: none"> <li>• Conducts themselves in a professional manner at all times</li> <li>• Approaches work with vigor, enthusiasm and engagement</li> <li>• Is open to feedback</li> <li>• Remains motivated and positive, even when facing difficult situations</li> </ul>   |
| Rapport Building                             | <ul style="list-style-type: none"> <li>• Interacts with customers in a polite, polished and courteous manner</li> <li>• Demonstrates patience and sensitivity when engaging customers</li> <li>• Establishes a relaxed and friendly atmosphere when interacting with customers</li> <li>• Creates credibility and trust through confidence and their interaction with the customer</li> </ul>                            |
| Customer Needs and Opportunity Assessment    | <ul style="list-style-type: none"> <li>• Uses standardized surveying questions to discover basic facts about the buyer (e.g. current energy usage and needs)</li> <li>• Seeks to prequalify customer and uncover decision process (e.g. people involved in decision process)</li> <li>• Establishes two-way communication by asking appropriate questions and listening carefully to the customer's responses</li> </ul> |
| Communication of Value Proposition           | <ul style="list-style-type: none"> <li>• Clearly and effectively communicates product value proposition to customers</li> <li>• Presents product value proposition in a way that allows the customer to favorably differentiate the value of their offer from competition</li> </ul>   |

|                 |   |
|-----------------|---|
| Advancing Sales | <ul style="list-style-type: none"> <li>• Seeks to gain better understanding of objections (i.e. clarifies or allows buyer to clarify the objection)</li> <li>• Maintains composure with confrontational customers</li> <li>• Employs standard approach to overcome different types of objections</li> <li>• Demonstrates basic closing techniques, such as summary-of-benefits closing technique</li> </ul> |
|-----------------|---|

### ADDITIONAL HIRING CHARACTERISTICS – INTERNAL USE ONLY

*The following skills are to inform hiring and are in addition to the Core Competencies. This is for **Internal Use Only**.*

|              |   |
|--------------|---|
| Motivation   | <ul style="list-style-type: none"> <li>• Highly motivated and driven</li> <li>• Overcomes obstacles and remains focused on the achieving performance targets</li> </ul>   |
| Perseverance | <ul style="list-style-type: none"> <li>• Remains positive in the face of rejection and challenging situations; does not get discouraged</li> <li>• Employs stress management techniques and does not let stress effect job performance</li> </ul> |

### Promotion Criteria to Team Leader

*The followings are guides to identify strong performance which could ultimately lead to a promotion to the Team Leader role*

|                                      |   |
|--------------------------------------|---|
| Promotion Identification             | <ul style="list-style-type: none"> <li>• Potential promotions are identified by the Territory Sales Manager, Field Sales Manager and Regional Manager of Field Operations</li> <li>• There must be scale to promote</li> </ul>  |
| Requirements for Potential Promotion | <ul style="list-style-type: none"> <li>• Office must be at critical mass for promotion. For example, promotion must be considered based on the demotion of a currently poor performing Team Leader or RSO has grown in size based on head count.</li> <li>• Personal compliance ratio of less than 0.5% (half of one percent) off of personal sales based on YTD or rolling 12 month statistics.</li> <li>• Cannot go from Energy Advisor to Field Sales Manager. Must be promoted to Team Leader role first unless the promotion falls into the categories listed below.</li> <li>• Minimum of three month tenure in Energy Advisor role with only one record of an Performance Improvement Plan (production) or Corrective Action Plan (behaviour) based on YTD or rolling 12 onth</li> </ul> |



|  |  |
|--|--|
|  | <p>statistics. Exceptions to the tenure can come from 1) previous sales experience leading a team of sales people; 2) RSO is in start up phase (brand new office) and/or; 3) immediate increase in actual performance above set standards and expectations.</p> <ul style="list-style-type: none"> <li>• Passing of Just Energy's Corporate fleet policy and drug test (failing the test may not result in promotion being offered however they will not be able to drive a Just Energy van or any car with Just Energy employees to and from the field).</li> <li>• Must have a strong track record of adhering to all Just Energy policies and procedures,</li> <li>• Must have referred a minimum of five individuals to Just Energy</li> </ul> |
| Income Baseline as Energy Advisor        | <ul style="list-style-type: none"> <li>• Hourly wages with overtime if eligible for overtime based on sales production.</li> <li>• Commissions on personal sales for Effective Contracts.</li> <li>• Ability to participate in Just Energy's Employee Benefit program,</li> <li>• Ability to participate in Just Energy's recognition and reward program</li> </ul>  |
| Promotion Bonus to Incumbent Team Leader | <ul style="list-style-type: none"> <li>• Team Leader to receive \$2,000 bonus for every individual from their team that is promoted to a Team Leader role. \$500 upon successful acceptance of promotion and the remaining \$1,500 after six months of successful role transition to the requirements listed on this document or if promoted to Field Sales Manager.</li> </ul>  |


**THIS IS EXHIBIT F REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**



**To:** Richard Teixeira[RTeixeira@justenergy.com]  
**From:** Rosalba Gullo  
**Sent:** Fri 04/11/2016 12:26:03 PM  
**Importance:** High  
**Subject:** FW: Ontario Employee Conversion  
**MAIL\_RECEIVED:** Fri 04/11/2016 12:26:04 PM

Thx.

Rosalba

(ext.73555)

**From:** Ryan Parnell  
**Sent:** Friday, November 04, 2016 12:24 PM  
**To:** Rosalba Gullo <rgullo@justenergy.com>; Ravi Maharaj <rmaharaj@justenergy.com>  
**Cc:** Arturo Florcruz <aflorcruz@justenergy.com>  
**Subject:** FW: Ontario Employee Conversion  
**Importance:** High

Hi Rosie,

Do you know who in HR will be supporting us in Ontario?

On Wednesday next week, I am planning to host a recruiter call to tell them about the new model as we will begin interviews 11/12.

Are you able to or can you suggest who can speak to the below:

- Benefit overview (for speaking purposes)

•□□□□□□□ Employee Package changes

•□□□□□□□ Hour tracking

Would you be able to join my call this week with the recruiters for a quick briefing on any admin responsibilities that may be changing as well as an Employee Package/HR benefit overview?

The purpose of the call is not training...but more an FYI so the recruiters can incorporate this into their understanding of the new world on Nov 28.

Please let me know

RP

**From:** Ryan Parnell

**Sent:** Wednesday, November 02, 2016 1:33 PM

**To:** Ravi Maharaj; Arturo Floracruz; Richard Teixeira; Rosalba Gullo; Mujeeb Jafferi


**Subject:** Ontario Employee Conversion

**Importance:** High

Hello Team,

I'm sending this note to confirm that we are moving full steam ahead on the recruiter side with a Nov 28, 2016 Ontario Employee conversion. What's unique about this conversion is we are converting 5 offices at the same time....so a lot of grounds to cover.

Here are some quick notes / items to confirm:



- Offices converting to Employee

- Oshawa
- Fairview
- Ottawa
- Toronto
- Kitchener

- Offices remaining Just Energy IC/Commercial – continue to keep IC commercial ads

- Islington
- Yorkland
- Cambridge

### ADS and EMPLOYEE TRAINING FOR RECRUITERS

- ON online Ads will be changed on Nov 10, 2016 to employee

- We will be conducting 2 weeks of employee interviews leading into Nov 28, 2016 where every new hire will start
- Do you want to introduce a CAP on new hires per office? Let me know....so we can onboard accordingly. My plan is to have 5-10-15 people starting on Nov, 28<sup>th</sup> in each office. (interviewing for a Nov 28 start)

- Employee Flyers and recruiting materials will be shared with all recruiters prior to Nov 10 for promotion/interviews

•□□□□□□□ RP to host ON Recruiter Employee Training call Wednesday Nov 9 to overview on the below – *interviews will start 11/11 or 11/14.*

- Earning model – hour + overtime + commission + bonus etc (Ravi to confirm ON offer prior to Wed Nov 9)

- Paid training

- Performance quotas / standards

- HR brief – Will ask HR or Rosie to join/support me on the call

- Employee packages

- Benefit offer – so recruiters know how to promote this during interviews

- Admin – overview on hourly tracking – will ask Rosie to join/support me on the call

- Admin training to be conducted by Rosie/Ravi?

To summarize, I will need to train the recruiters on everything they will need to know Wednesday Nov 9, prior to conducting employee interviews. We will start conducting employee interviews as early as 11/11 or 11/14 for a Nov 28<sup>th</sup> start date (first training class),

I hope this framework makes sense – I'm excited to work with Ravi/Rosie/HR to present the employee offer to our recruiters next week so we can begin to book interviews in for a Nov 28<sup>th</sup> hire date!

Thank you,

RP



T 905.670.4440 ext: 71346 | C 416.993.3626

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

Court File No. CV-15-527493-00CP  
ONTARIO  
SUPERIOR COURT OF JUSTICE

SC/ep

B E T W E E N:

Haidar Omarali

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and  
JUST ENERGY ONTARIO L.P.

Defendants

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This is the Continued Examination for Discovery of RAVI MAHARAJ, produced and examined on behalf of the corporate defendant, Just Energy Group Inc., held at the Offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, 222 Bay Street, Ernst & Young Tower, Toronto-Dominion Centre, Toronto, Ontario, on the 25th day of January, 2018.

-----

A P P E A R A N C E S:

|                           |   |                        |
|---------------------------|---|------------------------|
| DAVID ROSENFELD           | } |                        |
| JODY BROWN                | } |                        |
| BRITTANY TOVEE            | } | --- for the Plaintiff  |
| PAUL MARTIN               | } |                        |
| ANASTASIA REKLITIS        | } |                        |
| MELISSA LOSCO (law clerk) | } | --- for the Defendants |



1 an email chain and I'd like to go down to the bottom  
2 of the chain to an email dated November 2nd, 2016,  
3 from Ryan Parnell to yourself amongst others talking  
4 about Ontario employee conversion.

5 MR. MARTIN: Yes, I've got that.  
6

7 BY MR. ROSENFELD:

8 1134. Q. So, this is addressing the employee  
9 conversion in Ontario for Just Energy, is that  
10 right?

11 A. Yes. Did you want me to read it  
12 real quick or...

13 1135. Q. Yes, please.

14 A. Okay.

15 1136. Q. Great. And do you recall when this  
16 process started, to convert employees...convert  
17 contractors to employees at Just Energy?

18 A. For Ontario?

19 1137. Q. Yes.

20 A. I think in and around November of  
21 2016 is when the conversion occurred.

22 1138. Q. Right, and you said in Ontario.  
23 Have they converted everywhere else...in the other  
24 provinces or territories that they operate?

25 MR. MARTIN: Do you know?

1 THE DEPONENT: In Canada or the U.S?

2

3 BY MR. ROSENFELD:

4 1139. Q. In Canada or the United States.

5 A. I think the residential we have

6 converted in the U.S.

8

9 BY MR. ROSENFELD:

10 1190. Q. Okay. Can we go to JE00004714? And  
11 this is a document of role description sales  
12 representative/energy advisor.

13 MR. MARTIN: Yes, we have that.

14

15 BY MR. ROSENFELD:

16 1191. Q. Do you just want to take a moment to  
17 take a look at that document, please? Thank you.

18 A. Okay.

19 1192. Q. And so, can you tell me what this  
20 is?

21 A. My understanding is this is  
22 essentially the role description for the employee  
23 based energy advisor...

24 1193. Q. Have you seen this before?

25 A. That, I can tell you, this is...yes.

1 Typically when I look at it that's what I understand  
2 it to be. I've seen an energy advisor job  
3 description, essentially.

4 1194. Q. Great. And is this the same role as  
5 the...would be the door-to-door sales agent, that  
6 low level independent contractor, under the  
7 independent contractor structure?

8 A. If I had to compare the roles,  
9 correct.

10 1195. Q. Yes. And would the...sorry. On  
11 page two it talks about the working conditions.  
12 Would this be a similar description of what the  
13 independent contractor sales agents conditions were  
14 while they were operating under independent  
15 contractor agreements?

16 MR. MARTIN: I think it goes down to the  
17 next page too.

18 THE DEPONENT: Okay. Sorry, what was  
19 the question?  
20

21 BY MR. ROSENFELD:

22 1196. Q. Is that an accurate description of  
23 the conditions that the sales agents were operating  
24 under while they were independent contractors?

25 A. In my opinion this is the working

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

**CITATION:** Omarali v. Just Energy, 2019 ONSC 3734  
**COURT FILE NO.:** CV-15-527493-CP  
**DATE:** 20190621

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Haidar Omarali / Plaintiff

**AND:**

Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario LP /  
Defendants

**BEFORE:** Justice Edward P. Belobaba

**COUNSEL:** *David Rosenfeld and Garth Myers* for the Plaintiff / Moving Party

*Paul J. Martin and Anastasia Reklitis* for the Defendants / Responding  
Parties

**HEARD:** June 11 and 12, 2019

Proceeding under the *Class Proceedings Act, 1992*

**Summary Judgment Decision**

[1] A motion for summary judgment on certified common issues that ask in essence whether the defendants' sales agents were independent contractors or employees will not always work.

[2] If there are serious credibility issues, or the court finds that the evidence needs substantial clarification, and recourse to a "mini-trial" is precluded by a provision in the *Class Proceedings Act*,<sup>1</sup> the motion for summary judgment may well be dismissed.

[3] That's what happened here.

---

<sup>1</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

## Background

[4] In this class action, the plaintiff alleged that the defendants' 8000 sales agents were misclassified - that they were not independent contractors but employees and were therefore entitled to the benefits and protections of the *Employment Standards Act*<sup>2</sup> such as minimum wage, overtime pay, and vacation and public holiday pay. The defendants argued that the determination whether the defendants' sales agents were independent contractors or employees could only be made on an individualized basis. Because commonality could not be established on the evidence before the court, argued the defendants, the matter could not proceed as a class action and the motion for certification should be dismissed.

[5] In 2016, I certified this action as a class proceeding.<sup>3</sup> I found there was some evidence of commonality for each of the 13 certified common issues that are attached in the Appendix.

## The motion for summary judgment

[6] The plaintiffs now move for summary judgment on the 13 common issues. The key issues are Common Issue Nos. 1 and 4:

- CI No. 1: Are the Class Members "employees" of the Defendants pursuant to the *Employment Standards Act, 2000* ("ESA")?
- CI No. 4: If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?

[7] The outside sales agent exemption and the route sales person exception are set out in s. 2(1)(h) of O. Reg. 285/01:

### *Exemptions from Parts VII to XI of Act*

2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed...

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<sup>2</sup> *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA").

<sup>3</sup> *Omarali v. Just Energy*, 2016 ONSC 4094.

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer's place of business.

[8] In other words, if a worker is found to be an employee, he is entitled to the range of benefits and protections set out in Parts VII to XI of the Act, such as minimum wage, overtime pay, and vacation and public holiday pay. However, if the employee is an outside door to door sales agent who works on commission, he falls within the exemption and the ESA benefits and protections are not available, *unless* the outside sales agent is a "route salesperson." In other words, on the facts of this case, the ESA provisions in question only apply if the defendants' door to door sales agents are both employees *and* route salespersons.

[9] At the certification stage, I found there was some basis in fact for each of the 13 certified common issues, including the all-important employee and route salesperson determinations. But that was at the certification stage. We are now at the merits stage where the overall evidence may well point to a very different determination.

[10] The plaintiff says the evidence on this summary judgment motion requires a finding that the defendants' sales agents were employees and route salespersons.<sup>4</sup> The defendants refer to their evidence and argue that the sales agents were not employees but independent contractors and if they were employees, they cannot reasonably be characterized as route salespersons – and instead fall within the outdoor sales agent exemption.

#### **The "control" factor**

[11] Neither "employee" nor "route salesperson" is defined in the ESA – hence the need to rely on judicial interpretation. The case law is clear that one of the factors in the

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<sup>4</sup> I say "were" because the defendants' residential door to door sales practices ended five years into the class period. As of January 1, 2017, Just Energy no longer engages individuals for door-to-door energy solicitation as a result of legislative amendments to the *Energy Consumer Protection Act*, 2009, S.O. 2010, c. 8, which came into force on that date. These amendments provide, in part, that the sale or offer of sale of electricity or natural gas to a consumer in person at the consumer's home is prohibited, and that such sales or offers of sale cannot be based on a commission or value of volume sales basis.



analysis that decides both the “employee” and “route sales person” determinations is the defendants’ degree of control over the how, where and when of what is being sold.<sup>5</sup>

[12] The courts have identified five or six factors that are relevant to the “employee” determination.<sup>6</sup> The central question is “whether the person who has been engaged to perform the services is performing them as a person in business on his own account”<sup>7</sup> – in other words, “whose business is it?”<sup>8</sup> The various factors may be weighed differently depending on the evidence before the court, but as the Supreme Court noted in *Sagaz*, “the level of control the employer has over the worker’s activities will always be a factor.”<sup>9</sup>

[13] The focus on the level of control over the how, when and where of what is being sold – important as it is for deciding the threshold “employee” question - is even more important in deciding whether the employee/outside sales agent is a “route sales person.” The evidence that is relevant to the “route salesperson” determination is evidence about the degree of control exercised by the employer over the selection of the marketing locations, whether the employees are driven to and from the pre-assigned locations, are given sales scripts or direction or coaching on how to perform sales calls, wear uniforms provided by the employer and are generally subject to employer monitoring or supervision.<sup>10</sup>

[14] In short, evidence about the level of control that is exercised by the employer is always relevant (to some degree) when deciding the “employee” question and pretty much determinative when deciding whether the employee/outside sales agent is a “route salesperson.”

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<sup>5</sup> *Omarali, supra*, note 3, at para. 32.

<sup>6</sup> *671122 Ontario Ltd. v. Sagaz Industries Canada*, 2001 SCC 59, at para. 47. The Supreme Court set out a list of non-exhaustive factors that should be considered: (1) the level of control the employer has over the worker’s activities; (2) whether the worker provides his or her own equipment; (3) whether the worker hires his or her own helpers; (4) the degree of financial risk taken by the worker; (5) the degree of responsibility for investment and management held by the worker; and (6) the worker’s opportunity for profit in the performance of his or her risks. Also see *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. No. 3358 (C.A.) at para. 11 and *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464 at paras. 33-35

<sup>7</sup> *Sagaz, supra*, note 6, at para. 47.

<sup>8</sup> *Braiden, supra*, note 6, at para. 34.

<sup>9</sup> *Sagaz, supra*, note 6, at para. 47.

<sup>10</sup> *Omarali, supra*, note 3, at para. 31 and case law cited therein.

[15] Both sides, not surprisingly, provided compelling affidavit evidence about the level of control over the how, when and where Just Energy products were sold by the class member sales agents – the plaintiffs saying the level of control was extensive; the defendants the exact opposite.

[16] In the certification decision, I noted that “control” is conventionally defined as “the power to influence or direct people’s behaviour.”<sup>11</sup> On this motion, counsel on both sides focused more on the “power to direct” the sales agents’ behaviour than on “the power to influence” the sales agents’ behaviour. (This may change as the case proceeds.)

### **Mini-trial or trial?**

[17] The difficulty that I face on this motion for summary judgment is that there is diametrically conflicting evidence about the level of control over the how, when and where question. The plaintiff says I can decide the common issues more directly by simply considering the “organizational structure” evidence and finding that Just Energy’s organizational structure is “inconsistent” with the sales agents being independent contractors. Not surprisingly, the defendants refer to the same organizational structure to make the opposite point.

[18] In any event, even if I were to focus on the defendants’ organizational structure, I would still have to consider the relevant factors that are set out in the case law. Given that “the level of control the employer has over the worker’s activities will always be a factor”<sup>12</sup> I would be obliged to consider the extent to which Just Energy exercised control over the how, where and when of what was being sold.

[19] The plaintiffs filed six affidavits (all quite similar in format and content) that describe a high level of control. The affidavits say, in essence, that the morning sales meetings were mandatory, the sales agents were driven to and from pre-selected sales locations, were required to wear the defendants’ uniform, used a pre-approved sales script, and worked a mandatory number of hours, all under the defendants’ supervision. In other words, the defendants’ level of control over the how, when and where was extensive.

[20] The defendants filed three affidavits from equally knowledgeable witnesses swearing the exact opposite - that the outside sales agents were independent contractors that were “free to market anywhere they wanted.” The defendants’ affiants swore that the

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<sup>11</sup> *Ibid.* at para. 26.

<sup>12</sup> *Sagaz, supra*, note 6, at para. 47.

morning sales meetings were completely optional, the sales locations or hours of work were not imposed on the sales agents, they weren't required to wear a Just Energy uniform or accept van rides from the crew co-ordinators and they didn't only sell Just Energy products. There were sales scripts but they were imposed primarily because of regulatory requirements. The sales agents were neither monitored nor supervised. According to the defendants' affiants, the sales agents were free to come and go as independent contractors and work wherever and whenever they pleased.

[21] Cross-examinations were conducted by counsel on both sides but the conflicting evidence about the level of control remained intact.

[22] Following the roadmap in *Hryniak v. Mauldin*,<sup>13</sup> I readily concluded, without using the enhanced fact-finding powers set out in Rule 20.04 (2.1), that there were genuine issues (about the level of control) that required trial.

[23] I then asked the next question - whether the need for a trial could be avoided by using the enhanced fact-finding powers. I was concerned about using the enhanced powers for two reasons: (i) the significance of the credibility issues; and (ii) the insufficiency of the evidence before me. I realized that *viva voce* evidence would be needed. I then had to decide whether resort to a "mini-trial" under Rule 20.01 (2.2) was precluded by an over-arching statutory provision. I will explain each of these points in turn.

[24] **Credibility.** As already noted, the evidence about the level of control exercised by the defendants over its door to door sales agents is conflicting. One side swears that the sales agents could come and go and work whenever and wherever they pleased. The other side, the exact opposite.

[25] The Court of Appeal noted in *Gordashevskiy v. Aharon*,<sup>14</sup> that "it is not open to a motion judge to simply prefer one affidavit over another in the absence of explanatory reasons for the preference that permit appellate review."<sup>15</sup> Without hearing *viva voce* evidence, I would not be able to provide explanatory reasons why I prefer, say, the plaintiffs' affidavit evidence over that of the defendants. All the more so where, as here, the plaintiffs failed on cross-examination to challenge the defendants' affiants on their "no control" evidence. Given the evidentiary conflict in the sworn evidence before me, *viva voce* evidence would be essential, whether via a mini-trial or a trial.

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<sup>13</sup> *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87.

<sup>14</sup> *Gordashevskiy v. Aharon*, 2019 ONCA 297.

<sup>15</sup> *Ibid.* at para. 6.

[26] *Insufficient evidence.* During the class period, Just Energy had about a dozen offices in Ontario, each run by a regional distributor who was also said to be an independent contractor. The plaintiffs' affidants spoke about their experiences in only three of these offices and only for a portion of the class period. They also limited their evidence to residential door to door sales agents and made no mention of the other two sales agent categories: customer renewal agents and commercial (business) agents.

[27] In order to fairly determine the key Common Issues (Nos. 1 and 4) – that is, whether the class members were “employees” and if so, whether they fell within the “route salesperson” exception - I would need more evidence about the customer renewal agents and the commercial agents. In particular, I would need evidence about the number of sales agents that did renewal and commercial work on a regular basis; the level of control that the defendants exercised in these circumstances; and the number of residential agents that from time to time opted to do this kind of work and how often this happened.

[28] I would also need evidence that would allow this court to draw reasonable inferences that could support a determination of the Common Issues on a class-wide basis for all 8000 class members. To clarify these questions<sup>16</sup> at this stage of the proceeding, I would need to conduct either a mini-trial or a trial.

[29] *Can't be a mini-trial.* I say this for three reasons, the first two raising concerns and the third one being determinative. First, I would have to hear from numerous witnesses. Given the number of required witnesses, the mini-trial might arguably be no more efficient or cost-effective than a conventional “hybrid” trial.

[30] Second, I am mindful of the Court of Appeal's admonition in *Baywood Homes*,<sup>17</sup> that “the motion judge's task of assessing credibility and reliability [is] especially difficult in a summary judgment and mini-trial context.”<sup>18</sup> I recognize that the Supreme Court in *Hryniak* was less timid, noting that “concerns about credibility or clarification of the evidence” on the summary judgment motion can be addressed by calling oral evidence by way of a mini-trial.<sup>19</sup> However, I also recognize that the Supreme Court added a proviso to this statement that in my view could well apply here:

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<sup>16</sup> *Hryniak*, *supra*, note 13, at para. 51: “Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself.” (Emphasis added.)

<sup>17</sup> *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450.

<sup>18</sup> *Ibid.* at para. 44.

<sup>19</sup> *Hryniak*, *supra*, note 13, at para. 51.

A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner.<sup>24</sup>

[36] Common Issues Nos. 10 and 11 are not easily detached from the other 11 issues. And even if they could be detached, there is no good reason to do so on the facts herein. It makes more sense if all 13 issues are heard together.

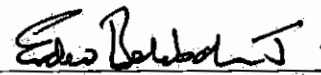
### **Disposition**

[37] The plaintiffs' motion for summary judgment is dismissed. All 13 common issues shall proceed to trial.

[38] If both sides agree, I would be prepared to preside over the trial of the common issues. I would issue directions under Rule 20.05 to ensure that the trial proceeds in a timely, focused and expeditious fashion.

[39] Given that much of the material that was filed on this summary judgment motion can be used at the upcoming trial (whoever hears it) I am inclined to defer the question of costs until after the trial and the court's decision on the common issues. I say this because but for s. 34(1) of the CPA I would seriously have considered the super-sized mini-trial (using s. 12 of the CPA if necessary.) Had this happened, the costs question would not have materialized until the mini-trial was concluded and a decision had been rendered. In fairness, the same reasoning should apply here. In other words, the costs award on this motion should be deferred until the conclusion of the trial and a decision on the common issues. If either side disagrees, they should advise forthwith.

[40] I am obliged to counsel on both sides for their co-operation and assistance.



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Justice Edward P. Belobaba

**Date:** June 21, 2019

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<sup>24</sup> *Ibid.* at para. 34.

AppendixCertified Common Issues*Statutory Claim*

1. Are the Class Members “employees” of the Defendants pursuant to the *Employment Standards Act, 2000* (“*ESA*”)?
2. If the answer to (1) is “yes”, are the Class Members in “pensionable employment” of the Defendants pursuant to the *Canada Pension Plan* (“*CPP*”)?
3. If the answer to (1) is “yes”, are the Class Members in “insurable employment” of the Defendants pursuant to the *Employment Insurance Act* (“*EI*”)?
4. If the answer to (1) is “yes”, are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?
5. If the answers to (1) and (4) are “yes”, do the minimum requirements of the *ESA* with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?

*Breach of Contract*

6. If the answers to questions (1) and (4) are “yes”, do the Defendants owe contractual duties and/or a duty of good faith to:
  - a. Ensure that the Class Members were compensated with the minimum wage?
  - b. Ensure that the Class Members’ hours of work were monitored and accurately recorded?
  - c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
  - d. Ensure that the Class Members were compensated with vacation pay?
  - e. Ensure that the Class Members were compensated with and public holiday and premium pay?
7. Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?
8. If the answers to (1) and (4) are “yes”, did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the *ESA*?

9. If the answers to (2) and/or (3) are “yes”, did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Negligence*

10. Alternatively, did the Defendant owe a duty of care to the Class Members to:
- a. ensure that Class Members are properly classified as employees;
  - b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;
  - c. ensure that the Class Members hours of work are monitored and accurately recorded; and
  - d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.

11. Did the Defendants breach any of the duties of care found to exist above? If so, how?

*Unjust Enrichment*

12. Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay owed to them, in accordance with the *ESA*, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

*Limitation Period*

13. Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

\*\*\*

**THIS IS EXHIBIT I REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', written over a horizontal line.

**COMMISSIONER FOR TAKING AFFIDAVITS**

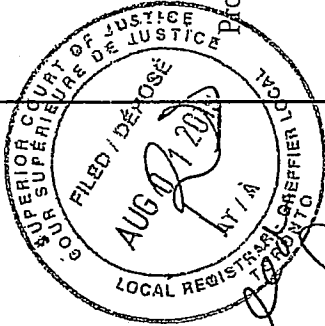
**VLAD CALINA (LSO NO. 69072W)**



HAIDAR OMARALI  
PLAINTIFF

JUST ENERGY GROUP INC., ET AL  
DEFENDANTS

Court File No.: CV-15-52749300CP



ONTARIO  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

TRIAL RECORD

KOSKIE MINSKY LLP  
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Toronto, ON M5H 3R3

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Lawyers for the Plaintiff

Nov 20/19.

A 20 day trial is scheduled for Nov 15/21. The pre-trial conference is scheduled for Sept 30/21, at 10:00 am. There are no experts for the trial. The parties consent to the attached timetable.

GARTH MYERS S. J.

#19

**TIMETABLE FOR REMAINING LITIGATION STEPS**

Title of Proceeding:

***OMARALI V JUST ENERGY GROUP et. al.***

File Number:

15-00527493-00CP

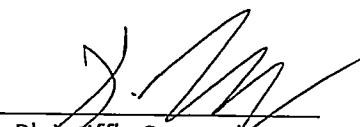
Examination for Discovery of the Plaintiff, if any, by: March 13, 2020

Answers to Undertakings of the Plaintiff, arising from the above examination by: May 15, 2020

Exchange of Expert Reports: N/A

Motions arising from the above examination, if any, to be initiated by: June 19, 2020

Evidentiary and pre-trial motions: TBD

  
\_\_\_\_\_  
Plaintiff's CounselName: Koskie Minsky LLP, David Rosenfeld  
Telephone Number: (416) 595-2700  
Email Address: [drosenfeld@kmlaw.ca](mailto:drosenfeld@kmlaw.ca)  
\_\_\_\_\_  
Defendants CounselName: FASKEN MARTINEAU DUMOULIN LLP, Paul Martin  
Telephone Number: (416) 865-4439  
Email Address: [pmartin@fasken.com](mailto:pmartin@fasken.com)

**THIS IS EXHIBIT J REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 À TORONTO LE 9<sup>JOUR</sup> DE MARS 20 21

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

REGISTRAR

ONTARIO  
GREFFIER

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. )

TUESDAY, THE 9TH

JUSTICE KOEHNEN )

DAY OF MARCH, 2021

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.  
 (each, an “Applicant”, and collectively, the “Applicants”)

### INITIAL ORDER

**THIS APPLICATION**, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), was heard this day by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

**ON READING** the affidavit of Michael Carter sworn March 9, 2021 and the Exhibits thereto (the “**Carter Affidavit**”), the pre-filing report of the proposed monitor, FTI Consulting

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 FAIT À TORONTO LE 9<sup>TH</sup> JOUR DE MARCH 20 21

REGISTRAR  
 GREGGIER

Canada Inc. (“**FTI**”), dated March 9, 2021 (the “**Pre-Filing Report**”), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants and the partnerships listed in Schedule “A” hereto (the “**JE Partnerships**”, and collectively with the Applicants, the “**Just Energy Entities**”), FTI, Alter Domus (US) LLC (the “**DIP Agent**”), as administrative agent for the lenders (the “**DIP Lenders**”) under the DIP Term Sheet (as defined below) and such other counsel who were present, and on reading the consent of FTI to act as the monitor (the “**Monitor**”),

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

## DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms that are used in this Order shall have the meanings ascribed to them in Schedule “B” hereto or the Carter Affidavit, as applicable, if they are not otherwise defined herein.

## APPLICATION

3. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies. Although not Applicants, the JE Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

## POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Just Energy Entities shall remain in possession and control of their respective current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “**Property**”). Subject to further Order of this Court, the Just Energy Entities shall continue to carry on business in a manner consistent with the preservation of their business (the “**Business**”) and Property. The Just Energy Entities shall each be authorized and empowered to continue to retain and employ the employees, contractors, staffing agencies, consultants, agents, experts, accountants, counsel and

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DATE AT TORONTO THIS 9TH DAY OF MARCH 20 21

MAJORSKY

GREFFIER

such other persons (collectively “**Assistants**”) currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that:

- (a) the Just Energy Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Carter Affidavit or, with the consent of the DIP Agent, replace it with another substantially similar central cash management system (the “**Cash Management System**”) and that any present or future bank providing the Cash Management System (a “**Cash Management Bank**”) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Just Energy Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Just Energy Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any plan of compromise or arrangement with regard to Cash Management Obligations. All present and future indebtedness, liabilities and obligations of any and every kind, nature or description whatsoever to a Cash Management Bank under, in connection with, relating to or with respect to any and all agreements evidencing treasury facilities and cash management products (including, for greater certainty, all pre-authorized debit banking services, electronic funds transfer services and overdraft balances) provided by a Cash Management Bank to any Just Energy Entity, and any unpaid balance thereof, are collectively referred to herein as the “**Cash Management Obligations**”;
- (b) during the Stay Period (as defined below), no Cash Management Bank shall, without leave of this Court: (i) exercise any sweep remedy under any applicable documentation (provided, for greater certainty, that the cash pooling and zero-balancing account services provided with respect to the JPMorgan accounts held by the U.S. Bank

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 FAIT A TORONTO LE 9<sup>ME</sup> JOUR DE MARS 20 21

REGISTRAR: *M. Marjodsk*  
 GREFFIER:

Account Holders (as defined in the Carter Affidavit) may continue in the ordinary course); or (ii) exercise or claim any right of set-off against any account included in the Cash Management System;

- (c) any of the Cash Management Banks may rely on the representations of the applicable Just Energy Entities with respect to whether any cheques or other payment order drawn or issued by the applicable Just Energy Entity prior to the date of this Order should be honoured pursuant to this or any other order of this Court, and such Cash Management Bank shall not have any liability to any party for relying on such representations by the applicable Just Energy Entities as provided for herein; and
- (d) (i) those certain existing deposit agreements between the Just Energy Entities and the Cash Management Banks shall continue to govern the post-filing cash management relationship between the Just Energy Entities and the Cash Management Banks, and that all of the provisions of such agreements shall remain in full force and effect, (ii) either any of the Just Energy Entities, with the consent of the Monitor, the DIP Agent and the Cash Management Banks may, without further Order of this Court, implement changes to the Cash Management System and procedures in the ordinary course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts, and (iii) all control agreements in existence prior to the date of this Order shall apply.

6. **THIS COURT ORDERS** that, except as specifically permitted herein, the Just Energy Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any of the Just Energy Entities to any of their respective creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business; provided, however, that the Just Energy Entities, until further order of this Court, are hereby permitted, subject to the terms of the Definitive Documents: (i) to reimburse the reasonable documented fees and disbursements of legal counsel and one financial advisor to the agent under the Credit Agreement, whether incurred before or after the date of this Order; (ii) to pay all non-default interest and fees to the agent and the lenders under the Credit Agreement in accordance with its terms; and (iii) to repay advances under the Credit

Agreement for the purpose of creating availability under the Revolving Facilities in order for the Just Energy Entities to request the issuance of Letters of Credit under the Revolving Facilities to continue to operate the Business in the ordinary course during these proceedings, subject to: (A) obtaining the consent of the Monitor with respect to the issuance of the Letters of Credit under the Revolving Facilities; and (B) receipt of written confirmation from the applicable lender(s) under the Credit Agreement that such lender(s) will issue a Letter of Credit of equal value within one (1) Business Day thereafter. Capitalized terms used but not otherwise defined in this paragraph shall have the meanings ascribed thereto in the Credit Agreement.

7. **THIS COURT ORDERS** that, subject to the terms of the Definitive Documents (as hereinafter defined), the Just Energy Entities shall be entitled but not required to pay the following amounts whether incurred prior to, on or after the date of this Order:

- (a) all outstanding and future wages, salaries, commissions, employee benefits, contributions in respect of retirement or other benefit arrangements, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
- (b) all outstanding and future amounts owing to or in respect of other workers providing services in connection with the Business and payable on or after the date of this Order, incurred in the ordinary course of business and consistent with existing arrangements;
- (c) the fees and disbursements of any Assistants retained or employed by the Just Energy Entities in respect of these proceedings at their standard rates and charges, which, in the case of the Financial Advisor (as defined below) shall be the amounts payable in accordance with the Financial Advisor Agreement (as defined below);
- (d) with the consent of the Monitor in consultation with the agent under the Credit Agreement (or its advisors), amounts owing for goods or services actually provided to any of the Just Energy Entities prior to the date of this Order by third parties, if, in the opinion of the Just Energy Entities, such third party is critical to the Business and ongoing operations of the Just Energy Entities;

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DATED AT TORONTO THIS 9TH DAY OF MARCH 2021  
 FAIT À TORONTO LE 9<sup>TH</sup> JOUR DE MARS 2021

*N. Maspolch*  
 REGISTRAR



- (e) any taxes (including, without limitation, sales, use, withholding, unemployment, and excise) not covered by paragraph 9 of this Order, and whereby the nonpayment of which by any Just Energy Entity could result in a responsible person associated with a Just Energy Entity being held personally liable for such nonpayment; and
- (f) taxes related to revenue, State income or operations incurred or collected by a Just Energy Entity in the ordinary course of business.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and subject to the terms of the Definitive Documents, the Just Energy Entities shall be entitled but not required to pay all reasonable expenses incurred by the Just Energy Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers' insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Just Energy Entities following the date of this Order.

9. **THIS COURT ORDERS** that the Just Energy Entities shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Just Energy Entities in connection with the sale of goods and services by the Just Energy Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or

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collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Just Energy Entities.

## RESTRUCTURING

10. **THIS COURT ORDERS** that the Just Energy Entities shall, subject to such requirements as are imposed by the CCAA and subject to the terms of the Definitive Documents, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of their Business or operations; and
- (b) pursue all avenues of refinancing, restructuring, selling and reorganizing the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing, restructuring, sale or reorganization,

all of the foregoing to permit the Just Energy Entities to proceed with an orderly restructuring of the Just Energy Entities and/or the Business (the “**Restructuring**”).

## NO PROCEEDINGS AGAINST THE JUST ENERGY ENTITIES, THE BUSINESS OR THE PROPERTY

11. **THIS COURT ORDERS** that until and including March 19, 2021 or such later date as this Court may order (the “**Stay Period**”), no proceeding or enforcement process before any court, tribunal, agency or other legal or, subject to paragraph 12, regulatory body (each, a “**Proceeding**”) shall be commenced or continued against or in respect of any of the Just Energy Entities or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the prior written consent of the Just Energy Entities and

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 FAIT À TORONTO LE 9<sup>TH</sup> MARS 20 21

*N. Madhoo*

the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Just Energy Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

12. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, organization, governmental unit, body or agency, foreign regulatory body or agency or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Just Energy Entities or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Just Energy Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Just Energy Entities to carry on any business which the Just Energy Entities are not lawfully entitled to carry on, (ii) subject to paragraph 13, affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

13. **THIS COURT ORDERS** that notwithstanding Section 11.1 of the CCAA, all rights and remedies of provincial energy regulators and provincial regulators of consumer sales that have authority with respect to energy sales against or in respect of the Just Energy Entities or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended during the Stay Period except with the written consent of the Just Energy Entities and the Monitor, or leave of this Court on notice to the Service List.

#### **NO INTERFERENCE WITH RIGHTS**

14. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Just Energy Entities except with the written consent of the Just Energy Entities and the Monitor, leave of this Court or as permitted under any Commodity ISO/Supplier Support Agreement.

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**CONTINUATION OF SERVICES**

15. **THIS COURT ORDERS** that during the Stay Period, except as permitted under any Commodity ISO/Supplier Support Agreement, all Persons having oral or written agreements with any Just Energy Entity or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Just Energy Entities or the Business, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Just Energy Entities, and that the Just Energy Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case, that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Just Energy Entities in accordance with normal payment practices of the Just Energy Entities or such other practices as may be agreed upon by the supplier or service provider and the applicable Just Energy Entity and the Monitor, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

16. **THIS COURT ORDERS** that, subject to paragraph 20 but notwithstanding any other paragraphs of this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to any of the Just Energy Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**COMMODITY SUPPLIERS**

17. **THIS COURT ORDERS** that each Qualified Commodity/ISO Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the "Priority Commodity/ISO Charge") on the Property in an amount equal to the value of the Priority Commodity/ISO Obligations. The value of the Priority Commodity/ISO Obligations shall be determined in accordance with the terms of the existing agreements or arrangements between the applicable Just

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FAIT A TORONTO LE JOUR DE MARCH 21  
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Energy Entity and the Qualified Commodity/ISO Supplier or, in the event of any dispute, by the Court. The Priority Commodity/ISO Charge shall have the priority set out in paragraphs 43-45 herein.

18. **THIS COURT ORDERS** that the Commodity/ISO Supplier Support Agreements are hereby ratified, approved and deemed to be Qualified Support Agreements.

19. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to execute and deliver Qualified Support Agreements with any counterparty to a Commodity Agreement.

20. **THIS COURT ORDERS** that upon the occurrence of an event of default under a Qualified Support Agreement, the applicable Qualified Commodity/ISO Supplier may exercise the rights and remedies available to it under its Qualified Support Agreement, or upon five (5) days' notice to the Just Energy Entities, the Monitor and the Service List, may apply to this Court to seek the Court's authorization to exercise any and all of its other rights and remedies against the Just Energy Entities or the Property under or pursuant to its Commodity Agreement or ISO Agreement and the Priority Commodity/ISO Charge, including without limitation, for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Just Energy Entities and for the appointment of a trustee in bankruptcy of the Just Energy Entities.

21. **THIS COURT ORDERS** that the Monitor shall provide a report on the value of the Priority Commodity/ISO Obligations as of the last day of each calendar month by posting such report on the Monitor's Website (as defined below) within three (3) Business Days of such calendar month end.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

22. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Just Energy Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Just Energy Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Just Energy Entities, if one is

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 FAIT A TORONTO LE 9<sup>TH</sup> JOUR DE MARS 2021

*J. Harpals*

filed, is sanctioned by this Court or is refused by the creditors of the Just Energy Entities or this Court.

### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

23. **THIS COURT ORDERS** that each of the Just Energy Entities shall jointly and severally indemnify their respective directors and officers against obligations and liabilities that they may incur as directors or officers of the Just Energy Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

24. **THIS COURT ORDERS** that the directors and officers of the Just Energy Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of C\$30,000,000, as security for the indemnity provided in paragraph 23 of this Order. The Directors' Charge shall have the priority set out in paragraphs 43-45 herein.

25. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (i) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (ii) the Just Energy Entities' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 23.

### **APPOINTMENT OF MONITOR**

26. **THIS COURT ORDERS** that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Just Energy Entities with the powers and obligations set out in the CCAA or set forth herein and that the Just Energy Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Just Energy Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 FAIT À TORONTO LE 9<sup>ÈME</sup> JOUR DE MARS 20 21

*N. Maynard*  
 REGISTRAR  
 GREFFIER

27. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Just Energy Entities' receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Just Energy Entities, to the extent required by the Just Energy Entities, in their dissemination to the DIP Agent, the DIP Lenders and their counsel of financial and other information in accordance with the Definitive Documents;
- (d) advise the Just Energy Entities in their preparation of the Just Energy Entities' cash flow statements and reporting required by the DIP Agent and DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Agent and DIP Lenders and their counsel in accordance with the Definitive Documents;
- (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Just Energy Entities, wherever located and to the extent that is necessary to adequately assess the Just Energy Entities' business and financial affairs or to perform its duties arising under this Order;
- (f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (g) perform such other duties as are required by this Order or by this Court from time to time.

28. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21.

FAIT À TORONTO LE 9<sup>TH</sup> JOUR DE MARCH 20 21.

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REGISTRAR GREFFIER

29. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

30. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Just Energy Entities and the DIP Agent and the DIP Lenders with information provided by the Just Energy Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Just Energy Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

31. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

32. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor (including both U.S. and Canadian counsel for all purposes of this Order), and counsel to the Just Energy Entities (including both U.S. and Canadian counsel for all purposes of this Order) shall be paid their

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reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of this Order, by the Just Energy Entities as part of the costs of these proceedings. The Just Energy Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, and the Just Energy Entities' counsel on a weekly basis.

33. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

#### ADMINISTRATION CHARGE

34. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Just Energy Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of C\$2,200,000 as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 43-45 herein.

#### DIP FINANCING

35. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to obtain and borrow or guarantee, as applicable, pursuant a credit facility from the DIP Agent and the DIP Lenders in order to finance the Just Energy Entities' working capital requirements and other general corporate purposes, all in accordance with the Cash Flow Statements (as defined in the DIP Term Sheet, which term is defined below) and Definitive Documents, provided that borrowings under such credit facility shall not exceed US\$125,000,000 unless permitted by further Order of this Court.

36. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the CCAA Interim Debtor-in-Possession Financing Term Sheet between the Just Energy Entities, the DIP Agent and the DIP Lenders dated as of March 9, 2021 and attached as Appendix "DD" to the Carter Affidavit (as may be amended or amended and restated from time to time, the "**DIP Term Sheet**").

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 FAIT À TORONTO LE 9<sup>TH</sup> JOUR DE MARCH 20 21

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 REGISTRAR  
 GREFFIER

37. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to execute and deliver such mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Term Sheet and the Cash Flow Statements, the “**Definitive Documents**”), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Agent and the DIP Lenders pursuant to the terms thereof, and the Just Energy Entities are hereby authorized and directed to pay and perform all of the indebtedness, interest, fees, liabilities and obligations to the DIP Agent and the DIP Lenders under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order. Notwithstanding any other provision in this Order, all payments and other expenditures to be made by any of the Just Energy Entities to any Person (except the Monitor and its counsel) shall be in accordance with the terms of the Definitive Documents, including in respect of payments in satisfaction of Priority Commodity/ISO Obligations.

38. **THIS COURT ORDERS** that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the “**DIP Lenders’ Charge**”) on the Property, which DIP Lenders’ Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders’ Charge shall have the priority set out in paragraphs 43-45 hereof.

39. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

- (a) the DIP Agent on behalf of the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders’ Charge or any of the Definitive Documents;

- (b) upon the occurrence of an event of default under any of the Definitive Documents or the DIP Lenders’ Charge, the DIP Agent or the DIP Lenders, as applicable, may immediately cease making advances or providing any credit to the Just Energy Entities and shall be permitted to set off and/or consolidate any amounts owing by the DIP Agent or the DIP Lenders to the Just Energy Entities against the obligations of the Just Energy Entities to the DIP Agent and the DIP Lenders under the Definitive Documents or the DIP Lenders’ Charge, make demand, accelerate payment and give other notices with respect to the obligations of the Just Energy Entities to the DIP Agent or the DIP Lenders under the Definitive Documents or the DIP Lenders’ Charge, or to apply to

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this Court on five (5) days' notice to the Just Energy Entities, the Monitor and the Service List to seek the Court's authorization to exercise any and all of its other rights and remedies against the Just Energy Entities or the Property under or pursuant to the Definitive Documents and the DIP Lenders' Charge, including without limitation, for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Just Energy Entities and for the appointment of a trustee in bankruptcy of the Just Energy Entities; and

- (c) the foregoing rights and remedies of the DIP Agent and the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Just Energy Entities or the Property.

40. **THIS COURT ORDERS AND DECLARES** that the DIP Agent, the DIP Lenders and the Qualified Commodity/ISO Suppliers shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants or any of them under the CCAA, or any proposal filed by the Applicants or any of them under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

#### APPROVAL OF FINANCIAL ADVISOR AGREEMENT

41. **THIS COURT ORDERS** that the agreement dated February 20, 2021 engaging BMO Nesbitt Burns Inc. (the "Financial Advisor") as financial advisor to the Just Energy Entities and attached as Confidential Appendix "FF" to the Carter Affidavit (the "Financial Advisor Agreement"), and the retention of the Financial Advisor under the terms thereof, is hereby ratified and approved and the Just Energy Entities are authorized and directed *nunc pro tunc* to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

42. **THIS COURT ORDERS** that the Financial Advisor shall be entitled to the benefit of and is hereby granted a charge (the "FA Charge") on the Property, which charge shall not exceed an aggregate amount of C\$1,800,000 as security for the fees and disbursements and other amounts payable under the Financial Advisor Agreement, both before and after the making of this Order in respect of these proceedings. The FA Charge shall have the priority set out in paragraphs 43-45 herein.

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 2021  
 FAIT À TORONTO LE 9<sup>JOUR</sup> DE MARS 2021

*M. Majedek*  
 REGISTRAR GREFFIER

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 REGISTRAR

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

43. **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the DIP Lenders' Charge and the Priority Commodity/ISO Charge, as among them, shall be as follows:

First – Administration Charge and FA Charge (to the maximum amount of C\$2,200,000 and C\$1,800,000, respectively), on a *pari passu* basis;

Second – Directors' Charge (to the maximum amount of C\$30,000,000); and

Third – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis.

44. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the DIP Lenders' Charge or the Priority Commodity/ISO Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

45. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person (including those commodity suppliers listed in Schedule "A" hereto), other than any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable legislation that has not been served with notice of this Order.

46. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the

FA Charge, the Directors' Charge and the Priority Commodity/ISO Charge, or further Order of this Court.

47. **THIS COURT ORDERS** that the Charges, the agreements and other documents governing or otherwise relating to the obligations secured by the Charges, and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Agent or the DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan document, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any of the Just Energy Entities and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed to constitute a breach by any Just Energy Entity of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Just Energy Entities entering into the DIP Term Sheet, the creation of the Charges or the execution, delivery or performance of any of the other Definitive Documents; and
- (c) the payments made by the Just Energy Entities pursuant to this Order or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

48. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Just Energy Entities' interest in such real property leases.

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 2021  
 FAIT À TORONTO LE 9<sup>JOUR</sup> DE MARS 2021

*N. Margad*  
 REGISTRAR GREFFIER

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 FAIT À TORONTO LE 9<sup>ME</sup> JOUR DE MARS 20 21

REGISTRAR *N. Maynard* GREFFIER

## SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and the Wall Street Journal a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner or by electronic message to the e-mail addresses as last shown on the records of the Just Energy Entities, a notice to every known creditor who has a claim against the Just Energy Entities of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of the individuals who are creditors publicly available.

50. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "Service List"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

51. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL - <http://cfcanada.fticonsulting.com/justenergy> (the "Monitor's Website").

52. **THIS COURT ORDERS** that the Just Energy Entities, the DIP Agent or the DIP Lenders and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 FAIT À TORONTO LE 9<sup>JOUR</sup> DE MARS 20 21

REGISTRAR      GREFFIER

other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal deliver, facsimile or other electronic transmission to the Just Energy Entities' creditors or other interested parties and their advisors and that any such service, distribution or notice shall be deemed to be received: (a) if sent by courier, on the next business day following the date of forwarding thereof, (b) if delivered by personal delivery or facsimile or other electronic transmission, on the day so delivered, and (c) if sent by ordinary mail, on the third business day after mailing. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

### FOREIGN PROCEEDINGS

53. **THIS COURT ORDERS** that the Applicant, Just Energy Group Inc. ("JEGI") is hereby authorized and empowered, but not required, to act as the foreign representative (in such capacity, the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized and approved in a jurisdiction outside of Canada.

54. **THIS COURT ORDERS** that the Foreign Representative is hereby authorized to apply for foreign recognition and approval of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

### GENERAL

55. **THIS COURT ORDERS** that any interested party that wishes to amend or vary this Order shall be entitled to appear or bring a motion before this Court on a date to be set by this Court upon the granting of this Order (the "**Comeback Date**"), and any such interested party shall give not less than two (2) business days' notice to the Service List and any other party or parties likely to be affected by the Order sought in advance of the Comeback Date; provided, however, that the Chargees, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued and entered and on the Charges and priorities set out in paragraphs 43-45 hereof, including with respect to any fees, expenses and disbursements incurred and in respect of advances made under the Definitive Documents or pursuant to the Qualified Support Agreement, as applicable, until the

date this Order may be amended, varied or stayed. For the avoidance of doubt, no payment in respect of any obligations secured by the Priority Commodity/ISO Charge shall be subject to the terms of any intercreditor agreement, including any "turnover" or "waterfall" provision(s) therein.

56. **THIS COURT ORDERS** that, notwithstanding paragraph 55 of this Order, the Just Energy Entities or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties under this Order or in the interpretation or application of this Order.

57. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Just Energy Entities, the Business or the Property.

58. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body or agency having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Just Energy Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies and agencies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to JEGI, in any foreign proceeding, or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.

59. **THIS COURT ORDERS** that each of the Just Energy Entities and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body or agency, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that JEGI is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

60. **THIS COURT ORDERS** that Confidential Appendices "FF" and "GG" to the Carter Affidavit shall be and are hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

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|--|---|



61. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

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| <p>DATED AT TORONTO THIS <u>9<sup>TH</sup></u> DAY OF <u>MARCH</u>, 20<u>11</u><br/>         FAIT À TORONTO LE _____ JOUR DE _____</p>   | <p>_____</p>   |
| <p>REGISTRAR</p>   | <p>GREFFIER</p>  |

**SCHEDULE "A"****JE Partnerships****Partnerships:**

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

**Commodity Suppliers:**

- EXELON GENERATION COMPANY, LLC
- BRUCE POWER L.P.
- SOCIÉTÉ GÉNÉRALE
- EDF TRADING NORTH AMERICA, LLC
- NEXTERA ENERGY POWER MARKETING, LLC
- MACQUARIE BANK LIMITED
- MACQUARIE ENERGY CANADA LTD.
- MACQUARIE ENERGY LLC
- MORGAN STANLEY CAPITAL GROUP

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 20 21  
 FAIT À TORONTO LE 9<sup>TH</sup> JOUR DE MARCH 20 21

REGISTRAR *N. Margolis* GREFFIER

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DATED AT TORONTO THIS 9<sup>TH</sup> DAY OF MARCH 2021  
 FAIT À TORONTO LE 9<sup>ÈME</sup> JOUR DE MARS 2021

REGISTRAR: *[Signature]* GREFFIER: *[Signature]*

**SCHEDULE "B"**  
**DEFINITIONS**

**"Commodity Agreement"** means a gas supply agreement, electricity supply agreement or other agreement with any Just Energy Entity for the physical or financial purchase, sale, trading or hedging of natural gas, electricity or environmental derivative products.

**"ISO Agreement"** means an agreement pursuant to which a Just Energy Entity has reimbursement obligations to a counterparty for payments made by such counterparty on behalf of such Just Energy Entity to an independent system operator that coordinates, controls and monitors the operation of an electrical power system, and includes all agreements related thereto.

**"Priority Commodity/ISO Obligation"** amounts that are due and payable, at the applicable time, for: (i)(A) the physical supply of electricity or gas that has been delivered on or after March 9, 2021; (B) financial settlements on or after March 9, 2021; and (C) amounts owing under a confirmation or transaction that was executed on or after March 9, 2021 pursuant to a Commodity Agreement as a result of the termination thereof in accordance with the applicable Qualified Support Agreement; and (ii) for services actually delivered by a Qualified Commodity/ISO Supplier on or after March 9, 2021 pursuant to an ISO Agreement (but for greater certainty, excluding any amount owing for ISO services provided under an ISO Agreement on or before the date of this Order, whether or not yet due).

**"Qualified Commodity/ISO Supplier"** means any counterparty to a Commodity Agreement or ISO Agreement as of March 9, 2021 that has executed or executes a Qualified Support Agreement with a Just Energy Entity and refrained from exercising termination rights under the Commodity Agreement as a result of the commencement of the Proceedings absent an event of default under such Qualified Support Agreement.

**"Qualified Support Agreement"** means a support agreement between a Just Energy Entity and a counterparty to a Commodity Agreement, in form and substance satisfactory to the Just Energy Entities and the DIP Lenders, acting reasonably, which includes, among other things: (i) that such counterparty shall apply to the Court on five (5) days' notice to the Just Energy Entities, the Monitor and the Service List prior to exercising any termination rights under a Qualified Support Agreement; (ii) the obligation to supply physical and financial power and natural gas and other

related services pursuant to any confirmations or transactions executed pursuant to a Commodity Agreement; and (iii) an agreement to refrain from exercising termination rights as a result of the commencement of the Proceedings absent an event of default under such support agreement.

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 FAIT À TORONTO LE 9<sup>ÈME</sup> JOUR DE MARS 20 21

REGISTRAR *[Signature]* GREFFIER

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al  
(collectively, the "Applicants")

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**INITIAL ORDER**

**OSLER, HOSKIN & HARCOURT, LLP**  
P.O. Box 50, 1 First Canadian Place  
Toronto, ON M5X 1B8

Marc Wasserman (LSO# 44066M)  
Michael De Lellis (LSO# 48038U)  
Jeremy Dacks (LSO# 41851R)

Tel: (416) 362-2111  
Fax: (416) 862-6666

Lawyers for the Applicants

**THIS IS EXHIBIT K REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal flourish extending to the right.

---

**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

**Lori Seto**

---

**From:** James Harnum <jharnum@kmlaw.ca>  
**Sent:** September 10, 2021 1:40 PM  
**To:** Wasserman, Marc; 'rthornton@tgf.ca'  
**Cc:** Aryan Ziaie; David Rosenfeld  
**Subject:** Just Energy - claims process order

Marc and Bob,

I hope you are both well.

As you know, Koskie Minsky is class counsel in *Omarali v. Just Energy*. The class action has been certified and was set for trial this year. Through the Representative Plaintiff, our firm represents approximately 7,900 potential employee creditors. We have reviewed the claims process order and have a few minor concerns that we hope can be addressed prior to the hearing of the motion on the 15th.

First, we see that the definition of "Claim" captures "any claim brought by any proposed or confirmed representative plaintiff on behalf of a class in a class action". Can both the Company and the Monitor please confirm that the Representative Plaintiff, through Koskie Minsky, can file one claim on behalf of all the Class Members and that the Class Members can rely on that claim without any need to file any individual claims. It appears that this is the intention of the language in the order, but as it is not as explicit as it might be, we would ask for you to both confirm on behalf of your clients that Koskie Minsky can file one claim on behalf of the class.

Second, we have some concerns about the process for the appointment of a claims officer. We are of course hopeful that the class members' claims can be resolved without the need for a claims officer, but if one is required, we are not convinced that Mr. Sellers is necessarily the right choice for the adjudication of this claim. We note that para. 42 of the Order empowers the Monitor or the Company to bring a motion to appoint a different officer, and we would request that this language be changed to allow for a different claims officer to be appointed upon agreement of the creditor, the Company and Monitor, and failing agreement, to allow any party to bring a motion to appoint a different officer. That being said, we are cognizant of concerns that the Company and Monitor may have about an unwieldy process where multiple creditors may seek to pick and choose who their claims officer would be, and as a result, we are open to other suggestions for how our concerns might be addressed.

We are happy to discuss.

Regards,

James Harnum

---

**KOSKIE  
MINSKY**

James Harnum

Partner

T: +1 416-542-6285 | F: +1 416-204-2819 | E: jharnum@kmlaw.ca

JUSTICE MATTERS

**THIS IS EXHIBIT L REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

---

**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**





September 21, 2021

**David Rosenfeld**  
Direct Dial: 416-595-2700  
Direct Fax: 416-204-2894  
drosenfeld@kmlaw.ca

**BY EMAIL - [MWasserman@osler.com](mailto:MWasserman@osler.com); [RThornton@tqf.ca](mailto:RThornton@tqf.ca)**

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

Mr. Robert Thornton  
THORNTON GROUT FINNIGAN LLP  
100 Wellington Street West, Suite 3200  
Toronto ON M5K 1K7

Dear Counsel:

**Re: *Omarali v. Just Energy Group Inc. et al.*  
Court File No. CV-15-52749300 CP  
Class Members' Claims in the Just Energy CCAA Proceeding**

As you are aware, we are class counsel in the above-noted action against Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P. (collectively "**Just Energy**") bearing Court File No. CV-15-52749300 CP (the "**Class Action**").

The Class Action has been certified and involves a class of approximately 7,900 individuals. As asserted in the Class Action, these individuals were employees of Just Energy and are owed wages. As a result, they are creditors in the application commenced by Just Energy and related companies under the *Companies' Creditors Arrangement Act* bearing Court File No. CV-21-00658423-00CL (the "**CCAA Proceeding**").

### **Background and Status of the Class Action**

The core allegation in the Class Action is that Just Energy misclassified class member employees as independent contractors, thereby denying them minimum protections under the *Employment Standards Act* ("**ESA**"). As a result of Just Energy's employment misclassification and related breach of contract, class members claim \$100 million in damages, including for Just Energy's failure to pay minimum wage, overtime pay and vacation pay to them. A copy of the Amended Statement of Claim filed in the Class Action is enclosed with this letter.

As you also know, a four-week trial of the certified common issues in this action was scheduled to commence in November 2021. Although the trial cannot proceed because of the stay of proceedings obtained in the CCAA Proceeding, there is significant evidence that confirms class members' employment status and their entitlement to the damages claimed in the aggregate. Such evidence will substantiate the class' entitlement to damages in the claims process.

Our position concerning the employment status of class members is consistent with judicial determinations made by the lower and appellate courts in Ohio. We are confident that an Ontario trier-of-fact would reach similar conclusions in the Class Action.

Based on our understanding of the CCAA Proceeding, there is a possibility that the claims of the class members will not be fully satisfied.

### **Claims Against Directors**

As employees of Just Energy, class members have valid claims for unpaid wages and vacation pay against Just Energy's directors under the *ESA*, the *Business Corporations Act* (Ontario) and/or the *Canada Business Corporations Act*. These claims will be asserted in the claims process in the CCAA Proceeding.

We understand that there exist certain insurance policies covering claims against Just Energy's directors. We recognize there are various other creditors who may attempt to make claims on those insurance policies. We also understand those policies, or some of them, were identified and disclosed as part of the *Canada Business Corporations Act* reorganization that occurred in September 2020. Pursuant to subrule 31.06(4) of the *Rules of Civil Procedure*, and given that the claims in the Class Action engage Just Energy's directors' liability, which liability is sought to be addressed in the CCAA Proceeding, class members are entitled to disclosure of the insurance policies. Kindly provide copies of them to us as soon as possible.

Yours truly,

**KOSKIE MINSKY LLP**



David Rosenfeld  
DR/ls  
Enclosure

C Marc Wasserman, Jeremy Dacks – Fasken Martineau (by email)  
James Harnum, Aryan Ziaie – Koskie Minsky LLP (by email)

**THIS IS EXHIBIT M REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

**Court File No. CV-21-00XXXX-00CL**

**Just Energy Group Inc. et al.**

**PRE-FILING REPORT OF FTI CONSULTING CANADA INC., AS  
THE PROPOSED MONITOR**

**March 9, 2021**

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Court File No. CV-21-00XXXX-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., 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 (collectively, the "**Applicants**").

**PRE-FILING REPORT OF THE PROPOSED MONITOR**

**INTRODUCTION**

1. FTI Consulting Canada Inc. ("**FTI**" or the "**Proposed Monitor**") understands that Just Energy Group Inc. ("**Just Energy**") and the other applicant companies listed in the style of cause above (collectively, the "**Applicants**") intend to make an application before the Ontario Superior Court of Justice (Commercial List) (the "**Court**") for an initial order (the "**Initial Order**") under the Companies' Creditors Arrangement Act (the "**CCAA**") to, among other things, obtain a stay of proceedings to allow the Applicants an opportunity to restructure their business and affairs.

2. The Applicants propose that the Court appoint FTI as Monitor in these CCAA proceedings (the “**CCAA Proceedings**”).
3. This Pre-Filing Report of the Proposed Monitor (the “**Pre-Filing Report**”) has been prepared by the Proposed Monitor prior to and in contemplation of its appointment as Monitor to provide information to the Court solely in respect of the relief sought by the Applicants at the hearing in respect of the Initial Order. Should FTI be appointed as Monitor at the initial hearing, FTI intends to file a further report with the Court as Monitor in respect of the relief being sought by the Applicants at the comeback hearing.
4. Any capitalized terms that are not defined herein have the meanings given to them in the glossary attached as **Schedule “A”** to this Pre-Filing Report (the “**Glossary**”). To assist the Court and other readers, the Glossary includes certain common industry-specific terms that are not used herein but arise in pertinent documents relating to the Applicants’ business.

## **PURPOSE**

5. The purpose of this Pre-Filing Report is to inform the Court of:
  - (a) background information with respect to the Applicants;
  - (b) FTI’s qualifications to act as Monitor, if appointed;
  - (c) an overview of the Cash Flow Forecast (as defined herein) and the Proposed Monitor’s comments regarding the reasonableness thereof;
  - (d) the relief sought by the Applicants in the proposed Initial Order and the Proposed Monitor’s recommendation in respect of same, including, among other things:
    - (i) granting a stay of proceedings (the “**Stay of Proceedings**”) in favour of the Applicants up to and including March 19, 2021;
    - (ii) extending the Stay of Proceedings to certain foreign and domestic regulators on an interim basis;

- (iii) extending the protections and stays afforded in the Initial Order to certain limited partnerships that are affiliates of the Applicants;
  - (iv) approving the proposed debtor-in-possession interim financing arrangement;
  - (v) approving the Applicants' engagement of BMO Nesbitt Burns Inc. ("**BMO**") as its financial advisor (in such capacity, the "**Financial Advisor**");
  - (vi) authorizing the Applicants to make certain pre-filing payments;
  - (vii) granting certain protections in favour of the Applicants' critical suppliers; and
  - (viii) granting certain Court-ordered charges sought by the Applicants.
6. This Pre-Filing Report should be read in conjunction with the Affidavit of Michael Carter, to be sworn March 9, 2021 (the "**Carter Affidavit**"), which describes in more detail the Applicants' operations and the circumstances leading to their current situation.
7. All references to monetary amounts in this Pre-Filing Report are in Canadian dollars unless otherwise noted.

## **BACKGROUND INFORMATION**

### Overview

8. Just Energy is incorporated under the *Canada Business Corporations Act*. It maintains dual headquarters in Ontario and Texas, and its shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.
9. Just Energy is primarily a holding company, with operating subsidiaries situated across Canada and the United States (Just Energy and its subsidiaries collectively, the "**Just Energy Group**"). A copy of the Just Energy Group's corporate organizational chart will be attached as Exhibit "F" to the Carter Affidavit.



10. As detailed herein, the Just Energy Group faces a material and immediate risk to its ability to continue as a going concern, which is a direct consequence of the unprecedented and catastrophic effects of an extreme weather event that crippled the Texas energy system in February of this year. The Proposed Monitor understands that the Just Energy Group is urgently seeking the Court-ordered relief described herein in order to avoid the near-certain demise of its operations. Specifically, as described herein, as a result of the winter storm and the subsequent regulatory response, the Just Energy Group estimates it may have incurred losses and additional costs totaling over \$312 million. As a result, the Just Energy Group is currently estimating that it will be in a negative liquidity position on March 9, 2021 as certain payments owing by the Just Energy Group become due and owing on such date, including approximately US\$96.24 million to Electric Reliability Council of Texas (“ERCOT”).

*Business Operations and the Regulatory Environment*

11. Established in 1997, the Just Energy Group is a leading retail energy provider. Its principal line of business consists of purchasing retail energy and natural gas commodities from certain large energy suppliers and re-selling them to residential and commercial customers.
12. The Just Energy Group services more than 950,000 residential and commercial customers across various jurisdictions in Canada and the United States. Residential customers represent approximately 35% of its residential customer equivalent (“RCE”)<sup>1</sup> base, with the Just Energy Group’s commercial customers making up the balance. The Proposed Monitor understands that Texas is the single largest market for the Just Energy Group, representing 47% of its revenues in fiscal year 2020. Other significant markets include Ontario, Alberta, Illinois and Pennsylvania. The Just Energy Group has expended significant effort over many years to build a large and geographically-diversified customer base.

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<sup>1</sup> A unit of measurement equivalent to the approximate amount of gas and electricity used by a typical household in Ontario.

13. According to the Just Energy Group's consolidated financial statements, for the nine-months ending December 2020, despite a challenging operating environment because of the COVID-19 pandemic, revenues were approximately \$1.7 billion. During the same period, the Just Energy Group had positive cash flow of approximately \$27 million. Its reported Embedded Gross Margin<sup>2</sup> for residential and commercial customers for the same period was approximately \$1 billion and \$360 million, respectively.
14. The Just Energy Group collectively employs approximately 979 full-time, non-unionized employees. A geographic breakdown of the employees is set out in the Carter Affidavit. Most employees are located in one of three jurisdictions: Ontario, Texas and India.
15. The Just Energy Group operates in highly regulated markets. The Just Energy Group is subject to numerous different regulatory regimes in Canada and the U.S. overseen by various provincial and state regulators. The Carter Affidavit provides an overview of the complex regulatory environment and details the licenses and other permissions granted in favour of the Just Energy Group in respect of the various jurisdictions in which it operates.
16. Certain of Just Energy's operating subsidiaries set out in **Schedule "B"** hereto are limited partnerships (collectively, the "**Just Energy LPs**"). The Just Energy LPs hold most of the regulatory licenses pursuant to which the Just Energy Group conducts business. The Just Energy LPs are not applicants in these CCAA proceedings as they are not "companies" to which the CCAA applies. Nevertheless, as the business and operations of the Just Energy LPs are heavily intertwined with that of the Applicants, the Applicants seek to have all of the protections and authorizations under the Initial Order extended to the Just Energy LPs, including the Stay of Proceedings.

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<sup>2</sup> The gross margin expected to be realized over the next five years from existing customers.

17. Complying with the various regulatory regimes creates direct and indirect financial, legal and operational obligations for the Just Energy Group. Among other things, certain regulators require substantial financial collateral to be posted by entities in the Just Energy Group. Any non-compliance with the regulatory regimes, including the failure to provide sufficient collateral by a specified deadline can lead to the suspension or cancellation of the Just Energy Group's ability to operate in a particular market and, in some jurisdictions, the transfer of the Just Energy Group's customers to another energy provider. The amount of collateral required can vary depending on a number of factors including the current commodity market environment and the financial health of the Just Energy Group and, as a result, can be difficult to forecast.
18. In certain circumstances, the Just Energy Group entities have posted collateral with the regulators themselves; in other circumstances, they have arranged for collateral to be posted by third-party bonding companies (the "**Bonding Companies**"). In such circumstances, a breach of the agreement with the Bonding Companies, including failing to post additional collateral with the Bonding Companies on demand, can lead to non-compliance with the regulator's demands and consequently, the suspension or cancellation of the Just Energy Group's ability to operate in a particular market. The Proposed Monitor understands that the Bonding Companies have recently demanded over \$30 million in additional collateral be posted by the Just Energy Group as a result of, among other things, the Texas weather event. The Just Energy Group estimates as much as \$10 million remains outstanding and could be demanded upon filing.

Commodity Suppliers and ISO Supplier Relationships

19. As noted earlier, the Just Energy Group transacts with various suppliers of natural gas and electricity (collectively, the "**Commodity Suppliers**"). As detailed in the Carter Affidavit, a small group of suppliers including Shell, BP, Exelon, and Bruce Power, provides the majority of such supplies. Any disruption to continued supply by the Commodity Suppliers would materially impact the Just Energy Group's ability to carry on its business operations. Such disruption would prevent the Just

Energy Group from entering into any further sales contracts with customers as it would be unable to properly backstop and hedge the obligations. The obligations owing to the Commodity Suppliers by the Just Energy Group are secured by security granted by Just Energy and other members of the Just Energy Group.

20. In addition to supply agreements, the Just Energy Group is also party to independent system operator (“**ISO**”) services agreements (the “**ISO Agreements**”) with certain of its Commodity Suppliers (in such capacity, the “**ISO Suppliers**”). Pursuant to the ISO Agreements, the contracting counterparty (for reasons of administrative efficiency) provides certain scheduling services as well as working capital and credit support to the Just Energy Group by making payments on its behalf to the independent system operator.

### *The Just Energy Group’s Capital Structure*

#### **2020 Recapitalization**

21. As detailed in the Carter Affidavit, the Just Energy Group underwent a balance sheet recapitalization in 2020 (the “**Recapitalization**”) pursuant to section 192 of the *Canada Business Corporations Act* under the supervision of this Court. The Recapitalization was the culmination of extensive discussions with stakeholders over the span of a year and put the Just Energy Group on a strong financial footing.

#### **Capital Structure**

22. The Just Energy Group’s capital structure is described in detail in the Carter Affidavit. As at December 31, 2020, the aggregate book value of the Just Energy Group’s assets was approximately \$1.069 billion, and the aggregate book value of its liabilities was approximately \$1.28 billion.
23. The Just Energy Group’s debt obligations include: (i) secured obligations to its Commodity Suppliers in the approximate amount of \$198.96 million as at January 31, 2021 (the “**Trade Debt**”); and (ii) significant non-trade obligations. Below is

a chart setting out the relative priorities of the Justice Energy Groups' debt obligations, which are detailed below.

| Tier   | Items                                      | Date              | Approximate Amount |
|--------|--|-------------------|--------------------|
| Tier 1 | Secured Suppliers AP                       | March 31, 2021    | \$244 million      |
| Tier 2 | Credit Facility Lenders                    | March 5, 2021     | \$331.82 million   |
|        | Suppliers MTM (Liability Only)             | March 1, 2021     | \$146.17 million   |
|        | ISO Service Obligations (Subject to Cap)   | March 5, 2021     | \$94.5 million     |
| Tier 3 | ISO Service Obligations (In Excess of Cap) | March 5, 2021     | \$77.66 million    |
| Tier 4 | Term Loan (unsecured)                      | December 31, 2020 | \$273.48 million   |
| Tier 5 | Subordinated Notes (unsecured)             | December 31, 2020 | \$13.2 million     |

(a) Trade Debt

24. The Proposed Monitor understands that the Commodity Suppliers and the agent for the lenders under the Credit Agreement (as defined below) are party to an intercreditor agreement (the “**Intercreditor Agreement**”) that sets out the relative priorities of the parties’ security interests. In accordance with the terms of the Intercreditor Agreement, the secured Commodity Suppliers rank *pari passu* with the lenders under the Credit Agreement subject to the following waterfall as set out in the above chart: (i) accounts payable owing to the secured Commodity Suppliers rank first, (ii) the following amounts rank second and *pari passu* amongst themselves: (A) the mark-to-market (“**MTM**”) liability to the secured Commodity Suppliers, (B) amounts owing to the lenders under the Credit Agreement, and (C) amounts owing to Commodity Suppliers under the ISO Agreements up to a cap of \$94.5 million (the “**Cap**”); and (iii) ranking third, amounts owing to providers under the ISO Agreements above the Cap.
25. The significant non-trade debt obligations of the Just Energy Group are summarized as follows:

|                         | Type  | Borrower(s)   | Maturity Date      | Approximate Outstanding Amount as of December 31, 2020               |
|-------------------------|---|---|--------------------|--|
| Secured Credit Facility | Revolving credit facilities available on borrowing base       | Just Energy Ontario L.P. and Just Energy (U.S.) Corp. | December 31, 2023  | \$232.62 million in principal<br>\$77.8 million in letters of credit |
| Term Loan               | Non-revolving, multi-draw senior unsecured term loan facility | Just Energy Group Inc.                                | March 31, 2024     | \$273.48 million   |
| Subordinated Notes      | Unsecured subordinated notes                                  | Just Energy Group Inc.                                | September 27, 2026 | \$13.2 million   |

(b) Credit Facility

26. Just Energy Ontario L.P. and Just Energy (U.S.) Corp. are borrowers under a ninth amended and restated credit agreement (the “**Credit Agreement**”) dated as of September 28, 2020 with a syndicate of lenders that includes CIBC, National Bank of Canada, HSBC, JPMorgan, Alberta Treasury Branches, Canadian Western Bank, and Morgan Stanley Senior Funding, Inc., a subsidiary of Morgan Stanley Bank N.A.
27. The Credit Agreement provides for certain scheduled mandatory commitment reductions over time.
28. As at March 5, 2021, there was approximately \$227.86 million in principal outstanding under the Credit Agreement, plus outstanding letters of credit amounting to approximately \$103.96 million.

(c) Term Loan

29. Just Energy is a borrower under a \$205.9 million unsecured principal note (the “**Term Loan Agreement**”) in favour of Sagard Credit Partners, LP and certain funds managed by a leading U.S.-based global fixed income asset manager. The Term Loan matures on March 31, 2024.
30. Pursuant to the Term Loan Agreement, interest payments are capitalized with payment of principal and accrued interest due on March 31, 2024.
31. As at December 31, 2020, approximately \$273.48 million was outstanding under the Term Loan.

(d) Subordinated Notes

32. Just Energy is also a borrower under certain subordinated unsecured notes (“**Subordinated Notes**”). As at October 19, 2020, the Subordinated Notes had a principal amount of \$13.2 million outstanding.

## THE TEXAS WEATHER EVENT

33. As noted earlier herein, Texas is the Just Energy Group’s single largest market. The Texas energy market is subject to regulatory oversight by ERCOT. ERCOT’s operations, in turn, are overseen by the Public Utility Commission of Texas (“**PUCT**”).
34. The Proposed Monitor understands that the Just Energy Group’s Texas-based operating subsidiaries, in addition to purchasing supply directly from the Commodity Suppliers, purchase energy products (for subsequent resale to customers) in Texas through an ERCOT-operated wholesale electricity market. The Texas subsidiaries are directly liable to ERCOT for such electricity purchases, pursuant to and in accordance with the terms of the ERCOT protocols (the “**Protocols**”) and certain governing agreements that implement such Protocols.<sup>3</sup>

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<sup>3</sup> The Protocols are accessible at the following link: <http://www.ercot.com/mktrules/nprotocols/current>.

35. As described in greater detail in the Carter Affidavit, beginning on February 13, 2021, Texas experienced an unprecedented and catastrophic energy crisis when a powerful winter storm impacted the entire state. Being a warm-weather state, (i) the colder temperatures had the effect of causing demand for electricity to spike as residents sought to heat their homes and businesses,<sup>4</sup> and (ii) certain of the state's electricity generating sources were not sufficiently winterized to withstand the cold temperatures or were unable to secure fuel with which to operate their plants and suffered critical operational shut-downs.
36. The Proposed Monitor understands that the Just Energy Group diligently hedges against potential weather risks based on historical data. For February 2021, the Just Energy Group had weather hedges in place to cover an incremental 50% increase in customer usage above the normal February consumption, which in any other year would have provided sufficient cushion against extreme weather. However, the extreme Texas weather event meant energy use on February 14, 2021 was 200% higher than the week earlier, substantially above the hedge estimates.
37. The Texas' electricity grid, by design, is largely separate from neighbouring states, so generating sources that were unable to operate could not be easily substituted by importing electricity from neighbouring markets. The combination of the spike in demand and plummeting supply pushed Texas' electric system to the brink of collapse. The Carter Affidavit details ERCOT and PUCT's hurried response to this event in order to avoid a complete shutdown of the entire grid and the operational and financial repercussions for the entire Texas electric grid that otherwise could have lasted several months.
38. The effects of ERCOT and PUCT's actions on the Texas wholesale energy market during the Texas weather event are described in detail in the Carter Affidavit. In brief, PUCT adopted an order instructing ERCOT to set wholesale energy prices at the maximum price allowed, being US\$9,000 per megawatt hour, for over 100 consecutive hours. By way of comparison, the real time electricity price did not hit

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<sup>4</sup> To note, most of Texas uses electric heating.



- US\$9,000/MWh for even one 15-minute interval in 2020. The winter storm and regulators' actions caused wholesale buyers to incur additional costs of approximately US\$55 billion during the 7-day period of the winter storm, equivalent to the amount the wholesale market would ordinarily incur over a four-year period.
39. The Proposed Monitor understands, as set out in the Carter Affidavit, that ERCOT and PUCT's decision to sustain an artificially high wholesale price may have contravened the Protocols and has been challenged by numerous stakeholders. The Proposed Monitor understands that there have been several appeals to PUCT and ERCOT to provide accommodations to energy providers affected by the ERCOT wholesale market price surges, including appeals by the Just Energy Group to suspend ERCOT's usual protocols. The Proposed Monitor understands that such appeals have not been successful to date.
  40. In the meantime, ERCOT has issued invoices to wholesale energy purchasers, including the Just Energy Group's Texas subsidiaries, for the entire US\$55 billion amount in additional costs. The Proposed Monitor understands that the Just Energy Group's portion of such obligation is estimated to be approximately US\$250 million. The magnitude of this financial burden has had a ripple effect through a myriad of market participants including retail energy providers, electric cooperatives and municipalities, independent power producers, and natural gas local distribution companies across the state.
  41. The Proposed Monitor understands that the Just Energy Group is disputing the amount of ERCOT's issued invoices. Nevertheless, in accordance with the Protocols, invoices issued by ERCOT must be paid in full within two days, even if the energy provider is actively disputing the invoice.
  42. ERCOT has several remedies available to it when an energy provider fails to pay in full the amount of any invoice within two days of it being issued. Principal among such remedies is ERCOT's ability to revoke all of the right of such energy provider to operate in the Texas market and to mass-transition all of such energy

- provider's Texas customers to another energy provider of last resort (a "**POLR**") on five days' notice to the energy provider (the mass-transition being, the "**POLR Process**").
43. The Proposed Monitor understands that the Just Energy Group does not have sufficient liquidity to cover its remaining unpaid obligation to ERCOT of approximately US\$123.21 million, of which approximately US\$96.24 million is required to be paid by the end of day on March 9, 2021. Additionally, on March 8, 2021, the Just Energy Group received from ERCOT (i) a notice that it must post approximately US\$25.7 million of additional collateral within two business days; and (ii) invoices totalling approximately US\$25.46 million, of which approximately US\$18.86 million is due by March 10, 2021.
  44. The Proposed Monitor understands that the Just Energy Group is unable, as a legal and practical matter, to charge and collect this unprecedented amount from its Texas customers given the fixed-rate customer billing arrangements with most of its customers.
  45. As at the date of this Report, and as described in the Carter Affidavit, the Proposed Monitor understands that one large Texas-based energy provider, Brazos Electric Power Cooperative, Inc., has already filed for relief under chapter 11 of title 11 of the United States Code, after incurring an estimated US\$2.1 billion in charges over seven days during the Texas weather event.
  46. The Proposed Monitor also understands that ERCOT (i) revoked all of the rights of two other energy providers, Griddy Energy LLC and Entrust Energy Inc., to operate in the Texas energy market after they failed to pay to ERCOT their portion of the additional US\$55 billion liability; and (ii) implemented the POLR Process in respect of both such energy providers. Without the protection afforded by the proposed Initial Order being sought by the Just Energy Group, the Just Energy Group could face similar consequences. If granted, Just Energy intends to initiate a case under Chapter 15 of Title 11 of the United States Code seeking to recognize and enforce the proposed Initial Order in the U.S.

**GOING CONCERN DOUBTS AS A RESULT OF THE TEXAS WEATHER EVENT**

47. As noted above, the Just Energy Group may be liable to ERCOT for an estimated US\$250 million. The Just Energy Group is disputing amounts that are owing to ERCOT. Nevertheless, if payment in full is not made to ERCOT within two days of invoices being issued, ERCOT may decide to implement a POLR Process that, the Proposed Monitor understands, would cause nearly half of the Just Energy Group's Embedded Gross Margin to dissipate and would pose significant risk to the Just Energy Group's ability to maintain going concern operations.
48. The Proposed Monitor understands that the Just Energy Group does not have sufficient liquidity to cover the amount of its estimated obligations, including the full amount of the estimated liability to ERCOT. The Just Energy Group is forecast to have negative liquidity as of March 9, 2021 primarily due to one of the aforementioned payments due to ERCOT on that date of approximately \$121.2 million.
49. In addition, on March 22, 2021, approximately \$270 million will become owing to counterparties under the ISO Agreements. This amount has increased significantly from normal levels, which is a direct result of the Texas weather event.
50. The Proposed Monitor further understands that an event of insolvency constitutes an event of default under the Just Energy Group's licences with various Canadian and U.S. regulators, as detailed in the Carter Affidavit, which causes serious concerns about the Just Energy Group's ability to continue to operate in key markets outside of Texas.
51. Likewise, upon an insolvency event, there are other material concerns about the continued supply of energy commodities from the Commodity Suppliers and immediate demands for additional collateral from the Bonding Agencies (in addition to the collateral that has already been demanded by the Bonding Companies, as noted earlier in this report). The Proposed Monitor understands that any one of these events (i.e. the loss of continuing supply or a request for additional

collateral that cannot be satisfied) could trigger cascading materially adverse results for the Just Energy Group by virtue of cross-default provisions under a number of governing agreements.

### **FTI'S QUALIFICATIONS TO ACT AS MONITOR**

52. Paul Bishop, who will lead the FTI team and have primary carriage of this matter, is a trustee within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act* (Canada).
53. Since becoming engaged by the Just Energy Group, FTI has acquired knowledge of the business and operations of the Just Energy Group, including its personnel, stakeholders and the key issues in the proposed CCAA Proceedings. As a result, FTI is in a position to immediately act as Monitor in the CCAA Proceedings if appointed by this Court.
54. In September 2020, FTI was engaged by the Applicant, Just Energy Inc., to assist in assessing the quantification of potential damages relating to certain securities class actions against the company. This work is ongoing, and an ethical wall has been put in place between the FTI members assisting with the preparation of the these CCAA Proceedings and those members assisting Just Energy Inc. with the claim quantification engagement.
55. Neither FTI, nor any of its representatives, has been, at any time in the two preceding years:
  - (a) a director, officer or employee of the Just Energy Group;
  - (b) related to the Just Energy Group or to any director or officer of the Just Energy Group; or
  - (c) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the Just Energy Group.

Engagement of FTI and the Preparation of this Pre-Filing Report

56. FTI was initially engaged by the Applicants in July 2020 to assist in preparing for a potential filing under the CCAA, on a contingency basis, as they sought, successfully, to conclude the Recapitalization under the CBCA.
57. Pursuant to an engagement letter dated February 26, 2021, FTI was engaged to assist the Just Energy Group with a review of its financial position, business plan, financial projections and liquidity requirements and, if required, to assist the Just Energy Group in preparation for a filing under each of the Canadian and U.S. insolvency regimes. For the purpose of this mandate, FTI has, among other things:
- (a) participated in numerous meetings and discussions with the Just Energy Group's senior management and legal advisors in connection with the Just Energy Group's business and financial affairs generally and in connection with the preparation of the Cash Flow Forecast (as defined herein);
  - (b) participated in numerous meetings and discussions with the Just Energy Group and its counsel in connection with the requested relief in these CCAA Proceedings;
  - (c) engaged legal counsel in Canada and the U.S., who have also participated in certain of the aforementioned meetings;
  - (d) obtained and reviewed financial and other information produced by the Just Energy Group relating to its operations, cash flow forecasts and current financial situation;
  - (e) assisted the Just Energy Group in the preparation of its cashflow forecasts;
  - (f) assisted the Just Energy Group in assessing the quantum of potential claims against its directors and officers; and
  - (g) prepared this Pre-Filing Report.
58. Although this Pre-Filing Report has been prepared in anticipation of FTI's appointment as Monitor of the Just Energy Group, it has been prepared with the

same duty, care and level of diligence that FTI would have utilized had it already been appointed as Monitor.

59. In preparing this Pre-Filing Report, the Proposed Monitor has relied upon unaudited financial information of the Just Energy Group, the books and records of the Just Energy Group, certain financial information prepared by the Just Energy Group and discussions with the Just Energy Group's management. Other than as described in this section of the Pre-Filing Report, the Proposed Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information. Accordingly, the Proposed Monitor expresses no opinion or other form of assurance on the information contained in Pre-Filing Report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this Pre-Filing Report is based on the Just Energy Group's management's assumptions regarding future events; actual results may vary from the forecast and such variations may be material.

#### **THE JUST ENERGY GROUP'S CASH MANAGEMENT SYSTEM**

60. The Just Energy Group maintains a centralized cash management system in Canada and the United States to consolidate and track funds generated by the operations of the Just Energy Group, as described more fully in the Carter Affidavit.
61. The Proposed Monitor has reviewed the Just Energy Group's cash management arrangements and confirms the importance of these systems for the continuation of the Just Energy Group's business and operations. Replacement of the cash management systems would be costly, unviable from a short-term operational perspective, and excessively time consuming. Accordingly, the Proposed Monitor supports the Just Energy Group's request to continue to operate its existing cash management systems throughout these CCAA Proceedings and supports the Just Energy Group's request to temporarily restrict the right of set-off by the lenders in order to ensure that the cash management system continues to function properly.

## CASH FLOW FORECAST

62. The Just Energy Group, with the assistance of the Proposed Monitor, has prepared (i) a consolidated 13-week cash-flow forecast of its receipts and disbursements (the “**Weekly Forecast**”), and (ii) a daily cash flow forecast for the 13-day period following the filing of these CCAA Proceedings ending March 21, 2021 (the “**Daily Forecast**”, and together with the Weekly Forecast, the “**Cash Flow Forecast**”). The Cash Flow Forecast and the management’s report on the cash-flow statement as required by section 10(2)(b) of the CCAA are attached hereto as **Appendix “A”**. The Weekly Forecast and Daily Forecast are summarized as follows:

| <i>(CAD\$ in millions)</i>                  | 13-Day<br>period ending<br>March 21, 2021 | 13-Week<br>period ending<br>June 6, 2021 |
|---|---|--|
| <b>Forecast Week</b>                        | <b>Total</b>                              | <b>Total</b>                             |
| <b>RECEIPTS</b>                             |   |  |
| Sales Receipts                              | \$77.1                                    | \$608.5                                  |
| Miscellaneous Receipts                      | -   | 8.0                                      |
| <i>Total Receipts</i>                       | \$77.1                                    | \$616.5                                  |
| <b>DISBURSEMENTS</b>                        |   |  |
| <i>Operating Disbursements</i>              |   |  |
| Energy and Delivery Costs                   | (\$224.6)                                 | (\$574.1)                                |
| Payroll                                     | -   | (22.3)                                   |
| Taxes                                       | (5.4)                                     | (36.6)                                   |
| Commissions                                 | (6.3)                                     | (27.8)                                   |
| Selling and Other Costs                     | (6.6)                                     | (48.4)                                   |
| <i>Total Operating Disbursements</i>        | (\$242.8)                                 | (\$709.1)                                |
| <b>OPERATING CASH FLOWS</b>                 | (\$165.7)                                 | (\$92.6)                                 |
| <i>Financing Disbursements</i>              |   |  |
| Credit Facility - Borrowings / (Repayments) | \$126.0                                   | \$157.5                                  |
| Interest Expense & Fees                     | (3.2)                                     | (7.2)                                    |
| <i>Restructuring Disbursements</i>          |   |  |
| Professional Fees                           | (1.4)                                     | (14.4)                                   |
| <b>NET CASH FLOWS</b>                       | <b>(\$44.3)</b>                           | <b>\$43.3</b>                            |
| <b>CASH</b>                                 |   |  |
| Beginning Balance                           | \$77.3                                    | \$77.3                                   |
| Net Cash Inflows / (Outflows)               | (44.3)                                    | 43.3                                     |
| Other (FX)                                  | -   | -  |
| <b>ENDING CASH</b>                          | <b>\$33.0</b>                             | <b>\$120.7</b>                           |

63. The Just Energy Group's Daily Forecast indicates that during the 13-day period ending March 21, 2021, the Just Energy Group will have net cash outflows from operating activities of approximately \$165.7 million with total receipts of approximately \$77.1 million and total disbursements of approximately \$242.8 million, before borrowings of approximately \$126.0 million and professional fees of approximately \$1.4 million such that the net cash outflows are forecast to be approximately \$44.3 million.
64. The Just Energy Group's Weekly Forecast indicates that, during the 13-week cash flow period ending June 6, 2021, the Just Energy Group will have net cash outflows from operating activities of approximately \$92.6 million with total receipts of approximately \$616.5 million and total disbursements of approximately \$709.1 million, before borrowings of approximately \$157.5 million and professional fees of approximately \$14.4 million such that the net cash flows are forecast to be approximately \$43.3 million.
65. The Cash Flow Forecast incorporates the following key assumptions:
- (a) Payment to ERCOT of approximately \$151.3 million with respect to the Texas weather event due during the week ending March 14, 2021;
  - (b) Payment of certain pre-filing amounts outstanding, pending Monitor consent, including with respect to commodity delivery-related services;
  - (c) Payment of pre-filing amounts outstanding, owing to or in respect of workers providing sales and sales support for the Just Energy Group;
  - (d) An initial drawdown on the DIP Facility of approximately \$126 million on March 9, 2021 to satisfy the liquidity requirements of the Just Energy Group through to the comeback hearing; and
  - (e) Cash receipts of the Just Energy Group contemplates the ongoing collection of receivables from its customers.



66. Section 23(1)(b) of the CCAA states that the Proposed Monitor shall, “review the company’s cash-flow statement as to its reasonableness and file a report with the court on the Proposed Monitor’s findings”.
67. Pursuant to section 23(1)(b) of the CCAA and in accordance with the Canadian Association of Insolvency and Restructuring Professionals Standard of Practice 09-1, the Proposed Monitor hereby reports as follows:
- (a) the Cash Flow Forecast has been prepared by management of the Just Energy Group for the purpose described in notes to the Cash Flow Forecast, using the probable and hypothetical assumptions set out therein;
  - (b) the Proposed Monitor’s review consisted of inquiries, analytical procedures and discussion related to information supplied by certain of the management and employees of the Just Energy Group. Since hypothetical assumptions need not be supported, the Proposed Monitor’s procedures with respect to them were limited to evaluating whether they were consistent with the purposes of the Forecast. The Proposed Monitor has also reviewed the support provided by management of the Just Energy Group for the probable assumptions, and the preparation and presentation of the Cash Flow Forecast;
  - (c) based on its review, and as at the date of this Pre-Filing Report, nothing has come to the attention of the Proposed Monitor that causes it to believe that, in all material respects:
    - (i) the hypothetical assumptions are not consistent with the purposes of the Cash Flow Forecast;
    - (ii) the probable assumptions developed by management are not suitably supported and consistent with the plans of the Just Energy Group or do not provide a reasonable basis for the Cash Flow Forecast, given the hypothetical assumptions; or
    - (iii) the Cash Flow Forecast does not reflect the probable and hypothetical assumptions;

- (d) Since the Cash Flow Forecast is based on assumptions regarding future events, actual results will vary from the information presented even if the hypothetical assumptions occur, and the variations may be material. Accordingly, the Proposed Monitor expresses no assurance as to whether the Cash Flow Forecast will be achieved. The Proposed Monitor expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Pre-Filing Report, or relied upon by the Proposed Monitor in preparing this Pre-Filing Report; and
- (e) The Cash Flow Forecast has been prepared solely for the purpose of estimating the liquidity requirements of the Just Energy Group during the forecast period. The Cash Flow Forecast should not be relied upon for any other purpose.

## **RELIEF SOUGHT IN INITIAL ORDER**

### *Extending the CCAA protections to the Just Energy LPs*

- 68. The Initial Order provides that the Just Energy LPs be granted all of the same protections and authorizations provided to the Applicants under the Initial Order, notwithstanding that the Just Energy LPs are not “companies” within the meaning of the CCAA.
- 69. The Proposed Monitor understands that the Just Energy LPs hold many of the permits, licenses and other regulatory permissions that permit the Just Energy Group to conduct business operations in particular jurisdictions. The Proposed Monitor further understands that the business and operations of the Applicants and the Just Energy LPs are heavily intertwined, including on a day-to-day basis.
- 70. If such entities are not granted protection under the proposed Initial Order, including in respect of any enforcement proceedings by regulators (as described below), the regulators may proceed to cancel such permits, licences or other regulatory permissions as a result of the filing of these CCAA Proceedings, which the Proposed Monitor understands would be within their rights. The effect of any

such regulator actions would have material adverse effects for the Just Energy Group, including the loss of customers or an inability to operate in a particular market.

71. For the above reasons and to ensure the stability of the Just Energy Group's operations during these CCAA Proceedings, the Proposed Monitor is of the view that the protections and other authorizations permitted to the Applicants under the Initial Order should be extended to the Just Energy LPs.

*Implementing the Stay of Proceedings, including in respect of Regulators*

72. The Just Energy Group is seeking the Stay of Proceedings up to and including March 19, 2021 in respect of the Just Energy Group.
73. The Just Energy Group requires the Stay of Proceedings and other protections provided by the CCAA given that the Just Energy Group is insolvent. The Stay of Proceedings is needed to maintain the *status quo* and provide time for the Just Energy Group to consider its strategic alternatives.
74. The proposed Initial Order provides that, notwithstanding section 11.1 of the CCAA, the Stay of Proceedings should apply to provincial energy regulators and provincial regulators of consumer sales that have authority with respect to energy sales (collectively, the "**Provincial Regulators**"), except with the written consent of the Just Energy Group and the Proposed Monitor, or leave of the Court.
75. As described in the Carter Affidavit, the Just Energy Group believes that an insolvency event or the filing of these CCAA Proceedings may cause the Provincial Regulators and U.S. Regulators (together, the "**Regulators**") to enforce certain of their rights and remedies, notwithstanding that the proposed interim financing will allow the Just Energy Group to pay the Regulators everything as and when due in the ordinary course of business. Any such enforcement would have material adverse effects for the Just Energy Group. This includes requiring additional collateral to be posted, revoking Just Energy Group's rights to operate in a particular market, or transitioning the Just Energy Group's customers in that

particular market to a competitor. Any such actions by any one Regulator could severely harm existing operations. If such actions are implemented by a group of Regulators however, or by a Regulator in respect of a particularly important market for the Just Energy Group's business, this could impair the Just Energy Group's viability to continue as a going concern.

76. Given the unique circumstances facing the Just Energy Group and the severe repercussions that could result if a Stay of Proceedings is not extended to the Regulators, the Proposed Monitor is of the view that the Regulators should be temporarily stayed from exercising their rights and remedies in accordance with the Initial Order, provided they are paid amounts owing to them in the ordinary course as planned, to provide the Just Energy Group with a stable environment in which it can seek to restructure. If necessary, this matter can be revisited at the subsequent comeback hearing.

Proposed debtor-in-possession financing

77. The Applicants are seeking approval of a term sheet (the "**DIP Agreement**") between Just Energy L.P., Just Energy Group Inc. and Just Energy (U.S.) Corp. (collectively, the "**Borrowers**") and Alter Domus (US) LLC, as administrative agent for the lenders (the "**DIP Lenders**"), pursuant to which the DIP Lenders will make a debtor-in-possession facility (the "**DIP Facility**") available to the Borrowers, subject to the terms and conditions set out in the DIP Agreement, in the maximum principal amount of US\$125 million. The obligations owing to the DIP Lenders under the DIP Facility will be guaranteed by each of the remaining Applicants (the "**Guarantors**"). The Proposed Monitor cautions that, at the current time, the DIP Agreement is still under negotiation and has not been finalized.
78. Terms not otherwise defined in this section have the meanings ascribed to them in the DIP Agreement, a copy of which will be appended as an exhibit to the Carter Affidavit.
79. The Proposed Monitor understands that the salient terms of the DIP Agreement are as follows:

- (a) **DIP Charge:** The DIP Charge (as defined below) shall have been granted in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, subject to the Permitted Priority Liens;
- (b) **Term:** The DIP Facility shall be available until the earlier of (i) December 31, 2021; (ii) the CCAA Plan Implementation Date; (iii) the expiry of the stay of proceedings; (iv) the termination of the CCAA proceedings; or (v) the acceleration of the DIP Facility in accordance with the terms of the DIP Agreement upon the occurrence and during the continuation of an Event of Default;
- (c) **Interest:** Interest accrued on the principal amounts outstanding under the DIP Facility at a rate equal to 13% per annum (which will automatically increase by an additional 2% per annum upon the occurrence of any Event of Default);
- (d) **Additional Fees:** A commitment fee in an amount equal to 1% of the Maximum Amount, along with an origination fee in an amount equal to 1% of the Maximum Amount, shall each be fully earned and payable in cash on the Closing Date;
- (e) **Use of proceeds:** The Borrowers shall use the DIP Facility solely for the purposes set out in the DIP Agreement, in each case in accordance with the CCAA Orders and Cash Flow Statements, subject to the Permitted Variance, which includes funding the general corporate and working capital requirements of the Borrowers and Guarantors. Once every four weeks, the Borrowers are required to deliver a new rolling 13-week cash flow forecast to the DIP Lenders, which shall be subject to the approval of the DIP Lenders;
- (f) **Initial Draw:** The Borrowers are required to make an initial draw under the DIP Facility in the minimum aggregate amount of US\$100 million. This amount will enable them to pay specified amounts that are known to be due

during the first 10 days of the CCAA proceedings, which are detailed in the Cash Flow Forecast; and

- (g) **Events of Default:** The DIP Agreement sets Events of Default, which include, among other things, failure to abide by specified milestones in the Loan Parties' CCAA proceedings.
80. The Just Energy Group requires such interim financing to provide stability, continue going concern operations and to restructure its business. The Applicants initially solicited interim financing terms from its five largest stakeholders, which ultimately culminated in the Just Energy Group entering into the DIP Agreement with the DIP Lenders.

Engagement of Financial Advisor

81. The Just Energy Group has engaged BMO as its Financial Advisor pursuant to an engagement letter dated February 20, 2021 (the “**Financial Advisor Engagement Letter**”) which will be attached as a confidential exhibit to the Carter Affidavit. The Financial Advisor’s mandate is to assist the Just Energy Group with assessing its liquidity and capital needs and reviewing potential strategic opportunities and transactions.
82. The proposed Initial Order provides that the FA Charge (as defined and described below) shall secure the Financial Advisor’s post-filing fees, including any success fees in connection with finalizing a DIP loan transaction and the successful closing of a strategic transaction in accordance with the terms of the Financial Advisor Engagement Letter.
83. The Proposed Monitor has discussed with the Financial Advisor the scope, allocation and complexity of the work already undertaken by it, as well as the work remaining to be completed. The Proposed Monitor understands that the Financial Advisor does not foresee the need for any out of scope work and that post-filing fees are not duplicated for services already rendered.

84. Given the scope, nature and complexity of the Financial Advisor's role and fees charged by financial advisors in similar circumstances, the Proposed Monitor is of the view that the fees charged by the Financial Advisor are reasonable in the circumstances.
85. The Proposed Monitor supports the approval of the (i) Financial Advisor Engagement Letter, and (ii) permitting the FA Charge to secure the Financial Advisor's post-filing fees (including its work fee and success fees), subject to review by the Proposed Monitor of any invoices and the services provided by the Financial Advisor. The FA Charge is proposed to rank *pari passu* with the Administration Charge and have first priority over all other charges.

Permitting certain repayments under the Credit Agreement

86. The proposed Initial Order provides that the Just Energy Group be permitted to repay advances under the Credit Agreement for the purpose of creating availability under the LC Facility (as defined in the Credit Agreement) (an "**Advance Repayment**"), and that the Just Energy Group may utilize such availability to allow letters of credit to be issued under the Credit Agreement in order to maintain ordinary business operations. The proposed Initial Order provides that the foregoing shall be subject (i) to the consent of the Proposed Monitor with respect to any letter of credit issuance, and (ii) written confirmation from the applicable lender under the Credit Agreement that they shall issue a letter of credit of equal value to an Advance Repayment.
87. Subject to the Proposed Monitor's review and prior consent with respect to any Advance Repayment and letter of credit to be issued and the respective confirmations from lenders, the Proposed Monitor is of the view that it is reasonable and appropriate for the Just Energy Group to be permitted to make Advance Repayments and obtain letters of credit in order to sustain its business operations.

Permitting certain pre-filing payments to third parties

88. Pursuant to paragraph 7(d) of the proposed Initial Order, the Just Energy Group is entitled, but not required, to pay certain pre-filing amounts to third parties for goods or services provided to the Just Energy Group prior to these CCAA Proceedings with the consent of the Proposed Monitor and provided that such third parties are critical to the business operations of the Just Energy Group.
89. In accordance with the above, the Proposed Monitor intends to review on a case-by-case basis any pre-filing payments and will only approve such payments to be made if it decides that payment of such amounts is critical to the Just Energy Group's operations. The Proposed Monitor is of the view that these conditions are sufficient in the circumstances to permit the Just Energy Group to make pre-filing payments that satisfy these conditions.

Certain other relief for Commodity Suppliers

90. The proposed Initial Order provides that any counterparty to a Commodity Agreement<sup>5</sup> or ISO Agreement<sup>6</sup> that has executed or executes a Qualified Support Agreement (as defined in the proposed Initial Order) with an entity in the Just Energy Group and refrained from exercising termination rights under the Commodity Agreement as a result of the commencement of the Proceedings (as defined in the proposed Initial Order) absent an event of default under such Qualified Support Agreement (each, a “**Qualified Commodity/ISO Supplier**”), shall be entitled to a charge that secures the Just Energy Group's obligations to the Qualified Commodity/ISO Supplier.

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<sup>5</sup> As defined in the Initial Order: a gas supply agreement, electricity supply agreement or other agreement with any Just Energy Entity for the physical or financial purchase, sale, trading or hedging of natural gas or electricity.

<sup>6</sup> As defined in the Initial Order: an agreement pursuant to which a Just Energy Entity has reimbursement obligations to a counterparty for payments made by such counterparty on behalf of such Just Energy Entity to an independent system operator that coordinates, controls and monitors the operation of an electrical power system, and includes all agreements related thereto.



91. Specifically, each Qualified Commodity/ISO Supplier shall be entitled to the benefit of a charge (the “**Priority Commodity/ISO Charge**”) on the Property in an amount equal to the value of the amounts that are due and payable, at the applicable time, for: (i)(A) the physical supply of electricity or gas that has been delivered on or after March 9, 2021; (B) financial settlements on or after March 9, 2021; and (C) amounts owing under a confirmation or transaction that was executed on or after March 9, 2021 pursuant to a Commodity Agreement as a result of the termination thereof in accordance with the applicable Qualified Support Agreement; and (ii) for services actually delivered by a Qualified Commodity/ISO Supplier on or after March 9, 2021 pursuant to an ISO Agreement (but for greater certainty, excluding any amount owing for ISO services provided under the ISO Agreement on or before the date of the Initial Order, whether or not yet due).
92. The proposed Initial Order does not specify a limit for the Priority Commodity/ISO Charge. Instead, such charge shall secure the actual quantum of supplies provided by the Qualified Commodity/ISO Suppliers that it is intended to secure. The proposed Initial Order further provides that if a Qualified Commodity/ISO Supplier ceases to be a Qualified Commodity/ISO Supplier, it shall no longer benefit from such charge.
93. The proposed Initial Order also provides that those Qualified Support Agreements that may be entered into among the Qualified Commodity/ISO Suppliers and the Just Energy Group confirming the terms for the continued supply by the Qualified Commodity/ISO Suppliers are to be approved. The Proposed Monitor understands that certain Qualified Support Agreements are under negotiation but have not yet been finalized.
94. Pursuant to the proposed Initial Order, the Proposed Monitor, if appointed, will post a report on its website, on a monthly basis, setting out the total value of obligations to the Qualified Commodity/ISO Suppliers, thereby allowing any stakeholder concerned about the size of the secured obligation to seek an appropriate remedy at that time.

95. As the Proposed Monitor has indicated herein, the Just Energy Group relies on a small group of Commodity Suppliers and ISO Suppliers to provide critical services, including the supply of electricity that the Just Energy Group resells to customers. If any such supply or services are stopped, delayed or otherwise impaired, the Proposed Monitor believes that such actions will have a material adverse effect on the operations of the Just Energy Group.
96. Further, certain of the Commodity Agreements or ISO Agreements may be eligible financial contracts that would be subject to termination, which is why the Just Energy Group is requesting this particular relief in order to encourage the counterparties under such contracts to continue to do business with it.
97. In agreeing to continue to supply commodities and provide services under the Commodity Agreements and ISO Agreements, the counterparties are providing new value to the Applicants that will allow them to continue operating in the ordinary course of business after the date of the Initial Order. In order to protect that continued supply of goods and services, the Priority Commodity/ISO Charge secures the payment for such post-filing provision of goods and services.
98. As outlined above, there is an Intercreditor Agreement that governs the priority for payments made by the Applicants to certain counterparties and lenders. We understand that various parties may wish to seek to have the court determine the application of such Intercreditor Agreement to payments and priorities as part of these proceedings. While the Intercreditor Agreement may be relevant with respect to certain pre-filing obligations of the Applicants, given that the Commodity Agreement and ISO Agreement counterparties could terminate their existing arrangements (requiring the Applicants to attempt to find replacement suppliers which may not be practically possible), the Proposed Monitor views the continued supply and provision of services as fresh, post-filing consideration.
99. As such, the Proposed Monitor is of the view that, at least until any potential dispute on the point is properly presented for a determination by this Court:

- (a) post-filing supply of goods and services pursuant to the Commodity Agreements and ISO Agreements should be governed only by the Initial Order and should be treated as separate and apart from the certain pre-filing amounts governed by the Intercreditor Agreement; and
  - (b) entitlement to the consideration for such newly supplied goods and services under the Commodity Agreements and ISO Agreements should be for the exclusive benefit of the actual counterparty delivering such post-filing goods and services and governed by the Priority Commodity/ISO Charge.
100. For the foregoing reasons, the Proposed Monitor is of the view that the Qualified Support Agreements consistent with the terms hereof should be approved and the Priority Commodity/ISO Charge be granted.

*Court-ordered charges sought in the proposed Initial Order*

**(i) Administration Charge**

101. The Initial Order provides for a charge in the amount of up to \$2.2 million (the “**Administration Charge**”), covering the period until the comeback hearing, in favour of the Proposed Monitor, the Proposed Monitor’s Canadian and U.S. counsel, and the Just Energy Group’s Canadian and U.S. counsel as security for their professional fees and disbursements incurred both before and after the making of the Initial Order in respect of these CCAA Proceedings.
102. The Administration Charge currently only secures the fees expected to be incurred by the foregoing professionals prior to and during the initial 10-day stay period prior to the comeback hearing. The quantum of the Administration Charge has been established based on the various professionals’ previous history and experience with cross-border restructurings of similar scope and complexity. The Proposed Monitor believes that such a charge is required and reasonable in the circumstances. The Proposed Monitor will comment on the proposed amendment to increase the amount of the Administration Charge at the comeback hearing as part of a further report to this Court.

**(ii) FA Charge**

103. The Initial Order provides for a charge in the amount of up to \$1.8 million (the “**FA Charge**”), covering the period until the comeback hearing, in favour of the Financial Advisor as security for (i) its professional fees and disbursements incurred both before and after the making of the Initial Order in respect of these CCAA Proceedings, and (ii) any success fees earned by the Financial Advisor in accordance with the terms of the Financial Advisor Engagement Letter. The FA Charge is intended to have an equal ranking to the Administration Charge.
104. The FA Charge currently only secures the fees earned prior to and during the initial 10-day stay period prior to the comeback hearing. The Proposed Monitor will comment on the proposed amendment to increase the amount of the FA Charge at the comeback hearing as part of a further report to this Court.
105. Given the Financial Advisor’s critical role in these restructuring proceedings and in exploring strategic transaction opportunities, the Proposed Monitor is of the view that such a charge is reasonable in the circumstances.

**(iii) Directors’ Charge**

106. The Proposed Monitor understands that the Just Energy Group’s present and former directors and officers are among the potential beneficiaries under liability insurance policies (the “**D&O Insurance**”) that cover an aggregate annual limit of approximately \$38.5 million. The Proposed Monitor understands that there may not be sufficient coverage under the D&O Insurance, given various exceptions and exclusions thereunder and as result of claims having been made thereunder.
107. The Just Energy Group is seeking the Directors’ Charge in the amount of \$30 million with priority over all encumbrances on the Just Energy Group’s property other than the Administration Charge and the FA Charge. The Proposed Monitor was involved in determining the quantum of the Directors’ Charge.

108. The proposed Directors' Charge represents the amount applicable during the initial 10-day stay period prior to the comeback hearing. The Proposed Monitor will comment on the proposed amendment to increase the amount of the Directors' Charge at the comeback hearing as part of a further report to this Court.
109. The Proposed Monitor is of the view that the amount of the Directors' Charge is reasonable in relation to the quantum of the estimated potential liability of the Just Energy Group's directors and officers, which includes significant potential director and officer liabilities under U.S. laws, including (i) approximately \$10.2 million potential liability under U.S. laws in respect of sales taxes, and (ii) approximately \$2.9 million potential liability under U.S. laws in respect of wages, source deductions and accrued vacation. The Just Energy Group's directors and officers are only entitled to the benefit of the Directors' Charge to the extent that coverage under the D&O Insurance is insufficient.
110. The Just Energy Group's directors have the necessary background and knowledge, particularly with respect to the complex regulatory environment in which the Just Energy Group operates, to steer it through these CCAA Proceedings. The Proposed Monitor also understands that the Just Energy Group's directors have insisted on the protection of the Directors' Charge in order to remain on the board during the course of the CCAA Proceedings. For the foregoing reasons, the Proposed Monitor is of the view that the Directors' Charge is necessary to ensure that the directors stay with the Just Energy Group and assist it through these CCAA Proceedings.

**(iv) DIP Charge**

111. The Applicants are seeking an Order granting the DIP Lender a charge (the "**DIP Charge**") over all of the present and future assets, property and undertaking of the Applicants, in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, subject to the Administration Charge, FA Charge, Directors' Charge, KERP Charge, and shall rank *pari passu* with the Priority Commodity/ISO Charge. The DIP Charge will secure all Obligations owing to the DIP Lenders under the DIP Facility.

112. The Monitor is of the view that the DIP Facility represents the necessary financing which allows the Just Energy Group to pay certain critical payables, including to ERCOT to prevent the application of ERCOT's POLR rights, and maintain the Just Energy Groups' ongoing operations. The requested DIP Charge does not secure any advances made to the Applicants prior to the commencement of the CCAA proceedings.
113. The Monitor recommends that the Court approve the DIP Agreement, DIP Facility and accordingly, also supports the granting of the DIP Charge.

**(v) KERP Charge and Employee Bonus**

114. The Just Energy Group will be seeking a key employee retention plan charge (the "**KERP Charge**") as part of an amended and restated initial order to be requested at the subsequent comeback hearing. The Proposed Monitor intends to review and comment on the KERP Charge as part of a further report to the Court.
115. The Just Energy Group will also be seeking the authority to pay certain employee bonuses in the amount of approximately \$3.2 million on April 2, 2021 (the "**Employee Bonus**"). The Proposed Monitor intends to review and comment on the Employee Bonus as part of a further report to the Court.

**(vi) Priority Commodity/ISO Suppliers Charge**

116. As noted above, the proposed Initial Order provides for a Priority Commodity/ISO Charge in favour of Qualified Commodity/ISO Suppliers, which is intended to ensure the continuing supply of critical goods and services to the Just Energy Group. Such charge does not have a set limit. Instead, it secures the actual amounts of the obligations to the Qualified Commodity/ISO Suppliers as described earlier herein, and in strict accordance with the terms of the Initial Order.
117. Just Energy's ongoing relationship with its Commodity Suppliers and ISO Suppliers is critical to these CCAA Proceedings and the long-term viability of Just

Energy Group's operations. For this reason, the Proposed Monitor is of the view that the Priority Commodity/ISO Charge is necessary and should be granted.

### **Summary of the Proposed Rankings of the Court-Ordered Charges**

118. If the proposed Initial Order is granted, the proposed Court-ordered charges would have the following ranking:
- (a) First – the Administration Charge in the amount of \$2.2 million and the FA Charge in the amount of \$1.8 million on a *pari passu* basis;
  - (b) Second – the Directors' Charge in the amount of \$30 million; and
  - (c) Third – the DIP Charge in in the amount of funds actually advanced under the DIP Facility and the Priority Commodity/ISO Charge on a *pari passu* basis.
119. The Proposed Monitor believes that the proposed Court-ordered charges and rankings are required and reasonable in the circumstances of these CCAA Proceedings in order to preserve the going concern operations of the Just Energy Group and maintain its enterprise value, and accordingly, supports the granting of and the proposed ranking of the charges.

## **CHAPTER 15 PROCEEDINGS**

120. The Just Energy Group seeks authorization under the proposed Initial Order to apply for foreign recognition and approval of these CCAA proceedings in foreign jurisdictions, including the United States pursuant to the chapter 15 of Title 11 of the United States Code (the "**Chapter 15 Proceedings**"). The Initial Order provides that the Applicant, Just Energy Group Inc., is authorized to act as the foreign representative for the purpose of the Chapter 15 Proceedings.
121. The Proposed Monitor agrees that recognition of the proposed Initial Order in the United States, including the Stay of Proceedings, is necessary to preserve the going concern value of the Just Energy Group's business and further agrees that the Chapter 15 proceedings should be commenced immediately. The Proposed Monitor

has reviewed the circumstances, including facts set out in the Carter Affidavit, and agrees that Canada is the centre of main interest for the Just Energy Group.

## CONCLUSION

122. The Proposed Monitor is of the view that the relief requested by the Just Energy Group pursuant to the proposed Initial Order is necessary, reasonable and justified, particularly in the context of the unprecedented challenges that have resulted from the Texas weather event. The Proposed Monitor is also of the view that granting the relief requested will provide the Just Energy Group the best opportunity to preserve value and maximize recoveries for its stakeholders.
123. The Proposed Monitor believes that the requested relief is justified by the exceptional circumstances confronting the Just Energy Group and is of the view that the Just Energy Group faces significant risks to its going concern operations if the requested relief is not granted.
124. Accordingly, the Proposed Monitor respectfully recommends that the Just Energy Group's request for the proposed Initial Order be granted.

The Proposed Monitor respectfully submits to the Court this Pre-Filing Report dated this 9<sup>th</sup> day of March, 2021.

**FTI Consulting Canada Inc.**, in its capacity as proposed Monitor of Just Energy Group Inc. et al. and not in its personal or corporate capacity



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Per: Paul Bishop  
Senior Managing Director



### Schedule “A”

**Commodity Agreement**” means a gas supply agreement, electricity supply agreement or other agreement with any Just Energy Entity for the physical or financial purchase, sale, trading or hedging of natural gas or electricity.

**“Embedded gross margin”** is a standard industry term that means the gross margin expected to be realized over the next five years from existing customers.

**“ERCOT”** means the Electric Reliability Council of Texas, an ISO.

**“FERC”** means the U.S. Federal Energy Regulatory Commission.

**“ISO”** means an independent system operator; an independent, regulated entity established to coordinate regional transmission and ensure the safety and reliability of the electric system.

**“ISO Servicing Agreement”** means an agreement pursuant to which a Just Energy Entity has reimbursement obligations to a counterparty for payments made by such counterparty on behalf of such Just Energy Entity to an independent system operator that coordinates, controls and monitors the operation of an electrical power system, and includes all agreements related thereto.

**“LDC”** means a local distribution company; the natural gas or electricity distributor for a regulatory or governmentally defined geographic area.

**“POLR”** means a provider of last resort, an energy retailer that has been selected by ERCOT to take over customers from another energy retailer that has been removed from the Texas electricity market by ERCOT.

**“Protocols”** means the ERCOT rules for market participants in the Texas energy market.

**“PUCT”** means the Public Utility Commission of Texas, a public body that oversees the ERCOT and otherwise manages the Texas utilities system.

**“RCE”** means residential customer equivalent, which is a unit of measurement equivalent to a customer using 2,815 m<sup>3</sup> (or 106 GJs or 1,000 Therms or 1,025 CCFs) of natural gas on an annual basis or 10 MWh (or 10,000 kWh) of electricity on an annual basis, which represents the approximate amount of gas and electricity, respectively, used by a typical household in Ontario, Canada

**Schedule “B”  
Just Energy LPs**

- Just Energy Ontario L.P.
- Just Energy Manitoba L.P.
- Just Energy (B.C.) Limited Partnership
- Just Energy Québec L.P.
- Just Energy Trading L.P.
- Just Energy Alberta L.P.
- Just Green L.P.
- Just Energy Prairies L.P.
- JEBPO Services LLP
- Just Energy Texas LP

**Appendix "A"**  
**Cash Flow Forecast**

## Just Energy Group Inc. et al

CCA 13-Week Cash Flow Forecast

March 9, 2021

(CAD\$ in millions)

| Weeks Ending (Sunday) <sup>1</sup>          | 3/14/21 | 3/21/21          | 3/28/21         | 4/4/21          | 4/11/21         | 4/18/21         | 4/25/21         | 5/2/21          | 5/9/21          | 5/16/21         | 5/23/21         | 5/30/21          | 6/6/21          | 13-Week         |                  |
|---|---------|------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|------------------|-----------------|-----------------|------------------|
| Forecast Week                               | 1       | 2                | 3               | 4               | 5               | 6               | 7               | 8               | 9               | 10              | 11              | 12               | 13              | Total           |                  |
| <b>RECEIPTS</b>                             |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| Sales Receipts                              | [2]     | \$28.6           | \$48.5          | \$46.3          | \$35.2          | \$44.4          | \$41.8          | \$67.1          | \$48.3          | \$48.4          | \$42.6          | \$60.5           | \$55.1          | \$41.8          | \$608.5          |
| Miscellaneous Receipts                      | [3]     | -                | -               | -               | 2.4             | -               | -               | -               | 5.6             | -               | -               | -                | -               | 8.0             |                  |
| <b>Total Receipts</b>                       |         | <b>\$28.6</b>    | <b>\$48.5</b>   | <b>\$46.3</b>   | <b>\$37.6</b>   | <b>\$44.4</b>   | <b>\$41.8</b>   | <b>\$67.1</b>   | <b>\$53.9</b>   | <b>\$48.4</b>   | <b>\$42.6</b>   | <b>\$60.5</b>    | <b>\$55.1</b>   | <b>\$41.8</b>   | <b>\$616.5</b>   |
| <b>DISBURSEMENTS</b>                        |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| <i>Operating Disbursements</i>              |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| Energy and Delivery Costs                   | [4]     | (\$172.1)        | (\$52.5)        | (\$9.7)         | (\$25.0)        | (\$13.2)        | (\$16.0)        | (\$79.8)        | (\$26.8)        | (\$13.6)        | (\$14.6)        | (\$103.2)        | (\$36.9)        | (\$10.8)        | (\$574.1)        |
| Payroll                                     | [5]     | -                | -               | (2.5)           | (3.2)           | (2.5)           | -               | (2.5)           | -               | (2.5)           | -               | (2.5)            | -               | (6.5)           | (22.3)           |
| Taxes                                       | [6]     | (0.1)            | (5.3)           | (6.0)           | (0.0)           | (0.1)           | -               | (5.0)           | (12.6)          | -               | (0.2)           | (4.7)            | (2.4)           | (0.1)           | (36.6)           |
| Commissions                                 | [7]     | (2.2)            | (4.0)           | (4.5)           | (0.6)           | (2.5)           | (0.7)           | (4.8)           | (0.7)           | (1.4)           | (0.4)           | (4.5)            | (0.7)           | (0.6)           | (27.8)           |
| Selling and Other Costs                     | [8]     | (3.2)            | (3.4)           | (3.5)           | (4.5)           | (5.0)           | (3.5)           | (3.3)           | (4.1)           | (4.7)           | (2.9)           | (3.5)            | (2.9)           | (4.0)           | (48.4)           |
| <b>Total Operating Disbursements</b>        |         | <b>(\$177.6)</b> | <b>(\$65.2)</b> | <b>(\$26.3)</b> | <b>(\$33.4)</b> | <b>(\$23.3)</b> | <b>(\$20.2)</b> | <b>(\$95.4)</b> | <b>(\$44.1)</b> | <b>(\$22.1)</b> | <b>(\$18.0)</b> | <b>(\$118.5)</b> | <b>(\$42.9)</b> | <b>(\$22.0)</b> | <b>(\$709.1)</b> |
| <b>OPERATING CASH FLOWS</b>                 |         | <b>(\$149.0)</b> | <b>(\$16.7)</b> | <b>\$19.9</b>   | <b>\$4.2</b>    | <b>\$21.1</b>   | <b>\$21.6</b>   | <b>(\$28.4)</b> | <b>\$9.7</b>    | <b>\$26.3</b>   | <b>\$24.6</b>   | <b>(\$57.9)</b>  | <b>\$12.2</b>   | <b>\$19.8</b>   | <b>(\$92.6)</b>  |
| <i>Financing Disbursements</i>              |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| Credit Facility - Borrowings / (Repayments) | [9]     | \$126.0          | \$-             | \$31.5          | \$-             | \$-             | \$-             | \$-             | \$-             | \$-             | \$-             | \$-              | \$-             | \$-             | \$157.5          |
| Interest Expense & Fees                     | [10]    | (3.2)            | -               | -               | (1.4)           | -               | -               | -               | (1.3)           | -               | -               | -                | -               | (1.4)           | (7.2)            |
| <i>Restructuring Disbursements</i>          |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| Professional Fees                           | [11]    | -                | (1.4)           | (2.6)           | (1.3)           | (1.6)           | (1.1)           | (1.1)           | (0.8)           | (1.1)           | (0.8)           | (0.9)            | (0.9)           | (0.9)           | (14.4)           |
| <b>NET CASH FLOWS</b>                       |         | <b>(\$26.2)</b>  | <b>(\$18.1)</b> | <b>\$48.9</b>   | <b>\$1.6</b>    | <b>\$19.5</b>   | <b>\$20.5</b>   | <b>(\$29.5)</b> | <b>\$7.6</b>    | <b>\$25.2</b>   | <b>\$23.8</b>   | <b>(\$58.9)</b>  | <b>\$11.3</b>   | <b>\$17.6</b>   | <b>\$43.3</b>    |
| <b>CASH</b>                                 |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| Beginning Balance                           |         | \$77.3           | \$51.2          | \$33.0          | \$81.9          | \$83.5          | \$103.0         | \$123.5         | \$94.0          | \$101.6         | \$126.9         | \$150.6          | \$91.8          | \$103.1         | \$77.3           |
| Net Cash Inflows / (Outflows)               |         | (26.2)           | (18.1)          | 48.9            | 1.6             | 19.5            | 20.5            | (29.5)          | 7.6             | 25.2            | 23.8            | (58.9)           | 11.3            | 17.6            | 43.3             |
| Other (FX)                                  |         | -                | -               | -               | -               | -               | -               | -               | -               | -               | -               | -                | -               | -               | -                |
| <b>ENDING CASH</b>                          |         | <b>\$51.2</b>    | <b>\$33.0</b>   | <b>\$81.9</b>   | <b>\$83.5</b>   | <b>\$103.0</b>  | <b>\$123.5</b>  | <b>\$94.0</b>   | <b>\$101.6</b>  | <b>\$126.9</b>  | <b>\$150.6</b>  | <b>\$91.8</b>    | <b>\$103.1</b>  | <b>\$120.7</b>  | <b>\$120.7</b>   |
| <b>BORROWING SUMMARY</b>                    |         |                  |                 |                 |                 |                 |                 |                 |                 |                 |                 |                  |                 |                 |                  |
| DIP Facility Credit Limit                   |         | \$157.5          | \$157.5         | \$157.5         | \$157.5         | \$157.5         | \$157.5         | \$157.5         | \$157.5         | \$157.5         | \$157.5         | \$157.5          | \$157.5         | \$157.5         | \$157.5          |
| DIP Draws                                   |         | 126.0            | -               | 31.5            | -               | -               | -               | -               | -               | -               | -               | -                | -               | -               | -                |
| DIP Principal Outstanding                   |         | 126.0            | 126.0           | 157.5           | 157.5           | 157.5           | 157.5           | 157.5           | 157.5           | 157.5           | 157.5           | 157.5            | 157.5           | 157.5           | 157.5            |
| DIP Availability                            |         | \$31.5           | \$31.5          | \$-             | \$-             | \$-             | \$-             | \$-             | \$-             | \$-             | \$-             | \$-              | \$-             | \$-             | \$-              |

1. The week shown as ending March 14, 2021 reflects a 6-day stub week from March 9 (the filing date) to 3/14/21.

2. Sales Receipts include collections from the Company's residential and commercial customers for the sale of energy, which primarily consists of electricity and natural gas, inclusive of sales tax. The sales forecast is based on historical sales patterns, seasonality, and management's current expectations.

3. Miscellaneous receipts reflect forecasted tax refunds and other receipts not sent from customers.

4. Energy & Delivery costs reflect the purchase energy from suppliers and the cost of delivery and transmission to the Company's customers.

5. Payroll disbursements reflect the current staffing levels and recent payroll amounts, inclusive of any payments associated with the Company's bonus programs.

6. Taxes reflect the remittance of sales taxes collected from customers and the Company's corporate income taxes.

7. Commissions include fees paid to customer acquisition contractors and suppliers.

8. Selling and Other Costs include selling, general, administrative and interest payments.

9. The Credit Facility Borrowings / (Repayments) assume USD\$ 100 million of the DIP is drawn immediately, with a subsequent draw for the remainder of the facility within the first few weeks of the proceedings.

10. Interest expenses & fees include interest and fees on the Company's credit facilities.

11. Professional Fees include fees for the Company's counsel and investment banker, the Monitor, the Monitor's Counsel, and the DIP lenders' professionals.

## Just Energy Group Inc. et al

CCA 13-Day Cash Flow Forecast

March 9, 2021

(CAD\$ in millions)

| Forecast Week                               |      | 3/9/21           | 3/10/21         | 3/11/21        | 3/12/21        | 3/13/21       | 3/14/21       | 3/15/21        | 3/16/21        | 3/17/21         | 3/18/21        | 3/19/21         | 3/20/21       | 3/21/21       | 13-Day Total     |
|---|------|------------------|-----------------|----------------|----------------|---------------|---------------|----------------|----------------|-----------------|----------------|-----------------|---------------|---------------|------------------|
|   |      | 1                | 2               | 3              | 4              | 5             | 6             | 7              | 8              | 9               | 10             | 11              | 12            | 13            | Total            |
| <b>RECEIPTS</b>                             |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| Sales Receipts                              | [1]  | \$8.7            | \$6.3           | \$6.9          | \$6.7          | \$ -          | \$ -          | \$8.2          | \$9.8          | \$8.0           | \$10.1         | \$12.4          | \$ -          | \$ -          | \$77.1           |
| Miscellaneous Receipts                      | [2]  | -                | -               | -              | -              | -             | -             | -              | -              | -               | -              | -               | -             | -             | -                |
| <b>Total Receipts</b>                       |      | <b>\$8.7</b>     | <b>\$6.3</b>    | <b>\$6.9</b>   | <b>\$6.7</b>   | <b>\$ -</b>   | <b>\$ -</b>   | <b>\$8.2</b>   | <b>\$9.8</b>   | <b>\$8.0</b>    | <b>\$10.1</b>  | <b>\$12.4</b>   | <b>\$ -</b>   | <b>\$ -</b>   | <b>\$77.1</b>    |
| <b>DISBURSEMENTS</b>                        |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| <i>Operating Disbursements</i>              |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| Energy and Delivery Costs                   | [3]  | (\$121.2)        | (\$45.8)        | (\$7.9)        | \$2.7          | \$ -          | \$ -          | (\$1.8)        | (\$7.0)        | (\$22.6)        | (\$6.1)        | (\$15.0)        | \$ -          | \$ -          | (\$224.6)        |
| Payroll                                     | [4]  | -                | -               | -              | -              | -             | -             | -              | -              | -               | -              | -               | -             | -             | -                |
| Taxes                                       | [5]  | -                | (0.1)           | -              | -              | -             | -             | (5.3)          | -              | -               | -              | -               | -             | -             | (5.4)            |
| Commissions                                 | [6]  | (0.0)            | -               | -              | (2.2)          | -             | -             | -              | (0.3)          | (3.2)           | -              | (0.6)           | -             | -             | (6.3)            |
| Selling and Other Costs                     | [7]  | (1.0)            | (1.0)           | (0.0)          | (1.0)          | -             | -             | (0.0)          | (1.1)          | (1.1)           | (0.0)          | (1.1)           | -             | -             | (6.6)            |
| <b>Total Operating Disbursements</b>        |      | <b>(\$122.2)</b> | <b>(\$46.9)</b> | <b>(\$7.9)</b> | <b>(\$0.5)</b> | <b>\$ -</b>   | <b>\$ -</b>   | <b>(\$7.1)</b> | <b>(\$8.4)</b> | <b>(\$26.9)</b> | <b>(\$6.2)</b> | <b>(\$16.7)</b> | <b>\$ -</b>   | <b>\$ -</b>   | <b>(\$242.8)</b> |
| <b>OPERATING CASH FLOWS</b>                 |      | <b>(\$113.5)</b> | <b>(\$40.6)</b> | <b>(\$1.0)</b> | <b>\$6.1</b>   | <b>\$ -</b>   | <b>\$ -</b>   | <b>\$1.1</b>   | <b>\$1.4</b>   | <b>(\$18.8)</b> | <b>\$3.9</b>   | <b>(\$4.3)</b>  | <b>\$ -</b>   | <b>\$ -</b>   | <b>(\$165.7)</b> |
| <i>Financing Disbursements</i>              |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| Credit Facility - Borrowings / (Repayments) | [8]  | \$126.0          | \$ -            | \$ -           | \$ -           | \$ -          | \$ -          | \$ -           | \$ -           | \$ -            | \$ -           | \$ -            | \$ -          | \$ -          | \$126.0          |
| Interest Expense & Fees                     | [9]  | (3.2)            | -               | -              | -              | -             | -             | -              | -              | -               | -              | -               | -             | -             | (3.2)            |
| <i>Restructuring Disbursements</i>          |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| Professional Fees                           | [10] | -                | -               | -              | -              | -             | -             | (1.4)          | -              | -               | -              | -               | -             | -             | (1.4)            |
| <b>NET CASH FLOWS</b>                       |      | <b>\$9.3</b>     | <b>(\$40.6)</b> | <b>(\$1.0)</b> | <b>\$6.1</b>   | <b>\$ -</b>   | <b>\$ -</b>   | <b>(\$0.4)</b> | <b>\$1.4</b>   | <b>(\$18.8)</b> | <b>\$3.9</b>   | <b>(\$4.3)</b>  | <b>\$ -</b>   | <b>\$ -</b>   | <b>(\$44.3)</b>  |
| <b>CASH</b>                                 |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| Beginning Balance                           |      | \$77.3           | \$86.7          | \$46.1         | \$45.0         | \$51.2        | \$51.2        | \$51.2         | \$50.8         | \$52.2          | \$33.4         | \$37.3          | \$33.0        | \$33.0        | \$77.3           |
| Net Cash Inflows / (Outflows)               |      | 9.3              | (40.6)          | (1.0)          | 6.1            | -             | -             | (0.4)          | 1.4            | (18.8)          | 3.9            | (4.3)           | -             | -             | (44.3)           |
| Other (FX)                                  |      | -                | -               | -              | -              | -             | -             | -              | -              | -               | -              | -               | -             | -             | -                |
| <b>ENDING CASH</b>                          |      | <b>\$86.7</b>    | <b>\$46.1</b>   | <b>\$45.0</b>  | <b>\$51.2</b>  | <b>\$51.2</b> | <b>\$51.2</b> | <b>\$50.8</b>  | <b>\$52.2</b>  | <b>\$33.4</b>   | <b>\$37.3</b>  | <b>\$33.0</b>   | <b>\$33.0</b> | <b>\$33.0</b> | <b>\$33.0</b>    |
| <b>BORROWING SUMMARY</b>                    |      |                  |                 |                |                |               |               |                |                |                 |                |                 |               |               |                  |
| DIP Facility Credit Limit                   |      | \$157.5          | \$157.5         | \$157.5        | \$157.5        | \$157.5       | \$157.5       | \$157.5        | \$157.5        | \$157.5         | \$157.5        | \$157.5         | \$157.5       | \$157.5       | \$ -             |
| DIP Draws                                   |      | 126.0            | -               | -              | -              | -             | -             | -              | -              | -               | -              | -               | -             | -             | -                |
| DIP Principal Outstanding                   |      | 126.0            | 126.0           | 126.0          | 126.0          | 126.0         | 126.0         | 126.0          | 126.0          | 126.0           | 126.0          | 126.0           | 126.0         | 126.0         | -                |
| DIP Availability                            |      | \$31.5           | \$31.5          | \$31.5         | \$31.5         | \$31.5        | \$31.5        | \$31.5         | \$31.5         | \$31.5          | \$31.5         | \$31.5          | \$31.5        | \$31.5        | \$ -             |

1. Sales Receipts include collections from the Company's residential and commercial customers for the sale of energy, which primarily consists of electricity and natural gas, inclusive of sales tax. The sales forecast is based on historical sales patterns, seasonality, and management's current expectations.

2. Miscellaneous receipts reflect forecasted tax refunds and other receipts not sent from customers.

3. Energy & Delivery costs reflect the purchased energy from suppliers and the cost of delivery and transmission to the Company's customers.

4. Payroll disbursements reflect the current staffing levels and recent payroll amounts, inclusive of any payments associated with the Company's bonus or programs.

5. Taxes reflect the remittance of sales taxes collected from customers and the Company's corporate income taxes.

6. Commissions include fees paid to customer acquisition contractors and suppliers.

7. Selling and Other Costs include selling, general, administrative and interest payments.

8. The Credit Facility Borrowings / (Repayments) assume USD\$ 100 million of the DIP is drawn immediately, with a subsequent draw for the remainder of the facility within the first few weeks of the proceedings.

9. Interest expenses & fees include interest and fees on the Company's credit facilities.

10. Professional Fees include fees for the Company's counsel and investment banker, the Monitor, the Monitor's Counsel, and the DIP lenders' professionals.

Court File No. \_\_\_\_\_

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

**March 9, 2021**

**REPORT ON CASH FLOW STATEMENT**

**(Paragraph 10.2(b) of the CCAA)**

The management of the Applicants has developed the assumptions and prepared the attached statement of projected cash flow as of March 9, 2021 consisting of (i) a 13-week cash flow forecast for the period March 9, 2021 to June 6, 2021 and (ii) a daily cash flow forecast for the 14-day period from March 9, 2021 to March 21, 2021 (together, the "**Forecasts**").

The purpose of the Forecasts is to estimate the liquidity requirements of the Applicants during the respective forecast periods. The hypothetical assumptions are reasonable and consistent with the purpose of the projections, and the probable assumptions are suitably supported and consistent with the plans of the Applicants and provide a reasonable basis for the Forecasts.

Since the Forecasts are based on future events, actual results will vary from the information presented and the variations may be material.

The Forecasts have been prepared solely for the purpose outlined above, using the probable and hypothetical assumptions set out in notes to the Forecasts. Consequently, readers are cautioned that the Forecasts may not be suitable for other purposes.

Dated at Houston, Texas, this 8<sup>th</sup> day of March 2021.

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Michael Carter  
Chief Financial Officer  
Just Energy Group Inc.

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-21-00 \_\_\_\_\_-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**PRE-FILING REPORT OF THE PROPOSED MONITOR**

**Thornton Grout Finnigan LLP**

TD West Tower, Toronto-Dominion Centre  
100 Wellington Street West, Suite 3200  
Toronto, ON M5K 1K7  
Tel: (416) 304-1616 / Fax: (416) 304-1313

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Lawyers for the proposed Monitor,  
FTI Consulting Canada Inc.



**THIS IS EXHIBIT N REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

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

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

Applicants

**AFFIDAVIT OF MICHAEL CARTER**

I, Michael Carter, of the Town of Flower Mound, in the State of Texas, MAKE OATH

AND SAY:

1. This affidavit is made in support of an application by Just Energy Group Inc. (“**Just Energy**”) and the other applicant companies listed in the style of cause above (collectively, the “**Applicants**”) for an Initial Order and related relief under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”).

2. I have been Just Energy’s Chief Financial Officer since September 2020. In that role, I am responsible for all financial-related aspects of Just Energy’s business. As such, I have personal knowledge of the matters deposed to in this affidavit, including the business and financial affairs of Just Energy and its subsidiaries. Where I have relied on other sources for information, I have stated the source of my information and I believe such information to be true.

3. All references to monetary amounts in this affidavit are in Canadian dollars unless noted otherwise.

**A. Overview**

4. Just Energy and its subsidiaries (collectively, the “**Just Energy Group**”) are retail energy providers specializing in delivering electricity and natural gas to consumer and commercial customers as well as energy-efficient solutions and renewable energy options. The Just Energy Group currently serves over 950,000 consumer and commercial customers, mostly in the United States and Canada.

5. Over the past few years, the Just Energy Group has taken steps to position itself for sustainable growth as an independent industry leader. Most notably, on September 28, 2020, Just Energy completed a balance sheet recapitalization transaction (the “**Recapitalization**”) through a plan of arrangement (the “**Arrangement**”) under section 192 of the *Canada Business Corporations Act* (the “**CBCA**”). The Arrangement was approved by a Final Order of the Ontario

Superior Court of Justice (Commercial List) dated September 2, 2020 and the Recapitalization closed on September 28, 2020. The Recapitalization was the culmination of a year-long strategic review process and reflected a comprehensive plan to strengthen Just Energy's business.

6. However, despite continued improving performance since the closing of the Recapitalization, the Just Energy Group is facing severe short-term liquidity challenges due to the recent unprecedented and catastrophic winter storm in Texas (the Just Energy Group's largest market). While the Just Energy Group employs a comprehensive hedging strategy to manage weather risk, the weather conditions in Texas were colder than anything experienced in decades, causing significantly higher than normal customer demand while also forcing significant electricity market supply offline. As a result, the Just Energy Group was forced to balance its demand through real time purchases through ERCOT (defined below).

7. While Texas was already experiencing extreme market pricing, the negative financial impact of the storm was exacerbated by the actions of Texas regulators. Texas's electricity grid, the Texas Interconnection, is one of the three main grids in the United States and largely operates independently with limited export and import capability. Unlike most other electricity markets in the United States, the Texas Interconnection is not subject to regulation by the Federal Energy Regulatory Commission ("FERC"). Instead, an independent system operator ("ISO") called Electric Reliability Council of Texas ("ERCOT") is solely responsible for managing the Texas Interconnection and ERCOT is only subject to regulation by the Texas Public Utility Commission ("PUCT").

8. In response to the winter storm, on February 15, 2021, the PUCT issued an order instructing ERCOT to set the real time settlement price of power at the high offer cap of U.S. \$9,000 per

megawatt hour (“MWh”) for over 100 consecutive hours (in contrast, the real time electricity price did not hit U.S. \$9,000 per MWh for even one 15-minute interval in 2020). As a result, the Just Energy Group was forced to balance its power supply through ERCOT at artificially high electricity prices and significantly increased ancillary service costs. The Just Energy Group estimates that it may have incurred losses and additional costs currently totaling over \$315 million as a result of PUCT and ERCOT’s actions and the winter storm.

9. The winter storm and the regulatory response has been devastating for other participants in the Texas electricity market as well. The largest power generation and transmission cooperative in Texas, Brazos Electric Power Cooperative, filed for Chapter 11 bankruptcy protection on March 1, 2021 after incurring an estimated U.S. \$2.1 billion in charges over seven days as reported in an article titled *Texas Power Firm Hit With \$2.1 Billion Bill Files for Bankruptcy*, attached as **Exhibit “A”**. In addition, ERCOT has already barred two electricity sellers, Entrust Energy Inc. and Griddy Energy LLC, from the Texas power market for failing to make payments after last month’s energy crisis as reported in an article titled *A Second Power Provider Defaults After Texas Energy Crisis*, attached as **Exhibit “B”**. The ERCOT wholesale market incurred charges of U.S. \$55 billion over a seven-day period, an amount equal to what it ordinarily incurs over four years.

10. ERCOT and PUCT have faced sustained criticism for their response to the winter storm. In recent weeks, both PUCT’s chair and several ERCOT board members have resigned and the ERCOT board voted to oust its CEO as reported in the article titled *ERCOT fires CEO, following resignation of head utility regulator, board members*, attached as **Exhibit “C”**. Potomac Economics, an independent market monitor hired by the state of Texas to assess ERCOT’s performance, concluded that ERCOT overpriced electricity for almost two days, resulting in U.S. \$16 billion in overcharges as noted in the article titled *Texas Watchdog Says Power Grid Operator*

*Made \$16 Billion Error*, a copy of which is attached as **Exhibit “D”**. In response, PUCT has indicated that it will not be reversing these overcharges despite its independent market monitor recommending that the charges be reversed, as reported in the article titled *Texas Opts Not to Fix \$16 Billion Power Overcharge*, a copy of which is attached as **Exhibit “E”**.

11. The Just Energy Group has disputed both the artificially high prices and the extraordinary ancillary costs charged by ERCOT. However, under ERCOT’s protocols, the Just Energy Group must pay any invoices within two days of receipt, even if it is disputing them. Otherwise, ERCOT can suspend the Just Energy Group’s market participation in as little as 2 days and transfer the Just Energy Group’s customers to another energy provider, called a Provider of Last Resort (“**POLR**”), on 5 days’ notice. The Texas market accounts for approximately 47% of the Just Energy Group’s embedded gross margin (“**EGM**”)<sup>1</sup> and is essential for the Just Energy Group maintaining going concern operations.

12. Despite the historic nature of the winter storm and the unprecedented resulting costs incurred by energy retailers, both ERCOT and PUCT have, to date, ignored the Just Energy Group’s requests to suspend ERCOT’s usual protocols. Therefore, the Just Energy Group had no option other than to pay its ERCOT invoices in Texas.

13. On March 5, 2021, the Just Energy Group received three invoices for approximately U.S. \$123.21 million from ERCOT, of which approximately U.S. \$96.24 million must be paid by end of day on March 9, 2021. On March 8, 2021, the Just Energy Group received from ERCOT (i) a notice that it must post approximately U.S. \$25.7 million of additional collateral within two

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<sup>1</sup> EGM is a rolling five-year measure of management’s estimate of future contracted energy and product gross margin.

business days; and (ii) three invoices for approximately U.S. \$ 25.46 million, of which approximately U.S. \$18.86 million is due by March 10, 2021. The Just Energy Group does not have enough liquidity to pay that amount without access to the DIP Facility (defined below). If the amount due is not paid, ERCOT can transfer all of the Just Energy Group's customers in Texas to a POLR, which would be devastating to the Just Energy Group's business.

14. The Just Energy Group's financial challenges have been exacerbated by the reaction of certain creditors and other stakeholders to the extreme weather event and significant amounts coming due in the near future. Bonding companies that issued surety bonds have demanded that the Just Energy Group provide more than \$30 million in additional collateral (with over \$20 million already provided and the rest expected by March 17). The bonding companies had either threatened to start the process of cancelling bonds issued by them if the Just Energy Group did not post additional collateral or had already started the process of cancelling the bonds they had issued and agreed to issue rescission notices upon receipt of the additional collateral. 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.

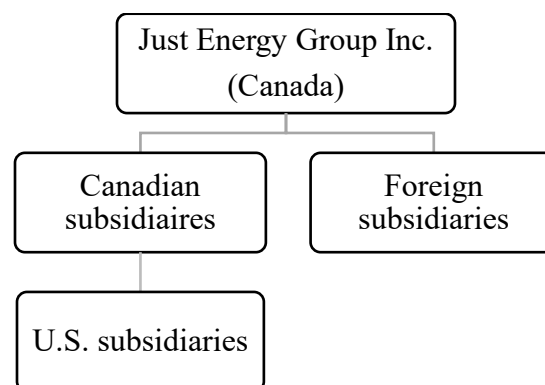
15. The Just Energy Group also has significant payables coming due in the next few weeks. On March 22, 2021, approximately \$270 million owing to counterparties under the ISO Services Agreements (defined below) will come due. In addition, over \$75 million owing to Commodity Suppliers (defined below) will be coming due by March 25, 2021. As such, the Just Energy Group has significant liabilities coming due that it cannot currently pay and are therefore insolvent. In these circumstances, the Applicants require immediate CCAA protection to ensure that they can continue as a going concern, service their significant customer base, maintain employment for almost 1,000 employees, and preserve enterprise value.

## B. Corporate Structure

16. Just Energy is the ultimate parent company of the Just Energy Group and the other Applicants are all direct or indirect subsidiaries of Just Energy. All of the Applicants are either borrowers under the Credit Facility (defined below) or have provided secured guarantees in respect of the Credit Facility.

17. While the limited partnerships listed in Schedule “A” (the “**Just Energy LPs**”) are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other provisions of an Initial Order under the CCAA extended to the Just Energy LPs in order to maintain stability and business operations through this restructuring process. The business and operations of the Applicants are heavily intertwined with that of the Just Energy LPs. In particular, certain of the Just Energy LPs hold most of the gas and electricity licenses granted by Canadian regulators pursuant to which the Just Energy Group conducts business in Canada.

18. A corporate chart showing the structure of the Just Energy Group as of November 10, 2020 is attached as **Exhibit “F”**. A simplified version of the corporate chart is below:



### (a) Just Energy Group Inc.

19. Just Energy is a CBCA corporation. It has two head offices: one in Mississauga, Ontario and one in Houston, Texas. Just Energy’s registered office is First Canadian Place, 100 King Street



West, Suite 2630, Toronto, Ontario. Its common shares (the “**Common Shares**”) are listed on the Toronto Stock Exchange (the “**TSX**”) and the New York Stock Exchange (the “**NYSE**”).

**(b) Canadian Subsidiaries**

20. The Canadian subsidiaries are corporations, limited partnerships, and unlimited liability companies that are directly or indirectly wholly owned by Just Energy. The material Canadian subsidiaries are set out below:

- (a) *Just Energy Corp.*: Just Energy Corp. is a direct subsidiary of Just Energy. It employs almost all of the Just Energy Group’s employees in Canada and is the general partner for all of the Just Energy operating subsidiaries listed below that are limited partnerships.
- (b) *Just Energy Ontario L.P. (Ontario), Just Energy Alberta L.P. (Alberta), Just Green L.P. (Alberta), Just Energy Manitoba L.P. (Manitoba), Just Energy B.C. Limited Partnership (British Columbia), Just Energy Québec L.P. (Quebec), Just Energy Prairies L.P. (Manitoba), Hudson Energy Canada Corp. (Canada), and Filter Group Inc.*: These are the Canadian operating entities for the Just Energy Group’s business.
- (c) *Just Energy Trading L.P. (Ontario)*: This entity is used to procure supply of energy commodities.

21. Just Energy also indirectly holds an approximate 8% fully diluted interest in ecobee Inc., a manufacturer and distributor of smart thermostats, located in Toronto, Ontario.

**(c) U.S. Subsidiaries**

22. The U.S. subsidiaries are corporations, limited liability companies and limited partnerships indirectly wholly owned by Just Energy. The material U.S. subsidiaries are noted below (all of which are formed under the laws of the State of Delaware, unless otherwise noted):

- (a) *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 Texas LP (Texas); Just Energy Pennsylvania Corp.; Just Energy Solutions Inc. (California); Just Energy Michigan Corp.; Hudson Energy Services LLC (New Jersey); Just Energy Limited; Fulcrum Retail Energy LLC d/b/a Amigo Energy (Texas); Tara Energy, LLC (Texas); Interactive Energy Group LLC; and Filter Group USA Inc.* These are the U.S. operating entities for the Just Energy Group's business.

**(d) Foreign Subsidiaries**

23. Until recently, the Just Energy Group had operations in several countries outside North America. In 2019, Just Energy made a strategic decision to focus on its North American operations. The Just Energy Group has completed sales of its U.K., Irish, and Japanese operations. On February 4, 2021, the Just Energy Group entered into an agreement to sell its German operations for nominal consideration. However, due to the current circumstances resulting from the Texas weather event, the preconditions for closing this sale may no longer be achievable and the German operations will likely be wound down instead. The Just Energy Group still has an Indian subsidiary and has employees in India that support the Just Energy Group's operations in North America.

**C. The Just Energy Group's Business**

**(a) Products and Services Offered by the Just Energy Group**

24. The Just Energy Group primarily supplies electricity and natural gas commodities to both consumer and commercial customers. These sales are made under various arrangements, mainly under long-term fixed price contracts with some customers remaining on month-to-month variable-price after their long-term contract expired. As of December 31, 2020, the Just Energy Group had a total of 956,000 customers (859,000 consumer and 97,000 commercial customers).

25. The Just Energy Group also provides various green products. Customers can choose an appropriate JustGreen program to supplement their natural gas and electricity contracts and offset their carbon footprint. In addition, through terrapass (a Just Energy subsidiary), customers can offset their environmental impact by purchasing high quality environmental products. Terrapass supports projects throughout North America that destroy greenhouse gases, produce renewable energy, and restore freshwater ecosystems through the purchase of renewable energy credits and carbon offsets.

26. The Just Energy Group also offers water filtration systems through Filter Group Inc. ("**Filter Group**") in Canada and through its subsidiary Filter Group US Inc. in the United States.

27. The Just Energy Group's business is divided into two main segments, a consumer segment and a commercial segment.

**(i) Consumer Segment**

28. The consumer segment sells gas and electricity to customers with annual consumption equal to or less than 15 residential customer equivalents (“RCEs”).<sup>2</sup> Consumer customers made up 36% of the Just Energy Group’s RCE base and accounted for approximately 60% of sales in the quarter ended December 31, 2020. Products are marketed to consumer customers primarily through digital and retail sales channels.

29. For its retail sales channels, in the United States, the Just Energy Group enters into contracts with (i) retail establishments to obtain access to their premises to market to and sign-up new customers, and (ii) staffing companies which provide sales agents who carry out the marketing activities to attract and sign-up customers and who are paid on commission.

30. The retail sales channel is a competitive space, and the Just Energy Group’s relationships with the retailers and staffing companies are critical for its ability to attract customers directly and maintain and grow its consumer business. The Just Energy Group experiences some attrition of customers on an ongoing basis (approximately 2 percent a month), and so marketing to and signing up new customers is essential for sustaining and growing the business.

31. For certain retailers, the Just Energy Group has exclusive relationships pursuant to which only the Just Energy Group is permitted to market in some or all of that retailer’s stores, including certain retailers where the Just Energy Group is able to target a more lucrative clientele. The Just Energy Group has long-standing relationships with certain staffing companies, which provide sales representatives to enroll consumer customers, and train sales agents and ensure that sales agents

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<sup>2</sup> A unit of measurement equivalent to a customer using 2,815 m<sup>3</sup> (or 106 GJs or 1,000 Therms or 1,025 CCFs) of natural gas on an annual basis or 10 MWh (or 10,000 kWh) of electricity on an annual basis, which represents the approximate amount of gas and electricity used by a typical household in Ontario, Canada.

act in accordance with standards and codes of conduct set by both the staffing agencies and the retailers.

**(ii) Commercial Segment**

32. The commercial segment sells gas and electricity to customers with annual consumption over 15 RCEs. Commercial customers made up 64% of the Just Energy Group's RCE base and accounted for approximately 40% of sales in the quarter ended December 31, 2020. Sales to commercial customers are made through three main channels: brokers, door-to-door commercial independent contractors, and inside commercial sales representatives.

33. Brokers and independent contractors are the two most significant channels through which the Just Energy Group attracts and renews commercial customers. Independent contractors directly market the Just Energy Group to potential commercial customers whereas brokers are contacted by potential customers and then reach out to energy sellers to bid on the opportunity. Both brokers and independent contractors are paid solely on commission.

34. The Just Energy Group's relationship with brokers and independent contractors is critical for its ability to attract and renew commercial customers. As noted above, in light of ongoing customer attrition, marketing to and signing up new customers is essential for sustaining and growing the Just Energy Group's business.

35. There is significant competition for commercial customers and the Just Energy Group attracts and renews the vast majority of its commercial customers through these channels. The brokers and independent contractors have direct relationships with customers and could easily divert the customers elsewhere. Moreover, if the Just Energy Group does not pay outstanding

amounts owing to brokers, those brokers may conclude that the Just Energy Group is not financially reliable and choose to refer customers to other retailers.

**(b) Just Energy Group operates in heavily regulated markets**

36. The natural gas and electricity markets that the Just Energy Group operates in are highly regulated. I am advised by Richard King of Osler, Hoskin & Harcourt LLP (“**Osler**”), Canadian counsel for the Applicants, and believe that the fundamental purpose of the regulatory regime governing energy (gas and electricity) retailers can be traced back to energy sector reforms across much of North America that began in the 1980s and 1990s. Through these reforms, non-utility power generators and retailers/marketers gained access to many North American energy markets, which were previously monopolized by traditional public utilities. These regulatory regimes were reformed to facilitate and encourage companies like the Just Energy Group to enter energy markets.

37. I am further advised by Mr. King and believe that the rationale for opening the energy commodity market to competition was to provide gas and electricity to consumers at lower cost, through price competition, as well as offering greater choice for customers. As a corollary to opening the market to greater competition for gas or electricity retailers like the Just Energy Group, the regulatory regime encompasses two important public interest goals:

- (a) to provide for consumer protection in the marketing of gas or electricity at the retail level; and
- (b) to establish standard contractual terms and conditions governing the relationship between energy retailers and the incumbent utilities, largely to ensure that utilities

do not utilize their dominant monopoly position to impair retailers from selling and contracting with retail customers.<sup>3</sup>

38. In most jurisdictions where it operates, the Just Energy Group is subject to oversight from public utility commissions or independent electricity system operators responsible for ensuring the financial stability of market participants and continued supply to customers. These regulators could take various steps if they are concerned about the Just Energy Group's financial stability or ability to continue as a going concern, including requiring the Just Energy Group to post additional collateral (or provide other financial security) or taking steps to suspend or revoke the Just Energy Group's licenses.

39. In Canada, certain of the Just Energy LPs (the "**Licensed Entities**") have received gas and electricity licenses from regulators in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario. I am advised by Mr. King and believe that the licences and registrations are granted by provincial regulatory bodies (the "**Provincial Regulators**") and are necessary to permit the Licensed Applicants to market and sell natural gas and/or electricity to consumers in the particular province.

40. In addition, I am advised by Mr. King and believe, Hudson Energy Canada Corp. (an Applicant) is registered as a market participant with the Alberta Electricity System Operator (the "**ISO Regulator**"). This registration allows the purchase and sale of electricity in the wholesale electricity market in Alberta and the import/export of electricity with neighbouring jurisdictions. Participation in the wholesale electricity market is essential to the Just Energy Group's ability to

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<sup>3</sup> These licensing, code of conduct, and mandatory contractual terms are set out in legislation as well as Rules, Codes and decisions issued by the Provincial Regulators.

supply electricity to retail customers in Alberta and neighbouring jurisdictions. I am advised by Mr. King and believe that an insolvency event constitutes an event of default under the applicable Market Rules, which permit the ISO Regulator to suspend trades and participation in the market, and then terminate the market registration. In relation to the ISO Regulator, the Just Energy Group has posted all required collateral.

41. I am further advised by Mr. King and believe the Licensed Entities are under certain obligations to the Provincial Regulators, including to notify some of the Provincial Regulators of any “material change” in their businesses. It is likely that a CCAA filing would constitute such a material change. At least two Provincial Regulators have expressed concern about the Just Energy Group’s ongoing viability. The queries were prompted by media reports arising from Just Energy’s public disclosure about its current financial challenges. In addition, a market participant in Manitoba has requested that the Provincial Regulator authorize the utility to no longer permit the Licensed Entity to enroll new customers in Manitoba. A copy of the request is attached as **Exhibit “G”**.

42. I am advised by Mr. King and believe that, absent the Regulatory Stay (defined below), these regulators could respond to the Applicants’ CCAA filing by terminating the licenses they have granted or imposing other conditions, and that these measures may result in the Just Energy Group losing its ability to conduct business with its customers in the applicable provinces. Without the stable of customer contracts that the Licensed Entities have invested many years developing, the Applicants will instantly lose vital revenue streams. A chart including information concerning the Provincial Regulators and the actions they could potentially take against the Just Energy Group is attached as **Exhibit “H”**.



43. As part of the proposed Initial Order, the Applicants are seeking to stay the Provincial Regulators from, among other things, terminating the licenses granted to the Licensed Entities. With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to its contractual counterparties (primarily its ISOs and utilities) in the ordinary course, which is reflected in the Cash Flow Forecast. Despite continuing to make such payments, the Provincial Regulators may still attempt to take steps to terminate the Licensed Entities in Canada or impose other conditions. Accordingly, unless the Provincial Regulators are stayed, the Just Energy Group may not be able to continue business in the applicable provinces and present a viable restructuring plan.

44. The Just Energy Group is also subject to regulation by the Federal Energy Regulatory Commission (“**FERC**”) and by regulators in the following U.S. states: Texas, Connecticut, California, Delaware, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Ohio, Pennsylvania, and Virginia.

45. I am advised by Kirkland & Ellis LLP (“**Kirland**”), U.S. counsel for the Applicants, that the Applicants’ entities that have been issued gas and electricity licenses (the “**U.S. Licensed Entities**”) by regulators in the United States (the “**U.S. Regulators**”) are susceptible to similar concerns as those applicable to the Licensed Entities regarding the risk that such licenses can be terminated or have other conditions imposed on them, which may result in the Just Energy Group losing its ability to conduct business with its customers in the United States. With the benefit of the DIP Facility, the Applicants intend to continue making payments to the ISOs and utilities in the ordinary course, which is reflected in the Cash Flow Forecast. Despite continuing to make such payments, the U.S. Regulators may still attempt to take steps to terminate the U.S. Licensed Entities’ licenses in the United States or impose other conditions. Accordingly, in conjunction with

the Chapter 15 Case (defined below), the Applicants are also seeking to stay the U.S. Regulators from, among other things, terminating the licenses granted to the U.S. Licensed Entities.

**(c) Employees and Employee Benefits**

46. As of March 1, 2021, the Just Energy Group employed approximately 979 full-time employees and 5 part-time employees. The geographic distribution of the Just Energy Group's employees is as follows:

| <b>Province / Territory</b>   | <b>Number of Employees</b> |
|-------------------------------|----------------------------|
| <b>Canada</b>                 |                            |
| Ontario                       | 324                        |
| Alberta                       | 6                          |
| British Columbia              | 1                          |
| New Brunswick                 | 1                          |
| Saskatchewan                  | 1                          |
| <i>Total (Canada)</i>         | 333                        |
| <b>United States</b>          |                            |
| Texas                         | 351                        |
| Other states                  | 30                         |
| <i>Total (United States)</i>  | 381                        |
| <b>Other</b>                  |                            |
| India                         | 265                        |
| <b><i>Total (overall)</i></b> | <b>979</b>                 |

47. In addition, as of March 1, 2021, the Just Energy Group contracts with 23 independent contractors. The Just Energy Group's employees are all non-unionized and there are no applicable collective agreements.

**(i) Stock-Based Compensation Plans**

48. The following sections describe certain stock-based compensation plans currently maintained by the Just Energy Group.

**(A) Employee Share Purchase Plan**

49. Certain employees of the Just Energy Group are eligible to participate in the Employee Share Purchase Plan (“**ESPP**”) that awards Common Shares, subject to the terms and conditions of the ESPP. There are separate ESPPs for Canadian and U.S. employees:

- (a) The *Canadian ESPP* is maintained for employees of Just Energy Corp. and its subsidiaries, subject to certain eligibility criteria. Eligible employees can have 2 percent of their salaries deducted for the program, which amount is matched by their employer. Employee and employer contributions are used by the administrative agent, Solium Capital Inc., to purchase Common Shares through normal market purchases. Awards of the Common Shares generally vest after two years from the date on which the employee first joins the Canadian ESPP. During the vesting period, all unvested Common Shares and all dividends from such unvested units are held in trust (the “**Canadian ESPP Trust**”). As of February 28, 2021, there are 144 current employees and 99 former employees participating in the Canadian ESPP. The share value of the Canadian ESPP Trust is approximately \$156,236.
  
- (b) The *U.S. ESPP* is maintained for employees of U.S. subsidiaries of Just Energy, subject to certain eligibility criteria. Eligible employees can have 3 percent of their salaries deducted for the program, which amount is matched by their employer. Employee and employer contributions are used by the administrative agent, Computershare Trust Company of Canada (“**Computershare**”), to acquire Common Shares. Awards of shares generally vest after six months of participation in the program. During the vesting period, all unvested shares and all dividends

from such unvested shares are held in trust (the “**U.S. ESPP Trust**”). As of February 28, 2021, there are 120 current employees and 49 former employees participating in the US ESPP and the share value of the U.S. ESPP Trust is approximately U.S. \$143,421.

### **(B) Equity Compensation Plan**

50. Just Energy’s 2020 Equity Compensation Plan, which was approved as part of the Recapitalization, provides for the issuance of Restricted Share Units (“**RSUs**”), Performance Share Units (“**PSUs**”), Options, and Deferred Share Units (“**DSUs**”). Currently, there are no RSUs or PSUs issued and outstanding. There is an aggregate of 190,983 DSUs issued to 7 directors and an aggregate of 650,000 options issued to 9 executives with an exercise price of \$8.46 each.

### **(C) Retirement Savings Plans**

51. Certain full-time employees are entitled to participate in (a) the group registered retirement savings plan for Canadian resident employees (“**RRSP**”) maintained by Just Energy Corp., (b) the profit sharing/401(k) plan for U.S. resident employees (“**401(k)**”) maintained by Just Energy (U.S.) Corp., and (c) the deferred profit sharing plan (“**DPS Plan**”) maintained by Just Energy Corp.

52. The RRSP is offered by Just Energy Corp. and is available to all full-time Canadian resident employees of Just Energy Corp. Just Energy Group does not make contributions to the RRSP.

53. The 401(k) is offered by Just Energy (U.S.) Corp. and is available to employees of Just Energy (U.S.) Corp., Just Energy Marketing Corp., and Just Energy Limited, I.E.G. Just Energy (U.S.) Corp. may make discretionary contributions to the 401(k). In 2020, the Just Energy Group contributed U.S. \$929,721 to the 401(k).

54. Full time employees who have materially and significantly contributed to the prosperity and profits of Just Energy Corp., as determined by the Board of Directors of Just Energy Corp., are entitled to participate in the DPS Plan. Just Energy Corp. contributes to the DPS Plan in the amount of two percent of any DPS Plan registered-employee's yearly salary, excluding overtime and bonuses. DPS Plan funds are held in trust and administered by a trustee. Upon retirement or death, the value of the DPS Plan registered-employee's account is paid out in the form of a cash refund. If the DPS Plan-registered employee is terminated prior to retirement after two years of continuous membership in the DPS Plan, he or she is entitled to receive a cash refund equal to the value of his or her account. Just Energy Corp. contributed approximately \$352,532 to the DPS Plan in 2020.

**(ii) Health and Welfare Benefits**

55. Just Energy (U.S.) Corp. offers group medical, prescription, dental, vision and disability benefits as well as basic life insurance to its full-time employees ("**U.S. Health and Welfare Benefits**"). U.S. Health and Welfare Benefits are effective following 30 days of continuous employment. Just Energy (U.S.) Corp. made total contributions of approximately U.S. \$3,102,330 in 2020 in respect of the U.S. Health and Welfare Benefits.

56. Just Energy Corp. offers group disability, prescription, dental, and health benefits as well as basic life insurance to its full-time and certain part-time employees ("**Canadian Health and Welfare Benefits**"). Canadian Health and Welfare Benefits are effective for full time salaried employees from the first day of employment. Canadian Health and Welfare Benefits are effective for full-time hourly and eligible part-time employees effective following 3 months of employment. Just Energy Corp. made total contributions of approximately \$2,520,370 in respect of the Canadian Health and Welfare Benefits in 2020.

**(d) Suppliers**

57. The Just Energy Group transacts with various suppliers to purchase gas and electricity (the “**Commodity Suppliers**”). The Just Energy Group typically purchases gas and electricity for larger commercial customers when it executes the contract for that customer. For remaining customers, supplies are purchased based on forecasted consumption. Commodity and volume forecasts are developed using historical data and current market conditions.

58. In addition to agreements for the physical supply of gas and electricity, the Just Energy Group also enters into hedge contracts with Commodity Suppliers in order to minimize commodity and volume risk. These include derivative instruments such as physical forward contracts and options and financial swap contracts and options that are designed to fix the price of supply for estimated customer commodity demand. The Just Energy Group also purchases various weather derivatives to mitigate its exposure to variances in customer requirements that are driven by changes in expected weather conditions.

59. The Just Energy Group evaluates and manages weather-related risks by analyzing historically observed weather and commodity scarcity scenarios in its various markets. The Just Energy Group’s current portfolio and forecasts are stress tested against multiple scenarios to estimate a range of revenue and supply outcomes. Scenarios are constructed using historical consumption, weather, load, and price patterns adjusted for known and expected market changes. Scenarios include events such as a polar vortex, the Texas 2011 heat wave, El-Nino winters, and other severe weather events. Based on the forecasts, the Just Energy Group will then layer in its hedging strategy under its risk management policy. In its planning for the current winter season (November 2020 – March 2021), the Just Energy Group had positioned its portfolio under all

known historical weather and commodity scarcity scenarios to not have its exposure exceed \$10 million in the aggregate.

60. In addition to supply agreements, the Just Energy Group is also party to ISO services agreements (the “**ISO Services Agreements**”) with certain Commodity Suppliers (in such capacity, the “**ISO Services Providers**”). The most significant is an Independent Electricity System Operator Scheduling Agreement (the “**BP Agreement**”) with BP Energy Company (“**BP**”) pursuant to which BP provides a variety of services as well as working capital and credit support:

- (a) BP provides all services and takes all actions required for the scheduling and arranging for the delivery of all physical sales of energy by Hudson Energy Services, LLC.
- (b) BP makes certain payments to ISOs monitoring the electrical power system in certain jurisdictions on behalf of the Just Energy Group. The payments to the ISOs must be made daily but BP provides the Just Energy Group on average 35 days to repay these amounts as the amounts due from the current month are due on the 20th day after month end or the first business day thereafter.
- (c) BP posts collateral and provides credit support for the Just Energy Group with ISOs, which relieves the Just Energy Group of the obligation to post the collateral related to its load requirements.

61. The services provided under the BP Agreement are critical to the delivery of energy to the Just Energy Group’s commercial customers. Absent this agreement, the Just Energy Group would

be obligated to provide these services itself and would be subject to shorter payment terms for amounts owing to the ISOs.

**(e) Distribution Arrangements**

62. The Just Energy Group transacts with various third-party local distribution companies (“LDCs”) to distribute electricity and natural gas to both commercial and consumer customers. The Just Energy Group also receives certain customer billing and customer collection services from LDCs in various markets, as described in greater detail below. These LDC agreements are critical to the delivery of electricity and natural gas in the Just Energy Group’s markets.

63. The Canadian counterparties to the LDC Agreements are incumbent public utilities in all of the Canadian provinces where the Licence-holders carry on business. They include both privately-owned entities (such as Enbridge Gas, Fortis BC, and ATCO Gas) and publicly-owned entities (such as Toronto Hydro, SaskEnergy, and Cit of Lethbridge). I am advised by Mr. King and believe that, whether these counterparties may be public or private, they are themselves regulated entities and that, in most cases, the terms of the LDC Agreements with the Licensed Entity are established and approved by the Provincial Regulators.

64. In respect of the Just Energy Group’s electricity retail services, LDCs provide customer billing services in all electricity markets except Alberta and Texas. The LDCs also provide collection services, including the collection and remittance to the Just Energy Group of the commodity portion of each customer’s account for a small monthly fee, except in Alberta and Texas, and with respect to some Ohio utilities. In the case of some Ohio utilities, the LDCs provide collection services only until the account is delinquent. In Alberta and Texas, the Just Energy Group conducts billing and collection directly. In Ontario, Massachusetts, Delaware, New York,



Pennsylvania, New Jersey, Illinois, Maryland, and Michigan, and in the case of some Ohio utilities, LDCs assume 100% of the risk associated with default in payment by customers.

65. In respect of the Just Energy Group's natural gas retail services, customers purchase gas supply directly from Just Energy's operating entities, which is distributed by the LDCs. With the exception of Alberta, the LDCs provide customer billing services. In all markets except Alberta, Illinois and California, the LDCs provide collection services, including the collection and remittance to the Just Energy Group of the commodity portion of each customer's account for a small monthly fee. In Illinois and California, the LDCs provide collection services only until the account is delinquent. In Ontario, British Columbia, Manitoba, Quebec, New York, Saskatchewan, Ohio, Maryland, New Jersey, New York, Pennsylvania, Indiana, and Michigan, each LDC assumes 100% of the credit (receivable) risk associated with default in payment by consumer and commercial customers. In all Canadian markets except for Alberta, the LDCs bill and collect from end-use customers (including the Just Energy Group's customers) and remit the commodity component of the bill to the Just Energy Group (less a small charge). In Alberta and Texas, the Just Energy Group bills and collects from end-use customers and pays the LDCs for providing transmission and distribution services for the customer.

**(f) Surety Bonds**

66. Pursuant to arrangements with several bonding companies, such bonding companies have issued surety bonds to various counterparties including states, regulatory bodies, utilities (including LDCs), and various other surety bond holders in return for a fee and/or meeting certain collateral posting requirements. Such surety bond postings are required to operate in certain states or markets. As at December 31, 2020, the total surety bonds issued were \$46.3 million.

67. Most bonding companies can require collateral on demand at any time, whereas one is required to give 30 days' notice. If the Just Energy Group does not discharge the liability or post the required collateral, the bonding companies have the right to cancel the underlying bond within as early as 10 days. Just Energy and various other members of the Just Energy Group have entered into indemnity agreements with the bonding companies with respect to such surety bonds. The bonding companies have already demanded that the Just Energy Group post approximately \$34 million in additional collateral.

68. The cancellation of certain bonds may trigger the suspension or cancellation of licenses necessary to operate, and the suspension or cancellation of all services including commodity delivery services provided by LDCs to consumers that would force the transfer of Just Energy's customers back to the utilities or regulated energy providers by the various utility commissions. This would affect the Just Energy Group's business in many significant markets making up a vast majority of its customer base, including Texas, Alberta, Saskatchewan, Illinois, Pennsylvania, Ohio, Michigan, New York, California, New Jersey, and British Columbia.

**(g) Banking and Cash Management System**

69. Just Energy maintains a centralized cash management system to consolidate and track funds generated by the operations of Just Energy and its subsidiaries.

70. Just Energy and certain subsidiaries have accounts at each of Canadian Imperial Bank of Commerce ("**CIBC**"), JPMorgan Chase and its affiliates ("**JPMorgan**"), Royal Bank of Canada ("**RBC**"), TD Canada Trust ("**TD**"), FirstCaribbean International Bank ("**CIBC First Caribbean**"), Allied Irish Banks ("**AIB**"), and Erste Bank Hungary Zrt. ("**Erste Bank**").

71. Just Energy and a number of other Just Energy Group companies<sup>4</sup> (collectively, the “**Bank Account Holders**”) maintain accounts at one or more of the above banks. Collectively, the Bank Account Holders maintain 36 accounts at CIBC, 60 accounts at JPMorgan, 3 accounts at TD, 2 accounts at AIB, and 1 account at each of RBC, CIBC First Caribbean and Erste Bank (the “**Bank Accounts**”). The Bank Accounts are either CAD, USD, EUR, GBP, or INR denominated. While most Bank Accounts are domiciled within Canada or the United States, a small number are domiciled outside of North America in Ireland, the United Kingdom, and Germany. These accounts in Ireland and Germany pertain to non-core businesses that the Just Energy Group is in the process of divesting or winding down.

72. For accounts held by Canadian Bank Account Holders, the Just Energy Group is in the process of decentralizing its cash management system with CIBC. Upon completion, it is expected that all account activity for outgoing wire or electronic funds transfer (“**EFT**”) direct deposits will need to be fully funded in advance. Pre-authorized debits from customer accounts will be subject to a daily limit.

73. For accounts held by U.S. Bank Account Holders, Just Energy has in place a cash pooling mechanism and zero-balance account service among most of the JPMorgan accounts that

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<sup>4</sup> 11929747 Canada Inc., Filter Group Inc., Filter Group USA Inc., Fulcrum Retail Energy LLC, Fulcrum Retail Holdings LLC, Just Energy Corp., Just Energy Group Inc., Just Management Corp.; Just Energy Finance Holding Inc.; Just Energy Foundation Canada; Just Energy Trading L.P.; Ontario Energy Commodities Inc.; Just Energy Advanced Solutions Corp.; Just Energy Advanced Solutions LLC; Just Energy Prairies L.P.; Just Energy (Québec) L.P.; Just Energy (B.C.) Limited Partnership; Just Green L.P.; Just Energy Ontario L.P.; Just Energy Manitoba L.P.; JE Services Holdco I Inc.; Just Energy Alberta L.P.; JE Services Holdco II Inc.; Just Energy Finance Canada ULC; Momentis Canada Corp.; Universal Energy Corporation; Hudson Energy Canada Corp.; 8704104 Canada Inc; Tara Energy LLC; Just Energy Foundation USA, Inc.; Just Energy (U.S.) Corp.; Just Energy Marketing Corp.; Just Energy Illinois Corp.; Just Energy New York Corp.; Just Energy Indiana Corp.; Just Energy Texas I Corp.; Just Energy Michigan Corp.; Just Energy Massachusetts Corp.; Just Energy Solutions Inc.; Just Energy Pennsylvania Corp.; Just Solar Holdings Corp.; Interactive Energy Group LLC; Just Energy Services Limited; Just Energy (U.K.) Limited; Just Energy (Ireland) Limited; Just Energy Germany GmbH; Just Energy Deutschland GmbH; Just Energy (Finance) Hungary Zrt; and JEBPO Services LLP.

automatically conducts transfers to ensure a zero-balance is achieved in U.S. accounts on a daily basis. Just Energy has a master account (the “**Master Account**”) used to sweep and replenish the zero balanced accounts. Upon business close on a daily basis, positive cash balances from zero-balanced accounts are automatically swept into the Master Account on a daily basis. Negative cash balances are likewise replenished daily from the Master Account.

74. The Just Energy Group maintains ISDA Master Agreements with HSBC Bank Canada (“**HSBC**”), National Bank of Canada, ATB Financial and the Bank of Nova Scotia, specifically to transact foreign exchange hedge transactions (“**FX hedges**”). As of March 1, 2021, the Just Energy Group held approximately U.S. \$105 million in FX hedges.

**D. The Financial Position of the Just Energy Group**

75. A copy of Just Energy’s consolidated audited financial statements for the fiscal year ended March 31, 2020 are attached as **Exhibit “I”** and a copy of Just Energy unaudited financial statements for the quarter ended December 31, 2020 are attached as **Exhibit “J”**. These are Just Energy’s most recent publicly disclosed annual and quarterly financial statements respectively and have been prepared on a consolidated basis for the Just Energy Group. Certain information contained in Just Energy’s latest quarterly financials is summarized below.

76. The latest quarterly financial statements include a going concern note explaining that, following the recent extreme cold weather event in Texas, the Just Energy Group’s ability to continue as a going concern for the next 12 months is dependent on the company meeting the potential liquidity challenges and potential non-compliance with debt covenants from this event. The note further explained that there can be no assurance that Just Energy will be able to address these challenges with its stakeholders or otherwise, and any inability or failure of the company to

appropriately address such challenges could materially and adversely impact the business, operations, financial condition and operating results of the Just Energy Group and that these material uncertainties may cast significant doubt upon Just Energy's ability to continue as a going concern.

**(a) Assets**

77. As at December 31, 2020, the total assets of the Just Energy Group had a book value of approximately \$1,069,042,000 and consisted of the following (which figures are in thousands of dollars):

|   |           |
|---|-----------|
| <b>Current assets: \$606,947</b>          |           |
| Cash and cash equivalent                  | \$66,635  |
| Restricted cash                           | \$207     |
| Trade and other receivables, net          | \$344,080 |
| Gas in storage                            | \$16,185  |
| Fair value of derivative financial assets | \$29,196  |
| Income taxes recoverable                  | \$4,928   |
| Other current assets                      | \$143,145 |
| Assets classified as held for sale        | \$2,571   |
| <b>Non-current assets: \$462,095</b>      |           |
| Investments                               | \$32,889  |
| Property and equipment, net               | \$20,638  |
| Intangible assets, net                    | \$86,618  |
| Goodwill                                  | \$264,651 |
| Fair value of derivative financial assets | \$20,071  |

|                            |                    |
|----------------------------|--------------------|
| Deferred income tax assets | \$3,414            |
| Other non-current assets   | \$33,814           |
| <b>Total Assets</b>        | <b>\$1,069,042</b> |

**(b) Liabilities**

78. As at December 31, 2020, the total liabilities of the Just Energy Group had a book value of approximately \$1,284,885,000 and consisted of the following (which figures are in thousands of dollars):

|  |                    |
|--|--------------------|
| <b>Current liabilities: \$607,464</b>                          |                    |
| Trade and other payables                                       | \$472,763          |
| Deferred revenue   | \$8,909            |
| Income taxes payable   | \$3,434            |
| Fair value of derivative financial liabilities                 | \$110,166          |
| Provisions   | \$5,945            |
| Current portion of long-term debt                              | \$3,535            |
| Liabilities associated with assets classified as held for sale | \$2,712            |
| <b>Non-current liabilities: \$677,421</b>                      |                    |
| Long-term debt   | \$515,233          |
| Fair value of derivative financial liabilities                 | \$136,329          |
| Deferred income tax liabilities                                | \$2,715            |
| Other non-current liabilities                                  | \$23,144           |
| <b>Total liabilities</b>                                       | <b>\$1,284,885</b> |

**(c) Stockholder's Deficit**

79. As at December 31, 2020, the shareholders deficit in the Just Energy Group was \$215,843,000 and consisted of the following (which figures are in thousands of dollars):

|  |                    |
|--|--------------------|
| Shareholders' capital                  | \$1,537,863        |
| Contributed deficit                    | \$(12,469)         |
| Accumulated deficit                    | \$(1,829,210)      |
| Accumulated other comprehensive income | \$88,388           |
| Non-controlling interest               | \$(415)            |
| <b>Total shareholders' deficit</b>     | <b>\$(215,843)</b> |

**(d) Capital Structure**

80. The Just Energy Group's capital structure includes trade debt, the Credit Facility, the Term Loan, the Subordinated Notes, and Common Shares, each of which is defined and described below. Below is a table setting out the priority of payment of the significant debt owed by the Just Energy Group:

| <b>Tier</b> | <b>Items</b>                   | <b>Date</b>                 | <b>Approximate Amount</b> |
|-------------|--------------------------------|-----------------------------|---------------------------|
| Tier 1      | Secured Suppliers AP           | March 31, 2021 <sup>5</sup> | \$244 million             |
| Tier 2      | Credit Facility Lenders        | March 5, 2021               | \$331.82 million          |
|             | Suppliers MTM (Liability Only) | March 1, 2021               | \$146.17 million          |

<sup>5</sup> This amount is an estimate based on a forecast of Secured Supplier AP estimated at March 31, 2021. An estimate has been included to give an indication of the expected quantum of this category following the impact of the Texas weather event. As of January 31, 2021, the Just Energy Group owed its Secured Suppliers approximately \$198.96 million.

|        |  |                   |                  |
|--------|--|-------------------|------------------|
|        | ISO Service Obligations (Subject to Cap)   | March 5, 2021     | \$94.5 million   |
| Tier 3 | ISO Service Obligations (In Excess of Cap) | March 5, 2021     | \$177.66 million |
| Tier 4 | Term Loan                                  | December 31, 2020 | \$273.48 million |
| Tier 5 | Subordinated Notes                         | December 31, 2020 | \$13.2 million   |

81. Attached as **Exhibit “K”** is a letter dated March 4, 2021 that Just Energy received from BP in the context of ongoing discussions regarding the effect of the Texas weather event on Just Energy. The letter advises that BP disagrees with the characterization of amounts due from Just Energy as Tier 2 and Tier 3 obligations and that such amounts are Tier 1 obligations. On March 5, 2021, Just Energy responded to the BP letter stating that Just Energy was happy to look into the matter but believed it is largely an intercreditor issue that will be resolved over time. The Applicants do not intend to take a position on this intercreditor issue as part of this proceeding or otherwise. Attached as **Exhibit “L”** is a copy of Just Energy’s responding letter.

82. As at March 5, 2021, the Just Energy Group had cash and cash equivalents of \$81.6 million and available borrowing capacity of \$2.9 million under the Credit Facility.

**(i) Trade Debt**

83. The Just Energy Group’s financial obligations to its primary Commodity Suppliers in North America, which include Shell, BP, Exelon Generation Company LLC, Bruce Power L.P., EDF Trading North America, LLC, Nextera Energy Marketing, LLC, Macquarie and Morgan Stanley Capital Group Inc. (collectively, the “**Secured Suppliers**”), are secured by security granted by Just Energy and other members of the Just Energy Group pursuant to general security



agreements, pledges of securities, and other security documents. As of January 31, 2021, the Just Energy Group owed its Secured Suppliers approximately \$198.96 million. The Just Energy Group currently estimates this amount will increase to approximately \$244 million as at March 31, 2021.

84. The Just Energy Group has also posted letters of credit to secure its obligations to certain Commodity Suppliers other than the Secured Suppliers.

85. In addition, Filter Group is the borrower under an outstanding loan from Home Trust Company to finance the cost of rental equipment over a period of three to five years (the “**Filter Group Loan**”). Payments on the loan are made monthly as Filter Group receives payment from the customer and continue up to the end date of the customer contract term on the factored receivable. As of December 31, 2020, there was approximately \$5.5 million outstanding under the Filter Group Loan.

**(ii) Non-Trade Debt**

86. The following table summarizes the Just Energy Group’s significant non-trade debt, which is described in greater detail below. The debts are listed by priority of payment in the table below.

|                 | <b>Type</b>                                   | <b>Borrower(s)</b>                                    | <b>Maturity Date</b> | <b>Approximate Outstanding Amount as of December 31, 2020</b>                                  |
|-----------------|---|---|----------------------|--|
| Credit Facility | Revolving credit facilities on borrowing base | Just Energy Ontario L.P. and Just Energy (U.S.) Corp. | December 31, 2023    | \$232.62 million in principal <sup>6</sup><br>\$77.8 million in letters of credit <sup>7</sup> |

<sup>6</sup> \$227.86 million as at March 5, 2021.

<sup>7</sup> \$103.96 million as at March 5, 2021.

|                    |  |                        |                    |                  |
|--------------------|--|------------------------|--------------------|------------------|
| Term Loan          | Non-revolving, senior unsecured term loan facility | Just Energy Group Inc. | March 31, 2024     | \$273.48 million |
| Subordinated Notes | Unsecured subordinated notes                       | Just Energy Group Inc. | September 27, 2026 | \$13.2 million   |

**(A) Credit Facility**

87. Just Energy Ontario L.P. and Just Energy (U.S.) Corp. (collectively, the “**Credit Facility Borrowers**”) are borrowers under a ninth amended and restated credit agreement (as amended from time to time, the “**Credit Agreement**”) made as of September 28, 2020 with a syndicate of lenders that includes CIBC, National Bank of Canada, HSBC, JPMorgan, Alberta Treasury Branches, Canadian Western Bank, and Morgan Stanley Senior Funding, Inc., a subsidiary of Morgan Stanley Bank N.A. (the “**Credit Facility Lenders**”). A copy of the Credit Agreement is attached as **Exhibit “M”**.

88. Under the Credit Agreement, the Credit Facility Lenders agreed to extend a credit facility of \$335 million, with scheduled mandatory commitment reductions during the term of the Credit Agreement (the “**Credit Facility**”).

89. As at March 5, 2021, there was approximately \$227.86 million in principal outstanding under the Credit Agreement, plus outstanding letters of credit amounting to \$103.96 million. The letters of credit are issued to various counterparties, primarily utilities and suppliers. Interest is payable on outstanding loans at rates that vary with bankers’ acceptance rates, London Interbank Offered Rate, Canadian bank prime rate or U.S. prime rate. Interest rates are adjusted quarterly based on certain financial performance indicators.

90. The Just Energy Group has made several draws on the Credit Facility in the past few months, including following the Texas weather event. As a result of these, available borrowing capacity under the Credit Facility has decreased from \$24.6 million as of December 31, 2020, to \$2.9 million as of March 5, 2021.

91. The Credit Facility Borrowers' obligations are guaranteed by guarantees from certain subsidiaries and affiliates and secured by general security agreements from the Credit Facility Borrowers and such subsidiaries and affiliates, pledges of the securities of the Credit Facility Borrowers and such subsidiaries and affiliates, and other security documentation. The Applicants are all borrowers under the Credit Facility or have delivered a guarantee and a general security agreement in respect of the Credit Facility.

#### **(B) Term Loan**

92. As part of the Recapitalization, Just Energy issued a U.S. \$205.9 million principal note (the "**Term Loan Agreement**") maturing on March 31, 2024 to Sagard Credit Partners, LP and certain funds managed by a leading U.S.-based global fixed income asset manager (the "**Term Loan Lenders**"). Attached as **Exhibit "N"** is a copy of the original Term Loan Agreement.

93. As at December 31, 2020, approximately \$273.48 million was outstanding on the Term Loan.

94. The Term Loan bears interest at 10.25% per annum, and payments are to be capitalized into the note. The interest is capitalized on a semi-annual basis on September 30 and March 31. Upon achieving certain financial measures, Just Energy will pay either 50% or 100% of the interest in cash at a 9.75% rate on a semi-annual basis. The Term Loan matures on March 31, 2024.

### (C) Subordinated Notes

95. As part of the Recapitalization, Just Energy issued \$15 million principal of subordinated notes (“**Subordinated Notes**”) to holders of certain subordinated convertible debentures that were extinguished as part of the Recapitalization. Attached as **Exhibit “O”** is a copy of the indenture for the Subordinated Notes. The Subordinated Notes bear an annual interest rate of 7% payable in-kind semi-annually on March 15 and September 15. A \$2 million fee related to the issuance of the notes was capitalized at inception to be amortized over the term of the notes. The Subordinated Notes had a principal amount of \$15 million as at September 28, 2020, which was reduced to \$13.2 million through a tender offer for no consideration on October 19, 2020.

### (iii) Intercreditor Arrangements

96. The Secured Suppliers, the Credit Facility Borrowers (defined below), certain subsidiaries and affiliates of the Credit Facility Borrowers (including Just Energy), and the agent for the lenders under the Credit Agreement (defined below) are also party to an intercreditor agreement (the “**Intercreditor Agreement**”) setting out the relative priority of the parties’ security interests. A copy of the Intercreditor Agreement is attached as **Exhibits “P”**. The security is granted in favour of a collateral agent under the Intercreditor Agreement for the benefit of the Credit Facility Lenders and the Secured Suppliers. Pursuant to the Intercreditor Agreement, the Secured Suppliers rank *pari passu* with the Credit Facility Lenders, subject to a waterfall set out in the agreement which provides that: (i) accounts payable owing to the Secured Suppliers rank first; (ii) the “mark to market” liability that would be owed to the Secured Suppliers rank second and *pari passu* with the amounts owed to the Credit Facility Lenders and amounts owing to the providers under the ISO Services Agreements up to a cap of \$94.5 million; and (iii) amounts owing to the providers under the ISO Services Agreement above the cap rank third.

(iv) **Equity**

97. Just Energy's authorized share capital consists of an unlimited number of Common Shares and 50,000,000 preference shares (the "**Preferred Shares**"). As at March 1, 2021, there were 48,078,637 Common Shares and no Preferred Shares issued and outstanding. The Common Shares are listed on the TSX and the NYSE.

**E. Background to CCAA Proceedings**

(a) **Just Energy's efforts to improve financial performance**

98. Over the past few years, the Just Energy Group has taken various steps to address significant financial challenges (including high leverage levels and an unsustainable capital structure) and liquidity risks faced by the business. Attached as **Exhibits "Q"** and "**R"** are the Interim Order and Final Order affidavits sworn by Jim Brown (my predecessor as Just Energy's CFO and currently Just Energy's Chief Commercial Officer) for the Arrangement proceeding that describes the measures taken by the Just Energy Group in detail.

99. In May 2020, after a year-long review of strategic alternatives (the "**Strategic Review**"), Just Energy concluded that the Recapitalization was the only viable option short of an insolvency proceeding that provided a long-term solution to its financial challenges. Following extensive negotiations, Just Energy entered into support agreements with its Credit Facility and Term Loan lenders and launched the Arrangement proceedings under s. 192 of the CBCA in July 2020. The Arrangement was approved by a Final Order of the Court granted on September 2, 2020 and the Recapitalization closed on September 28, 2020. The Recapitalization was the culmination of a comprehensive plan to strengthen and de-leverage its business and it positioned the Just Energy Group for sustainable growth as an independent industry leader. After the Recapitalization closed,

the Just Energy Group hit its financial targets and accordingly the Board approved a distribution of the Q3 bonus, which were tied to meeting those targets.

**(b) Texas regulatory environment**

100. As noted above, this filing is the result of recent events in Texas. For context, I explain the regulatory environment in Texas below before describing the Texas weather event.

101. Fulcrum Retail Energy, LLC, Just Energy Texas L.P., Tara Energy, LLC, and Hudson Energy Services, LLC (the “**Just Energy Texas Entities**”) have electricity licenses in Texas. The Just Energy Texas Entities are subject to oversight from ERCOT and PUCT.

102. ERCOT is the ISO that is solely responsible for managing the Texas Interconnection, which covers 213 of the 254 Texas counties. ERCOT is subject to regulation by PUCT, a state agency that regulates the state’s electric, water and telecommunication utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints. Among other things, PUCT enforces compliance with Texas utility laws and regulates electric utility rates. Thus, PUCT is ultimately responsible for ERCOT’s operations and overall electricity regulation in Texas.

103. Generally, ISOs within the Eastern and Western Interconnections (the two main grids in the United States outside Texas) are subject to regulation by the FERC and various regional reliability agencies. The ERCOT grid, by contrast, is its own standalone interconnection, and it has limited ability to import electricity into or export it out of the grid. Texas is the only one of the contiguous 48 states with its own standalone electricity grid. However, the delivery of electricity in the ERCOT market operates similarly to other electricity markets in the United States. Market participants buy and sell electricity using both the Real-Time Market (*i.e.*, electricity for current

transmission/distribution and use by consumers) and the Day-Ahead Market, both of which are facilitated by ERCOT in its role as the ISO, and through bilateral contracts that indirectly facilitate the majority of wholesale electricity sales in the ERCOT market.

104. These markets allow ERCOT, in conjunction with the qualified scheduling entities (“QSEs”) that transact directly in the day-ahead and spot markets (facilitated by the bilateral contracts entered into between electricity generators/wholesalers, retailers, and the qualified scheduling entities) to ensure that electricity is reliably delivered to all market participants.

105. As such, in addition to managing the overall operation of the electrical grid, ERCOT effectively serves as a clearinghouse for the purchase and sale of electricity between electric generation and load-serving entities. ERCOT also performs financial settlements for the competitive wholesale electricity market and enforces certain credit requirements, including collateral-posting requirements, to ensure market participants’ creditworthiness for ERCOT-facilitated transactions.

106. The Just Energy Group is required to post collateral or other form of financial comfort with ERCOT in an amount determined pursuant to ERCOT’s protocols. If the Just Energy Group is unable to provide such financial comfort or pay its invoices when due, ERCOT can suspend the Just Energy Group’s market participation in as little as 2 days and transfer the Just Energy Group’s customers to a POLR on 5 days’ notice. Such actions would be devastating to the Just Energy Group’s business.

**(c) Unprecedented winter storm and regulatory response in Texas**

107. Just Energy Group is facing new liquidity pressures and challenges because of the extreme cold weather recently experienced throughout Texas, which is the Just Energy Group’s single

largest market and one of the largest electricity markets in the United States. Attached as **Exhibits “S”, “T”, “U”, “V” and “W”** are press releases issued by the Just Energy Group between February 16 and March 3, 2021, describing the Texas weather event and its impact on the Just Energy Group.

108. Beginning on February 13, 2021, Texas experienced an unprecedented and catastrophic energy crisis when a powerful winter storm moved over and blanketed the entire state, resulting in temperatures well below 20°F in a state where many homes and businesses rely on electricity for heating. Price shocks in Texas were felt as early as February 12 when natural gas prices jumped from U.S. \$3 to over U.S. \$150/MMBtu in anticipation of gas supply shortages.

109. Customer demand for electricity grew on February 13 and 14, pushing Texas’s power grid to a new winter peak demand record, topping 69,000 megawatts between 6:00 p.m. and 7:00 p.m. This was more than 3,200 megawatts higher than the previous winter peak set in January 2018.

110. As noted above, the Just Energy Group hedges weather risk based on historical scenarios. For February 2021, the Just Energy Group had weather hedge contracts in place to cover an incremental 50% increase in customer usage above normal February consumption. However, due to the extreme cold weather, customer usage increased significantly above the weather hedges for a sustained period. For example, the Just Energy Group’s load in Texas was up over 200% on February 14 from the same day a week earlier.

111. In the early hours of February 15, ERCOT declared an Energy Emergency Alert Level 1, urging consumers to conserve power. Within an hour, ERCOT elevated to an Energy Emergency Alert Level 2, and only 13 minutes later, at 1:25 a.m., ERCOT elevated to an Energy Emergency Alert Level 3. With the grid stressed to within minutes of a catastrophic failure, ERCOT ordered transmission operators to implement deep cuts in load in the form of rotating outages to reduce the



strain and avoid a complete collapse of the grid. While demand soared, supply plummeted as power plants tripped offline and demand threatened to exceed supply. Natural gas prices spiked in response to falling supply as lines froze up. As a result, the cost to produce electricity from gas-fueled power plants increased dramatically.

112. The financial impact of the Texas winter event was exacerbated by the actions of Texas regulators. PUCT adopted an order instructing ERCOT to set the real time price at the high offer cap of U.S. \$9,000 per MWh during an emergency meeting on February 15, 2021. PUCT's actions and rationale are described by the Wall Street Journal article, *Amid Blackouts, Texas Scrapped Its Power Market and Raised Prices. It Didn't Work*, a copy of which is attached as **Exhibit "X"**. PUCT has stated that it made this order because the computer that was supposed to help match supply and demand on the power grid was not working properly and PUCT believed it needed to intervene to relieve a growing crisis. However, the higher prices did not result in additional power production because many electricity generators were dealing with frozen equipment or fuel shortages and were unable to deliver more power. As a result, buyers were forced to pay significantly higher prices for the same limited supply of electricity as before.

113. While ERCOT rescinded all load shed instructions by 1:05 a.m. on February 18, it failed to return the real time prices to their normal levels as required by PUCT's order and ERCOT Nodal Protocols. Instead, the price for wholesale electricity remained at U.S. \$9,000/MWh for more than four straight days until 9:00 a.m. on February 19, 2021 (*i.e.*, for over 100 consecutive hours). In contrast, the real time electricity prices did not hit U.S. \$9,000 for even one 15-minute interval for all of 2020.

114. In addition to artificially high electricity costs in ERCOT during the Texas weather event, the Just Energy Group was also exposed to significantly increased ancillary service costs, which are charges associated with maintaining the reliability of the grid that are uplifted to all market participants daily based on that day's load ratio share. The Just Energy Group believes that its invoices include Ancillary Services charges that were either erroneously calculated or are an unreasonable application of ERCOT's protocols.

115. For example, typically the Just Energy Group's invoices include a charge for Reliability Deployment Ancillary Service Imbalance Revenue Neutrality that ranges from U.S. \$0 to U.S. \$23,500 per day. Between June 2015 and February 16, 2021, the Just Energy Group paid approximately \$504,000 in respect of this charge. In contrast, for the three settlement dates of February 17, 18 and 19, 2021, the aggregate charge is over U.S. \$53 million. This is approximately **106 times higher than the last 5 years of charges combined**. The Just Energy Group has not been able to discern any reasonable basis for the exponential increase in this charge and ERCOT has provided no data in support of this determination.

116. The Just Energy Group had hedge contracts in place to cover its normal load level ancillary costs which are based on its normal load share of electricity in ERCOT. However, the significantly higher Ancillary Service prices resulted in significant additional costs of more than U.S. \$105 million that cannot be covered by the Just Energy Group's hedge contracts.

**(d) Efforts to seek relief from Texas regulators refused**

117. Other energy retailers operating in the Texas market have also suffered significant losses and incurred significant costs because of the Texas weather event and ERCOT's response. The Texas weather event caused the ERCOT wholesale market to incur charges of approximately

U.S. \$55 billion over a seven-day period, an amount equal to what it ordinarily incurs over four years. In recognition of this fact, on February 21, 2021, PUCT issued an “Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols” (the “**February 21 Order**”), a copy of which is attached as **Exhibit “Y”**, which explained that “In an attempt to protect the overall integrity of the financial electric market in the ERCOT region, the Commission concludes it is necessary to authorize ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols to resolve financial obligations between a market participant and ERCOT.”

118. In response, ERCOT issued a notice on February 22, 2021 stating that it was “temporarily deviating from Protocol deadlines and timing related to settlements, collateral obligations, and Invoice payments while prices are under review. Invoices or settlements will not be executed until issues are finalized by State leaders considering solutions to the financial challenges caused by the winter event, which is anticipated to occur this week.” However, just one day later, ERCOT changed course without explanation and issued a second notice saying that “ERCOT has ended its temporary deviation from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments. Invoices and settlement will be executed in accordance with Protocol language.” Copies of the February 22 and 23 notices from ERCOT are attached as **Exhibits “Z”** and **“AA”**.

119. On March 1, 2021, representatives of the Just Energy Group had a teleconference with ERCOT personnel to discuss these charges during which participating ERCOT personnel were unable to explain the dramatic departure from historical charges other than stating that it was protocol driven. The Just Energy Group has officially disputed invoices from ERCOT and taken the position that ERCOT should remove the administrative price adders that set prices to U.S. \$9,000/MWh from 1:05 a.m. on February 18, 2021 forward and to challenge the additional and

unprecedented ancillary costs. Copies of the written submissions sent to ERCOT are attached as **Exhibit “BB”**.

120. In addition, on March 3, 2021, the Just Energy Group filed with PUCT a petition for emergency relief seeking an order (i) that ERCOT deviate from the deadlines and timing in its Protocols and Market Guides related to settlements, collateral obligations, and invoice payments and suspend the execution or issuance of invoices or settlements for intervals during the dates of February 14, 2021 through February 19, 2021 until issues related to the catastrophic Texas weather event of February 2021 raised by Texas authorities from the executive and legislative branches (collectively, “**State Authorities**”) are investigated, addressed, and resolved, or alternatively (ii) waiving Section 9.6(2) of the ERCOT Protocols to allow the Just Energy Group to delay payment of certain ERCOT Settlement Invoices while it fully exercises its rights under the ERCOT Protocols to dispute the invoiced payment amounts. A copy of the petition is attached as **Exhibit “CC”**. PUCT has not granted the relief requested by the Just Energy Group.

121. As such, the Just Energy Group had no choice but to pay its invoices from ERCOT. As noted above, under ERCOT’s protocols, the Just Energy Group must pay any invoices within two days, even if it is disputing them. Otherwise, ERCOT can suspend the Just Energy Group’s market participation in as little as 2 days and transfer the Just Energy Group’s customers to a POLR.

122. The Texas weather event and the response from ERCOT and PUCT has been devastating for other participants in the Texas electricity market as well. As noted above, Brazos Electric Power Cooperative filed for creditor protection under Chapter 11 of the U.S. Bankruptcy Code on March 1, 2021 and ERCOT has barred two electricity sellers (Entrust Energy Inc. and Griddy Energy LLC) from Texas’s power market for failing to make payments and has already transferred

their customers to a POLR. Several energy retailers have also filed petitions for emergency relief with PUCT that, like the Just Energy Group's petition, are seeking relief from section 9.62 of the ERCOT Protocols, including Brilliant Energy, LLC, Liberty Power, and Spark Energy, Inc.

**(e) Payment and collateral demands from other creditors**

123. The Just Energy Group's liquidity challenges have been further exacerbated because certain business partners and regulators following the Texas weather event have issued demands or taken actions in response to concerns about the Just Energy Group's liquidity and significant amounts owing to trade creditors that are coming due:

- (a) The Just Energy Group has received demands from certain of its bonding companies for more than \$30 million in additional collateral. Over \$20 million of additional collateral has already been provided and the rest is expected to be provided by March 17, 2021. The bonding companies had either threatened to start the process of cancelling bonds issued by them if the Just Energy Group did not post additional collateral or had already started the process of cancelling bonds they issued and agreed to issue rescission notices upon receipt of the additional collateral. 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.
- (b) On February 24, 2021, the Just Energy Group received a letter from a transmission and distribution service provider stating that the Just Energy Group was delinquent on invoices totaling U.S. \$141,745 that had an original due date of February 23, 2021 (*i.e.*, one day earlier), that the Just Energy Group would be in default if the

delinquent balance is not received within ten days, and that the supplier would exercise its remedies in the event of default. The Just Energy Group paid all outstanding amounts due to the transmission and distribution service providers on March 1, 2021, as an event of default for non-payment may result in ERCOT transferring customers to a POLR.

- (c) On March 22, 2021, approximately \$270 million owing to counterparties under the ISO Services Agreements. This amount has increased significantly from what the Just Energy Group would normally expect, which increase is a direct result of the Texas weather event. In addition, more than \$75 million in payables owing to Commodity Suppliers will also come due around March 22, 2021.

#### **F. Urgent Need for Relief under the CCAA**

124. Following the Texas weather event, the steps taken by the Texas regulators in response and the additional demands from creditors, the Just Energy Group is facing significant liquidity challenges which threaten its ability to continue as a going concern. Both ERCOT and PUCT have ignored the Just Energy Group's requests to delay payment of invoices it is challenging

125. On March 5, 2021, the Just Energy Group received three invoice for approximately U.S. \$123.21 million from ERCOT, of which approximately U.S. \$96.24 million is required to be paid by the end of day on March 9, 2021.<sup>8</sup> The Just Energy Group cannot pay this amount without access to the DIP Facility (defined below). However, if the Just Energy Group does not pay amounts owing to ERCOT, ERCOT can assign some or all of its customers in Texas to a POLR.

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<sup>8</sup> The remaining amount is paid by BP in the first instance under the BP Agreement. The amount owing to BP from the Just Energy Group is part of the amounts owing to ISO counterparties coming due on March 22, 2021.

126. In addition to the March 5 ERCOT invoices, on March 8, 2021, the Just Energy Group received from ERCOT (i) a notice that it must post approximately U.S. \$25.7 million of additional collateral within two business days; and (ii) three invoices for approximately U.S. \$ 25.46 million, of which approximately U.S. \$18.86 million is due by March 10, 2021.<sup>9</sup> In addition, as noted above, the Just Energy Group has significant amounts coming due in the near future.

127. As such, the Just Energy Group has significant liabilities coming due in the near future that it cannot currently pay. Just Energy is therefore insolvent as it cannot meet its liabilities as they come due. In these circumstances, the Applicants require urgent relief under the CCAA to ensure that they can continue as a going concern, service their significant customer base, maintain employment for approximately 1,000 employees, and preserve enterprise value.

128. The Applicants, with the assistance of the proposed Monitor, have sized the DIP to address the Just Energy Group's urgent liquidity needs over the first ten days of this proceeding. The Applicants estimate that they will a beginning cash balance of \$77.4 million on March 9, 2021 and the Applicants are seeking authority to draw \$126 million on the DIP Facility on March 9. Between March 9 and 19, the cashflows reflect that the Applicants will need to pay the following amounts:

- (a) Energy and delivery costs: \$224.6 million.
- (b) Taxes: \$5.4 million.
- (c) Commissions: \$6.3 million.

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<sup>9</sup> The remaining amount is paid by BP in the first instance under the BP Agreement. The amount owing to BP from the Just Energy Group is part of the amounts owing to ISO counterparties coming due on March 22, 2021.

- (d) Selling and other costs: \$6.6 million.
- (e) Interest expenses and fees: \$3.2 million
- (f) Professional fees: \$1.4 million.

129. The Cash Flow Forecasts state that (as a result of the receipts and outflows set out there) the Applicants cash balance is expected to be as low as \$33 million at certain points in the first 10 days of this proceeding. In addition to the specific amounts set out above, the Just Energy Group expects that it may receive other demands or invoices that will have to be paid in the first 10 days of this proceeding. The Just Energy Group expects that it may receive one or more additional invoices from ERCOT, and, in light of the continuing uncertainty created by the Texas weather event, it is not possible to reliably predict the amount of those invoices. In addition, as discussed above, the Just Energy Group operates in heavily regulated markets and may receive additional demands to post collateral or other financial security on short notice after its CCAA filing as a condition of permitting the Just Energy Group to continue doing business. As a result, in order to ensure that it can continue going concern operations in the first 10 days of this proceeding, the Just Energy Group needs authorization to access the full DIP Facility to ensure that it has sufficient liquidity to pay both the specific amounts set out above and other demands that may arise.

## **G. Initial Relief Sought**

### **(a) Stay of Proceedings**

130. The Applicants are insolvent and urgently require a stay of proceedings and other protections provided by the CCAA in order to preserve the status quo and secure breathing space to prevent precipitous regulatory and counterparty action which threatens its business. The proposed Initial Order provides a stay of proceedings until March 19, 2021 (the “**Stay Period**”).



131. The proposed Initial Order includes a prohibition on any present or future bank providing the Cash Management System (as defined in the Initial Order) from exercising any sweep remedy under any applicable documentation and exercising or claiming any right of set-off against any account included in the Cash Management System (except for the cash pooling and zero-balancing account services provided with respect to the JPMorgan accounts). As noted above, the Canadian Bank Account Holders have recently agreed to decentralize the Just Energy Group's cash management system with CIBC. Therefore, this relief is needed to ensure that any amounts borrowed under the DIP Facility and any receipts received during the Stay Period are used to facilitate the Just Energy Group's restructuring objectives and to maintain its going concern operations. Any risk of prejudice to banks providing the Cash Management System is mitigated by the fact that the Canadian Bank Account Holders have agreed that all account activity for outgoing wire or EFT direct deposits will need to be fully funded in advance.

132. As noted above, the Applicants seek to have a stay of proceedings and other provisions of an Initial Order under the CCAA extended to the Just Energy LPs (with the Applicants, the "**Just Energy Entities**"). The business and operations of the Applicants are heavily intertwined with that of the Just Energy LPs. In particular, the Just Energy LPs hold most of the gas and electricity licenses granted by Canadian regulators pursuant to which the Just Energy Group conducts business in Canada.

133. Moreover, the proposed Initial Order provides that, pursuant to section 11.1(3) of the CCAA, all rights and remedies of Provincial Regulators are stayed during the Stay Period except with the written consent of the Just Energy Entities and the Monitor or leave of the Court.

134. The Applicants believe that it is necessary to extend the Stay to prevent Provincial Regulators and U.S. Regulators from taking steps against any Licensed Entities and U.S. Licensed Entities that could undermine their ability to restructure their business, and to provide a meaningful opportunity for licenceholders to engage with the regulators with respect to a path forward. In order to give effect to the Stay as against parties in the United States, the Applicants intend to commence a proceeding to recognize this Canadian proceeding under Chapter 15 of the US Bankruptcy Code. As discussed above, with the benefit of the DIP Facility, the Applicants intend to continue making payments to the contractual counterparts in the ordinary course, which is reflected in the Cash Flow Forecast. Despite this, if the Stay is not granted, it is possible that the Provincial Regulators or U.S. Regulators may still take steps that would cause the Just Energy Group to lose its ability to conduct business with its customers and frustrate the Just Energy Group's restructuring efforts to the detriment of the Just Energy Group and its key stakeholders.

**(b) DIP Financing**

135. Because of its current liquidity challenges, and as demonstrated in the Cash Flow Forecast (discussed below), the Just Energy Group requires interim financing to provide stability, continue going concern operations, and to restructure its business as part of this CCAA proceeding.

136. The Just Energy Group contacted its five largest stakeholders and provided them with a term sheet and certain information necessary to assess and evaluate an opportunity to provide debtor-in-possession financing. The information provided included a situation update presentation and access to a virtual data room. The Just Energy Group also responded to numerous information requests and management held virtual meetings with these stakeholders to answer questions about the Just Energy Group and its financial forecast. In addition, the Just Energy Group engaged with four other parties who had interest in considering the DIP financing opportunity. The Just Energy

Group negotiated the form of non-disclosure agreement (“**NDA**”) with two of these parties. However, due to the short timeframe in which the Just Energy Group needed to secure DIP financing, there was not sufficient time for the parties to finalize NDAs or conduct the necessary due diligence.

137. As a result of this process, subject to certain terms and conditions, the DIP Lenders have agreed to provide a debtor-in-possession facility (the “**DIP Facility**”). The related credit agreement (the “**Commitment Letter**”) is attached to this affidavit as **Exhibit “DD”**.

138. The DIP Facility includes the following commercial terms:

- (a) **Facility size:** U.S. \$125 million delayed-draw term loan credit facility, subject to a first draw of U.S. \$100 million and a second draw of U.S. \$25 million.
- (b) **Term:** December 31, 2021.
- (c) **Interest:** 13% per annum, payable in cash.
- (d) **Default rate:** 2% per annum, payable in cash.
- (e) **Fees:** Commitment Fee equal to 1% of Commitments and Origination Fee equal to 1% of Commitments.

139. The DIP Facility is proposed to be secured by a Court-ordered charge (the “**DIP Lenders’ Charge**”) on all of the present and future assets, property and undertaking of the Applicants (the “**Property**”). The DIP Lenders’ Charge will not secure any obligation that exists before the Initial Order is made. The DIP Lenders’ Charge will have priority over all other security interests, charges

and liens, except the Administration Charge, the FA Charge, the Directors' Charge and the KERP Charge and *pari passu* with the Priority Commodity/ISO Charge (each defined below).

140. In the Initial Order, the Applicants are seeking authorization to request an initial draw of U.S. \$100 million to enable them to pay specified amounts that are known to be due during the first 10 days of the CCAA proceeding. These amounts are specified in the Cash Flow Forecast and include amounts owed to ERCOT and other energy and delivery costs, taxes, commissions, selling and other costs, interest expenses and fees, and professional fees and other costs and expenses in connection with the CCAA proceedings. The balance of funds will only be used if necessary, providing the Applicants with flexibility to address additional liquidity demands made during the first 10 days of the CCAA proceeding given the nature of the Applicants' business, unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern, and the continued risk of receipt of future invoices from ERCOT that must be paid within 2 business days of receipt. At the Comeback Hearing, the Applicants intend to request the authority to draw down the remainder of the DIP Facility in accordance with the Cash Flow Forecast.

**(c) Monitor**

141. FTI Consulting Canada Inc. ("FTI") has consented to act as the Monitor of the Applicants under the CCAA. A copy of the Monitor's consent is attached as **Exhibit "EE"**.

**(d) Administration Charge**

142. The Applicants propose that the Monitor, its Canadian and U.S. counsel, and Canadian and U.S. counsel to the Applicants be granted a court-ordered charge on the Property as security for their respective fees and disbursements relating to services rendered in respect of the

Applicants (the “**Administration Charge**”). The Administration Charge is proposed to rank *pari passu* with the FA Charge and have first priority over all other charges. With the concurrence of the proposed Monitor, the Applicants are proposing that the Administration Charge for the first ten days be limited to \$2.2 million and will be seeking to increase the charge at the comeback hearing.

**(e) Financial Advisor and FA Charge**

143. In the aftermath of the Texas weather event, Just Energy engaged BMO Nesbitt Burns Inc. (“**BMO**”) as an independent financial advisor to assist Just Energy in dealing with the liquidity challenges it was facing and to provide financial advisory services to, among other things, assist in exploring and evaluating potential transactional alternatives. The engagement letter for BMO is attached as **Confidential Exhibit “FF”** (the “**BMO Engagement Letter**”). The Applicants are asking, as part of the proposed Initial Order, for the Court to approve Just Energy’s engagement of BMO as its financial advisor and are seeking a charge in the amount of \$1.8 million (the “**FA Charge**”) to secure the amounts payable to BMO. At the comeback hearing, the Applicants will be seeking to increase the FA Charge. The FA Charge is proposed to rank *pari passu* with the Administration Charge and have first priority over all other charges.

144. As the BMO Engagement Letter contains commercially sensitive information, the proposed Initial Order also orders that the Confidential Appendix to the Pre-Filing Report be sealed and not form part of the court record pending further order of the Court.

**(f) Directors’ and Officers’ Protection**

145. A successful restructuring of the Just Energy Group will only be possible with the continued participation of its directors, officers, management, and employees. These personnel are

essential to the viability of the Applicants' continuing business and the preservation of enterprise value.

146. I am advised by Marc Wasserman of Osler and believe that, in certain circumstances, directors of Canadian companies can be held liable for certain obligations of a company owing to employees and government entities, which may include unpaid accrued wages, unpaid accrued vacation pay, and unremitted sales, goods and services, and harmonized sales taxes. The Applicants estimate, with the assistance of FTI in its capacity as proposed Monitor, that these obligations may amount to as much as approximately \$5.8 million.

147. I am also advised by Kirkland and believe that, in certain circumstances, directors of U.S. companies may be held liable for certain obligations of a company owing to employees and government entities, which may include sales and use taxes, employee withholding and certain payroll taxes, state income taxes in a few states, 401(k) and other obligations withheld from employees, unpaid wages (including paid vacation), ERISA fiduciary obligations, and non-payment of contractual obligations owed to suppliers of perishable agricultural commodities. The Applicants estimate, with the assistance of FTI in its capacity as proposed Monitor, that these obligations may amount to as much as approximately \$30 million.

148. It is my understanding that Just Energy's present and former directors and officers are among the potential beneficiaries under liability insurance policies (the "**D&O Insurance**") that cover an aggregate annual limit of approximately U.S. \$38.5 million. However, I understand that the D&O Insurance has various exceptions, exclusions, and carve-outs where coverage may not be available and that claims on such policy have already been made. I therefore do not believe that this insurance policy provides sufficient coverage against the potential liability that the directors

and officers could incur in relation to this CCAA proceeding. The current D&O Insurance will be expiring on its own terms on April 1, 2021. The Applicants are currently in the process of either securing renewal or replacement insurance or purchasing a tail for the existing policy and a new policy.

149. In light of the complexity and scope of the overall enterprise and potential liabilities and the uncertainty surrounding available indemnities and insurance, the directors and officers have indicated to the Applicants that their continued service to the company and involvement in this proceeding is conditional upon the granting of an order under the CCAA which grants a charge in favour of the directors and officers of Just Energy in the amount of \$30 million on the Property (the “**Directors’ Charge**”). The Directors’ Charge is proposed to be subordinate to the Administration Charge and FA Charge but shall rank in priority to all the other charges. The Directors’ Charge is necessary so that the Applicants may benefit from their directors’ and officers’ experience with the Applicants’ business and industry, and so that its directors and officers can guide the Applicants’ restructuring efforts.

**(g) KERP**

150. At the comeback hearing, the Applicants will be seeking approval of a key employee retention plan (the “**KERP**”) and the granting of a Court-ordered charge (the “**KERP Charge**”) as security for payments under the KERP. A summary of the KERP is attached as **Confidential Exhibit “GG”**. The KERP summary contains commercially sensitive information as well as personal information relating to the Just Energy Group’s employees. Therefore, the proposed Initial Order orders that the Confidential Exhibit EE be sealed and not form part of the court record pending further order of the Court.

151. The KERP was developed by the Applicants to facilitate and encourage the continued participation of senior management and other key employees of the Applicants who are required to guide the business through the restructuring and preserve value for stakeholders. The KERP will provide participants with additional payments as an incentive to continue their employment through the CCAA proceedings. These employees have significant experience and specialized expertise that cannot be easily replicated or replaced. Further, these key employees will likely have other, more certain employment opportunities and will be faced with a significantly increased workload during the restructuring process.

152. The Applicants propose to include the following employees in the KERP:

| <b>Group</b>                      | <b>Approximate Number of Employees</b> | <b>Approximate Estimated Cost</b>  |
|-----------------------------------|--|------------------------------------|
| Executives                        | 8                                      | \$3.39 million                     |
| Commercial                        | 11                                     | \$1.37 million                     |
| Operations                        | 13                                     | \$925,249                          |
| Legal, Regulatory, Finance and HR | 10                                     | \$1.14 million                     |
| <b>Total</b>                      | <b>42</b>                              | <b>\$6.83 million<sup>10</sup></b> |

153. The KERP payments will be made in three installments payable as follows: (i) 180 days after the filing date; (ii) 270 days after the filing date; and (iii) the earlier of 15 months after the filing day or exit from the CCAA proceeding. For executive employees, the first and second

<sup>10</sup> Over \$1 million of the amount of the KERP comprises foreign exchange charges for employees being paid in U.S. dollars.



installments will each be in an amount equal to 25 percent of the total KERP payment payable to the employee in question whereas the final installment will be equal to 50 percent of the total KERP payment. For all other employees, the first and second installments will each be in an amount equal to 40 percent of the total KERP payment payable to the employee in question whereas the final installment will be equal to 20 percent of the total KERP payment. The total KERP payments range from 35 percent to 90 percent of the base salary of the relevant employees.

**(h) Q3 Bonuses**

154. The cash flows included payment of certain bonuses awarded to Just Energy Group employees for Q3 of Fiscal 2021 and the Just Energy Group intends to pay them when due on April 2, 2021, in accordance with the terms of the proposed Initial Order.

155. The payment of the bonus depended on Just Energy achieving corporate targets as set and approved annually by the Compensation Committee and the Board of Just Energy. Following the close of the applicable fiscal quarter, the Board has the absolute discretion to determine if the corporate targets have been met and will make all determinations with respect to any bonus. Any approved bonus shall be paid no later than 60 days following the date the bonus is approved by the Board, subject to the executive's continued employment through the end of the applicable fiscal quarter.

156. At the Compensation Committee meeting on July 2, 2020, the Compensation Committee reviewed a quarterly bonus structure for FY 2021 based on the excess achievement of quarterly Base EBITDA targets. If Just Energy's actual Base EBITDA result for a fiscal quarter exceeds the target, then the bonus for such quarter would be funded from a portion of such excess. The Compensation Committee recommended to the board that the quarterly bonus structure for FY

2021, including the quarterly Base EBITDA targets, be approved. The Q3 target was set at \$42 million and the Board approved the quarterly bonus structure for FY 2021, including the quarterly Base EBITDA targets, at its July 3, 2020 meeting.

157. At the Compensation Committee meeting on February 9, 2021, it was reported that the Q3 Base EBITDA result was \$55.785 million, which exceeded the target of \$42 million, which is reflected in Just Energy's Q3 financials. The Compensation Committee requested that the Board approve the bonus pool for Q3 in the amount of approximately \$3.23 million and the Board approved the Q3 bonus at its February 10, 2021 meeting. As such, the Q3 bonuses were properly approved by both the Compensation Committee and the Board based on the achieved Base EBITDA for Q3 in accordance with the terms of the bonus structure that the Compensation Committee and the Board approved in July 2020.

**(i) Priority Commodity/ISO Charge**

158. To continue to operate as a going concern and successfully achieve its restructuring objectives, the Just Energy Group requires its relationships with its Commodity Suppliers and ISO Service Providers to remain uninterrupted. I am advised by Mr. Wasserman and believe that the Commodity Agreements (as defined in the Initial Order) are covered by the eligible financial contract provisions in the CCAA and, therefore, the Applicants cannot rely on a stay of proceedings to prevent the Commodity Suppliers from terminating their existing contractual commitments or refraining from conducting new business with the Applicants.

159. Accordingly, to incentivize Commodity Suppliers and ISO Services Providers to continue transacting with the Just Energy Group, the proposed Initial Order grants a charge to any counterparty to a Commodity Agreement or ISO Agreement (as defined in the Order) as of March

9, 2021 that has executed or executes a Qualified Support Agreement (as defined in the Initial Order) with a Just Energy Entity and refrained from exercising termination rights under the Commodity Agreement as a result of the commencement of these proceedings absent an event of default under such Qualified Support Agreement (each, a “**Qualified Commodity/ISO Supplier**”). The Initial Order provides that each Qualified Commodity/ISO Supplier shall be entitled to the benefit of a charge (the “**Priority Commodity/ISO Charge**”) on the Property in an amount equal to the value of the amounts that are due and payable, at the applicable time, for: (i)(A) the physical supply of electricity or gas that has been delivered on or after March 9, 2021; (B) financial settlements on or after March 9, 2021; and (C) amounts owing under a confirmation or transaction executed pursuant to a Commodity Agreement as a result of the termination thereof in accordance with the applicable Qualified Support Agreement on or after March 9, 2021; and (ii) for services actually delivered by a Qualified Commodity/ISO Supplier on or after March 9, 2021 pursuant to an ISO Agreement (but for greater certainty, excluding any amount owing for ISO services provided under the BP ISO Agreement on or before the date of this Order, whether or not yet due) (the “**Priority Commodity/ISO Obligation**”).

160. The Just Energy Group cannot continue going concern operations or successfully restructure if Commodity Suppliers and ISO Services Providers do not enter into new transactions. Due to the financial pressures the Just Energy Group is facing, suppliers may be reluctant to continue transacting without receiving additional security. Under the terms of the Credit Agreement, the Term Loan Agreement and the Intercreditor Agreement, the Just Energy Group cannot provide additional security without the applicable lenders’ consent. Therefore, the Priority Commodity/ISO Charge is essential for incentivizing Commodity Suppliers and ISO Services Providers to continue doing business with the Just Energy Group.

161. The Just Energy Group has entered into Qualified Support Agreements with its two most significant Secured Suppliers, (i) Shell Energy North America (Canada) Inc., Shell Energy North America (US), L.P., and Shell Trading Risk Management, LLC (collectively, “**Shell**”); and (ii) BP Canada Energy Company, BP Canada Energy Marketing Corp., BP Energy Company, a Delaware corporation, BP Corporation North America Inc., and BP Canada Energy Group ULC (collectively, “**BP**”), copies of which are attached as **Exhibit “HH”** and “**II**”. In these Commodity/ISO Supplier Support Agreements, among other things, Shell and BP have agreed to not exercise any termination rights and to supply and deliver services under their existing agreements consistent with historical practice and perform such other acts that are required to satisfy all of their obligations. However, Shell and BP’s obligation to continue supplying services is conditional on the Court granting the Commodity/ISO Charge.

**(j) Cash Flow Forecast**

162. The Applicants prepared 13-week cash flow projections and the underlying assumptions as required by the CCAA. A copy of the cash flow projections is attached as **Exhibit “JJ”**. The projections demonstrate that the Applicants have sufficient liquidity and cash on hand to continue going concern operations during the Stay Period. I confirm that:

- (a) all material information relative to the 13-week cash flow projections and to the underlying assumptions has been disclosed to FTI in its capacity as proposed Monitor; and
- (b) senior management has taken all actions that it considers necessary to ensure that:
  - (i) the individual assumptions underlying the 13-week cash flow projections are appropriate in the circumstances; and
  - (ii) the individual assumptions underlying the

13-week cash flow projections, taken as a whole, are appropriate in the circumstances.

163. The Applicants anticipate that the Monitor will provide oversight and assistance and will report to the Court in respect of the Applicants' actual results relative to the cash flow forecast during this proceeding if the relief being requested by the Applicants is granted by the Court.

**(k) Payments During this CCAA Proceeding**

164. During the course of this CCAA proceeding, the Applicants intend to make payments for goods and services supplied post-filing in the ordinary course as set out in the Cash Flow Forecast described above and as permitted by the Initial Order.

165. Moreover, in order to ensure uninterrupted business operations during the CCAA proceeding, the Applicants are proposing in the Initial Order that they be authorized, with the consent of the Monitor, in consultation with the DIP Agent and the agent under the Credit Agreement (or its advisors), to make certain payments, including payments owing in arrears, to certain third parties that are critical to the Just Energy Group's business and ongoing operations.

166. I am advised by Kirkland and believe that the nonpayment of taxes (including, without limitation, sales, use, withholding, unemployment, and excise) could result in a Director or Officer of a Just Energy Entity being held personally liable in certain circumstances for such nonpayment as well as for taxes related to income or operations incurred or collected by a Just Energy Entity in the ordinary course of business. Accordingly, the proposed Initial Order provides that the Just Energy Entities are authorized to pay any such taxes.

167. In addition, the proposed Initial Order provides that the Applicants shall not grant credit or incur liabilities except in the ordinary course of business but may repay advances under the Credit Agreement for the purpose of creating availability under the LC Facility (as defined in the Initial Order) in order for the Just Energy Entities to provide Letters of Credit to continue to operate their business in the ordinary course during these proceedings, subject to: (i) obtaining the consent of the Monitor with respect to the issuance of the Letters of Credit; and (ii) receipt of written confirmation from the applicable lender(s) under the Credit Agreement that such lender(s) will issue a Letter of Credit of equal value within one business day. The Just Energy Group is required to post collateral with regulators in various jurisdictions where it conducts business and so it is essential that the Just Energy Group have the ability to obtain Letters of Credit to avoid any disruptions that would result from failing to post collateral when required.

**(l) Chapter 15 Case**

168. Because the Just Energy Group has operations in the U.S., and thus has assets in and valuable business and trade relationships with a number of parties in the U.S., contemporaneously with commencement of the CCAA proceeding, Just Energy intends to initiate a case under Chapter 15 of Title 11 of the United States Code (the “**Bankruptcy Code**”) seeking an order to recognize and enforce the CCAA proceeding in the U.S. and protect against any potential adverse action taken by the Just Energy Group’s U.S. creditors and stakeholders (the “**Chapter 15 Case**”).

169. Just Energy intends to file the Chapter 15 Case in the United States Bankruptcy Court for the Southern District of Texas, where Just Energy maintains its principal place of business in the United States.

170. The Just Energy Group is a consolidated business, with offices and primary operations in both Canada and the United States which is operationally and functionally integrated in many respects. However, the Applicants' center of main interest is in Canada:

- (a) The Applicant have assets in Canada.
- (b) The operations of the Just Energy Group are directed in part from Just Energy's head office in Toronto, Ontario. In particular, decisions relating to the Just Energy Group's primary business (*i.e.*, 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 Group 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), 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.

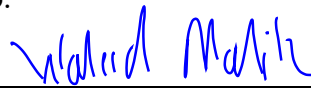
## **H. Conclusion**

171. I am confident that granting the draft Initial Order sought by the Applicants is in the best interests of the Applicants and their stakeholders. Although the Just Energy Group has made significant strides in recent years to position itself for sustainable growth as an independent industry leader, it is currently in a very challenging financial position because of the “once in a generation” Texas weather event. Without the relief requested, including the stay of proceedings, the Just Energy Group faces a cessation of going concern operations, the liquidation of its assets, and the loss of its employees’ jobs. The Just Energy Group requires the breathing space provided by CCAA protection to engage in a dialogue with and among its stakeholders with the goal of maximizing the ongoing value of the business and continuing employment for as many of its employees as is reasonably possible. The granting of the requested stay of proceedings will



maintain the “status quo” and permit an orderly restructuring and analysis of the Just Energy Group’s affairs.

SWORN BEFORE ME over video  
teleconference this 9th day of March, 2021  
pursuant to O. Reg 431/20, Administering  
Oath or Declaration Remotely. The affiant was  
located in the Town of Flower Mound, in the  
State of Texas while the Commissioner was  
located in the City Toronto, in the Province of  
Ontario.



---

Commissioner for Taking Affidavits  
Waleed Malik (LSO No. 678460)



---

Michael Carter

**Schedule "A"**

- Just Energy Ontario L.P.
- Just Energy Manitoba L.P.
- Just Energy (B.C.) Limited Partnership
- Just Energy Québec L.P.
- Just Energy Trading L.P.
- Just Energy Alberta L.P.
- Just Green L.P.
- Just Energy Prairies L.P.
- JEBPO Services LLP
- Just Energy Texas LP

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C- 36, AS AMENDED; Court File No:

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

Applicants

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at: TORONTO

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Counsel for the Applicants

**THIS IS EXHIBIT O REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', written over a horizontal line.

**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

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

**Just Energy Group Inc. et al.**

**THIRD REPORT OF FTI CONSULTING CANADA INC.,  
IN ITS CAPACITY AS COURT-APPOINTED MONITOR**

**September 8, 2021**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**THIRD REPORT OF THE MONITOR**

**INTRODUCTION**

1. Pursuant to an Order (the “**Initial Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated March 9, 2021 (the “**Filing Date**”), Just Energy Group Inc. (“**Just Energy**”) and certain of its affiliates (collectively, the “**Applicants**”) were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (the “**CCAA**” and in reference to the proceedings, the “**CCAA Proceedings**”).



2. Pursuant to the Initial Order, among other things:
  - (a) a stay of proceedings (the “**Stay of Proceedings**”) was granted until March 19, 2021 (the “**Stay Period**”);
  - (b) the protections of the Initial Order, including the stay of proceedings, were extended to certain subsidiaries of Just Energy that are partnerships (collectively with the Applicants, the “**Just Energy Entities**”);
  - (c) FTI Consulting Canada Inc. (“**FTI**”) was appointed as Monitor of the Just Energy Entities (in such capacity, the “**Monitor**”);
  - (d) a debtor-in-possession interim financing facility was approved (the “**DIP Facility**”) in the maximum principal amount of US\$125 million subject to the terms and conditions set forth in the financing term sheet (the “**DIP Term Sheet**”) between the Just Energy Entities and Alter Domus (US) LLC, as administrative agent for the lenders (the “**DIP Lenders**”) dated March 9, 2021; and
  - (e) certain charges were granted with priority over all encumbrances on the Just Energy Entities’ property, including two third-ranking charges on a *pari passu* basis in favour of: (A) the DIP Lenders to secure all Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time up to the maximum amount of the Obligations (the “**DIP Lenders’ Charge**”); and (B) each Commodity/ISO Supplier that has executed a Qualified Support Agreement in an amount equal to the value of the Priority Commodity/ISO Obligations (the “**Priority Commodity/ISO Charge**”).
3. On March 9, 2021, Just Energy, in its capacity as foreign representative, commenced proceedings under Chapter 15 of the United States Bankruptcy Code (the “**Chapter 15 Proceedings**”) for each of the Just Energy Entities with the United States Bankruptcy Court for the Southern District of Texas (the “**U.S. Court**”). The U.S. Court entered, among others, the *Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code*.

4. On March 19, 2021, at the comeback hearing in the CCAA Proceedings, the Court granted the Amended and Restated Initial Order (the “**First A&R Initial Order**”), which, among other things:
  - (a) extended the Stay Period to June 4, 2021;
  - (b) approved a key employee retention plan (“**KERP**”) and the KERP Charge in respect of certain Key Employees (each term as defined below);
  - (c) increased the amount of the Administration Charge, FA Charge and Directors’ Charge;
  - (d) granted the Cash Management Charge in favour of the Cash Management Banks to secure Cash Management Obligations;
  - (e) confirmed that any obligations secured by a valid, enforceable and perfected security interest shall continue to be secured by the Property, including any Property acquired after the date of the applicable security agreement; and
  - (f) authorized the Just Energy Entities to provide cash collateral to third parties where so doing is necessary to operate the Business in the normal course, with the consent of the Monitor and subject to the terms of the Definitive Documents (as defined in the Amended and Restated Initial Order).
  
5. On April 2, 2021, the U.S. Court granted the *Order Granting Petition for (I) Recognition as Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the “**Final Recognition Order**”). The Final Recognition Order, among other things, gave full force and effect to the Initial Order in the United States.
  
6. On May 26, 2021, the Court granted the Second Amended and Restated Initial Order (the “**Second A&R Initial Order**”) which, among other things:
  - (a) amended the definition of “Qualified Commodity/ISO Supplier” in the Initial Order to include counterparties to a Commodity Agreement or ISO Agreement executed after the Filing Date;

- (b) amended the definition of “Commodity Agreement” to include contracts entered into by a Just Energy Entity for protection against fluctuations in foreign currency exchanges rates; and
  - (c) amended the requirements set out at paragraph 30 of the Initial Order to permit Qualified Commodity/ISO Suppliers to terminate a Commodity Agreement or Qualified Support Agreement entered into after May 26, 2021 without obtaining Court authorization in certain limited circumstances.
7. Also on May 26, 2021, the Court granted the Stay Extension Order which, among other things:
- (a) extended the Stay Period to September 30, 2021;
  - (b) approved the Monitor’s previous reports to the Court and activities described therein;
  - (c) relieved Just Energy of any obligation to call and hold an annual meeting of its shareholders until further Order of the Court; and
  - (d) authorized, but did not obligate, Just Energy (U.S.) Corp. (“**Just Energy U.S.**”) to repatriate funds to the Just Energy Entities operating in Canada should it become necessary to do so to ensure sufficient working capital is held by such entities to fund their ongoing operations, which repatriation was permitted to be by way of repayment of certain intercompany indebtedness, including interest.
8. This Report should be read in conjunction with the Affidavit of Michael Carter sworn September 8, 2021 (the “**Carter Affidavit**”), which is accessible on the Monitor’s Website (as defined below).
9. All references to monetary amounts in this Third Report of the Monitor (the “**Third Report**”) are in Canadian dollars unless otherwise noted. Any capitalized terms not otherwise defined herein have the meanings attributed to them in the Second A&R Initial Order.

10. Further information regarding the CCAA Proceedings, including all materials publicly filed in connection with these proceedings, are available on the Monitor's website at <http://cfcanada.fticonsulting.com/justenergy/> (the "**Monitor's Website**").
11. Further information regarding the Chapter 15 Proceedings, including the Final Recognition Order and all other materials publicly filed in connection with the Chapter 15 Proceedings, are available on the website of Omni Agent Solutions as the U.S. noticing agent of the Just Energy Entities at <https://omniagentsolutions.com/justenergy>.

## PURPOSE

12. The purpose of this Third Report is to provide information to the Court with respect to the following:
  - (a) the Monitor's activities since the date of the Monitor's Second Report to the Court dated May 21, 2021 (the "**Second Report**");
  - (b) certain contract disclaimers issued by the Just Energy Entities with the consent of the Monitor pursuant to the CCAA;
  - (c) certain energy-related legislative developments in the state of Texas and their potential impact on the Just Energy Entities;
  - (d) details regarding a lift of the Stay of Proceedings for a limited purpose with the consent of the Just Energy Entities and the Monitor in accordance with the Second A&R Initial Order;
  - (e) details regarding discussions with commodity suppliers and agreements executed;
  - (f) details regarding the status of the Intercreditor Dispute and the Resolution Process (both as defined below);
  - (g) the status of the Just Energy Entities' restructuring initiatives;
  - (h) the relief sought by the Applicants in their proposed Order (the "**Claims Procedure Order**"), including the following relief, among other things:

- (i) approving a claims process for the identification, quantification, and resolution of Claims (as defined below) as against the Just Energy Entities and their respective directors and officers (the “**Claims Process**”);
  - (ii) authorizing the Just Energy Entities, the Monitor, the Claims Agent and the Claims Officer (each as defined below) to perform their respective obligations under the Claims Procedure Order; and
  - (iii) establishing the Claims Bar Date and the Restructuring Period Claims Bar Date (each as defined below);
- (i) the relief sought by the Applicants in their proposed Order (the “**Stay Extension and Other Relief Order**”), including approval of the following, among other things:
- (i) modifying the KERP approved in the First A&R Initial Order to permit the Just Energy Entities, in consultation with the Monitor, to reallocate unpaid KERP funds originally allocated to Key Employees (as defined below) who have resigned, or will resign, from their employment with the Just Energy Entities, or have declined, or will decline to receive payment(s) under the KERP, to remaining Key Employees or other employees of the Just Energy Entities that the Just Energy Entities, in consultation with the Monitor, identify as critical to their ongoing business;
  - (ii) authorizing the Just Energy Entities to enter into blocked account control agreements with respect to new bank accounts opened in the ordinary course of business as part of the Just Energy Entities’ Cash Management System, provided that the blocked account control agreements and the exercise of any and all rights thereunder shall be subject to (a) the terms of the DIP Term Sheet and the rights of the DIP Agent and the DIP Lenders thereunder; and (b) the terms of the Second A&R Initial Order, including the priority of the security interests in the Property granted to holders of the various Charges pursuant to the Second A&R Initial Order; and
  - (iii) extending the Stay Period to December 17, 2021;
- (j) the Monitor’s recommendations in respect of the foregoing, as applicable;

- (k) the Just Energy Entities' actual cash receipts and disbursements for the 15-week period ending August 28, 2021 and a comparison to the cash flow forecast (the "**Revised Cash Flow Forecast**") attached as Appendix "A" to the Second Report, along with an updated cash flow forecast for the period ending December 31, 2021 (the "**Updated Cash Flow Forecast**");
- (l) approving the fees and disbursements of the Monitor and its counsel incurred in the CCAA Proceedings for the period from March 9, 2021 to August 27, 2021; and
- (m) approving the Third Report and the actions, conduct and activities of the Monitor described herein.

### TERMS OF REFERENCE AND DISCLAIMER

- 13. In preparing this Third Report, the Monitor has relied upon audited and unaudited financial information of the Just Energy Entities, the Just Energy Entities' books and records, and discussions and correspondence with, among others, management of and advisors to the Just Energy Entities as well as other stakeholders and their advisors (collectively, the "**Information**").
- 14. Except as otherwise described in this Third Report:
  - (a) the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Auditing Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*; and
  - (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Third Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook*.
- 15. Future-oriented financial information reported in or relied on in preparing this Third Report is based on assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.

16. The Monitor has prepared this Third Report to provide information to the Court in connection with the relief requested by the Applicants. The Third Report should not be relied on for any other purpose.

### **MONITOR'S ACTIVITIES SINCE THE SECOND REPORT**

17. In accordance with its duties as outlined in the Initial Order and its prescribed rights and obligations under the CCAA, the activities of the Monitor since the Second Report have included the following:
- (a) assisting the Just Energy Entities with communications to employees, creditors, vendors, and other stakeholders;
  - (b) participating in regular discussions with the Just Energy Entities, their respective legal counsel and other advisors, regarding, among other things, the CCAA Proceedings, communications with stakeholders and business operations;
  - (c) participating in multiple discussions with the Just Energy Entities, the DIP Lenders, the agent under the Credit Agreement (the “**CA Agent**”), BP Energy Company (“**BP**”) and Shell Energy North America (Canada) Inc. and certain of its related parties (collectively, “**Shell**”) and their respective counsel and advisors in respect of, among other things, the Intercreditor Dispute (as defined below) and facilitating development of an intercreditor dispute resolution process (the “**Resolution Process**”) with the input of such stakeholders;
  - (d) maintaining the service list for the CCAA Proceedings with the assistance of Thornton Grout Finnigan LLP (“**TGF**”), counsel for the Monitor, a copy of which is posted on the Monitor’s Website;
  - (e) monitoring the receipts and disbursements of the Just Energy Entities;
  - (f) working with the Just Energy Entities, their advisors, and TGF, as applicable, to, among other things:
    - (i) provide stakeholders with financial and other information;
    - (ii) assist the Just Energy Entities in furthering their analysis and considerations with respect to possible exit strategies from the CCAA Proceedings,

- including assisting with the preparation of related cash flow forecasts and presentations;
- (iii) assist the Just Energy Entities in the preparation of the claims procedure set out in the Claims Procedure Order, including a preliminary review of potential claims by category and classification, and claims procedure design considerations;
  - (iv) determine amendments to the KERP to account for the resignations of Key Employees and the availability of funds thereunder;
  - (v) assist the Just Energy Entities in their discussions with financial institutions in respect of entering into blocked account control agreements;
  - (vi) ensure compliance with the requirements of regulators in applicable jurisdictions; and
  - (vii) consider a request to lift the Stay of Proceedings to permit recourse to the Just Energy Entities' insurance policy;
- (g) reviewing and, where applicable, approving the Just Energy Entities' disclaimers of certain contracts;
  - (h) pursuant to the terms of the Second A&R Initial Order, consulting regularly with the advisors to the CA Agent with respect to payments being made by the Just Energy Entities with the consent of the Monitor for amounts owing for goods and services rendered to the Just Energy Entities prior to the CCAA Proceedings;
  - (i) attending meetings of the Board of Directors of Just Energy, and various committees thereof;
  - (j) responding to creditor and other stakeholder inquiries;
  - (k) posting monthly reports on the value of the Priority Commodity/ISO Obligations to the Monitor's Website in accordance with the terms of the Initial Order; and
  - (l) preparing this Third Report.



## CONTRACT DISCLAIMER UPDATE

18. On May 21, 2021, Just Energy U.S. disclaimed a master subscription agreement and related order form dated July 31, 2018 between it and Vlocity, Inc. as contract counterparty (the “**Vlocity Contract**”) for certain subscription-based services to enhance sales and marketing, customer experience, billing management, and other initiatives.
19. On June 2, 2021, Just Solar Holdings Corp. (“**Solar**”), a Just Energy Entity, disclaimed an Agreement of Lease dated August 30, 2016 between it, as tenant, and RA 660 White Plains Road, LLC, as landlord (the “**Solar Lease**”). The Solar Lease was sub-leased by Solar to a sub-tenant, which sub-tenant agreed to vacate the premises upon the Solar Lease being disclaimed.
20. Both the Vlocity Contract and the Solar Lease disclaimers were carried out in accordance with the provisions of the CCAA and with the consent of the Monitor. The Monitor found both disclaimers to be fair and reasonable in the circumstances, as they benefited the Just Energy Entities and enhanced the prospect of a viable restructuring. The counterparties to the disclaimed contracts have not filed an objection with the Court within the 15-day objection period specified under the CCAA.
21. The Just Energy Entities have advised the Monitor that they are continuing to consider the viability of other agreements and may seek to disclaim additional agreements subject to the Monitor’s review and approval.

## TEXAS LEGISLATIVE DEVELOPMENTS

22. On June 16, 2021, the Governor of Texas signed House Bill 4492 (“**HB 4492**”), which provides a mechanism for the partial recovery of costs incurred by certain Texas energy market participants, including the Just Energy Entities, during the Texas weather event in February 2021.
23. HB 4492 addresses the securitization of (i) ancillary service charges above the system-wide offer cap of US \$9,000/MWh during the weather event; (ii) reliability deployment price adders charged by the Electric Reliability Council of Texas, Inc. (“**ERCOT**”) during the weather event; and (iii) non-payment of amounts owed to ERCOT due to defaults by

competitive market participants, resulting in short payments to market participants, including Just Energy (collectively, the “Costs”).

24. Consistent with the requirements of HB 4492, ERCOT requested that the Public Utility Commission of Texas (the “**Commission**”) establish securitization financing mechanisms for the payment of the Costs incurred by load-serving entities, including Just Energy. The Commission is currently considering ERCOT’s request.
25. The total amount that the Just Energy Entities may recover through the mechanisms authorized in HB 4492 will depend on a number of factors, including: (i) details of financing order(s) issued by the Commission; (ii) additional ERCOT resettlements; (iii) the aggregate amount of funds sought under HB 4492 by market participants; (iv) the outcome of the dispute process initiated by the Just Energy Entities with ERCOT; and (v) any potential challenges to the HB 4492 scheme. There is therefore no assurance that Just Energy will recover all the Costs it seeks to recover through HB 4492. Just Energy continues to evaluate the potential benefits and impact of HB 4492 on an on-going basis as new or updated information becomes available.

#### **LIFTING THE STAY OF PROCEEDINGS TO ALLOW RECOURSE TO INSURANCE**

26. On June 22, 2021, the Monitor consented to lift the Stay of Proceedings in accordance with paragraph 17 of the Second A&R Initial Order and paragraph 23 of the Final Recognition Order, for the limited purpose of permitting an insurance provider to certain Just Energy Entities’ to issue payment for the reimbursement of approximately US\$400,000 of legal defense costs paid by the Just Energy Entities prior to the filing date in relation to one action in Texas and two actions in Ontario. Such consent was required to lift the Stay of Proceedings as recognized in the United States under the Final Recognition Order to enable reimbursement of the legal defence costs to the Just Energy Entities.
27. The Monitor is of the view that lifting the Stay of Proceedings for such limited purposes was fair, reasonable and beneficial to the estate of the Just Energy Entities in the circumstances.

## COMMODITY SUPPLIERS

### *Update on Discussions with Commodity Suppliers and Agreements Executed*

28. As detailed in the Second Report, the Just Energy Entities are of the view that an expanded supply base would be beneficial to the longer-term viability of their business and have canvassed the market for potential suppliers with a goal of securing a diversified and competitive group of suppliers.
29. In addition to the ISDA Master Agreement with Mercuria Energy America, LLC previously entered into by the Just Energy Entities for the supply of electricity and natural gas, the Just Energy Entities have been successful in further diversifying their commodity supply arrangements and have entered into the following arrangements for the supply of electricity and natural gas in the United States – both of which require Just Energy U.S. to provide financial support under a letter of credit or to post cash collateral:
  - (a) an ISDA Master Agreement dated April 15, 2019 as amended on July 19, 2021 with corresponding schedules and related agreements with J. Aron & Company LLC; and
  - (b) an ISDA Master Agreement dated July 30, 2021 with corresponding schedules and related agreements with Hartree Partners, LP.
30. Going forward, the Just Energy Entities intend to continue actively managing their commodity supplier arrangements to enhance the longer-term viability of the business, and will continue to identify and engage in discussions with additional potential commodity suppliers as opportunities arise.

### *Dispute with Commodity Suppliers*

31. After the Filing Date, Skyview Finance Company, LLC (“**Skyview**”), a counterparty that previously traded in renewable energy credits with Just Energy U.S., terminated its forward contracts with Just Energy U.S. and disputed certain amounts that the Applicants contend are owing to Just Energy U.S. The Just Energy Entities and Skyview have agreed on a process to resolve their dispute and the parties have completed preparation of their

materials in this process. The Monitor is being kept apprised of the developments in the dispute process and will provide a further update to the Court at a later date.

## **INTERCREDITOR DISPUTE**

32. As described in the Monitor's earlier reports, certain of the Just Energy Entities are party to an intercreditor agreement (the "**Intercreditor Agreement**") between certain secured commodity and ISO service suppliers (each, a "**Secured Supplier**"), including BP and Shell, and the CA Agent on behalf of certain secured lenders. The Intercreditor Agreement, among other things, sets out the relative priority of the parties' security interests.
33. Prior to the commencement of these proceedings, Just Energy was advised by BP, a Secured Supplier and a party to the Intercreditor Agreement, that it disagreed with the characterization of certain amounts due to BP as Tier 2 and Tier 3 obligations and considered such amounts to be Tier 1 obligations. The Just Energy Entities have advised BP that they consider any dispute regarding the ranking of amounts due to BP under the Intercreditor Agreement to be an intercreditor dispute (the "**Intercreditor Dispute**") and that the Just Energy Entities do not intend to take a position on the Intercreditor Dispute.
34. The Monitor understands that the potential quantum of the amount under dispute is approximately US\$200 million.
35. In order to avoid lengthy and costly litigation, the Monitor facilitated extensive discussions with, among others, BP, Shell, the CA Agent, the DIP Lenders, the Just Energy Entities and their respective financial and legal advisors (collectively, the "**Interested Parties**"), all of whom expressed an interest in the Intercreditor Dispute in order to understand the positions of such parties in respect of the Intercreditor Dispute and establish a process to resolve same.
36. The Monitor has not taken, and will not take, a position on the substance of the Intercreditor Dispute, and has assisted the Interested Parties in its capacity as an independent officer of the Court to develop the Resolution Process.
37. During the negotiation of the Resolution Process, the Monitor was advised that an entity or entities related to the DIP Lender had acquired the claim of BP against the Just Energy

Entities, which claim included the amount that was the subject of the Resolution Process. Following consultation with the Just Energy Entities, the DIP Lenders and the Monitor, the Interested Parties agreed to put the Resolution Process in abeyance while a potential restructuring solution is pursued.

38. Prior to putting the Resolution Process in abeyance, one point of dispute remained between the Interested Parties dealing with an issue regarding a potential post-award judicial review. In light of the abeyance, the Monitor is of the view that it is neither necessary to seek approval of the Resolution Process nor deal with the remaining point in dispute at this time. In the event that the discussions on the potential restructuring solution are no longer proving fruitful, or the resolution of the Intercreditor Dispute becomes otherwise required, the Monitor, in consultation with the Interested Parties now excluding BP, may bring the Resolution Process or a revised version of it before this Court for consideration.

#### **UPDATE ON RESTRUCTURING EFFORTS OF THE JUST ENERGY ENTITIES**

39. Pursuant to the DIP Term Sheet, the Just Energy Entities delivered their business plan on May 18, 2021 to the DIP Lenders and other stakeholders as required.
40. Since that time, the Just Energy Entities with the assistance of legal counsel and the Financial Advisor, and in consultation with the Monitor and the DIP Lenders, have continued their restructuring efforts with a focus on developing a restructuring plan that facilitates emergence from the CCAA Proceedings, preserves the going concern value of the business, maintains customer service and relationships, and preserves employment and critical vendor relationships – all for the benefit of the Just Energy Entities’ stakeholders.
41. To provide sufficient time to further restructuring efforts, the Just Energy Entities have negotiated extensions to certain milestone deadlines provided for in the DIP Term Sheet including the following:
- (a) October 7, 2021 – deadline for delivery of a term sheet for a recapitalization transaction reasonably acceptable to the DIP Lenders (the “**Recapitalization Plan**”);

- (b) November 5, 2021 – deadline for the CCAA Court to grant an order approving one or more meetings for a vote on the Recapitalization Plan and related materials, if applicable;
  - (c) December 8, 2021 – deadline for the meeting(s) to vote on the Recapitalization Plan, if applicable;
  - (d) December 17, 2021 – deadline for the CCAA Court to grant an order approving and sanctioning the Recapitalization Plan, if applicable;
42. Pursuant to the DIP Term Sheet and in connection with the restructuring efforts noted above, the Just Energy Entities with the assistance of the Financial Advisor and in consultation with the Monitor have been working to develop a recapitalization term sheet (the “**Recapitalization Term Sheet**”).
43. The Monitor understands that the Just Energy Entities are in the process of broadening the scope of such discussions to include other key stakeholders as the Recapitalization Term Sheet and the Recapitalization Plan develop.

#### **CLAIMS PROCEDURE ORDER**

44. For the purpose of this section only, any capitalized terms not defined herein have the meanings ascribed thereto in the proposed Claims Procedure Order.
45. The Just Energy Entities and the Monitor have developed the Claims Process to determine the nature, quantum, and validity of Claims against the Just Energy Entities and their Directors and Officers in a flexible, fair, comprehensive, and expeditious manner. The Claims Process is described in detail in the Carter Affidavit. Intercreditor disputes, including the Intercreditor Dispute described above, are specifically omitted from the Claims Process.

#### *Types of Claims*

46. The following is a summary of Claims that the Just Energy Entities are soliciting in the Claims Process:

- (a) **Prefiling Claims**: any right or claim of any Person against any of the Just Energy Entities in connection with any indebtedness, liability or obligation of any kind whatsoever of such Just Energy Entity that was in existence on the Filing Date. Such Pre-Filing Claims may include, but are not limited to:
- (i) **General trade creditor claims**: any claim by contractual counterparties with respect to goods or services supplied by such counterparties to the Just Energy Entities;
  - (ii) **Customer claims**: any right or claim of any customer against any of the Just Energy Entities;
  - (iii) **Employee claims**: any right or claim of any current or former employee against any of the Just Energy Entities including, but not limited to, any claim for termination or severance pay;
  - (iv) **Litigation or class action claims**: any claim of any proposed plaintiff with respect to any potential litigation, or proposed or confirmed representative plaintiff on behalf of a class in any class action, against any of the Just Energy Entities;
  - (v) **Commodity Agreement claims**: any claim by counterparties to a gas supply agreement, electricity supply agreement or other agreement with any Just Energy Entity for the physical or financial purchase, sale, trading or hedging of natural gas, electricity or environmental derivative products, or contracts entered into for protection against fluctuations in foreign currency exchange rates, which shall include any master power purchase and sale agreement, base contract for sale and purchase, ISDA master agreement or similar agreement;
  - (vi) **Tax claims**: any claim of Her Majesty the Queen in Right of Canada or of any province or territory or municipality or any other taxation authority in any Canadian or non-Canadian jurisdiction, including, without limitation, amounts which may arise or have arisen under any current or future notice of assessment, notice of objection, notice of reassessment, notice of appeal,

audit, investigation, demand or similar request from any taxation authority (“**Assessments**”);

- (vii) Equity claims: any claim in respect of an equity interest, including a claim for a dividend or similar payment, a return of capital, a redemption or retraction obligation, a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission of a purchase or sale of an equity interest, or a claim for contribution or indemnity with respect to any of the foregoing; and
- (viii) Funded debt claims: any claim in respect of funded debt for which any of the Just Energy Entities is liable.

- (b) **Restructuring Period Claims**: any right or claim of any Person against any of the Just Energy Entities in connection with any indebtedness, liability or obligation of any kind whatsoever owed by any such Just Energy Entity to such Person out of the restructuring, disclaimer, resiliation, termination or breach by such Just Energy Entity on or after the Filing Date of any contract, lease or other agreement whether written or oral, and including any claim with respect to any Assessment;
- (c) **Pre-Filing D&O Claims**: any right or claim of any Person against one or more Directors and/or Officers arising based in whole or in part on facts that existed prior to the Filing Date, including with respect to any Assessments or any claims brought by any proposed or confirmed representative plaintiff on behalf of a class in a class action; and
- (d) **Restructuring Period D&O Claims**: any right or claim of any Person against one or more of the Directors and/or Officers arising after the Filing Date, including with respect to any Assessments.

47. The Claims Process does not apply to the following (collectively, “**Excluded Claims**”):

- (a) any Claim that may be asserted by any beneficiary of the Charges provided for by the Second A&R Initial Order, or any other charges granted by the Court within the CCAA Proceedings, with respect to such charge(s);



- (b) any Claim that may be asserted by any federal or provincial energy regulators, including provincial regulators of consumer sales that have authority with respect to energy sales, U.S. municipal, state, federal or other foreign energy regulatory bodies or agencies, local energy transmission and distribution companies, regional transmission organizations or independent system operators;
  - (c) the three class action lawsuits, including any claim for contribution or indemnity in respect of or related to such actions, enumerated within the definition of “Specified Equity Class Action Claim” in the proposed Claims Procedure Order, which claims were channeled to insurance under the CBCA Plan of Arrangement (as defined below);
  - (d) any Intercompany Claim that may be asserted against any of the Just Energy Entities by or on behalf of any of the Applicants or any of their affiliated companies, partnerships, or other corporate entities; and
  - (e) any Claim that may be asserted by any of the Just Energy Entities against any Directors and/or Officers.
48. In addition to the Excluded Claims, the definition of “Claim” also does not include any right or claim of any Person that was previously released, barred, estopped, stayed and/or enjoined pursuant to the amended and restated plan of arrangement dated September 2, 2020 (the “**CBCA Plan of Arrangement**”) under section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, which arrangement was approved by a final order of the Court on application by Just Energy and 12175592 Canada Inc.

#### *Claims Process and Notice*

49. The Claims Process contains a negative notice process as detailed below. This process covers a majority of the Claims in terms of number of Claimants. The Claims Procedure Order sets out the categories of Claims that shall be subject to the negative notice process. All other Claimants (or potential Claimants) will be required to file a Proof of Claim as prescribed by the proposed Claims Procedure Order.
50. The negative notice process was designed to streamline the Claims Process for the Claimants and the Just Energy Entities. While the Just Energy Entities anticipate that the

vast majority of Claimants will receive Negative Notice Packages, certain Claimants may hold Claims more readily quantified directly by the Claimant. The Claims Process provides the Just Energy Entities and the Monitor with the appropriate flexibility to issue a General Claims Package, rather than a Negative Notice Claims Package, as appropriate given the size and complexity of the Just Energy Entities' business in pursuit of a fair and efficient notice process with respect to each Claimant.

51. The Monitor, or Omni Agent Solutions as claims and noticing agent (the “**Claims Agent**”), will send out a Negative Notice Claims Package to every Negative Notice Claimant. This will include a Statement of Negative Notice Claim, which sets out the Negative Notice Claimant's Claim, according to the books and records of the Just Energy Entities. Any Negative Notice Claimant that wishes to dispute the amount set out in the notice is required to dispute that claim by delivering a Notice of Dispute of Claim in accordance with the Claims Process. If the Negative Notice Claimant does not dispute the Negative Notice Claim set out in its statement, such Negative Notice Claim will be deemed accepted in accordance with the Claims Process and all dispute rights of such Negative Notice Claimant shall be forever extinguished and barred.
52. For all other Claims, a general claims process is being conducted that requires a Claimant to file its Proof of Claim and/or D&O Proof of Claim (as used herein, together “**Proof of Claim**”) with the Monitor or Claims Agent (as set out in the Claims Procedure Order and the Carter Affidavit).
53. With respect to notice, and in addition to the mailings and delivery of claims packages (either negative or general) to known potential Claimants based on the books and records of the Just Energy Entities, the parties on the Service List, and any other person who requests a claims package, the Just Energy Entities will also provide additional noticing of the Claims Process to the following (the “**Additional Notice Parties**”):
  - (a) all current employees via posting of a notice on the employee intranet site advising of the existence of the Claims Process and providing information on steps to be taken if they may hold a claim against the Just Energy Entities; and

- (b) all active vendors of the Just Energy Entities listed in their books and records as not having any existing claim against the Just Energy Entities (i.e. are owed \$0) will be sent either a General Claims Package (as defined below) or a notice advising of the existence of the Claims Process which will include instructions for accessing a General Claims Package available on the websites of the Monitor and the Claims Agent.
54. Despite the Additional Notice Parties not holding Claims pursuant to the books and records of the Just Energy Entities, the additional noticing is being undertaken for completeness purposes and to ensure the most exhaustive approach is undertaken by the Just Energy Entities for the provision of notice to interested stakeholders of the Claims Process.
55. As a final measure to ensure all Persons holding or wishing to assert a Claim against the Just Energy Entities, the Monitor shall cause notices to be put in *The Globe and Mail* (National Edition), the *Wall Street Journal*, the *Houston Chronicle*, and the *Dallas Morning News*, as soon as practicable after the date of the Claims Procedure Order. The claims package will be made available on the websites of the Monitor and the Claims Agent.
56. The Claims Process will be conducted entirely pursuant to the CCAA Proceedings, and any U.S. Claimants will be required to file their Claims in accordance with the Claims Process.

*Claims Agent and Claims Officer*

57. In order to assist the Just Energy Entities and the Monitor to administer the Claims Process, and to allow Claims to be submitted electronically in an expeditious and efficient manner, the Just Energy Entities have retained the Claims Agent. The Claims Agent is familiar with the matter as it is currently the U.S. noticing agent in the Chapter 15 proceedings and was also retained by the Monitor for the purpose of providing administrative support services in association with the CCAA Proceedings.
58. The Claims Agent, together with the Monitor, as applicable, will be responsible for: (a) disseminating Negative Notice Claims Packages and General Claims Packages in

accordance with the Claims Procedure Order; (b) receiving and tracking Notices of Dispute of Claim submitted by a Negative Notice Claimant disputing a Statement of Negative Notice Claim; and (c) receiving and tracking Proofs of Claim. In addition, the Claims Agent and Monitor are required under the Claims Procedure Order to post the Notice to Claimants, the General Claims Package and a blank form of Notice of Dispute of Claim to their respective websites.

59. The Claims Agent will also be responsible for opening the online claims submission portals on its website to enable the electronic submission of Proofs of Claim, and Notices of Dispute by Claimants. Claimants will be encouraged to submit documents through the Claims Agent's customized website, which will provide an efficient platform for both Claimants to submit Claims, and the Just Energy Entities, the Monitor and the Claims Agent to review, record and categorize all Claims.
60. The proposed Claims Procedure Order also seeks to appoint Mr. Edward Sellers, and such further and other persons as may be appointed from time to time by this Court on a motion by the Just Energy Entities or the Monitor, as claims officers (each, a "**Claims Officer**") for the Claims Process. Mr. Sellers is President & Managing Director of Black Swan Advisors Inc., one of Canada's pre-eminent restructuring advisors, and has extensive experience in the restructuring space. Mr. Sellers was formerly a partner with the Applicants' counsel. He ceased to be a partner with the Applicants' counsel in January of 2016.
61. The proposed Claims Procedure Order gives the Just Energy Entities, in consultation with the Monitor, the discretion to determine whether a disputed Claim should be adjudicated by the Court or by a Claims Officer. If referred to a Claims Officer, the proposed Claims Procedure Order provides that the Claims Officer shall: (a) determine the amount and characterization of the disputed Claim in accordance with the Claims Procedure Order; (b) determine whether any Claim or part thereof constitutes an Excluded Claim; (c) provide written reasons for his or her determination of the matter; and (d) determine all procedural matters which may arise in respect of his or her determination of the disputed Claim, including any participation rights for any stakeholder and the manner in which any evidence may be adduced. In addition, the Claims Procedure Order provides the Claims

Officer with the discretion to mediate any dispute and to determine by whom and to what extent the costs of any hearing or mediation before a Claims Officer shall be paid. Each party to the dispute, any other stakeholder (if applicable) and the Monitor may appeal any determination by the Claims Officer to the Court within ten (10) days of such party receiving notice of the Claims Officer's determination.

#### *Claims Bar Dates*

62. The proposed Claims Procedure Order provides that any Person asserting a Pre-Filing Claim or Pre-Filing D&O Claim or disputing a Negative Notice Claim provided to them be required to deliver to the Claims Agent or the Monitor a Proof of Claim or Notice of Dispute of Claim (in the case of Negative Notice Claimants) on or before 5:00 p.m. (Toronto time) on November 1, 2021 (the "**Claims Bar Date**").
63. The proposed Claims Procedure Order further provides that any person asserting a Restructuring Period Claim or Restructuring Period D&O Claim be required to deliver to the Claims Agent or the Monitor a Notice of Dispute of Claim (in the case of Negative Notice Claimants) or a Proof of Claim before the later of: (i) 30 days after the date on which the Monitor or Claims Agent sends a Negative Notice Claims Package or General Claims Package, as applicable, and (ii) the Claims Bar Date (the "**Restructuring Period Claims Bar Date**").
64. The Claims Bar Date and the Restructuring Period Claims Bar Date were selected by the Just Energy Entities, in consultation with the Monitor. The Claims Bar Date and the Restructuring Period Claims Bar Date provide sufficient time for potential Claimants to evaluate and submit any Proof of Claim or Notice of Dispute of Claim and will permit the process to continue expeditiously while the Just Energy Entities concurrently develop their restructuring plan.
65. The proposed Claims Procedure Order provides that:
  - (a) any Negative Notice Claimant who does not submit a Notice of Dispute of Claim by the Claims Bar Date or Restructuring Period Claims Bar Date, as applicable, is deemed to have accepted the amount and characterization of its Claim as set out in the Statement of Negative Notice Claim, and all rights of the Negative Notice

Claimant to dispute the Claim or otherwise assert or pursue such Claim other than as set out in the Statement of Negative Notice Claim are extinguished and barred; and

- (b) any potential Claimant (other than a Negative Notice Claimant) that does not submit a Proof of Claim by the Claims Bar Date or Restructuring Period Claims Bar Date, as applicable, is: (i) forever barred, estopped and enjoined from asserting or enforcing such Claim against the Just Energy Entities and/or their Directors and Officers, as applicable; (ii) not permitted to vote at any meeting on account of such Claim; (iii) not entitled to receive further notice with respect to the Claims Process or these CCAA Proceedings with respect to such Claim; and (iv) not permitted to participate in any distributions under any plan of arrangement or compromise or otherwise on account of such Claim.
66. Pursuant to the proposed Claims Procedure Order, the Monitor, in consultation with the Just Energy Entities, may use its reasonable discretion to determine whether to agree to accept a Claim submitted after the applicable Bar Date.

#### *Adjudication of Claims*

67. The Just Energy Entities, in consultation with the Monitor, will review and record all Notices of Dispute of Claim and Proofs of Claim that are received on or before the applicable Bar Date. If the Just Energy Entities, in consultation with the Monitor, determine that it is necessary to finally determine the amount and characterization of any or all Claims against the Just Energy Entities (or any of them) or their Directors and Officers, the Just Energy Entities, in consultation with the Monitor, will review and finally determine the amount and characterization of all such Claims asserted in any Proof of Claim or for which a Notice of Dispute of Claim has been received on or before the applicable Bar Date. Such review and determination will be completed in accordance with the adjudication and resolution process set out in the Claims Procedure Order.
68. It is not presently known whether the Just Energy Entities will be required to finally determine the amount and characterization of all Claims. The necessity to undertake such exercise will depend, among other things, on the restructuring transaction ultimately

contemplated by the Just Energy Entities, and the nature and quantum of any proposed distributions sought to be made to creditors within the CCAA Proceedings. The proposed Claims Procedure Order accordingly incorporates flexibility for the Just Energy Entities to review and, in consultation with the Monitor, finally determine all Claims on an “as needed” basis at the appropriate time.

69. In the event the Just Energy Entities, in consultation with the Monitor, determine that it is appropriate and necessary to review and finally determine the amount and characterization of any Claims, the following process will apply:
- (a) In respect of any Notice of Dispute of Claim submitted by a Negative Notice Claimant:
    - (i) if the Just Energy Entities, in consultation with the Monitor, disagree with a Claim set out in a Notice of Dispute of Claim, the Just Energy Entities and the Monitor will attempt to resolve such dispute and settle the purported Claim;
    - (ii) in the event that a dispute is not settled, the Just Energy Entities will, in consultation with the Monitor, refer the dispute to a Claims Officer or the Court for adjudication; and
    - (iii) the Monitor will send written notice of such referral to the Negative Notice Claimant.
  - (b) In respect of any Proof of Claim submitted by a Claimant:
    - (i) if the Just Energy Entities, in consultation with the Monitor with respect to a Proof of Claim, and in consultation with both the Monitor and the Directors and Officers with respect to a D&O Proof of Claim, as applicable, agree with the amount and characterization of a Claim set out in a Proof of Claim, the Monitor or Claims Agent will notify such Claimant of the acceptance of its Claim by the Just Energy Entities;
    - (ii) if the Just Energy Entities, in consultation with the Monitor, disagree with the amount or characterization of a Claim set out in a Proof of Claim, the Just Energy Entities, the Monitor and any applicable Directors and Officers

will attempt to resolve such dispute and settle the purported Claim with the Claimant;

- (iii) if the Just Energy Entities and the Monitor intend to revise or reject a Claim, the Monitor will notify the applicable Claimant that its Claim has been revised or rejected, and the reasons for such revision or rejection, by sending a Notice of Revision or Disallowance to the Claimant;
- (iv) any Claimant who wishes to dispute a Notice of Revision or Disallowance must deliver a completed Notice of Dispute of Revision or Disallowance, along with the reasons for its dispute, to the Monitor by no later than thirty (30) days after the date on which the Claimant is deemed to receive the Notice of Revision or Disallowance, or such other date as may be agreed to in writing by the Monitor, in consultation with the Just Energy Entities. Failure to deliver a Notice of Dispute of Revision or Disallowance within the required time period will result in the Claimant's Claim being deemed to be as determined in the Notice of Revision or Disallowance;
- (v) upon receipt of a Notice of Dispute of Revision or Disallowance, and unless the dispute is settled, the Just Energy Entities will, in consultation with the Monitor and any applicable Directors and Officers, refer the dispute to a Claims Officer or the Court for adjudication; and
- (vi) the Monitor will send written notice of such election to the Claimant.

70. Pursuant to the proposed Claims Procedure Order, the Just Energy Entities are not permitted to accept or revise any portion of a D&O Claim absent the consent of the applicable Directors and Officers, or further Order of the Court.

71. Pursuant to the proposed Claims Procedure Order, the Just Energy Entities, in consultation with the Monitor, may consult with and/or provide reporting to the Consultation Parties in the review, adjudication and/or resolution of any Claims. Further, the Just Energy Entities are required to provide seven days' prior written notice to the Consultation Parties of the details of any proposed settlement or allowance of any Claim in an amount exceeding \$5 million, and any Consultation Party may seek the direction of the Court regarding any such



proposed resolution of the Claim. The Consultation Parties include the DIP Lenders and their affiliates holding secured Claims against any of the Just Energy Entities, the CA Agent and CA Lenders, Shell, and their respective counsel and financial advisors.

*Summary of the Claims Process*

72. The Just Energy Entities have prepared the following summary table of the Claims Process that highlights the important dates and timelines:

| <b><u>Timeframe</u></b>  | <b><u>Activity</u></b>   |
|--|--|
| September 15, 2021   | Motion for approval of Claims Procedure Order.   |
| ~ September 17, 2021<br>[as soon as practicable after the granting of the Claims Procedure Order]                        | Monitor to cause the Notice to Claimants (or a condensed version thereof) to be published in required newspapers.  |
| ~ September 17, 2021<br>[as soon as practicable after the granting of the Claims Procedure Order]                        | Monitor to cause the Notice to Claimants, the General Claims Package, and a blank form of Notice of Dispute of Claim to be posted on the Monitor's Website.  |
| ~ September 17, 2021<br>[as soon as practicable after the granting of the Claims Procedure Order]                        | Claims Agent to cause the Notice to Claimants, the General Claims Package, and a blank form of Notice of Dispute of Claim to be posted on the Claims Agent's Website.<br><br>Claims Agent to open the online claims submission portal on the Claims Agent's Website. |
| September 29, 2021<br>[10th Business Day following date of the Claims Procedure Order]                                   | Deadline for the Monitor or Claims Agent, as applicable, to cause a Negative Notice Claims Package to be sent to every Negative Notice Claimant.   |
| September 29, 2021<br>[10th Business Day following date of the Claims Procedure Order]                                   | Deadline for the Monitor or the Claims Agent, as applicable, to cause a General Claims Package to be sent to applicable Persons.   |
| November 1, 2021   | Claims Bar Date.   |
| Later of the following: (i) November 1, 2021; or, (ii) 30 days after the date on which the Monitor or Claims Agent sends | Restructuring Period Claims Bar Date.  |

| <u>Timeframe</u>  | <u>Activity</u> |
|---|-----------------|
| a Negative Notice Claims Package or General Claims Package with respect to a Restructuring Period Claim or Restructuring Period D&O Claim |                 |

73. The Just Energy Entities developed the Claims Process in consultation with its advisors and the Monitor. The Monitor is of the view that the Claims Process is fair and reasonable in the circumstances, will assist the Just Energy Entities with the development of its restructuring plan, and help to facilitate an orderly exit of the Just Energy Entities from the CCAA. Accordingly, the Monitor supports approval of the Claims Process including the appointments of the Claims Agent and Claims Officer, and recommends its approval by the Court.

#### AMENDMENTS TO THE KERP

74. The First A&R Initial Order approved a KERP and the granting of a Court-ordered charge (the “**KERP Charge**”) as security for payments under the KERP. Among other things, the KERP authorized payments in three installments to certain senior management and other key employees of the Just Energy Entities who are required to guide the business through the restructuring process. In total, the approved KERP contemplated payments to 42 employees (the “**Key Employees**”) totaling approximately \$6.90 million.
75. Since the approval of the KERP, two Key Employees have resigned from the Just Energy Entities and one Key Employee declined to receive any payments under the KERP (collectively, the “**KERP Departees**”). The total of such foregone payments by the KERP Departees is approximately US\$0.4 million.
76. The Just Energy Entities are seeking this Court’s approval to permit the reallocation of the funds previously authorized for distribution under the KERP and foregone by the KERP Departees, in consultation with the Monitor, to either: (i) remaining Key Employees who have taken on additional responsibilities as a result of employee resignations, or (ii) other employees that the Just Energy Entities identify as critical to their ongoing business

(collectively, the “**Revised Key Employees**”). Subject to this Court’s approval, any re-allocated funds will be paid on the same terms and on the same dates or milestones as set out in the KERP.

77. The requested relief is consistent with the purpose and spirit of the KERP, and the requested reallocation of some or all of the foregone payments by the KERP Departees in consultation with the Monitor will have no financial impact on the stakeholders as the Just Energy Entities are not looking to increase the KERP or the KERP Charge. The Monitor views the relief requested by the Just Energy Entities regarding the KERP as fair and reasonable in the circumstances, and in the best interest of the Just Energy Entities. Accordingly, the Monitor supports the relief sought by the Applicants with respect to the approval of the revisions to the KERP.

#### **BLOCKED ACCOUNT CONTROL AGREEMENTS**

78. Pursuant to the terms of the Intercreditor Agreement and certain other loan agreements, the Just Energy Entities and their affiliates are barred from opening any new bank accounts, without first causing the financial institution with whom such account is maintained to enter into a blocked account control agreement (“**Account Control Agreement**”).
79. Interactive Energy Group LLC (“**IEG**”), an indirect, wholly owned subsidiary of Just Energy (U.S.) Corp., intends to establish separate bank accounts in the United States and Canada to receive and track revenues. Further new bank accounts may also be required by the Just Energy Entities in the normal course of business during the pendency of these CCAA Proceedings for similar purposes.
80. The Applicants are seeking authority for the Just Energy Entities, in consultation with the Monitor, to enter into Account Control Agreements in the ordinary course of business as part of the Just Energy Entities’ Cash Management System, provided that the Account Control Agreements and the exercise of any and all rights thereunder shall be subject to (i) the terms of the DIP Term Sheet and the rights of the DIP Agent and the DIP Lenders thereunder; and (ii) the terms of the Second A&R Initial Order, including the priority of the security interests granted to holders of the various Charges pursuant to the Second A&R Initial Order.

81. The Monitor supports the Applicants' request to enter into Account Control Agreements in the ordinary course of business subject to the conditions set out in the preceding paragraph. In the Monitor's view, the requested relief is fair and reasonable in the circumstances.

## RECEIPTS AND DISBURSEMENTS FOR THE 15-WEEK PERIOD ENDED AUGUST 28, 2021

82. The Just Energy Entities' actual net cash flow for the 15-week period from May 16, 2021 to August 28, 2021, was approximately \$41.4 million better than the Revised Cash Flow Forecast appended to the Second Report as summarized below:

| <i>(CAD\$ in millions)</i>                  | <u>Forecast</u>  | <u>Actuals</u>  | <u>Variance</u> |
|---|------------------|-----------------|-----------------|
| <b>RECEIPTS</b>                             |                  |                 |                 |
| Sales Receipts                              | \$744.9          | \$729.9         | (\$15.0)        |
| Miscellaneous Receipts                      | 3.8              | 1.9             | (1.9)           |
| <i>Total Receipts</i>                       | \$748.7          | \$731.7         | (\$17.0)        |
| <b>DISBURSEMENTS</b>                        |                  |                 |                 |
| <i>Operating Disbursements</i>              |                  |                 |                 |
| Energy and Delivery Costs                   | (\$688.4)        | (\$651.9)       | \$36.4          |
| Payroll                                     | (25.7)           | (25.3)          | 0.4             |
| Taxes                                       | (39.8)           | (27.5)          | 12.3            |
| Commissions                                 | (30.1)           | (27.4)          | 2.6             |
| Selling and Other Costs                     | (52.5)           | (45.9)          | 6.6             |
| <i>Total Operating Disbursements</i>        | (\$836.5)        | (\$778.1)       | \$58.4          |
| <b>OPERATING CASH FLOWS</b>                 | (\$87.8)         | (\$46.3)        | \$41.5          |
| <i>Financing Disbursements</i>              |                  |                 |                 |
| Credit Facility - Borrowings / (Repayments) | \$ -             | \$ -            | \$ -            |
| Interest Expense & Fees                     | (11.6)           | (11.0)          | 0.6             |
| <i>Restructuring Disbursements</i>          |                  |                 |                 |
| Professional Fees                           | (11.1)           | (11.8)          | (0.7)           |
| <b>NET CASH FLOWS</b>                       | <b>(\$110.5)</b> | <b>(\$69.1)</b> | <b>\$41.4</b>   |
| <b>CASH</b>                                 |                  |                 |                 |
| Beginning Balance                           | \$216.9          | \$234.1         | \$17.2          |
| Net Cash Inflows / (Outflows)               | (110.5)          | (69.1)          | 41.4            |
| Other (FX)                                  | -                | 9.7             | 9.7             |
| <b>ENDING CASH</b>                          | <b>\$106.5</b>   | <b>\$174.8</b>  | <b>\$68.3</b>   |

83. Explanations for the main variances in actual receipts and disbursements as compared to the Revised Cash Flow Forecast are as follows:
- (a) The unfavourable variance of approximately \$15.0 million in Sales Receipts is primarily comprised of the following:
    - (i) A permanent unfavourable variance of approximately \$3.1 and \$13.3 million for U.S. residential and commercial customers, respectively, primarily due to lower than anticipated energy demand as a result of mild spring and early summer weather; and
    - (ii) A permanent favourable variance of approximately \$1.4 million primarily due to higher than forecast Canadian residential and commercial customer billings relative to the Revised Cash Flow Forecast;
  - (b) The unfavourable timing variance of approximately \$1.9 million of Miscellaneous Receipts is primarily due to the delayed collection of certain sales tax refunds, which are expected to be collected in a future period;
  - (c) The favourable variance of approximately \$36.4 million for Energy and Delivery Costs as compared to the Revised Cash Flow Forecast is primarily driven by the following:
    - (i) A favourable variance of approximately \$42.5 million primarily due to lower commodity payments related in part to lower customer electricity usage as noted in the cash receipts comments above and higher than forecast commodity receivables collections, which were partially reduced by the set-off of approximately US\$6.1 million for certain commodity receivables;
    - (ii) A permanent favourable variance of approximately \$3.6 million due to lower than forecast transportation and delivery payments in the Revised Cash Flow Forecast due in part to lower energy transmission volumes and normal course fluctuations relative to the Revised Cash Flow Forecast; and
    - (iii) An unfavourable timing variance of approximately \$9.6 million related to credit support forecasted to be posted prior to the current 15-week period but which was actually paid in the current 15-week period;

- (d) The favourable variance of approximately \$0.4 million for Payroll is due to normal course fluctuations for various payroll tax remittances and sale incentive payments relative to the Revised Cash Flow Forecast;
- (e) The favourable variance of approximately \$12.3 million for Taxes is primarily due to the timing of estimated tax payments including an estimated sales tax reassessment payment owing by the Just Energy Entities of approximately \$7.8 million that was forecast, but not paid, during the period. The exact timing of when this amount will be paid remains unknown, but payment at a future date will continue to be carried forward in the forecast;
- (f) The permanent favourable variance of approximately \$2.6 million for Commissions is primarily due to normal course fluctuations related to customer sign-ups and associated commissions relative to the Revised Cash Flow Forecast;
- (g) The favourable timing variance of approximately \$6.6 million for Selling and Other Costs is primarily due to the Just Energy Entities' continued successful negotiation of payment terms and go-forward arrangements with its vendors;
- (h) The favourable variance of \$0.6 million for Interest Expense & Fees is primarily due to lower than forecast interest and fees owed on the Just Energy Entities' credit facilities;
- (i) The unfavourable timing variance of \$0.7 million for Professional Fees is due to higher than forecast payments of professional fee invoices during the current 15-week period; and
- (j) The favourable variance of approximately \$17.2 million in the opening cash balance is due to the variances identified in the Second Report that covered the initial two-week period of the Revised Cash Flow Forecast.

*Reporting Pursuant to the DIP Term Sheet*

84. The variances shown and described herein compare the Revised Cash Flow Forecast, as appended to the Second Report, with the actual performance of the Just Energy Entities over the 15-week period noted.

85. Pursuant to Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a variance report setting out the actual versus projected cash disbursements once every four weeks (the “**DIP Variance Reports**”). The permitted variances to which certain line items of the cash flow forecast are tested are outlined in section 24(30) of Schedule I of the DIP Term Sheet. The Just Energy Entities provided the required variance reports for the four-week periods ended May 29, 2021, June 26, 2021, July 24, 2021, and August 21, 2021. All variances reported were within the required permitted variances.
86. Also, in accordance with Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a new 13-week cash flow forecast, which shall replace the immediately preceding cash flow forecast in its entirety upon the DIP Lenders’ approval thereof and is used as the basis for the next four-week variance report and permitted variance testing (the “**DIP Cash Flow Forecasts**”). The Just Energy Entities provided the required cash flow forecasts, which were approved by the DIP Lenders for the 13-week periods beginning May 30, 2021, June 27, 2021, July 25, 2021, and August 22, 2021.
87. As the DIP Variance Reports utilize updated underlying cash flow forecasts vis-à-vis the Revised Cash Flow Forecast for the same period, the DIP Variance Reports differed from the variance analysis above that compares actual results to the Revised Cash Flow Forecast. For purposes of the Just Energy Entities reporting requirements pursuant to the DIP Term Sheet, the DIP Cash Flow Forecasts as approved by the DIP Lenders will continue to govern.
88. Since the Second Report, the Just Energy Entities have complied with their reporting obligations pursuant to the DIP Term Sheet, the Second A&R Initial Order, and other documents including certain support agreements. These reporting obligations during the period included the in-time delivery of the following:
- (a) Delivery of a Priority Supplier Payables Certificate weekly and monthly;
  - (b) Delivery of an ERCOT Related Settlements update weekly;
  - (c) Delivery of a Cash Management Charge update monthly;
  - (d) Delivery of a Priority Commodity / ISO Charge update weekly and monthly;

- (e) Delivery of a Marked to Market Calculation monthly;
- (f) Delivery of the consolidated financial statements for fiscal 2021, Management's discussion and analysis on the consolidated financial statements, and related compliance certificate annually;
- (g) Delivery of the Gross Margin Calculation Certificate quarterly; and
- (h) Delivery of the modified (quarterly presentation) consolidated financial statements and related compliance certificate quarterly.

### **CASH FLOW FORECAST FOR THE PERIOD ENDING JANUARY 1, 2022**

89. The Just Energy Entities, with the assistance of the Monitor, have updated and extended their weekly cash flow forecast for the 19-week period ending January 1, 2022 (the “**September Cash Flow Forecast**”), which encompasses the requested stay extension to December 15, 2021. The September Cash Flow Forecast is attached hereto as **Appendix “A”**, and is summarized on the subsequent page:



| <i>(CAD\$ in millions)</i>                  | 13-Week Period           | 19-Week Period         |
|---|--------------------------|------------------------|
|   | Ending November 20, 2021 | Ending January 1, 2022 |
| <b>Forecast Week</b>                        | <b>Total</b>             | <b>Total</b>           |
| <b>RECEIPTS</b>                             |                          |                        |
| Sales Receipts                              | \$666.1                  | \$920.2                |
| Miscellaneous Receipts                      | 6.6                      | 6.6                    |
| <i>Total Receipts</i>                       | \$672.7                  | \$926.8                |
| <b>DISBURSEMENTS</b>                        |                          |                        |
| <i>Operating Disbursements</i>              |                          |                        |
| Energy and Delivery Costs                   | (\$508.9)                | (\$741.5)              |
| ERCOT Resettlements                         | 0.8                      | 0.8                    |
| Payroll                                     | (29.2)                   | (44.7)                 |
| Taxes                                       | (32.0)                   | (42.8)                 |
| Commissions                                 | (28.5)                   | (41.8)                 |
| Selling and Other Costs                     | (47.6)                   | (69.0)                 |
| <i>Total Operating Disbursements</i>        | (\$645.3)                | (\$939.0)              |
| <b>OPERATING CASH FLOWS</b>                 | \$27.4                   | (\$12.2)               |
| <i>Financing Disbursements</i>              |                          |                        |
| Credit Facility - Borrowings / (Repayments) | \$ -                     | \$ -                   |
| Interest Expense & Fees                     | (10.5)                   | (16.9)                 |
| <i>Restructuring Disbursements</i>          |                          |                        |
| Professional Fees                           | (11.3)                   | (16.4)                 |
| <b>NET CASH FLOWS</b>                       | <b>\$5.5</b>             | <b>(\$45.4)</b>        |
| <b>CASH</b>                                 |                          |                        |
| Beginning Balance                           | \$142.0                  | \$142.0                |
| Net Cash Inflows / (Outflows)               | 5.5                      | (45.4)                 |
| Other (FX)                                  | -                        | -                      |
| <b>ENDING CASH</b>                          | <b>\$147.5</b>           | <b>\$96.6</b>          |

90. The Revised Cash Flow Forecast indicates that during the 19-week period ending January 1, 2022, the Just Energy Entities will have net cash outflows from operating activities of approximately \$12.2 million with total receipts of approximately \$926.8 million and total disbursements of approximately \$939.0 million, before interest expense and fees of approximately \$16.9 million and professional fees of approximately \$16.4 million, such that net cash outflows are forecast to be approximately \$45.4 million. The Monitor notes that the September Cash Flow Forecast has not incorporated actual results for the week ending August 28, 2021 for presentation purposes as it reflects the current approved DIP Cash Flow Forecast. As a result, the actual ending cash balance reported in the budget to actual section above as at August 28, 2021 will not agree to the forecast cash balance reflected in the September Cash Flow Forecast as at the same date.

91. Generally, the underlying assumptions and methodology utilized in the Just Energy Entities' Cash Flow Forecast have remained the same for this Revised Cash Flow Forecast; however, the Monitor notes the following:
- (a) The forecast period was extended from the week ending October 2, 2021 to the week ending January 1, 2022;
  - (b) The Just Energy Entities have updated and revised certain underlying data supporting the assumptions that contribute to the cash receipts and disbursements included in the Revised Cash Flow Forecast, which include:
    - (i) Customer cash receipt collection timing and bad debt estimates have been updated based on recent trends and analysis;
    - (ii) Customer cash receipt estimates have also been updated based on actualized revenue billed for recent periods combined with refined estimates for future customer billings;
    - (iii) Certain disbursements not incurred during the period ending August 21, 2021 have been moved forward as they are expected to be incurred in future weeks;
    - (iv) Vendor credit support and cash collateral requirements have been updated based on business requirements and on-going discussions between the Just Energy Entities and its vendors;
    - (v) The tax disbursements forecast has been updated based on the tax department's latest tax payment schedule and estimates;
    - (vi) Professional fee estimates have been updated to reflect expected activity during the forecast period; and
    - (vii) The Just Energy Entities' forecast cash receipts and disbursements have been refined generally to reflect updated seasonality expectations where energy and delivery costs increase leading into and during the peak summer period. The higher energy and delivery costs during the peak period result in higher customer receipts during the later summer and early fall months as customer billings for the peak period are collected.

(c) Pursuant to the DIP Term Sheet, the DIP Facility shall be available until the earlier of certain milestone dates and December 31, 2021. For purposes of the September Cash Flow Forecast, it is assumed that the DIP Facility is not repaid and applicable arrangements will be in place to extend the DIP Facility for an additional term if so required. The Monitor understands that preliminary discussions between the Just Energy Entities and the DIP Lenders are underway should such an extension be required, and the Monitor will provide further updates in its future reports.

92. The Revised Cash Flow Forecast demonstrates that, subject to its underlying hypothetical and probable assumptions, the Just Energy Entities have sufficient liquidity to continue funding their operations during the CCAA Proceedings to January 1, 2022.

### **STAY EXTENSION**

93. The Stay Period will expire on September 30, 2021, and the Applicants are seeking an extension to the Stay Period up to and including December 15, 2021.

94. The Monitor supports extending the Stay Period to December 15, 2021 for the following reasons:

- (a) during the proposed extension of the Stay Period, the Just Energy Entities will have an opportunity to consider and develop their restructuring process in an effort to achieve a going concern solution in consultation with the Financial Advisor, the Monitor and other key stakeholders;
- (b) the Monitor is of the view that the proposed extension to the Stay Period is necessary to give the Just Energy Entities the flexibility required in order to have the best possible chance to implement a successful restructuring;
- (c) as indicated by the Updated Cash Flow Forecast, the Just Energy Entities are forecast to have sufficient liquidity to continue operating in the ordinary course of business during the requested extension of the Stay Period;
- (d) no creditor of the Just Energy Entities would be materially prejudiced by the extension of the Stay Period; and

- (e) in the Monitor's view, the Just Energy Entities have acted in good faith and with due diligence in the CCAA Proceedings since the Filing Date.

#### **APPROVAL OF THE ACTIVITIES OF THE MONITOR AND THE FEES OF THE MONITOR AND ITS COUNSEL**

95. The Stay Extension and Other Relief Order also seeks approval of: (i) the actions, conduct, and activities of the Monitor since the date of the Stay Extension Order; (ii) the Third Report; and, (iii) the fees and disbursements of the Monitor and its counsel from the Filing Date to August 27, 2021.
96. As outlined in the Monitor's previous reports to the Court (all of which are available on the Monitor's Website), the Monitor and its counsel have played, and continue to play, a significant role in the CCAA Proceedings. The Monitor respectfully submits that its actions, conduct, and activities in the CCAA Proceedings since the Second Report have been carried out in good faith and in accordance with the provisions of the orders issued therein, and should therefore be approved.
97. Pursuant to paragraphs 42 and 43 of the Second A&R Initial Order, the Monitor, TGF and Porter Hedges LLP as the Monitor's U.S. legal counsel shall: (i) be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of the Initial Order, by the Just Energy Entities as part of the costs of the CCAA Proceedings; and (ii) pass their accounts from time to time before this Court.
98. Since the Filing Date, the Monitor and its counsel have maintained detailed records of their professional time and costs. The total fees and disbursements of the Monitor for the period from March 9, 2021 to August 27, 2021 total \$3,107,636.36, including fees in the amount of \$2,741,828.00, disbursements in the amount of \$8,292.62, and Harmonized Sales Tax ("HST") in the amount of \$357,515.74, as more particularly described in the Affidavit of Paul Bishop sworn September 8, 2021 (the "**Bishop Affidavit**"), a copy of which is attached hereto as **Appendix "B"**.

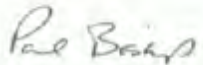
99. The total fees and disbursements of the Monitor's counsel, TGF, from March 9, 2021 to August 27, 2021 total \$1,537,317.14, including fees in the amount of \$1,315,267.50, disbursements in the amount of \$50,734.49, and HST in the amount of \$171,315.15, as more particularly described in the Affidavit of Puya Fesharaki sworn September 8, 2021 (the "**Fesharaki Affidavit**", together with the Bishop Affidavit, the "**Fee Affidavits**"), a copy of which is attached hereto as **Appendix "C"**.
100. The total fees and disbursements of the Monitor's U.S. counsel, Porter Hedges LLP, from March 9, 2021 to August 27, 2021 total US\$157,201.37, including fees in the amount of US\$152,375.00 and disbursements in the amount of US\$4,826.37, as more particularly described in the Affidavit of John Higgins sworn September 7, 2021 (the "**Higgins Affidavit**", together with the Bishop Affidavit and Fesharaki Affidavit, the "**Fee Affidavits**"), a copy of which is attached hereto as **Appendix "D"**.
101. The Monitor respectfully submits that the fees and disbursements incurred by the Monitor and its counsel, as described in the Fee Affidavits, are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Initial Order, First A&R Initial Order and Second A&R Initial Order. Accordingly, the Monitor respectfully requests the approval of the fees and disbursements of the Monitor and its counsel as set out in the Fee Affidavits.

## CONCLUSION

102. The Monitor is of the view that the relief requested by the Applicants is necessary, reasonable and justified in the circumstances.
103. Accordingly, the Monitor respectfully recommends that the proposed Claims Procedure Process Order, and the Stay Extension and Other Relief Order be granted.

The Monitor respectfully submits to the Court this Third Report dated this 8th day of September, 2021.

**FTI Consulting Canada Inc.,**  
in its capacity as Court-appointed Monitor of  
Just Energy Group Inc. *et al*,  
and not in its personal or corporate capacity



Per: \_\_\_\_\_

Paul Bishop  
Senior Managing Director

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**  
(each, an “**Applicant**”, and collectively, the “**Applicants**”)

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceedings commenced at Toronto

**THIRD REPORT OF THE MONITOR**

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Lawyers for the Court-appointed Monitor,  
FTI Consulting Canada Inc.

**THIS IS EXHIBIT P REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', written over a horizontal line.

**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**



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

**Just Energy Group Inc. et al.**

**SECOND REPORT OF FTI CONSULTING CANADA INC.,  
IN ITS CAPACITY AS COURT-APPOINTED MONITOR**

**May 21, 2021**

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## APPENDICES

Appendix A      Cash Flow Forecast for the Period Ending October 2, 2021

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**SECOND REPORT OF THE MONITOR**

**INTRODUCTION**

1. Pursuant to an Order (the “**Initial Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated March 9, 2021 (the “**Filing Date**”), Just Energy Group Inc. (“**Just Energy**”) and certain of its affiliates (collectively, the “**Applicants**”) were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (the “**CCAA**” and in reference to the proceedings, the “**CCAA Proceedings**”).

2. Pursuant to the Initial Order, among other things:
  - (a) a stay of proceedings was granted until March 19, 2021 (the “**Stay Period**”);
  - (b) the protections of the Initial Order, including the stay of proceedings, was extended to certain subsidiaries of Just Energy that are partnerships (collectively with the Applicants, the “**Just Energy Entities**”);
  - (c) FTI Consulting Canada Inc. (“**FTI**”) was appointed as Monitor of the Just Energy Entities (in such capacity, the “**Monitor**”);
  - (d) a debtor-in-possession interim financing facility was approved (the “**DIP Facility**”) in the maximum principal amount of US\$125 million subject to the terms and conditions set forth in the financing term sheet (the “**DIP Term Sheet**”) between the Just Energy Entities that are borrowers thereunder (the “**Just Energy DIP Borrowers**”) and Alter Domus (US) LLC (the “**DIP Agent**”), as administrative agent for the lenders (the “**DIP Lenders**”) dated March 9, 2021; and
  - (e) certain charges were granted with priority over all encumbrances on the Just Energy Entities’ property, including two third-ranking charges on a *pari passu* basis in favour of: (A) the DIP Lenders to secure all Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time up to the maximum amount of the Obligations (the “**DIP Lenders’ Charge**”); and (B) each Commodity/ISO Supplier that has executed a Qualified Support Agreement in an amount equal to the value of the Priority Commodity/ISO Obligations (the “**Priority Commodity/ISO Charge**”).
3. Any capitalized terms not otherwise defined herein have the meanings attributed to them in the Initial Order.
4. On March 9, 2021, Just Energy, in its capacity as foreign representative, commenced proceedings under Chapter 15 of the United States Bankruptcy Code (the “**Chapter 15 Proceedings**”) for each of the Just Energy Entities with the United States Bankruptcy Court for the Southern District of Texas (the “**U.S. Court**”). The U.S. Court entered, among others, the *Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code*.

5. At the comeback hearing on March 19, 2021 in the CCAA Proceedings, the Court granted the Amended and Restated Initial Order (the “**A&R Initial Order**”), which, among other things:
  - (a) extended the Stay Period to June 4, 2021;
  - (b) approved a key employee retention plan and associated charge;
  - (c) increased the amount of the Administration Charge, FA Charge and Directors’ Charge;
  - (d) granted the Cash Management Charge in favour of the Cash Management Banks to secure Cash Management Obligations;
  - (e) confirmed that any obligations secured by a valid, enforceable and perfected security interest shall continue to be secured by the Property, including any Property acquired after the date of the applicable security agreement; and
  - (f) authorized the Just Energy Entities to provide cash collateral to third parties where so doing is necessary to operate the Business in the normal course, with the consent of the Monitor.
6. On April 2, 2021, the U.S. Court granted the *Order Granting Petition for (I) Recognition as Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the “**Final Recognition Order**”). The Final Recognition Order, among other things, gave full force and effect to the Initial Order in the United States.
7. This Report should be read in conjunction with the Affidavit of Michael Carter sworn May 19, 2021 (the “**Carter Affidavit**”), which is accessible on the Monitor’s Website (as defined below).
8. All references to monetary amounts in this Second Report of the Monitor (the “**Second Report**”) are in Canadian dollars unless otherwise noted.
9. Further information regarding the CCAA Proceedings, including the A&R Initial Order and all materials publicly filed in connection with these proceedings, are available on the

Monitor's website at <http://cfcanada.fticonsulting.com/justenergy/> (the "**Monitor's Website**").

10. Further information regarding the Chapter 15 Proceedings, including the Final Recognition Order and all other materials publicly filed in connection with the Chapter 15 Proceedings, are available on the website of Omni Agent Solutions as the U.S. noticing agent of the Just Energy Entities at <https://omniagentsolutions.com/justenergy>.

## **PURPOSE**

11. The purpose of this Second Report is to provide information to the Court with respect to the following:
  - (a) the Monitor's activities since the date of the Monitor's First Report to the Court dated March 18, 2021 (the "**First Report**");
  - (b) certain developments in the CCAA Proceedings since the First Report;
  - (c) certain developments relating to the dispute of resettlement invoices delivered by the Electric Reliability Council of Texas ("**ERCOT**") in relation to the February weather event in Texas;
  - (d) certain contract disclaimers issued by the Just Energy Entities with the consent of the Monitor pursuant to the CCAA;
  - (e) the Just Energy Entities' ongoing discussions with various commodity suppliers and agreements that they have executed with same since the First Report;
  - (f) the status of the Intercreditor Dispute (as defined below);
  - (g) the Just Energy Entities' business plan;
  - (h) the Just Energy Entities' actual cash receipts and disbursements for the 9-week period ending May 15, 2021 and a comparison to the cash flow forecast (the "**Cash Flow Forecast**") attached as Appendix "A" to the Pre-Filing Report of the Monitor dated March 9, 2021 (the "**Pre-Filing Report**"), along with an updated cash flow forecast for the period ending October 2, 2021;

- (i) the relief sought by the Applicants in their proposed Order (the “**May Stay Extension Order**”), including, among other things:
  - (i) extending the Stay Period in favour of the Just Energy Entities up to and including September 30, 2021;
  - (ii) relieving Just Energy of any obligation to call and hold an annual meeting of its shareholders until further Order of the Court;
  - (iii) approving the Pre-Filing Report, the First Report and this Second Report and the Monitor’s activities and conduct to the date of the May Stay Extension Order; and
  - (iv) authorizing, but not requiring, Just Energy (U.S.) Corp. (“**Just Energy U.S.**”) to repatriate funds to the Just Energy Entities operating in Canada should it become necessary to do so to ensure sufficient working capital is held by such entities to fund their ongoing operations, which repatriation may be by way of repayment of certain intercompany indebtedness, including interest;
- (j) the relief sought by the Applicants in their proposed Second Amended and Restated Initial Order (the “**Second A&R Initial Order**”), amending:
  - (i) the definition of “Qualified Commodity/ISO Supplier” in the Initial Order to include counterparties to a Commodity Agreement or ISO Agreement executed after the Filing Date;
  - (ii) the definition of “Commodity Agreement” to include contracts entered into by a Just Energy Entity for protection against fluctuations in U.S. dollar to Canadian dollar foreign currency exchanges; and
  - (iii) the requirements set out at paragraph 30 of the Initial Order to permit Qualified Commodity/ISO Suppliers to terminate a Commodity Agreement or Qualified Support Agreement entered into after May 26, 2021 without obtaining Court authorization in certain limited circumstances; and
- (k) the Monitor’s recommendations in respect of the foregoing, as applicable.

## TERMS OF REFERENCE AND DISCLAIMER

12. In preparing this Second Report, the Monitor has relied upon audited and unaudited financial information of the Just Energy Entities, the Just Energy Entities' books and records, and discussions and correspondence with, among others, management of and advisors to the Just Energy Entities as well as other stakeholders and their advisors (collectively, the "**Information**").
13. Except as otherwise described in this Second Report:
  - (a) the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Auditing Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*; and
  - (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Second Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook*.
14. Future-oriented financial information reported in or relied on in preparing this Second Report is based on assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.
15. The Monitor has prepared this Second Report in connection with the relief requested by the Applicants in the proposed May Stay Extension Order and the proposed Second A&R Initial Order. The Second Report should not be relied on for any other purpose.

## MONITOR'S ACTIVITIES SINCE ITS APPOINTMENT

16. In accordance with its duties as outlined in the Initial Order and its prescribed rights and obligations under the CCAA, the activities of the Monitor since the First Report have included the following:
  - (a) assisting the Just Energy Entities with communications to employees, creditors, vendors, and other stakeholders;



- (b) consulting with the Just Energy Entities with respect to the support agreement dated March 18, 2021 (the “**Lender Support Agreement**”) among the Just Energy Entities and the lenders under the ninth amended and restated credit agreement dated September 28, 2020 (the “**Credit Facility Lenders**”), the terms of which were described in the Supplementary Affidavit of Michael Carter sworn March 18, 2021 (the “**Supplementary Carter Affidavit**”);
- (c) consulting with the Just Energy Entities with respect to the amendment to the DIP Term Sheet dated March 18, 2021 (the “**DIP Amendment**”), the terms of which are discussed below and were described in the Supplementary Carter Affidavit;
- (d) participating in regular discussions with the Just Energy Entities, their respective legal counsel and other advisors, regarding, among other things, the CCAA Proceedings, communications with stakeholders, business operations and a restructuring process;
- (e) participating in discussions with the DIP Agent and its counsel;
- (f) participating in discussions with the Credit Facility Lenders, their advisors and counsel, including, among other things, in respect of the Intercreditor Dispute;
- (g) participating in discussions with BP Energy Company (“**BP**”) and its counsel in respect of the Intercreditor Dispute;
- (h) maintaining the Service List with the assistance of Thornton Grout Finnigan LLP, counsel for the Monitor in the CCAA Proceedings, a copy of which is posted on the Monitor’s Website;
- (i) monitoring the receipts and disbursements of the Just Energy Entities;
- (j) working with the Just Energy Entities and their advisors to provide stakeholders with financial and other information;
- (k) reviewing and, where applicable, approving the Just Energy Entities’ disclaimers of certain contracts;
- (l) pursuant to paragraph 10(d) of the A&R Initial Order, consulting regularly with the advisors to the Credit Agreement (as defined therein) with respect to payments being made by the Just Energy Entities with the consent of the Monitor for amounts

owing for goods and services rendered to the Just Energy Entities prior to the CCAA Proceedings;

- (m) attending meetings of the Board of Directors of Just Energy;
- (n) responding to creditor and other stakeholder inquiries;
- (o) posting monthly reports on the value of the Priority Commodity/ISO Obligations to the Monitor's Website in accordance with the terms of the Initial Order; and
- (p) preparing this Second Report.

### **ERCOT RESETTLEMENT INVOICES AND DISPUTE**

17. As described in the Pre-Filing Report and the First Report, the Just Energy Entities sought CCAA protection in response to a severe short-term liquidity shortfall resulting from the February weather event in Texas that led to the receipt of invoices from ERCOT requiring payment of significant amounts within two business days of receipt of the invoice.
18. To date, the Just Energy Entities have received and paid invoices from ERCOT totaling more than US\$336 million relating to the weather event, of which approximately US\$48 million in resettlement invoices were received and paid after the date of the First Report. While the Just Energy Entities continue to pay invoices issued by ERCOT, it should be noted that they are disputing the resettlement statements pursuant to ERCOT's protocols. One of the grounds on which the Just Energy Entities continue to protest the fees charged to them by ERCOT is Unaccounted for Energy ("UFE"). UFE is the difference between total metered electricity load for a settlement period, adjusted for transmission and distribution losses, and the total ERCOT system net generation. The manner in which ERCOT charges market participants their respective shares of UFE is a matter of dispute with respect to the total dollar value of UFE across the market and how shares are calculated.
19. The Monitor understands that ERCOT has dismissed one of the disputes filed by the Just Energy Entities. The Just Energy Entities expect a similar response to the other disputes they have filed in respect of resettlements. Pursuant to ERCOT's protocols, the Just Energy Entities may commence an alternative dispute resolution process within 45 days from

receipt of the dismissal notice from ERCOT, failing which ERCOT considers the dispute “closed”.

20. The Just Energy Entities are considering the rights and remedies available to them. Additionally, the Monitor understands that the Just Energy Entities, along with other participants in the Texas electricity market that were affected by the February weather event, are pursuing potential legislative solutions to address the financial hardships caused by the February weather event. In respect of such efforts, Just Energy’s Board of Directors formed a Legislative and Regulatory Affairs Committee to assist the Board of Directors in seeking such legislative remedies. The activities of this committee are further described in the Carter Affidavit.

### CONTRACT DISCLAIMERS

21. Since the date of the First Report, the Just Energy Entities have disclaimed the following agreements pursuant to the provisions of the CCAA with the consent of the Monitor (collectively, the “**Disclaimers**”):
  - (a) on March 30, 2021, certain of the Just Energy Entities disclaimed a services agreement and addendum with Hampstead Co. Limited and related persons (collectively, “**Hampstead**”);
  - (b) on March 31, 2021, certain of the Just Energy Entities disclaimed six lease agreements in respect of underutilized or unutilized properties across the United States;
  - (c) on April 2, 2021, certain of the Just Energy Entities disclaimed service agreements and related contracts with Red Ventures, LLC, Save On Energy, LLC and certain of their affiliates (collectively, “**Red Ventures**”); and
  - (d) on May 14, 2021, certain of the Just Energy Entities disclaimed a lease agreement in respect of a property in Irving, Texas.
22. The Monitor approved each of the Disclaimers, finding them to be fair and reasonable in the circumstances as they benefited the Just Energy Entities and enhanced the prospect of a viable restructuring.

23. Hampstead and Red Ventures requested written reasons for the Disclaimers that affected them, which reasons were delivered by the Just Energy Entities in accordance with the CCAA. Neither Hampstead nor Red Ventures applied to the Court to object to the subject disclaimers within the 15-day objection period specified under the CCAA.
24. The Just Energy Entities have advised the Monitor that they are continuing to consider the viability of other agreements and may seek to disclaim additional agreements subject to the Monitor's review and approval.

## **DEVELOPMENTS WITH COMMODITY SUPPLIERS**

### *Qualified Support Agreements*

25. The Initial Order provides the benefit of the Priority Commodity/ISO Charge to counterparties to a Commodity Agreement (such counterparties, the “**Commodity Suppliers**”) or an ISO Agreement as of the Filing Date that enter into a Qualified Support Agreement. Since the date of the Initial Order, the Just Energy Entities have been in consultation with other Commodity Suppliers in an effort to preserve existing contractual relationships and maintain uninterrupted going concern operations. In addition to BP, Shell Energy North America (Canada) Inc. and Shell Energy North America (US), LP, each of which entered into Qualified Support Agreements with the Just Energy Entities prior to the Filing Date, Macquarie Energy LLC and Macquarie Energy Canada Ltd. (together, “**Macquarie**”) and certain of the Just Energy Entities executed a Qualified Support Agreement dated March 30, 2021 (the “**Macquarie Support Agreement**”). Pursuant to the Macquarie Support Agreement, Macquarie has continued to supply electricity and gas to the Just Energy Entities in accordance with their existing agreements.
26. The Just Energy Entities' remaining Commodity Suppliers have not executed a Qualified Support Agreement, and all but one have terminated their agreements with the Just Energy Entities.
27. The Just Energy Entities are of the view that an expanded supply base would be beneficial to the longer-term viability of their business, and accordingly have canvassed the market for potential suppliers with a goal of securing a diversified and competitive group of

suppliers beyond the three current providers that have entered into Qualified Support Agreements.

28. To date, the Just Energy Entities have entered into an ISDA Master Agreement with Mercuria Energy America, LLC for the supply of electricity and natural gas. This arrangement requires Just Energy U.S. to provide financial support under a letter of credit or to post cash collateral.
29. Additionally, the Just Energy Entities are in active discussions with potential commodity suppliers. As discussed below, the proposed Second A&R Initial Order sought by the Just Energy Entities amends the definition of “Qualified Commodity/ISO Supplier” in the Initial Order to include parties that may execute a Commodity Agreement and Qualified Support Agreement with a Just Energy Entity after the Filing Date. The Monitor supports these amendments as it is in the Just Energy Entities’ best interests to source energy through a diversified supplier network, which these changes will facilitate while potentially allowing the Just Energy Entities to enter into supply arrangements without tying up financial collateral.

#### *Disputes with Commodity Suppliers*

30. After the Filing Date, a Commodity Supplier, Skyview Finance Company, LLC (“**Skyview**”), a counterparty that previously traded in renewable energy credits with Just Energy U.S., terminated its forward contracts with Just Energy U.S. and has disputed amounts owing to its obligation to pay Just Energy U.S. in respect of the net mark-to-market value of the forward contracts on the termination date. The Monitor understands that the Just Energy Entities and Skyview have agreed on a process which is intended to resolve the dispute in an efficient manner.

#### **INTERCREDITOR DISPUTE**

31. As described in the First Report, an intercreditor agreement (the “**Intercreditor Agreement**”) has been entered into between certain secured Commodity Suppliers (the “**Secured Suppliers**”), the agent for the Credit Facility Lenders and certain of the Just

Energy Entities. The Intercreditor Agreement, among other things, sets out the relative priority of the parties' security interests.

32. The Intercreditor Agreement includes a waterfall of priorities that provides for the following tiered ranking: (i) accounts payable owing to the Secured Suppliers rank first (i.e. Tier 1); (ii) on a *pari passu* basis, the "mark to market" liability owing to the Secured Suppliers, the amounts owing to the Credit Facility Lenders and the amounts owing to the providers under the ISO Agreements up to a cap of US\$75 million rank second on a *pari passu* basis (i.e. Tier 2); and (iii) amounts owing to the providers under the ISO Agreements above a US\$75 million cap rank third (i.e. Tier 3). There are other tiers that are in priority to these tiers under the Intercreditor Agreement waterfall; however, they are not the subject of the Intercreditor Dispute and therefore not described herein.
33. Prior to the commencement of these proceedings Just Energy was advised by BP, a Secured Supplier and a party to the Intercreditor Agreement, that it disagreed with Just Energy's characterization of certain amounts due to BP as Tier 2 and Tier 3 obligations and that it considered such amounts to be Tier 1 obligations. The Just Energy Entities have advised BP that they consider any dispute regarding the ranking of amounts due to BP to be an intercreditor dispute among the parties to the Intercreditor Agreement (the "**Intercreditor Dispute**") and that the Just Energy Entities do not intend to take a position on the Intercreditor Dispute (though they have provided and will continue to provide information requested by the Monitor and other applicable key stakeholders with respect to the Intercreditor Dispute).
34. The Monitor has engaged in discussions with, among others, the Just Energy Entities, BP, the Credit Facility Lenders, and the DIP Agent, to understand the Intercreditor Dispute and the positions of the various interested parties. The Monitor has not taken and will not take a position on the Intercreditor Dispute, and it understands that the potential quantum of the amount under dispute could be approximately US\$200 million. The Monitor in consultation with the Just Energy Entities is currently drafting a process for the timely and efficient resolution of the Intercreditor Dispute for consideration by the affected parties. Given the magnitude of the dispute, the Monitor is aware of the need to resolve this dispute in a timely manner and will provide an update on this matter in its next report to the Court.

## **DEVELOPMENT OF JUST ENERGY'S BUSINESS PLAN**

35. In accordance with the requirements of the DIP Term Sheet, the Just Energy Entities have been preparing a detailed business plan, detailing, among other things, operational and financial projections, near and longer-term liquidity requirements, and anticipated business operations during and upon emergence from the CCAA Proceedings. It is anticipated that the business plan will facilitate the development of a restructuring process for emergence from the CCAA Proceedings in a manner that optimizes value for the benefit of all stakeholders.
36. The Monitor understands that the business plan has been approved by Just Energy's Board of Directors and was distributed to key stakeholders on May 18, 2021.

## **CORPORATE GOVERNANCE MATTERS**

37. As described in the Carter Affidavit, Just Energy has appointed Mr. Anthony Horton (previously Chairman of the Board of Directors of Just Energy) as its Executive Chairman effective March 1, 2021. In this role, Mr. Horton will guide the Just Energy Entities' restructuring process, with the assistance of the Monitor and the Just Energy Entities' financial advisors.
38. Mr. Horton's compensation for such role is described in the Carter Affidavit and is comprised of a base fee of US\$600,000, payable on a monthly basis in increments of US\$50,000 over a twelve-month period. Mr. Horton will not receive regular board fees during this time. If the Just Energy Entities successfully restructure prior to the end of the twelve-month period, a lump sum payment equal to the remaining amount of the base fee (less applicable deductions and withholdings) will be paid to Mr. Horton. The Monitor participated in the meeting of the Board of Directors in which this new role and compensation structure was discussed and concurs with the appointment and related remuneration.

## **UPDATE ON DIP FACILITY**

39. As described in the Supplementary Carter Affidavit, the Just Energy Entities have entered into the DIP Amendment since the date of the First Report. Pursuant to the DIP

Amendment, among other things: (i) reference to the Lender Support Agreement was added, (ii) the Just Energy Entities agreed to certain additional reporting requirements consistent with the Lender Support Agreement, and (iii) the scope of permitted priority liens was amended to authorize the Just Energy Entities to provide cash collateral to the Cash Management Banks in accordance with the Initial Order.

40. Since the date of the First Report, the Just Energy Entities have drawn down the remaining availability under the DIP Facility in the amount of US\$25 million. Accordingly, the DIP Facility is now fully drawn.
41. Certain of the DIP Lenders requested the consent of the Just Energy DIP Borrowers to the grant of temporary silent participation rights in their respective interests under the DIP Facility. In accordance with the terms of the DIP Facility, the DIP Lenders are entitled to grant such participation rights with the consent of the DIP Borrowers provided they furnish certain necessary information under the DIP Facility, including to the Monitor. The Just Energy Entities provided their consent to the requested participation on May 20, 2021. The Monitor understands that the granting of the silent participation rights is expected to be temporary and does not change the terms of the DIP Facility.

#### **RECEIPTS AND DISBURSEMENTS FOR THE NINE-WEEK PERIOD ENDED MAY 15, 2021**

42. The Just Energy Entities' actual net cash flow for the 9-week period from March 15, 2021 to May 15, 2021, was approximately \$65 million better than the Cash Flow Forecast as summarized below:



| <i>(CAD\$ in millions)</i>                  | <u>Forecast</u> | <u>Actuals</u> | <u>Variance</u> |
|---|-----------------|----------------|-----------------|
| <b>RECEIPTS</b>                             |                 |                |                 |
| Sales Receipts                              | \$422.4         | \$449.1        | \$26.7          |
| Miscellaneous Receipts                      | 8.0             | 6.0            | (2.0)           |
| <i>Total Receipts</i>                       | \$430.5         | \$455.2        | \$24.7          |
| <b>DISBURSEMENTS</b>                        |                 |                |                 |
| <i>Operating Disbursements</i>              |                 |                |                 |
| Energy and Delivery Costs                   | (\$251.1)       | (\$232.0)      | \$19.1          |
| Payroll                                     | (13.3)          | (15.1)         | (1.8)           |
| Taxes                                       | (29.2)          | (18.7)         | 10.6            |
| Commissions                                 | (19.7)          | (13.9)         | 5.9             |
| Selling and Other Costs                     | (34.8)          | (25.9)         | 8.9             |
| <i>Total Operating Disbursements</i>        | (\$348.1)       | (\$305.5)      | \$42.7          |
| <b>OPERATING CASH FLOWS</b>                 | <b>\$82.3</b>   | <b>\$149.7</b> | <b>\$67.4</b>   |
| <i>Financing Disbursements</i>              |                 |                |                 |
| Credit Facility - Borrowings / (Repayments) | \$31.5          | \$31.0         | (\$0.5)         |
| Interest Expense & Fees                     | (2.7)           | (4.6)          | (1.9)           |
| <i>Restructuring Disbursements</i>          |                 |                |                 |
| Professional Fees                           | (11.7)          | (11.6)         | 0.1             |
| <b>NET CASH FLOWS</b>                       | <b>\$99.5</b>   | <b>\$164.4</b> | <b>\$65.0</b>   |
| <b>CASH</b>                                 |                 |                |                 |
| Beginning Balance                           | \$51.2          | \$77.7         | \$26.5          |
| Net Cash Inflows / (Outflows)               | 99.5            | 164.4          | 65.0            |
| Other (FX)                                  | -               | (8.0)          | (8.0)           |
| <b>ENDING CASH</b>                          | <b>\$150.6</b>  | <b>\$234.1</b> | <b>\$83.5</b>   |

43. Explanations for the main variances in actual receipts and disbursements as compared to the Cash Flow Forecast are as follows:

- (a) The favourable variance of approximately \$26.7 million in Sales Receipts is comprised of the following:
  - (i) A permanent favourable variance of approximately \$16.3 million due to the receipt of payments from U.S. residential customers which had been assumed to be uncollectible in the Cash Flow Forecast;
  - (ii) A permanent favourable variance of approximately \$4.6 million due to the receipt of payments from U.S. commercial customers related to higher billed revenue than was estimated in the Cash Flow Forecast; and

- (iii) A permanent favourable variance of approximately \$5.8 million due to the receipt of payments from Canadian residential and commercial customers related to higher billed revenue than was estimated in the Cash Flow Forecast;
- (b) The unfavourable variance of approximately \$2.0 million of Other Receipts is due to the delayed collection of certain sales tax refunds of approximately \$2.0 million, timing of the receipt of such refunds is unknown at this time;
- (c) The favourable variance of approximately \$19.1 million for Energy and Delivery Costs as compared to the Cash Flow Forecast is driven by the following:
  - (i) A permanent unfavourable variance of approximately \$43.4 million is due to payment of Real Time Market (“**RTM**”) Final Statements to ERCOT on the 55th day following each operating day during the Texas weather event (the “**Resettlement Invoices**”). The Just Energy Entities were not provided with any advance warning by ERCOT for the large quantum of these Resettlement Invoices, as mentioned above, and are disputing the amounts. The Monitor understands that ERCOT may also issue an RTM True-Up Statement at the end of the 180th day following each operating day during the Texas weather event, and that an estimate for these charges cannot be reasonably estimated at this time;
  - (ii) A favourable variance of approximately \$28.4 million due to lower commodity payments and higher commodity receivables during the period than contemplated in the Cash Flow Forecast;
  - (iii) A permanent favourable variance of approximately \$11.6 million due to lower than forecast transportation and delivery payments in the Cash Flow Forecast; and
  - (iv) A favourable variance of approximately \$22.6 million related to lower credit support being required in certain circumstances combined with lower than forecast collateral postings during the period;

- (d) The unfavourable variance of approximately \$1.8 million for Payroll is due to higher than forecast quarterly sale incentive payments and the payment of certain payroll tax remittances during the period;
- (e) The favourable variance of approximately \$10.6 million for Taxes is primarily due to an estimated sales tax reassessment payment owing by the Just Energy Entities of approximately \$7.8 million that was forecast, but not paid, during the period. Exact timing of when this amount will be paid remains unknown, but payment at a future date will continue to be rolled forward in the forecast;
- (f) The permanent favourable variance of approximately \$5.9 million for Commissions is primarily due to lower than forecast payments as a result of the termination of certain independent commission contractors and the disclaimer of certain commission contracts;
- (g) The favourable variance of approximately \$8.9 million for Selling and Other Costs is primarily due to the Just Energy Entities' successful negotiation of payment terms and go-forward arrangements with its vendors;
- (h) The permanent unfavourable variance of approximately \$0.5 million of Credit Facility Borrowings relates to the difference in the USD / CAD foreign exchange rate assumed in the Cash Flow Forecast versus the foreign exchange rate at the time of borrowing as borrowings are denominated in USD. Total borrowings during the period totaled US\$25 million, which resulted in the \$125 million DIP credit facility becoming fully drawn as contemplated in the Cash Flow Forecast; and
- (i) The favourable variance of approximately \$26.5 million in the opening cash balance is due to the variances noted during the initial 6-day period after the Filing Date as discussed in the First Report.

#### ***Reporting Pursuant to the DIP Term Sheet***

44. The variances shown and described herein compared the Cash Flow Forecast, as included as Appendix "A" in Pre-Filing Report, with the actual performance of the Just Energy Entities over the 9-week period noted.

45. Pursuant to Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a variance report setting out the actual versus projected cash disbursements once every four weeks (the “**DIP Variance Reports**”). The permitted variances to which certain line items of the cash flow forecast are tested are outlined in section 24(30) of Schedule I of the DIP Term Sheet. The Just Energy Entities provided the required variance reports for the four-week periods ended April 3, 2021 and May 1, 2021. All variances reported were within the required permitted variances.
46. Also in accordance with Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a new 13-week cash flow forecast, which shall replace the immediately preceding cash flow forecast in its entirety upon the DIP Lenders’ approval thereof and is used as the basis for the next four-week variance report and permitted variance testing (the “**DIP Cash Flow Forecasts**”). The Just Energy Entities provided the required cash flow forecasts, which were approved by the DIP Lenders for the 13-week periods beginning April 4, 2021 and May 2, 2021 (the “**May 2 Forecast**”).
47. As the DIP Variance Reports utilize updated underlying cash flow forecasts vis-à-vis the Cash Flow Forecast for the same period, the DIP Variance Reports differed from the variance analysis above comparing actual results to the Cash Flow Forecast.
48. The Revised Cash Flow Forecast (defined below) incorporates the May 2 Forecast approved by the DIP Lenders for the initial 13-week period and has been extended to cover the period through to the week encompassing the requested stay extension of September 30, 2021 in support of the relief requested by the Just Energy Entities. For purposes of the Just Energy Entities reporting requirements pursuant to the DIP Term Sheet, the DIP Cash Flow Forecasts as approved by the DIP Lenders will continue to govern.
49. Since the First Report of the Monitor, the Just Energy Entities have complied with their reporting obligations pursuant to the DIP Term Sheet, the Initial Order as amended and restated, and other documents including certain support agreements. These reporting obligations include the following:
- (a) Delivery of a Priority Supplier Payables Certificate weekly and monthly;
  - (b) Delivery of an ERCOT Related Settlements update weekly;

- (c) Delivery of a Cash Management Charge update monthly; and
- (d) Delivery of a Priority Commodity / ISO Charge update weekly and monthly.

### CASH FLOW FORECAST FOR THE PERIOD ENDING OCTOBER 2, 2021

50. The Just Energy Group, with the assistance of the Monitor, has reviewed and updated its weekly cash flow forecast for the 22-week period ending October 2, 2021 (the “**Revised Cash Flow Forecast**”), which encompasses the requested stay extension to September 30, 2021. The Revised Cash Flow Forecast is attached hereto as **Appendix “A”**, and is summarized below:

| <i>(CAD\$ in millions)</i>                  | 13-Week Period<br>Ending July 31, 2021 | 22-Week Period<br>Ending October 2, 2021 |
|---|--|--|
| Forecast Week                               | Total                                  | Total                                    |
| <b>RECEIPTS</b>                             |  |  |
| Sales Receipts                              | \$618.4                                | \$1,098.8                                |
| Miscellaneous Receipts                      | 3.8                                    | 3.8                                      |
| <i>Total Receipts</i>                       | \$622.2                                | \$1,102.6                                |
| <b>DISBURSEMENTS</b>                        |  |  |
| <i>Operating Disbursements</i>              |  |  |
| Energy and Delivery Costs                   | (\$582.3)                              | (\$946.2)                                |
| ERCOT Resettlements                         | -                                      | -  |
| Payroll                                     | (22.7)                                 | (40.2)                                   |
| Taxes                                       | (33.4)                                 | (51.3)                                   |
| Commissions                                 | (25.1)                                 | (41.2)                                   |
| Selling and Other Costs                     | (47.3)                                 | (78.5)                                   |
| <i>Total Operating Disbursements</i>        | (\$710.9)                              | (\$1,157.5)                              |
| <b>OPERATING CASH FLOWS</b>                 | (\$88.7)                               | (\$54.9)                                 |
| <i>Financing Disbursements</i>              |  |  |
| Credit Facility - Borrowings / (Repayments) | \$-                                    | \$-                                      |
| Interest Expense & Fees                     | (11.7)                                 | (22.3)                                   |
| <i>Restructuring Disbursements</i>          |  |  |
| Professional Fees                           | (9.9)                                  | (16.1)                                   |
| <b>NET CASH FLOWS</b>                       | <b>(\$110.2)</b>                       | <b>(\$93.3)</b>                          |
| <b>CASH</b>                                 |  |  |
| Beginning Balance                           | \$213.3                                | \$213.3                                  |
| Net Cash Inflows / (Outflows)               | (110.2)                                | (93.3)                                   |
| Other (FX)                                  | 5.0                                    | 5.0                                      |
| <b>ENDING CASH</b>                          | <b>\$108.0</b>                         | <b>\$125.0</b>                           |

51. The Revised Cash Flow Forecast indicates that during the 22-week period ending October 2, 2021, the Just Energy Entities will have net cash outflows from operating activities of approximately \$54.9 million with total receipts of approximately \$1,102.6 million and total disbursements of approximately \$1,157.5 million, before interest expense and fees of approximately \$22.3 million and professional fees of approximately \$16.1 million, such that net cash outflows are forecast to be approximately \$93.3 million. Please note that the Revised Cash Flow Forecast has not incorporated actual results for the weeks ending May 8, 2021 and May 15, 2021 for presentation purposes as it reflects the current approved DIP Cash Flow Forecast. As a result, the actual ending cash balance reported in the budget to actual section above as at May 15, 2021 will not agree to the forecast cash balance reflected in the Revised Cash Flow Forecast as at the same date.
52. Generally, the underlying assumptions and methodology utilized in the Just Energy Entities' Cash Flow Forecast have remained the same for this Revised Cash Flow Forecast; however, the Monitor notes the following:
- (a) The forecast period was extended from the week ending June 6, 2021 to the week ending October 2, 2021;
  - (b) The Just Energy Entities have updated and revised certain underlying data supporting the assumptions that contribute to the cash receipts and disbursements included in the Revised Cash Flow Forecast, which include:
    - (i) Customer cash receipt collection timing and bad debt estimates have been updated based on recent historical trends;
    - (ii) Customer cash receipt estimates have also been updated based on actualized revenue billed for recent periods combined with refined estimates for future customer billings;
    - (iii) Certain disbursements not incurred during the 9-week period ended May 15, 2021 have been moved forward as they are expected to be incurred in future weeks;

- (iv) Vendor credit support and cash collateral requirements have been updated based on business requirements and on-going discussions between the Just Energy Entities and its vendors;
  - (v) The tax disbursements forecast has been updated based on the tax department's latest tax payment schedule and estimates;
  - (vi) Professional fee estimates have been updated to reflect expected activity during the forecast period; and
  - (vii) The Just Energy Entities forecast cash receipts and disbursements have been refined generally to reflect updated seasonality expectations where energy and delivery costs increase leading into and during the peak summer season while resulting in higher customer receipts follow during the later summer and early fall months as customer billings for peak summer months are collected.
53. The Revised Cash Flow Forecast demonstrates that, subject to its underlying hypothetical and probable assumptions, the Just Energy Entities have sufficient liquidity to continue funding their operations during the CCAA Proceedings to October 2, 2021.

## **RELIEF SOUGHT IN THE PROPOSED ORDERS**

### ***Second A&R Initial Order***

#### **Qualified Commodity/ISO Suppliers**

54. As discussed above, the Just Energy Entities are seeking new supply sources for the benefit of the Just Energy Entities and their stakeholders. The A&R Initial Order currently provides for the Priority Commodity/ISO Charge in favour of those counterparties to a Commodity Agreement with a Just Energy Entity entered into prior to the Filing Date that have also executed a Qualified Support Agreement. Given that one or more Just Energy Entities are in discussions with potential suppliers regarding entering into a new Commodity Agreement, the Just Energy Entities are seeking to expand the definition of "Qualified Commodity/ISO Supplier" in the Initial Order to include parties that may execute a Commodity Agreement with a Just Energy Entity after the Filing Date, subject

to execution of a Qualified Support Agreement. It is anticipated that this expanded definition will encourage potential new suppliers to trade without requiring the Just Energy Entities to provide collateral. There are no remaining counterparties to Commodity Agreements extant as of the Filing Date.

55. Additionally, the Just Energy Entities propose to limit the number of Qualified Support Agreements that may be covered by the Priority Commodity/ISO Charge to eight, the same number of eligible suppliers that could have entered into a Qualified Support Agreement as at the Filing Date.
56. The Monitor supports this relief sought by the Just Energy Entities, as it would provide flexibility for new counterparties to execute a Qualified Support Agreement and provide the benefit of the Priority Commodity/ISO Charge without requiring the Just Energy Entities to post financial collateral in respect of such counterparties.

#### Commodity Agreements

57. The Just Energy Entities are seeking to amend the definition of “Commodity Agreement” in the Initial Order to include contracts entered into for protection against fluctuations in U.S. dollar to Canadian dollar foreign currency exchange rates related to certain customer obligations. This will ensure that the Just Energy Entities continue to be able to manage fluctuations in currency exchange rates consistent with the Just Energy Entities’ ordinary course risk management policy.

#### Termination of Commodity Agreement or Qualified Support Agreement

58. Lastly, the Just Energy Entities are seeking to amend the requirements set out at paragraph 30 of the Initial Order to permit Qualified Commodity/ISO Suppliers to terminate a Commodity Agreement or Qualified Support Agreement entered into after May 26, 2021 without obtaining Court authorization in certain limited circumstances, specifically: (i) if an Order is granted in the CCAA Proceedings permitting the DIP Agent and DIP Lenders to exercise their rights and remedies against the Just Energy Entities or the Property; or (ii) the CCAA Proceedings or Chapter 15 Proceedings are dismissed or converted to a liquidation proceeding (including a receivership, bankruptcy or proceeding under Chapter 7 of the United States Bankruptcy Code). These amendments are being sought by the Just



Energy Entities in response to certain concerns raised by potential new commodity suppliers.

59. The Monitor supports such amendments as these circumstances are narrow in scope and, in the Monitor's view, appropriate in the circumstances. Further, such changes will facilitate the Just Energy Entities' ability to enter into potential new Commodity Agreements, which is critical for the reasons outlined above.

***May Stay Extension Order***

*Annual Meeting of Shareholders*

60. Pursuant to the provisions of the *Canada Business Corporation's Act*, Just Energy, as a public company, is required to call an annual meeting of its shareholders by no later than September 30, 2021. Just Energy's executive management team is currently focusing its efforts and resources on the CCAA Proceedings and the Just Energy Entities' restructuring generally. The work required to prepare for and hold an annual meeting would require significant work by the Just Energy Entities' management team and detract from its focus on restructuring efforts. Accordingly, the Just Energy Entities are seeking an order relieving Just Energy of its obligations to call an annual meeting of shareholders until further order of the Court. The Monitor views this request as reasonable and supports such relief in these circumstances and notes that substantial financial information concerning the Just Energy Entities has been made publicly available through the CCAA Proceedings.

*Repatriation of Cash and Intercompany Transfers*

61. As described in the Carter Affidavit, the Just Energy Entities previously made certain intercompany payments and advances, which the Monitor understands include the following:
- (a) In August 2018, Just Energy subscribed for newly issued shares of Just Energy Financing Holdings Inc. ("**JE Finance**") (one of its Canadian subsidiaries) in the amount of US\$235 million;
  - (b) JE Finance then advanced US\$235 million to Just Energy (Finance) Hungary ZRT ("**Just Energy Hungary**") by way of a convertible, non-interest bearing loan, payable on demand (the "**Convertible Loan**"); and

- (c) Just Energy Hungary then advanced US\$235 million to Just Energy U.S. (the “**Just Energy U.S. Loan**”).
62. As a pre-emptive measure in the event that the Canadian Just Energy Entities require liquidity to fund their ongoing operations within the CCAA Proceedings, the Just Energy Entities are seeking authorization for Just Energy to repatriate funds on an “as needed” basis to Canada. The Canadian Just Energy Entities currently have sufficient liquidity to fund their operations, however, they are concerned that they may be required to post additional cash collateral or letters of credit which would deplete available liquidity in Canada. Further, the DIP Facility is fully drawn with the result that there are no available funds remaining thereunder.
63. The proposed repatriation of funds is to be affected through a repayment of the Just Energy U.S. Loan by Just Energy U.S. to Just Energy Hungary, and a subsequent repayment of the Convertible Loan by Just Energy Hungary to JE Finance. The Monitor understands that the proposed structure for the repayment of the intercompany indebtedness is tax efficient, which is in the best interest of all stakeholders.
64. The above transactions would provide necessary liquidity to Just Energy and its Canadian subsidiaries for their ongoing operations and restructuring efforts. Without such transactions, going concern value may be lost. For this reason, the Monitor supports this relief sought by the Just Energy Entities.

*Extension of the Stay Period*

65. The Stay Period will expire on June 4, 2021, and the Applicants are seeking an extension to the Stay Period up to and including September 30, 2021.
66. The Monitor supports extending the Stay Period to September 30, 2021 for the following reasons:
- (a) during the proposed extension of the Stay Period, the Just Energy Entities will have an opportunity to consider and develop their restructuring process in an effort to achieve a going concern solution in consultation with the Financial Advisor, the Monitor and other key stakeholders;

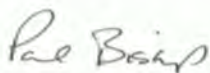
- (b) the Monitor is of the view that the proposed extension to the Stay Period is necessary to give the Just Energy Entities the flexibility required in order to have the best possible chance to implement a successful restructuring;
- (c) as indicated by the Cash Flow Forecast, Just Energy Entities are forecast to have sufficient liquidity to continue operating in the ordinary course of business during the requested extension of the Stay Period;
- (d) no creditor of the Just Energy Entities would be materially prejudiced by the extension of the Stay Period; and
- (e) in the Monitor's view, the Just Energy Entities have acted in good faith and with due diligence in the CCAA Proceedings since the Filing Date.

## CONCLUSION

67. The Monitor is of the view that the relief requested by the Just Energy Entities pursuant to the proposed May Stay Extension Order and Second A&R Initial Order is necessary, reasonable and justified in the circumstances.
68. Accordingly, the Monitor respectfully recommends that the Just Energy Entities' request for the proposed relief be granted.

The Monitor respectfully submits to the Court this Second Report dated this 21st day of May, 2021.

**FTI Consulting Canada Inc.,**  
in its capacity as Court-appointed Monitor of  
Just Energy Group Inc. et al., and not in its  
personal or corporate capacity



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Per: Paul Bishop  
Senior Managing Director

**THIS IS EXHIBIT Q REFERRED TO IN THE  
AFFIDAVIT OF JAMIE SHILTON  
AFFIRMED BEFORE ME THIS 18<sup>TH</sup> DAY OF AUGUST, 2023**

A handwritten signature in black ink, appearing to read 'VCalina', with a long horizontal stroke extending to the right.

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**COMMISSIONER FOR TAKING AFFIDAVITS**

**VLAD CALINA (LSO NO. 69072W)**

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

**Just Energy Group Inc. et al.**

**FOURTH REPORT OF FTI CONSULTING CANADA INC.,  
IN ITS CAPACITY AS COURT-APPOINTED MONITOR**

**November 5, 2021**

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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., 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.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**FOURTH REPORT OF THE MONITOR**

**INTRODUCTION**

1. Pursuant to an Order (the “**Initial Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated March 9, 2021 (the “**Filing Date**”), Just Energy Group Inc. (“**Just Energy**”) and certain of its affiliates (collectively, the “**Applicants**”) were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (the “**CCAA**” and in reference to the proceedings, the “**CCAA Proceedings**”).

2. Pursuant to the Initial Order, among other things:
  - (a) a stay of proceedings (the “**Stay of Proceedings**”) was granted until March 19, 2021 (the “**Stay Period**”);
  - (b) the protections of the Initial Order, including the Stay of Proceedings, were extended to certain subsidiaries of Just Energy that are partnerships (collectively with the Applicants, the “**Just Energy Entities**”);
  - (c) FTI Consulting Canada Inc. (“**FTI**”) was appointed as Monitor of the Just Energy Entities (in such capacity, the “**Monitor**”);
  - (d) a debtor-in-possession interim financing facility was approved (the “**DIP Facility**”) in the maximum principal amount of US\$125 million subject to the terms and conditions set forth in the financing term sheet (the “**DIP Term Sheet**”) between the Just Energy Entities and Alter Domus (US) LLC, as administrative agent for the lenders (the “**DIP Lenders**”) dated March 9, 2021; and
  - (e) certain charges were granted with priority over all encumbrances on the Just Energy Entities’ property, including two third-ranking charges on a *pari passu* basis in favour of: (A) the DIP Lenders to secure all Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time up to the maximum amount of the Obligations; and (B) each Commodity/ISO Supplier that has executed a Qualified Support Agreement in an amount equal to the value of the Priority Commodity/ISO Obligations.
  
3. On March 9, 2021, Just Energy, in its capacity as foreign representative, commenced proceedings under Chapter 15 of the United States Bankruptcy Code (the “**Chapter 15 Proceedings**”) for each of the Just Energy Entities with the United States Bankruptcy Court for the Southern District of Texas (the “**U.S. Court**”). The U.S. Court entered, among others, the *Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code*.



4. On March 19, 2021, at the comeback hearing in the CCAA Proceedings, the Court granted the Amended and Restated Initial Order (the “**First A&R Initial Order**”), which, among other things:
  - (a) extended the Stay Period to June 4, 2021;
  - (b) approved a key employee retention plan (“**KERP**”) and an associated charge as security for payments under the KERP (the “**KERP Charge**”) in respect of certain key employees of the Applicants (the “**Key Employees**”) deemed critical to the continued operation and stability of the Just Energy Entities;
  - (c) increased the amount of the Administration Charge, FA Charge and Directors’ Charge;
  - (d) granted the Cash Management Charge in favour of the Cash Management Banks to secure Cash Management Obligations;
  - (e) confirmed that any obligations secured by a valid, enforceable and perfected security interest shall continue to be secured by the Property, including any Property acquired after the date of the applicable security agreement; and
  - (f) authorized the Just Energy Entities to provide cash collateral to third parties where so doing is necessary to operate the Business in the normal course, with the consent of the Monitor and subject to the terms of the Definitive Documents (as defined in the First A&R Initial Order).
5. On April 2, 2021, the U.S. Court granted the *Order Granting Petition for (I) Recognition as Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the “**Final Recognition Order**”). The Final Recognition Order, among other things, gave full force and effect to the First A&R Initial Order in the United States.
6. On May 26, 2021, the Court granted the Second Amended and Restated Initial Order (the “**Second A&R Initial Order**”) which, among other things:

- (a) amended the definition of “Qualified Commodity/ISO Supplier” in the Initial Order to include counterparties to a Commodity Agreement or ISO Agreement executed after the Filing Date;
  - (b) amended the definition of “Commodity Agreement” to include contracts entered into by a Just Energy Entity for protection against fluctuations in foreign currency exchanges rates; and
  - (c) amended the requirements set out at paragraph 30 of the Initial Order to permit Qualified Commodity/ISO Suppliers to terminate a Commodity Agreement or Qualified Support Agreement entered into after May 26, 2021 without obtaining Court authorization in certain limited circumstances.
7. Also on May 26, 2021, the Court granted an Order (the “**May Order**”) which, among other things, (a) extended the Stay Period to September 30, 2021, and (b) authorized, but did not obligate, Just Energy (U.S.) Corp. (“**Just Energy U.S.**”) to repatriate funds to the Just Energy Entities operating in Canada should it become necessary to do so to ensure sufficient working capital is held by such entities to fund their ongoing operations, which repatriation was permitted to be by way of repayment of certain intercompany indebtedness, including interest.
8. On September 15, 2021, the Court granted the Claims Procedure Order (the “**Claims Procedure Order**”) which approved the claims process for the identification, quantification, and resolution of Claims (as defined in the Claims Procedure Order) as against the Just Energy Entities and their respective directors and officers (the “**Claims Procedure**”). Additionally, on September 15, 2021, the Court granted an order, which among other things, extended the Stay Period to December 17, 2021.
9. This Report should be read in conjunction with the Affidavit of Michael Carter sworn November 3, 2021 (the “**Carter Affidavit**”), which is accessible on the Monitor’s Website (as defined below).
10. All references to monetary amounts in this Fourth Report of the Monitor (the “**Fourth Report**”) are in Canadian dollars unless otherwise noted. Any capitalized terms not

otherwise defined herein have the meanings attributed to them in the Second A&R Initial Order.

11. Further information regarding the CCAA Proceedings, including all materials publicly filed in connection with these proceedings, are available on the Monitor's website at <http://cfcanada.fticonsulting.com/justenergy/> (the "**Monitor's Website**").
12. Further information regarding the Chapter 15 Proceedings, including the Final Recognition Order and all other materials publicly filed in connection with the Chapter 15 Proceedings, are available on the website of Omni Agent Solutions as the U.S. noticing agent of the Just Energy Entities at <https://omniagentsolutions.com/justenergy>.

## **PURPOSE**

13. The purpose of this Fourth Report is to provide information to the Court with respect to the following:
  - (a) the Monitor's activities since the date of the Monitor's Third Report to the Court dated September 8, 2021 (the "**Third Report**");
  - (b) certain energy-related legislative developments in the state of Texas, including an update on House Bill 4492, and their impact on the Just Energy Entities;
  - (c) the Just Energy Entities' restructuring initiatives;
  - (d) the Claims Procedure;
  - (e) the announced sale transaction of ecobee Inc. in which Just Management Corp. holds a minority equity position;
  - (f) the relief sought by the Applicants in their proposed Order (the "**Proposed Order**"), which includes, among other things:
    - (i) authorizing the Just Energy Entities to enter into the Fifteenth Amendment to the DIP Term Sheet dated November 3, 2021 (the "**DIP Amendment**"), a copy of which is attached to the Carter Affidavit;

- (ii) approving the wind-up of Just Energy Finance Holding Inc. (“**JE Finance**”) into Just Energy and the associated transactions as described below, including the eventual dissolution of JE Finance;
- (iii) approving a second key employee retention plan (the “**Second KERP**”) for the Key Employees, as further described below, which shall be secured by the existing KERP Charge, and sealing the summary of the proposed Second KERP, which is attached as a confidential exhibit to the Carter Affidavit, pending further order of the Court;
- (iv) extending the Stay Period to February 17, 2022;
- (v) approving the fees and disbursements of the Monitor and its Canadian and U.S. counsel incurred in the CCAA Proceedings for the period from August 28, 2021 to October 29, 2021; and
- (vi) approving the Fourth Report and the actions, conduct and activities of the Monitor described herein;
- (g) the Monitor’s recommendations in respect of the foregoing, as applicable; and
- (h) the Just Energy Entities’ actual cash receipts and disbursements for the 9-week period ending October 30, 2021 and a comparison to the cash flow forecast attached as Appendix “A” to the Third Report, along with an updated cash flow forecast for the period ending February 19, 2022.

#### **TERMS OF REFERENCE AND DISCLAIMER**

14. In preparing this Fourth Report, the Monitor has relied upon audited and unaudited financial information of the Just Energy Entities, the Just Energy Entities’ books and records, and discussions and correspondence with, among others, management of and advisors to the Just Energy Entities as well as other stakeholders and their advisors (collectively, the “**Information**”).
15. Except as otherwise described in this Fourth Report:

- (a) the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Auditing Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*; and
  - (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Fourth Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook*.
16. Future-oriented financial information reported in or relied on in preparing this Fourth Report is based on assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.
17. The Monitor has prepared this Fourth Report to provide information to the Court in connection with the relief requested by the Applicants. The Fourth Report should not be relied on for any other purpose.

#### **MONITOR'S ACTIVITIES SINCE THE THIRD REPORT**

18. In accordance with its duties as outlined in the Initial Order and its prescribed rights and obligations under the CCAA, the activities of the Monitor since the Third Report have included the following:
- (a) assisting the Just Energy Entities with communications to employees, creditors, vendors, and other stakeholders;
  - (b) participating in regular discussions with the Just Energy Entities, their respective legal counsel and other advisors, regarding, among other things, the CCAA Proceedings, the Just Energy Entities' restructuring initiatives, the Claims Procedure, communications with stakeholders and business operations;
  - (c) maintaining the service list for the CCAA Proceedings with the assistance of Thornton Grout Finnigan LLP ("TGF"), counsel for the Monitor, a copy of which is posted on the Monitor's Website;
  - (d) monitoring the cash receipts and disbursements of the Just Energy Entities;

- (e) working with the Just Energy Entities, their advisors, and TGF, as applicable, to, among other things:
  - (i) provide stakeholders with financial and other information;
  - (ii) assist the Just Energy Entities in furthering their analysis and considerations with respect to possible exit strategies from the CCAA Proceedings, including assisting with the preparation of related cash flow forecasts and presentations;
  - (iii) consider and provide input on the proposed Second KERP;
  - (iv) ensure compliance with the requirements of regulators in applicable jurisdictions;
  - (v) establish the online submission claims portal hosted by Omni Agent Solutions in its capacity as claims agent (the “**Claims Agent**”) in connection with the Claims Procedure, and finalize and issue all notices in accordance with the Claims Procedure; and
  - (vi) administer the Claims Procedure, and collect and record filed Claims;
- (f) attending meetings of the Board of Directors of Just Energy, and various committees thereof;
- (g) responding to many creditor and other stakeholder inquiries regarding the Claims Procedure and the CCAA Proceedings generally;
- (h) posting monthly reports on the value of the Priority Commodity/ISO Obligations to the Monitor’s Website in accordance with the terms of the Second A&R Initial Order; and
- (i) preparing this Fourth Report.

## TEXAS LEGISLATIVE DEVELOPMENTS

19. As discussed in the Third Report, the Governor of Texas signed House Bill 4492 (“**HB 4492**”) on June 16, 2021, which provides a mechanism for the partial recovery of costs

incurred by certain Texas energy market participants, including certain of the Just Energy Entities, during the Texas weather event in February 2021.

20. HB 4492 addresses the securitization of (i) ancillary service charges above the system-wide offer cap of US\$9,000/MWh during the weather event; (ii) reliability deployment price adders charged by the Electric Reliability Council of Texas, Inc. (“**ERCOT**”) during the weather event; and (iii) non-payment of amounts owed to ERCOT due to defaults by competitive market participants, resulting in short payments to market participants, including Just Energy (collectively, the “**Costs**”).
21. Consistent with the requirements of HB 4492, ERCOT requested that the Public Utility Commission of Texas (“**PUCT**”) establish securitization financing mechanisms for the payment of the Costs incurred by load-serving entities, including certain of the Just Energy Entities. On October 13, 2021, PUCT signed a final order (the “**PUCT Order**”) approving the securitization and authorized ERCOT to issue \$2.1 billion of securitization bonds, the proceeds of which will be used to repay the Costs. No party appealed the PUCT order by the November 1, 2021 deadline and therefore, the PUCT Order is considered non-appealable. The Monitor understands that parties wishing to opt-out of receiving any securitization proceeds from ERCOT, as well as receiving future charges from ERCOT to pay the securitization bonds, must elect to do so by November 29, 2021.
22. The Just Energy Entities have advised the Monitor that they anticipate recovering at least US\$100 million of the Costs from ERCOT; however, this is dependant on several factors including the number of entities that opt-out of the ERCOT financing and the outcome of any dispute resolution process initiated by the Just Energy Entities with ERCOT. There is therefore no assurance that Just Energy will recover all the Costs it seeks to recover from ERCOT. Just Energy continues to evaluate the potential benefits and impact of HB 4492 on an on-going basis as new or updated information becomes available.

## UPDATE ON RESTRUCTURING EFFORTS OF THE JUST ENERGY ENTITIES

23. As mentioned in the Third Report, pursuant to the DIP Term Sheet, the Just Energy Entities delivered their business plan on May 18, 2021 to the DIP Lenders and other stakeholders as required.
24. Since that time, the Just Energy Entities with the assistance of legal counsel and BMO Nesbitt Burns Inc. as financial advisor (the “**Financial Advisor**”), and in consultation with the Monitor and the DIP Lenders, have continued their restructuring efforts with a focus on developing a restructuring plan that facilitates emergence from the CCAA Proceedings, preserves the going concern value of the business, maintains customer service and relationships, and preserves employment and critical vendor relationships – all for the benefit of the Just Energy Entities’ stakeholders.
25. The Monitor, while not a party to all discussions, has been kept apprised of developments as these restructuring efforts have continued to advance. The Just Energy Entities with their counsel and the Financial Advisor, in consultation with the DIP Lenders, the Credit Facility Lenders, Shell, and their respective legal and financial advisors, have made significant progress in developing a recapitalization term sheet (the “**Recapitalization Term Sheet**”) that provides a framework for the recapitalization of the Just Energy Entities and their respective businesses.
26. To provide sufficient time to advance restructuring efforts and finalize the Recapitalization Term Sheet, the Just Energy Entities have negotiated extensions to certain milestone deadlines provided for in the DIP Term Sheet including the following (the “**Amended Milestones**”):
  - (a) November 30, 2021 (extended from October 7, 2021) – deadline for delivery of the settled Recapitalization Term Sheet (the “**Recapitalization Plan**”);
  - (b) December 21, 2021 (extended from November 5, 2021) – deadline for the CCAA Court to grant an order approving one or more meetings for a vote on the Recapitalization Plan and related materials, if applicable, and December 29, 2021



(extended from November 8, 2021) being the deadline to mail the meeting materials;

- (c) February 9, 2022 (extended from December 8, 2021) – deadline for the meeting(s) to vote on the Recapitalization Plan, if applicable; and
- (d) February 18, 2022 (extended from December 17, 2021) – deadline for the CCAA Court to grant an order approving and sanctioning the Recapitalization Plan, if applicable.

- 27. The Amended Milestones are reflected in the DIP Amendment, which is further discussed below.
- 28. The Monitor understands that the Just Energy Entities are in the process of broadening the scope of such discussions to include other key stakeholders as the Recapitalization Term Sheet and the Recapitalization Plan develop.

#### **UPDATE ON CLAIMS PROCEDURE**

- 29. For the purpose of this section only, any capitalized terms not defined herein have the meanings ascribed thereto in the Claims Procedure Order.
- 30. As discussed in detail in the Third Report, the Just Energy Entities, in consultation with the Monitor and the Claims Agent, developed the Claims Procedure to determine the nature, quantum, and validity of Claims against the Just Energy Entities and their Directors and Officers in a flexible, fair, comprehensive, and expeditious manner.
- 31. Since the Third Report, the Monitor has, with the assistance of the Claims Agent and the Just Energy Entities, (a) prepared and issued the Negative Notice Claims Packages and General Claims Packages; (b) finalized and caused to be published on September 21, 2021, a Notice to Claimants in The Globe and Mail (National Edition), the Wall Street Journal, the Houston Chronicle, and the Dallas Morning News (copies of which are attached to the Carter Affidavit); and (c) created a section within the Case Website for information and forms in support of the Claims Procedure.

32. The Monitor has also engaged in discussions with numerous stakeholders in respect of questions that arose, in certain circumstances, in respect of their Negative Notice Claims Package and the Claims Procedure generally.
33. The Monitor and Claims Agent are in the process of recording and categorizing all Notices of Dispute of Claim and Proofs of Claim that were received before, on, or after the Claims Bar Date (being November 1, 2021). A further update on the Claims Procedure will be provided in a future Report to the Court.

### **ECOBEE TRANSACTION**

34. As discussed in the Carter Affidavit, it was announced on November 1, 2021 that ecobee Inc. (“**ecobee**”), a private company in which Just Management Corp. (“**JMC**”) owns approximately an 8% equity interest, has agreed to sell all of its issued and outstanding shares (the “**ecobee Transaction**”) to 13462234 Canada Inc. (“**Generac**”), a wholly-owned subsidiary of Generac Power Systems, Inc., which is in turn a wholly-owned subsidiary of Generac Holdings Inc. (“**Generac Holdings**”). Generac Holdings stock trades on the New York Stock Exchange under the symbol GNRC. The proposed sale is intended to be effected pursuant to a court approved arrangement under the *Canada Business Corporations Act*.
35. As consideration for the ecobee Transaction, Generac will pay (or cause to be paid) to the sellers of the ecobee shares US\$200 million cash on closing, subject to customary adjustments, and US\$450 million in Generac Holdings common stock. Additionally, upon achievement of certain performance targets between closing of the transaction and June 30, 2023, the sellers may receive a further amount up to an aggregate of US\$120 million in shares of Generac Holdings common stock.
36. The ecobee Transaction will result in Just Energy (following a proposed corporate transaction between Just Energy and JMC) receiving approximately \$61 million, comprised of \$18 million in cash and \$43 million of Generac Holdings stock (which can increase by approximately \$10 million in 2022 and 2023 if the performance targets noted above are met). The Monitor understands that, once the Ontario Superior Court of Justice

has authorized ecobee to call a meeting of affected securityholders to vote on the plan of arrangement, the Just Energy Entities will bring a motion before the Court to seek approval (i) to enter into a support agreement with Generac to vote in favour of the ecobee Transaction, and (ii) of certain restructuring steps proposed to be taken by the Just Energy Group to ensure that the sale of stock owned by JMC can be completed in a tax efficient manner. The Monitor will provide a further report to the Court in connection with such approval motion.

### **DIP AMENDMENT**

37. Notwithstanding the significant efforts expended by the Just Energy Entities with the assistance of the Monitor and key stakeholders to develop a restructuring plan since the Filing Date, for the reasons set out in the Carter Affidavit, the discussions have taken longer than expected. The DIP Facility is currently set to mature on December 31, 2021.
38. Given the status and progress of the Just Energy Entities' restructuring efforts, the DIP Lenders have agreed to the Amended Milestones as set out above and have agreed to extend the maturity date for the DIP Facility to September 30, 2022. The DIP Amendment provides for an amendment and extension fee equal to 1.0% (the "**Extension Fee**") of the existing commitment, which is equal to US\$1.25 million. The Monitor has reviewed and compared the Extension Fee to fees of other senior-secured debtor-in-possession facilities in comparable restructuring proceedings in both Canada and the United States. The Monitor is of the view that the Extension Fee is reasonable based on the length of the extension, the size of the facility, and the circumstances of the Just Energy Entities in the CCAA Proceedings.
39. The above noted terms are set out in the DIP Amendment for which the Applicants are seeking this Court's approval. A copy of the DIP Amendment is attached as Exhibit "A" to the Carter Affidavit.
40. The DIP Amendment also prohibits the Just Energy Entities from (i) disclaiming any material agreement, or (ii) settling any Claims in an amount greater than \$15 million

(except for those Claims subject to the Intercreditor Agreement), in each case, without the prior consent of the DIP Lenders.

41. Additionally, the DIP Amendment permits an increase in the cash collateral posting limitations that the Just Energy Entities are entitled to provide to certain providers pursuant to the terms of the DIP Term Sheet, up to the maximum amount of \$80 million (which is an increase from \$30 million as previously permitted), and permits cash collateral to be posted in favour of new approved commodity providers limited to the aggregate amount of \$65 million (which is an increase from the \$15 million previously permitted), subject to certain restrictions as set out in the DIP Amendment.
42. As discussed in the Third Report, the Just Energy Entities have negotiated agreements for the supply of electricity and natural gas with new providers, thereby reducing the risk associated with single source or limited source supply arrangements. Each of the new commodity agreements requires that credit support be posted for mark-to-market and accounts payable exposure, the amount of which varies in accordance with the price of power and gas. The quantum of such collateral can be significant. Given that the Just Energy Entities continue to add volume to their supply portfolio to support their ongoing businesses, they require the proposed increase to the cash collateral posting limitations as set out in the DIP Term Sheet.
43. The Amended Milestones, extended maturity date and increase to the cash collateral posting limits, will ensure the continued stability of the Just Energy Entities' business into 2022 and provide the requisite assurances to the Just Energy Entities' customers, suppliers, employees, regulators and other stakeholders that the businesses remain stable and that the Just Energy Entities are committed to emerging from the CCAA Proceedings as a long-term, financially viable enterprise.
44. The Monitor has reviewed the terms of the DIP Amendment and, for the foregoing reasons, the Monitor is supportive of the DIP Amendment.

## JE FINANCE WIND UP

45. Subject to Court approval, the Just Energy Entities intend to wind up JE Finance and complete certain loan settlements as between JE Finance, Just Energy (Finance) Hungary ZRT (“**Just Energy Hungary**”) and Just Energy U.S. (the “**JE Finance Transaction**”) in order to (i) realize certain tax losses in Just Energy Hungary, (ii) simplify redundancies in Just Energy’s corporate structure, and (iii) settle/transfer various intercompany loans as between these entities to result in one loan from Just Energy to Just Energy U.S.
46. As described in the Carter Affidavit, the existing intercompany structure and loans are as follows:
- (a) Just Energy formed JE Finance in August 2018, as a wholly owned Canadian subsidiary, and made capital advances to JE Finance in the amount of US\$235 million;
  - (b) JE Finance then formed Just Energy Hungary and advanced a convertible, non-interest-bearing loan to Just Energy Hungary in the amount of US\$235 million (the “**Convertible Loan**”), of which US\$213 million is currently outstanding;
  - (c) Just Energy Hungary then advanced an interest-bearing loan to Just Energy U.S. in the amount of US\$235 million (the “**IB Loan**”) of which US\$235 million is currently outstanding.
47. The proposed steps of the wind up of the JE Finance Transaction are largely dependant on the expected timing for closing the transaction. If the JE Finance Transaction can close before November 30, 2021, the Just Energy Entities propose to complete the transaction in the following steps (the “**First Transaction Structure**”):
- (a) settle some or all of the Convertible Loan by transferring the IB Loan and any right of Just Energy Hungary to receive any tax installment refund to JE Finance, thereby resulting in JE Finance becoming the holder of the IB Loan; and
  - (b) wind-up of JE Finance into Just Energy, resulting in the transfer of all assets of JE Finance to Just Energy and Just Energy becoming the holder of the IB Loan and the end beneficiary of any tax refunds received by Just Energy Hungary.

48. If the JE Finance Transaction closes after November 30, 2021, the Just Energy Entities propose to complete the transaction in the following steps (the “**Second Transaction Structure**”):
- (a) wind-up JE Finance into its parent corporation, Just Energy, and transfer the Convertible Loan, the shares of Just Energy Hungary and any other incidental property of JE Finance to Just Energy; and
  - (b) settle some or all of the Convertible Loan (which will then be held by Just Energy) by transferring the IB Loan and any right to receive any tax installment refund received by Just Energy Hungary to Just Energy, thereby resulting in Just Energy becoming the holder of the IB Loan and the end beneficiary of any tax refunds received by Just Energy Hungary.
49. In both the First Transaction Structure and the Second Transaction Structure, Just Energy becomes the ultimate holder of the IB Loan, the shares of Just Energy Hungary, the right of Just Energy Hungary to receive tax installment refunds, and other incidental property held by JE Finance.
50. The wind up of JE Finance and the completion of the JE Finance Transaction will allow Just Energy to realize a capital loss on the settlement of the Convertible Loan to the extent that the value received (i.e., the value of the IB Loan and the tax refund) is less than the Convertible Loan receivable. Additionally, the Monitor understands that Just Energy Hungary will realize a loss on the disposition of the IB Loan and a gain from the settlement of the Convertible Loan in the current tax period, resulting in an overall net loss for Hungarian tax purposes and an expected refund of all amounts paid in tax installments by Just Energy Hungary in respect of the 2021 taxation year (which the Monitor understands is expected to be approximately US\$1.3 million).
51. In light of the JE Finance Transaction, the Applicants are also seeking an amendment to the May Order to reflect the optional repatriation of funds being from Just Energy U.S. to Just Energy (rather than to Just Energy Hungary and, in turn, JE Finance). The Applicants are also seeking to amend the title of proceeding once the JE Finance Transaction has been completed, to remove JE Finance as an Applicant in the CCAA Proceedings.

52. The Monitor also understands that, in order for JE Finance to effect its dissolution, pursuant to section 238(1) the *Ontario Business Corporations Act* it must either have no debts, obligations or liabilities or its debts, obligations or liabilities must have been provided for in accordance with subsection (3) (which addresses unknown creditors) or its creditors must consent to its dissolution.
53. The Monitor understands that the only liabilities of JE Finance and Just Energy Hungary are in their capacities as guarantors under the Credit Facility, the DIP Facility, the Court-ordered charges in the CCAA Proceedings, and to applicable secured suppliers, along with the Term Loan and the Convertible Loan, respectively. Aside from the Convertible Loan, each of the Just Energy Entities are jointly and severally liable for the above obligations. Further, the Monitor is not aware of any Proofs of Claim filed in the Claims Procedure against JE Finance or Just Energy Hungary by the Bar Date apart from those directly related to the foregoing. Once the wind-up of JE Finance is completed in accordance with the First Transaction Structure or Second Tax Transaction Structure, as outlined in the Carter Affidavit, the Monitor understands that it is Just Energy's position that JE Finance's debts, obligations and liabilities will have been provided for, as required under the applicable statute.
54. The JE Finance Transaction is expected to result in a net benefit to Just Energy and its stakeholders, while not prejudicing any stakeholder, all of whom were given notice of the proposed JE Finance Transaction. Given that JE Finance is an Applicant in the within CCAA Proceedings, the Applicants are therefore seeking the authorization of this Court pursuant to the Court's general powers under section 11 of the CCAA to complete the JE Finance Transaction (pursuant to either the First Transaction Structure or Second Tax Transaction Structure, as applicable) including to file articles of dissolution for JE Finance, once the wind-up is complete and to remove JE Finance as an Applicant in this proceeding.
55. Accordingly, the Monitor is supportive of the JE Finance Transaction and recommends that the Court authorize and empower the Just Energy Entities to take all steps to effect the JE Finance Transaction.

**SECOND KERP**

56. As mentioned above, the KERP and KERP Charge were approved in the First A&R Initial Order. The KERP authorized payments in three installments to the Key Employees of the Just Energy Entities who are required to guide or support the business through the restructuring process. The KERP payments previously approved by the Court total approximately CAD\$2.0 million and US\$3.9 million and were payable to 42 Key Employees in total: 8 executive employees and 34 non-executive employees.
57. Under the KERP, non-executive KERP recipients receive: (i) 40% of their KERP on the 180th day after the Filing Date (which payments were made on September 8, 2021); (ii) 40% of their KERP on the 270th day after the Filing Date (December 4, 2021); and (iii) the remaining 20% of their KERP on the date that is the earlier of 15 months after the Filing Date (June 9, 2022) or the completion of a Successful Restructuring (as defined in the Affidavit of Michael Carter sworn March 16, 2021). If a Successful Restructuring occurs before the date on which any remaining KERP payments are due, the full amount of any remaining KERP payments become payable on that date.
58. Pursuant to the KERP, executive KERP recipients receive: (i) 25% of their KERP on the 180th day after the Filing Date (which payments were made on September 8, 2021), (ii) 25% of their total KERP on the 270th day after the Filing Date (December 4, 2021), and (iii) 50% of their KERP only upon the completion of a Successful Restructuring.
59. Accordingly, on December 4, 2021, the Applicants will have paid 80% of the total KERP entitlements to non-executive Key Employees, and 50% of the total KERP entitlements to executive Key Employees. In order to retain the Key Employees throughout the pendency of the CCAA Proceedings, given the increased workload required from such Key Employees, the high turnover rates experienced in the labour market over the recent months (as described in detail in the Carter Affidavit) and the longer than anticipated period of time required to complete a successful restructuring, the Applicants are seeking approval of the Second KERP. The Just Energy Entities are concerned that, absent the approval of the Second KERP, there is a risk that Key Employees will resign.



60. The proposed payments under the Second KERP total approximately CAD\$4.4 million (US\$2.4 million and CAD\$1.3 million) and if approved, would be payable to 41 Key Employees in total: 9 executive employees and 32 non-executive employees. The proposed Second KERP payments are calculated as follows:<sup>1</sup>
- (a) non-executive Second KERP recipients will receive, subject to this Court's approval, installment payments in March and September 2022, each in the amount of approximately CAD\$1.3 million, for an aggregate total of CAD\$2.6 million. Under the Second KERP, non-executive recipients receive: (i) 50% of their Second KERP amount payable on March 1, 2022; and (ii) 50% of their Second KERP payment on September 1, 2022. If a Successful Restructuring occurs before the date on which any remaining Second KERP payments are due, the full amount of the remaining KERP payments become payable on that date. The variance in non-executive amounts payable under the KERP of CAD\$1,445,409 and Second KERP of CAD\$1,269,577 as set out in the table below is primarily due to the resignation of certain Key Employees under the KERP, the addition of certain new Key Employees to the Second KERP, and the change in status of two Key Employees from non-executive positions to executive positions.
  - (b) executive Second KERP recipients will receive, subject to this Court's approval, installment payments in March 2022 and upon the completion of a Successful Restructuring, each in the amount of approximately CAD\$0.9 million, for an aggregate total of CAD\$1.8 million. Under the Second KERP, executive Second KERP recipients receive: (i) 50% of their Second KERP on March 1, 2022, and (ii) 50% of their Second KERP only upon the completion of a Successful Restructuring. If a Successful Restructuring occurs before the date on which any remaining Second KERP payments are due, the full amount of the remaining KERP payments become payable on that date. The executive amounts payable under the KERP of CAD\$767,937 and Second KERP of CAD\$921,390 as stated in the table below are

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<sup>1</sup> Note: Amounts stated below in this paragraph are presented in Canadian dollars or Canadian dollar equivalent for summary purposes.

different primarily due to the resignation of one executive KERP recipient and the addition of two new executive Second KERP recipients.

61. A summary of payments made to date and approved but not yet paid under the KERP, and the proposed additional payments to be made under the Second KERP, is set out below. All amounts set out below are presented in Canadian dollars or Canadian dollar equivalent for U.S. dollar payments for comparison purposes. KERP and Second KERP payments will be made in both Canadian dollars and U.S. dollars as applicable.

| <i>(all amounts stated in CAD or CAD equivalent for comparison purposes)</i> | September 2021   | December 2021      | March 2022       | June 2022        | September 2022   | Successful Restructuring | TOTAL                   |
|--|------------------|--------------------|------------------|------------------|------------------|--------------------------|-------------------------|
| <b>Status of payment:</b>  | <i>Paid</i>      | <i>Pending</i>     | <i>Pending</i>   | <i>Pending</i>   | <i>Pending</i>   | <i>Pending</i>           |                         |
| <b>KERP:</b>   |                  |                    |                  |                  |                  |                          |                         |
| Executive  | 767,937          | 767,937            | -                | -                | -                | 1,535,875                | 3,071,749               |
| Non-Executive  | 1,445,409        | 1,445,409          | -                | 717,058          | -                | -                        | 3,607,876               |
| <b>Total - KERP</b>  | <b>2,213,346</b> | <b>2,213,346</b>   | <b>-</b>         | <b>717,058</b>   | <b>-</b>         | <b>1,535,875</b>         | <b>6,679,625</b>        |
|  |                  |                    |                  |                  |                  |                          | <b>A</b>                |
| <b>Second KERP:</b>  |                  |                    |                  |                  |                  |                          |                         |
| Executive  | -                | -                  | 921,390          | -                | -                | 921,390                  | 1,842,780               |
| Non-Executive  | -                | -                  | 1,269,577        | -                | 1,269,577        | -                        | 2,539,154               |
| <b>Total - Second KERP</b>   | <b>-</b>         | <b>-</b>           | <b>2,190,967</b> | <b>-</b>         | <b>1,269,577</b> | <b>921,390</b>           | <b>4,381,934</b>        |
|  |                  |                    |                  |                  |                  |                          | <b>B</b>                |
| <b>TOTAL - KERP and Second KERP</b>  | <b>2,213,346</b> | <b>2,213,346</b>   | <b>2,190,967</b> | <b>717,058</b>   | <b>1,269,577</b> | <b>2,457,265</b>         | <b>11,061,559</b>       |
|  |                  |                    |                  |                  |                  |                          | <b>=A+B</b>             |
| <b>Cumulative payments pending - KERP and Second KERP</b>                    |                  | <b>8,848,213</b>   | <b>6,634,867</b> | <b>4,443,900</b> | <b>3,726,842</b> | <b>2,457,265</b>         | <b>C</b>                |
| <b>KERP Charge:</b>  |                  |                    |                  |                  |                  |                          |                         |
| CAD amount   |                  | 2,012,100          | 2,012,100        | 2,012,100        | 2,012,100        | 2,012,100                |                         |
| USD amount   |                  | 3,876,024          | 3,876,024        | 3,876,024        | 3,876,024        | 3,876,024                |                         |
| <b>Total KERP Charge - CAD equivalent</b>                                    |                  | <b>6,895,890</b>   | <b>6,895,890</b> | <b>6,895,890</b> | <b>6,895,890</b> | <b>6,895,890</b>         | <b>D=CAD+(USD*1.26)</b> |
| <b>Excess/(deficiency) of KERP Charge</b>                                    |                  | <b>(1,952,323)</b> | <b>261,023</b>   | <b>2,451,990</b> | <b>3,169,048</b> | <b>4,438,625</b>         | <b>=D-C</b>             |

62. As shown above, the current KERP Charge in the amounts of CAD\$2,012,100 and US\$3,876,024 securing KERP and proposed Second KERP payments will be sufficient to cover payments proposed in the Second KERP after the December 2021 payment under the KERP is made. As noted in the Carter Affidavit, and should the Court approve the Second KERP, the Applicants are not requesting an increase to the KERP Charge to cover the temporary deficiency until the December 2021 payment under the KERP is made.

63. A summary of the Second KERP is attached as Confidential Exhibit “Q” to the Carter Affidavit, which contains commercially sensitive information as well as personal information relating to the Key Employees. Accordingly, the Applicants are seeking an order that this exhibit be sealed and not form part of the Court record pending further order of the Court. The Monitor supports such relief and notes that such treatment is consistent with the treatment of the previous KERP summary.
64. The requested relief is consistent with the purpose and spirit of the previously approved KERP and reflects the additional length of time anticipated to be required to achieve a successful restructuring. The Second KERP was developed in consultation with, and reflects feedback provided by, the Monitor. The Monitor views the relief requested by the Just Energy Entities regarding the Second KERP as fair and reasonable in the circumstances, and in the best interest of the Just Energy Entities. Accordingly, the Monitor supports the relief sought by the Applicants with respect to the approval of the Second KERP.

**RECEIPTS AND DISBURSEMENTS FOR THE 9-WEEK PERIOD ENDED OCTOBER 30, 2021**

65. The Just Energy Entities’ actual net cash flow for the 9-week period from August 29, 2021 to October 30, 2021, was approximately \$88.2 million better than the Cash Flow Forecast appended to the Third Report (the “**September Cash Flow Forecast**”) as summarized below:

| <i>(CAD\$ in millions)</i>                  | <b>Forecast</b> | <b>Actuals</b>  | <b>Variance</b> |
|---|-----------------|-----------------|-----------------|
| <b>RECEIPTS</b>                             |                 |                 |                 |
| Sales Receipts                              | \$466.0         | \$498.4         | \$32.4          |
| Miscellaneous Receipts                      | 6.6             | 0.8             | (5.8)           |
| <i>Total Receipts</i>                       | \$472.6         | \$499.2         | \$26.6          |
| <b>DISBURSEMENTS</b>                        |                 |                 |                 |
| <i>Operating Disbursements</i>              |                 |                 |                 |
| Energy and Delivery Costs                   | (\$450.2)       | (\$421.4)       | \$28.8          |
| <i>ERCOT Resettlements</i>                  | -               | -               | -               |
| Payroll                                     | (18.5)          | (16.2)          | 2.3             |
| Taxes                                       | (31.0)          | (14.2)          | 16.9            |
| Commissions                                 | (19.3)          | (14.9)          | 4.3             |
| Selling and Other Costs                     | (33.5)          | (26.3)          | 7.2             |
| <i>Total Operating Disbursements</i>        | (\$552.6)       | (\$493.0)       | \$59.5          |
| <b>OPERATING CASH FLOWS</b>                 | <b>(\$80.0)</b> | <b>\$6.2</b>    | <b>\$86.2</b>   |
| <i>Financing Disbursements</i>              |                 |                 |                 |
| Credit Facility - Borrowings / (Repayments) | \$-             | \$-             | \$-             |
| Interest Expense & Fees                     | (9.3)           | (9.1)           | 0.2             |
| <i>Restructuring Disbursements</i>          |                 |                 |                 |
| Professional Fees                           | (8.9)           | (7.1)           | 1.9             |
| <b>NET CASH FLOWS</b>                       | <b>(\$98.2)</b> | <b>(\$10.0)</b> | <b>\$88.2</b>   |
| <b>CASH</b>                                 |                 |                 |                 |
| Beginning Balance                           | \$162.4         | \$174.8         | \$12.3          |
| Net Cash Inflows / (Outflows)               | (98.2)          | (10.0)          | 88.2            |
| Other (FX)                                  | -               | (0.1)           | (0.1)           |
| <b>ENDING CASH</b>                          | <b>\$64.2</b>   | <b>\$164.7</b>  | <b>\$100.5</b>  |

66. Explanations for the main variances in actual receipts and disbursements as compared to the September Cash Flow Forecast are as follows:

- (a) The favourable variance of approximately \$32.4 million in Sales Receipts is primarily comprised of the following:
  - (i) A permanent favourable variance of approximately \$16.5 and \$6.9 million for U.S. residential and commercial customers, respectively, primarily due to higher than anticipated energy demand and customer acquisitions, which is partially offset by higher Energy and Delivery costs in current and future periods;
  - (ii) A permanent favourable variance of approximately \$9.1 million primarily due to higher than forecast Canadian residential and commercial customer

billings relative to the September Cash Flow Forecast, which is partially offset by higher Energy and Delivery costs in current and future periods;

- (b) The unfavourable temporary variance of approximately \$5.8 million of Miscellaneous Receipts is primarily due to the delayed return of collateral supporting a bond posted in connection with litigation that had been pending appeal. The collateral is expected to be returned in a future period;
- (c) The favourable variance of approximately \$28.8 million for Energy and Delivery Costs as compared to the September Cash Flow Forecast is primarily driven by the following:
  - (i) A favourable timing variance of approximately \$38.8 million primarily due to lower commodity payments related in part to lower than anticipated credit support to commodity trading counterparties; and
  - (ii) A permanent unfavourable variance of approximately \$9.2 million due to higher than forecasted transportation and delivery payments in the September Cash Flow Forecast due in part to higher energy transmission volumes, temporarily increased transportation and delivery rates, and normal course fluctuations relative to the September Cash Flow Forecast. These higher costs offset some of the favourable variances in sales receipts described above;
- (d) The favourable variance of approximately \$2.3 million for Payroll is due to normal course fluctuations for various payroll tax remittances and sale incentive payments relative to the September Cash Flow Forecast;
- (e) The favourable variance of approximately \$16.9 million for Taxes is primarily due to the timing of estimated tax payments including an estimated sales tax reassessment payment owing by the Just Energy Entities of approximately \$7.8 million that was forecast, but not paid, during the period. The exact timing of when this amount will be paid remains unknown, but payment at a future date will continue to be carried forward in the forecast;

- (f) The permanent favourable variance of approximately \$4.3 million for Commissions is primarily due to normal course fluctuations related to customer sign-ups and associated commissions relative to the September Cash Flow Forecast;
- (g) The favourable timing variance of approximately \$7.2 million for Selling and Other Costs is primarily due to the Just Energy Entities' continued successful negotiation of payment terms and go-forward arrangements with its vendors;
- (h) The favourable variance of \$0.2 million for Interest Expense & Fees is primarily due to lower than forecast interest and fees owed on the Just Energy Entities' credit facilities; and
- (i) The favourable timing variance of \$1.9 million for Professional Fees is due to lower than forecast payments of professional fee invoices during the current 9-week period.

*Reporting Pursuant to the DIP Term Sheet*

- 67. The variances shown and described herein compare the September Cash Flow Forecast, as appended to the Third Report, with the actual performance of the Just Energy Entities over the 9-week period noted.
- 68. Pursuant to Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a variance report setting out the actual versus projected cash disbursements once every four weeks (the "**DIP Variance Reports**"). The permitted variances to which certain line items of the cash flow forecast are tested are outlined in section 24(30) of Schedule I of the DIP Term Sheet. The Just Energy Entities provided the required variance reports for the four-week periods ended May 29, 2021, June 26, 2021, July 24, 2021, August 21, 2021, September 18, 2021, and October 16, 2021. All variances reported were within the required permitted variances.
- 69. Also, in accordance with Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a new 13-week cash flow forecast, which shall replace the immediately preceding cash flow forecast in its entirety upon the DIP Lenders' approval thereof and is used as the basis for the next four-week variance report and permitted variance testing (the

“**DIP Cash Flow Forecasts**”). The Just Energy Entities provided the required cash flow forecasts, which were approved by the DIP Lenders for the 13-week periods beginning May 30, 2021, June 27, 2021, July 25, 2021, August 22, 2021, September 19, 2021, and October 17, 2021.

70. As the DIP Variance Reports utilize updated underlying cash flow forecasts vis-à-vis the September Cash Flow Forecast for the same period, the DIP Variance Reports differed from the variance analysis above that compares actual results to the September Cash Flow Forecast. For purposes of the Just Energy Entities reporting requirements pursuant to the DIP Term Sheet, the DIP Cash Flow Forecasts as approved by the DIP Lenders will continue to govern.
71. Since the Third Report, the Just Energy Entities have complied with their reporting obligations pursuant to the DIP Term Sheet, the Second A&R Initial Order, and other documents including certain support agreements. These reporting obligations during the period included the in-time delivery of the following:
- (a) Delivery of a Priority Supplier Payables Certificate monthly;
  - (b) Delivery of an ERCOT Related Settlements update weekly;
  - (c) Delivery of a Cash Management Charge update monthly;
  - (d) Delivery of a Priority Commodity / ISO Charge update weekly and monthly;
  - (e) Delivery of a Marked to Market Calculation monthly; and
  - (f) Delivery of Electricity and Natural Gas Portfolio Reports, Hedging Exposure and Supply/Demand Projections quarterly.

#### **CASH FLOW FORECAST FOR THE PERIOD ENDING FEBRUARY 19, 2022**

72. The Just Energy Group, with the assistance of the Monitor, has updated and extended its weekly cash flow forecast for the 18-week period ending February 19, 2022 (the “**November Cash Flow Forecast**”), which encompasses the requested stay extension to February 17, 2022. The November Cash Flow Forecast is attached hereto as **Appendix “A”**, and is summarized below:

| <i>(CAD\$ in millions)</i>                  | 13-Week Period          | 18-Week Period           |
|---|-------------------------|--------------------------|
|   | Ending January 15, 2022 | Ending February 19, 2022 |
| <b>Forecast Week</b>                        | <b>Total</b>            | <b>Total</b>             |
| <b>RECEIPTS</b>                             |                         |                          |
| Sales Receipts                              | \$620.7                 | \$905.4                  |
| Miscellaneous Receipts                      | 67.6                    | 67.6                     |
| <i>Total Receipts</i>                       | \$688.2                 | \$972.9                  |
| <b>DISBURSEMENTS</b>                        |                         |                          |
| <i>Operating Disbursements</i>              |                         |                          |
| Energy and Delivery Costs                   | (\$554.8)               | (\$758.9)                |
| <i>ERCOT Resettlements</i>                  | -                       | -                        |
| Payroll                                     | (33.4)                  | (41.8)                   |
| Taxes                                       | (35.5)                  | (53.7)                   |
| Commissions                                 | (25.0)                  | (35.0)                   |
| Selling and Other Costs                     | (50.8)                  | (66.2)                   |
| <i>Total Operating Disbursements</i>        | (\$699.6)               | (\$955.7)                |
| <b>OPERATING CASH FLOWS</b>                 | (\$11.3)                | \$17.2                   |
| <i>Financing Disbursements</i>              |                         |                          |
| Credit Facility - Borrowings / (Repayments) | \$-                     | \$-                      |
| Interest Expense & Fees                     | (12.8)                  | (13.8)                   |
| <i>Restructuring Disbursements</i>          |                         |                          |
| Professional Fees                           | (11.6)                  | (14.8)                   |
| <b>NET CASH FLOWS</b>                       | <b>(\$35.7)</b>         | <b>(\$11.3)</b>          |
| <b>CASH</b>                                 |                         |                          |
| Beginning Balance                           | \$260.0                 | \$260.0                  |
| Net Cash Inflows / (Outflows)               | (35.7)                  | (11.3)                   |
| Other (FX)                                  | -                       | -                        |
| <b>ENDING CASH</b>                          | <b>\$224.4</b>          | <b>\$248.7</b>           |

73. The November Cash Flow Forecast indicates that during the 18-week period ending February 19, 2022, the Just Energy Entities will have net cash inflows from operating activities of approximately \$17.2 million with total receipts of approximately \$972.9 million and total disbursements of approximately \$955.7 million, before interest expense and fees of approximately \$13.8 million and professional fees of approximately \$14.8 million, such that net cash outflows are forecast to be approximately \$11.3 million. The Monitor notes that the November Cash Flow Forecast has not incorporated actual results for the weeks ending October 23 and October 30, 2021 for presentation purposes as it reflects the current approved DIP Cash Flow Forecast. As a result, the actual ending cash balance reported in the budget to actual section above as at October 30, 2021 will not agree



to the forecast cash balance reflected in the November Cash Flow Forecast as at the same date.

74. The underlying assumptions and methodology utilized in the September Cash Flow Forecast have largely remained the same for this November Cash Flow Forecast; however, the Monitor notes the following:

- (a) The forecast period was extended from the week ending January 1, 2022 to the week ending February 19, 2022;
- (b) The Just Energy Entities have updated and revised certain underlying data supporting the assumptions that contribute to the cash receipts and disbursements included in the November Cash Flow Forecast, which include:
  - (i) Customer cash receipt collection timing and bad debt estimates have been updated based on recent trends;
  - (ii) Customer cash receipt estimates have also been updated based on actualized revenue billed for recent periods combined with refined estimates for future customer billings;
  - (iii) Estimated sale proceeds totaling approximately \$61.0 million from the announced ecobee Transaction have been included in the Miscellaneous Receipts line item;
  - (iv) Certain disbursements not incurred during the prior period have been carried forward as they are expected to be incurred in future weeks;
  - (v) Vendor credit support and cash collateral requirements have been updated based on business requirements and on-going discussions between the Just Energy Entities and its vendors;
  - (vi) The tax disbursements forecast has been updated based on the tax department's latest tax payment schedule and estimates; and
  - (vii) Professional fee estimates have been updated to reflect expected activity during the forecast period.

75. The November Cash Flow Forecast demonstrates that, subject to its underlying hypothetical and probable assumptions, the Just Energy Entities are forecast to have sufficient liquidity to continue funding their operations during the CCAA Proceedings to February 19, 2022.

### **STAY EXTENSION**

76. The Stay Period will expire on December 17, 2021, and the Applicants are seeking an extension to the Stay Period up to and including February 17, 2022.
77. The Monitor supports extending the Stay Period to February 17, 2022 for the following reasons:
- (a) during the proposed extension of the Stay Period, the Just Energy Entities will have an opportunity to consider and develop their restructuring proposal in an effort to achieve a going concern solution in consultation with the Financial Advisor, the Monitor and key stakeholders;
  - (b) the Monitor is of the view that the proposed extension to the Stay Period is necessary to give the Just Energy Entities the flexibility and time required in order to develop and implement a successful restructuring;
  - (c) as indicated by the November Cash Flow Forecast, the Just Energy Entities are forecast to have sufficient liquidity to continue operating in the ordinary course of business during the requested extension of the Stay Period;
  - (d) no creditor of the Just Energy Entities would be materially prejudiced by the extension of the Stay Period; and
  - (e) in the Monitor's view, the Just Energy Entities have acted in good faith and with due diligence in the CCAA Proceedings since the Filing Date.

**APPROVAL OF THE ACTIVITIES OF THE MONITOR AND THE FEES OF THE MONITOR AND ITS COUNSEL**

78. The Proposed Order also seeks approval of: (i) the actions, conduct, and activities of the Monitor since the date of Third Report; (ii) the Fourth Report; and (iii) the fees and disbursements of the Monitor and its counsel from August 28, 2021 to October 29, 2021.
79. As outlined in the Monitor's previous reports to the Court (all of which are available on the Monitor's Website), the Monitor and its counsel have played, and continue to play, a significant role in the CCAA Proceedings. The Monitor respectfully submits that its actions, conduct, and activities in the CCAA Proceedings since the Third Report have been carried out in good faith and in accordance with the provisions of the orders issued therein and should therefore be approved.
80. Pursuant to paragraphs 42 and 43 of the Second A&R Initial Order, the Monitor, TGF and Porter Hedges LLP as the Monitor's U.S. legal counsel shall: (i) be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of the Initial Order, by the Just Energy Entities as part of the costs of the CCAA Proceedings; and (ii) pass their accounts from time to time before this Court.
81. Since the Third Report, the Monitor and its counsel have maintained detailed records of their professional time and costs. The total fees and disbursements of the Monitor for the period from August 28, 2021 to October 29, 2021 total \$989,957.02, including fees in the amount of \$864,065.00, disbursements in the amount of \$12,003.15, and Harmonized Sales Tax ("HST") in the amount of \$113,888.87, as more particularly described in the Affidavit of Paul Bishop sworn November 4 2021 (the "**Bishop Affidavit**"), a copy of which is attached hereto as **Appendix "B"**.
82. The total fees and disbursements of the Monitor's counsel, TGF, from August 28, 2021 to October 29, 2021 total \$377,229.44, including fees in the amount of \$332,872.50, disbursements in the amount of \$962.07, and HST in the amount of \$43,394.87, as more

particularly described in the Affidavit of Puya Fesharaki sworn November 3, 2021 (the “**Fesharaki Affidavit**”), a copy of which is attached hereto as **Appendix “C”**.

83. The total fees and disbursements of the Monitor’s U.S. counsel, Porter Hedges LLP, from August 28, 2021 to October 29, 2021 total US\$18,217.50, including fees in the amount of US\$18,170.00 and disbursements in the amount of US\$47.50, as more particularly described in the Affidavit of John Higgins sworn November 4, 2021 (the “**Higgins Affidavit**”, together with the Bishop Affidavit and Fesharaki Affidavit, the “**Fee Affidavits**”), a copy of which is attached hereto as **Appendix “D”**.
84. The Monitor respectfully submits that the fees and disbursements incurred by the Monitor and its counsel, as described in the Fee Affidavits, are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Second A&R Initial Order. Accordingly, the Monitor respectfully requests the approval of the fees and disbursements of the Monitor and its counsel as set out in the Fee Affidavits.

## CONCLUSION

85. The Monitor is of the view that the relief requested by the Applicants is necessary, reasonable and justified in the circumstances.
86. Accordingly, the Monitor respectfully recommends that the Proposed Order and requested relief therein be granted.

The Monitor respectfully submits to the Court this Fourth Report dated this 5th day of November, 2021.

**FTI Consulting Canada Inc.,**  
in its capacity as Court-appointed Monitor of  
Just Energy Group Inc. *et al*,  
and not in its personal or corporate capacity

Per: \_\_\_\_\_

  
Paul Bishop  
Senior Managing Director

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**  
(each, an “**Applicant**”, and collectively, the “**Applicants**”)

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceedings commenced at Toronto

**FOURTH REPORT OF THE MONITOR**

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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 14487893 CANADA INC.

Court of Appeal File No. COA-24-OM-0342  
Superior Court File No. CV-21-00658423-00CL

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**MOTION RECORD OF THE PROPOSED  
APPELLANT, HAIDAR OMARALI  
(Motion for Leave to Appeal, Returnable in Writing)  
VOLUME 1 OF 3**

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