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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

APPLICANTS

RESPONDING FACTUM OF THE APPLICANTS
(Plaintiffs' Counsel's Motion for Advice and Directions)

February 7, 2022

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TO: THE SERVICE LIST

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PART I - NATURE OF THIS MOTION

1. On March 9, 2021, the Applicants obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**"). The Initial Order, among other things, extended the protections granted thereunder to the partnerships listed on Schedule "A" thereto (together with the Applicants, the "**Just Energy Entities**").[1] The CCAA Court granted an Amended and Restated Initial Order ("**ARIO**") and the Second ARIO on March 19, 2021, and May 26, 2021, respectively.

2. The issue in this motion relates to whether counsel for the proposed representative plaintiffs ("**Plaintiffs' Counsel**") in two uncertified U.S. putative class actions – the Donin Action[2] and the Jordet Action[3] (the "**Putative Class Actions**") – should be entitled to obtain certain relief which preemptively dictates how the Just Energy Entities are entitled to negotiate their proposed plan of arrangement, as well as the terms of that plan and the manner in which their claims are to be resolved. The Just Energy Entities submit that all of the requested relief should be denied.

3. The Just Energy Entities have been engaging in good faith to address reasonable requests for information from the Plaintiffs' Counsel and have been operating in good faith to provide for resolution of all disputed claims, including the Putative Class Actions, in accordance with the Claims Procedure Order granted by this Court. Nonetheless, the Plaintiffs seek a suite of relief,

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[1] Affidavit of Michael Carter, sworn February 2, 2022 (the "**Seventh Carter Affidavit**"), paras. 1 and 6, Motion Record of the Applicants dated February 2, 2022 ("**Applicants' MR**") at pp. 6 and 10, Compendium of the Applicants and DIP Lenders dated February 7, 2022 ("**Compendium**"), Tab 14, pp. 240 and 244. Capitalized terms not otherwise defined have the same meaning as in the Seventh Carter Affidavit.

[2] *Donin v. Just Energy Group Inc. et al.*, No. 17 Civ.5787 (WFK) (SJB)(E.D.N.Y.).

[3] *Trevor Jordet v. Just Energy Solutions Inc.*, No. 18 Civ. 953 (WMS) (W.D.N.Y.).

including information rights and a seat at the negotiating table, that is completely out of step with the highly contingent nature of their claim, including its uncertified status.

4. The Just Energy Entities remain willing, together with the Monitor, to answer further reasonable requests for information. However, it would be potentially disruptive to the ability of the Just Energy Entities to achieve a restructuring proposal at this critical juncture if the Just Energy Entities are required to provide the Plaintiffs with confidential information regarding their businesses or the restructuring, or a seat at the negotiating table, in circumstances where they are contributing nothing to the restructuring.

5. The Plaintiffs' request to be treated as Unaffected Creditors is antithetical to the objectives of the restructuring. Their alternative request for an order requiring their claim to be fully adjudicated ahead of a creditors' meeting is equally prejudicial. Their proposed adjudication schedule is patently unrealistic and unachievable. The Just Energy Entities, with the concurrence of the Monitor, estimate an aggressively expedited adjudication timeline to be approximately 12 months, not the 6 and a half weeks most recently proposed by the Plaintiffs.

6. There is no scenario in which the Putative Class Claims can be fully adjudicated prior to the anticipated creditor meeting date. Any order to this effect would therefore shackle the timeline for the entire restructuring to the time required to fully adjudicate one complex, uncertified class action of disputed scope. As a result, granting the requested order would effectively allow one contingent creditor to hold the restructuring and all its stakeholders for ransom, potentially jeopardizing the entire restructuring to the very material detriment of those stakeholders. This is contrary to bedrock CCAA principles of equity and fairness.

7. The Just Energy Entities respectfully submit that this Court's intervention is unnecessary at this time. The CCAA process should be allowed to unfold. Management must continue to

dedicate their efforts to concluding the negotiations to achieve a going-concern restructuring proposal with a view to filing their plan and obtaining a meeting order in due course.

PART II - FACTS

8. The facts underlying this Motion are more fully set out in the Seventh Carter Affidavit and the Fifth Report of the Monitor.[4] Facts relevant to the requested relief are highlighted below.

A. CURRENT STATUS OF CCAA PROCEEDINGS

9. On September 15, 2021, the CCAA Court granted an Order approving a process (the "**Claims Process**") for the identification, quantification and resolution of claims against the Just Energy Entities and their respective directors and officers and establishing a Claims Bar Date of November 1, 2021 (the "**Claims Procedure Order**"). Since the Claims Bar Date, the Just Energy Entities have been working diligently with the Monitor to review, record, dispute and, where appropriate, finally determine the amount and characterization of Claims against the Just Energy Entities and their Directors and Officers.[5]

10. The Just Energy Entities have also been working in earnest with the most significant participants in their capital structure, including the DIP Lenders (who are also Term Loan Lenders and the assignee of a significant secured supplier claim from BP), the Credit Facility Lenders and Shell (a significant secured supplier), to develop a going concern restructuring plan (the "**Plan**") which, among other things, preserves the value of the Just Energy Entities' businesses for the benefit of stakeholders (including the company's approximately 950,000 customers, more than 1000 employees, and significant trading partners) and supports the long-term viability of the

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4 Fifth Report of FTI Consulting Canada Inc., in its capacity as Court-Appointed Monitor, dated February 4, 2022 (the "**Monitor's Fifth Report**"), Compendium, Tab 11, p 172.

5 Seventh Carter Affidavit, at para 9, Applicants' MR at p. 11, Compendium, Tab 14, p 245.

business upon emergence from these CCAA and Chapter 15 proceedings. These negotiations have been complex due to the nature of the company's business and financial arrangements.[6]

11. The Just Energy Entities are hopeful that agreement on the Plan can be reached in the near future. To this end, the Just Energy Entities intend to bring a motion returnable on March 3, 2022, to seek the authority to file the Plan and request that the Court grant the Meeting Order.[7]

B. PUTATIVE CLASS ACTIONS

12. The Jordet Action was commenced on April 6, 2018 solely against Just Energy Solutions, Inc. ("**Just Energy Solutions**") on behalf of a putative class of all "Just Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present".[8]

13. The Donin Action was commenced on October 3, 2017 against JEGI, Just Energy New York Corp. ("**Just Energy NY**"), and John Does 1-100, which the plaintiffs alleged were "shell companies and affiliates" through which JEGI did business in New York and elsewhere, as well as "management and employees who perpetrated the unlawful acts." The Donin Action was brought on behalf of a putative class of "all Just Energy customers in the United States […] who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment".[9]

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6 Seventh Carter Affidavit, at paras 11-12, Applicants' MR at pp. 12-13, Compendium, Tab 14, p 246.

7 Monitor's Fifth Report, at para 27, Compendium, Tab 11, p 183.

8 Seventh Carter Affidavit, at para 20, Applicants' MR at p. 17, Compendium, Tab 14, p 251. A copy of the plaintiff's complaint in the Jordet Action is attached as Exhibit "D" to the affidavit of Robert Tannor sworn January 17, 2022 (the "**Tannor Affidavit**"), Motion Record of the Moving Parties dated January 19, 2022 ("**Plaintiffs' MR**") at pp. 141-162.

9 Seventh Carter Affidavit, at para 25, Applicants' MR at p. 18, Compendium, Tab 14, p 252. A copy of the plaintiffs' complaint in the Donin Action is attached as Exhibit "B" to the Tannor Affidavit, Plaintiffs' MR at pp. 50-123.

14. Following successful motions to dismiss, which significantly narrowed the scope of both actions, the only claims that remain are allegations that the applicable Just Energy Entities' actions breached contractual provisions to consider "business and market conditions" and breached the implied covenant of good faith when they charged rates that were more than the local utility rate for natural gas and (in the case of the Donin Action only) electricity. All other causes of action asserted in the Donin and Jordet Actions were dismissed. Additionally, all claims against John Does 1-100 in the Donin Action were dismissed for lack of jurisdiction and all claims for breach of contract prior to April 6, 2014 were held to be time-barred in the Jordet Action.[10]

15. Factual discovery in the Donin Action was closed as of January 10, 2020. Such discovery was limited to the defendants' New York business, consistent with the scope of the remaining claim.[11] No discovery has occurred in the Jordet Action to date.[12]

C. PROOFS OF CLAIM AND NOTICES OF DISALLOWANCE

16. On November 1, 2021, Plaintiffs' Counsel filed two Proofs of Claim in respect of the Donin and Jordet Actions, each in the unsecured amount of approximately USD$3.66 billion.[13] On January 11, 2022, the Monitor delivered Notices of Revision or Disallowance denying those claims

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[10] Seventh Carter Affidavit, paras 22, 27 and 29, Applicants' MR at pp. 17-20, Compendium, Tab 14, pp 251-254. A copy of the EDNY Court's decision on the motion to dismiss dated September 24, 2021 is attached as Exhibit "C" to the Tannor Affidavit, Plaintiffs' MR at pp. 124-140, Compendium, Tab 4, pp 53-68. A copy of the WDNY Court's decision on the motion to dismiss dated December 7, 2020 is attached as Exhibit "E" to the Tannor Affidavit, Plaintiffs' MR at pp. 163-195, Compendium, Tab 5, pp 69-100.

[11] Seventh Carter Affidavit, para 30, Applicants' MR at p. 20, Compendium, Tab 14, p 254.

[12] Seventh Carter Affidavit, para 56, Applicants' MR at p. 33, Compendium, Tab 14, p 267.

[13] Seventh Carter Affidavit, para 31, Applicants' MR at p. 20, Compendium, Tab 14, p 254. The damages calculation purports to be a joint, composite damages claim encompassing both lawsuits, notwithstanding the fundamental differences in terms of the defendants, scope of the claim and potential class members in the two actions.

Copies of the Donin Proof of Claim, the Jordet Proof of Claim and the Claim Documentation included in both Proofs of Claim (excluding Exhibits 2-5, which are copies of the pleadings and motions to dismiss for both Putative Class Actions) are attached to the Tannor Affidavit as Exhibits "F", "G" and "H", respectively, Plaintiffs' MR at pp. 196-252. Claims Documentation can be found in the Compendium, Tab 6, pp 101-146.

in full as part of the Claims Process.[14] The disallowances disallowed the Claims advanced by the Plaintiffs in full as, among other things, contingent, uncertified, speculative, and remote. The time for the Claimants to dispute such disallowances has not yet passed.

17. The Notices of Disallowance specifically address the Plaintiffs' impermissible attempts to expand the scope of their claims to add new defendants, new customer groups, and extended class periods. The Proofs of Claim purport to advance claims against all "Just Energy Entities" on behalf of both gas and electricity customers, notwithstanding the fact that: (a) the Jordet Action only names Just Energy Solutions as defendant and is only brought on behalf of natural gas customers; (b) the only named defendants in the Donin Action are JEGI and Just Energy NY and the EDNY Court dismissed all claims against JEGI's other affiliates; and (c) the WDNY Court found claims prior to April 6, 2014 were time-barred in the Jordet Action.[15]'

18. The Plaintiffs have not attempted to add any additional defendants (or in the case of Jordet Action, to add electricity customers) to the Putative Class Actions in the approximately four years since they were commenced.[16] Instead, they are attempting to use the Claims Process to do so. The extent of the attempted expansion of the Plaintiffs' claims is shown in the Appendix to this Factum.

19. Additionally, the Plaintiffs' damages calculations are highly inflated and based on a number of flawed assumptions. To take only one example, the Plaintiffs' purported expert report assumes that 50% of residential and commercial natural gas and electricity usage of the Just Energy Entities' customer base is attributable to customers that are parties to variable rate contracts. However, currently only 2.1% and 0.04%, respectively, of natural gas and electricity usage is

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[14] Notices of Disallowance are at Exhibits "Q" and "R" of the Tannor Affidavit, Plaintiffs' MR at pp. 303-324, Compendium, Tabs 8 and 9, pp 149-158 and 159-168.

[15] Seventh Carter Affidavit, para 34, Applicants' MR at p. 21, Compendium, Tab 14, p 255.

[16] Seventh Carter Affidavit, para 36, Applicants' MR at p. 23, Compendium, Tab 14, p 257.

attributable to customers who are parties to variable rate contracts with the Just Energy Entities. Other issues with respect to the plaintiffs' purported expert report are outlined in detail on pages 6-10 of both Notices of Revision or Disallowance.[17]

D. INFORMATION REQUESTS

20. As submitted in more detail below, the Just Energy Entities and the Monitor have engaged with Plaintiffs' Counsel since they first contacted the Monitor's legal counsel on November 11, 2021 – a full eight months after the Applicants filed for CCAA protection.[18]

E. ADJUDICATION SCHEDULE

21. Plaintiffs' Counsel sent a proposed schedule to Osler on December 13, 2021 (the "**December Proposed Schedule**"),[19] which suggested: (a) the appointment of a tripartite panel of arbitrators from JAMS (U.S.); (b) the application of the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures to pre-hearing discovery and the hearing; (c) "sufficient disclosure" from the Just Energy Group; (d) "circumscribed" depositions; and (e) a hearing lasting approximately 5-7 days to be scheduled for the first week of February 2022.

22. The December Proposed Schedule was not remotely achievable, especially as the Applicants are at a critical time in their attempts to reorganize.[20] It also ignores significant steps in the adjudication process including summary judgment and certification.

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17 Seventh Carter Affidavit, paras 37-38, Applicants' MR at pp. 23-24, Compendium, Tab 14, pp 257-258.

18 A comprehensive chronology of the communications with, and information provided to, Plaintiffs' Counsel and Plaintiffs' Canadian counsel is set out at paragraph 43 of the Seventh Carter Affidavit, Applicants' MR at p. 25-28, Compendium, Tab 14, pp 259-262.

19 Tannor Affidavit, Exhibit S, Plaintiffs' MR at pp. 325-328, Compendium, Tab 10, pp 169-171.

20 Seventh Carter Affidavit, para 53, Applicants' MR at p. 32, Compendium, Tab 14, p 255.

23. The Notices of Disallowance delivered to the Plaintiffs on January 11, 2022 both specified the steps that are required to be addressed in order to fairly and properly adjudicate the Putative Class Actions – most of which were missing from the December Proposed Schedule.[21]

24. The Plaintiffs subsequently put forward a largely identical proposed schedule in their motion record on January 19, 2022 (the "**January Proposed Schedule**"). It still sought a hearing on the merits in February 2022 without addressing the need for discovery in the Jordet Action or motions for summary judgment and class certification in both Putative Class Actions.[22]

25. On February 1, 2022, the Applicants provided the Applicants' proposed adjudication schedule to Plaintiffs' Counsel (the "**Applicants' Proposed Schedule**").[23] The Applicants' Proposed Schedule provides for a process for all of the relevant steps that would see both Putative Class Claims adjudicated over the course of **twelve months**:

Step	**Applicants' Proposed Expedited Schedule**
Fact Discovery	After conducting a meet and confer among counsel, appropriately tailored document production by June 30, 2022 consistent with the status of the Donin and Jordet cases.
Expert Discovery	Opening Expert Disclosures: July 29, 2022 Rebuttal Expert Disclosures: August 19, 2022 Expert Depositions: August 29, 2022
Dispositive Motions Hearing	November 10, 2022
Class Certification Hearing	November 17, 2022
Joint Pretrial Order/ Pretrial Conference	December 9, 2022
Trial	February 10, 2023

[21] Seventh Carter Affidavit, para 56, Applicants' MR at p. 33, Compendium, Tab 14, p 267.

[22] Plaintiffs' Notice of Motion, para 3(a), Plaintiffs' MR at p. 3, Compendium, Tab 2, p 9.

[23] A copy of the communication to Plaintiffs' Counsel, including the Applicants' Proposed Schedule is attached to the Seventh Carter Affidavit as Exhibit "M", Applicants' MR at pp. 366-368, Compendium, Tab 15, pp 272-274.

26. The Plaintiffs suggest that the Applicants' Proposed Adjudication Schedule would have the Putative Class Claims determined "over 1-4 years".[24] This is plainly incorrect.

27. The Applicants' compressed schedule provides for the hearing of the certification and summary judgment motions in November 2022, almost a year and a half before such motions would be heard in the Jordet Action in the ordinary course. If the Plaintiffs are successful on both of these motions, a trial with respect to any certified common issues would commence by February 10, 2023 – approximately three years before any such trial would have been heard in the Jordet Action and seven months before any trial would have been heard in the Donin Action.[25]

28. The Applicants have also indicated that they are willing to discuss the appointment of an arbitrator from Arbitration Place or similar forum to act as Claims Officer.[26]

29. On February 4, 2022, the Plaintiffs proposed a new adjudication schedule (the "**February Proposed Schedule**"). Although Plaintiffs' Counsel noted that they were originally "prepared to send a proposal for a process that resulted in a decision on the merits in May 2022", they instead proposed a schedule that would require the Putative Class Action Claims to be determined no later than three days before the meeting of creditors ("**Creditors' Meeting**") – i.e. March 27, 2022, given that the DIP Term Sheet requires the Creditors' Meeting be held by March 30, 2022.[27]

30. The February Proposed Schedule acknowledges the need to determine class certification, but provides that the proposed Claims Officers would decide when and how certification would

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[24] Plaintiffs' Factum, at para 4.

[25] Seventh Carter Affidavit, para 61, Applicants' MR at p. 36, Compendium, Tab 14, p 270.

[26] Seventh Carter Affidavit, Exhibit M, Applicants' MR at p. 367, Compendium, Tab 15, p 273.

[27] Plaintiffs' Factum, Schedule C, "Proposed Expedited Adjudication Framework", Compendium, Tab 16, pp 275-276.

be briefed. It is subject to the overriding requirement that the Putative Class Claims be determined three days prior to the Creditors' Meeting. The six-and-a-half-week timeframe proposed by the Plaintiffs does not provide sufficient time to address certification.[28]

31. The February Proposed Schedule further acknowledges that there will have to be a determination with respect to the scope of the Plaintiffs' claims (e.g. what states, customers, and defendants are included). However, it requires that such determination be subject to the requirement that the Putative Class Claims be fully adjudicated and valued no later than three days before the Creditors' Meeting. The February Proposed Schedule proposes a tripartite panel of two US arbitrators and one Canadian arbitrator and provides that any appeal would be to this Court.[29]

PART III - ISSUES AND THE LAW

32. The principal issues on this Motion are whether this Court should:

(a) direct that the Putative Class Claims be unaffected in the CCAA Proceeding;

(b) grant the Plaintiffs' information and participation requests; and

(c) impose the Plaintiffs' February Proposed Schedule.

A. JURISDICTION TO MAKE THE ORDER

33. The Plaintiffs state that this Court has the jurisdiction to grant their proposed relief under section 11 of the CCAA, which provides this court with broad powers to make "any order that it considers appropriate in the circumstances."

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[28] Plaintiffs' Factum, Schedule C, "Proposed Expedited Adjudication Framework", Compendium, Tab 16, p 277; Seventh Carter Affidavit, paras 53 and 65, Applicants' MR at pp. 32 and 37, Compendium, Tab 14, pp 266 and 271.

[29] Plaintiffs' Factum, Schedule C, "Proposed Expedited Adjudication Framework", Compendium, Tab 16, pp 275 and 277.

34. The Plaintiffs, citing the Supreme Court of Canada's decision in *Century Services*, appear to recognize that the Court's jurisdiction under section 11 is constrained by the objectives of the CCAA – namely, whether the order will "usefully advance the policy objectives underlying the CCAA", including the need to "avoid the social and economic losses resulting from liquidation of an insolvent company."[30] However, the Plaintiffs' proposed relief is antithetical and disruptive to the ability of Just Energy and the Applicants to achieve a successful going concern restructuring.

B. PLAINTIFFS' CLAIMS SHOULD NOT BE TREATED AS UNAFFECTED

35. The Plaintiffs' request for a declaration that they are to be treated as "Unaffected Creditors" under a proposed Plan that has yet to be placed before this Court purports to pre-emptively dictate the form of the restructuring of the Just Energy Group's business that can occur. The Plaintiffs have cited no case law in which a single creditor (let alone an unliquidated, highly contingent creditor) has convinced this Court to exercise its jurisdiction under section 11 of the CCAA to dictate what a debtor company can or cannot do in a plan with respect to that creditor, let alone a plan that the Court has not yet even seen.

36. The Plaintiffs' request that they be deemed to be "unaffected" by the plan is essentially a request to lift the CCAA stay and exempt them from the entire restructuring without satisfying the applicable legal test. Many other stakeholders in this insolvency no doubt would like similar treatment, which would entirely defeat the objectives of this CCAA proceeding.

37. Although not yet finalized, the Plan under negotiation with the Just Energy Entities' funded debtholders will provide that all contingent litigation creditors are "Affected Creditors" under the Plan. The DIP Lenders (who are also the Plan Sponsors) have confirmed that under no

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[30] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70, Plaintiffs' BOA, Tab 4.

circumstances will they support a CCAA Plan which leaves these contingent claims unaffected.[31] For that matter, no financial sponsor or "new money" would permit the Just Energy Entities to pursue a Plan that does not affect litigation claims.

38. The Monitor explicitly states that it does not support the Plaintiffs' request to be treated as unaffected by the CCAA Proceedings and agrees that all litigation claims, including those of the Plaintiffs, must be dealt with as part of the CCAA Proceedings. There is no basis for treating the Plaintiffs any differently than the other contingent creditors in these CCAA Proceedings.[32]

C. THE INFORMATION AND PARTICIPATION REQUESTS

39. The Plaintiffs' request for information rights and an information protocol is premised on their erroneous position that the Applicants and the Monitor have not been responsive to information requests over the last twelve weeks. The Plaintiffs further accuse the Applicants of a "lack of transparency" and a failure to balance the interests of all of its stakeholders. These claims are unfounded and incorrect.

40. Despite being under no legal obligation to do so, the Applicants and the Monitor have engaged extensively with Plaintiffs' Counsel since they first contacted the Monitor's legal counsel on November 11, 2021. Plaintiffs' Counsel has been provided with confidential information and documents, subject to the terms of an NDA. There have been multiple meetings between Plaintiffs' Counsel, its financial advisor and, at various times, counsel for the Just Energy Entities, the Monitor, counsel to the Monitor, and the financial advisor to the Just Energy Entities.[33] The

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31 Monitor's Fifth Report, para 54, Compendium, Tab 11, p 192.

32 Monitor's Fifth Report, para 54, Compendium, Tab 11, p 192.

33 Seventh Carter Affidavit, paras 41 and 43, Applicants' MR at pp. 24-28, Compendium, Tab 14, pp 258-262.

Applicants and Monitor have answered all reasonable requests for information in good faith, and in a timely manner,[34] despite being under considerable pressure to negotiate and conclude a restructuring transaction at this critical juncture.

41. Plaintiffs' Counsel's remaining information requests are overbroad, relate to confidential information about the business and restructuring, and/or are more akin to discovery questions that are not relevant to developing an understanding of the restructuring process.[35]

42. There is no statute or rule that requires a CCAA debtor to share confidential information regarding its restructuring with any or all stakeholders and the Plaintiffs cite none.

43. This proposition is helpfully confirmed by the *Abitibi* decision, cited by the Plaintiffs. In that case, the debtor's data rooms were accessible only to certain key stakeholders. The Court refused to grant access to a contingent stakeholder whose status as "creditor" was not determined because it had not demonstrated that its potential claims were neither speculative nor remote.[36]

44. The Court in *Abitibi* accepted that it was appropriate in the context of that restructuring for the debtor not to provide open access to its data rooms for every creditor, let alone for every "stakeholder". Nor did it violate principles of fairness or transparency, in the absence of bad faith, for the debtor to provide access to some creditors but not others.[37] Thus the debtor was entitled "for legitimate business reasons and through the exercise of reasonable business judgment, [to]

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34 Monitor's Fifth Report, para 52, Compendium, Tab 11, p 192; Seventh Carter Affidavit, para 43, Applicants' MR at pp. 25-28, Compendium, Tab 14, pp 259-262.

35 The Monitor noted in its response to the December 13th Questions that numerous questions were essentially discovery questions not relevant to developing an understanding of the restructuring process: Seventh Carter Affidavit, para 43 and Confidential Exhibit G, Applicants' MR at pp. 27 and 174, Compendium, Tab 14, p 261.

36 *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 5482 at para 61 ("***Abitibi***").

37 *Abitibi*, at paras. 64-66, 73.

restrict access to its electronic data rooms when its use by mere stakeholders (or sometimes, even creditors) would not further nor enhance its restructuring process."[38]

45. The amount of confidential information provided to a creditor regarding the debtor's business is therefore within the discretion of the debtor company, acting reasonably and under the oversight of the Monitor. The Applicants continue to be willing to, in consultation with the Monitor, engage with Plaintiffs' Counsel to address reasonable and appropriate requests for information. There is no need for intervention of this Court in this regard.

46. Similarly, as confirmed by the Monitor,[39] a CCAA debtor is not required to negotiate a plan with any specific stakeholder or creditor, secured or otherwise, regardless of the amount of leverage that stakeholder may claim to have. The Plaintiffs cite no provisions of the CCAA and no cases that would suggest otherwise.

47. The Second ARIO charged the Applicants with the authority to develop and file a plan with the assistance of the Monitor and that is exactly what the Applicants have been doing. Plan discussions are currently limited to the Just Energy Entities' key stakeholders (which comprise the DIP Lenders, the Credit Facility Lenders, Shell and other key non-contingent creditors including the Term Loan Lenders).[40] The information and documents relating to any proposed transaction must, out of necessity, be confidential to ensure a constructive dialogue with financial participants with proven claims against the company.[41]

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38 *Abitibi* at para. 80.

39 Monitor's Fifth Report, para 62, Compendium, Tab 11, p 194.

40 Monitor's Fifth Report, para 62, Compendium, Tab 11, p 194.

41 Seventh Carter Affidavit, at para 50, Applicants' MR at p. 31, Compendium, Tab 14, p 265.

48. No contingent litigation creditors or other creditors with Disputed Claims are privy to the Applicants' discussions in respect of the Plan. Adding the Plaintiffs to negotiations at this stage would be bound to delay and hinder negotiations, lead to other similar requests and jeopardize the restructuring at a crucial stage. As Mr. Carter noted, "It is not feasible to have other stakeholders 'at the table' to second guess the Applicants or distract management from the task at hand"[42] – particularly contingent creditors who are contributing nothing to the restructuring.

49. The Plaintiffs cite examples of other CCAA orders at paragraph 83 of their Factum in which varying levels of information were provided to particular stakeholders. However, the orders in question were either granted on consent or provided information rights tailored to the context of the particular proceeding, the facts of which are not provided to this Court. None of these cases establishes a legal principle entitling particular stakeholders to information rights, let alone a seat at the negotiating table, and are therefore of little or no value to this Court:

(a) Sino-Forest:[43] the order required production of documents by the CCAA debtor in its capacity as defendant to the securities litigation being pursued by the class action plaintiffs, not about its business or restructuring. In any event, such production was ordered on consent of the Applicant, with the Monitor's support.

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42 Seventh Carter Affidavit, para 50, Applicants' MR at p. 31, Compendium, Tab 14, p 265.

43 *Sino-Forest Corp., Re* (30 July 2012), Toronto, CV-12-9667-00CL (Ont. S.C.J.) (Document Production Order), Plaintiffs' BOA, Tab 15.

(b) Poseidon: although the plaintiffs obtained access to certain information in the company's data-room, paragraph 5 of the order denied access to a significant amount of information about the restructuring itself.[44] No other context is provided.

(c) Collins & Aikman:[45] there is no context provided in the order cited by the Plaintiffs to explain why the information access provided to the union was appropriate in the circumstances of this restructuring.

(d) Nortel: the Plaintiffs cite no particular order or reasons that would support the statement that "all stakeholders" were provided access to confidential data-rooms.

50. The Plaintiffs argue that they are entitled to confidential information about the restructuring because the financial statements filed by JEGI demonstrate that "there is equity in the Just Energy Entities" and consequently the Plaintiffs have a "significant stake in the CCAA Proceedings".[46] This is both incorrect and irrelevant. The Plaintiffs point to no provision or case entitling them to obtain information or participation rights in a CCAA restructuring where there is "equity" on a debtor company's balance sheet. Shareholder equity on JEGI's balance sheet bears little or no relationship to what would be a fair and reasonable going concern transaction as part of a court-supervised restructuring or to the ultimate financial outcome of a restructuring transaction, including distributions to unsecured creditors.

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[44] *Poseidon Concepts Corp., Re* (31 May 2013), Calgary, 1301-04364 (ABQB) (Access Order), Plaintiffs' BOA Tab 17.

[45] *Collins & Aikman Automotive Canada Inc., Re* (20 February 2008), Toronto, 07-CL7105 (Ont. S.C.J.) (Document Production Order), Plaintiffs' BOA Tab 16.

[46] Plaintiffs' Notice of Motion, at paras 14 and 15, Plaintiffs' MR at p. 8, Compendium, Tab 2, p 14; Plaintiffs' Factum at para 67-69.

51. In any event, even if this factor were relevant, the Plaintiffs persist in misinterpreting the balance sheet on this point. As Mr. Carter explains, the Plaintiffs fail to adjust the equity on the balance sheet for the impact of approximately $545 million of net derivative financial assets resulting from approximately $580 million of unrealized gains on its derivative instruments in the six months ended September 30, 2021. JEGI has historically and consistently noted in its financial statements that these amounts do not impact its long-term financial performance and are excluded from its base EBITDA calculation. Similarly, these amounts should be excluded when considering the balance sheet.[47]

52. Finally, the Plaintiffs raise the spectre at para. 80 of their factum that the Applicants' Plan will not be capable of recognition in the US due to purported lack of inclusiveness or procedural fairness, citing several US cases. This is a red herring in this motion. The CCAA proceeding has already been recognized under Chapter 15 in the United States Bankruptcy Court for the Southern District of Texas. Notice was given in the Chapter 15 case that all claims against the Applicants must be filed in accordance with the Canadian Claims Procedure Order.[48] No doubt the Plaintiffs intend to fight recognition of the Plan in the US Court, no matter how it purports to deal with their claims. There is nothing, however, that this Court can or should do to address this in this motion.

D. PLAINTIFFS' ADJUDICATION SCHEDULE SHOULD NOT BE GRANTED

(a) *The CCAA Process Must be Respected*

53. The CCAA sets out a process for all restructuring companies to file a plan, schedule a meeting of creditors, and then seek sanction of an approved plan. Under the CCAA, it is the debtor

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47 Seventh Carter Affidavit, paras 45-47, Applicants' MR at pp. 28-30, Compendium, Tab 14, pp 262-264.

48 Notice of Filing of (I) Claims Procedure and Stay Extension Motion, (II) Claims Procedure and Stay Extension Order, and (III) Endorsement in the CCAA Proceeding, dated September 29, 2021, Case 21-30823.

that has responsibility for proposing the plan – although it is also open to a creditor, including the Plaintiffs, to propose a plan if they believe that such an alternate plan would be approved by the creditors and provide better recoveries.

54. The Court has the discretion to determine whether to accept the filing of a plan and to permit the debtor company to put it before a creditors' meeting for voting, applying applicable legal principles set out in the CCAA case law. If the plan is approved by creditors, the Court has the discretion to sanction or refuse to sanction that plan based on whether it is fair and reasonable, again based on the test articulated in the CCAA case law. This process has been proven on countless occasions to be effective in facilitating going-concern transactions while protecting the rights of debtors' stakeholders.

55. The Applicants' Plan has not yet been presented to the Court, nor has the question of whether a meeting order should be granted. The Applicants propose to seek a meeting order on March 3, 2022. At that time, the Court will have the benefit of seeing the terms of the Plan and will be fully briefed regarding the facts and the law that will support the granting of a meeting order. The CCAA process should therefore be allowed to unfold. There will be a full opportunity for both the Court and the creditors, with the advice of the Monitor, to determine whether the Applicants' Plan strikes the appropriate balance among stakeholders, in light of the Applicants' insolvency and the available restructuring options.[49]

56. By contrast, if the Court grants the requested relief in this motion, including requiring the Applicants to adjudicate the Putative Class Claims in advance of the meeting of creditors, such an order risks upsetting the delicate negotiations currently underway and potentially derailing them

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[49] Monitor's Fifth Report, para 62, Compendium, Tab 11, p 194.

entirely. Such a determination would also effectively shackle the timeline – and the very feasibility – of the restructuring to the resolution of the claim of one contingent stakeholder, to the potentially severe prejudice of the stakeholders as a whole. This is antithetical to the fundamental principles of maintaining a level playing field that are at the heart of a CCAA restructuring.

(b) ***The Plaintiffs' Motion is a Collateral Attack on the Claims Procedure Order***

57. The Plaintiffs' request that their claims be adjudicated in accordance with their proposed process, on their proposed timeline is a collateral attack on the Claims Procedure Order.

58. The doctrine of collateral attack prevents a party from undermining previous orders of a Court. It is based on the fundamental principle that a court order stands as binding and conclusive unless set aside on appeal or lawfully quashed. Such an order cannot be attacked, except in proceedings whose specific object is to appeal or reverse the prior order.[50] In *Muscletech*, for example, the CCAA Court criticized certain objecting creditors for essentially mounting a collateral attack on a prior claims procedure order when those creditors questioned the treatment of third party liabilities under the order and the plan.[51]

59. Despite the fact that the Plaintiffs did not appear or make submissions at the Claims Procedure Order hearing, and did not seek leave to appeal from that Order, the Plaintiffs' relief with respect to the proposed adjudication procedure, timeline (including the request to impose an outside date for resolution of the Plaintiffs' claims), and choice of adjudicators effectively seeks to vary or overturn certain key provisions of the Claims Procedure Order:

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[50] *Bear Creek Contracting Ltd. V. Pretium Exploration Inc.*, 2020 BCSC 1523 at para. 101, citing *Garland v Consumers' Gas Co.*, 2004 SCC 25 at para. 71.

[51] *Muscletech Research and Development Inc., Re*, 2006 CanLII 34344 (ON SC) at para 10.

(a) It is the choice of the Just Energy Entities, in consultation with the Monitor, and not the choice of an individual creditor as to whether and when to refer a dispute to a Claims Officer or the Court (clauses 39 and 40);

(b) The Claims Officer is intended to be Mr. Edward Sellers and such other Persons as may be appointed by the Court from time to time on a motion by the Just Energy Entities or the Monitor. (clause 42). Individual creditors, such as the Plaintiffs, have no right to appoint Claims Officers or adjudicators.

(c) Where a Disputed Claim is referred to a Claims Officer, the Claims Officer "shall determine all procedural matters which may arise in respect of his or her determination of these matters, including any participation rights for any stakeholder and the manner in which any evidence may be adduced." (clause 44). An individual Claimant has no right to dictate procedural matters.

60. If the Just Energy Entities are required to adopt the procedure requested by the Plaintiffs, it would allow the Plaintiffs to effectively vary the Claims Procedure Order, without objecting to it or appealing it at the appropriate time or in the appropriate forum.

(c) ***The Plaintiffs' Proposed Schedule is Unachievable and Prejudicial***

61. Despite the fact that they have not yet received the Plaintiffs' Notice of Dispute of Revision or Disallowance, the Just Energy Entities have been working in good faith and with due diligence to reach an agreement with Plaintiffs' Counsel with respect to an expedited adjudication schedule for the Putative Class Claims. However, the parties have not yet been successful.

62. The February Proposed Schedule is practically unachievable and procedurally unfair, not only to the defendants, but to all of the Applicants' stakeholders. In particular:

(a) **The Timeline is Unrealistic:** The parties would have to start and complete documentary discovery in the Jordet Action, conduct depositions, prepare and exchange expert reports, complete a certification motion, and complete a hearing on the merits within six and a half weeks. On its face, this proposal is absurd. It is imperative that any schedule allow for a full and fair consideration of the merits of the Putative Class Claims to ensure the integrity of the process and to avoid prejudice to unsecured creditors with competing claims.

(b) **Strain on Management:** Management is fully occupied in negotiating a highly complex restructuring transaction for the benefit of all stakeholders, under immense time pressure, while simultaneously running the business. Management simply does not have the capacity to accelerate the litigation schedule any further than the already aggressively expedited 12-month process proposed by the Applicants.

(c) **Failure to Address Certification:** Without certifying the classes (the scope of which are very much in contention given the Plaintiffs' attempts to broaden the Putative Class Actions), it will be impossible to conduct a trial or give notice to potential class members to allow them to opt out.[52]

At this time, the claims asserted by Plaintiffs' Counsel are the claims of only three individuals. The value of the Donin and Jordet Actions (as well as the Plaintiffs' asserted entitlements to "leverage" in this proceeding) hinge on whether they are capable of certification. Only after certification could these claims be asserted at a face value that reflects the collective entitlements (if any) of the purported Class

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[52] Seventh Carter Affidavit, para 54, Applicants' MR at p. 32, Compendium, Tab 14, p 266.

> Members. The question of certification potentially impacts the recoveries of all other unsecured creditors and for this reason alone, it is a step that cannot simply be omitted, nor can the outcome of a certification motion simply be presumed.

63. With respect to the Plaintiffs' January Proposed Schedule, the Monitor noted that it was "far too brief" and "not achievable at the outset" given the "complex nature and the early stages of the underlying litigation and size of the claims being alleged".[53] Moreover, it would place unacceptable strain on an already-stretched management team:

> The Just Energy Entities' business is complex and requires diligent, focused management. The CCAA Proceedings have imposed considerable additional demands and responsibilities on management as they combine day to day responsibilities with the pursuit of a restructuring of the Just Energy Entities. In the Monitor's view, seeking adjudication of the Donin/Jordet Claims on the timeline proposed by the Plaintiffs would unduly impede the ability of management and key employees to focus their time and attention on achieving a successful restructuring for the benefit of all stakeholders.[54]

64. Those same considerations apply in respect of the Plaintiffs' February Proposed Schedule. The Monitor's view is that the Applicant's Proposed Schedule spanning approximately twelve months before a Claims Officer is more realistic.[55] As such, the Monitor "does not support the proposed adjudication process set forth in the Donin/Jordet Motion."[56]

65. There is therefore no scenario in which the Putative Class Claims could be adjudicated to judgment on their merits before the anticipated date of the creditors' meeting. The Plaintiffs themselves acknowledge that their February Proposed Schedule is unrealistic. But instead of building a schedule that they believe to be viable, the Plaintiffs seek to impose a requirement that

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53 Monitor's Fifth Report, para 57, Compendium, Tab 11, p 193.

54 Monitor's Fifth Report, para 59, Compendium, Tab 11, p 194.

55 Monitor's Fifth Report, para 57, Compendium, Tab 11, p 193.

56 Monitor's Fifth Report, para 60, Compendium, Tab 11, p 194.

their Claims be determined in advance of the Creditors' Meeting, essentially guaranteeing that the restructuring process will be significantly delayed, if not impossible to achieve.

66. The entire restructuring rests on the financial support of its funded debtholders. Moreover, as Mr. Carter noted, "Due to the nature of the business, the length of time the Applicants have been in the CCAA proceedings, the complexities and time-consuming nature of the multiparty negotiations, and the volatility of the energy market, any significant delays in the conclusion of the restructuring could have damaging effects on the outcome for stakeholders and the support of the financial participants for the proposed restructuring."[57]

67. It cannot be the case that a contingent unsecured creditor can hold the company, and all other creditors with ascertainable, proven claims, for ransom, and claim to have a veto over a CCAA plan of arrangement simply by putting a vastly inflated and unsupported number in a Proof of Claim form and then insisting that this Claim has to be adjudicated before anyone else's. The Applicants cannot wait until the Putative Class Claims have been finally determined before holding a Creditors' Meeting. The Monitor agrees that "it is unreasonable to delay the entire restructuring process of the Just Energy Entities to resolve one outstanding contingent litigation claim."[58]

68. Just Energy Group does not dispute that orders for "bespoke" adjudication processes within a CCAA proceeding can and should be made where appropriate. That is exactly what has already been proposed to the Plaintiffs. However, whether such processes are appropriate and what such process should entail is a fact-specific determination, in light of the nature of the particular claim, including its complexity and the number of steps required (even if expedited) in order to resolve it

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57 Seventh Carter Affidavit, at para 14, Applicants' MR at p. 13, Compendium, Tab 14, p 247.

58 Monitor's Fifth Report, para 58, Compendium, Tab 11, p 193.

in a manner that is fair and reasonable. And "appropriateness" must be considered not only from the perspective of the creditor in question, but also the debtor and its resources, as well as the impact on other stakeholders.

69. It therefore does not assist the Plaintiffs to cite a list of other specifically tailored processes which were designed in light of the specific facts of the claims and the particular restructuring in question (see para. 82 of the Plaintiffs' Factum). They are of no assistance in determining what type of process or its duration is appropriate for the fair adjudication of the Putative Class Claims. In fact, all of the examples cited by the Plaintiffs are entirely distinguishable:

(a) *Essar Steel Algoma*: (Grievance Claims Process): the fact that the Court ordered the resolution of 3,000 grievances within six months is meaningless without the proper context. For example, it appears that a number of grievances had already advanced to the final stage of adjudication, a number were to be disallowed or rejected, and others were to be resolved on consent. Certain (presumably) more complex grievances were to be resolved outside the expedited process.[59]

(b) *Essar Steel Algoma*: (Oppression Claim): While the oppression claim in this case was certainly resolved on an expedited basis, its timeline was significantly longer than the six and a half weeks currently proposed by the Plaintiffs.

This proceeding was very different from the Putative Class Actions. The oppression claim was brought by the Monitor, on behalf of creditors, with a view to removing a barrier to the debtor's restructuring for the benefit of all stakeholders. It was not

[59] *Essar Steel Algoma (Re)*, 2016 ONSC 1802, paras. 4 and 5.

a claim brought by one contingent creditor seeking to have its own claim resolved in a truncated manner that would be prejudicial to other creditors.

More importantly, it was not a class action, let alone an uncertified class action. Instead, it was a proceeding under one statutory provision, involving a single issue and a single transaction. Moreover, the CCAA Judge who agreed to hear the case on the expedited timeline was already very familiar with the issues in the litigation.

(c) *Covia Canada Partnership Corp.*: Farley J. expressly noted that the four actions had been resolved in a "four week trial" commencing in February of 1993, with judgment rendered in April 1993. However, in a normal scenario, Farley J. stated that the litigation would "have taken place over some three or four months sometime in 1994."[60] This is very different from the Putative Class Actions, which have now been ongoing for four years, without proceeding to certification, and which would, in the ordinary course, require an additional one and a half to four years to adjudicate.

PART IV - NATURE OF THE ORDER SOUGHT

70. For all of the reasons above, the Applicants submit that this Court should dismiss the Plaintiffs' Motion in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of February, 2022.

OHH

Osler, Hoskin & Harcourt LLP

[60] *Covia Canada Partnership Corp. v. PWA Corp.*, 1993 CanLII 9429 (ON SC) at para. 5

Appendix – Expansion of Plaintiffs' Claims

	Donin Complaint/ Motion to Dismiss	Donin POC	Jordet Complaint/ Motion to Dismiss	Jordet POC
Defendants	JEGI, Just Energy NY Claims against other JEGI affiliates dismissed	All "Just Energy Entities"	Just Energy Solutions	All "Just Energy Entities"
Defendants' Customer Base[61]	New York	California Delaware Georgia Illinois Indiana Maryland Massachusetts, Michigan Nevada New Jersey New York Ohio Pennsylvania Texas	California Georgia Illinois Maryland Nevada Ohio Pennsylvania Virginia	California Delaware Georgia Illinois Indiana Maryland Massachusetts, Michigan Nevada New Jersey New York Ohio Pennsylvania Texas
Defendants' Customer Type	Largely Residential	Residential and Commercial	Largely Residential	Residential and Commercial
Product Type	Electricity and Natural Gas	Electricity and Natural Gas	Natural Gas Only	Electricity and Natural Gas
Class Period	October 3, 2011 based on applicable statute of limitations period for NY contract claims	2011-2020	WDNY Court held claims prior to April 6, 2014 are time-barred.	2011-2020

[61] The customer base in the "Jordet Complaint/ Motion to Dismiss" column reflects the states where natural gas was marketed by Just Energy Solutions. Just Energy Solutions marketed natural gas in these various states for different lengths of time.

SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 5482
2. *Bear Creek Contracting Ltd. V. Pretium Exploration Inc.*, 2020 BCSC 1523
3. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
4. *Collins & Aikman Automotive Canada Inc., Re* (20 February 2008), Toronto, 07-CL7105 (Ont. S.C.J.) (Document Production Order)
5. *Covia Canada Partnership Corp. v. PWA Corp.*, 1993 CanLII 9429 (ON SC)
6. *Essar Steel Algoma (Re)*, 2016 ONSC 1802
7. *Muscletech Research and Development Inc., Re,* 2006 CanLII 34344 (ON SC)
8. *Poseidon Concepts Corp., Re* (31 May 2013), Calgary, 1301-04364 (ABQB) (Access Order),
9. *Sino-Forest Corp., Re* (30 July 2012), Toronto, CV-12-9667-00CL (Ont. S.C.J.) (Document Production Order)

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

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

General power of court

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

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

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

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at: TORONTO

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