

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

APPLICANTS

**FACTUM OF THE APPLICANTS
(Comeback Hearing)**

March 18, 2021

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PART I - NATURE OF THIS APPLICATION

1. The Applicants obtained relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”) by an initial order dated March 9, 2021 (the “**Initial Order**”). The relief requested by the Applicants was supported by the Affidavit of Michael Carter¹. The Initial Order, among other things, appointed the Monitor and granted a stay of proceedings in favour of the Applicants until and including March 19, 2021 (the “**Initial Stay Period**”).

2. The Applicants now seek an order (the “**ARIO**”) extending the stay of proceedings (the “**Stay**”) up to and including June 4, 2021 (the “**Stay Period**”) under section 11.02(1) of the CCAA, together with certain related relief. Since this Court issued the Initial Order, the Just Energy Group, in close consultation and with the assistance of the Monitor, has been working in good faith and with due diligence to stabilize its business and engage with its key stakeholders.²

3. Much of the relief granted in the Initial Order was fully supported in the Factum of the Applicants filed on March 9, 2021. Those submissions are not repeated below. This factum focuses on two employee-related measures: (a) the approval of a key employment incentive and retention plan (the “**KERP**”); and (b) payment of the employee bonuses to current employees in respect of the third quarter of fiscal 2021 (the “**Q3 Bonuses**”). Both of these measures, which are interrelated, are crucial to the ability of the Applicants to retain their key employees throughout the course of the restructuring and to motivate them to engage in the significant efforts that will be required of them. The Monitor supports both measures.

¹ Affidavit of Michael Carter, sworn March 9, 2021 [Initial Order Affidavit].

² Details of the steps taken in the Initial Stay Period are outlined in the Affidavit of Michael Carter, sworn March 16, 2021 [Second Carter Affidavit].

4. The Applicants submit that the KERP is reasonable and appropriate in both its scope and its quantum. KERPs are routinely granted in restructurings of this nature, given the unique challenges facing a debtor company's employees in such circumstances and the corresponding flight risks. The proposed KERP has been designed in consultation with the Monitor based on an evaluation of the employees that are necessary to the business and the restructuring and on the assumption that the Q3 Bonuses will be paid. The KERP Charge and its priority relative to other court-ordered charges has been disclosed to other stakeholders with security interests in the Applicants' property and no objections have been raised.

5. The Q3 Bonuses are an integral part of the compensation package offered to employees. They were approved by the Board of Directors of the Applicants in February 2021, on the recommendation of the Compensation Committee, *before* the Texas weather event and this CCAA filing. They have been earned by the over 400 current employees and 8 executives who are entitled to participate in the Fiscal 2021 Bonus Plan. The Q3 Bonuses relate to services performed by employees from October 1, 2020 to December 31, 2020, a time period in which the Applicants exceeded the Q3 Base EBITDA target for bonus payment by approximately \$15 million, due at least in part to the efforts of the recipients who have worked hard to assist the Applicants over the past several years in addressing their then existing financial and other business challenges.

6. The Q3 Bonuses are an integral part of the compensation of the Applicants' employees and are legally characterized as wages under employment standards legislation. It is customary – and essential – to pay all earned and outstanding compensation, including wages, bonuses and other incentive compensation, to employees who will be expected to remain engaged and committed during the restructuring period. Failure to pay the Q3 Bonuses to those who have earned them will have a potentially devastating impact on employee morale. Indeed, the Fiscal 2021 Bonus Plan

was specifically created to motivate employee performance and mitigate against employee departures as the Just Energy Group emerged from its recapitalization process in Fiscal 2020.

7. Failure to pay the Q3 Bonuses could also hurt cohesion in the Applicants' workforce more generally, given that other performance-based incentive remuneration, such as commissions for sales staff (who are not Eligible Employees), will continue during a CCAA filing. At this juncture, the Applicants simply cannot afford to lose hundreds of employees and key executives whose skills and talents will be necessary to maintain going-concern operations while the Applicants seek to restructure.

PART II - FACTS

8. The facts regarding this Application are fully set out in the Second Carter Affidavit and the affidavit of Margaret Munnelly.³

A. THE KERP

9. The Initial Order Affidavit described the KERP developed by the Applicants.⁴ Following the Filing Date, in consultation with the Monitor and in response to certain concerns expressed by this Court, the Applicants have made certain revisions to the KERP.⁵

10. Briefly:

³ Affidavit of Margaret Munnelly, sworn March 16, 2021 [Munnelly Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the Initial Order Affidavit. All references to monetary amounts in this affidavit are in Canadian dollars unless otherwise noted.

⁴ Initial Order Affidavit at paras. 150 to 153. See also **Confidential Exhibit "GG"** attached to the Initial Order Affidavit.

⁵ Second Carter Affidavit at para. 33.

- (a) The KERP will be provided to a total of 42 employees, for a total amount of \$6.9 million.⁶
- (b) Payments range from 35 percent to 102 percent of the base salary of relevant employees.⁷
- (c) The KERP designed for the 8 executives has been revised to provide that the final payment is incentive based (i.e. based solely on completion of a Successful Restructuring, as defined in the KERP), as opposed to time based, and cannot be paid prior to September 30, 2021 even if a Successful Restructuring occurs before such date.⁸

11. For non-executive KERP recipients, the KERP payments continue to be based on certain time-based milestones.⁹

B. EMPLOYEE BONUSES

(a) *Fiscal 2021 Bonus Plan*

12. In light of the financial and operational challenges facing the Just Energy Group in Fiscal 2020 and the resulting impact on bonus entitlement and employee morale,¹⁰ and in consultation with an executive compensation consulting firm, the Just Energy Group developed a new Quarterly Short-Term Incentive Bonus Plan for Eligible Employees and Eligible Executives for Fiscal 2021

⁶ Second Carter Affidavit, para. 34.

⁷ Second Carter Affidavit, para. 35.

⁸ Second Carter Affidavit, para. 36.

⁹ Second Carter Affidavit, para. 39.

¹⁰ This history is described in greater detail in the Munnely Affidavit at paras. 3 to 7.

(the “**Fiscal 2021 Bonus Plan**”).¹¹ The quarterly base EBITDA targets and quarterly payments were designed to motivate employee and executive behavior to drive performance, bolster employee morale and mitigate retention risk.¹²

13. The Fiscal 2021 Bonus Plan was announced to employees of the Just Energy Group at a townhall meeting held on July 17, 2020. The meeting was recorded and posted to the Just Energy Group’s internal company intranet. In addition, business leaders were asked to tell their teams about the Fiscal 2021 Bonus Plan, including the quarterly base EBITDA targets.¹³

(b) Bonuses for Eligible Employees

14. One component of the quarterly bonus plan applies to Eligible Employees, meaning regular full-time employees in North America who do not qualify for any other quarterly variable bonus or commission plan. This group comprises approximately 416 employees, out of the 424 total employees eligible for a Q3 Bonus. This is less than half of the total number of employees in the Just Energy Group. Eligible Employees will receive approximately 86% of the total Q3 Bonus amounts to be paid.¹⁴

15. “Eligible Employees” include rank and file employees outside of sales,¹⁵ such as legal, operations, HR, IT, finance, etc., and excludes executives.¹⁶

¹¹ The terms “Eligible Employees” and “Eligible Executives” have the same meaning as in the Munnely Affidavit at paras. 12 and 16.

¹² Munnely Affidavit at para. 8.

¹³ Munnely Affidavit at para. 10.

¹⁴ Munnely Affidavit at paras. 12-13. The remaining 14% of the bonus amounts will be paid to executives.

¹⁵ Sales personnel receive incentive-based compensation through commissions: Munnely Affidavit at para. 32.

¹⁶ Munnely Affidavit at para. 12.

16. Bonus payments for Eligible Employees are contingent on achieving certain minimum corporate performance targets, with the specific bonus payment to individuals varying based on their contractual terms as well as their individual performance rating in the relevant period. The Board approved the following Base EBITDA targets for each quarter: Q1: \$32 million; Q2: \$27 million; Q3: 42 million; and Q4: \$49 million. The Base EBITDA targets reflect the seasonal nature of the business, with the majority of the Just Energy Group's gas customers using high volumes of gas during Q3 and Q4 (October to March).¹⁷

17. Following the close of each fiscal quarter, the Board meets to determine if the Base EBITDA targets has been met for that quarter and makes a determination with respect to approval of bonus payments for that quarter.¹⁸

(c) Bonuses for Eligible Executives

18. Quarterly bonuses are also available to Eligible Executives (which does not include Just Energy's CEO) (the "**Eligible Executives**"). There are eight (8) Eligible Executives covered by the Fiscal 2021 Bonus Plan, which has an incentive-based component.¹⁹

19. For the first three quarters of the fiscal year, Eligible Executives are eligible to receive a partial quarterly bonus payment of up to 12.5% of their total bonus, with another 12.5% per quarter being deferred until year end and being conditional upon achievement of the annual target. After the close of the fourth quarter, an Annual Incentive Bonus is calculated based on the Eligible

¹⁷ Munnely Affidavit at para. 14.

¹⁸ Munnely Affidavit at para. 15.

¹⁹ Munnely Affidavit at para. 16.

Executive's base salary times a bonus factor less any bonus payments received in the first three quarters, subject to certain caps.²⁰

(d) CEO Bonus

20. Just Energy's CEO is not eligible for a quarterly short-term bonus under the Fiscal 2021 Bonus Plan. Rather, in November 2020, the Board approved an annual short-term bonus for the CEO based on an annual Base EBITDA target. If achieved (which, as set out below, it will not be), the bonus amount would be based on the CEO's base salary times a bonus factor, pro-rated between 5% and 150% depending on the Base EBITDA achieved and approved by the Board.²¹

(e) Bonus Payments Approved in Q3 of Fiscal 2021

21. At the Compensation Committee meeting on February 9, 2021, management reported that the Just Energy Group exceeded the Base EBITDA target set for the third quarter by approximately \$15 million. At its February 10, 2021 meeting, on the recommendation of the Compensation Committee, the Board therefore approved a Q3 bonus pool in the amount of approximately \$3.23 million to be paid to the Eligible Employees and Eligible Executives.²² Based on the bonus pool approved by the Board, management then determined the individual bonus payments to be paid to ongoing Eligible Employees based on their performance during the relevant time period.

22. The Just Energy Group publicly released its quarterly financial statements and announced its third quarter results on February 26, 2021. On March 10, 2021, these results were shared with

²⁰ Munnely Affidavit at para. 17.

²¹ Munnely Affidavit at para. 18.

²² Munnely Affidavit at para. 20.

employees at a townhall. As such, the Just Energy Group's employees are aware that the Just Energy Group has exceeded the Base EBITDA target set for the Q3 Bonuses.²³

(f) *Q4 Bonuses Are Unlikely*

23. In light of the current financial challenges facing the Applicants resulting from the Texas weather event, the response of the Texas regulators and the financial impact of these unforeseeable events on the Just Energy Group, the Just Energy Group will not meet the Base EBITDA target that was set for the fourth quarter of Fiscal 2021 under the Fiscal 2021 Bonus Plan. As a result, and through no fault of their own, Eligible Employees will very likely not receive any bonus for that quarter.²⁴

24. Eligible Executives will also not be entitled to receive the deferred portion of their bonuses for the first and second quarter of Fiscal 2021, which depends on the Just Energy Group meeting its annual EBITDA targets. Therefore, in aggregate, if this Court approves the payment of the Q3 Bonuses, they will have only received a small portion of the bonus they expected for Fiscal 2021.²⁵

25. Notably, the bonuses declared and paid under the 2021 Fiscal Year Bonus Plan are the only cash bonuses which the majority of Eligible Executives will have received since 2017. Executives did not receive any bonuses for Fiscal 2020. Executives entitled to a cash bonus for Fiscal 2019 almost all agreed to take the bonus in immediately vested restricted share units.²⁶

26. The CEO will not receive any bonus for Fiscal 2021 due to the Applicants' current financial

²³ Munnely Affidavit at para. 21.

²⁴ Munnely Affidavit at para. 22.

²⁵ Munnely Affidavit at para. 23.

²⁶ Munnely Affidavit at para. 24.

challenges. Like other executives, the Just Energy Group's CEO did not receive any bonus for Fiscal 2020 either.²⁷

PART III - ISSUES AND THE LAW

27. The principal issues on this Application are whether:

- (a) this Court should grant the Stay extension;
- (b) this Court should approve the KERP; and
- (c) this Court should approve the payment of the Q3 Bonuses.

A. THE STAY EXTENSION SHOULD BE GRANTED

28. On an application other than an initial application, s. 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court a) that circumstances exist that make the order appropriate, and b) that the applicant has acted, and is acting, in good faith and with due diligence.²⁸

29. The Applicants are seeking to extend the Initial Stay Period up to and including June 4, 2021. This Stay Period is necessary and appropriate in the circumstances to allow for continued steps to stabilize the Just Energy Group's business, to engage with stakeholders and to explore restructuring options.

30. During the Initial Stay Period, the Applicants have acted in good faith and with due diligence. The Second Carter Affidavit outlines the steps taken by the Applicants since the granting of the Initial Order to stabilize their business and operations, including giving notice of these CCAA proceedings to affected parties and, in consultation with the Monitor, engaging in

²⁷ Munnely Affidavit at para. 25.

²⁸ CCAA, s. 11.02(2).

discussions with key stakeholders, including Commodity Suppliers and ISO Services Providers, regulators, bonding companies, and creditors.²⁹

B. THE KERP SHOULD BE APPROVED

31. The approval of a KERP and related KERP Charge is in the discretion of the CCAA court. The authority to grant such a charge derives from the Court's general jurisdiction to make any order that the CCAA Court thinks appropriate.³⁰ KERPs have been approved in numerous CCAA proceedings.³¹

32. As the Court held in *Walter Energy*, the factors to be considered by the Court in granting a KERP vary from case to case. However, some factors are generally present.³²

33. Factors supporting a KERP and a related KERP charge have been held to include (a) the approval of the Monitor; (b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved; (c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (e) the business judgement of the board of directors of the debtor.³³

²⁹ Second Carter Affidavit at para. 48.

³⁰ See *Re Mountain Equipment Co-operative*, [2020 BCSC 1586](#) [MEC] at para. 66, citing *Re US Steel Canada Inc.*, [2014 ONSC 6145](#) [US Steel] at para. 27.

³¹ See, for example, *Re Aralez Pharmaceuticals Inc.*, [2018 ONSC 6980](#) [Commercial List] [Aralez] at para. 57; *Re Target Canada Co.*, [2015 ONSC 303](#), at para. 59; *U.S. Steel* at paras. 28 to 33; *Re Nortel Networks Corp.*, [2009 CarswellOnt 1330](#) (S.C.J. [Commercial List]) at para. 4; MEC above at para. 71.

³² *Re Walter Energy Canada Holdings Inc.*, [2016 BCSC 107](#) [Walter] at para. 58, citing *Re Grant Forest Products* (2009), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J. [Commercial List]) [Grant Forest].

³³ *Grant Forest*, above at para. 19. See also *Walter*, above at para. 59; MEC, above at para. 68.

34. As Dunphy J. recently held in *Aralez*, three criteria underlie the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (a) arm's length safeguards; (b) necessity; and (c) reasonableness of design.³⁴ Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact dependent, based on the needs of the particular CCAA debtor and the role of the beneficiaries in the business and the restructuring.

35. In evaluating the criteria suggested by Dunphy J. in *Aralez*, the Court should defer to the business judgment of the debtor regarding the scope and quantum of the KERP where the process for designing the KERP has been fair and objectively reasonable and where the end result is also objectively reasonable.³⁵ The oversight of the Monitor in relation to the KERP design is of considerable importance. Also relevant is the support (or lack of objection) of secured creditors who are affected by the granting of a court-ordered KERP charge.³⁶

36. The revised KERP was developed by the Just Energy Group, with input from the Monitor, 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 beneficiaries of the KERP are employees with significant experience and specialized expertise that cannot be easily replicated or replaced. These key employees will also have other, more certain employment opportunities and will be faced with a significantly increased workload during the restructuring process.³⁷

³⁴ *Aralez*, above at para. 30.

³⁵ *Aralez*, above at paras. 27, 30, 36.

³⁶ *Aralez*, above at para. 35.

³⁷ Initial Order Affidavit at para. 151.

37. To address feedback received from this Court during the Initial Order hearing, the Applicants have revised the KERP for executives so that the final payment is incentive-based as opposed to time-based. Specifically, under the revised KERP, executive KERP recipients will receive (i) 25% of their total KERP on the 180th day after the Filing Date, (ii) 25% of their total KERP on the 270th day after the Filing Date, and (iii) 50% of their total KERP only upon the completion of a Successful Restructuring.³⁸ Further, the final payment is not payable before September 20, 2021, even if a Successful Restructuring occurs before then.³⁹

38. The Just Energy Group believes that the revised KERP for executives will motivate these executives, who are critical to a successful going concern solution, to continue working at the company and to provide further support for the Just Energy Group's restructuring efforts.⁴⁰

39. For non-executive KERP recipients, the Just Energy Group has left the KERP design unchanged. Such employees will receive: (i) 40% of their total KERP on the 180th day after the Filing Date; (ii) 40% of their total KERP on the 270th day after the Filing Date; and (iii) 20% of their total KERP 15 months after the Filing Date or the completion of a Successful Restructuring.⁴¹

40. After careful consideration, the Just Energy Group concluded that the KERP payments for non-executive recipients should not include any performance-based conditions because this could result in such employees doubting whether they will receive their KERP payments for reasons

³⁸ Second Carter Affidavit at para. 36.

³⁹ Second Carter Affidavit at para. 37.

⁴⁰ Second Carter Affidavit at para. 38.

⁴¹ Second Carter Affidavit at para. 39.

outside of their control, thereby hindering employee morale and retention, and undermining the effectiveness of the KERP.⁴²

41. The Applicants submit that the process for developing the KERP was objectively reasonable, and is the product of consultation with the Monitor and other stakeholders. In the business judgment of the Applicants, it is both objectively reasonable in scope and quantum and is necessary to facilitate the restructuring. As such, it should be approved.

C. PAYMENT OF THE Q3 BONUSES SHOULD BE APPROVED

42. The Applicants request the approval of this Court to pay the Q3 Bonuses. This Court has the authority to approve their payment under its broad jurisdiction under section 11 of the CCAA. In particular, this Court has the authority to approve the payment of the Q3 Bonuses on the same basis as any pre-filing amount owing to a stakeholder whose supplies or services are critical to the debtor company's ability to restructure.⁴³

(a) *Employee Compensation Permitted to be Paid*

43. It is both permissible and appropriate for a debtor company to pay all compensation to employees owing in relation to both the pre-filing and the post-filing period. Thus, the language of the model order provides that the Applicant is entitled to, but not required to pay (among other things) “all outstanding and future wages, salaries, employee and pension benefits ... in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements.”⁴⁴ (emphasis added).

⁴² Second Carter Affidavit at para. 40.

⁴³ See Initial Order Factum at paras. 98 to 100.

⁴⁴ Model Order, clause 6(a).

44. This language is reflected in the proposed ARIO, with the clarification that the wages that the Applicants are permitted to pay include the Q3 Bonuses, in accordance with the Fiscal 2021 Bonus Plan.⁴⁵ It is customary for CCAA orders to provide for the payment of both pre-filing and post-filing wage amounts, including bonuses.⁴⁶ These payments may be made alongside KERPs.⁴⁷

45. The rationale for such payments is similar to the rationale for a KERP. An employee of a debtor company seeking to restructure under the CCAA faces challenging circumstances – an obligation to continue working in an uncertain environment, often with new or expanded duties created by the restructuring. These factors create flight risk at a time when a debtor company may be least able to adapt to the loss of key participants in its workforce. The debtor company’s discretion to pay all pre- and post-filing compensation owing to an employee assists in alleviating the hardship caused by these factors, thereby promoting employee retention.

(b) *Contractual Entitlement to Bonuses as an Integral Component of Compensation*

46. The Q3 Bonuses are an integral part of the compensation package provided to the Applicants’ employees.

47. Certain key principles apply to the interpretation of an employment contract: (a) due to the importance of employment to a person’s life, an employment contract is interpreted more liberally than a commercial contract;⁴⁸ (b) rarely is the employment contract found in a single written

⁴⁵ ARIO, clause 10(a).

⁴⁶ See, for example, *Arrangement relatif à Cirque du Soleil Canada inc.*, [2020 QCCS 1981](#), at para. 15 [*Cirque*]; *Arrangement relatif à Bloom Lake, g.p.l.*, [2015 QCCS 169](#), at para. 13; *Re Canwest Global Communications Corp.*, [2009 CarswellOnt 9398](#) (S.C.J. [Commercial List]), at para. 3; *Re Canwest Publishing Inc.*, [2010 CarswellOnt 18852](#) (S.C.J. [Commercial List]), at para. 9.

⁴⁷ *Cirque*, above at para. 24.

⁴⁸ See, for example, *Wood v Fred Deeley Imports Ltd.*, [2017 ONCA 158](#) at para. 26.

agreement with fixed terms and conditions;⁴⁹ and (c) employment agreements are interpreted to protect employees where possible.⁵⁰

48. Canadian courts have often considered whether a bonus is an integral component of an employee's compensation package in determining whether a wrongfully-dismissed employee is entitled to damages for bonus payments during the reasonable notice period following the termination of their employment. Factors that courts consider in determining whether a bonus is integral to the employee's compensation package include: whether the bonus was received each year; whether bonuses were required to remain competitive with other employers; whether bonuses had been awarded to the employee in the past; whether the employer had ever exercised its discretion not to award a bonus to the employee; whether the bonus was promoted as an integral part of the employee's compensation; and whether the bonus constituted a significant component of the employee's overall compensation.⁵¹

49. In the Applicants' view, each of the applicable factors is satisfied in respect of the Q3 Bonuses. Bonuses have been paid in each of the past three quarters as announced, bonuses have historically been paid when the eligibility criteria have been met, and bonuses constitute a significant component of overall compensation.⁵²

50. Further, bonuses can be so fundamental to an employee's compensation that failure to provide bonuses can give rise to claims for constructive dismissal.⁵³ Accordingly, failure to pay

⁴⁹ *Campbell v MacMillan Bloedel Ltd.*, [1978 CarswellBC 393](#) (S.C.) at paras. 15-16.

⁵⁰ *O'Neill v General Motors of Canada Ltd.*, [2013 ONSC 4654](#) at para. 72.

⁵¹ *Gillies v. Goldman Sachs Canada Inc.*, [2000 BCSC 355](#) at para. 63; *Manastersky v. Royal Bank of Canada*, [2019 ONCA 609](#), at para. 107.

⁵² Munnely Affidavit at para. 3-7, 14-17, 19, 33.

⁵³ See for example, *Piron v. Dominion Masonry Ltd.*, [2013 BCCA 184](#).

the Q3 Bonuses could result in the Applicants' employees resigning from employment and later asserting damages for constructive dismissal.

(c) *Statutory Entitlement to Bonuses as Wages*

51. Similarly, under the *Employment Standards Act, 2000* (Ontario), bonuses are presumptively considered wages unless they are both dependent on the discretion of the employer and not related to hours, production or efficiency.⁵⁴ In an accompanying interpretation manual, it is stated that any bonuses related to “hours of work, production or the efficiency of the worker” are wages “even if the awarding of the bonus is otherwise discretionary”.⁵⁵

52. The Q3 Bonuses are “wages” under the ESA, particularly given that: (a) the Eligible Employees and Eligible Executives worked for the entire bonus period and have remained employed through the proposed payment date; (b) the Q3 Base EBITDA target was exceeded, and (c) the Board approved the bonus payments in accordance with the plan terms. Further, the Q3 Bonuses for Eligible Employees are “related to” production and efficiency in at least two ways: they are tied to EBITDA (and thus corporate production/efficiency) as well as individual employee performance ratings (and thus personal production/efficiency). For Eligible Executives, the incentive-based bonus plan relates to quarterly and annual performance.

⁵⁴ *Employment Standards Act, 2000*, S.O. 2000 c. 41[ESA], at s. 1(1) (definition of “wages”).

⁵⁵ Government of Ontario, “*Employment Standards Act Policy and Interpretation Manual*”, <<https://www.ontario.ca/document/employment-standard-act-policy-and-interpretation-manual/part-i-definitions>>. See also *Bain v. UBS Securities Canada Inc.*, [2018 ONCA 190](#) at para. 24, in which the Court of Appeal affirmed the finding that the bonuses at issue were “wages” because they were based on employee performance, and although the bonus was discretionary, it was based on definite factors such as performance; *Re Newman Hattersley Co.*, [1982 CarswellOnt 3877](#) (Ont. ESB (Adjud.)) at paras. 9 to 12, in which a group incentive plan dependent on achieving of budget projections was found to be “wages”.

53. A failure of a debtor company to pay wages gives rise to potential personal liability for directors and officers of the company under both corporate and employment standards legislation.⁵⁶

(d) *Payment of Q3 Bonuses is Critical to Employee Retention*

54. The Q3 Bonuses are primarily payable to “Eligible Employees” and constitute a means of compensating “rank and file” employees who, unlike sales personnel, do not have the opportunity to earn commission as a reward for successful performance.⁵⁷ In this sense, the Q3 Bonus payments are designed to promote equity among different participants in the Applicants’ workforce by ensuring various forms of incentive compensation are treated equally, an objective which will be defeated, to the likely detriment of employee morale and workforce cohesion, if the Q3 Bonuses are not paid.⁵⁸

55. Those Eligible Employees and Eligible Executives whose ratings entitle them to receive the Q3 Bonuses have worked extremely hard over the past few years in general – and in Q3 of Fiscal 2021 in particular – to help the Just Energy Group address its historical financial problems and meet its corporate performance targets.⁵⁹ The Q3 Bonuses payable to Eligible Employees and Eligible Executives relate entirely to the successful performance of the Just Energy Group’s business during a time period *before* the Texas weather event and related actions taken by the Texas regulators that precipitated the need for the Applicants to seek protection under the CCAA.

⁵⁶ *ESA*, ss. 80 to 81; *Canada Business Corporations Act*, RSC 1985, c. C-44, s. 119; *Business Corporations Act*, RSO 1990, c. B.16, s. 131.

⁵⁷ Munnely Affidavit at paras. 12 and 32.

⁵⁸ Munnely Affidavit at para. 32.

⁵⁹ Munnely Affidavit at para. 29.

56. The average bonus for such Eligible Employees is approximately \$6,500. While the amount may not be significant in the context of this proceeding, it is a material amount for many such employees. Not receiving the Q3 Bonuses may result in personal hardship.⁶⁰ Moreover, the Q3 Bonuses are payable to employees who will be heavily relied on during these proceedings to help the Just Energy Group achieve a going concern solution.⁶¹

57. The Applicants' Eligible Employees and Eligible Executives have earned the Q3 Bonuses, are aware of their entitlements to those bonuses, and expect to receive them.⁶² The uncertainty regarding whether the payment of the Q3 Bonuses will be paid is already generating significant concern among the Eligible Employees, who have expressed their angst and worry at an employee townhall immediately following the filing.⁶³ If the Q3 Bonuses are not paid, this will create risks to employee morale and commitment at a crucial juncture for the ability of the Applicants to achieve a going-concern restructuring solution.

58. The Just Energy Group experienced significant employee attrition in 2019 and 2020, prior to the Recapitalization. The quarterly bonus program was well received by employees when it was announced. The Applicants believe that shifting to a more transparent bonus model played a significant role in stemming that attrition. Failing to pay the Q3 Bonuses will undermine employees' trust in the program and management more generally, will be detrimental to this restructuring, and may once again give rise to significant employee attrition.⁶⁴

⁶⁰ Munnely Affidavit at para. 33.

⁶¹ Munnely Affidavit at para. 29.

⁶² Munnely Affidavit at para. 21.

⁶³ Munnely Affidavit at para. 27.

⁶⁴ Munnely Affidavit at para. 30.

(e) *No Inappropriate Overlap with the KERP*

59. The KERP provides incentive payments for key executives and select employees of the Just Energy Group who are critical to a successful restructuring. However, the KERP alone is not sufficient to mitigate employee flight risk. The Applicants submit that, without making the broader Q3 Bonus payments in order to foster goodwill and encourage retention, the Just Energy Group will be vulnerable to continued, significant employee attrition. Such attrition could significantly impair the Just Energy Group's ability to successfully restructure.⁶⁵

60. There are only 42 proposed recipients of the KERP, whereas there are over 400 Eligible Employees and Eligible Executives under the Fiscal 2021 Bonus Plan.⁶⁶ Thus, while there is some overlap in that beneficiaries of the KERP are also eligible to receive Q3 Bonuses,⁶⁷ this overlap does not result in double compensation. The KERP was designed on the assumption that the Q3 Bonuses would be paid out. If management had thought that it would not be permitted to pay the Q3 Bonuses, the first KERP payments may well have been made earlier, the quantum of certain KERP payments may have been increased, and the number of proposed recipients expanded, on the basis that employees may be less willing to remain working for a CCAA debtor in exchange for a KERP payment that is many months away.⁶⁸

⁶⁵ Munnely Affidavit at para. 30.

⁶⁶ Munnely Affidavit at para. 31.

⁶⁷ Of the 42 proposed KERP recipients, 31 Eligible Employees and all 8 Eligible Executives are also proposed KERP recipients: Munnely Affidavit, para. 31.

⁶⁸ Munnely Affidavit at para. 31.

PART IV - NATURE OF THE ORDER SOUGHT

61. For all of the reasons above, the Applicants submit that this Court should grant the relief requested and issue the ARIO substantially in the form of the draft Order included in Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March, 2021.

A handwritten signature in blue ink, appearing to read "Michael Malik", is written above a horizontal line.

per Marc Wasserman / Michael De Lellis / Jeremy Dacks

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Law

1. *Aralez Pharmaceuticals Inc., Re*, [2018 ONSC 6980](#) [Commercial List]
2. *Bain v. UBS Securities Canada Inc.*, [2018 ONCA 190](#)
3. *Bloom Lake, g.p.l., Arrangement relatif à*, [2015 QCCS 169](#)
4. *Campbell v. MacMillan Bloedel Ltd.*, [1978 CarswellBC 393](#) (S.C.)
5. *Canwest Global Communications Corp., Re*, [2009 CarswellOnt 9398](#) (S.C.J. [Commercial List])
6. *Canwest Publishing Inc., Re*, [2010 CarswellOnt 18852](#) (S.C.J. [Commercial List])
7. *Cirque du Soleil Canada inc., Arrangement relatif à*, [2020 QCCS 1981](#)
8. *Gillies v. Goldman Sachs Canada Inc.*, [2000 BCSC 355](#)
9. *Grant Forest Products, Re* (2009), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J. [Commercial List])
10. *Manastersky v. Royal Bank of Canada*, [2019 ONCA 609](#)
11. *Mountain Equipment Co-operative, Re*, [2020 BCSC 1586](#)
12. *Newman Hattersley Co., Re*, [1982 CarswellOnt 3877](#) (Ont. ESB (Adjud.))
13. *Nortel Networks Corp., Re*, [2009 CarswellOnt 1330](#) (S.C.J. [Commercial List])
14. *O’Neill v General Motors of Canada Ltd.*, [2013 ONSC 4654](#)
15. *Piron v. Dominion Masonry Ltd.*, [2013 BCCA 184](#)
16. *Target Canada Co., Re*, [2015 ONSC 303](#)
17. *US Steel Canada Inc., Re*, [2014 ONSC 6145](#)
18. *Walter Energy Canada Holdings Inc., Re*, [2016 BCSC 107](#)
19. *Wood v. Fred Deeley Imports Ltd.*, [2017 ONCA 158](#)

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

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

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.

[Canada Business Corporations Act, RSC, 1985, c. C-44](#)

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.

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

General Power of Court

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

[...]

Stays, etc. – other than initial application

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

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

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

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

Burden of proof on application

11.02 ... (3) The court shall not make the order unless

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

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

[Employment Standards Act, 2000, SO 2000, c. 41](#)

Definitions

1(1) In this Act ...

“wages” means,

(a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

(b) any payment required to be made by an employer to an employee under this Act, and

(c) any allowances for room or board under an employment contract or prescribed allowances,

but does not include,

(d) tips or other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60 (3) or 62 (2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan; (“salaire”)

[...]

Application of Part

80 (1) This Part applies with respect to shareholders described in section 79 only to the extent that the directors are relieved, under subsection 108 (5) of the *Business Corporations Act* or subsection 146 (5) of the *Canada Business Corporations Act*, of their liability to pay wages to the employees of the corporation.

[...]

Directors' liability for wages

81 (1) The directors of an employer are jointly and severally liable for wages as provided in this Part if,

- (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;
- (b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;
- (c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or
- (d) the Board has issued, amended or affirmed an order under section 119, the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.

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

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

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

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT Toronto

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