

**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

**FACTUM OF THE APPLICANTS
(Sale Process Approval Order)**

August 8, 2022

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TO: SERVICE LIST

INDEX

PART I - NATURE OF THIS MOTION 1

PART II - FACTS 2

PART III - ISSUES AND THE LAW 7

 A. Approval of the SISP Support Agreement..... 7

 B. The SISP should be approved..... 11

 C. Stalking Horse Transaction..... 18

 D. The Third KERP should be approved..... 22

 E. Suspension of the Claims Process 23

 F. Sealing of Confidential Materials 25

PART IV - NATURE OF THE ORDER SOUGHT 25

PART I - NATURE OF THIS MOTION

1. Just Energy Group Inc. (“**Just Energy**”), together with its subsidiaries (referred to below as the “**Applicants**”) obtained relief under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”) by an initial order dated March 9, 2021 (as subsequently amended, the “**Initial Order**”). The Initial Order extended the benefits of its protections and authorizations to the partnerships listed on Schedule A (collectively, the “**Just Energy Entities**”). On April 2, 2021, the U.S. Bankruptcy Court granted the Final Recognition Order under Chapter 15 of the United States *Bankruptcy Code*.

2. This factum is filed in support of the Applicants’ motion for this Court’s approval of a sales and investment solicitation process (“**SISP**”) and certain related relief. Among other things, the Applicants seek this Court’s authorization, *nunc pro tunc*, for Just Energy to enter into the Stalking Horse Transaction Agreement¹ between Just Energy and LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC (collectively, the “**Sponsor**” and the transactions detailed therein, the “**Stalking Horse Transaction**”).

3. The Applicants further seek approval of the Break-Up Fee, supported by a Court-ordered Bid Protections Charge, as well as authorization, *nunc pro tunc*, for the Just Energy Entities to enter into the SISP Support Agreement.

4. Additionally, the Applicants seek approval of an additional KERP for non-executive key employees.

5. Given that the Applicants’ proposed Plan of Compromise and Arrangement (the “**Plan**”) is no longer feasible, the Applicants also seek this Court’s advice and directions regarding the

¹ Capitalized terms not otherwise defined have the same meaning as in the Affidavit of Michael Carter, sworn August 4, 2022 [Carter Affidavit].

suspension of all ongoing claims review, claims determination and dispute resolution processes pending further order of the CCAA Court, unless the adjudication of the claim is necessary for determining entitlement to proceeds to be distributed in accordance with the Stalking Horse Transaction or another transaction entered into pursuant to the SISP.

6. The Applicants submit that the SISP, supported by the Stalking Horse Transaction, is the only viable going concern exit strategy available to the Just Energy Entities as a result of insufficient stakeholder support for the Plan. Both the SISP and Stalking Horse Transaction are necessary and urgent for the preservation of the value of the Just Energy Entities' business, the maintenance of its key relationships with employees, Commodity Suppliers, Regulators and other business-critical stakeholders, and to facilitate a going concern solution that concludes these lengthy and costly CCAA and Chapter 15 proceedings.

PART II - FACTS

(a) *Meetings Order Motion and Plan*

7. On May 12, 2022, the Just Energy Entities filed and served a Notice of Motion seeking orders, among other things: (i) accepting the filing of the Plan; (ii) approving a Plan Support Agreement (the "**Plan Support Agreement**") and a Backstop Commitment Letter (the "**Backstop Commitment Letter**"); and (iii) authorizing the Just Energy Entities to call, conduct and hold meetings of the established creditor classes to consider and approve the Plan (the "**Meetings Order Motion**").²

8. The Meetings Order Motion was opposed by certain contingent creditors, namely, counsel in the Putative Class Actions, the representative plaintiff in the Omarali Class Action, the Mass

² Carter Affidavit, para. 12.

Tort Claimants (together with the Putative Class Actions and the Omarali Class Action, the “**Contingent Litigation Claimants**”), and Pariveda Solutions Inc. (“**Pariveda**”).³

9. On June 10, 2022, the CCAA Court released a brief endorsement determining the majority of the issues raised both in the Meetings Order Motion and in the various objections filed by the Contingent Litigation Claimants in response to the Meetings Order Motion, with reasons to follow (the “**First Endorsement**”).⁴ Among other things, the First Endorsement approved the Plan Support Agreement, the Backstop Commitment Letter, the Termination Fee, the establishment of two classes of creditors (the Unsecured Creditor Class and the Secured Creditor Class) for the purpose of voting on the Plan, and the provision of one vote to each of the Putative Class Actions and the Omarali Class Action, and four votes to the Mass Tort Claimants.⁵

10. However, the First Endorsement denied the Applicants’ proposal that each vote of the Contingent Litigation Claimants be valued at \$1 for voting purposes. The CCAA Court stated that summary proceedings should be undertaken on an expedited basis to determine the validity and value of the Contingent Litigation Claimants’ claims, as well as the claim of Pariveda, prior to the creditors’ meetings. To that end, the Monitor was directed to liaise with the relevant parties to determine a process to conduct these expedited claim determinations and valuations.⁶

³ Carter Affidavit, para. 13.

⁴ Carter Affidavit, para. 14. This endorsement was followed by reasons issued on June 21, 2022.

⁵ Carter Affidavit, para. 14(a).

⁶ This process was subsequently clarified by the CCAA Court at a case conference: Carter Affidavit, paras. 14(b) and (c). In response to certain supplemental submissions requested by the CCAA Court, the CCAA Court issued a second endorsement on June 23, 2022 confirming that the differential consideration offered to unsecured creditors within the Unsecured Creditor Class in the Plan was to be evaluated at the Sanction Hearing as a matter of fairness: Carter Affidavit, para. 16.

11. Both the representative plaintiff in the Omarali Class Action and U.S. counsel in the Putative Class Actions filed motions for leave to appeal the First Endorsement.⁷

(b) *The Plan is No Longer Feasible*

12. After the release of the First Endorsement, the Plan Sponsor/DIP Lenders advised the Court and stakeholders that the Plan Sponsor/DIP Lenders intended to withdraw their support for the Plan, indicating in their view that the Plan was no longer feasible. The Supporting Secured CF Lenders also indicated a desire for a different process to try and achieve a going concern solution in light of the objections to the Plan, appeals brought, and uncertainty regarding approval and implementation of the Plan.⁸

13. Since that time, in an effort to preserve the viability of the Plan and a going concern solution, the Just Energy Entities have engaged in both bilateral and multilateral discussions with certain of the Contingent Litigation Claimants,⁹ Pariveda and the Plan Sponsor to canvass whether a resolution could be achieved to permit the Plan to move forward. At all relevant times, the Monitor was involved in, or kept apprised of, the status of such ongoing discussions, and actively assisted. Notwithstanding the best efforts of the Just Energy Entities, no resolution was reached.¹⁰

(c) *Development of the SISP*

14. Since no resolution was achieved that would enable the Plan to move forward, the Just Energy Entities were in a very difficult position with respect to their ongoing efforts to restructure. Accordingly, the Just Energy Entities engaged in extensive discussions with the Plan Sponsor/DIP

⁷ Carter Affidavit, para. 14 and Exhibit F.

⁸ Carter Affidavit, paras. 15 and 19.

⁹ Despite being contacted by counsel for the Just Energy Entities multiple times for this purpose, counsel for the Mass Tort Claimants did not respond: Carter Affidavit, footnote 3.

¹⁰ Carter Affidavit, para. 18.

Lenders, the Supporting Secured CF Lenders and Shell regarding the terms on which they would continue to support the Just Energy Entities' efforts to restructure and emerge as a going concern absent a resolution in respect of the Plan.¹¹

15. Each of the Plan Sponsor/DIP Lenders, the Supporting Secured CF Lenders and Shell ultimately agreed to terminate the Plan Support Agreement and support a going concern solution for the Just Energy Entities through the SISP Support Agreement. The latter includes, among other things, the implementation of the SISP, supported by the Stalking Horse Transaction.¹²

(d) *Need for Exit from CCAA Proceedings*

16. The SISP is the only viable going concern exit strategy available to the Just Energy Entities given the absence of sufficient stakeholder support for the Plan. The CCAA and Chapter 15 proceedings have been ongoing for more than 16 months. It is necessary and urgent for the preservation of the value of the Just Energy Entities' business and key relationships that the Just Energy Entities complete a going concern solution and conclude these proceedings.¹³

17. It is imperative that the SISP be undertaken expeditiously. Over the past year, and particularly since the spring of 2022, the global price of natural gas and electricity has been extremely volatile. Significant price increases for natural gas have occurred, peaking in June 2022 at US\$9 per million Btu (a price not seen since before the stock market crash and financial crisis of 2008), and resulting in corresponding increases in electricity prices in many of the Just Energy Entities' markets. Commodity prices continue to remain extremely volatile.¹⁴

¹¹ Carter Affidavit, para. 20.

¹² Carter Affidavit, para. 20.

¹³ Carter Affidavit, para 21.

¹⁴ Carter Affidavit, para. 24.

18. Additionally, since May 2022, Texas (the largest market in which the Just Energy Entities operate) has experienced unseasonably hot temperatures, which have continued through June and July 2022. This has created soaring energy demand across the State and resulting price increases.¹⁵

19. Collectively, these market and operating conditions have resulted in a significant increase in the working capital requirements for the Just Energy Entities both in relation to energy supply costs and collateral posting requirements, with a resulting impact on the short-term and long-term profitability of the Just Energy Entities. These factors have also resulted in a tightening of the Just Energy Entities' cash on hand available to pay their secured creditors and priority payables in any going concern transaction, further complicating the restructuring efforts.¹⁶

20. Moreover, these CCAA and Chapter 15 proceedings have been ongoing for more than 16 months, creating an atmosphere of uncertainty, which is (among other things) detrimentally affecting employee retention and morale. Employee fatigue and burn out is resulting from the additional workload being undertaken by many employees to advance the restructuring efforts, in addition to their ordinary duties carrying on the day-to-day operations of the business. The competitive landscape for employee retention in the U.S. and Canada has exacerbated the issue, with the Just Energy Entities experiencing higher than normal rates of employee resignations in 2022, including two key employees who recently departed.¹⁷

21. As submitted below, the SISF is necessary, reasonable and fair, and the only viable option for a going-concern exit for the Just Energy Entities from these CCAA and Chapter 15 proceedings.

¹⁵ Carter Affidavit, para. 25.

¹⁶ Carter Affidavit, paras. 26 and 27.

¹⁷ Carter Affidavit, para. 28.

PART III -ISSUES AND THE LAW

22. The principal issues on this motion are whether:
- (a) this Court should authorize the Just Energy Entities to enter into the SISP Support Agreement, *nunc pro tunc*;
 - (b) this Court should authorize Just Energy to enter into the Stalking Horse Transaction Agreement, *nunc pro tunc*;
 - (c) this Court should approve the SISP and authorize the Just Energy Entities to implement the SISP in accordance with its terms;
 - (d) this Court should approve the Break-Up Fee and grant the Bid Protections Charge;
 - (e) the Applicants are entitled to suspend the determination of Claims under the Claims Procedure Order, the Appointment Order and the First Endorsement until further order of the Court (subject to the caveat discussed below); and
 - (f) this Court should approve the Third KERP.

A. APPROVAL OF THE SISP SUPPORT AGREEMENT

(a) *Terms of the SISP Support Agreement*

23. The SISP Support Agreement was entered into by the Just Energy Entities, the Sponsor, Shell and the Supporting Secured CF Lenders, subject to court approval, on August 4, 2022. On the Effective Date of the SISP Support Agreement, the Plan Support Agreement and Backstop Commitment Letter automatically terminated.¹⁸

¹⁸ Carter Affidavit, para. 37.

24. The SISP Support Agreement is similar in many respects to the Plan Support Agreement that this Court has already approved.¹⁹ Under the SISP Support Agreement, each of the parties agreed, among other things, to cooperate with each other in good faith and to use commercially reasonable efforts to pursue, obtain approval of, implement and consummate the transactions contemplated under the SISP Support Agreement, as well as to negotiate and execute the Definitive Documents. In addition, the Sponsor agreed to support the Stalking Horse Transaction and exercise any powers or rights available to it to the extent necessary to implement the Stalking Horse Transaction. The Supporting Secured CF Lenders agreed to participate in a New Credit Facility and enter into the New Credit Agreement, subject to the implementation of the Stalking Horse Transaction. Shell agreed to continue to provide commodity supply in accordance with the existing Shell agreements and to enter into the New Intercreditor Agreement.²⁰

25. Unlike the Plan Support Agreement, the SISP Support Agreement does not contain any restriction on the ability of the Just Energy Entities or the Financial Advisor to solicit superior offers to the Stalking Horse Transaction. Such restrictions would be inconsistent with the purpose of the SISP to actively canvas the market for superior bids.²¹

26. The parties have the right to terminate the SISP Support Agreement upon the occurrence of certain events, unless waived or cured by the applicable party.²² Among other things, the SISP Support Agreement preserves the right of the Just Energy Entities to terminate the SISP Support Agreement if the Just Energy Board determines, on the advice of outside legal counsel and

¹⁹ [First Endorsement](#), para. 2(i).

²⁰ Carter Affidavit, paras. 38, 40 and Exhibit I. Many of the commitments made by the Sponsor and the other parties to the SISP Support Agreement are summarized at paras. 39 to 42 of the Carter Affidavit.

²¹ Carter Affidavit, para. 43.

²² Carter Affidavit, para. 46 (termination rights of the Just Energy Entities); para 47 (termination rights of the Sponsor); para. 48 (termination rights of Shell and the Supporting Secured CF Lenders).

financial advisors, that proceeding with the Stalking Horse Transaction would be inconsistent with the exercise of its fiduciary duties or applicable law. This termination right ceases to apply if no Qualified Bids other than the Stalking Horse Transaction are received by the Qualified Bid Deadline, or if the Stalking Horse Transaction is declared to be the Successful Bid.²³

(b) *The SISP Support Agreement Should be Approved*

27. This Court approved the Plan Support Agreement – which was uncontested – in the First Endorsement.²⁴ The Applicants rely on the same authorities in support of this Court’s approval of the SISP Support Agreement as were cited in the Applicants’ Factum in support of the approval of the Plan Support Agreement.²⁵

28. This Court has the jurisdiction under section 11 of the CCAA, which provides the authority to make any order it thinks fit,²⁶ to authorize the Just Energy Entities to enter into the SISP Support Agreement. As submitted in the Meetings Order Motion, restructuring support agreements are commonly approved by CCAA Courts. Although there is no specific reported decision addressing approval of a SISP Support Agreement, there is no difference in principle between the approval of this type of restructuring agreement and the plan support or other restructuring agreements that have previously been approved in these and other CCAA proceedings.

29. For example, in *US Steel*, this Court approved a plan sponsor agreement at the conclusion of a SISP, in reliance on section 11 of the CCAA and its powers to vary the stay of proceedings under section 11.02(2) of the CCAA. The agreement in question was consistent with the objectives

²³ Carter Affidavit, para. 46.

²⁴ [First Endorsement](#), para. 2(i).

²⁵ See *Re U.S. Steel Canada Inc.*, [2016 ONSC 7899](#) at para. 39 [*U.S. Steel*]. See also: *Re Stelco* (2005), [78 OR \(3d\) 254](#) (CA) at paras 18 and 19.

²⁶ CCAA, s. 11.

of the CCAA and the facilitation of the restructuring. Any resulting constraints on the negotiation of alternative restructurings arising subsequent to the authorization were the product of the economic circumstances in which the creditors found themselves and the lack of available alternative outcomes.²⁷

30. Considerations regarding the “lock up” of votes on a plan that have been raised in certain of the plan support agreement cases²⁸ do not arise here. The agreement of the parties to support the Stalking Horse Transaction does not preclude other superior Alternative Restructuring Proposals from being advanced under the SISP or from being selected as the Successful Bid. It also does not preclude an interested party from proposing a transaction under the SISP that would be implemented through a plan of arrangement. There are no constraints on the Just Energy Entities precluding them from soliciting or accepting a superior alternative to the Stalking Horse Transaction – in fact, the whole point of the SISP is to fully canvass the market to determine if such an alternative is available.

31. Nor does the approval of the SISP Support Agreement in any way usurp the role of this Court in approving the Stalking Horse Transaction under section 36 of the CCAA if no Alternative Restructuring Proposals emerge from the SISP. While the parties to the SISP Support Agreement have committed not to take any steps that are inconsistent with or that oppose such approval, this Court remains free to determine under section 36 of the CCAA if the Stalking Horse Transaction is the Successful Bid under the SISP.

32. The SISP Support Agreement is a critical component of the Just Energy Entities’ going concern restructuring. It permits the Just Energy Entities to broadly market their assets and

²⁷ *U.S. Steel*, para. 48.

²⁸ See for example *U.S. Steel* at para. 44; *Stelco*, at para. 19.

business to ensure that they are obtaining the best possible value for the benefit of all stakeholders. It facilitates consensus amongst the Just Energy Entities' significant secured creditors and ensures continued access to commodity supply, letters of credit and a credit facility – all critical to the ability of the Just Energy Entities to operate in the normal course upon closing of any going concern transaction. Absent the continuing support of the parties to the SISP Support Agreement, the Just Energy Entities would be faced with navigating a sale process while wholly exposed to the vagaries of the market, without any assurance of success or an ability to continue operations.²⁹

33. Similar to the plan support agreements approved in *US Steel* and *Stelco*,³⁰ the SISP Support Agreement provides stability and certainty for the Just Energy Entities' employees and stakeholders while the Just Energy Entities seek to finalize a going-concern restructuring for the benefit of all stakeholders. It should therefore be approved.

B. THE SISP SHOULD BE APPROVED

34. It is well recognized that a CCAA court has jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets, prior to the development (or even in the absence) of a plan of compromise and arrangement.³¹ This Court identified in *Nortel* a number of factors that should be considered in determining whether to authorize a sale process, including:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole “economic community”?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

²⁹ Carter Affidavit, paras. 49 and 50.

³⁰ *U.S. Steel*, at paras. 49 and 50.

³¹ See *Nortel Networks Corp. (Re)* (2009), [55 C.B.R. \(5th\) 229](#) (Ont. S.C.J. [Commercial List]) at para. 48 [*Nortel*].

(d) Is there a better viable alternative?³²

35. Although the above *Nortel* criteria were articulated in the CCAA context prior to the 2009 amendments, this Court in *Brainhunter* confirmed that the same criteria apply under the post-2009 CCAA.³³ These criteria have also recently been applied by this Court in *Green Growth Brands*.³⁴

36. This Court has noted that s. 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sales process.³⁵ In other words, it is not this Court's role in approving a sale process to apply the s. 36 criteria. Such criteria will apply and be considered by the Court if the Stalking Horse Transaction is the Successful Bid and the Court is eventually asked to approve that transaction. This approval will be sought at the conclusion of the SISP, in relation to the successful transaction at the end of the process, whether that is the Stalking Horse Transaction or an alternative restructuring transaction.

37. Nevertheless, the *Nortel* criteria for approving a sales process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a concluded sale under s. 36.³⁶ The Court is entitled to consider whether the proposed SISP is likely to satisfy the requirement that the process be fair and that the best price has been obtained, whether the Monitor supports the SISP and the Stalking Horse Transaction, as well as the extent to which creditors were consulted and other relevant factors.³⁷

38. The Applicants submit that the *Nortel* criteria are satisfied in these circumstances.

³² *Nortel* at para. 49.

³³ *Brainhunter Inc., (Re)*, (2009), [62 CBR \(5th\) 41](#) (Ont. S.C.J. [Commercial List]) at paras. 15-17 [*Brainhunter*].

³⁴ *Green Growth Brands, (Re)*, [2020 ONSC 3565](#) at para. 61 [*Green Growth*].

³⁵ *Brainhunter* at para. 17.

³⁶ *Brainhunter* at para. 16.

³⁷ CCAA, s. 36(3). See also *Royal Bank v. Soundair*, [1991 CarswellOnt 205](#) (CA) at para. 20.

(a) *Is a Sale Process Warranted?*

39. The SISP, supported by the Stalking Horse Transaction, was developed by the Just Energy Entities in consultation with the Financial Advisor, the Monitor, the Sponsor, the Supporting Secured CF Lenders and Shell. It is intended to provide a fair and reasonable process to canvass the market to confirm whether the Stalking Horse Transaction delivers the best possible result for stakeholders.³⁸ As submitted above, it represents the culmination of consultations with the Just Energy Entities' key stakeholders, in the wake of the withdrawal of their support for the Plan.

40. It cannot be seriously doubted that a sale process is warranted. It is now the only viable means for achieving a going concern exit from this CCAA proceeding given that the Plan is no longer feasible. The CCAA and Chapter 15 proceedings have been ongoing for more than 16 months. The Just Energy Entities cannot remain in these proceedings indefinitely.³⁹

(b) *Will the Sale benefit the Whole Economic Community?*

41. If the Stalking Horse Transaction is the Successful Bid, it will benefit the whole community with an economic interest by providing a going-concern solution for the Just Energy Entities, thereby preserving the jobs of the Just Energy Entities' over 1,000 employees, as well as critical economic relationships with multiple suppliers, regulators, and other stakeholders. If the SISP generates an Alternative Restructuring Proposal that is superior to the Stalking Horse Transaction, the benefits available to the Just Energy Entities' stakeholders will only be heightened.

42. The Stalking Horse Transaction is structured to achieve comparable benefits for the Just Energy Entities and their stakeholders to those that would have been delivered under the Plan.⁴⁰

³⁸ Carter Affidavit, para. 82.

³⁹ Carter Affidavit, paras. 24 to 29.

⁴⁰ Carter Affidavit, paras. 23 and 54. See paragraph 12 of the Carter Affidavit for a discussion of the Plan benefits.

Specifically, the Stalking Horse Transaction generally replicates the restructuring terms previously set out in the Plan, although it does not provide any recoveries to General Unsecured Creditors, including the Term Loan Lenders.⁴¹ The SISP, together with the Stalking Horse Transaction, will demonstrate whether there is any other better option that could provide such recoveries.

43. Moreover, it is necessary and urgent for the preservation of value of the Just Energy Entities' business and the maintenance of its key relationships with employees, Commodity Suppliers, Regulators and other business-critical stakeholders, that the Just Energy Entities complete a going-concern solution and conclude these lengthy CCAA and Chapter 15 proceedings. The SISP, supported by the Stalking Horse Transaction, is the only viable avenue to effect such outcome.⁴² It must be approved and undertaken expeditiously and without delay to protect against further erosion of the Just Energy Entities' value and prevent loss of business critical relationships.⁴³

(c) *Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?*

44. The Just Energy Entities do not believe that there is any *bona fide* reason for their creditors to object to the sale of the business or the need to undertake a SISP. Among other things, counsel in the Putative Class Actions has been invited to submit an alternative restructuring plan (which could take the form of a plan of arrangement) to the Just Energy Entities, or to submit an NOI or Qualified Bid in the SISP, if approved.

45. Counsel in the Putative Class Actions advised the Just Energy Entities during the course of discussions that, absent a consensual arrangement, their clients anticipated filing their own

⁴¹ Carter Affidavit, para. 54.

⁴² Carter Affidavit, paras. 29 and 84.

⁴³ Carter Affidavit, paras. 29 and 84.

restructuring plan for consideration by the Just Energy Entities' creditors.⁴⁴ Counsel in the Putative Class Actions and their financial advisor were provided early access on July 20, 2022 to a data room created for the SISP, notwithstanding that the SISP had not yet commenced, in order to maximize their opportunity to submit an alternative restructuring proposal for the benefit of all stakeholders. The proposed financier for an alternative plan executed a non-disclosure agreement on August 4, 2022 and was granted access to the data room.⁴⁵

46. The Just Energy Entities continue to facilitate diligence by counsel in the Putative Class Actions and their financial advisor and provided them with an advance copy of the SISP on July 30, 2022.⁴⁶

47. There is nothing preventing counsel in the Putative Class Actions from coming forward within the SISP with an Alternative Restructuring Proposal, including a plan of arrangement. The Applicants submit that any such Alternative Restructuring Proposal must be addressed within the parameters of the SISP, given the significant efforts made and expenses incurred by all parties to negotiate the terms of the SISP, the SISP Support Agreement and the Stalking Horse Transaction. Further, it is imperative that there be only one process, fully understood by all parties and supervised by the Court with the assistance of the Monitor, to ensure that the Just Energy Entities' restructuring is completed in a fair and transparent manner.

48. In particular, if counsel in the Putative Class Actions (or other Contingent Litigation Claimants) genuinely believe that they can put forward a restructuring proposal that satisfies all prior ranking claims and provides better recoveries for unsecured claimants, including themselves,

⁴⁴ Carter Affidavit, para. 31.

⁴⁵ Carter Affidavit, paras. 32 and 33.

⁴⁶ Carter Affidavit, paras. 33 and 34.

they should be required to demonstrate that their proposal is superior to the Stalking Horse Transaction (or any other Alternative Restructuring Proposal that arises in the course of the SISP), within the guidelines established by the SISP to ensure a level playing field. Any attempt to try to by-pass this process would be fundamentally unfair to all stakeholders, not to mention costly and inefficient, which the Just Energy Entities and their stakeholders can ill afford at this juncture.

(d) *Is there a better viable alternative?*

49. It is abundantly clear for all of the reasons submitted above that, at this stage of these proceedings, there is no other viable alternative to the SISP and the Stalking Horse Transaction, let alone a better one.

(e) *Additional Considerations*

50. In anticipation of the criteria that may eventually have to be satisfied under s. 36 of the CCAA in approving the Stalking Horse Transaction or an Alternative Restructuring Proposal, the Applicants submit that the proposed SISP is fair, transparent and objective.⁴⁷ Given the increasing demands on the Just Energy Entities' available funds and current market challenges, the SISP is designed to facilitate a process to obtain the best possible price, and achieve a going concern solution for the benefit of all stakeholders, without unduly prolonging the process.

51. As a general matter, the pool of likely purchasers is limited based on the capital-intensive and highly specialized nature of the Just Energy Entities' business.⁴⁸ The timelines under the SISP were developed by the Just Energy Entities on the advice of their experienced Financial Advisor and in consultation with the Monitor. Over the past 2.5 years, the business of the Just Energy

⁴⁷ The key features of the SISP are summarized in the Carter Affidavit at paras. 73 to 77. See also paras 73 and 74 which describe the requirements for Qualified Bids.

⁴⁸ Carter Affidavit, para. 81.

Entities has been marketed extensively and, since commencement of these CCAA proceedings, three third parties have undertaken significant due diligence without coming forward with any executable transaction. The Financial Advisor has provided the view that the timelines and terms of the SISP are fair, reasonable and appropriate in the circumstances and provide sufficient time to allow interested parties to fully participate in the SISP.⁴⁹

52. In addition, the Plan Support Agreement provided the Just Energy Entities with a robust “fiduciary out” in the event that a superior proposal to the Plan was received. Almost three months have passed since the Meetings Order Motion was served and interested parties were notified of the opportunity by press release. No meaningful inquiries and no proposals have been received by either the Financial Advisor or the Just Energy Entities during that time.⁵⁰

53. The Just Energy Entities, with the advice of the Financial Advisor, are of the view that the SISP will adequately canvass the market to maximize value for stakeholders, while at the same time avoiding an unnecessary prolonging of these CCAA proceedings by providing for the automatic termination of the SISP, and consummation of the Stalking Horse Transaction (subject to Court approval), if no NOIs or Qualified Bids are received by the required dates.⁵¹

54. The SISP contemplates that Just Energy will provide information regarding the SISP to the DIP Lenders, CBHT Energy I LLC and the Supporting Secured CF Lenders on a confidential basis, including copies of any NOIs and bids received. The SISP also authorizes Just Energy to provide general updates and information in respect of the SISP to counsel to any General Unsecured Creditor on a confidential basis if such counsel confirms in writing that the applicable General

⁴⁹ Carter Affidavit, para 83.

⁵⁰ Carter Affidavit, para. 81(b).

⁵¹ Carter Affidavit, para. 82.

Unsecured Creditor will not submit an NOI or bid in the SISP and executes a confidentiality agreement with Just Energy.⁵²

C. STALKING HORSE TRANSACTION

(a) *Use of Stalking Horse Mechanism*

55. It is well-accepted that a stalking horse transaction is a beneficial mechanism to support a SISP.⁵³ Such an agreement provides the “floor” for other bidders to match and demonstrates that at least one potential purchaser has confidence in the value of the company. SISPs that are based on stalking horse transactions have been approved by this Court on many occasions.⁵⁴

56. The Stalking Horse Transaction essentially replicates the restructuring terms previously set out in the Plan, although it does not provide either the \$10 million General Unsecured Creditor Cash Pool or any share issuance or other compensation for the Term Loan Lenders. The cash consideration provided under the Stalking Horse Transaction is required to satisfy all Charges, secured Claims and other priority payables in full (other than the BP Commodity/ISO Services Claim (which will be satisfied by credit bid) and the Credit Facility Remaining Debt (if any, which will remain outstanding)). Unless a superior bid is received under the SISP that generates proceeds that exceed the Just Energy Entities’ secured debt and priority payables, no amounts will be available for distribution to the Just Energy Entities’ General Unsecured Creditors.⁵⁵

57. The Stalking Horse Transaction, together with the SISP Support Agreement and the SISP, allows the Just Energy Entities to broadly market their assets and business to ensure the best

⁵² Carter Affidavit, para. 79.

⁵³ See, for example, *PCAS Patient Care Automation Services Inc.*, [2012 ONSC 2840](#) at para. 17, citing *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#) at paras. 6 to 8 [*CCM Master*].

⁵⁴ See for example, *Nortel*, above; *Brainhunter*, above; *Green Growth*, above.

⁵⁵ Carter Affidavit, para. 54. See also para. 58 for an outline of the key terms of the Stalking Horse Transaction.

possible value for stakeholders, while simultaneously protecting against the downside risks to the Just Energy Entities of undertaking a sales process in the absence of a stalking horse.⁵⁶

58. As contemplated in the applicable authorities, the Stalking Horse Transaction (a) sets a “floor price” and the commercial terms for a transaction involving the shares and/or business and assets of the Just Energy Entities; (b) helps generate interest among potential purchasers; and (c) provides certainty, stability and efficiency not only by setting the baseline price and documentation for the SISP, but also assuring stakeholders that there will be a going concern sale of the Just Energy Entities’ business and a near term exit from these CCAA proceedings. Such stability is particularly important in the current volatile market conditions in both Canada and the U.S.⁵⁷

(b) *Proposed Reverse Vesting Order Structure*

59. The Stalking Horse Transaction, if it is the successful bid, contemplates that the Sponsor will directly or indirectly acquire all of the equity interests in the Just Energy Entities⁵⁸, as well as certain assumed liabilities. Existing equity interests of Just Energy (U.S.) Corp. (“JEUS”) and Just Energy will be cancelled, terminated or redeemed for no consideration.⁵⁹ Excluded Assets and Excluded Liabilities will be assigned, by means of a reverse vesting order (“RVO”), to newly created Canadian and US “ResidualCo”.⁶⁰

60. This Court is not being asked at this stage to grant the RVO, or even to approve the Stalking Horse Transaction. If the Stalking Horse Transaction is the Successful Bid at the conclusion of the SISP, the Just Energy Entities intend to seek this Court’s approval of the Stalking Horse

⁵⁶ Carter Affidavit, paras. 66 to 68.

⁵⁷ Carter Affidavit, paras. 66 to 68.

⁵⁸ Except where such equity interests constitute Excluded Assets: Carter Affidavit, footnote 9.

⁵⁹ Carter Affidavit, para. 56 and Exhibit A.

⁶⁰ Carter Affidavit, para 56 and Exhibit A.

Transaction and the RVO under sections 11 and 36 of the CCAA. In this context, the Just Energy Entities intend to submit that the criteria for use of the RVO structure established by this Court apply and are satisfied.⁶¹ In particular, the numerous regulatory licenses and permits held by the Just Energy Entities in the various jurisdictions in which they operate, together with the Just Energy Entities' tax attributes and hedging contracts, make their going concern value extremely difficult to preserve through a traditional vesting order structure.⁶²

(c) Break-Up Fee

61. Court approval of a break fee in connection with a stalking horse transaction is common. This Court previously approved a break fee and associated charge in connection with the Plan which is near-identical to the Break-Up Fee in the Stalking Horse Transaction and requested Bid Protections Charge.⁶³ The Bid Protections Charge should be granted based on the same principles which supported the Termination Fee Charge previously approved by this Court.

62. Break fees have been approved regardless of whether all or part of the consideration for a transaction is provided by means of a credit bid. This Court has stated that: "The fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability."⁶⁴

63. The Break-Up Fee is payable concurrently with the consummation of an Alternative Restructuring Proposal.⁶⁵ The evidence is that the Break-Up Fee is well within the range of

⁶¹ See *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) at paras. 37 and 38; *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#) at paras. 95 and 99.

⁶² Carter Affidavit, para. 57.

⁶³ [First Endorsement](#), para. 2(i).

⁶⁴ *Green Growth* at para 52.

⁶⁵ Carter Affidavit, para. 60.

payments that have been approved by this Court on numerous occasions,⁶⁶ including the break fee approved in connection with the Plan. The quantum of the Break-Up Fee was calculated taking into account the same factors on which the fee under the Backstop Commitment Letter was previously calculated.⁶⁷ Specifically, the quantum of USD\$14.66 million, which is slightly lower than the fee previously approved by the Court, takes into account the new value contribution of the Sponsor by payment of the Purchase Price (excluding the potential additional equity commitment of \$10 million in the event of a shortfall).⁶⁸

64. Based on the Sponsor's contribution of US\$184.9 million in cash, as well as the credit bid of the BP Commodity/ISO Services Claim (US\$252.7 million), the Break-Up Fee equates to approximately 3.4% of the Purchase Price. While this calculation does not take into account the potential additional \$10 million equity commitment or any of the Assumed Liabilities, such amounts represent additional value to the Just Energy Entities. If such amounts were taken into account, the percentage represented by the Break-Up Fee would be lower than 3.4%.⁶⁹

65. The Break-Up Fee is part of the interrelated components comprising the Stalking Horse Transaction which provides stability, certainty, and efficiency to the SISP and allows the Just Energy Entities to maintain employee retention, supplier commitment and stakeholder confidence by providing a firm and executable transaction.

⁶⁶ See, for example, *CCM Master* at para. 13; *Brainhunter* at para. 20; *Re Danier Leather Inc.*, [2016 ONSC 1044](#) at paras. 12, 42; *Green Growth Brands* at para. 52.

⁶⁷ Carter Affidavit, paras. 61 and 65; [First Endorsement](#), para. 2(i). The Termination Fee previously approved by the Court was not paid.

⁶⁸ The calculation does not take into account the additional commitment of \$10 million which may be made by the Sponsor if additional funds are required to pay all required amounts under the Stalking Horse Transaction and the Vesting Order. Further, it does not include Assumed Liabilities: Carter Affidavit, para. 61.

⁶⁹ Carter Affidavit, paras. 61 and 63.

D. THE THIRD KERP SHOULD BE APPROVED

66. On March 19, 2021, the Court approved a key employee retention plan (the “**KERP**”) and granted a related Court-ordered charge (the “**KERP Charge**”) as security for payments under the KERP.⁷⁰ At the time, the Just Energy Entities expected that their restructuring would be largely concluded by the end of 2021. It subsequently became apparent that additional time would be required and consequently, this Court approved a second KERP (the “**Second KERP**”) on November 10, 2021. An increase to the KERP Charge was not required.⁷¹

67. The Just Energy Entities now seek this Court’s approval of a third KERP (the “**Third KERP**”) solely for non-executive key employees. The same authorities that justified the granting of the original KERP and the Second KERP support this Court’s discretion to grant the Third KERP.⁷² Moreover, the reasons justifying the need for the Third KERP fall squarely within the rationale previously accepted by this Court in this proceeding⁷³ and in other similar CCAA cases.

68. All payments to key employees under the original KERP were exhausted in June 2022. The final payment to non-executive key employees under the Second KERP will be made on September 9, 2022. Executive management is extremely concerned that, unless additional KERP funds are made available, non-executive key employees may resign at this critical juncture in the restructuring.⁷⁴

⁷⁰ The benefits under the original KERP are set out in greater detail at para. 50 of the Affidavit of Michael Carter, sworn November 3, 2021.

⁷¹ Carter Affidavit, paras. 86 to 88. The details of the second KERP are set out at para 87 of the Carter Affidavit.

⁷² *Re Grant Forest Products* (2009), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J. [Commercial List]) at para. 19. See also *Re Walter Energy Canada Holdings Inc.*, [2016 BCSC 107](#) at para. 59; *Re Mountain Equipment Co-operative*, [2020 BCSC 1586](#) at para. 68.

⁷³ Endorsement of Koehnen J., dated [March 19, 2021](#), para. 7.

⁷⁴ Carter Affidavit, para. 89.

69. The loss of key non-executive employees at this stage could be exceedingly detrimental to the ongoing, normal course operation of the Just Energy Entities' highly specialized and expertise-dependent business. Moreover, the Stalking Horse Transaction is predicated on – and requires – the Just Energy Entities' continued operations as a going concern through to the Closing Date, which depends on the retention of key employees. Non-executive employees continue to bear increased workloads managing certain aspects of the restructuring, while maintaining the day-to-day operations of the business. Such employees are experiencing burnout and fatigue, leading to higher-than-normal levels of resignations. The continuing uncertainty facing such employees as a result of the longer than expected length of the CCAA proceedings, failure of the Plan to proceed, and recent introduction of a sales process has only exacerbated the situation.⁷⁵

70. This Court therefore has the jurisdiction and the discretion to approve the Third KERP in the amount of CDN \$405,280 and US\$633,910 to be paid to non-executive KERP recipients upon emergences from the CCAA and Chapter 15 proceedings or within 30 days thereof. The timing of such payments is intended to motivate key employees to continue their employment until the conclusion of the restructuring. No payments are contemplated for executive level employees, who are entitled to success-based payments under the original KERP and Second KERP upon completion of a successful restructuring. The Monitor is supportive of the Third KERP. No increase to the KERP Charge is required.⁷⁶

E. SUSPENSION OF THE CLAIMS PROCESS

71. The Just Energy Entities have, since the Claims Procedure Order was issued, been working together with the Monitor to review and determine, where necessary, disputed Claims asserted

⁷⁵ Carter Affidavit, para. 90.

⁷⁶ Carter Affidavit, paras. 91 to 93.

against one or more of the Just Energy Entities. In the First Endorsement, this Court made certain orders regarding the expedited valuation of the Claims of the Contingent Litigation Claimants and Pariveda.⁷⁷ On notice to this Court from the Monitor on June 17, 2022, the parties agreed to temporarily postpone this process while they engaged in discussions regarding the restructuring.⁷⁸

72. The Just Energy Entities now seek this Court's advice and direction regarding a suspension of all ongoing claims review, claims determination, and dispute resolution processes under the Claims Procedure Order, the Appointment Order and the First Endorsement. Under the Stalking Horse Transaction, the proceeds payable by the Sponsor will not result in any recoveries to General Unsecured Creditors. The SISP will test the market to determine the existence of any superior offers. In the absence of a Successful Bid being accepted within the SISP which provides sufficient value for recoveries to unsecured creditors, unsecured claims will not need to be resolved. The determination of unresolved unsecured Claims is therefore irrelevant to this process, at least for the time-being. The Just Energy Entities therefore submit, with the support of the Monitor, that it is unnecessary and inappropriate at this time to spend money and devote limited resources to determine the validity and value of unresolved Claims in the Claims Process, unless the determination of such Claim is necessary for determining entitlement to proceeds to be distributed in accordance with the Stalking Horse Transaction or another transaction entered into pursuant to the SISP.⁷⁹

⁷⁷ [First Endorsement](#), para. 2(vi).

⁷⁸ Carter Affidavit, para. 99, Exhibit M.

⁷⁹ Carter Affidavit, paras. 101 and 102.

F. SEALING OF CONFIDENTIAL MATERIALS

73. The SISP Support Agreement contains confidential and commercially sensitive information regarding the Sponsors' contact information and the holding percentages of the various entities comprising the Sponsor in the DIP Lenders' Claim. Similarly, the Third KERP contains commercially sensitive information as well as the personal information of certain of the Just Energy Entities' employees.⁸⁰ The Just Energy Entities therefore seek an order that the SISP Support Agreement and summary of the Third KERP be sealed and not form part of the public record pending further order of the CCAA Court. Similar sealing orders were granted for the Plan Support Agreement and previous KERPs.⁸¹

PART IV - NATURE OF THE ORDER SOUGHT

74. For all of the reasons above, the Applicants submit that this Court should grant the relief requested and issue an Order substantially in the form of the draft Order at **Tab 3** to the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of August, 2022.



per Marc Wasserman / Michael De Lellis / Jeremy Dacks

⁸⁰ Carter Affidavit, paras. 52, 95 and Confidential Exhibits J and L.

⁸¹ [First Endorsement](#), para 2(i); [Amended and Restated Initial Order](#), granted March 19, 2021 at para 70; [Order of the Honourable Mr. Justice Koehnen](#), granted November 10, 2021 at para 17.

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Law

1. *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#)
2. *Brainhunter Inc. (Re)*, [2009 CanLII 72333](#) (Ont. S.C.J. [Commercial List])
3. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#)
4. *Green Growth Brands, (Re)*, [2020 ONSC 3565](#)
5. *Harte Gold Corp. (Re)*, [2022 ONSC 653](#)
6. *Nortel Networks Corp. (Re)*, (2009), [55 C.B.R. \(5th\) 229](#) (Ont. S.C.J. [Commercial List])
7. *PCAS Patient Care Automation Services Inc.*, [2012 ONSC 2840](#)
8. *Re Danier Leather Inc.*, [2016 ONSC 1044](#)
9. *Re Grant Forest Products* (2009), [57 C.B.R. \(5th\) 128](#) (Ont. S.C.J. [Commercial List])
10. *Re Mountain Equipment Co-operative*, [2020 BCSC 1586](#)
11. *Re Stelco* (2005), [78 OR \(3d\) 254](#) (CA)
12. *Re U.S. Steel Canada Inc.*, [2016 ONSC 7899](#)
13. *Re Walter Energy Canada Holdings Inc.*, [2016 BCSC 107](#)
14. *Royal Bank v. Soundair Corp.* (1991), [4 O.R. \(3d\) 1](#) (C.A.)

**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.

Restriction on disposition of business assets

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[...]

Factors to be considered

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**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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