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

COURT OF APPEAL FOR ONTARIO

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

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

Respondent
Moving Party

SUPPLEMENTARY MOTION RECORD OF THE PROPOSED APPELLANT, HAIDAR OMARALI (Motion for Leave to Appeal, Returnable in Writing)

December 18, 2024

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

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FACTUM OF THE INSURERS
(Prior Acts Exclusion)

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FACTUM OF THE INSURERS
(Prior Acts Exclusion)

PART I - INTRODUCTION

1. The Insurers bring this motion addressing a threshold coverage issue that may determine the viability of the motion brought by the representative plaintiff, Haidar Omarali, seeking damages and relief against the Insurers and Just Energy Directors, and bring finality to this CCAA proceeding. For purposes of this motion only, the Insurers assume that the Just Energy Directors would be found liable to Omarali and that the insuring agreement of their policies may be triggered. The declaratory relief sought here addresses whether the Prior Acts Exclusion in the Policies would nonetheless bar coverage for the claim against the Just Energy Directors.

2. Specifically, the Insurers seek a declaration that the Prior Acts Exclusion bars coverage for the claim asserted against the Just Energy Directors that they are personally liable for Just Energy's conduct and purported failure to pay wages and benefits owing to the class, as alleged in: (i) the motion record filed by Omarali in this CCAA proceeding ("**Omarali Motion Record**"); and (ii) the D&O Proof of Claim filed by Omarali in this proceeding ("**D&O Proof**" and together with the Omarali Motion Record, the "**Omarali Claim**").

3. The class action filed in 2015 alleges that Just Energy misclassified class members as "independent contractors" commencing in 2012, resulting in the company's failure to pay minimum wage, overtime pay, vacation pay, public holiday and premium pay and other benefits to the class ("**Class Action**"). The Class Action seeks, *inter alia*, $100,000,000 in damages.[1]

[1] Amended Statement of Claim, Exhibit A to the affidavit of Jamie Shilton affirmed August 18, 2023 ("**Shilton Affidavit**"), at para 1(b). Motion record of Haidar Omarali dated August 25, 2023 ("**Omarali MR**") at 38.

4. The Class Action is the foundation for the D&O Proof and Omarali Claim:

(a) The D&O Proof states in paragraph 1 of Schedule "C" that it "arises from a class action for unpaid wages brought against Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P." (collectively, "**Just Energy**");[2]

(b) The Omarali Claim alleges that Just Energy misclassified class employees as independent contractors, and as a result the class was denied minimum protections under the *Employment Standards Act, 2000,* SO 2000, c 41 ("**ESA**"), for which directors of Just Energy from 2012 onwards (the "**Directors**") are now personally liable;

(c) The Omarali Claim incorporates the Class Action. It seeks as damages the unpaid amounts allegedly owed by Just Energy from both the company and the Directors, jointly and severally, *plus* pre-judgment interest accruing from filing of the Class Action to the CCAA filing date.

5. The Omarali Motion Record, filed following the rejection of the D&O Proof and a Vesting Order in the Just Energy CCAA proceeding, asserts that class members are entitled to a damages award against the Directors for the unpaid wages and benefits.

6. The Omarali Claim also seeks coverage and indemnity for the claim award from the Insurers as an allegedly covered Loss under an integrated tower of D&O policies issued to Just Energy Group Inc. when it filed for CCAA protection on March 9, 2021.

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[2] D&O Proof of Claim Form for Claims against Directors or Officers of the Just Energy Entities, Schedule "C", at para 1. Motion record of the Insurers dated June 10, 2024 ("**Insurers' MR**"), tab 3, at 70.

7. This integrated tower of policies exclusively applies to the insolvency period. Coverage ceases upon the company emerging from insolvency (subject to a run-off period). The policies include exclusions that expressly eliminate coverage for matters arising from the insolvent company's pre-existing problems.

8. One such exclusion is the Prior Acts Exclusion, which states:[3]

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

9. The Prior Acts Exclusion bars coverage for the Omarali Claim because it is specifically based upon, arises out of and resulted from the alleged misclassification of employees and failure to pay related wages and benefits that began in 2012 and that was the subject of litigation "prior to" March 9, 2021:

(a) The Prior Acts Exclusion specifically excludes coverage for <u>any</u> Claim that is based upon, arises out of, results from, or in any way involves <u>any</u> act, error, or omission allegedly committed prior to March 9, 2021;

(b) The Prior Acts Exclusion is triggered by any act or omission occurring before March 9, 2021. The exclusion is not limited to an act or omission of an Insured, or a Wrongful Act by an Insured Person;

[3] XL Policy, Schedule "A" to the Insurers' Notice of Motion, endorsement 3, as modified by endorsement 7. Insurers' MR at 17 and 23. See "follow form" language in TM Policy and Hiscox Policy, Exs KK and LL to the Shilton Affidavit. Omarali MR at 1210, 1225.

(c) The Omarali Claim is based upon, arises out of, and resulted from the alleged misclassification of employees and failure to pay related wages and benefits, which are acts and omissions committed or allegedly committed prior to March 9, 2021;

(d) Any purported statutory liability of the Directors is based upon, arises out of and resulted from Just Energy's failure to pay wages and benefits allegedly accruing because of the misclassification, which also occurred prior to March 9, 2021; and

(e) The Omarali Claim falls squarely within the Prior Acts Exclusion and coverage is therefore excluded under the Policies.

10. For purposes of this motion, which is solely for a conclusion of law regarding the application of the Prior Acts Exclusion, this Court may assume without deciding that the alleged misclassification of employees occurred and that the Omarali Claim may fall within the Policies' insuring agreement (subject to the application of exclusions under the Policies). By bringing this motion and filing this factum, the Insurers express no opinion on, among other things, whether the alleged misclassification occurred, in fact, or in law. The Insurers expressly reserve all their rights to challenge any such proposition in the future in any forum.

11. The Insurers move here only for a declaration that coverage is barred by the Prior Acts Exclusion. However, other policy provisions, including related exclusions for prior litigation and prior notice under other policies, are relevant to the commercial context and the interpretation of the Policies. These exclusions delineate the scope of risks that the Insurers agreed to insure. They inform the insurance contract, the premium paid, and the availability of insurance in the insolvency context. Omarali is a stranger to the insurance contract who seeks to access policy proceeds ignoring the Policies' unambiguous terms and exclusions.

PART II - FACTS

PARTIES TO THIS MOTION

12. The moving parties (collectively, the "**Insurers**") are: (a) XL Specialty Insurance Company ("**XL**"); (b) Tokio Marine HCC – D&O Group, the Coverholder by HCC Underwriting Agency Ltd, HCC Syndicate 4141 trading as Tokio Marine HCC International via Agreement No. B602121HCCGFM ("**TM**"); and (c) Certain Underwriters at Lloyd's London Subscribing to Policy No. B0146ERINT2100865 by their authorized coverholder Hiscox ("**Hiscox**").

13. The respondent Haidar Omarali is the representative plaintiff in the Class Action.

MAY 2015: THE CLASS ACTION IS COMMENCED

14. On May 4, 2015, a Statement of Claim for the proposed Class Action was issued.[4] On November 13, 2015, the Statement of Claim was amended to name Omarali as the representative plaintiff and to add allegations related to employment insurance and Canada Pension Plan contributions.[5]

15. The class members allege Just Energy misclassified each of them as "independent contractors" and that the structure imposed on Sales Agents was an employment relationship.[6] They claim entitlement to unpaid wages and benefits, relying principally on the ESA.[7]

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[4] In Court File No. CV-15-527493-CP: Shilton Affidavit at para 2 and Ex A. Omarali MR at 17, 36.
[5] Amended Statement of Claim, November 13, 2015, Ex A to the Shilton Affidavit. Omarali MR at 36–54.
[6] See, e.g., Amended Statement of Claim at paras 34–35, Ex A to the Shilton Affidavit. Omarali MR at 49.
[7] Amended Statement of Claim at para 1, esp paras 1(c)–(f), Ex A to the Shilton Affidavit. Omarali MR at 38–40.

16. On July 27, 2016, Justice Belobaba certified the Class Action.[8] The certification order defines the class to include "[a]ny person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement".[9]

17. On November 28, 2016, Just Energy "formally adjusted its own classification of its then current Sales Agents from 'independent contractors' to employees".[10]

18. On June 20, 2017, the opt-out deadline for potential members of the class occurred.[11] Accordingly, the class period for the Class Action (taken at its highest) runs from January 1, 2012, to June 17, 2017.[12] The class consists of 7,723 individuals.[13]

19. On June 21, 2019, Omarali's summary judgment motion was denied based on, *inter alia*, conflicting evidence on fundamental credibility issues.[14] On November 20, 2019, Justice Chalmers ordered that the Class Action be tried for 20 days starting on November 15, 2021.[15]

MARCH 9, 2021: CCAA FILING AND ISSUANCE OF THE POLICIES

20. On March 9, 2021, Just Energy filed for protection from creditors, and an order commencing this proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-

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[8] *Omarali v Just Energy Group Inc*, 2016 ONSC 4094 (July 27, 2016), book of authorities of the Insurers ("**BOA**") tab 1.
[9] Ex D to the Shilton Affidavit at para 2. Omarali MR at 147.
[10] Shilton Affidavit at para 11. Omarali MR at 22
[11] Shilton Affidavit at para 10. Omarali MR at 22.
[12] The start date of the class period is uncertain, as a common issue regarding the application of the *Limitations Act, 2002*, to claims predating May 4, 2013, was certified: *Omarali v Just Energy Group Inc*, 2016 ONSC 4094, appendix A, issue no 15, BOA tab 1. It appears, however, that the period could not extend *before* January 1, 2012.
[13] Shilton Affidavit at para 10. Omarali MR at 22.
[14] *Omarali v Just Energy Group Inc*, 2019 ONSC 3734, esp paras 22–32. BOA tab 2.
[15] Endorsement of Chalmers J, November 20, 2019, Ex I to the Shilton Affidavit. Omarali MR at 181.

36 ("**CCAA**"), was issued.[16] The order stayed all proceedings against Just Energy, including the Class Action.[17] This stay remains in effect, currently until September 30, 2024.[18]

21. Also on March 9, 2021, the Insurers issued to Just Energy Group Inc. an integrated insurance tower, effective from commencement of this CCAA proceeding, in the following layers: (a) XL issued a one-year primary liability policy no. ELU173707-21 ("**XL Policy**"); (b) TM issued a one-year first layer excess policy no. 21G196460101 ("**TM Policy**");[19] and (c) Hiscox issued a one-year second layer excess policy no. B0146ERINT2100865 ("**Hiscox Policy**"), above the TM layer.[20]

22. The XL Policy, TM Policy, and Hiscox Policy are the insurance tower referred to as the "**Policies**" herein. A copy of the XL Policy is appended as Schedule "A" to the Insurers' Notice of Motion.[21] The TM and Hiscox Policies follow form to the XL Policy in relevant part.[22]

23. The Policies are claims-made D&O insurance policies with a one-year Policy Period: March 9, 2021, to March 9, 2022.[23] They provide, under insuring agreement A, that "the Insurer shall pay on behalf of the Insured Persons Loss resulting from a Claim first made against the

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[16] Initial order, Koehnen J, March 9, 2021, Ex J to the Shilton Affidavit. Omarali MR at 184.
[17] Initial order, Koehnen J, March 9, 2021, Ex J to the Shilton Affidavit, paras 11–13. Omarali MR at 190–191.
[18] Order, Cavanagh J, January 25, 2024, para 3
[19] TM Policy, Ex KK to the Shilton Affidavit. Omarali MR at 1188–1213.
[20] Hiscox Policy, Ex LL to the Shilton Affidavit. Omarali MR at 1215–1234.
[21] Notice of Motion of the Insurers, Schedule "A". Insurers' MR at 13–38.
[22] See follow form language in TM Policy and Hiscox Policy, Exs KK and LL to the Shilton Affidavit. Omarali MR at 1210, 1225.
[23] XL Policy, declarations, item 2. Insurers' MR at 13.

Insured Persons during the Policy Period for a Wrongful Act."[24] Only directors and officers of Just Energy are Insured Persons.[25] Just Energy is not insured for its own liability.

24. "Loss" is defined to include "damages, judgments […] or other amounts that any Insured is legally obligated to pay"; as well as "salary, wages and related amounts such as vacation pay or holiday pay that are or were payable by the Company to an employee for services performed if an Insured Person has become personally liable to make such payment under any applicable federal, provincial, territorial or municipal statutory provision […] that an Insured Person is obligated to pay if such […] payments are insurable by law and imposed in connection with such Insured Person's service with an insolvent Company".[26]

25. "Claim" includes "any written demand […] for monetary or non-monetary relief".[27] As relevant to this motion, "Wrongful Act" is defined to mean "any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by an Insured Person while acting in his or her capacity as such or due to his or her status as such".[28]

26. Endorsement No. 3, as modified by Endorsement No. 7, contains the Prior Acts Exclusion, which states (as quoted above) that there is no coverage for "any Claim based upon, arising out of,

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[24] XL Policy, s. I(A), as modified by endorsement 7. Insurers' MR at 18 and 24. Insuring agreement A is the only insuring agreement in the Policies: XL Policy, s. I, as modified by endorsement 4, ss. 1–5. Insurers' MR at 18, 24.
[25] XL Policy, endorsement 4, s. 6 ("'Insured' means the Insured Persons."), s. II(J) ("Insured Person" means, among other things, "any past, present or future natural person director or officer, or member or manager of the board of managers, of the Company"), s. II(D) ("Company" means "Parent Company" and "any Subsidiary created or acquired on or before the Inception Date"), declarations item 1 ("Parent Company" means Just Energy Group Inc."). Insurers' MR at 13, 18, 25, 26.
[26] XL Policy, s. II(O). Insurers' MR at 27–28.
[27] XL Policy, s. II(C), as modified by endorsement 4, s. 8 (deleting references to "Investigation Demand"). Insurers' MR at 18 and 25.
[28] XL Policy, endorsement 4, s. 10. Insurers' MR at 19. Prong 2 of the definition of Wrongful Act pertains only to Claims related to "formal or informal investigation of the Company by any Enforcement Authority" (XL Policy, s. II(C)(4)). Prong 3 of the definition pertains only to Employment Practices Wrongful Acts, which are restricted to wrongful dismissal, harassment in employment, and the like (XL Policy, s. II(G)). Insurers' MR at 19, 25, 26.

directly or indirectly resulting from, in consequence of or in any way involving any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed prior to March 09, 2021."[29]

27. Pursuant to Endorsement No. 6, the Policies convert to run-off coverage upon the company's emergence from bankruptcy. Under run-off coverage, the Policies continue to apply to a covered Claim for a Wrongful Act committed between March 9, 2021 and that event, but coverage ceases with respect to any Claim for a Wrongful Act committed thereafter.[30]

28. In addition to the Prior Acts Exclusion, the Policies include parallel exclusions to coverage for pre-March 9, 2021 risks. The Insurers do not seek declarations regarding these exclusions on this motion, but they provide context that highlights the commercial structure and interpretation of the Policies.

29. In that regard, the Policies exclude coverage based on prior and pending litigation before March 9, 2021, stating that no coverage is available for any Claim that is based on (among other things) a fact, circumstance, or Wrongful Act alleged in litigation against an Insured brought before March 9, 2021.[31] Likewise, the Policies exclude coverage for any Claim arising from any fact, circumstances, or Wrongful Act about which notice was given under other D&O or similar insurance policies before March 9, 2021.[32]

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[29] XL Policy, endorsement no. 3, as modified by endorsement no. 4, ss. 7–8 (deleting references to "Interview" and "Investigation Demand"). Insurers' MR at 17–18.
[30] XL Policy, endorsement no. 6. Insurers' MR at 22.
[31] XL Policy, s. III(B)(1), as modified by endorsement no. 4, ss. 7–8. Insurers' MR at 18 and 31. The Pending and Prior Litigation Date is March 9, 2021: declarations, item 1. Insurers' MR at 13.
[32] XL Policy, s. III(B)(2), as modified by endorsement no. 4, ss. 7–8. Insurers' MR at 18 and 31. The Inception Date is March 9, 2021: declarations, item 2. Insurers' MR at 13.

SEPTEMBER 15, 2021, TO PRESENT: CCAA PROCEEDING CONTINUES

30. On September 15, 2021, a Claims Procedure Order was entered in this proceeding. It established the process for advancing claims against (among others) Just Energy and its directors and officers. A claimant could commence a claim by filing a Proof of Claim with the Monitor.[33]

31. On October 29, 2021, Omarali filed (i) the D&O Proof, alleging the Directors are jointly and severally liable for CAD 105,854,794.52 allegedly owed to class members in the underlying Class Action;[34] and (ii) a Proof of Claim against Just Energy for CAD 105,854,794.52 allegedly owed to class members in the underlying Class Action.[35]

32. At Schedule "C", the D&O Proof outlines the Omarali Claim, explaining that it "arises from" the Class Action; the alleged misclassification of Sales Agents, and claim for wages and benefits arising "as a result of" that alleged misclassification:[36]

> 1. This claim arises from a class action for unpaid wages brought against Just Energy Group Inc. ("JE"), Just Energy Corp. ("JEC") and Just Energy Ontario L.P. (collectively the "Defendants"), for the period of 2012 to date.
>
> […]
>
> 4. The Defendants misclassified class member employees as independent contractors. All of the Class Members worked for the Defendants in Ontario. As a result of JEC's misclassification, the Class Members were denied minimum protections under the Employment Standards Act, 2002 ("ESA"), including but not limited to minimum wage, overtime, public and holiday pay and vacation pay.
>
> […]
>
> 6. As set out in the Amended Statement of Claim filed with this Proof of Claim, the Class Members seek recovery from the Defendants for unpaid wages including minimum wage, overtime, holiday and vacation pay, in accordance with the ESA. […]

[33] Claims Procedure Order, Koehnen J, September 15, 2021, esp paras 3(tt), 26–27, pp 15, 24–25
[34] D&O Proof. Insurers' MR, tab 3, at 60–71.
[35] Proof of Claim against Just Energy. Insurers' MR, tab 4, at 73–78.
[36] D&O Proof, Schedule "C". Insurers' MR, tab 3, at 70 [underlining added].

33. Schedule "C" goes on to cite the statutory provisions relied upon from the ESA, *Business Corporations Act* (Ontario) ("**OBCA**"), and *Canada Business Corporations Act* ("**CBCA**").[37]

34. On February 22, 2022, the Monitor disallowed both Proofs of Claim in their entirety on the basis, *inter alia*, that:[38]

(a) The D&O Proof was "entirely contingent on the success of the Class Action Claim",[39] which was being advanced in the parallel Proof of Claim brought against Just Energy only;

(b) On its face, the D&O Proof was statute-barred under the *Limitations Act, 2002*, and was improper because it was advanced long out of time, more than six years after the Class Action was commenced in 2015. As the Monitor noted, "[Omarali] made a strategic choice not to pursue the Directors as part of the Class Action, and must be accountable for that choice";[40]

(c) Even if the D&O Proof did not fail because the underlying Class Action failed or for limitations reasons, none of the statutory criteria for directors' liability in the ESA, CBCA, or OBCA were met because, among other things, the alleged misclassification ended in 2016 and only Directors appointed in 2016 or earlier could be liable for any alleged unpaid wages.[41] Also, Omarali seeks *damages*

[37] D&O Proof, tab 4 of Insurers' MR at 70, citing ESA, s 81; *Business Corporations Act*, RSO 1990, c B.16, s 131 ("**OBCA**"); *Canada Business Corporations Act*, RSC 1985, c C-44, s 119 ("**CBCA**")
[38] Notice of Revision or Disallowance re: D&O Proof. Insurers' MR, tab 5, at 80–86. Notice of Revision or Disallowance re: Proof of Claim against Just Energy. Insurers' MR, tab 6, at 88–93.
[39] Notice of Revision or Disallowance re: D&O Proof. Insurers' MR, tab 5, at 83.
[40] Notice of Revision or Disallowance re: D&O Proof. Insurers' MR, tab 5, at 83–84.
[41] Notice of Revision or Disallowance re: D&O Proof. Insurers' MR, tab 5, at 85–86.

arising from the alleged misclassification of Class members, and the statutes deem directors liable for *unpaid wages*.[42]

35. On February 24, 2022, Omarali filed Notices of Dispute of both disallowances.

36. On November 3, 2022, this Court approved a sale transaction in this CCAA proceeding and granted an approval and vesting order ("**Vesting Order**").[43] The Vesting Order includes a general release and provides, *inter alia*: (i) Just Energy and the D&Os were not released from the Class Action claims to the limited extent of maintaining claims against insurance policies that "may be available to pay insured claims";[44] and (ii) nothing in the Vesting Order "prejudices, compromises, releases or otherwise affects (a) any right, defence or obligation of any insurer in respect of an Insurance Policy".[45]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

37. To determine the sole issue in this motion—whether the Prior Acts Exclusion applies to the Omarali Claim—the factual and legal assertions in the Omarali Claim (including its filed affidavit) may be assumed to be true, without prejudice to the Insurers' rights to later contest the factual and legal assertions in the Omarali Claim or the scope of coverage provided by the Policies.

38. This motion raises just one question: Does the Prior Acts Exclusion bar coverage for the Omarali Claim?

39. In short, it does and thereby renders all other issues between the parties moot. The Omarali Claim against the Directors is "based upon, arising out of, directly or indirectly resulting from, in

[42] Notice of Revision or Disallowance re: D&O Proof. Insurers' MR, tab 5, at 84–85.
[43] Vesting Order, Ex Z to the Shilton Affidavit. Omarali MR at 845–878.
[44] Vesting Order, Ex Z to the Shilton Affidavit, at para 26. Omarali MR at 865.
[45] Vesting Order, Ex Z to the Shilton Affidavit, at para 29. Omarali MR at 866–867.

consequence of and in any way involving" an act, error, omission, neglect, or breach of duty committed or allegedly committed **prior to March 9, 2021**. Coverage is excluded because:

(a) Just Energy's alleged misclassification of Sales Agents as independent contractors began as early as January 1, 2012, and ended on November 28, 2016;

(b) The Omarali Claim (as asserted in the Class Action, the D&O Proof, and the Omarali Motion Record of 2023) is based on this alleged misclassification;

(c) The Omarali Claim asserts former Directors of the Just Energy entities are liable for the alleged misclassification, although the Class Action never claimed against them;

(d) The Omarali Claim names post-filing Directors on a theory that there is statutory liability for such Directors for the same amounts sought in the Class Action; and

(e) Even if any such statutory liability could arise (which is not accepted given that the statutes apply to company debts incurred *while directors are serving as such*[46]), the Claim is still based upon, arises from, and results from the original alleged misclassification that gave rise to a purported company debt.

[46] All statutes on which Omarali relies restrict statutory liability for wages, etc., to wages accrued during the director's term. The ESA restricts liability to wages and vacation pay for directors, respectively, "that become payable *while they are directors*" and "accrued *while they are directors*" (ESA, s 81(7), emphasis added). See *Warehouse Drug Store Ltd (Re)*, 2006 CanLII 42802 at paras 17, 20 (Ont Sup Ct J), BOA tab 3 (imposing liability on future directors for previously accrued debts would contradict the s 81 scheme and increase uncertainty). Similarly, the CBCA and OBCA restrict liability for six months' wages "payable […] while they are […] directors" (CBCA, s 119(1)) and "that become payable while they are directors" (OBCA, s 131(1)). Here, too, the statutes are clear: directors are not liable for wages that accrue before or after their term as directors. See, e.g., *Brown v Shearer*, 1995 CanLII 6258, 102 Man R (2d) 76 at 7 (Man CA), BOA tab 4 (directors liable for wages under the CBCA that "arose while they were occupying their positions as directors") and *Englefield v Wolf*, 2006 CanLII 9600 at para 7 (Ont Sup Ct J), BOA tab 5 (approving and applying *Brown*).

40. The Prior Acts Exclusion bars coverage for the Omarali Claim, as it is replete with allegations of acts and omissions that precede the prior acts date.

A. INSURANCE POLICY INTERPRETATION

41. Insurance policies are interpreted under settled legal principles.

42. As the Supreme Court of Canada has consistently affirmed, the overriding principle is that "where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language".[47] Only when policy language is *not* clear should the Court turn to further interpretive principles, such as the *contra proferentem* rule and the corollary that insuring agreements are interpreted broadly and exclusions narrowly.[48]

43. Therefore, provisions must be read in accordance with their plain meaning and the stated purpose of a policy. Policy language is construed in accordance with usual rules of construction rather than inferred "expectations" not apparent on a fair reading of the document.[49]

B. PLAIN MEANING OF PRIOR ACTS EXCLUSION

44. The plain meaning of the Prior Acts Exclusion is straightforward and unambiguous. Its expansive language expressly excludes coverage for any Claim "based upon", "arising out of", "directly or indirectly resulting from", "in consequence of or in any way involving" **any** act or omission that occurred, or allegedly occurred, before March 9, 2021.

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[47] *Sabean v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7 at para 12, BOA tab 6; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 49, BOA tab 7

[48] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at paras 50–51, BOA tab 7

[49] *Markham (City) v AIG Insurance Co of Canada*, 2020 ONCA 239 at para 45, leave to appeal ref'd 2020 CanLII 94500, BOA tab 8; *Goodfellow v CUMIS General Insurance Co*, 2021 ONSC 3604 at paras 44–45, BOA tab 9

45. The express exclusion of Claims arising out of "any act or omission" must be given its plain and expansive meaning. As the Court of Appeal recently affirmed in *Trillium Mutual Insurance Co v Emond*, interpreting an exclusion that referenced "any law", use of the term "any" demands a broad interpretation: "any" is "all-embracing and without limitation or qualification".[50]

46. This language excludes coverage for any Claim arising from or in any way based upon a prior act or omission. It does not require that such an act or omission be performed by an Insured Person. Rather, it excludes Claims arising out of **any** act or omission, including prior acts or omissions of the company, which might be the basis of subsequent claims and/or liabilities.

47. Notably, the exclusion does not require a Wrongful Act (which is an act of an Insured Person). Coverage is excluded if a Claim is based on "any act, error, omission, […] **or** Wrongful Act committed or allegedly committed prior to March 09, 2021". The provision is disjunctive: an act or omission need not be a Wrongful Act to trigger the Prior Acts Exclusion.

48. The Prior Acts Exclusion applies even if a Claim also alleges a Wrongful Act that might post-date the "prior" acts date. That is, if the Claim alleges a Wrongful Act committed during the policy period, coverage is still not available if the Claim is nonetheless "based upon", "arising out of", "directly or indirectly resulting from", "or in any way involving" **any** act or omission committed before March 9, 2021.

49. Here, the Omarali Claim asserts numerous acts, errors, omissions, and neglects that occurred before March 9, 2021.

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[50] *Trillium Mutual Insurance Company v Emond*, 2023 ONCA 729 at para 67, BOA tab 10, leave to appeal to SCC granted 2024 CanLII 61126, SCC file no 41077, citing *Epp School District v Park (Rural Municipality)*, 1936 CanLII 151, [1936] 2 WWR 331 at para 20 (Sask CA), BOA tab 11

50. Therefore, Omarali's anticipated argument that the alleged statutory liability of post-filing directors crystallizes during the policy period is beside the point. The Prior Acts Exclusion does not operate on the basis of the timing of alleged liability; it applies if any acts or omissions alleged in the Claim occurred before the prior acts date.

C. COMMERCIAL CONTEXT OF THE POLICIES

51. The effective date of the Policies is the commencement date of this CCAA proceeding. This provides the essential, overall commercial context and purpose for the Prior Acts Exclusion, as well as the related prior litigation and prior notice exclusions. Their purpose is plain from their language: to exclude coverage for Claims based on conduct in the pre-insolvency past.

52. Here, the basis on which coverage is limited is expressly delineated by each exclusion's cutoff date of March 9, 2021. Together with the Prior Acts Exclusion, these provisions comprehensively bar coverage for pre-insolvency claims, intended claims, and/or post-filing claims that are based on prior circumstances: (i) acts or omissions that occurred, or allegedly occurred, before March 9, 2021 (Prior Acts Exclusion); (ii) claims underlying or alleged in litigation against an Insured brought before March 9, 2021 (prior and pending litigation exclusion);[51] and (iii) claims subject to notice under other D&O policies before March 9, 2021 (prior notice exclusion).[52]

53. The Prior Acts Exclusion and its companion provisions carefully delineate the scope of risk that the Insurers agreed to insure and thereby expressly inform the purpose of the Policies. Unsurprisingly in the insolvency context, the Insurers did not agree to assume the risk of exposure

[51] XL Policy, s. III(B)(1), as modified by endorsement no. 4, ss. 7–8. Insurers' MR at 18 and 31.
[52] XL Policy, s. III(B)(2), as modified by endorsement no. 4, ss. 7–8. Insurers' MR at 18 and 31.

to pre-filing conduct. It would make no commercial sense to assume the pre-filing risk for prior acts and omissions, pre-existing litigation, or risks previously notified to pre-filing insurers.

54. These provisions limit insurer exposure for "claims made" policies issued to troubled or insolvent companies. Prior acts and related exclusions, such as prior and pending litigation exclusions, allow insurers to issue coverage they otherwise may not have been willing to issue at all or only for a much higher price. As the U.S. Court of Appeals for the First Circuit held, affirming the first instance judgment denying coverage based on a prior and pending litigation exclusion, such exclusions allow both insurer and insured to[53]

> […] combat the problem of adverse selection or "insuring the building already on fire"; that is, an insured who has previously been sued faces a greater risk of related litigation and has a corresponding incentive to seek insurance. The insurance company's legitimate interest in combating the adverse selection problem is properly implicated when there is a real and substantial overlap with the complaint in the prior lawsuit, as opposed to an incidental or fortuitous relationship to the prior complaint. [Citations deleted]

55. In other words, in exchange for insuring the "building on fire", the insurer needs confidence that the burning fires will not be among the perils to be insured going forward. Here, the Insurers issued the Policies subject to parallel prior acts, prior and pending litigation, and prior notice exclusions to exclude the "fires" that were already burning prior to the CCAA filing and issuance of the Policies on March 9, 2021.

56. The plain meaning of the Prior Acts Exclusion, which expressly excludes any Claim based upon or resulting from any act or omission committed or allegedly committed by anyone before

[53] *Federal Insurance Co v Raytheon Co* (2005), 426 F 3d 491 at 499 (US Court of Appeals, First Circuit) [Google Scholar], BOA tab 12

March 9, 2021, aligns with the other exclusions and the overall commercial context for the Policies which were issued to provide coverage only for the going forward post-insolvency risk.

D. COVERAGE IS NOT ILLUSORY

57. Despite its broad reach, the Prior Acts Exclusion does not render coverage illusory for post-filing Directors. Omarali only asserts that coverage is available for post-filing Directors (i.e., those appointed after March 9, 2021). Those Directors have coverage under the Policies in accordance with their provisions as long as the Claim does not involve prior acts, omissions, or duties performed.

58. The Policies still provide coverage for a wide variety of Claims, including for unpaid wages that Just Energy might incur because of acts or omissions taking place during the Policy Period (post-filing), and for which such directors may become liable by statute. As cited above, Loss is defined to include wages and related amounts payable by the Company to an employee for services performed if an Insured Person has become personally liable to make such payment by statute.[54]

59. But it makes no commercial sense to issue a D&O liability insurance policy to cover directors of an insolvent entity for the very claims that may have led to the insolvency. Otherwise, the insurance policy would become a guaranteed indemnity for those existing liabilities, as compared with the risk of future contingent liabilities. Insurance exists to transfer "fortuitous contingent risks" from insured to insurer, and its "economic rationale" depends on this commercial structure: if risks were "neither fortuitous nor contingent", the premium would need to be greater than the loss (which would be absurd).[55]

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[54] XL Policy, s. II(O)(1)(b). Insurers' MR at 28.
[55] *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at paras 68–69, BOA tab 13

E. THE OMARALI CLAIM IS BASED UPON AND RESULTED FROM PRIOR ACTS

60. There is no coverage for the Omarali Claim under the Policies. It is overwhelmingly based upon/arises out of/directly results from prior acts that trigger the exclusion—namely the alleged misclassification of "Sales Agents" as independent contractors.

61. This alleged act of misclassification—or purported failure/neglect to correctly classify employees—is the foundation for the Omarali Claim and is plainly pleaded to have started in 2012 and ended in 2016. The D&O Proof expressly pleads that, "This claim arises from a class action for unpaid wages brought against [Just Energy] for the period of 2012 to date."[56]

(i) The misclassification occurred "prior to March 9, 2021"

62. On Omarali's own allegations, the misclassification occurred prior to March 9, 2021: it began on January 1, 2012,[57] (more than nine years before) and ended on November 28, 2016, when "Sales Agents" were reclassified as employees (more than four years before).[58]

63. Just as the alleged misclassification and Class Action long predate March 9, 2021, so do the liabilities alleged in the Omarali Claim. As cited above, the D&O Proof is based on the claims in the Class Action and the failure of Just Energy to pay the wages and benefits allegedly owing to the class. As the Class Action claims will not be satisfied, Omarali alleges statutory liability for each Director from 2012 onward for the unpaid wages claimed.

64. In other words, Omarali's theory of liability for Directors arises from: (i) the alleged misclassification between 2012 and 2016, which resulted in unpaid wages and other benefits; (ii)

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[56] D&O Proof, Schedule "C", at para 1. Tab 3 of the Insurers' MR, tab 3, at 70.
[57] Ex D to the Shilton Affidavit at para 2. Omarali MR at 147.
[58] Shilton Affidavit at para 11. Omarali MR at 22.

the resulting alleged debt owing to the class members by Just Energy, which crystallized between 2012 and 2016; and (iii) solely by operation of the ESA, CBCA, and OBCA (as interpreted by Omarali), the Directors are alleged to be liable for damages on or about the commencement of this CCAA proceeding for unpaid entitlements that accrued between 2012 and 2016.

(ii) The misclassification is an alleged "act or omission"

65. On the allegations and evidence of Omarali, the misclassification is an "act or omission" as that term is used in the Prior Acts Exclusion. For example, the Amended Statement of Claim describes how the Just Energy defendants "systematically classified all Sales Agents as 'independent contractors'", and failed to pay them benefits based on this misclassification.[59]

66. The Omarali Motion Record attests that "the Omarali Action concerns Just Energy's misclassification of just over 7,700 employees as 'independent contractors', and its failure to comply with the minimum protections of the [ESA]".[60] The D&O Proof relies on the same misclassification, attaching the Amended Statement of Claim.[61]

67. This misclassification also constitutes an alleged neglect or breach of duty. The class pleads that Just Energy breached its contracts with, and contractual duty of good faith to, the class members; committed "systemic negligence"; and was unjustly enriched, all in connection with the misclassification.[62] The certified common issues mirror these pleadings.[63]

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[59] Amended Statement of Claim, Ex A to the Shilton Affidavit at para 31. Omarali MR at 48.
[60] Shilton Affidavit at para 3. Omarali MR at 18.
[61] D&O Proof, Schedule "C", at para 6 (Amended Statement of Claim "filed with this Proof of Claim"). Insurers' MR, tab 3, at 70.
[62] Amended Statement of Claim, Ex A to the Shilton Affidavit, at paras 37–47. Omarali MR at 50–52.
[63] See *Omarali v Just Energy Inc*, 2016 ONSC 4094, appendix, common issues nos. 6, 7, 10, 11, BOA tab 1

(iii) The Directors' alleged liability depends on the misclassification

68. The D&O Proof relies on the ESA, OBCA, and CBCA to plead that the Directors are liable for Just Energy's unpaid wages as Omarali will prove the claim for the unpaid wage debt in the insolvency proceeding.[64] Thus the Directors are alleged to become liable, solely by operation of the statutes, for Just Energy's failure to satisfy the alleged unpaid wage debt.

69. There is no allegation that the Directors themselves were personally responsible for the misclassification. Their liability as alleged arises solely by operation of law because (as alleged in the Class Action) Just Energy committed the misclassification. The D&O Proof pleads the same sequence of acts and omissions which give rise to the same basis of liability: namely, statutory pay entitlements arising from the misclassification.[65]

70. Absent the misclassification (assuming it could be proved), there would be no unpaid wages claim or debt owed by Just Energy, for which the Directors could be liable on insolvency. The class's claim for damages depends entirely on Just Energy's alleged "misclassification of the Class Members as independent contractors" that occurred before March 9, 2021.[66]

F. CASELAW

71. Few Canadian cases have considered prior acts exclusions in detail, and the exclusions they have considered involve language distant from the Prior Acts Exclusion.[67] Where relevant and

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[64] The statutory language regarding insolvency as a trigger for liability is not uniform. See ESA, s 81(1)(a) (when "employer is insolvent" and "the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer"); OBCA, s 131(2)(b) (when "the corporation goes into liquidation" and "the claim for the debt has been proved"); CBCA, s 119(2)(b) (when "the corporation has commenced liquidation and dissolution proceedings" and "a claim for the debt has been proved within six months").

[65] D&O Proof, Schedule "C", at para 4. Insurers' MR at 70.

[66] Amended Statement of Claim, Ex A to the Shilton Affidavit, para 47. Omarali MR at 52.

[67] The Canadian cases include *Lloyds Syndicate 1221 (Millennium Syndicate) v Coventree Inc*, 2012 ONCA 341, leave to appeal ref'd 2012 CanLII 70218, BOA tab 14, in which a prior acts exclusion limited to Wrongful Acts expressly carved out only an excess layer of insurance (see esp para 39); *Onex Corp v American Home Assurance Co*, 2013

helpful, Canadian appellate courts refer to American jurisprudence in the insurance context.[68] Here, American jurisprudence clarifies that the Prior Acts Exclusion means what it says and bars coverage for the Omarali Claim.

72. In *Zucker v US Specialty Insurance Co*,[69] the U.S. Court of Appeals for the Eleventh Circuit held that a prior act exclusion barred coverage for a lawsuit including alleged acts occurring both before and after the cutoff date. Like the Policies, the policy in *Zucker* was a replacement D&O insurance policy purchased by a distressed insured (a bank) undergoing bankruptcy proceedings. The insurer gave the bank a choice between a cheaper policy with the exclusion and a more expensive policy without one. The bank chose the cheaper policy.

73. The prior acts exclusion in *Zucker* includes the same "arising out of" and "based upon" language as used in the Policies, stating as follows:[70]

> In consideration of the premium charged, it is agreed that the Insurer will not be liable to make any payment of Loss in connection with a Claim arising out of, based upon or attributable to any Wrongful Act committed or allegedly committed, in whole or in part, prior to [November 10, 2008].

74. The Court rejected the claimant's argument that there was coverage for the underlying wrongful acts, which were fraudulent transfers that occurred in 2009 and after the prior acts cutoff date in the policy. It held that an "essential element" of Zucker's claim "has a connection" to

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ONCA 117, leave to appeal ref'd 2013 CanLII 63055; and 2015 ONCA 573, leave to appeal ref'd 2016 CanLII 20450, BOA tab 15, which concerned distant exclusion language (see 2013 ONCA 117 at para 58); and *Boland v Allianz Insurance Company of Canada*, 2008 ONCA 569, which apparently concerned an exclusion limited to wrongful acts with a knowledge carveout (see para 10), BOA tab 16.

[68] *Zurich Insurance Co v 686234 Ontario Ltd*, 2002 CanLII 33365, 62 OR (3d) 447 at para 34 (Ont CA), BOA tab 17, leave to appeal ref'd SCC file no 29577

[69] *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343 [Google Scholar], BOA tab 18

[70] *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343 at 1349 [Google Scholar], BOA tab 18

wrongful acts that "occurred before the policy's effective date" and that the prior acts exclusion thus barred coverage.[71]

75. Here, the Omarali Claim has an essential logical and legal connection to the alleged misclassification that occurred before March 9, 2021. There could be no claim against Just Energy (in the first instance), the Directors (in the second), or the Insurers (in the third) if there was no misclassification. All entitlements claimed depend on proving that the class members should have been classified as employees.

76. In *Zucker*, the Court also rejected the claimant's argument that coverage would be "illusory" if the prior acts exclusion applied. As the Court explained:[72]

> It is enough that the policy provided coverage for claims that arose exclusively from conduct that happened after the effective date of the policy. The Prior Acts Exclusion excludes a lot of coverage, but not all coverage. And regardless of what the result might have been had this exclusion been included in an adhesion policy issued to a layperson, it was not. The Parent Bank entered into this insurance contract with its eyes wide open and with its wallet on its mind. [Emphasis added]

77. Here, while the Prior Acts Exclusion is broad on its face—excluding claims based upon any act or and omission predating March 9, 2021—it does not render coverage illusory, as discussed above. A policyholder does not expect coverage for known loss. Rather, the Directors would have reasonably expected the Policies to respond to loss arising exclusively from acts or omissions that happen after the policy incepts and during their tenure.

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[71] *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343 at 1350–1351 [Google Scholar], BOA tab 18
[72] *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343 at 1353 [Google Scholar], BOA tab 18

78. In *Jayhawk Private Equity Fund II LP v Liberty Insurance Underwriters Inc*,[73] a coverage application, the U.S. District Court for California's Central District considered an exclusion (also in a policy issued by XL) analogous to the Prior Acts Exclusion. The claimant there alleged a claim on behalf of a class in a securities fraud class action. The insurers disputed coverage for the class action on the basis of, *inter alia*, a prior acts exclusion.

79. The Court agreed with XL that the prior acts exclusion applied, because the class action alleged false and misleading statements which were based on conduct that preceded the prior acts date of December 1, 2011 and which caused each statement to be false and misleading. The Court found that the alleged misstatements made after the prior acts date were excluded from coverage because they "perpetuated the same pre-December 1, 2011 myth that the company was financially stable and that its internal financial mechanisms were adequate". The later alleged Wrongful Acts arose out of, "or at the very least" involved, acts or omissions committed prior to that date.[74]

80. Further, in *Casualty Insurance Co v McGhan*,[75] the U.S. District Court for the District of Nevada held that a policy containing a "past acts exclusion" barred coverage. Like the Prior Acts Exclusion, the exclusion at issue was not limited to wrongful acts *of the insureds seeking coverage*—it applied to "any" wrongful act.

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[73] *Jayhawk Private Equity Fund II LP v Liberty Insurance Underwriters Inc*, 2018 US Dist LEXIS 250716 (Central District of California), BOA tab 19. The similar provision excluded coverage for claims: "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any act, error, omission, misstatement, misleading statement, neglect, breach of duty, Wrongful Act, Company Wrongful Act or Employment Wrongful Act committed or allegedly committed prior to December 1, 2011" (2018 US Dist LEXIS 250716 at *6).

[74] *Jayhawk Private Equity Fund II LP v Liberty Insurance Underwriters Inc* (2018), 2018 US Dist LEXIS 250716 (Central District of California) at *24, BOA tab 19

[75] *Carolina Casualty Insurance Co v McGhan* (2008), 2008 US Dist LEXIS 143800 (D Nevada), see esp *22–23, BOA tab 20

81. The reasoning of these cases applies to the Prior Acts Exclusion. There is a straightforward connection between any alleged liability of the Directors that arises after March 9, 2021, and the misclassification which Omarali pleads had *ended* on November 28, 2016. The exclusion applies regardless of the identity of the perpetrator of the prior act or omission.[76]

82. Simply put, any liability alleged in this CCAA proceeding by Omarali depends on events that, by his own lights, had ended more than four years before March 9, 2021. The Prior Acts Exclusion bars coverage for the Omarali Claim.

PART IV - ORDER SOUGHT

83. The Insurers respectfully request the following relief:

(a) A declaration that the Prior Acts Exclusion bars coverage for the Omarali Claim in its entirety;

(b) An order dismissing the relief sought against the Insurers in the Omarali Motion Record; and

(c) Costs of this motion on a partial indemnity scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on July 22, 2024.

[76] Consider also the recent decision of *Spinks v Lloyd's Underwriters*, 2024 ONSC 42 at paras 124–139, BOA tab 21, which dealt with a prior litigation exclusion applicable to a breach of confidentiality claim that arose after the litigation had settled.

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SCHEDULE A:
LIST OF AUTHORITIES

1. *Omarali v Just Energy Group Inc*, 2016 ONSC 4094
2. *Omarali v Just Energy Group Inc*, 2019 ONSC 3734
3. *Warehouse Drug Store Ltd (Re)*, 2006 CanLII 42802 (Ont Sup Ct J)
4. *Brown v Shearer*, 1995 CanLII 6258 (Man CA)
5. *Englefield v Wolf*, 2006 CanLII 9600 (Ont Sup Ct J)
6. *Sabean v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7
7. *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37
8. *Markham (City) v AIG Insurance Co of Canada*, 2020 ONCA 239
9. *Goodfellow v CUMIS General Insurance Co*, 2021 ONSC 3604
10. *Trillium Mutual Insurance Co v Emond*, 2023 ONCA 729
11. *Epp School District v Park (Rural Municipality)*, 1936 CanLII 151 (Sask CA)
12. *Federal Insurance Co v Raytheon Co* (2005), 426 F 3d 491 at 499 (U.S. Court of Appeals for the First Circuit)
13. *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24
14. *Lloyds Syndicate 1221 (Millennium Syndicate) v Coventree Inc*, 2012 ONCA 341
15. *Onex Corp v American Home Assurance Co*, 2013 ONCA 117 and 2015 ONCA 573
16. *Boland v Allianz Insurance Company of Canada*, 2008 ONCA 569
17. *Zurich Insurance Co v 686234 Ontario Ltd*, 2002 CanLII 33365 (Ont CA)
18. *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343 (U.S. Court of Appeals for the Eleventh Circuit)
19. *Jayhawk Private Equity Fund II LP v Liberty Insurance Underwriters Inc* (2018), 2018 US Dist LEXIS 250716 (Central District of California)

20. *Carolina Casualty Insurance Co v McGhan* (2008), 2008 US Dist LEXIS 143800 (District of Nevada)

21. *Spinks v Lloyd's Underwriters*, 2024 ONSC 42

SCHEDULE B:
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Employment Standards Act, 2000, SO 2000, c 41, s 81

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.

Employer primarily responsible

(2) Despite subsection (1), the employer is primarily responsible for an employee's wages but proceedings against the employer under this Act do not have to be exhausted before proceedings may be commenced to collect wages from directors under this Part. 2000, c. 41, s. 81 (2).

Wages

(3) The wages that directors are liable for under this Part are wages, not including termination pay and severance pay as they are provided for under this Act or an employment contract and not including amounts that are deemed to be wages under this Act.

Vacation pay

(4) The vacation pay that directors are liable for is the greater of the minimum vacation pay provided in Part XI (Vacation With Pay) and the amount contractually agreed to by the employer and the employee.

Holiday pay

(5) The amount of holiday pay that directors are liable for is the greater of the amount payable for holidays at the rate as determined under this Act and the regulations and the amount for the holidays at the rate as contractually agreed to by the employer and the employee.

Overtime wages

(6) The overtime wages that directors are liable for are the greater of the amount of overtime pay provided in Part VIII (Overtime Pay) and the amount contractually agreed to by the employer and the employee.

Directors' maximum liability

(7) The directors of an employer corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages, as described in subsection (3), 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 12 months under this Act and the regulations made under it or under any collective agreement made by the corporation.

(8) Repealed: 2017, c. 22, Sched. 1, s. 50.

Contribution from other directors

(9) A director who has satisfied a claim for wages is entitled to contribution in relation to the wages from other directors who are liable for the claim.

Limitation periods

(10) A limitation period set out in section 114 prevails over a limitation period in any other Act, unless the other Act states that it is to prevail over this Act.

***Business Corporations Act*, RSO 1990, c B.16, s 131**

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.

Limitation of liability

(2) A director is liable under subsection (1) only if,

(a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or

(b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved.

Idem

(3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Rights of director who pays debt

(4) Where a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and where a judgment has been obtained the director is entitled to an assignment of the judgment.

Idem

(5) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

Canada Business Corporations Act, RSC 1985, c C-44, s 119

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.

Conditions precedent to liability

(2) A director is not liable under subsection (1) unless

(a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.

Limitation

(3) A director, unless sued for a debt referred to in subsection (1) while a director or within two years after ceasing to be a director, is not liable under this section.

Amount due after execution

(4) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Subrogation of director

(5) A director who pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings is entitled to any priority that the employee would have been entitled to and, if a judgment has been obtained, the director is

(a) in Quebec, subrogated to the employee's rights as declared in the judgment; and

(b) elsewhere in Canada, entitled to an assignment of the judgment.

Contribution

(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 14487893 CANADA INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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