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

**FACTUM OF THE PROPOSED APPELLANT**
**(Motion for Leave to Appeal, Returnable in Writing)**

November 18, 2024

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## PART I - OVERVIEW

1. Between 2012 and 2016, Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P. ("**Just Energy**") failed to pay 7,723 sales-people in Ontario the wages and benefits that they were owed under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("**ESA**").

2. On March 9, 2021, when Just Energy became insolvent, its directors and officers became liable for those unpaid wages under statute. The respondents to this motion (the "**Insurers**") issued policies that insure Just Energy's directors and officers for liabilities arising as a consequence of that insolvency filing (the "**Policies**"). The Policies "specifically provide coverage for loss resulting from a statutory claim for unpaid wages."[1]

3. The motion below was on a single issue: does the "Prior Acts Exclusion" included in the Policies defeat coverage of the statutory unpaid wages claims of those 7,723 former Just Energy employees?

4. One question determines the coverage issue: is that exclusion, which refers to an "act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act," triggered by (1) a prior act or omission of a person or entity insured under the Policies, or (2) a prior act or omission of anyone at all?

5. No authority supports the latter interpretation, advanced by the Insurers. No Canadian court has interpreted a substantially similar exclusion, nor has any US court

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[1] Endorsement of Justice Cavanagh, dated September 20, 2024 ("**Reasons**"), at paras. 3 and 16, Motion Record of the Proposed Appellant ("**MR**"), Vol. 1, Tab 3, pp. 16 and 17.

interpreted such an exclusion to encompass anybody's acts. Regardless, the motion judge adopted that latter, broad interpretation of the Prior Acts Exclusion, barring coverage for all claims with any nexus prior to the issue date of the Policies (the date of Just Energy's insolvency), including the statutory unpaid wages claims of former employees.

6. Haidar Omarali, in his capacity as representative plaintiff of the certified class (being the 7,723 former Just Energy employees) in *Omarali v. Just Energy*, Court File No. CV-15-527493-00CP ("**the Class Action**"), seeks leave to appeal from that decision, made in the Endorsement of Justice Cavanagh, dated September 20, 2024, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**").

7. There is only one question on the proposed appeal: was the motion judge's interpretation of the Prior Acts Exclusion correct?

8. It was not. While citing the correct principles, the motion judge failed to read the exclusion in light of the Policies as a whole. And after arriving at his interpretation, he erred in applying the nullification of coverage doctrine.

9. When the Policies are considered before arriving at a reading of the exclusion, it is clear that the Prior Acts Exclusion is triggered only by the acts and omissions of insured persons and entities. In the alternative, an interpretation triggered by anyone's acts and omissions offends the nullification of coverage doctrine and cannot be given effect.

10. Leave is required for this appeal, under the CCAA. The criteria for granting leave are met. This dispute is all that remains of the CCAA proceeding: there is no action left to hinder. The appeal is *prima facie* meritorious and is of significance to 7,723 former

employees of Just Energy. It is also of significance to the practice, speaking to the ability of unpaid employees to recoup wages in insolvencies. Leave should be granted to determine these issues on a complete record.

**PART II - THE FACTS**

11. Haidar Omarali, as representative plaintiff in the Class Action, alleges that, between 2012 and 2016, Just Energy failed to pay 7,723 sales-persons in Ontario the wages and benefits that they were owed, as employees, under the ESA.[2] In November 2016, after the class action was certified, Just Energy began to pay its sales-persons wages and benefits as employees.[3] In November 2019, the Class Action was set down for a trial beginning in November 2021.[4]

12. That trial never happened. In March 2021, Just Energy faced an unexpected liquidity crisis as a "direct consequence" of "an extreme weather event that crippled the Texas Energy system" and led the Electric Reliability Council of Texas ("**ERCOT**") to issue Just Energy invoices totalling around $250 million USD, $123.23 million of which was outstanding in March 2021.[5] Of that amount, $96.24 million was to be paid by the end of March 9, with the remaining balance due March 10.[6]

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[2] Reasons, paras. 1, and 13, MR Vol. 1, Tab 3, pp. 15, 16-17.
[3] Reasons, paras. 12-13, MR Vol. 1, Tab 3, pp. 16-17.
[4] Reasons, para. 14, MR Vol 1., Tab 3, p. 17.
[5] See the Affidavit of Jamie Shilton ("**Shilton Affidavit**"), at para. 24 and Exhibit "M", MR Vol 1, Tab 6, pp. 150-151, 354-355.
[6] See Exhibit M to the Shilton Affidavit, MR Vol 1, Tab 6, pp. 354-355; and Exhibit N to the Shilton Affidavit, at paras. 8-15, MR Vol 1, Tab 6, pp. 389-392.

13. As a result, Just Energy filed for protection under the CCAA on March 9, 2021.[7] All proceedings against Just Energy, including the Class Action, were stayed on that date.

14. On the same day, the Insurers, XL Specialty Insurance Company and two excess insurers, issued the Policies: primary and excess insurance policies issued to Just Energy, providing coverage for Just Energy's directors and officers.[8] The excess policies follow the form of the primary policy in all relevant parts.[9]

15. On October 9, 2021, within the CCAA proceeding, Mr. Omarali filed a proof of claim against Just Energy's directors and officers for the unpaid wages and benefits owed to the class ("**the Claim**").[10] The Claim is a statutory one under s. 81 of the ESA; s. 119 of the *Canada Business Corporations Act*, RSC 1985, c C-44 ("**CBCA**"); and s. 131 of the *Business Corporations Act*, RSO 1990, c B.16 ("**OBCA**").

16. Just Energy restructured through a going-concern sale. As part of the approval of that sale, Just Energy sought releases for its directors and officers of all existing liabilities. Just Energy, its directors and officers, and Mr. Omarali agreed that a form of release could be granted, provided that the directors and officers' liability survived to permit the Class to pursue their statutory wage claims as against the Policies.

17. The CCAA court approved a restructuring transaction on November 3, 2022, but ordered that Just Energy and its directors and officers "are not released from the Claim to

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[7] Reasons, para. 2, MR Vol 1, Tab 3, p. 15.
[8] Reasons, para. 3, MR Vol 1, Tab 3, p. 16.
[9] Reasons, para. 16, MR Vol 1, Tab 3, p. 17.
[10] Reasons, para. 5, MR Vol 1, Tab 3, p. 16.

the limited extent of maintaining claims against insurance policies that may be available to pay insured claims."[11] That Order allowed the Claim to proceed as against the Insurers, only. The Court noted that this was a "fair and reasonable" procedure.[12]

18. The Claim is now all that remains of the CCAA proceeding: the reverse vesting order, made on November 3, 2022, has already taken effect.[13] The Claim, which is not delaying restructuring in this case, is now the only means by which the Class can seek the payment of the unpaid wages that they are owed under the ESA, through the statutory liability specifically created in the ESA, OBCA, and CBCA. If coverage is barred, those unpaid wages will never be recovered.

**A. Reasons of Cavanagh J.**

19. Mr. Omarali brought a motion, on August 25, 2023, seeking an order directing the Insurers to pay the unpaid wages and benefits owed to the Class under the Policies.[14] In response, the Insurers brought a motion, on June 10, 2024, asking the court to declare that the Prior Acts Exclusion in the Policies bars coverage of the Claim.

20. The Insurers' motion was heard on September 9, 2024. On September 20, 2024, the motion judge granted the Insurers' motion, declared that the Prior Acts Exclusion bars coverage of the Claim, and denied the relief sought by Mr. Omarali on behalf of the Class.

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[11] Reasons, para. 6, MR Vol 1, Tab 3, p. 16 (emphasis added).
[12] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354, at para. 67.
[13] Notice of Motion of the Monitor, dated August 30, 2024, at paras. 4-6, MR Vol. 3, Tab 8, p. 1498.
[14] Reasons at para. 7, MR Vol 1, Tab 3, p. 16.

21. The motion judge describes many of the pertinent parts of the Policies in his reasons. The Policies are claims-made policies.[15] They provide coverage to Just Energy's directors and officers for claims made from March 9, 2021, the date of Just Energy's insolvency, until Just Energy's "[e]mergence from bankruptcy."[16] The Policies take the form of standard form policies, amended by a series of endorsements.[17]

22. As the motion judge repeatedly found, "[t]he Policies specifically provide coverage for loss resulting from a statutory claim for unpaid wages."[18]

23. The sole insuring agreement in the Policies states:

> In consideration of the payment of the premium, and in reliance on all statements made and information furnished to the Insurer identified in the Declarations (hereinafter the "Insurer"), including the Application, and subject to all of the terms, conditions and limitations of all of the provisions of this Policy, the Insurer, the Insured Persons, and the Company agree as follows:
>
> I. INSURING AGREEMENTS
>
> (A) The Insurer shall pay on behalf of the **Insured Persons Loss** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period** for a **Wrongful Act,** except for **Loss** which the **Company** is permitted or required to pay on behalf of the **Insured Persons** as indemnification.[19]

24. Within that agreement, "Insured Persons" "means 'any past, present or future natural person director or officer' of Just Energy and those persons serving in a

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[15] Reasons at para. 24, MR Vol 1, Tab 3, p. 18.
[16] Reasons, para. 3 and para. 24, MR Vol 1, Tab 3, p. 16 and 18, and see Policy ELU173707-21 (the "**XL Policy**"), Declarations and Endorsement 6, MR Vol 3, Tab 7, pp. 1411 and 1420.
[17] Reasons at para. 25, MR Vol 1, Tab 3, p. 19.
[18] Reasons at paras. 3, 16, and 29, MR Vol 1, Tab 3, pp. 16, 17 and 19.
[19] Reasons at paras. 25 and 26, MR Vol 1, Tab 3, p. 19, and see XL Policy, Endorsement No. 4 and I(A), MR Vol 3, Tab 7, pp. 1416 and 1422.

functionally equivalent role…".[20] The motion judge directly addressed the application of Insuring Agreement (A) to statutory claims for unpaid wages:

> The term "Loss" to which Insuring Agreement (A) applies is defined to "specifically include ... salary, wages and related amounts such as vacation pay or holiday pay that are or were payable by the Company to an employee for services performed if an **Insured Person** has become personally liable to make such payment under any applicable federal, provincial, territorial or municipal statutory provision; that an **Insured Person** is obligated to pay if such ... payments are ... imposed in connection with such **Insured Person's** service with an insolvent **Company;".**
>
> I accept Mr. Omarali's submission that the risks covered for the D&Os during Just Energy's insolvency specifically include the risk of statutory claims brought against the D&Os for wages that were not paid by Just Energy. This is the basis in the Policies for an initial grant of coverage for Mr. Omarali's claim.[21]

25. After accepting that the Policies "specifically" cover "statutory claim[s] for unpaid wages," the motion judge considered the "true nature" of the Claim, finding:

> The Claim is a statutory claim by class members against the D&Os for unpaid wages where their employer, Just Energy, failed to pay these wages during 2012 to 2016. The insolvency of Just Energy is the precipitating event for the Claim against the D&Os. Mr. Omarali accepts that the Claim arises from Just Energy's failure to pay class members' wages under the *Employment Standards Act*.[22]

26. The Insurers argued that, assuming the Claim is covered, coverage is barred by the Prior Acts Exclusion, an Endorsement to the Policies that states:

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

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[20] Reasons, at para. 27, MR Vol 1, Tab 3, p. 19, and see XL Policy, II(J), MR Vol 3, Tab 7, p. 1424.
[21] Reasons at paras. 28-29, MR Vol 1, Tab 3, p. 19 (emphasis added), and see XL Policy, II (O)(1)(b)(iii), MR Vol 3, Tab 7, pp. 1425-1426.
[22] Reasons at para. 34, MR Vol 1, Tab 3, p. 20.

All other, conditions and limitations of this Policy shall remain unchanged.[23]

27. The sole issue on the Insurers' motion was "[t]he interpretation of this endorsement."[24] Two competing interpretations were advanced:

> (a) Mr. Omarali argued that, when the Prior Acts Exclusion is read in the context of the Policies as a whole and the surrounding circumstances, it must be read as referring to "any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed" by a person or entity insured under the Policies.[25]
>
> (b) The Insurers argued, instead, that the Prior Acts Exclusion should be read as referring to "any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act" that is "committed or allegedly committed by anyone."[26]

28. Under Mr. Omarali's interpretation, the Prior Acts Exclusion does not bar coverage of the Claim. As the motion judge acknowledged, "the Claim arises from Just Energy's failure to pay class members' wages."[27] Just Energy is not an insured under the Policies: Just Energy, or "the Company" was explicitly removed from the definition of the "Insured" in the Insurance Policies.[28] Just Energy's failure to pay wages is not an "act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act" of an entity insured under the Policies. The exclusion is not triggered.

29. The Prior Acts Exclusion only bars coverage for the Claim when it is read very broadly: as triggered by "any act, error, omission, misstatement, misleading statement,

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[23] Reasons at para. 32, MR Vol 1, Tab 3, p. 20, and see XL Policy, Endorsement No. 3, MR Vol 3, Tab 7, p. 1415.
[24] Reasons at para. 4, MR Vol 1, Tab 3, p. 16.
[25] Reasons, at para. 40, MR Vol 1, Tab 3, p. 21.
[26] Reasons, at para. 40, MR Vol 1, Tab 3, p. 21.
[27] Reasons, at para. 34, MR Vol 1, Tab 3, p. 20.
[28] XL Policy, II(I) and Endorsement No. 4 (6), MR, Vol 3, Tab 7, p. 1416 and 1424.

neglect, breach of duty or Wrongful Act committed or allegedly committed" by anyone.

The motion judge accepted that broad reading. He did so in error

30. In his endorsement, the motion judge correctly set out some of the applicable principles that govern the interpretation of the Prior Acts Exclusion:

> (a) "[T]he court should give effect to clear language, reading the contract as a whole."[29]
>
> (b) "[E]xclusions should be read in light of the initial grant of coverage."[30]
>
> (c) "The terms of the policy must be examined in light of the surrounding circumstances… The factual matrix is gleaned from the context of the transaction and extends to the genesis of the policy, its purpose, and the commercial context in which the policy was made."[31]
>
> (d) "Even a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy."[32]

31. Despite setting out these principles correctly, the motion judge erred in applying them. He failed to read the language of the Prior Acts Exclusion in the context of the policy as a whole, the initial grant of coverage, and the commercial context. And he erred in applying the nullification of coverage doctrine by presuming – in applying that doctrine – the very limit on coverage that the doctrine should have been used to test.

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[29] Reasons, para. 19, MR Vol 1, Tab 3, p. 17, quoting *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 22-24 ("***Progressive Homes***").
[30] Reasons, para. 22, MR Vol 1, Tab 3, p. 18, citing *Progressive Homes*, at paras. 26-28.
[31] Reasons, para. 20, MR Vol 1, Tab 3, p. 18, citing *Onex Corporation v. American Home Assurance Company*, 2013 ONCA 117, at paras. 102-105, citing *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, at paras. 27-30.
[32] Reasons, para. 21, MR Vol 1, Tab 3, p. 18, citing *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729, at para. 41, citing *Sam's Auto Wrecking Co. Ltd. v. Lombard General Insurance Company of Canada*, 2013 ONCA 186, at para. 37.

32. These errors led the motion judge to side with the Insurers, finding that the Prior Acts Exclusion is triggered by any "act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed" by anyone, prior to March 9, 2021. That conclusion – which bars coverage of the claims of the Class – was unprecedented and is incorrect.

33. The proposed appeal provides this court an opportunity to consider the proper interpretation of the Prior Acts Exclusion, and to correct the motion judge's errors.

## PART III - QUESTIONS ON PROPOSED APPEAL

34. There is only one question on the proposed appeal: was the motion judge's interpretation of the Prior Acts Exclusion correct?

## PART IV - ISSUES, LAW AND ARGUMENT

35. A correctness standard applies. As the Supreme Court of Canada found in *Ledcor*:

> Where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.[33]

36. The Policies, including the Prior Acts Exclusion, are standard form. As demonstrated by US caselaw relied upon by the Insurers before the motion judge, the language of the exclusion has been adopted in other policies of the same insurer, XL

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[33] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, at para. 24 ("***Ledcor***").

Specialty Insurance.[34] The wording of the Prior Acts Exclusion will likely come before Canadian courts again, particularly given the very broad interpretation it was given below.

37. As this court has observed, "[i]t is untenable for standard form insurance policy wording to be given one meaning by one trial judge and another by a different trial judge."[35] This court should consider the language of the Prior Acts Exclusion and arrive at the correct interpretation.

38. Here, there is no "meaningful factual matrix that is specific to the parties to assist the interpretation process."[36] The only factual matrix that the motion judge referred to, and that is relevant, is a general one: the context of a policy covering directors and officers during CCAA proceedings. The exercise of interpreting the provision in that context is precedential – only strengthening the need for correctness review.

39. Applying *Ledcor*, the applicable standard of review on the proposed appeal is correctness. The motion judge's interpretation of the Prior Acts Exclusion is incorrect. His unprecedently broad interpretation arises from two key errors:

> (a) The motion judge determined the "clear language" of the exclusion before comparing that "clear language" to the policy as a whole, the initial grant of coverage and the commercial context, instead of reading the exclusion itself in light of these elements, as the jurisprudence requires; and
>
> (b) In applying the nullification of coverage doctrine, the motion judge gave effect to his own interpretation in defining the coverage provided, rendering his conclusion – that the exclusion did not nullify coverage – circular.

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[34] *Jayhawk Private Equity Fund II LP v. Liberty Insurance Underwriters Inc.*, 2018 US Dist LEXIS 250716 (Central District of California), p. 4, Abbreviated Book of Authorities, Tab 1.
[35] *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, at para. 40.
[36] *Ledcor*, at para. 24.

40. By making these errors, the motion judge short-circuited the very analysis he was obliged to conduct. He assumed the meaning of the exclusion in reading the policy as a whole. And he assumed the effectiveness of that exclusion in applying the nullification of coverage doctrine. These errors require consideration and correction by this court.

41. While leave is, ordinarily, "sparingly granted" in CCAA proceedings, granting leave is more than justified in this case. The motion judge's interpretation is incorrect and leaves 7,723 former Just Energy employees without recourse. No deference is owed to the motion judge's erroneous interpretation. And hearing the appeal will not delay the restructuring of Just Energy or affect the rights of other parties to the CCAA proceeding. Granting leave is the only appropriate option, in the circumstances.

## A. Leave Test for Decisions under the CCAA

42. The circumstances of this leave application are unusual, but may arise again in future cases. While the underlying motion was heard under the CCAA, and leave is therefore required, the order of the motion judge is final and disposes of statutory relief that might otherwise be available to thousands of former Just Energy employees.

43. In addressing whether leave should be granted, the court should consider whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.[37]

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[37] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at para. 23, citing *Nortel Networks Corp (Re)*, 2016 ONCA 332, at para. 34.

44. Ordinarily, leave to appeal from an Order under the CCAA "is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties."[38]

45. As set out below, the appeal is *prima facie* meritorious and its significance to Mr. Omarali and the Class is clear. The only parties whose interests are directly affected, at this stage, are the Class and the Insurers: hearing the appeal will not delay the granting of relief to any other party in the CCAA proceeding or have any knock-on effect on the interests of other parties to the CCAA proceeding, the restructuring transaction in this case already having been approved and put into effect.

46. While the test is easily met, as set out below, the particular facts of this case also call for a permissive approach to leave. In *Laurentian University of Sudbury (Re)*, this court describes the "cautious approach" to granting leave (the test set out above) as a "function of several factors":

> (a) First, the high degree of deference owed to discretionary decisions made by CCAA judges.[39] The decision in this case is not discretionary. A correctness standard applies and no deference is owed.
>
> (b) Second, the dynamic nature of CCAA proceedings and the need to balance various interests. That dynamism has passed in this case: only the claim of Mr. Omarali and the Class against the Insurers survives, and its outcome will not affect any other parties to the CCAA proceeding.[40]
>
> (c) Third, that CCAA restructurings can be time sensitive. In this case, a reverse vesting order has already taken affect. The appeal will not prevent or delay "a successful restructuring."[41]

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[38] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at para. 19.
[39] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at para. 20.
[40] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at para. 21.
[41] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at para. 22.

## B. The Appeal is *Prima Facie* Meritorious

47. The proposed appeal has merit and should be heard by this Court. The motion judge erred in both his interpretation of the Prior Acts Exclusion, and his application of the nullification of coverage doctrine.

48. He erred, first, by failing to read the Prior Acts Exclusion in light of the Policies as a whole, the initial grant of coverage, and the commercial context. The only reading available in light of the Policies as a whole, the initial grant of coverage, and the commercial context is Mr. Omarali's, which limits the Prior Acts Exclusion to the acts and omissions of those insured under the Policies.

49. Second, and in the alternative, if the motion judge was correct in reading the Prior Acts Exclusion as applying to the acts and omissions of "anyone", he erred in applying the nullification of coverage doctrine. When that doctrine is properly applied, the Insurer's interpretation of the Prior Acts Exclusion would "render nugatory the coverage for the most obvious risks for which the policies were issued," and must be rejected.[42]

### i. Failure to Read the Exclusion in Light of the Policy and Commercial Context

50. The "primary interpretive principle" applicable in this case requires a motion judge to read the "contract as a whole" in interpreting any single term. The motion judge was obliged to read the Prior Acts Exclusion "in light of the initial grant of coverage,"

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[42] *Cabell v. The Personal Insurance Company*, 2011 ONCA 105, at para. 26, ("***Cabell***"), quoting *Foodpro National Inc. v. General Accident Assurance Co. of Canada*, 1988 CanLII 4739 (Ont. C.A.).

before arriving at an interpretation. The motion judge did not do so: he settled on a "clear" meaning of the Prior Acts Exclusion, and then – having accepted that "clear" meaning – restricted the meaning of the balance of the Policies, and created redundancy, in order to reconcile the two.

51. While the motion judge averted to several applicable interpretive principles in his reasons, he ignored a principle put to him by both parties: that, in interpreting a contract, a court must strive to avoid redundancy. As this court has made clear, the court "should strive to give meaning to the agreement and 'reject an interpretation that would render one of its terms ineffective'."[43] Instead, "the governing principles oblige the court to give effect to the terms of the insurance contract read as a whole."[44]

52. The Prior Acts Exclusion itself states, "[a]ll other terms, conditions and limitations of this Policy shall remain unchanged."[45] However, as the motion judge acknowledges in his reasons, the meaning that he gave the Prior Acts Exclusion categorically changed both the scope and effect of several other terms, all but robbing those terms of their meaning:

> (a) Coverage specifically provided for statutory claims for unpaid wages is reduced to coverage for statutory claims for unpaid wages owed for employment during the insolvency period. This coverage does not just become unavailable in certain discrete circumstances: it is categorically changed.[46]
>
> (b) Coverage provided to a "past… director or officer" is reduced to coverage for those who, during the insolvency period, become past directors, that is – those who serve as directors during the insolvency period and cease to be directors

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[43] *Kahlon v. ACE INA Insurance*, 2019 ONCA 774, at para. 61.
[44] *Kahlon v. ACE INA Insurance*, 2019 ONCA 774, at para. 62.
[45] Reasons at para. 32, MR Vol 1, Tab 3, p. 20; XL Policy, Endorsement 3, MR Vol 3, Tab 7, p. 1415.
[46] Reasons at para. 41-42, MR Vol 1, Tab 3, p. 21-22.

during that period. Coverage is not simply limited in discrete circumstances, an entire category of insureds cease to be covered. That is a categorical change.[47]

(c) Two other exclusions in the Policies, the "Prior/Pending Litigation Exclusion" and the "Prior Notice Exclusion" became meaningless, subsumed entirely within the scope of the Prior Acts Exclusion.[48] The result is not simply that these exclusions "may overlap."[49] The other exclusions are left with "no work to do": there is no circumstance where those exclusions will apply without the Prior Acts Exclusion also applying.

53. The motion judge accepted an interpretation of the Prior Acts Exclusion that categorically changed the coverage available to past directors and for past unpaid wages, and that rendered two exclusions ineffective. His interpretation cuts vast swathes of redundancy through the policy.

54. This might be unavoidable, were it the case that – when the policy is read as a whole – the Prior Acts Exclusion can only be read as triggered by anyone's acts or omissions. But that is not the case: an alternative and more plausible interpretation is suggested by the Policy itself. That interpretation is apparent in considering the Policies as a whole and the commercial context:

(a) The Policies are claims-made and cover the period of Just Energy's insolvency;

(b) The initial grant of coverage specifically extends to statutory claims for unpaid wages that insureds "become personally liable" to pay "under any… statutory provision";[50]

(c) Outstanding claims for unpaid wages, accrued prior (often immediately prior) to the commencement of CCAA proceedings, are a common feature of insolvency proceedings; and

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[47] Reasons at paras. 44-45, MR Vol 1, Tab 3, p. 22.
[48] Reasons, paras. 46-48, MR Vol 1, Tab 3, pp. 22-23; and see XL Policy, III(B)(1) and (2), MR Vol 3, Tab 7, p. 1429.
[49] Reasons, para. 48, MR Vol 1, Tab 3, p. 23.
[50] XL Policy, II (O)(1)(b)(iii), MR Vol 3, Tab 7, pp. 1425-1426.

(d) Upon insolvency, the directors and officers of the insolvent corporation become personally liable for those unpaid wages pursuant to s. 81 of the ESA, s. 119 of the CBCA, and s. 131 of the OBCA.

55. Given the immediate insolvency context, in which the Policies are intended to operate, and the specific coverage of statutory claims for unpaid wages, the more plausible reading is one that does not categorically bar those claims. Such a reading is available on the words of the Prior Acts Exclusion: a reading that imports an implicit but important limit, triggered only by the acts and omissions of a person or entity insured under the Policies.

56. That limit is revealed in the words of the Policies themselves. Both the prior/pending litigation exclusion and the prior notice exclusion use the phrase "any fact, circumstance, situation, transaction, [or] event" to describe the circumstances that – if alleged in litigation against an Insured or subject to notice under a prior policy – result in an exclusion.[51]

57. If the words of the Prior Acts Exclusion are read as triggered by any act or omission of anyone (no matter how distant that person might be from the Policies), then "any fact, circumstance, situation, transaction [or] event" will trigger the Prior Acts Exclusion, as any such circumstance will necessarily in some way involve some person or entity's past acts or omissions.[52]

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[51] XL Policy, III(B)(1) and (2), MR Vol 3, Tab 7, p. 1429.

[52] The Prior Acts Exclusion bars claims "in any way involving any act, error, omission, misstatement, misleading statement, neglect breach of duty or Wrongful Act," Reasons, para. 32, MR Vol 1, Tab 3, p. 32; XL Policy, Endorsement 3, MR Vol 3, Tab 7, p. 1415.

58. Under the motion judge's interpretation, then, no meaning is given to the difference in language between "any fact, circumstance, situation, transaction [or] event" and "any act, error, omission, misstatement, misleading statement, neglect breach of duty or Wrongful Act." They are forced to mean the same thing.

59. The motion judge all but recognized this – accepting that the interpretation he adopted eliminated all pre-insolvency liability, insuring "only for the going forward, post-insolvency, risk."[53]

60. However, the difference between these terms, itself, suggests that each bears a different meaning. This court can assume that, had the drafters of the Policies intended the same meaning and effect, they would have used the same language. They did not.

61. Acts, errors, omissions, statements, and breaches of duties all belong to someone: they are tied to an agent. Facts, circumstances, situations, transactions and event need not be. The language of the Prior Acts Exclusion suggests a connection to some agent or actor.

62. The Prior Acts Exclusion begs the question "Whose acts?" where the prior notice and prior/pending litigation exclusions do not. Once that is recognized, the exclusion is most reasonably read as triggered by the very same acts and omissions that give rise to claims under the Policies: the acts and omissions of those insured under the Policies. Those are the relevant acts and omissions in the context of the Policies as a whole.

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[53] Reasons, para. 54, MR Vol 1, Tab 3, p. 24.

63. On this reading, the Prior Notice and Prior/Pending Litigation exclusions are no longer subsumed by the Prior Acts Exclusion. For each exclusion, circumstances can be contemplated in which only that exclusion applies:

> (a) The Prior Notice exclusion will apply where a prior event, giving rise to a claim, did not involve an act or omission of an insured, notice was given under a similar policy, but no litigation was commenced;
>
> (b) The Prior/Pending Litigation exclusion will apply where a prior event, giving rise to a claim, did not involve an act or omission of an insured and no notice was given under a similar policy but litigation was commenced against an insured; and
>
> (c) The Prior Acts Exclusion will apply where the prior acts or omissions of an insured gave rise to a claim, no notice was given under a similar policy, and no litigation was commenced against an insured.

64. This reading of the exclusion makes sense of the Prior Acts Exclusion and the Policies as a whole in a manner that the reading adopted by the motion judge does not. Past directors – i.e. those who were directors prior to the policy period – remain covered so long as the claim at issue does not relate to their own past acts or omissions, or those of another insured. Statutory claims for prior unpaid wages remain covered so long as those claims do not relate to the past acts or omissions of an insured. And each exclusion has its own independent meaning and role.

65. This being the case, how did the motion judge come to accept a different meaning? The answer is clear on the face of his reasons: instead of reading the exclusion in the context of the policy as a whole, he accepted a "clear and unambiguous" meaning of the exclusion, and then limited the meaning of the rest of the Policies in order to reconcile the Policies with his reading of the Prior Acts Exclusion.

66. The motion judge's reasons demonstrate that he first accepted a "clear" reading of the exclusion in isolation, before turning to the Policies as a whole and the commercial context. For both past directors and statutory claims for unpaid wages, the motion judge asked whether – accepting the Insurer's interpretation – some coverage was still provided, instead of considering what import these areas of coverage might have in arriving at the correct reading of the Prior Acts Exclusion.[54]

67. In considering the other exclusions, the motion judge asked whether these exclusions defeated the interpretation he had already adopted, rather than considering what light these exclusions might shed on how the Prior Acts Exclusion should be read:

> I do not regard the fact that there are two exclusions in the Policies that may overlap with the Prior Acts Exclusion… as a reason not to give effect to the clear language of the Prior Acts Exclusion.
>
> …
>
> The words used in the Prior Acts Exclusion are broad and it is not necessary for this exclusion to track the broad language of another exclusion for it to be given effect, especially where the language is clear and unambiguous.[55]

68. Put simply, the motion judge failed to move beyond the interpretation of the exclusion that he found most compelling when looking at the words of the exclusion alone. This is not what the Supreme Court demanded in stating: "Exclusions, should, however, be read in light of the initial grant of coverage."[56] This court should not make the same mistake and should not allow this error to go uncorrected.

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[54] See Reasons, paras. 39-50, MR Vol 1, Tab 3, pp. 21-23.
[55] Reasons, paras. 48, 50, MR Vol 1, Tab 3, p. 23.
[56] *Progressive Homes*, at para. 27.

69. A court cannot identify the meaning of an exclusion's "clear language" without regard for the policy and context.[57] Exclusions – ambiguous or unambiguous – cannot first be read in isolation before considering that context: they must be "read in light of the initial grant of coverage," and interpreted by "reading the insurance policy as a whole."[58] The "plain meaning" of an exclusion does not exist in the abstract: it must be a meaning that "is consistent with reading the policy as a whole."[59]

70. The interpretation of the Prior Acts Exclusion that the motion judge adopted transformed these Policies from providing broad coverage to directors and officers of an insolvent company during that company's insolvency, to narrowly covering any liability of the directors and officers that arises – in its entirety and without any relationship to any prior event – during the period of insolvency. As a consequence of the motion judge's interpretation, any claim arising from the insolvency itself would be barred, as the insolvency was a "direct consequence" of ERCOT's actions after the Texas winter storm.

71. The more plausible interpretation of the Prior Acts Exclusion, when read in the context of the initial grant of coverage and the Policies as a whole, is that it excludes coverage where a claim – while arising at or post-insolvency – relates to the pre-insolvency acts or omissions of a person or entity insured under the Policies. That is the interpretation suggested by the initial grant of coverage itself. That is the interpretation that preserves the most meaning and creates the least redundancy in the Policy as a whole.

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[57] Reasons, para. 48, MR Vol 1, Tab 3, p. 23.
[58] *Progressive Homes*, at paras. 27-28 and 37; and see *Ledcor*, at para. 49.
[59] *Progressive Homes*, para. 37.

And that interpretation, which does not bar coverage of the Claim, is the one that the motion judge ought to have adopted, an error that this court should correct on appeal.

### ii. Circular Application of the Nullification of Coverage Doctrine

72. In the alternative, if the motion judge was correct in the "clear and unambiguous" interpretation he adopted, he erred by misapplying the nullification of coverage doctrine. In the words of this court, that doctrine "is an independent doctrine that applies even in the absence of an ambiguity."[60]

73. As the motion judge recognized, "[e]ven a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy."[61] The nullification of coverage doctrine gives effect to the principle that "the construction given to a policy of insurance must not nullify the purpose for which the insurance was sold."[62]

74. Under the nullification of coverage doctrine, a court should not give effect to an interpretation of a clause in an insurance policy that would, in the words of this court, "render nugatory the coverage for the most obvious risks for which the policies were issued."[63] Evidence about the reasonable expectations of the parties is not needed to invoke the nullification of coverage doctrine.[64]

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[60] *Cabell*, at para. 17.
[61] Reasons, para. 21, MR Vol 1, Tab 3, p. 18.
[62] *Cabell*, at para. 16, quoting *Amos v. Insurance Corp. or British Columbia*, [1995] S.C.R. 405, at para. 16.
[63] *Cabell*, at para. 26.
[64] *Cabell*, at para. 25.

75. On the motion, Mr. Omarali argued that "the most obvious risks for which the policies were issued" were risks of personal liability, for the directors and officers, occasioned by Just Energy's insolvency. The motion judge did not appear to reject that framing – to the contrary, he accepted the relevance of the CCAA context,[65] and stated:

> The protection that the D&Os would reasonably need for them to serve during the period of Just Energy's insolvency would be for their exposure to risk of liability during this period of insolvency.[66]

76. Liability for pre-filing wage claims is one of the most common risks for directors; it is a live issue in any insolvency. The motion judge's reading would exclude coverage even for claims for wages payable to current employees at the time CCAA proceedings were commenced. Outstanding wages and benefits owed to current employees are a common feature of insolvency proceedings.

77. The risk of statutory claims for prior unpaid wages was among "the most obvious risks" for which the insurance was issued. A policy that did not cover statutory liability that arises upon the company's insolvency, would not cover the directors and officers "exposure to risk of liability during this period of insolvency."

78. This limit was clear in the motion judge's interpretation. He acknowledged that his interpretation eliminated all pre-insolvency liability, insuring "only for the going forward, post-insolvency, risk."[67] That interpretation bars coverage for any claims that arise from the insolvency itself, because those would be claims "indirectly resulting from" ERCOT's actions, in response to the Texas winter storm, which plunged Just Energy into

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[65] Reasons at para. 59, MR Vol 1, Tab 3, p. 25.
[66] Reasons, at para. 57, MR Vol 1, Tab 3, p. 24.
[67] Reasons, para. 54, MR Vol 1, Tab 3, p. 24.

its liquidity crisis. Such a policy cannot provide "[t]he protection that the D&Os would reasonably need for them to serve during the period of Just Energy's insolvency."[68]

79. Why, then, did the motion judge find that the nullification of coverage doctrine did not apply? The answer lies in the final paragraphs of his reasons:

> When the language of the Prior Acts Exclusion Policies, read in the context of the Policies as a whole and having regard to surrounding circumstances, is given its clear and unambiguous meaning, it is clear that protection of D&Os for their post-filing liability during Just Energy's insolvency is the main purpose of the insurance coverage provided by the Policies. The interpretation of the Prior Acts Exclusion advanced by the Insurers is not inconsistent with this purpose of insurance coverage. Given this main purpose of the insurance coverage, it would not be contrary to the reasonable expectations of the ordinary person as to the coverage purchased to exclude coverage for loss resulting from claims based upon or arising out of any act or omission, committed by anyone, prior to Just Energy's filing for protection under the *CCAA* on March 9, 2021.
>
> I conclude that the nullification of coverage doctrine does not apply to preclude the application of the Prior Acts Exclusion to bar the Claim. [69]

80. In the motion judge's own words, "[e]ven a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy."[70] However, in applying this principle, as shown in the quote above, the motion judge gave effect to his reading of the exclusion in order to define the coverage provided by the policy. This rendered his application of the nullification of coverage doctrine circular.

81. Instead, the motion judge should have considered the purpose of the Policies without regard for what he had found to be the "clear and unambiguous" meaning of the exclusion. That is, as the motion judge found, providing the directors and officers the

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[68] Reasons, para. 57, MR Vol 1, Tab 3, p. 24.
[69] Reasons, paras. 64-65, MR Vol 1, Tab 3, pp. 25-26 (emphasis added).
[70] Reasons, para. 21, MR Vol 1, Tab 3, p. 18.

protection they "would reasonably need… to serve during the period of Just Energy's insolvency" given "their exposure to risk of liability during this period of insolvency."[71]

82. The Insurers issued Just Energy a standard form directors and officers' liability policy, in the context of – and to cover the period of – Just Energy's insolvency. The Prior Acts Exclusion must be read in the context of that coverage and can only be given effect if it does not nullify that coverage. "Loss" in the policies could have been defined to eliminate statutory claims for unpaid wages accrued pre-filing, or to eliminate all claims with a nexus in the pre-filing past. Not having done so, the nullification of coverage doctrine prevents the Insurers from relying on an exclusion to nullify coverage for the very risks for which the Policies were issued.

83. In this case, statutory claims for unpaid wages accrued prior to the insolvency were not an abstract risk. The Class Action had been brought and certified. It was known that liability for the unpaid wages owed to the Class would transfer to Just Energy's directors and officers upon Just Energy's insolvency. The Claim itself was among the most obvious risks that Just Energy's directors and officers faced. The Claim could have been specifically excluded from the scope of coverage: it was not. Nor is it covered by the Prior/Pending Litigation exclusion, which only excludes claims where litigation was previously brought against an Insured (none of the named defendants in the Class Action are Insureds under the Policies).

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[71] Reasons, para. 57, MR Vol 1, Tab 3, p. 24.

84. Even if the motion judge were correct in finding that the clear and plausible reading of the Prior Acts Exclusion bars coverage of the Claim, that reading offends the nullification of coverage doctrine and "should not be given effect."

### C. The Test for Granting Leave to Appeal is Met

85. As noted above, the factors that motivate a stringent application of the leave test on CCAA motions are absent in this case: no deference is owed as a correctness standard applies to the only question on the appeal; there are no third-party interests to be balanced beyond those of the Class and the Insurers; and the hearing of this appeal will not delay the restructuring in this case, which has already taken place.[72]

86. In any event, the test for granting leave in a CCAA proceeding is met. This appeal is, as set out in detail above, *prima facie* meritorious. The points on the appeal, which centre on the interplay of CCAA proceedings, statutory claims for unpaid wages, and the standard form insurance policies regularly provided to directors and officers of insolvent companies, are of significance to the practice.

87. In particular, this appeal provides this court an opportunity to consider how the right to recover unpaid wages from directors and officers, specifically and intentionally made available to current and former employees of insolvent companies under multiple statutes, operates within CCAA proceedings. That question is of paramount importance,

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[72] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at paras. 19-22.

given the legislative choice, repeated across multiple statutes, to protect employees' recourse in insolvency.[73]

88. The appeal is of significant interest to the profession at large – especially the insolvency, employment and insurance bars – as it bears on the manner in which statutory wage claims should be dealt with during an insolvency. The motion judge's decision, which betrays an unwillingness to entertain interpretations that maintain coverage for unpaid wages, risks prompting employees to oppose restructuring transactions that release directors and officers.

89. If the motion judge's decision stands, and generally worded exclusions are held capable of nullifying specific coverage for statutory unpaid wages claims, future litigants will not, as Mr. Omarali did in this case, agree to rely upon insurance policies and not oppose the release of directors and officers. This could prompt requests to determine insurance coverage before directors and officers are released in CCAA proceedings, to avoid the outcome in this case, where, the directors and officers having been released, there is no further recourse for the Class. If this outcome is indeed inevitable, the authoritative final word should come from this court.

90. The points in this appeal are also of significance to the immediate parties, and the Class. Mr. Omarali and the 7,723 members of the Class are owed unpaid wages and benefits for four years of their labour. If the proposed appeal is not heard, they will never receive those wages and benefits. If, under the Policies, the Claim should be paid, then this appeal must be heard, so as not to leave the Class without a remedy. The Class should

[73] Section 81 of the ESA; Section 119 of the CBCA; and Section 131 of the OBCA.

be granted the ability to have their day in court on this appeal with a complete record before their claims are dismissed outright.

91. Finally, hearing this appeal will not "unduly hinder the progress of the action."[74] The restructuring transaction was ordered on November 3, 2022.[75] The transaction closed on December 16, 2022, and that order took effect.[76] In the words of the Monitor, "most of the Original Applicants have now exited the CCAA Proceedings."[77]

92. Other than the Claim, very little remains of the CCAA Proceeding. The Monitor, in its Seventeenth Report, describes the remaining activities as consisting of a Barbados court placing a Barbadian entity into bankruptcy (a proceeding for which no date has yet been fixed), and the resolution of this Claim.[78] When both are resolved, all that will remain is a motion to terminate the CCAA Proceeding and discharge the Monitor, and the wind down of the residual corporation that is the applicant in the CCAA Proceeding.[79]

93. There is no other entity or proceeding left to be impacted by the hearing of the appeal regarding this Claim, which is a Claim against the Insurance Policies alone. There can be no substantive future impact on the CCAA Proceeding or any third party.

94. At this stage, the Stay of Proceedings has been extended until January 31, 2025 (a stay that the Monitor itself stated would not materially prejudice any creditor of the Remaining Entities). Extending the stay further, in response to this court granting leave,

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[74] *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at para. 23(d).
[75] Approval and Vesting Order, dated November 3, 2022, MR Vol 1, Tab 4.
[76] Seventeenth Report of the Monitor, para. 7, MR Vol 3, Tab 8, p. 1509.
[77] Seventeenth Report of the Monitor, para. 8, MR Vol 3, Tab 8, p. 1509.
[78] Seventeenth Report of the Monitor, paras. 26-28, MR Vol 3, Tab 8, pp. 1513-1514.
[79] Seventeenth Report of the Monitor, para. 29, MR Vol 3, Tab 8, p. 1514.

would delay only the remaining administrative steps and would cause the Monitor to incur only modest administrative expenses. A significant amount remains in the Administrative Reserve.[80]

95. There is no progress in this CCAA proceeding left to hinder. Given that no date is set for the bankruptcy proceeding in Barbados, hearing this appeal may cause no delay at all. In any event, the delay of final administrative steps in this proceeding, steps that do not affect any party's interests, is insignificant when balanced against the interests of 7,723 Class Members in recovering the unpaid wages that they are owed.

96. This appeal has significant merit. The motion judge's erroneous interpretation of the Policies at issue has left the Class without recourse. Leave must be granted in this case, in order that the Class Members be paid the wages they are owed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2024.

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[80] The balance was approximately $795,000 on August 29, 2024: Seventeenth Report of the Monitor, para. 21, MR Vol 3, Tab 8, p. 1512.

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

1. *Amos v. Insurance Corp. or British Columbia*, [1995] S.C.R. 405.
2. *Cabell v. The Personal Insurance Company*, 2011 ONCA 105.
3. *Foodpro National Inc. v. General Accident Assurance Co. of Canada*, 1988 CanLII 4739 (Ont. C.A.).
4. *Jayhawk Private Equity Fund II LP v. Liberty Insurance Underwriters Inc.*, 2018 US Dist LEXIS 250716 (Central District of California), p. 4.
5. *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21.
6. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354.
7. *Kahlon v. ACE INA Insurance*, 2019 ONCA 774.
8. *Laurentian University of Sudbury (Re)*, 2021 ONCA 199.
9. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37.
10. *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842.
11. *Nortel Networks Corp (Re)*, 2016 ONCA 332.
12. *Onex Corporation v. American Home Assurance Company*, 2013 ONCA 117.
13. *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33.
14. *Sam's Auto Wrecking Co. Ltd. v. Lombard General Insurance Company of Canada*, 2013 ONCA 186.
15. *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729.

**SCHEDULE "B"**
**RELEVANT STATUTES**

1. ***Business Corporations Act,* RSO 1990, c B.16.**

**Directors' liability to employees for wages**

**131** (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation. R.S.O. 1990, c. B.16, s. 131 (1).

**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. 2002, c. 24, Sched. B, s. 27 (1).

**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. R.S.O. 1990, c. B.16, s. 131 (3).

**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. R.S.O. 1990, c. B.16, s. 131 (4).

**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. R.S.O. 1990, c. B.16, s. 131 (5).

**2. *Canada Business Corporations Act*, RSC 1985, c C-44.**

**Liability of directors for wages**

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

(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.

(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.

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

(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.

(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.

**3. *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36.**

**Leave to appeal**

**13** Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

**4. *Employment Standards Act, 2000,* S.O. 2000, c. 41.**

**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. 2000, c. 41, s. 81 (1).

**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. 2000, c. 41, s. 81 (3).

**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. 2000, c. 41, s. 81 (4).

**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. 2000, c. 41, s. 81 (5).

**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. 2000, c. 41, s. 81 (6).

**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. 2000, c. 41, s. 81 (7).

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

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

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

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

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