

Court of Appeal File No.
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

**NOTICE OF MOTION FOR LEAVE TO APPEAL
(RETURNABLE IN WRITING)**

Haidar Omarali will make a motion to a panel of the Court of Appeal for Ontario on a date to be fixed by the Registrar at 130 Queen Street West, Toronto,

THE MOTION IS FOR:

1. **AN ORDER** granting leave to appeal to the Court of Appeal from the Endorsement of Justice Cavanagh of the Superior Court, dated September 20, 2024; and
2. Such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

3. Haidar Omarali in his capacity as representative plaintiff of the certified class in *Omarali v. Just Energy*, Court File No. CV-15-527493-00CP, seeks leave to appeal from the Endorsement of Justice Cavanagh made within this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") denying the relief sought in Mr. Omarali's Notice of Motion, dated August 25, 2023;

Background

4. Haidar Omarali is the representative plaintiff in a class action against Just Energy (Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P.) on behalf of roughly 7700 sales-people employed by Just Energy in Ontario from 2012 until 2016, when Just Energy began to pay its sales-people their entitlements under the ESA;
5. The class action alleges that Just Energy failed to pay class members the wages and benefits that they were owed as employees under the *Employment Standards Act* ("**ESA**");
6. Before the scheduled trial of the class action commenced, on March 9, 2021, Just Energy filed for protection under the CCAA as a result of an extreme adverse weather event in Texas that resulted in \$315 million in losses, including an estimated \$250 million demanded by the Electric Reliability Council of Texas;
7. On the same day, March 9, 2021, XL Specialty Insurance Company and two other insurers (the "**Insurers**") issued policies providing coverage to the Directors and Officers of Just Energy (the "**Policies**");
8. The Policies specifically provide coverage for losses resulting from statutory claims for unpaid wages;
9. Pursuant to s. 81 of the *Employment Standards Act*, 2000, SO 2000, c 41 ("**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**"), Just Energy's Directors and Officers became liable to Class Members for unpaid wages and benefits upon Just Energy's insolvency;

10. Mr. Omarali filed a proof of claim in the CCAA proceedings on October 9, 2021, as against the Directors and Officers, seeking the unpaid wages and benefits owed to Class Members under the ESA;
11. In approving a sale transaction in the CCAA proceedings on November 3, 2022, the court ordered, as a carve-out to the release provided to Just Energy and its Directors and Officers, that Mr. Omarali's Claim could be maintained but was limited to seeking relief from applicable insurance policies;
12. Mr. Omarali brought a motion on August 25, 2023, for, among other things, an order directing the Insurers to pay the amounts owed to the Class Members under the Policies;
13. In response, the Insurers brought a motion seeking a declaration that the Prior Acts Exclusion, contained in the Policies, barred coverage for the Claims of Mr. Omarali and the Class Members and asked that the relief sought by Mr. Omarali in his motion be denied;

The Motion Judge's Endorsement

14. The motion judge granted the Insurers' motion finding that while the risks covered by the Policies specifically included the risk of statutory claims for unpaid wages not paid by Just Energy, the Prior Acts Exclusion barred coverage for all claims for wages that were unpaid prior to March 9, 2021;
15. To reach that conclusion, the motion judge interpreted the Prior Acts Exclusion as barring coverage for claims that relate to the acts or omissions of any person or entity prior to the effective date of the Policies;

16. The Prior Acts Exclusion reads:

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.

All other conditions and limitations of this Policy shall remain unchanged.

17. The motion judge rejected Mr. Omarali's reading of the exclusion, as barring coverage only for claims that relate to the prior acts or omissions of a person or entity insured under the Policies;

18. The motion judge's interpretation of the Prior Acts Exclusion is the sole issue on the proposed appeal. The motion judge erred in interpreting the Prior Acts Exclusion:

- (a) In an unprecedentedly broad manner that eliminates an entire category of coverage specifically provided by the Policies and all coverage for claims that bear any relation to prior acts or omissions of any person or entity;
- (b) In a manner that is inconsistent with the Policies as a whole and renders significant parts of the Policies redundant;
- (c) In a manner that is inconsistent with the surrounding circumstances of the CCAA proceedings; and
- (d) In a manner that nullifies coverage for the most obvious risks that the Policies were intended to cover;

19. This erroneous decision denies relief to the class, and also results in a lack of protection for Directors and Officers under these and similar insurance policies, who are left open to statutory claims brought against them personally for the pre-filing conduct of the companies they serve;

Leave Ought to be Granted

20. Leave ought to be granted in this case;
21. Federal and provincial legislation specifically and purposefully provides recourse to employees to recover unpaid wages from a company's Directors and Officers in the event of the company's insolvency, regardless of whether the company became liable to pay for the wages before or after the date of insolvency;
22. The motion judge's erroneous decision results in the loss of this, or any, recourse for over 7700 class members who were denied their entitlements under the ESA;
23. The motion judge's decision, and the proposed appeal raises several points that are of significance to the interwoven practices of insolvency and employment law including:
 - (a) The manner in which the statutory liability of Directors and Officers during insolvency under the ESA and other statutes interacts with CCAA proceedings, and insurance policies provided in the context of such proceedings;
 - (b) The manner in which the rights of current and former employees to recover unpaid wages in the event of an insolvency are to be protected and recognized within CCAA proceedings;
 - (c) The interpretation, within the context of CCAA proceedings, of insurance policies providing coverage to Directors and Officers for periods of insolvency; and
 - (d) The availability in law of broad interpretations of exclusions in claims-based insurance policies that operate to remove coverage specifically provided.
24. The proposed appeal will not unduly hinder the progress of the action. The sale transaction in the CCAA proceedings has already been approved. The stay of proceedings has already been extended to January 31, 2025, and can be extended further if necessary to fairly determine Mr. Omarali's claim;

25. At this stage, all that remains of the proceeding is Mr. Omarali's claim: the points raised in the appeal are of paramount significance to that claim, which will otherwise be dismissed;
26. The well-established test for granting leave to appeal in matters under the CCAA is readily met in this case:
 - (a) The appeal is *prima facie* meritorious and is not frivolous;
 - (b) Several points on appeal are of significance to the practice;
 - (c) The points raised are of significance to the proceeding; and
 - (d) The appeal will not unduly hinder the progress of the action;
27. Sections 11, 13 and 14 of the CCAA;
28. Section 81 of the ESA;
29. Section 119 of the CBCA;
30. Section 131 of the OBCA; and
31. Rule 61.03.1 of the *Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Motion Record of Haidar Omarali, dated August 25, 2023;
- (b) The Motion Record of the Insurers on the Prior Acts Exclusion, dated June 10, 2024;
- (c) Such further and other materials as counsel may advise and this Honourable Court may permit.

October 11, 2024

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