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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicant

FACTUM OF HAIDAR OMARALI
(Motion re: Prior Acts Exclusion)

Dated August 16, 2024

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PART I - INTRODUCTION

1. Employees can recover unpaid wages directly from directors and officers through standalone statutory entitlements triggered by a company's insolvency.[1] Aware of this regime, the Insurers "specifically" indemnified Just Energy's directors and officers ("**D&O's**") for all "salary, wages and related amounts" if the D&O's "become personally liable to make such payment under any applicable… statutory provision," in connection with their "service with an insolvent Company".[2]

2. When Just Energy[3] became insolvent, the D&O's became liable for unpaid wages. Haidar Omarali, on behalf of certain former employees of Just Energy (the "**Class**"), seeks to recover the unpaid wages and related amounts owed by the D&O's to the Class.

3. The Class were employed by Just Energy as "Sales Agents" in Ontario, going door-to-door selling contracts. For four years, they were not paid the minimum wage, overtime pay, vacation pay or public holiday pay to which they were entitled, as employees, under the ESA. In November 2016, Just Energy changed its practices and began to pay its employees their entitlements under the ESA.

4. The Approval and Vesting Order of McEwen J. allows the Class's claim against the D&O's (the "**D&O Claim**") to proceed in the CCAA proceedings, limited to applicable

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[1] *Employment Standards Act*, 2000, SO 2000, c 41, s 81 ["**ESA**"]. *Canada Business Corporations Act*, RSC 1985, c C-44, s 119 ["**CBCA**"]. *Business Corporations Act*, RSO 1990, c B.16, s 131 ["**OBCA**"].
[2] Definition of "Loss" in the XL Policy, II(O), Motion Record of the Insurers ["**IMR**"], Tab 1A, pp. at pp. 27-28. The operative language from the XL Policy is reproduced in Appendix "A."
[3] Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P. (collectively, "**Just Energy**").

insurance coverage. On this motion, the Insurers now ask the Court to find that the Prior Acts Exclusion bars any coverage for the D&O Claim.

5. The Insurers frame their motion as raising only one question: "Does the Prior Acts Exclusion bar coverage for the [D&O] Claim?"[4] This Court cannot answer that question without first determining the scope of coverage provided by the relevant insurance policies and assessing whether, and why, the D&O Claim falls within that coverage. This is the order of operations, for interpreting insurance policies, endorsed by the Supreme Court of Canada.[5]

6. When the relevant policies, and the coverage they provide, are considered, it is clear that the D&O Claim is not excluded. The D&O Claim is not based on any prior acts of those insured by the policies but on the Class's unpaid minimum entitlements under the ESA, and the statutory provisions that now render the D&O's liable for those amounts, a liability "specifically" covered by the policies.

7. A broad interpretation of the Prior Acts Exclusion that bars statutory claims for prior unpaid wages would not accord with the balance of the relevant policies, the commercial context, or the jurisprudence. Instead, that interpretation offends the nullification of coverage doctrine. This court must, therefore, conclude that the D&O Claim – if proven – is covered by the Insurance Policies and is not excluded by the Prior Acts Exclusion.

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[4] Factum of the Insurers (Prior Acts Exclusion) at para. 38, ["**Insurers' Factum**"].
[5] *Progressive Homes v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at para. 28 ["***Progressive Homes***"].

PART II - THE FACTS

8. On June 21, 2016, a class action was certified in *Omarali v. Just Energy*, CV-15-527493-00CP (the "**Omarali Class Action**") against Just Energy. Haidar Omarali, the Representative Plaintiff, claimed that Just Energy did not pay 7,723 employees in Ontario wages owed in accordance with the ESA.

9. Before the scheduled trial of that action could occur, Just Energy, prompted by an unrelated liquidity crisis resulting from an adverse weather event affecting its operations in Texas, filed for protection under the CCAA, commencing these proceedings. On October 29, 2021, in the CCAA claims process, Class Counsel filed a claim for unpaid wages on behalf of the Class against the D&O's.[6]

10. On October 17, 2022, Just Energy sought an order approving a sale transaction under which "no recoveries [would] be available for General Unsecured Creditors," including the Class.[7] The November 3, 2023, Approval and Vesting Order of McEwen J. approved the restructuring transaction but explicitly carved out the D&O Claim, allowing it to be maintained within the CCAA proceedings but limiting recovery to the insurance policies covering the D&O's.[8]

11. Those insurance policies include ELU173707-21 (the "**XL Policy**"), issued by XL Specialty Insurance Company to Just Energy Group Inc. on March 9, 2021, the day that

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[6] Proof of Claim Form for Claims Against Directors or Officers of the Just Energy Entities dated October 29, 2021, IMR, Tab 3 ["**D&O Proof**"]. Class Counsel made clear the intention to assert this claim within the CCAA proceeding in a letter dated September 21, 2021: Affidavit of Jamie Shilton, at paras. 19-20 and Exhibit "L", Motion Record of Haidar Omarali ["**OMR**"], Tabs 2 and 2L, pp. 24-25, 213-214.
[7] Affidavit of Jamie Shilton, at para. 35 and Exhibit "X", para. 45, OMR, Tabs 2 and 2X, pp. 29-30, 772.
[8] See paras. 27-28, Exhibit "Z" to the Affidavit of Jamie Shilton, OMR, Tab 2Z, p. 866.

Just Energy filed for creditor protection, and excess coverage issued under the XL Policy (collectively, the "**Insurance Policies**"). The Insurance Policies specifically indemnify the D&O's for statutory claims for unpaid wages.

12. Pursuant to the Approval and Vesting Order, Mr. Omarali brought a motion seeking (a) a declaration that the Class are owed unpaid wages by the D&O's, and (b) an Order directing the Insurers to pay the amounts owed by D&O's under the Insurance Policies. The Insurers, in response, brought this motion.

PART III - ISSUES AND THE LAW

13. The Insurers frame the issue on this motion as whether the Prior Acts Exclusion bars coverage of the D&O Claim. But to answer that question, the Court must first determine what coverage the Insurance Policies provide, and whether the D&O Claim is covered.

14. For the sake of their motion, the Insurers assume, and ask the Court to assume without any analysis, that the D&O Claim triggers the Insurance Policies.[9] The Court should reject that approach. An assessment of the initial grant of coverage, and whether and why a particular claim is covered, is – as the Supreme Court of Canada has made clear – an essential first step in interpreting and applying an exclusion in an insurance policy.

15. To answer the Insurers' question, the only assumption that this court should make is that the D&O Claim is proven. The issues are therefore as follows:

[9] Insurers' Factum, para. 10.

In the event that the D&O Claim is proven:

(a) Does the D&O Claim fall within the initial grant of coverage provided by the Insurance Policies?

(b) If so, is the D&O Claim barred by the Prior Acts Exclusion?

A. Analysis Should Begin from the Initial Grant of Coverage

16. The Supreme Court has made the correct approach to interpreting exclusions in insurance policies very clear: "Exclusions, should, however, be read in light of the initial grant of coverage."[10]

17. Yet, the Insurers ask this Court to skip straight to interpreting an exclusion, bypassing any discussion of coverage. The Insurers' Factum does not tell the Court what the Insurance Policies cover, only what they purportedly exclude.[11] The exclusions, the Insurers say, "delineate the scope of risk that the Insurers agreed to insure."[12]

18. The "scope of the risks [an insurer] has agreed to insure" cannot be understood or "delineate[d]" based on exclusions alone. In the words of the Supreme Court, "[e]xclusions do not create coverage – they preclude coverage when the claim otherwise falls within the initial grant of coverage."[13] The path that the Insurers invite the Court to follow leads only to error. It omits the very analysis necessary to correctly interpret the Prior Acts Exclusion.

19. A court cannot simply, as the Insurers suggest, give effect to an exclusion's "clear language."[14] Exclusions – ambiguous or unambiguous – cannot be understood in isolation:

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[10] *Progressive Homes*, at para. 27.
[11] Insurers' Factum, at paras. 51-53.
[12] Insurers Factum, at para. 53.
[13] *Progressive Homes*, at para. 27.
[14] Insurers' Factum, at paras. 42-44.

they must be "read in light of the initial grant of coverage," and interpreted by "reading the insurance policy as a whole."[15] This is, according to the Supreme Court, the "primary interpretive principle": "when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole."[16] The "plain meaning" of an exclusion must be one that "is consistent with reading the policy as a whole."[17]

20. An assessment of the "initial grant of coverage" is also essential given Mr. Omarali's invocation of the nullification of coverage doctrine, below. This "independent doctrine", in the words of the Court of Appeal, "applies even in the absence of an ambiguity."[18] Under that doctrine, a court should not give effect to an interpretation of a clause in an insurance policy that would "render nugatory the coverage for the most obvious risks for which the policies were issued."[19]

21. To interpret and apply the Prior Acts Exclusion "in light of the initial grant of coverage," this Court must first assess the coverage that the Insurance Policies provide.

B. Assessing the Initial Grant of Coverage

22. This Court should determine whether the D&O Claim, if proven and subject to the Court's interpretation of the Prior Acts Exclusion, falls within the coverage granted by the Insurance Policies. In this case, the initial grant of coverage is clear on the face of the XL

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[15] *Progressive Homes*, at paras. 27-28 and 37; and see *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, at para. 49 "[***Ledcor***"].
[16] *Progressive Homes*, at para. 22; *Ledcor*, at para. 49.
[17] *Progressive Homes*, para. 37.
[18] *Cabell v. The Personal Insurance Company*, 2011 ONCA 105, at para. 17 ["***Cabell***"].
[19] *Cabell*, at para. 26, quoting *Foodpro National Inc. v. General Accident Assurance Co. of Canada*, 1988 CanLII 4739 (Ont. C.A.).

Policy: the Insurance Policies protect the D&O's of Just Energy from claims made against them as a result of their service for the company during the period of its insolvency.

23. The XL Policy is a "claims made policy" that applies to "claims first made during the policy period."[20] The policy period is tied to Just Energy's insolvency. Coverage is provided from March 9, 2021, the date that Just Energy filed for protection under the CCAA, until Just Energy's "[e]mergence from bankruptcy."[21]

24. The Insurance covers the D&O's. "Insured Persons," as defined in the XL Policy, is limited to the D&O's and, in very limited circumstances, specific employees of Just Energy.[22] An endorsement removed all other Insuring Agreements such that only Insuring Agreement (A) remains:

> 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.[23]

Subject to exclusions, the D&O's are covered for any "Loss" not indemnified by the Company. That is, the initial grant of coverage ensures that the D&O's are fully indemnified for any "Loss" during the period of Just Energy's insolvency.

25. "Loss" is defined to "specifically include":

> solely with respect to Loss to which Insuring Agreement (A) applies…
>
> > (iii) 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

[20] XL Policy, IMR, Tab 1A, Schedule "A", p. 13.
[21] See XL Policy, Declarations and Endorsement 6, IMR, Tab 1A, pp. 13, 22.
[22] XL Policy, II(J), IMR, Tab 1A, p. 26.
[23] XL Policy, I(A) and Endorsement 4, (1)-(5), IMR, Tab 1A, pp. 18, 24.

> payment under any applicable federal, provincial, territorial or municipal statutory provisions;
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> that an Insured Person is obligated to pay if such fines, penalties, taxes or payments are insurable by law and are imposed in connection with such Insured Person's service with an insolvent Company.[24]

26. As this provision makes very clear, the risks covered, for the D&O's during Just Energy's insolvency, "specifically included" the risk of statutory claims brought against those D&O's for unpaid wages.

i. The Insurance Policies Cover the D&O Claim

27. That "Loss" is precisely what the D&O Claim is. The D&O Claim was asserted on October 29, 2021, at the latest, which is during the policy period.[25] It is asserted against former or current directors of Just Energy Group Inc. or Just Energy Corp. from 2012 onwards.[26] It seeks "recovery from the [D&O's] for unpaid wages including minimum wage, overtime, holiday and vacation pay, in accordance with the ESA."[27]

28. Mr. Omarali relies on three statutory provisions to assert a claim against the D&O's for unpaid wages: s. 81 of the *ESA*; s. 131 of *OBCA*; and s. 119 of the *CBCA*. These provisions each render the directors of an insolvent corporation liable to an employee or former employee of the corporation for up to six months of unpaid wages.

29. Those provisions are the basis for the D&O Claim. If the D&O Claim is proven, it will be proven as a statutory claim against the directors for unpaid wages. That claim, against the Directors, could not have been brought prior to March 9, 2021. That date – the

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[24] XL Policy, II (O)(1)(b)(iii), IMR, Tab 1A, pp. 27-28 (emphasis added).
[25] D&O Proof, IMR, Tab 3, pp. 60-71.
[26] D&O Proof, Schedule "B", IMR, Tab 3, p. 64.
[27] D&O Proof, Schedule "C", IMR, Tab 3, p. 70.

start of the policy period – is when Just Energy's insolvency and inability to pay the Class's unpaid wages claims triggered those statutory provisions and rendered the D&O's liable to the Class.

30. The D&O Claim is, therefore, a claim (to borrow the words of the XL Policy) for "salary, wages and related amounts" that "were payable by the Company" and that the D&O's "became personally liable to make…under… applicable federal [and/or] provincial… statutory provisions" and that the D&O's are, if the claim is proven, "obligated to pay… in connection with [the D&O's] service with an insolvent Company."[28]

31. The D&O Claim is "specifically included" as a "Loss" covered by the Insurance Policies. It falls squarely within the initial grant of coverage, being "specifically included", to borrow the Insurers' words, in the "scope of risk that the Insurers agreed to insure."[29]

C. Coverage for the D&O Claim is Not Barred by the Prior Acts Exclusion

32. Once a court finds that a claim falls within a policy's initial grant of coverage, the onus shifts to the insurer to show that coverage of the claim is precluded by an exclusion clause.[30] The Insurers rely on the Prior Acts Exclusion to argue that coverage is barred:

> 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.[31]

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[28] XL Policy, II (O)(1)(b)(iii), IMR, Tab 1A, pp. 27-28
[29] Insurers Factum, at para. 53.
[30] *Progressive Homes*, at para. 51.
[31] XL Policy, Endorsement No. 3, IMR, Tab 1A, at p. 17.

33. The D&O Claim is not barred by this exclusion. The liability of the D&O's only having been triggered on March 9, 2021, the D&O Claim does not involve any prior act or omission of an insured under the policies: it is not captured by the Prior Acts Exclusion.

34. To capture the D&O Claim, the Prior Acts Exclusion must be interpreted such that it is triggered by any prior act or omission, regardless of the entity or person responsible. That broad interpretation is inconsistent with the balance of the Insurance Policies and the commercial context, the "scope of risks that the Insurers agreed to insure", finds no support in the jurisprudence, and offends the nullification of coverage doctrine.

i. The D&O Claim is a Statutory Claim for Unpaid Wages

35. For the purposes of applying the Prior Acts Exclusion, the D&O Claim is a statutory claim, against the D&O's, for unpaid wages. Mr. Omarali and the Class stand in the same position – for the purpose of the Insurance Policies – as a hypothetical Just Energy employee who was not paid in the month leading up to Just Energy filing for protection under the CCAA on March 9, 2021. In determining the D&O's liability, the reasons why the wages are unpaid do not matter. The D&O Claim is no different from any other statutory claims against the D&O's for prior unpaid wages.

36. The Insurers argue that the D&O Claim is excluded, and is set apart from other statutory claims for unpaid wages, because of its connection to the Omarali Action or because "[t]he 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."[32] Neither is correct.

37. What matters, in applying the Insurance Policies, is the substantive legal basis of the D&O Claim itself. To determine coverage, as stated by the Court of Appeal for Ontario, "the court is required to assess the substance or the 'true nature' of each claim contained within the pleadings…"[33] The same approach is required when determining whether an exclusion applies.[34]

38. The language used by any party to describe or label the claim at issue is not determinative. As the Supreme Court of Canada stated in the context of the duty to defend:

> In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff… What is determinative is the true nature or the substance of the claim. [Emphasis added, citations omitted.][35]

39. In identifying the "true nature" and substance of a claim, the Court of Appeal has looked for "the precipitating and most important cause" of the loss;[36] and has considered the "chain of causation" by which the claim "arises."[37]

40. The D&O Claim arises from:

(a) The Class' employment and entitlement to wages under the *ESA*;
(b) Just Energy's failure to pay those wages;
(c) Just Energy's insolvency and inability to pay those wages; and

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[32] Insurers' Factum, at para. 70.
[33] *Papapetrou v. 1054422 Ontario Limited*, 2012 ONCA 506, at para. 44; and see *Ontario v. St Paul Fire and Marine Insurance Company*, 2023 ONCA 173, at para. 12.
[34] See, e.g., *Demme v. Healthcare Insurance Reciprocal of Canada*, 2022 ONCA 503, at para. 67.
[35] *Progressive Homes*, at para. 20.
[36] *Aviva Insurance Company v. Pizza Pizza Ltd.*, 2008 ONCA 535, at para. 7.
[37] *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance* Company, 2021 ONCA 159, at para. 90.

(d) The D&O's statutory liability for those unpaid wages, under s. 81 of the *ESA*, and provisions of the *OBCA* and the *CBCA*, triggered on March 9, 2021.

41. The "true nature" and substance of the D&O Claim is clear: it is a claim for unpaid wages owed to the Class as a result of their employment with Just Energy. The insolvency is "the precipitating and most important cause" *for the claim against the D&O's*. Without the insolvency, there is no claim against them. The D&O's liability does not depend on the reason why employees' wages were unpaid on the date of insolvency.

42. Just Energy attempted to justify its failure to pay the Class their minimum entitlements by calling them "independent contractors." But that fact is irrelevant to the D&O Claim. If the D&O Claim succeeds, it will not be on the basis that the Class was misclassified: it will be on the basis that the Class were employees and were not paid the wages they were owed as employees. The Class's employment, with the provisions of the *ESA*, grounds the D&O Claim. It is, in its "true nature", a statutory claim for unpaid wages.

43. Court of Appeal jurisprudence supports this characterization. In assessing whether wages are owed to an individual as an "employee," the labels (or "classification") imposed by the employer are not determinative.[38] Neither an employer nor an employee can contract out of the minimum standards in the ESA, including through a contract that treats the employee as something other than an employee.[39]

44. An individual is an employee or they are not. The "misclassification" of the Class as "independent contractors" excluded from ESA protection is not the violation of the ESA

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[38] *Belton v. Liberty Insurance Co. of Canada*, 2004 CanLII 6668 (Ont. C.A.), at para. 11; *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464, at para. 33.
[39] Section 5 of the ESA.

at issue in the D&O Claim. The violation is the failure to pay wages owed to the Class as employees, which wages were owed irrespective of how Just Energy classified the Class.

45. The D&O Claim will be determined in the same manner as any other claim for unpaid wages: based on whether the Class were "employees." Any individual bringing a statutory claim for unpaid wages under the ESA must establish that they were an employee entitled to those wages. This question of mixed fact and law must be answered, whether or not a "misclassification" is alleged, through a "search for the total relationship of the parties," without regard to the employer's labelling of the employee.[40]

46. If the court finds that the Class were employees, then Just Energy owed the Class wages under the ESA from the date those wages accrued, regardless of the label Just Energy attached to the Class. The court's finding that the Class were employees would demonstrate that Just Energy did misclassify the Class by failing to treat them as employees. But that conclusion has no bearing on the D&O Claim.

47. "Misclassification" is not a prior act that gave rise to or must be proven in the D&O Claim, nor is it a cause of action. The Class does not stand in a different position to any other former employees bringing statutory claims for unpaid wages.

48. Nor, as the Insurers suggest, is the D&O Claim excluded because it "arises from" or "incorporates" the Omarali Action.[41] Legal claims do not arise from class actions: they are asserted in class actions. The fact that a claim in relation to the same unpaid wages was asserted against Just Energy in the Omarali Action does not change the true nature of

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[40] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, at para. 46.
[41] Insurers' Factum, at para. 4.

the D&O Claim: it is a statutory unpaid wages claim against the D&O's that only arose upon Just Energy's insolvency.

49. Notably, as the Insurers appear to acknowledge, the prior litigation exclusion in the Insurance Policies does not cover the D&O Claim, as no related "prior and/or pending litigation" had been brought "against an Insured."[42] The "Insured" as defined, in the Insurance Policies, does not include any of the defendants to the Omarali Action.[43] The Omarali Action did not include – and could not have included – a claim against the D&O's, whose liability was only triggered upon Just Energy's insolvency.

50. The Omarali Action was certified on July 27, 2016.[44] Just Energy was aware of the Class's claims, and the D&O's potential statutory liability in the event of Just Energy's insolvency. The Director's Charge was granted, in part, based on "the potential liability that the directors and officers could incur in relation to this *CCAA* proceeding", which included liability for "wages… and accrued vacation pay."[45] The Insurers must have been aware of the possibility when "specifically" insuring statutory wage liability. The failure to include an exclusion specific to the Omarali Action, or a prior-litigation exclusion capable of capturing a resulting claim against the D&O's, speaks volumes in this case.

ii. Statutory Claims for Prior Unpaid Wages are not Excluded

51. The prior class action and the Insurers' references to Just Energy's misclassification of the Class are both irrelevant in applying the Prior Acts Exclusion. Mr. Omarali's claim

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[42] XL Policy, III(B)(1), IMR, Tab 1A, p. 31.
[43] XL Policy, II(I) and Endorsement No. 4 (6), IMR, Tab 1A, pp. 18, 26.
[44] *Omarali v. Just Energy*, 2016 ONSC 4094, leave to appeal refused, 2016 ONSC 7096 (Div. Ct.).
[45] *Just Energy Corp. (Re)*, 2021 ONSC 1793 at paras. 110 and 111.

is a statutory claim against the D&O's, arising from Just Energy's insolvency, for unpaid wages. That claim is the same as any other statutory claim for prior unpaid wages. It will only be excluded if the Prior Acts Exclusion bars all claims against the D&O's for statutory liability, arising on March 9, 2021, for unpaid wages accrued prior to that date.

52. On the face of the Prior Acts Exclusion, those claims are not excluded. Unpaid wages were an obligation owed by Just Energy prior to March 9, 2021, which obligation the D&O's only became liable for on that date, due to Just Energy's insolvency. The Insurances Policies "specifically include" these claims in the definition of "Loss."

53. Just Energy, or "the Company" was explicitly removed from the definition of the "Insured" in the Insurance Policies.[46] As a result, its acts and omissions do not trigger the Prior Acts Exclusion.

54. Prior to March 9, 2021, the D&O's – the only insureds – were not responsible for unpaid wages. There cannot have been – based on that fact – any "act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act" of a person or entity covered by the Insurance Policies, involved in statutory claims for prior unpaid wages, including the D&O Claim.

D. The Correct Interpretation of the Prior Acts Exclusion

55. The Insurers ignore that Just Energy is not an "Insured". They contend that an act or omission of Just Energy is sufficient to trigger the Prior Acts Exclusion. But Just Energy is not an "Insured."[47] It has no special status under the terms of the Insurance Policies. If

[46] XL Policy, II(I) and Endorsement No. 4 (6), IMR, Tab 1A, pp. 18, 26.
[47] XL Policy, II(I) and Endorsement No. 4 (6), IMR, Tab 1A, pp. 18, 26.

Just Energy's acts or omissions can trigger the Prior Acts Exclusion, so can anyone's. As the Insurers make clear, their interpretation means that the Prior Acts Exclusion "expressly excludes any Claim based upon or resulting from any act or omission committed or allegedly committed by anyone before March 9, 2021."[48]

56. The Prior Acts Exclusion is ambiguous as to whose prior acts are excluded. There are two competing interpretations of the Prior Acts Exclusion before the Court:

(a) **Mr. Omarali's:** The exclusion is only triggered by an "act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed" by an Insured.

(b) **The Insurers:** The exclusion is triggered by an "act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act committed or allegedly committed" by anybody.

57. It is well established that, even where *contra preferentum* is not being applied, "coverage provisions should be construed broadly and exclusion clauses narrowly."[49] Exclusion clauses are to be applied "strictly and narrowly."[50] When the Prior Acts Exclusion is read in accordance with the Insurance Policies as a whole, the factual matrix that surrounds those policies, and the jurisprudence, it is clear that Mr. Omarali's narrower interpretation is correct and that prior unpaid wages claims, including the D&O Claim, are not excluded.

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[48] Insurers' Factum at para. 56 (emphasis added).
[49] See *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 SCR 252; *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66, at para. 32; *Boliden Limited v. Liberty Mutual Insurance Company*, 2008 ONCA 288, at para. 30 ["***Boliden***"]; *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72, at para. 52 ["***Derksen***"].
[50] *Boliden*, at para. 30, citing *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, at para. 16 ["***Amos***"]; *Derksen*, at paras. 52 and 57.

i. Reading the Exclusion in Light of the Insurance Policies as a Whole

58. That Interpreters' broad interpretation of the Prior Acts Exclusion makes no sense when the Insurance Policies are read as a whole.[51]

59. First, it would implicitly exclude losses that are "specifically included" under the Insurance Policies' coverage. The Insurance Policies "specifically" cover loss related to wages that "were payable by the Company", and that the D&O's have "become personally liable" to pay under statute. That transition – from unpaid wages being an obligation of the Company, to those wages being a liability of the D&O's – occurs at insolvency. Prior unpaid wage claims are specifically and explicitly covered by the Insurance Policies. The Prior Acts Exclusion cannot be read in a manner that excludes them.

60. Second, it renders the exclusion so broad as to exclude any claim with a nexus to the pre-filing past, lacking coherence with the balance of the policy. "Insured Person" includes "any past, present or future natural person director or officer… of the Company."[52] But under the Insured's interpretation, no claim could ever be made against a past director, as that claim would, necessarily, have a nexus in the pre-filing past.

61. A similar problem arises in relation to the prior/pending litigation exclusion, and the prior notice exclusion.[53] On the Insurers' interpretation, everything that would be barred by these exclusions – anything for which litigation against the D&O's was started or notice given prior to the insolvency – is necessarily also barred by the Prior Acts Exclusion. The Supreme Court has looked for "consistency with [other] exclusion clauses"

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[51] *Progressive Homes*, at para. 22; *Ledcor*, at para. 49.
[52] XL Policy, II(J), IMR, Tab 1A, p. 26.
[53] XL Policy, III(B)(1) and (2), IMR, Tab 1A, p. 31.

in interpreting insurance policies and has declined to accept interpretations that would leave other exclusions with "little or no work" to do. [54]

62. Instead, the prior/pending litigation exclusion and the prior notice exclusion support Mr. Omarali's interpretation. Both use the phrase "any fact, circumstance, situation, transaction, [or] event" to describe the circumstances that – if alleged in litigation against an Insured or the subject of notice under a prior policy – result in an exclusion. This language clearly requires no connection between the prior circumstance and the Insured.

63. Had the parties intended the Prior Acts Exclusion to be similarly broad, and to exclude claims based on prior circumstances not involving the Insureds, they would have used this language. The Insurer's interpretation of the Prior Acts Exclusion is not consistent with the policy as a whole and should be rejected.

ii. The Jurisprudence Does Not Assist the Insurers

64. The Insurers have not pointed to any Canadian jurisprudence that supports their interpretation. Nor is Mr. Omarali aware of any cases where an exclusion's reference to an "act, error, omission, misstatement, misleading statement, neglect, [or] breach of duty" has been interpreted as referring to anybody's "act, error, omission, misstatement, misleading statement, neglect, [or] breach of duty," and not solely that of an Insured.

[54] *Progressive Homes*, at para. 37.

65. In the absence of Canadian jurisprudence to support their position, the Insurers turn to caselaw from the United States. That caselaw does not support their position.

66. In *Zucker*, the policy excluded claims "arising out of, based upon, or attributable to any Wrongful Act… prior to" the effective date, with the policy clearly defining whose acts could constitute a "Wrongful Act" under the policy.[55] Similarly, "Wrongful Act," in the Insurance Policies is defined to include only acts of Insured Persons. *Zucker* does not support the Insurers' broad interpretation.

67. Nor does *Jayhawk*. In that case, the Prior Acts Exclusion was triggered by prior acts of the company, ChinaCast. But in that case not only was the company, ChinaCast, the insured under the policy, the prior acts exclusion explicitly referred to "Company Wrongful Acts."[56] *Jayhawk* does not stand for the proposition that anyone's misconduct can trigger a prior acts exclusion.

68. The Insurers rely on *Carolina Casualty* to argue that the Prior Acts Exclusion "applies regardless of the entity of the perpetrator of the prior act or omission."[57] According to the Insurers, the court in *Carolina Casualty* found that "the exclusion at issue was not limited to wrongful acts *of insureds seeking coverage* – it applied to 'any' wrongful act."[58] The underlined is not what the court found, nor does this case support the Insurers' interpretation.

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[55] *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343, at p. 1349, Book of Authorities of the Insurers ["**IBOA**"], Tab 18.
[56] *Jayhawk Private Equity Fund II LP v. Liberty Insurance Underwriters Inc.*, 2018 US Dist LEXIS 250716 (Central District of California), p. 12, IBOA, Tab 19, p. 465.
[57] Insurers' Factum, at para. 81.
[58] Insurers' Factum, at para. 80, emphasis in the original.

69. The question in *Carolina Casualty* was whether the "Wrongful Act" must have been committed by the insured before the court, or whether it could have been committed by another insured. "Wrongful Act" was defined to include only acts of the directors or officers of the company.[59] The court found that the prior acts exclusion applied "regardless of whether [the Wrongful Act] was committed by the insured seeking coverage or one of the other officers or directors" (who were also insureds under the policy).[60] That finding is not pertinent to this case.

iii. Commercial Context Does Not Support the Insurers' Interpretation

70. The Insurers' interpretation finds no support in the Insurance Policies as a whole, or the jurisprudence. Nor is it grounded in the commercial context. In the insurance context, even before finding a provision ambiguous, "a court must assess the words of a contract in light of the factual matrix in which the agreement was written."[61] That factual matrix, according to the Court of Appeal, is "gleaned from the context of the transaction," including "the genesis of the agreement, its purpose, and the commercial context in which the agreement was made."[62]

71. The commencement of the CCAA proceeding provides, as the Insurers agree, "the essential, overall commercial context and purpose" for the Insurance Policies.[63] The Insurance Policies are closely tied to the CCAA context. They were purchased by a Canadian subsidiary specifically to cover that subsidiary's D&O's for the period of Just

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[59] *Carolina Casualty Insurance Co. v. McGhan*, 2008 US Dist LEXIS 143800 (District of Nevada), pp. 6-7, IBOA, Tab 20, pp. 472-473 ["***Carolina Casualty***"].
[60] *Carolina* Casualty, p. 10, IBOA, Tab 20, p. 476.
[61] *Onex Corporation v. American Home Assurance Company*, 2013 ONCA 117, at para. 104 ["***Onex***"].
[62] *Onex*, at para. 105, citing *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, at para. 55.
[63] Insurers' Factum, at para. 51.

Energy's insolvency. They came into effect on the date of Just Energy's filing under the CCAA. And they specifically cover "Loss" arising from the D&O's service with "an insolvent Company."

72. As the Supreme Court has made clear, the purpose of the CCAA "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[64] The Insurance Policies should be interpreted in accordance with that purpose.

73. The Insurers "specifically" insured "salary, wages and related amounts" that "were payable by the Company", and that the D&O's could "become personally liable to make such payment under any applicable… statutory provision," in connection with their "service with an insolvent Company".[65]

74. The purpose of the Insurance Policies, as reflected in that grant of coverage in particular, was to allow Just Energy to retain D&O's while insolvent. This is reinforced in Insuring Agreement (A). The Insurance Policies explicitly cover whatever "Loss" cannot be indemnified by Just Energy.

75. The factual matrix, together with the content of the Insurance Policies, strongly suggests that the policies were intended to cover off personal liability for the D&O's so that the D&O's would remain with the company in order for it to be restructured.[66] At the

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[64] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 15.
[65] Definition of "Loss" in the XL Policy, II(O), IMR, Tab 1A, pp. at pp. 27-28.
[66] This same rationale motivates the adoption of Key Employee Retention Plans ("**KERPS**") and special super-priority charges to protect directors from liability (the "**Directors' Charge**" or "**D&O Charge**"): see, e.g., *Danier Leather Inc. (Re)*, 2016 ONSC 1044, at paras. 75-78; *Timminco Limited (Re)*, 2012 ONSC 106 at para. 33; and *Canwest Global Communications Corp. (Re)*, 59 CBR (5th) 72, 2009 CanLII 55114 (Ont. S.C.J.) at paras. 46 to 48. See also *Just Energy Corp. (Re)*, 2021 ONSC 1793 at paras. 109 to 111.

time, Just Energy needed to retain the D&O's in spite of its insolvency and their increased liability. Doing so required insurance capable of protecting the D&O's from personal liability incurred as a result of their continued service with the company.

76. A policy that failed to do so – by excluding all statutory claims related to any prior conduct whatsoever, and not just the prior conduct of the D&O's – would have provide no comfort to the D&O's and would not have allowed Just Energy to continue to operate. The Insurers' interpretation of the Prior Acts Exclusion is inconsistent with the factual matrix.

77. The Insurers' view of the commercial context differs. They state that they "did not agree to assume the risk of exposure to pre-filing conduct" because "it would make no commercial sense" to do so.[67] They do not explain, however, why Just Energy would have purchased D&O insurance incapable of protecting its D&O's from the statutory liability that it knew they would potentially incur on the day the insurance policy came into effect.

78. At the time that the Insurance Policies came into effect, the risk that the D&O's would be held liable for statutory unpaid wage claims for prior service remained fortuitous and contingent. It was discussed in pre-filing material. It was not certain that the statutory unpaid wages claims of the Omarali Class would succeed against the D&O's: two years prior, Mr. Omarali had unsuccessfully moved, in the Omarali Action, for summary judgment.[68] Nor was it clear that the CCAA court would allow those claims to proceed within the restructuring of Just Energy (and indeed, to the extent the claims process took place, the D&O Claim was explicitly rejected by Just Energy). Inclusion of the D&O

[67] Insurers' Factum, at para. 53.
[68] *Omarali v. Just Energy*, 2019 ONSC 3734.

Claim was not, contrary to the Insurers' claim, "a guaranteed indemnity for those existing liabilities."[69]

79. Nor were these claims, or any other claims for unpaid wages, as the Insurers suggest, "the very claims that may have led to the insolvency."[70] As the Monitor explained in its Pre-Filing Report dated March 9, 2021, Just Energy filed under the *CCAA* because it faced "a material and immediate risk to its ability to continue as a going concern, which is a direct consequence of the unprecedented and catastrophic effects of an extreme weather event that crippled the Texas Energy system in February of [2021]."[71]

80. Directors' liability for unpaid, pre-filing wage claims is a foundational and well-known feature of the Canadian insolvency regime. The Insurers' knowledge of possible statutory claims against the D&O's for unpaid wages – including the D&O Claim – may well have prompted the Insurers to seek higher premiums from Just Energy.[72] Just Energy paid $800,000 for the XL Policy, which has a coverage limit of $5 million; and a total of $1.2 million in premiums for a further $10 million of excess coverage.[73]

81. The negotiations between Just Energy and the Insurers that led to agreement on those premiums are not in evidence before the Court. The Court must rely on the Insurance Policies as a whole and the surrounding factual matrix to determine whether the Insurers' broad interpretation of the Prior Acts Exclusion is reasonable.

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[69] Insurers Factum, at para. 59.
[70] Insurers Factum, at para. 59.
[71] See the Affidavit of Jamie Shilton, at para. 24 and Exhibit "M", OMR Tab 2 and 2M, pp. 26, 221.
[72] As the Insurers observe, "[p]rior acts and related exclusions… allow insurers to issue coverage they otherwise may not have been willing to issue at all or only for a much higher price": Insurers' Factum, at para. 54.
[73] See OMR Tabs 2JJ, 2KK and 2LL, pp. 1162, 1188, 1218-1219.

82. It is not. The Insurance Policies specifically cover statutory unpaid wage claims. In the CCAA context, and given the protection from liability that Just Energy needed to retain its D&O's in order to restructure, an interpretation that is inconsistent with the policy as a whole, and that implicitly excludes statutory claims for prior unpaid wages, should be rejected.

iv. The Insurers' Interpretation Nullifies Coverage

83. Even if the Insurers' interpretation were not only plausible, but plain and unambiguous, this Court would be required to reject it. An interpretation that excludes the D&O Claim, and other claims for prior unpaid wages, offends the nullification of coverage doctrine, which 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."[74] This doctrine, according to the Court of Appeal for Ontario, "is an independent doctrine that applies even in the absence of an ambiguity."[75]

84. 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 the Court of Appeal, "render nugatory the coverage for the most obvious risks for which the policies were issued."[76] Evidence about the reasonable expectations of the parties is not needed to invoke the nullification of coverage doctrine.[77]

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[74] *Cabell*, at para. 16, quoting *Amos v. Insurance Corp. or British Columbia*, [1995] S.C.R. 405, at para. 16.
[75] *Cabell*, at para. 17.
[76] *Cabell*, at para. 26.
[77] *Cabell*, at para. 25.

85. Here, sufficient evidence can be drawn from the context and the policies to understand "the most obvious risks for which the policies were issued." Just Energy purchased the Insurance Policies to protect its D&O's from personal liability, in order to retain those D&O's through the insolvency process. Liability for pre-filing wage claims is one of the most common risks for directors; it is a live issue in any insolvency. The risk of statutory claims for prior unpaid wages were among "the most obvious risks" for which the insurance was issued.

86. An interpretation of the Prior Acts Exclusion that excludes the D&O Claim nullifies the coverage provided by the Insurance Policies, rendering those policies incapable of protecting the D&O's from one of the "most obvious risks" they faced. Such an interpretation must, under the nullification of coverage doctrine, be rejected.

PART IV - ORDER REQUESTED

87. Mr. Omarali seeks an order dismissing the Insurers' motion, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August.

David Rosenfeld
Vlad Calina
Caitlin Leach
Koskie Minsky LLP

Lawyers for Haidar Omarali,
Representative Plaintiff in *Omarali v. Just Energy*

APPENDIX "A" – RELEVANT PROVISIONS OF THE XL POLICY
(as amended by Endorsement No. 4)

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.

…

II. DEFINITIONS

(B) **"Claim"** means:

1. any written demand (other than an **Investigation Demand**) for:
   a. monetary or non-monetary relief, including injunctive relief; or
   b. arbitration, mediation or other alternative dispute resolution proceeding;

…

(I) **"Insured"** means the Insured Persons.

(J) "**Insured Person"** means:

1. any past, present or future natural person director or officer… of the Company…

…

(O) **"Loss"** means damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts (including punitive, exemplary or multiplied damages, where insurable by law) that any Insured is legally obligated to pay and Defense Expenses, including that portion of any settlement which represents the claimant's legal fees. **Loss** will not include that portion which constitutes:

1. fines, penalties or taxes imposed by law; provided that **Loss** will specifically include: ….

b. solely with respect to **Loss** to which Insuring Agreement (A)[78] applies…

(iii) 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 provisions;

[78] Endorsement No. 4 deleted Insuring Agreements (B) to (F) in their entirety.

that an **Insured Person** is obligated to pay if such fines, penalties, taxes or payments are insurable by law and are imposed in connection with such **Insured Person's** service with an insolvent **Company**;

…

(U) **"Wrongful Act"** means:

1. 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;

2. solely with respect to a **Claim** as defined in Definition (C)(4) of the Policy, any other matter concerning an **Insured Person** solely by reason of his or her capacity as such or due to his or her status as such;

3. any **Employment Practices Wrongful Act** by an **Insured Person** while acting in his or her capacity as such or due to his or her status as such.

III. EXCLUSIONS

…

(B) No coverage shall be available under this Policy for that portion of any **Claim, Interview** or **Investigation Demand** made against an **Insured**:

1. based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or **Wrongful Act** underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration against an **Insured** which was brought prior to the Pending and Prior Litigation Date set forth in ITEM 6 of the Declarations;

2. based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or **Wrongful Act** which, before the Inception Date of this Policy, was the subject of any notice given under any other Management Liability policy, Directors and Officers liability policy or similar policy;

…

Endorsement No. 3

PRIOR ACTS EXCLUSION

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 terms, conditions and limitations of this Policy shall remain unchanged.

Endorsement No. 6

CONVERT POLICY TO RUN-OFF UPON HAPPENING OF SPECIFIC EVENT

In consideration of an additional premium of $0 (the "Run-Off Premium") charged:

1. Immediately upon the date which the event described in paragraph (2) below occurs:

(a) coverage under this Policy will continue in full force and effect with respect to any Claim or Investigation Demand for a Wrongful Act committed or allegedly committed before such event, but coverage will cease with respect to any Claim or Investigation Demand for a Wrongful Act, committed or allegedly committed on or after such event (hereinafter, the date of such event, "Conversion Date").

(b) The Expiration Date set forth in Item 2 of the Declarations shall be amended to that date exactly six (6) years after the Conversion Date.

(c) The term "Company" shall not include those Subsidiaries created or acquired after the Conversion Date.

(d) Section VI General Conditions (F) of the Policy and Item 5 of the Declarations, and all other references in the Policy to an Optional Extension Period, are deleted in their entirety.

(e) Section VI General Conditions (E)(1) is amended to read in its entirety as follows:

"(1) The entire premium for this Policy is fully earned."

(g) Section VI General Conditions (A)(3) of the Policy is deleted in its entirety.

2. The event upon the happening of which coverage under this Policy will cease with respect to any Claim or Investigation Demand described in paragraph (1) above, is as follows:

3. The Run-Off Premium shall be deemed fully earned as of the effective date of this endorsement.

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

SCHEDULE "A"
LIST OF AUTHORITIES

1. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59
2. *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405
3. *Aviva Insurance Company v. Pizza Pizza Ltd.*, 2008 ONCA 535
4. *Belton v. Liberty Insurance Co. of Canada*, 2004 CanLII 6668 (Ont. C.A.)
5. *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464
6. *Boliden Limited v. Liberty Mutual Insurance Company*, 2008 ONCA 288
7. *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66
8. *Canwest Global Communications Corp. (Re)*, 59 CBR (5th) 72, 2009 CanLII 55114 (Ont. S.C.J.)
9. *Cabell v. The Personal Insurance Company*, 2011 ONCA 105
10. *Carolina Casualty Insurance Co. v. McGhan*, 2008 US Dist LEXIS 143800 (District of Nevada)
11. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
12. *Danier Leather Inc. (Re)*, 2016 ONSC 1044
13. *Demme v. Healthcare Insurance Reciprocal of Canada*, 2022 ONCA 503
14. *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72
15. *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59
16. *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance* Company, 2021 ONCA 159
17. *Foodpro National Inc. v. General Accident Assurance Co. of Canada*, 1988 CanLII 4739 (Ont. C.A.).
18. *Jayhawk Private Equity Fund II LP v. Liberty Insurance Underwriters Inc.*, 2018 US Dist LEXIS 250716
19. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37
20. *Omarali v. Just Energy*, 2016 ONSC 4094, leave to appeal refused, 2016 ONSC 7096 (Div. Ct.).
21. *Omarali v. Just Energy*, 2019 ONSC 3734
22. *Onex Corporation v. American Home Assurance Company*, 2013 ONCA 117
23. *Ontario v. St Paul Fire and Marine Insurance Company*, 2023 ONCA 173
24. *Papapetrou v. 1054422 Ontario Limited*, 2012 ONCA 506
25. *Progressive Homes v. Lombard General Insurance Co. of Canada*, 2010 SCC 33

26. *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 SCR 252
27. *Timminco Limited (Re)*, 2012 ONSC 106
28. *Just Energy Corp. (Re)*, 2021 ONSC 1793
29. *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343

SCHEDULE "B"
RELEVANT STATUTES

***Employment Standards Act*, 2000, SO 2000, c 41, section 5:**

No contracting out
5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. 2000, c. 41, s. 5 (1).

Greater contractual or statutory right
(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply. 2000, c. 41, s. 5 (2).

***Employment Standards Act*, 2000, SO 2000, c 41, section 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.

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.

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

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

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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