CITATION: In the Matter of the Companies' Creditors Arrangement Act and a Plan of Compromise or Arrangement of 14487893 Canada Inc., 2024 ONSC 5220
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20240920

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-26, AS AMENDED

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

BEFORE: Cavanagh J.

COUNSEL: *Vlad Calina and Caitlin Leach*, for Haidar Omarali in his capacity as representative plaintiff of the certified class in *Omarali v. Just Energy*, Court File No. CV-15-527493-00CP

Nina Bombier and Evan Linn, for XL Specialty Insurance Company

David Ullman and Jason Mangano, for Tokio Marine HCC Syndicate 4141

Marcus Snowden and Pearl Rombis, for Lloyd's Underwriters (Hiscox D&O Consortium 4632))

Jeremy Dacks, for the Just Energy Group

Rebecca Kennedy, for the Court-appointed Monitor, FTI Consulting Canada Inc.

HEARD: September 9, 2024

ENDORSEMENT

Introduction

[1] Haidar Omarali is the representative plaintiff in a class action against Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario L.P. (collectively, "Just Energy") in which claims are made for unpaid wages and benefits under the *Employment Standards Act* resulting from a misclassification by Just Energy of sales agents as independent contractors instead of employees during 2012 to 2016.

[2] On March 9, 2021, before commencement of the scheduled trial of the class action, Just Energy filed for protection under the *Companies' Creditors Arrangement Act* ("*CCAA*") and an order was made staying all proceedings against Just Energy, including the class action.

[3] On the same day as the *CCAA* filing, XL Specialty Insurance Company ("XL") issued a primary insurance policy and two other insurers (together with XL, the "Insurers") issued excess policies (together, the "Policies") providing coverage to directors and officers of Direct Energy. The Policies specifically provide coverage for loss resulting from a statutory claim for unpaid wages.

[4] The Policies include an endorsement called the "Prior Acts Exclusion". The interpretation of this endorsement is at issue on this motion.

[5] On October 9, 2021, Mr. Omarali filed a proof of claim (the "Claim") asserting that the directors are jointly and severally liable for CAD $105,854,794.52 claimed to be owed to class members in the class action for unpaid wages and benefits pursuant to statutory provisions. The Monitor in the *CCAA* proceeding disallowed this claim.

[6] On November 3, 3033, this Court approved a sale transaction and made an order that Just Energy and the directors and officers are not released from the Claim to the limited extent of maintaining claims against insurance policies that may be available to pay insured claims.

[7] By Notice of Motion dated August 25, 2023, Mr. Omarali as representative plaintiff in the class action moved for, among other things, an order directing the Insurers to pay amounts owed under the Policies.

[8] On this motion, the Insurers move for a declaration that under the Policies, the Prior Acts Exclusion applies to bar coverage for the Claim asserted against the D&Os, and related relief. Mr. Omarali opposes the Insurers' motion.

[9] For the following reasons, the Insurers' motion is granted.

Background Facts

[10] On May 4, 2016, a statement of claim in a proposed class action was issued. On November 13, 2015, the statement of claim was amended to name Mr. Omarali as the representative plaintiff.

[11] The class members allege that Just Energy misclassified each of them as independent contractors and that the structure imposed on them as sales agents was an employment relationship. They claim entitlement to unpaid wages and benefits, relying principally on the *Employment Standards Act*.

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

[13] On November 28, 2016, Just Energy formally adjusted its own classification of its then current sales agents from "independent contractors" to "employees". On June

20, 2017, the opt-out deadline for potential class members of the class occurred. The class consists of 7,723 individuals.

[14] On November 20, 2019, the court ordered that the Class Action be tried beginning on November 15, 2021.

[15] On March 9, 2021, before the scheduled trial of the Class Action, Just Energy filed for protection under the *CCAA.* An Order was issued staying all proceedings against Just Energy, including the class action. This stay remains in effect, currently until September 30, 2024.

[16] Also on March 9, 2021, the Insurers issued the Policies. The excess policies follow form to the XL Policy in the relevant parts. The Policies specifically provide coverage for loss resulting from a statutory claim for unpaid wages.

[17] On October 29, 2021, in the *CCAA* claims process, class counsel filed the Claim for unpaid wages on behalf of the Class against Just Energy's directors and officers (the D&Os").

[18] On November 3, 2022, this Court approved a sale transaction in this *CCAA* proceeding and granted an approval and vesting order. The vesting order includes a general release and provides, among other things, that Just Energy and the D&Os are not released from the class action claims to the limited extent of maintaining claims against insurance policies that may be available to pay insured claims.

Analysis

[19] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, the Supreme Court of Canada set out general principles of insurance policy interpretation taken from the jurisprudence:

> The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole [citation omitted].
>
> Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction [citation omitted]. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties [citations omitted], so long as such an interpretation can be supported by the text of the policy. Court should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded [citations omitted]. Courts should also strive to ensure that similar insurance policies are construed consistently [citation omitted]. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in first place.

> When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* - against the insurers [citations omitted]. One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly [citation omitted].

[20] The terms of the policy must be examined in light of the surrounding circumstances in order to determine the intent of the parties and the scope of their understanding. 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. In cases of insurance contracts, the evidence of the factual matrix may be of more assistance when the contract is an individually negotiated contract rather than a standard form contract resulting from a routine purchase of an insurance policy. See *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] 1 S.C.R. 744, at paras. 27-30.

[21] Even a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy. See *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.

[22] In *Progressive Homes*, at paras. 26-28, the Supreme Court of Canada observed that the type of insurance policy before it (a comprehensive general liability or CGL policy) typically sets out the types of coverage contained in the agreement, followed by specific exclusions to coverage which preclude coverage when the claim otherwise falls within the initial grant of coverage. The Court held that exclusions should be read in light of the initial grant of coverage. The Court noted that a policy may also contain exceptions to exclusions. Exceptions bring an otherwise excluded claim back within coverage, where the claim fell within the initial grant of coverage in the first place. The Court held that because of this alternating structure of a CGL policy, it is generally advisable to interpret the policy in the order described above: coverage, exclusions and then exceptions.

[23] The Insurers and Mr. Omarali accept that the Prior Acts Exclusion is not ambiguous. Each of the Insurers and Mr. Omarali argues in support of a different interpretation of the Prior Acts Exclusion when the Policies are read as a whole in light of surrounding circumstances.

Assumption that the Claim falls within the initial grant of coverage in the Policies

[24] The XL Policy is a claims made policy that apples to claims first made during the policy period. Coverage is provided from March 9, 2021, the date that Just Energy filed for protection under the *CCAA*. Endorsement No. 6 provides that upon Just Energy's "[e]mergence from bankruptcy", coverage under the Policy will cease with respect to any claim described in paragraph 1 of this endorsement.

[25] The XL Policy includes a number of endorsements, including the "Prior Acts Exclusion", an endorsement deleting insuring agreements (B) to (F), and an endorsement amending "Insured" to mean "the Insured Persons" and amending the definition of the term "Wrongful Act".

[26] The XL Policy provides:

> 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.

[27] The "Insured Persons" as defined in the XL Policy means "any past, present or future natural person director or officer" of Just Energy and those persons serving in a functionally equivalent role for the Parent Company or any Subsidiary operating or incorporated outside the United States or Canada (including any *de facto* director). Subject to exclusions, the D&Os are covered for any "Loss" not indemnified by the Company.

[28] 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**;".

[29] 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.

[30] As the Insurers request, I assume for the purposes of this motion, without deciding, that the Claim falls within the Policies' insuring agreement (subject to the application of exclusions under the Policies).

Prior Acts Exclusion

[31] Once it is held 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. See *Progressive Homes*, at para. 51.

[32] The Insurers rely on the Prior Acts Exclusion for their submission that coverage for Mr. Omarali's claim is excluded. 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.

[33] In *Non-Marine Underwriters, Lloyds of London v. Scalera*, 2000 SCC 24, the Supreme Court of Canada, at para. 50, explained that in determining whether or not a given claim could trigger indemnity under an insurance policy, a court must decide, based on the pleadings, the true nature of the claims. See also *Papapetrou v. 1054422 Ontario Limited*, 2012 ONCA 506, at para. 44.[1]

[34] 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*.

[35] The Insurers submit that the clear and unambiguous meaning of the language in the Prior Acts Exclusion excludes coverage for any Claim "based upon", "arising out of", "directly or indirectly resulting from", "in consequence of or in any way involving" any act or omission that occurred, or allegedly occurred, before March 9, 2021. The Insurers submit that coverage for the Claim is excluded when the words used in the Prior Act Exclusion are given their clear and unambiguous meaning.

[36] In support of this submission, the Insurers cite *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729; leave to appeal to Supreme Court of Canada granted,

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[1] In both cases, the analysis was needed to determine whether an insurer's duty to defend arose in relation to the claims made.

2024 CanLII 61126. In *Trillium*, an exclusion referred to "any law". The Court of Appeal, at para. 67, held, citing *Epp School District v. Park (Rural Municipality)*, 1936 CanLII 151 (SK CA), that "[t]he term 'any' is all-embracing and without limitation or qualification".

[37] Mr. Omarali relies on the fact that Just Energy is not an Insured Person. He submits that the Claim does not involve any prior act or omission of an Insured Person under the Policies and, therefore, coverage for the Claim is not excluded by the Prior Acts Exclusion.

[38] Mr. Omarali submits that to capture the 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. He submits that (i) this broad interpretation is inconsistent with the balance of the Policies and the commercial context within which they were issued; (ii) the position of the Insurers on the scope of the Prior Acts Exclusion finds no support in the jurisprudence; and (iii) the interpretation of the Prior Acts Exclusion advanced by the Insurers, if accepted, would offend the nullification of coverage doctrine.

Consideration of the Prior Acts Exclusion reading the Policies as a whole

[39] Mr. Omarali submits that on the face of the Prior Acts Exclusion, the Claim is not excluded because unpaid wages were an obligation owed by Just Energy prior to March 9, 2021, which obligation the D&Os only became liable for on that date, due to Just Energy's insolvency. Mr. Omarali submits that prior to March 9, 2021, the D&Os – the only Insured Persons – were not liable for unpaid wages and, based on that fact, there cannot have been an act or omission of a person covered by the Policies involved in statutory claims for prior unpaid wages, including the Claim. Mr. Omarali submits that, as a result, the acts and omissions of Just Energy do not trigger the Prior Acts Exclusion.

[40] I do not accept this submission. The timing of the liability imposed on D&Os for unpaid wages does not assist me to interpret the scope of the Prior Acts Exclusion. The fact that Just Energy is not an Insured Person under the Policies does not lead to the conclusion that the Prior Acts Exclusion does not apply to exclude coverage for prior acts by a non-insured person. The question remains whether the words "any act, error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Act" as they are used in the Prior Acts Exclusion mean any such act etc. committed or allegedly committed by anyone, as the Insurers contend, or whether they mean any such act etc. committed or allegedly committed by an Insured Person, as Mr. Omarali contends.

[41] Mr. Omarali relies on the definition of the term "Loss" as used in Insuring Agreement (A) which specifically includes wages that "are or were payable by the Company" and that the D&Os "have become personally liable" to pay under statute (emphasis added). He submits that this language makes it clear that coverage is specifically provided for prior unpaid wage claims (before the insolvency of Just

Energy) and that the Prior Acts Exclusion cannot be read in a manner that excludes coverage for such past unpaid wages.

[42] I have assumed for purposes of this motion that the Policies provide an initial grant of coverage for the claim for loss in the amount of the statutory liability of Insured Persons for past wages (before Just Energy's insolvency). I do not accept that because a claim is, specifically, initially covered by an insuring agreement, this means that an exclusion clause cannot be read to exclude coverage. Although exclusions should be read in light of the initial grant of coverage, exclusions in an insurance policy preclude coverage when the claim otherwise falls within the initial grant of coverage. That is the very nature of an exclusion. See *Progressive*, at para. 27.

[43] In addition, the Policies cover liability of D&Os for statutory claims for unpaid wages after March 9, 2021 and the Prior Acts Exclusion does not exclude coverage for a claim based on such liability. If, after March 9, 2021, Just Energy were to fail to pay wages and D&Os were to become statutorily liable for such unpaid wages, the Policies would provide coverage. The use of the past tense in the definition of the term "Loss" in the Policies does not necessarily refer only to loss resulting from unpaid wage claims before the insolvency of Just Energy.

[44] Mr. Omarali relies on the definition of "Insured Person" in the Policies which includes "any past, present or future natural person director or officer ... of the Company" (emphasis added). Mr. Omarali submits that under the Insurers' interpretation of the Prior Acts Exclusion, no claim could ever be made against a past director as that claim would, necessarily, have a nexus in the pre-*CCAA* filing past. He submits that, for this reason, the Insurers' interpretation of the Prior Acts Exclusion, if accepted, would result in this exclusion lacking coherence with the balance of the policy.

[45] I do not accept this submission. Whether or not the Policies cover loss from an unpaid wages claim before March 9, 2021, they cover loss resulting from claims based on statutory liability of D&Os for unpaid wages after March 9, 2021 and the Prior Acts Exclusion does not exclude coverage for a loss based on such liability. If a director or officer of Just Energy were to cease being a director or officer after March 9, 2021, this person could still be statutorily liable for unpaid wages after this date and would have coverage under the Policies, even as a "past" director or officer. The definition of "Insured Person" has meaning, and the terms of the Policies cohere in this respect, even if the Insurers' interpretation of the Prior Acts Exclusion is accepted.

[46] Mr. Omarali submits that if the Insurers' interpretation of the Prior Acts Exclusion is accepted, the "prior/pending litigation exclusion" (III(B)(1) of the XL Policy) and the "prior notice exclusion" (III(B)(2) of the XL Policy) would not be needed because coverage for loss from every claim that would be excluded under these provisions would be excluded under the Prior Acts Exclusion. Mr. Omarali submits, citing *Progressive Homes*, at para. 37, that a Court should decline to accept an

interpretation of an insurance policy that "would leave little or no work" for an exclusion.

[47] The Prior Acts Exclusion is included in the XL Policy as Endorsement No. 3 attached to the XL Policy at issuance. The "prior/pending litigation exclusion" and the "prior notice exclusion" are not included in the XL Policy as added endorsements but are in the form of the XL Policy as issued, subject to endorsements. It may be so that the Prior Acts Exclusion, if given the interpretation advanced by the Insurers, would leave the other exclusions with little work to do. However, given the manner in which the Prior Acts Exclusion became part of the XL Policy, it was not necessary to remove the other exclusions, even if they may not have been needed.

[48] Where the language of an exclusion is unambiguous, the court should give effect to clear language, reading the contract as a whole. I do not regard the fact that there are two exclusions in the Policies that may overlap with the Prior Acts Exclusion, which was added to the XL Policy as an endorsement, as a reason not to give effect to the clear language of the Prior Acts Exclusion.

[49] Mr. Omarali refers to the language of the "prior/pending litigation exclusion" and the "prior notice exclusion" which both include the words "any fact, circumstance, situation, transaction, event or Wrongful Act" 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. Mr. Omarali submits that this language clearly requires no connection between the prior circumstance and the Insured Person and, had the parties intended the Prior Acts Exclusion to be similarly broad, they would have used this language. Mr. Omarali submits that the interpretation of the Prior Acts Exclusion advanced by the Insurers is not consistent with the Policy as a whole and should be rejected.

[50] The Prior Acts Exclusion differs from the other two exclusions in that it excludes coverage for any claim based upon or arising out of "any act, error, omission" etc. which is committed [by a person] prior to March 9, 2021, as opposed to "any fact, circumstance, situation" etc. 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.

Commercial Context of the Policies

[51] The effective date of the Policies is the commencement date of the *CCAA* proceeding. The *CCAA* proceeding and the issuance of the Policies in connection therewith provides the essential, overall, commercial context and purpose for the Policies.

[52] The Insurers submit that the Policies, which include the Prior Acts Exclusion and the prior litigation and prior notice exclusions, carefully delineate the scope of the

risk the Insurers agreed to insure and thereby expressly inform the purpose of the Policies. The claim by Mr. Omarali in the class action was known when Just Energy filed for *CCAA* protection. They submit that in this insolvency context, the Insurers did not agree to assume the risk of exposure to claims based on pre-filing conduct because it would make no commercial sense for them to do so.

[53] The Insurers submit that these exclusions allowed them to issue policies providing coverage for losses that they may not otherwise have been willing to cover at all, or only for a much higher price. The Insurers submit that the Prior Acts Exclusion and the prior litigation and prior notice exclusions operated to ensure that coverage for claims existing at the time of the *CCAA* filing were excluded.

[54] The Insurers submit that the exclusion of claims based upon or arising from any act or omission committed or allegedly committed by anyone before March 9, 2021 aligns with the other exclusions and the overall commercial context within which the Policies were issued to provide coverage only for the going forward, post-insolvency, risk.

[55] Mr. Omarali submits that the purpose of the Policies, as reflected in the grant of coverage in particular, was to allow Just Energy to retain D&Os while insolvent. He submits that the factual matrix, together with the language of the Policies, strongly suggest that they were intended to cover personal liability for the D&Os so that they would remain with the company in order for it to be restructured.

[56] Mr. Omarali submits that a policy that failed to do so by excluding coverage for all statutory claims related to prior conduct by anyone, and not just the prior conduct of the D&Os, would have provided no comfort to the D&Os and would not have allowed Just Energy to continue to operate. Mr. Omarali submits that the Insurer's interpretation of the Prior Acts Exclusion is inconsistent with the factual matrix.

[57] I do not accept that the evidence of the surrounding circumstances when the Policies were issued at the time of Just Energy's *CCAA* filing supports the conclusion that the Policies, if they excluded coverage for prior acts or omissions, by anyone, before March 9, 2021, would have provided no comfort to the D&Os such that they would have refused to continue to serve and Just Energy would not have continued to operate. 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.

[58] When the language of the Prior Acts Exclusion is read with the Policies as a whole and in the context of the surrounding circumstances, particularly Just Energy's *CCAA* filing, I accept the Insurers' submissions and conclude that the surrounding circumstances are consistent with the interpretation of the Prior Acts Exclusion advanced by the Insurers.

[59] I conclude that the language of the Prior Acts Exclusion is clear and unambiguous when read in the context of the Policies as a whole and having regard to the

surrounding circumstance of the issuance of the Policies at the time of Just Energy's *CCAA* filing. Having reached this conclusion, I should give effect to the clear and unambiguous language of the Prior Acts Exclusion, subject to the nullification of coverage doctrine.

Nullification of coverage doctrine

[60] In *Cabell v. The Personal Insurance Company*, 2011 ONCA 105, the Court of Appeal addressed the doctrine of nullification of coverage. The Court reviewed jurisprudence concerning this doctrine and held that the passages cited from this jurisprudence suggest that the nullification of coverage doctrine is an independent doctrine that applies even in the absence of ambiguity. The Court of Appeal, at para. 17, cited with approval the following passage from *Zurich Insurance Co. v. 686234 Ontario Ltd*., 2002 CanLII 33365 (ON CA), at para. 28:

> From Weston Ornamental Iron Works it is clear that this court has concluded that even though an exclusion clause may be clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

[61] Evidence from which a determination could be made about nullification of coverage and reasonable expectations of the parties is not necessarily needed for the court to determine the reasonable expectations of the parties. If the court is able to determine on an objective basis that the insurer's position would render nugatory coverage for the most obvious risk for which the policy is issued, it will be for the insurer to show that the effect of its interpretation would not virtually nullify the coverage and would not be contrary to the reasonable expectations of the parties as to the coverage purchased. See *Cabell*, at paras. 24-28.

[62] Mr. Omarali submits that Just Energy purchased the Policies to protect the D&Os from personal liability in order to retain those D&Os through the insolvency process and that liability for pre-filing wage claims is a common risk for directors and a live issue in any insolvency. He submits that an interpretation of the Prior Acts Exclusion that excludes the Claim would render the Policies incapable of protecting the D&Os from an obvious risk they faced such that, under the nullification of coverage doctrine, such an interpretation should be rejected.

[63] The Policies cover the Insured Persons for loss resulting from a claim made during the policy period for unpaid wages accruing after the *CCAA* filing and during the period of Just Energy's insolvency while it continues to operate and attempts to emerge from insolvency.

[64] 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.

[65] I conclude that the nullification of coverage doctrine does not apply to preclude the application of the Prior Acts Exclusion to bar the Claim.

Disposition

[66] For these reasons:

a. I declare that the Prior Acts Exclusion bars coverage for the Claim; and

b. I order that the relief sought against the Insurers in Mr. Omarali's Notice of Motion dated August 25, 2023 is denied.

[67] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable (and with reasonable page limits) to be agreed upon by counsel and approved by me.

Cavanagh J.

Date: September 20, 2024