

SUPREME COURT OF NOVA SCOTIA

Citation: *Fiera Private Debt Fund III LP v, 3306133 Nova Scotia Limited,*
2026 NSSC 35

Date: 20260130

Docket: *HFX*, No. 531463

Registry: Halifax

Between:

Fiera Private Debt Fund III LP, Fiera Private Debt Fund V LP, each by their
general partner, Fiera Private Debt Inc.

Applicants

v.

3306133 Nova Scotia Limited, 1003940 Nova Scotia Limited, Headline
Promotional Products Limited, Titan Security & Investigation Inc., Brace Capital
Limited, Brace Holdings Limited

Respondent

<p>Decision</p>

Judge: The Honourable Justice John Keith

Heard: July 15 and 16, 2025, in Halifax, Nova Scotia

Written Decision: January 30, 2026

Counsel: Michael Murphy and Mary Paterson, for the Applicant in this
motion, Eckler Admin Corp. Ltd.
Eric Dolden, Paul Dawson and Mark Whyte, for the
Respondent in this motion, AIG Insurance Company of
Canada
Grace MacCormick, Roderic McLauchlin and Mark
Mandelker, for the Respondent in this motion, Newline
Canada Insurance Limited

BY THE COURT:

INTRODUCTION AND BRIEF CONCLUSIONS

[1] The Halifax Herald Ltd. (“**The Herald**”) was a prominent media and publishing company in Atlantic Canada and a wholly-owned subsidiary of Brace Holdings Limited. At all material times, Mark Lever, Ian Scott, and Sarah Dennis, were The Herald’s directors and officers and effectively its operating minds. Unless otherwise noted, these individuals are referred to collectively as the “**Directors and Officers**”.

[2] The Herald sponsored a pension plan for its employees known as The Herald Retirement Plan, Registration Number C255869 (the “**Pension Plan**”).

[3] In 2018 and 2019, The Herald failed to make \$2,656,656 of pension contributions into the Pension Plan (the “**Unpaid Special Payments Amount**”) otherwise required under Nova Scotia’s *Pension Benefits Act*, S.N.S. 2011, c. 41, as amended and related regulations. This freed up funds that would otherwise be held in the Pension Plan and enabled them to be used for other purposes - including a plan to transition The Herald’s traditional print operation into a digital model. Mr. Scott testified in discovery examinations that “... the business needed to move more demonstrably into a digital future or it was going to cease to be. You know, we couldn’t continue as a newspaper focused organization, it needed to move to a broader digitally focused organization with a smaller element of the traditional newspaper side.” (Transcript of Ian Scott’s Discovery Examination at pp 66 – 67)¹

[4] Nova Scotia’s Superintendent of Pensions eventually discovered that The Herald was not making proper pension contributions on the strength of the (incorrect) belief that a pending regulatory amendment was retrospective in nature, thus rendering any existing breach a nullity. A dispute arose between the Superintendent and The Herald as to the propriety of The Herald’s actions. It began with a demand letter sent by the Superintendent on May 17, 2021 and then escalated when the Superintendent issued a Notice of Intended Order on January 17, 2022 seeking to compel payment.

¹ In *Halifax Herald Limited v. Superintendent of Pensions*, 2024 NSSC 39, Norton, J. wrote at para. 1 that “The Herald preferred to use the money [from the Unpaid Special Payments Amount] to fund its pivot into digital operations”.

[5] The Labour Board and then, on appeal, the Nova Scotia Supreme Court held that the amendments were not retroactive and that The Herald remained obligated to pay the Unpaid Special Payments Amount. The decision was not appealed.

[6] Shortly thereafter:

1. The Herald sought protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("**CCAA**"); and
2. The Applicant, Eckler Admin Corp Ltd., ("**Eckler**") was appointed interim administrator for the Pension Plan

[7] On October 21, 2024, Eckler commenced an Action against The Herald (Court File No. 537579, the "**Herald Action**"). On November 28, 2024, Eckler commenced action against the Directors and Officers (Court File No. 538755, the "**D & O Action**"). While the identities of the Defendants differ, the underlying allegations and causes of action are effectively the same and may be distilled as follows:

1. By failing to make required pension contributions, the Directors and Officers (acting through The Herald) breached Nova Scotia's *Pension Benefits Act*, S.N.S. 2011, c. 41, as amended ("**Pension Benefits Act**"), the *Pension Benefits Regulations*, and corresponding private contractual obligations under the Pension Plan;
2. Breach of fiduciary duties (and related conflict of interest allegations) by using the contributions payable to the Pension Plan to improperly fund The Herald's planned transition to a digital media company and then compounding the breach by deliberately using Pension Plan assets to fund litigation with the Superintendent of Pensions.

A more detailed description of the claims contained in the pleadings is provided below and is important to the conclusions which follow.

[8] In this motion, Eckler seeks various forms of declaratory relief in connection with coverage available under the following two insurance policies:

1. AIG Insurance Company of Canada's ("**AIG**") Fiduciary Liability Policy, being policy number 01-602-90-33 (the "**Fiduciary Liability Policy**"), which was in force from October 22, 2023 to October 22, 2024; and
2. Newline Canada Insurance Limited's ("**Newline**") Directors' and Officers' Liability Policy, being policy number CAN23030707A (the

"D & O Liability Policy"), which was in force from November 30, 2023 to November 30, 2024.

[9] The insurers (AIG and Newline) oppose the relief sought and state that there is no available coverage under either insurance policy. Newline also raises a preliminary jurisdictional issue and argues that Eckler does not have standing to seek the requested relief. AIG acknowledges the Court's jurisdiction to determine whether there is a duty to defend under the Fiduciary Liability Policy but states that the Court lacks jurisdiction to go further at this stage and that it would be premature to weigh in on the existence and scope of any duty to indemnify for alleged losses.

[10] For the reasons which follow:

1. Under the Fiduciary Liability Policy, AIG has a duty to defend The Herald and its Directors and Officers against the covered Eckler Claims raised in the Herald Action and the D & O Action.
2. Under the D & O Liability Policy, Newline has a duty to advance defence costs to the Directors and Officers so that they might defend the covered Eckler Claims in the same actions.
3. Finally and based on the declaratory relief sought, the covered Eckler Claims do not form part of the broad release language contained in the Saltwire and The Herald Sale Approval and Vesting Order and, instead, are carved out of that release as part of the "Insured Claims" as defined therein.

[11] The remaining relief sought by Eckler seeking a declaration regarding broader duties to indemnify for losses associated with the Eckler Claims is dismissed.

BACKGROUND

[12] As mentioned, in 2018 and 2019, The Herald failed to make \$2,656,656 of pension contributions into the Pension Plan (the Unpaid Special Payments Amount). At around that same time, The Herald took the view that certain pending amendments to Nova Scotia's *Pension Benefits Regulations*, N.S. Reg. 164/2002 that came into force on April 1, 2020 (the "**Amended Regulations**") were retrospective in nature. Therefore, The Herald reasoned, any existing obligation to make those past contributions vanished.

[13] The Herald's interpretation of the Amended Regulations was proven wrong and misguided. On March 14, 2023, the Labour Board determined that the Amended

Regulations were not retrospective in nature and did not relieve The Herald of its obligations around the Unpaid Special Payment Amount (2023 NSLB 32). On February 8, 2024, Norton, J. dismissed The Herald's appeal (*Halifax Herald Limited v. Superintendent of Pensions*, 2024 NSSC 39 referred to below as "***Halifax Herald Limited***"). Norton, J.'s decision was not appealed and is final and binding.

[14] In the interim (i.e. beginning in or around 2018 and before its misinterpretation of the Amended Regulations was finally confirmed), The Herald's views as to the retrospective nature of the Amended Regulations freed up funds (or enhanced The Herald's financial capacity) which could then be redeployed in other areas of the company - including a planned transition to digital operations. Ian Scott (one of the Directors and Officers) attended discovery examinations in this proceeding. Mr. Scott confirmed that The Herald "couldn't continue as a newspaper focused organization, it needed to move to a broader digitally focused organization with a smaller element of the traditional newspaper side." (Transcript of Ian Scott's Discovery Examination at pp. 66 – 67)

[15] The Superintendent of Pensions eventually discovered The Herald was not making the necessary contributions and was justifying that decision based on its interpretation of the Amended Regulations. A dispute arose. The history of that dispute and the ensuing litigation is germane:

1. At the same time as The Herald decided not to satisfy the Unpaid Special Payments Amount, it also stopped filing annual information returns due under the *Pension Benefits Act* and regulations. Those filings would have exposed the non-payment.
2. On November 9, 2020, the Superintendent of Pensions sent a letter attaching a Notice of Intended Order requiring The Herald to, among other things, file Annual Information Returns for the years ending December 31, 2017, December 31, 2018, and December 31, 2019 within 30 days of the date of the Order; and remit the applicable late filing fees.
3. On November 26, 2020, The Herald provided the requested returns and suggested that it was in full compliance of all solvency requirements under the Amended Regulations and, therefore, no further solvency payments were required – implying that any past obligations regarding the Unpaid Special Payment Amount was eliminated.

4. By letter dated May 17, 2021, the Superintendent of Pensions stated that the Amended Regulations did not eliminate previously required contributions; and that these past obligations remained payable regardless of the Pension Plan's current funded status calculated according to the new solvency requirements. The Superintendent further confirmed that failure to pay the Unpaid Special Payment Amount may result in a proposed Order to wind up the Pension Plan.
5. By letters dated October 12, 2021 and November 8, 2021, The Herald's legal counsel (Stewart McKelvey) confirmed its view that the historic Unpaid Special Payments Amount was no longer due because the Amended Regulations retroactively established minimum funding standards that were met.
6. On January 17, 2022, the Superintendent issued a Notice of Intended Order (the "**NOID**") seeking, among other things, to compel The Herald to pay Unpaid Special Payments.
7. The Herald appealed the NOID to the Labour Board. On March 14, 2023, the Labour Board concluded that the Amended Regulations were not retrospective;
8. On February 8, 2024, Norton, J. dismissed The Herald's appeal, confirming that:
 - a. There was no dispute that in 2018 and 2019, The Herald was still responsible to be making monthly "special payments" towards this outstanding special payment amount (in the total amount of \$2,656,656.00), but The Herald did not make these payments (*Halifax Herald* at para. 9);
 - b. The only issue was whether subsequent statutory amendments that altered the pension contributions formula was retrospective in nature and served to eliminate the special payment amount that otherwise was due and owing in 2018 and 2019 was still required to be paid (*Halifax Herald Limited* at para. 118); and
 - c. The statutory amendments were not retroactive and, therefore, "... the correct statutory interpretation leads to the conclusion that The Herald continues to owe the [Unpaid Special Payment Amount]" (*Halifax Herald Limited*, at para. 152).

As mentioned, Norton, J.'s decision is final and binding.

[16] About 5 weeks after Norton, J.'s decision, on March 13, 2024, The Herald filed for protection under the *CCAA*.

[17] On March 20, 2024, Eckler was appointed as the interim administrator for the Pension Plan.

[18] On March 26, 2024, as case management judge overseeing the *CCAA* proceedings, I issued the Second Amended & Restated Initial Order which, among other things, granted a stay of proceedings with respect to any claim against the Directors and Officers for liabilities on that date (March 26, 2024).

[19] On August 8, 2024, the Court issued an Order approving the sale transaction between The Herald and Saltwire Network Inc. as sellers, and Postmedia Network Inc., as purchasers (the "**Vesting Order**"). Paragraph 15 of the Vesting Order contains language that, among other things, releases the Directors and Officers from all claims and liability, but also carves out specific exceptions from that broad release. As will be seen below, Newline raises questions as to the scope of those exceptions and whether they include the claims being brought against the Directors and Officers in this proceeding.

[20] After its appointment, Eckler discovered that, in addition to the non-payment of the Unpaid Special Payments Amount, The Herald, acting through its Directors and Officers, deliberately diverted \$388,883.68 from the Pension Plan to fund litigation expenses accruing in connection with The Herald's various appeals of the Superintendent's NOID, described above (the "**Litigation Expenses**").

[21] On October 21, 2024, Eckler commenced the Herald Action.

[22] On November 28, 2024, Eckler commenced the D & O Action.

[23] The allegations in both The Herald Action and the D & O Action are effectively identical.

[24] It is necessary to pause here and examine the nature and scope of Eckler's allegations and claims as expressed in these pleadings. Obviously, to determine whether the Eckler Claims attract insurance coverage, it is essential that the nature and scope of those claims be clearly and accurately defined.

[25] I condensed the allegations in the Herald Action and the D & O Action at para. 7 above but, again, greater precision and clarity is required as it helps guide the analysis around coverage that follows. The allegations and claims in the pleadings are:

1. The Directors and Officers (acting through The Herald) served as both the sponsor of the Pension Plan and its administrator;
2. In 2018 and 2019, the Directors and Officers (acting through The Herald as sponsor of the Pension Plan), failed to make the minimum statutory pension contributions and special payments totalling \$2,656,656 (the Unpaid Special Payments Amount). These acts:
 - a. Breached their statutory obligations under the *Pension Benefits Act* and the 2020 *Amended Regulations*; and
 - b. Also breached the contractual obligations under the terms of the Pension Plan.
3. The Directors and Officers also wrongly assumed that the 2020 *Amended Regulations* were retrospective in nature and would nullify their past breaches and eliminate the Unpaid Special Payments Amount otherwise owing. On the strength of that mistaken assumption, the Directors and Officers made the further assumption that whatever monies were otherwise payable into the Pension Fund did not have to be retained but, instead, could be redeployed or redirected. It is alleged that the monies were subsequently completely dissipated for such things as transitioning The Herald's historic printing operation into a digital media enterprise. These acts, it is alleged:
 - a. Placed the Directors and Officers in an irreconcilable conflict of interest in which they improperly subordinated their obligations to the Pension Plan and its members; and
 - b. Constituted a breach of the fiduciary duty owed by the Directors and Officers (acting through The Herald) to the Pension Plan and its beneficiaries.
4. The alleged conflict of interest and fiduciary breach became more overt when The Herald, acting through its Directors and Officers, did not simply fail to make contributions owing to the Pension Plan but actually depleted Pension Plan assets by withdrawing monies to pay for the legal expenses incurred as a result of ongoing litigation with the

Superintendent of Pensions. The pleadings estimated these legal expenses to be \$405,583.68; however, in this proceeding, the amount was reduced to \$388,883.68. (the “**Legal Expenses**”)

5. As to remedy, Eckler’s prayer for relief repeatedly mentions compensation equal to the Unpaid Special Payments Amount and Legal Expenses. However, the nature of the remedy shifts depending on the underlying cause of action. Thus, for example, Eckler seeks Judgement for liquidated damages equal to the Special Payments Amount but, alternatively, claims general damages for fiduciary breach.

(Collectively, the “**Eckler Claims**”)

[26] As indicated, Eckler now seeks various forms of declaratory relief confirming coverage under AIG’s Fiduciary Liability Policy and Newline’s Directors’ and Officers’ Liability Policy.

JURISDICTION AND STANDING

[27] Newline’s concerns around jurisdiction and standing may be summarized as follows:

1. Eckler is not a named insured under Newline’s D & O Liability Policy and therefore lacks contractual privity and standing to enforce or rely on the policy;
2. Relying upon the Ontario Court of Appeal’s decision in *Re Stelco Inc.* (2005), 75 O.R. (3d) 5, 9 C.B.R. (5th) 135 (Ont. C.A., referred to below as “*Re Stelco*”), Newline says that the Court cannot claim jurisdiction where there is no legislative gap thus usurp or displace an existing legislative process. In this case, Newline maintains that s. 28(1) of Nova Scotia’s *Insurance Act*, RSNS 1989, c. 231, as amended (the “*Insurance Act*”), provides a preferred and alternative process for adjudicating the Insured Claims. In the circumstances, s. 11 cannot be used to confer jurisdiction and fill a legislative gap that does not exist; and
3. The Court should refuse to accept jurisdiction because the requested declaratory relief has no practical utility and will not resolve anything. Newline says that the Vesting Order fully, finally, and irrevocably released the Directors and Officers of any continuing liability. Thus, the Eckler Claims are effectively moot. The issue of potential coverage

under the D & O Liability Policy has no legal consequence if there is no longer any liability to cover.

[28] Each issue is addressed separately below.

Privity and Standing

[29] The named insureds to the D & O Liability Policy were Brace Holdings Limited² and its Directors and Officers (including Independent Directors and Retired Directors and Officers). Neither Eckler nor the employee-members of the Pension Plan were named insureds on the policy.

[30] In Newline's submission, allowing a non-insured stranger standing to invoke the D & O Policy would improperly circumvent both the doctrine of privity and the contractual preconditions to suit against the insurer. Newline relies on *Bertrand v. Academic Medical Organization*, 2023 ONSC 3209 ("**Bertrand**") and *Peter B. Cozzi Professional Corporation v. Szot*, 2019 ONSC 1274 ("**Cozzi**") as support for the proposition that a person cannot seek a declaration enforcing benefits over an insurance policy to which it is not a party.

[31] In *Bertrand*, the Applicants were gynecologic oncologists and faculty at Western University. They commenced an Application seeking to reverse the decision of a governance organization called the Academic Medical Organization of Southwestern Ontario ("**AMOSO**") which determined the Applicants were no longer eligible for academic funding under a particular Funding Agreement. Notably, the Applicants signed the Governance Agreement out of which AMOSO was formed. In doing so, they acknowledged the Funding Agreement, and agreed to be bound by it. That said, neither the Applicants nor AMOSO were parties to the Funding Agreement. While privity of contract generally bars third-party enforcement, the Supreme Court of Canada recognized that the historical doctrine of privity was encased in rigidity that needed to be relaxed where contracting parties intend to confer a benefit and the third party's activities fall within the contract's scope. However, in *Bertrand*, there was no express or implied intention to extend enforceable benefits to the individual Applicant physicians.

[32] In *Cozzi*, Mr. Nguyen obtained \$100,000 "after the event" (or an "**ATE**") insurance policy through his lawyer, Mr. Cozzi. The policy was held in the name of

² As indicated, Brace Holdings Limited was The Herald's parent company. There is no dispute that the D & O Liability Policy includes The Herald as a wholly owned subsidiary.

Mr. Cozzi but in trust for Mr. Nguyen. ATE insurance is commonly referred to as “adverse costs insurance”. It insures a Plaintiff against the risk of an adverse costs award in the event that they lose their lawsuit, and may also include disbursements incurred by the Plaintiff’s lawyer.

[33] At trial, Mr. Nguyen succeeded on the issue of liability, but his damages did not exceed the deductible and a significant costs Order was made against him. The insurer paid policy proceeds to the named insured (the lawyer, in trust for Mr. Nguyen). Mr. Cozzi applied the funds to disbursements and costs. Mr. Cozzi then sought declarations confirming Mr. Nguyen’s ownership of the ATE insurance proceeds and their proper payment to him. The insurer for the Defendant (Aviva) cross-claimed, seeking entitlement to the proceeds or a *pro rata* share. Nishikawa, J. determined that the insurance proceeds ultimately belonged to Mr. Nguyen and that he had the sole right to determine how they are to be used (at para. 58). At para 52 of the decision, Nishikawa, J. reasoned:

The ATE Policy is between DAS and Mr. Nguyen. Aviva is not a party to the ATE Policy, and is not a named beneficiary. The doctrine of privity of contract states that a contract cannot confer rights or impose obligations arising under it on any person except for the parties to the contract: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 at para. 200. The exceptions to the doctrine of privity do not apply here, as there is nothing in the terms of the ATE Policy to suggest that the parties intended to extend the benefit to Aviva or to assign the benefits to Aviva: see *London Drugs* at paras. 255-58.

[34] While *Bertrand* nor *Cozzi* address the strict confines of privity, neither involved claims being raised in the context of *CCAA* proceedings. That is an important distinction that, in my view, substantially weakens Newline’s arguments.

[35] The overall purpose and object of the *CCAA* includes avoiding or mitigating against the severe social and economic consequences of bankruptcy. It does so through the facilitation of compromises or arrangements between insolvent companies and their creditors. In this case, the arrangement involved the orderly liquidation of company assets – as opposed to the company continuing as an ongoing concern. The *CCAA* achieves these objectives through practical and efficient procedures that fairly address the claims of creditors and interested stakeholders. The process is supervised by an independent Monitor and actively managed by a judge. Affected stakeholders in a *CCAA* process clearly include affected employees (*Re. Skeena Cellulose Inc.*, 2003 BCCA 344 at para. 39 and *Re. U.S. Steel Canada Inc.*, 2016 ONCA 662 at paras. 47 – 52).

[36] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (“*Century Services*”), the Supreme Court of Canada confirmed a “single proceeding model” under the *CCAA* which contemplates a single, orderly, and collective claims management process that avoids, for example, the risk that more aggressive creditors will realize against the assets while other creditors seek a compromise (at para. 22).

[37] Finally, the Court gives the *CCAA* a large and liberal interpretation consistent with the remedial nature of the legislation and consistent with the purpose of the *CCAA*. Procedurally, the Court generally seeks to act in a manner that offers a forum for the efficient and principled resolution of disputes.

[38] Addressing Eckler Claims through these *CCAA* proceedings conforms with the underlying statutory intent and purpose. This process under the *CCAA* incorporates all of the named insureds as parties and is intended to address the assets and undertakings (including claims for and against) those parties. Thus, the Vesting Order which was issued in the context of these proceedings released the Directors and Officers, but specifically excluded (or carved out) insured claims under any insurance policy maintained by The Herald. I note that both the Monitor and The Herald expressly consented to the terms of the Vesting Order, further intertwining the assessment of these issues raised by Eckler.

[39] Second, this conclusion is consistent with the decision of Cavanagh, J. In *the Matter of the Companies' Creditors Arrangement and a Plan of Compromise or Arrangement of 14487893 Canada Inc.*, 2024 ONSC 5220 (“*Just Energy*”). In *Just Energy*, the Court issued an Order approving a sale transaction but the Order expressly confirmed that the company’s Directors and Officers were not released “... to the limited extent of maintaining claims against insurance policies that may be available to pay insured claims” (para. 6).

[40] The Court subsequently heard a preliminary dispute as to whether the insurers had coverage obligations under a Directors and Officers’ liability insurance policy issued just prior to the *CCAA* proceedings. The policies covered statutory wage-liability claims but excluded coverage for “Prior Acts”.

[41] The insurers moved for a declaration that the exclusion for “Prior Acts” barred coverage in the circumstances of that case. The relief was opposed by the representative Plaintiff in a certified class action claiming over \$105 million in unpaid wages and benefits on behalf of himself and numerous misclassified workers (at paras. 1, 5). The representative Plaintiff’s interest in the dispute was almost entirely financial in nature. He was neither a named insured nor party to the

Directors and Officers' liability insurance policy. Nevertheless, that policy represented a primary source of recovery for class members in the certified class action.

[42] Cavanagh, J. ultimately concluded that the "Prior Acts" exclusion unambiguously barred coverage for pre-filing conduct (at paras. 31–36, 58–59). In doing so, Cavanagh, J. clearly assumed jurisdiction and implicitly accepted the representative Plaintiff's standing to bring the claims forward. In my view, *Just Energy* confirms that, in the circumstances of this case, the Court's jurisdiction similarly extends to determine contested issues regarding the scope of coverage under Newline's D & O Liability Policy. And that Eckler has standing to bring this Motion on behalf of those employees who were beneficiaries under The Herald's Pension Plan.

[43] A number of additional commonalities between the case at bar and *Just Energy* strengthen this conclusion. In both cases:

1. None of the Directors or Officers who were parties to the insurance policy took a position for/against the insurer's Motion for Declaratory Relief;
2. The Monitor remained neutral and did not contest either jurisdiction or standing;
3. The parties primarily engaged in the dispute were also the insurer and a representative of the persons claiming a financial interest in the subject insurance policy. In *Just Energy*, the parties engaged in the dispute were the insurer and the representative Plaintiff in a certified class action filed on behalf of numerous employees (at para. 8). Here, the parties are the insurers and the Administrator who represents a group of affected employees (i.e. the employees who were members of the Pension Plan); and
4. Ultimately, the Court confirmed a willingness to determine coverage in analogous circumstances where the insureds themselves are not true adversarial participants and lack any economic motivation to litigate coverage.

[44] Newline seeks to distinguish *Just Energy*; however, in my respectful view, the distinctions may be dismissed and do not compel a different conclusion:

1. Newline points out that in *Just Energy* coverage was assumed – without, Cavanagh, J. pointed out, deciding the issue (at para. 30). By contrast, in this case, Newline contests coverage. Newline describes the distinction as significant but does not elaborate. Respectfully, the point is not whether the insurer denies on the basis of the contractual scope of coverage or the limiting effect of an exclusion. Rather, it is whether the claims in question are insured under the terms of the policy – taking into account arguments around coverage and any relevant exclusion. In other words, is the claim insured? Newline has not offered a principled basis for concluding that the representative Plaintiff in *Just Energy* had standing to contest the scope of an exclusion (“Prior Acts”), but would not have had standing if the dispute arose around coverage in the first instance. In my view, there is no reasonable basis for drawing this distinction in the case at hand. A person that otherwise had standing to contest the impact of an exclusion should not be denied standing because the insurer denies coverage in the first place. Both arguments involve an interpretation of terms in the same insurance policy. Moreover, it would be contrary to the object and purposes of the *CCAA* proceeding if an insurer may unilaterally avoid *CCAA* proceedings altogether by simply denying coverage; and
2. Newline argues that the insurance policy in *Just Energy* was expressly tied to the *CCAA* proceedings because the effective date of the policy was at, or immediately prior to, the commencement date of the *CCAA* proceeding. By contrast, Newline argues, the D & O Liability Policy “has no connection to The Herald's *CCAA* proceedings beyond being brought into them by Eckler's misconceived motion” (Newline's written submissions at para. 48). Respectfully, I disagree. The nature of (and background to) the claims being made under Newline's D & O Liability Policy is important commercial context and tied to the *CCAA* proceedings. Recall that The Herald sought protection under the *CCAA* almost immediately (about 5 weeks) after:
 - a. Norton, J. determined that The Herald continued to owe \$2,656,656 in pension contributions or Unpaid Special Payments Amount (2024 NSSC 39); and
 - b. The Herald incurred another \$388,883.68 in Litigation Expenses related to The Herald's continuing liability for the Unpaid Special Payments Amount.

In my view, there is a clear commercial and factual connection between the liabilities that give rise to the alleged insured claims and the *CCAA* proceedings.

Alternate Procedures and s. 28(1) of Nova Scotia's *Insurance Act*

[45] Newline maintains that the Court's jurisdiction and Eckler's standing is located in s. 11 of the *CCAA* which states:

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-Up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[46] In *Re Stelco Inc.* (2005), 75 O.R. (3d) 5, 9 C.B.R. (5th) 135 (Ont. C.A., referred to below as "*Re Stelco*"), the Court of Appeal stated that s. 11 represents "...the source of judicial power in a *CCAA* proceeding to 'fill in the gaps' or to 'put flesh on the bones' of that Act" (at para. 32). It confers the judicial discretion "to establish the boundaries of the playing field and act as a referee in the process" so long as that discretion is exercised within the scope and purpose of the *CCAA* (at para. 44).

[47] The Court in *Re Stelco* also considered the limits of s. 11 and concluded that, while the scope of the Court's jurisdiction under s. 11 is broad and flexible, it is "not open ended and unfettered" (para. 44). In that case, it did not create a wide-ranging authority to develop new governance remedies for the removal of Directors and effectively usurp the jurisdiction recognized in other statutes designed exclusively and specifically to address the internal governance of a corporation. In *Re Stelco*, the Ontario Court of Appeal referred specifically to s. 109(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (the "*CBCA*") which permits shareholders to remove Directors and the oppression remedy under s. 241 of the *CBCA* (at paras. 47 and 52 – 64). To further emphasize the unique and serious statutory implications, the Court noted that removing Directors under the oppression remedy is considered "an extreme form of judicial intervention" and only imposed "most sparingly" (at para. 55).

[48] Relying on *Re Stelco*, Newline maintains that the Court cannot claim jurisdiction because it would usurp or displace an existing legislative process under s. 28(1) of the *Insurance Act* which states:

28 (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Given this statutory option, Newline concludes, s. 11 cannot be used to fill a legislative gap that does not exist. Put differently, Newline states that Eckler may only pursue claims under the D & O Liability Policy through s. 28(1) of the *Insurance Act*.

[49] In my view and in the circumstances of this case, the optional process contemplated under s. 28(1) of the *Insurance Act* does not preclude the Court from taking jurisdiction of the Motions brought by Eckler. Rather, a potential procedure under s. 28(1) of the *Insurance Act* admits of gaps that the Court retains jurisdiction to address under s. 11 of the *CCAA*. My reasons include:

1. The language of s. 28(1) is permissive – not mandatory. It states that, subject to certain statutory preconditions, an action “may” be brought against an insurer for coverage. The “person entitled to coverage” (potentially Eckler, in this case) is not obliged to move under s. 28(1). And this provision of the *Insurance Act* certainly does not override the Court’s jurisdiction under the *CCAA*. *Just Energy* confirms that the Court may take jurisdiction over these types of coverage disputes in appropriate circumstances. I acknowledge that the decision in *Just Energy* did not specifically address the optional process available under the *Insurance Act*.³
2. Unlike the situation in *Re Stelco*, the optional process available under s. 28(1) of the *Insurance Act* is neither mandatory nor strikes at the heart of a statutory corporate governance model regarding the appointment/removal of Directors. It also could not be elevated to the level of a similarly serious statutory principle which must only be

³ *Just Energy* was an Ontario decision. However, s. 132(1) of Ontario’s *Insurance Act* is identical to s. 28(1) of Nova Scotia’s *Insurance Act*.

avoided in extraordinary circumstances. At most, taking jurisdiction under s. 11 of the *CCAA* in appropriate circumstances simply provides an efficient procedural vehicle for the Court to consider coverage issues;

3. There is no identifiable prejudice to Newline and, indeed, Newline's concerns around jurisdiction and standing are largely technical in nature. Newline does not allege any particular prejudice associated with having Eckler's Motions heard under the *CCAA*. The same law and defences will be available to Newline. On this issue of prejudice, the unique factual and procedural circumstances in this case are germane. Recall Norton, J.'s determination that The Herald failed to pay \$2,656,656 in pension contributions that were otherwise owing. Neither The Herald nor its directing minds have appealed that finding. It is deemed to be final and binding. There is also no dispute that the Directors and Officers held those roles (and would be bound by the corresponding obligations) during the time period within which these payments came due. Further, the parties engaged in discovery examinations leading up to this Motion. During the course of those examinations, one of the three Directors and Officers (Ian Scott) testified under oath that The Herald and its Directors and Officers used its available funds to fund operations, including The Herald's digital strategy; that The Herald and its Directors and Officers, through The Herald's pension advisory committee, directed that the Legal Expenses be paid out of the Pension Plan fund. Finally, only Eckler on behalf of The Herald's employees who were beneficiaries under the Pension Plan holds any practical interest in this claim on the strict understanding that only those insurance proceeds that may become available to Eckler are subject to recovery. This restricts any potential recovery to the limits of the insurance policy and ensures that the assets of the insolvent company are not otherwise placed at additional risk. Finally, while certainly not determinative, it should be noted that only Newline raises a jurisdictional issue. The Monitor, The Herald, and the Directors and Officers do not challenge or contest the Court's jurisdiction. Neither does AIG in respect of the Fiduciary Liability Policy. Moreover, in all these circumstances, respectfully, converting the optional process under s. 28(1) of the *Insurance Act* into a mandatory statutory precondition for addressing coverage issues in matters that otherwise

fall within the purview of the *CCAA* exposes procedural gaps that the Court can reasonably and appropriately fill under s. 11 of the *CCAA*;

4. At the risk of repetition, in my view, a judicial determination of the relief sought in Eckler's Motion fulfills the objects and purposes of the *CCAA* by providing a fair and efficient process regarding the issue of whether Eckler has an insured claim under the D & O Liability Policy. It also heeds the Supreme Court of Canada's call in *Century Services* for a single proceeding model, and aligns with the decision in *Just Energy*; and
5. The cases relied upon by Newline (Registrar Cregan's decision in *Hemeon v West Hants (District)*, 2008 NSSC 234 ("**Hemeon**") and Lederman, J.'s decision in *Re. Carey Canada Inc.*, 29 C.B.R. (5th) 81 (Ont. S.C.J. – Commercial List referred to below as "**Re Carey**") are distinguishable. In both cases, the core issue was whether to lift a stay so that a party might pursue litigation involving the insolvent entity (or, in the case of *Hemeon*, a discharged bankrupt). In *Hemeon*, the proposed Plaintiff sought relief under s. 69.4 of the BIA to lift the bankruptcy stay and continue an Action against a discharged bankrupt contractor who was alleged to have misrepresented that a house purchased by the Plaintiff was built in compliance with by-laws and codes. In *Re Carey*, the proposed Plaintiffs sought to bring Actions arising out of alleged environmental contamination on real property owned by the insolvent company (Carey Canada Inc.). It is true that, in both cases, the moving party sought to lift the stay in order to pursue insured claims under the applicable legislation. However, the Court's analysis was limited to the issue of whether the stay should be lifted. In *Hemeon*, Registrar Cregan concluded that lifting the stay to pursue Judgment is appropriate, provided no enforcement was then taken against the bankrupt personally. In *Carey Canada*, the insolvent entity sought a permanent stay of the proposed Claims, relying upon a 2005 *CCAA* Recognition Order which enforced U.S. bankruptcy orders that imposed comprehensive stays and injunctions against claims against Carey Canada. Lederman, J. determined that the stay may be lifted to establish liability and access the debtor's insurance coverage, without exposing the debtor or its estate to financial prejudice. Neither decision considered s. 11 of the *CCAA*. Neither decision concluded that the optional process available under the *Insurance Act* was the sole, mandatory process for considering insurance coverage issues. And

neither decision involved the same unique factual and procedural circumstances identified in para. 49(3) above.

The Vesting Order

[50] Newline argues that Ecker's claims are moot because there are no "live issues" and the requested relief will not result in anything of legal consequence. In this case, Newline's primary argument is that the Directors and Officers were finally, fully, and irrevocably released under the terms of the Vesting Order and, therefore, are no longer exposed to any of the risks which might have otherwise triggered coverage under Newline's D & O Liability Policy.

[51] I respectfully disagree that the Vesting Order is so expansive as to include (and effectively extinguish) the claims which Eckler seeks to advance on behalf of certain employees of The Herald as beneficiaries of the Pension Plan.

[52] I acknowledge Newline's concern that Eckler's written submissions injected a degree of unnecessary confusion. At para. 27(c) of its written submissions, Eckler argued that the Vesting Order:

... released the named insured D & Os from all personal liability. The D & Os no longer have any economic interest in the insurance coverage dispute; they are unaffected by the outcome. Under Newline's narrow approach, which ignores the CCAA context, the only parties who could have standing have no economic incentive to take a stand.

[53] Newline understandably questions how insurance coverage could be available to respond to claims that presuppose some degree of personal liability when Eckler's submissions suggest that no such personal liability exists. However, this dispute does not turn on an interpretation of Eckler's written argument.

[54] When interpreting a Court Order, a broad, liberal, and commercially reasonable approach applies – not one which is overly literal and restrictive. The goal is to give effect to the Court's underlying objective intent. To that end, Orders are to be interpreted like contracts or statutes, using ordinary meaning and surrounding context, and with the goal of avoiding absurd or inconsistent results (*Imperial Ace Capital Group Inc v. Accencis Investment Corp*, 2024 ONSC 5443 at paras. 5-6).

[55] For present purposes, the relevant aspects of para. 15 of the Vesting Order may be distilled as having fully, finally, and irrevocably discharged the Directors

and Officers from any and all claims and liabilities regarding any act or undertaken or completed prior to the sale of debtor in connection with, in respect of, relating to, or arising out of the sale transaction described above and involving Postmedia Network Inc., as purchaser. However, excluded from (or carved out of) this broad release was, among other things, "(z) any claim or liability that is an insured claim under any insurance policy maintained by any of the Sellers or their advisors" (the "**Insured Claims**")⁴.

[56] In my view, Eckler's requested relief in respect of the D & O Liability Policy falls within the exceptions afforded to Insured Claims. For the same reason, Eckler, as the Administrator of an Insured Claim, has standing sufficient to pursue the remedies sought.

[57] It was clear when drafting the Vesting Order, and I find as a relevant contextual fact, that s. 15(z) was intended to preserve (not release) claims such as those now being advanced by Ecklers in respect of the Fiduciary Liability Policy and Newline's D & O Liability Policy. That fact is consistent with the ordinary meaning of the wording:

1. The D & O Liability Policy and Fiduciary Liability Policy are both insurance policies that were "maintained" by The Herald for those individuals through whom the company operated (i.e. the Directors and Officers) and intended for the benefit of those who relied upon those individuals to fulfil their corporate and fiduciary obligations – including employees; and
2. In so far as this threshold jurisdictional issue is concerned, the relief sought by Eckler reasonably falls within the scope of para. 15(z) of the Vesting Order and its reference to "any claim ... that is an insured claim" (emphasis added). Disputes as to whether the D & O Liability Policy and Fiduciary Liability Policy attract insurance coverage are necessarily and reasonably included within this broad language.

[58] I note, as well, that the list of parties released under para. 15 of the Vesting Order does not expressly reference or include any insurers. This exclusion reinforces the underlying intention of the Vesting Order described above.

⁴ The term "Insured Claims" in the context of this Vesting Order as a convenient label for describing this category of claims excluded from the otherwise broad release language. The label neither signifies nor has any bearing on the question as to whether any of the "Insured Claims" being advanced are actually covered under Newline's D & O Liability Policy. Those claims were separately defined above as "**Eckler Claims**"

[59] In my view, this conclusion and interpretation of the Vesting Order also conforms with the overall purpose and object of the *CCAA* in that it:

1. Helps mitigate the economic consequences of bankruptcy by providing a process for the affected employees who are beneficiaries under the Pension Plan to have these insurance issues determined; and
2. Allows for the orderly administration of claims.

AIG COVERAGE ISSUES

Duty to Defend

[60] Ecklers and AIG agree that the bar for triggering AIG’s duty to defend the claims in question is well established and comparatively low. The party seeking coverage must simply demonstrate the “mere possibility that a claim falls within the insurance policy”. *Progressive Homes Ltd. v Lombard General Insurance Co of Canada*, 2010 SCC 33 (“*Progressive Homes*”) at para. 19.⁵

[61] AIG does not dispute that Eckler Claims (as defined in para. 25 above) are “Claims” for “Loss” arising from “Wrongful Acts” – as those terms are defined under the Fiduciary Liability Policy. AIG’s central arguments for denying coverage go beyond that simple acknowledgement and expose problems that, it contends, preclude Ecklers from discharging even the relatively modest persuasive burden which arises when assessing a duty to defend. AIG states that:

1. The Fiduciary Liability Policy is in the nature of a “claims-made-and-reported” policy; meaning that coverage is conditional upon the underlying claim being both made and reported to the insurer during the term of the policy. In this case, AIG argues that insurable “Claims” made under the policy also includes related disputes which, AIG contends, necessarily trace back to the Superintendent of Pension’s demand letter dated May 17, 2021 when then escalated with the Superintendent’s NOID of January 17, 2022. Having received notice of these claims made in 2021 and 2022, Eckler was obliged to report

⁵ In its brief, AIG proposes slightly different wording that essentially conveys the same meaning. It acknowledges *Progressive Homes* as a leading case on the duty to defend and indemnify but expresses the threshold test as being whether the claims “could potentially” attract coverage under the subject policy. (See, for example, AIG’s written submissions at paras. 68, 71, 76, and 117) See also *Arch Insurance Canada Ltd. v. Financial and Consumer Services Commission and Encon Group Inc. et al*, 2016 NBCA 53 at para. 16; *Neary v. Wawanese Mutual Insurance Co.*, 2003 NSCA 66 at para. 6; and *Canadian Maritime Engineering Ltd. v. Intact Insurance Company*, 2019 NSSC 328 at para. 23.

them to AIG during that same policy term. However, The Herald failed to report these “related” claims until 2024 thus disentitling it to coverage. In drawing a connection between Eckler Claims and the prior events of 2021 and 2022, AIG points to:

- a. The essential nature of the misconduct is inextricably linked to the Unpaid Special Payments Amount. Indeed, AIG observes the striking frequency with which specific funds and Eckler’s adoption of the Superintendent of Pension’s arguments are invoked by Eckler in the Herald Action and D & O Action pleadings and when formulating the specific nature of damages being sought; and
- b. The two claims “rise and fall together” because the failure to discharge the pension contributions obligation is an essential element of the Eckler Claims. Absent this predominant component, the Eckler Claims wither. for example, AIG argues that:

“The Herald’s non-compliance with pension legislation is in fact a central part of Eckler’s “Claims” and the Superintendent’s “Claim”, alike. Eckler’s “Claims” do not depend on any findings of fact that The Herald wrongfully allocated funds to operations.”

(AIG’s written submissions at para. 86)

- c. The parties are the same in that both the Superintendent and Eckler seek the same thing: recovery of the Special Payments for the benefit of Plan members. And their respective claims similarly engage the same interests, loss, and underlying misconduct—The Herald’s failure to fund the Plan.
 - d. The timing is the same and, again, falls back to the failure to discharge the statutory pension contribution obligations; and
 - e. As to the Legal Expenses, they are also intertwined with the same initial “Wrongful Act” (i.e. failure to make pension contributions). In addition, AIG says that the evidence reveals that they were incurred at approximately the same time as that initial “Wrongful Act”.
2. The Fiduciary Liability Policy contains a specific exclusion for “Known Claims”. In this case, AIG argues that The Herald expressly

referenced the Superintendent of Pension's NOID as a "Known Claim" when completing a Questionnaire as part of its application for renewal of the subject policy of insurance. The questionnaire forms part of the subject policy and expressly warns that there is no coverage "FOR ANY LOSS IN CONNECTION WITH SUCH KNOWN CLAIM". In the circumstances, AIG states that there can be no coverage for any losses associated with the NOID which necessarily includes all of the monetary damages claimed in connection with the Unpaid Special Payments Amount and Litigation Expenses.

[62] Eckler counters with the argument that the Fiduciary Liability Policy is not "claims-made-and-reported". In any event, the Eckler Claims are new and not "related" to the dispute with the Superintendent of Pensions which emerged in 2021 and 2022 because the Eckler Claims:

1. Target different misconduct including the misallocation of funds to operations and deliberate payment of the Legal Expenses from assets of the Pension Plan;
2. Involve different parties and interests, focussing on the distinction between the Pension Plan members seeking relief through a private civil action and a regulator (i.e. the Superintendent of Pensions) exercising authority under its enabling statute;
3. Involve different time frames because, from Eckler's perspective, the focus in terms of insurance coverage shifts to the use and diversion of monies to fund corporate operations, all in an alleged breach of fiduciary duties. In short, the breach of a statutory duty only enabled the breach but it did not, by itself, legally constitute the breach.

[63] For similar reasons, Eckler denies that its claims could be entirely barred from coverage on the basis that it was a "Known Claim" (i.e. the claims which it says attract coverage weren't known, they were new). Eckler says that AIG's conduct during the renewal of the Fiduciary Liability Policy strengthens their argument and certainly elevates an entitlement to coverage beyond a mere possibility. In particular, Eckler points out that AIG deliberately withdrew its request for (and elected not to pursue) a "Known Loss Exclusion for the regulatory dispute in January 17, 2022". Had the Eckler Claims been known, Eckler argues there would have been no need to request this exclusion. The subsequent decision not to pursue that request only further undermines the argument.

[64] As to the issue of whether the Claims are “related” to AIG and Eckler agree as to the test for assessing the “relatedness” of “Claims”. The Court considers the:

...similarities and differences between the nature and kind of alleged misconduct which underlies each claim, and the kind and character of losses for which recovery is sought in each claim.

(*Simpson Wagle Law LLP v Lawyers’ Professional Indemnity Company*, 2014 ONCA 492 at para. 70)

[65] In my view, there is a mere possibility that the Eckler Claims sounding in breach of fiduciary breach (including the alleged conflict of interest) attract the duty to defend. The low threshold for defence duty tips the issue decisively. My reasons include:

1. The declarations page and the structure of Clause 8 supports the view that the Fiduciary Liability Policy functions as claims-made policy with notice as a condition to invoke coverage during that period—not a strict “made-and-reported-in-same-period-or-forfeit-forever” model. This weighs toward a duty to defend, having regard to the low persuasive burden;
2. There is no doubt that breaching the statutory and regulatory obligations to make contributions to the Pension Plan form part of the relevant factual backdrop. However, the “Claim” is neither confined to nor made by either the Superintendent’s demand letter in 2021 or the NOID in 2022. These alleged, actionable wrongs did not (and could not) involve the Superintendent and were different in kind, timing, and the nature of the loss and corresponding remedies. On the issues of remedy, breach of fiduciary duty compels an equitable remedy where the Court exercises a discretion in a manner that is flexible and robust but designed to achieve a just result in all the circumstances and having regard to the specific nature of the breach. (see, for example, *Sather v Sather Ranch Ltd.*, 2025 BCCA 464). For present purposes, the point is that the nature of the remedy and the manner in which a remedy is crafted having regard to the acts are distinctly different when the focus changes to fiduciary breach. Depending on the evidence and the actual nature of the loss, the remedy may (but does not necessarily) overlap with the basic monetary demands made by the Superintendent of Pensions;

3. Eckler's framing of these claims as including subsequent, active mismanagement, ongoing conflict of interest, and re-deploying of funds that ought to have been deposited with the Pension Plan creates a possibility sufficient to trigger the duty to defend. Eckler's allegations regarding the Legal Expenses and the deliberate erosion of Pension Plan assets to pay for litigation with the Superintendent is stronger still in terms of the duty to defend;
4. Based on the information before me, I am satisfied that the communications in August, 2024 and the broker's email on October 18, 2024 were sufficient to satisfy the notice requirements under Clause 8 of the Fiduciary Liability Policy;
5. I am not satisfied that the "Known Claim" exclusion bars coverage. Again, in my view, the claims identified above are not in connection with the NOID or disputes with the Superintendent. They fall outside the regulatory regime and involve internal corporate decisions that give rise to different wrongful acts and different potential remedies. Further, the underwriter's decision to propose a "Known Loss Exclusion" endorsement, face resistance, and then withdraw it all serve to blunt AIG's complaint and undermine the suggestion that the Questionnaire boilerplate represented a clear, bargained exclusion sufficient to avoid the duty to defend.

Duty to Indemnify

[66] I agree with AIG that the Court should not go further and make any premature determinations around the duty to indemnify at this time.

[67] First, there are presently no "losses" which might trigger the duty to indemnify. Moreover, the relative strengths or weaknesses associated with any potential defences have yet to be tested.

[68] Second, AIG is entitled to preserve its rights under Clause 5.B.1 to bar some or all of its potential indemnity obligations. This provision excludes "Loss" arising from any "profit or advantage to which the Insured was not legally entitled" or any "knowing or willful violation of any statute, rule or law [...] if established by any final, non-appealable adjudication".

[69] Finally, the actual nature and scope of any remedy remains largely unknown or untested at this time.

[70] Eckler's request for broader declaratory relief around the duty to indemnify is dismissed.

[71] This conclusion does not affect my findings regarding the duty to defend. On the contrary, it respects the distinction. At paras. 16 – 18 of *Fares Construction Limited v Lead Structural Formwork Limited*, 2024 NSSC 322, Norton, J. explained the differences and his reasons reinforce my conclusions regarding the duty to indemnify (citations omitted):

At the outset, it is important to acknowledge that an insurer's duty to defend and duty to indemnify are governed by separate and distinct principles. The scope of the duty to defend is broader than the duty to indemnify.

The duty to defend arises where the facts alleged in pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim. It is irrelevant if the allegations can be proven in evidence. In other words, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 19-20.

In comparison, the duty to indemnify does not arise until an insured is liable for compensatory damages, either by settlement or judgment. It does not arise on the filing of pleadings but when allegations are proved at trial.

(emphasis added)

NEWLINE COVERAGE ISSUES

[72] Newline stresses that, unlike AIG's Fiduciary Liability Policy, Newline's D & O Liability Policy is indemnity alone (i.e. there is no separate duty to defend). On the issue of indemnification for covered losses, I repeat my concerns and conclusions at paras. 66 - 71 above.

[73] That said, another issue arises here regarding ongoing reimbursement for the costs associated with defending the D & O Action. On this issue, Newline acknowledges Clause 5(f) of the D & O Liability Policy which raises an issue as to whether there is an ongoing obligation to pay the expenses associated with the D & O Action on a rolling ninety (90) day basis. It says, *inter alia* that: "The Insurer shall pay Costs and Expenses ... every ninety (90) days ...". Clause 6(c) provides some additional support for this reimbursement argument to the extent that it says if the Company (The Herald in this case) cannot indemnify the Directors and Officers then Newline shall advance the subject costs subject to a claim for reimbursement

from the company. This clause obviously gains considerable significance when, as here, the Company is insolvent.

[74] However, Newline argues that, while the D & O Liability Policy contemplates potential reimbursement of defence costs, any such costs are only covered if, based on the pleadings, the true substance of the claim attracts indemnity coverage. This does not occur where:

1. The claims in question arise from the same conduct and cause the same harm or are otherwise merely derivative in nature (*Non-Marine Underwriters, Lloyd's London v Scalera*, 2000 SCC 24 referred to below as “*Scalera*” at para. 85);
2. Pleadings are crafted in a manipulative manner designed to attract insurance coverage where “the gravamen of the complaint is truly excluded” (*Fitzgerald v Co-operators General Insurance Co*, 2023 NSSC 129 at para. 8).

[75] In this case, Newline says that the true nature of the claim is located in the breach of the applicable Pension Plan legislation by failing to honour the Unpaid Special Payments Amount and then engaging in litigation with the Pension Supervisor in an attempt to justify their breach. These acts do not meet the requirement for an “Individual Act” under the D & O Liability Policy because, in reality, the Directors acted (and are being sued) “... only as agents of The Herald qua administrator of the [Pension] Plan ...” – and not as Directors and Officers of the “Company” as that term is defined. Quoting from the decision in *Onex Corp v American Home Assurance Co*, 2013 ONCA 117, Newline confirms that the capacity in which the Directors and Officers were operating is “a crucial feature of coverage” (at para. 143).

[76] On this issue, Newline also relies on the Ontario Court of Appeal decision in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc*, 2008 ONCA 196 (“*Slater Steel*”). In *Slater Steel*, the company (Slater Steel) acting as both employer and pension plan administrator, relied for years on actuarial valuations prepared by Norton of Aon Consulting. It was later alleged that these reports improperly overstated asset values, allowing Slater Steel to avoid required contributions and contributing to large plan deficits. When Slater Steel entered CCAA protection, the Court granted a broad \$17.5 million director and officer indemnity and also created a claims-bar process, through which Superintendent of Financial Services filed a regulatory claim against the Directors and Officers for participating in breaches of

the controlling pension legislation. After the *CCAA* proceeding collapsed and Slater Steel went into receivership, the Superintendent appointed Morneau Sobeco as successor Administrator of the Pension Plan in issue. Morneau then brought an action against Aon and Norton for the underfunding. Aon and Norton sought to bring third-party claims against members of Slater Steel's Audit Committee—individuals who were also Directors, Officers, or senior employees—alleging they instructed Norton to adopt certain improper techniques effectively designed to conceal the underfunding of the pension plan. Given the broad release granted under the *CCAA*, these third party claims could not have been brought against the Directors and Officers. However, the Court of Appeal determined that these individuals, when administering the Pension Plans, were acting not as Directors/Officers but as agents of the plan Administrator. As such, the *CCAA* release did not bar the claims and were allowed to proceed.

[77] Even if the true nature or gravamen of the claim falls within the grant of coverage, the insurer may still point to (and has the burden of proving) an exclusion justifying a denial of coverage. In this case, Newline relies upon the following two exclusions where Newline shall not be liable to make “any payment under the Policy in connection with any Claim”:

1. Exclusion E which refers to excluded Claims that are “... based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the actual or alleged violation of the responsibilities, duties or obligations imposed upon any Insured by...” Ontario’s pension legislation “or similar provincial ... legislation”;
2. Exclusion L which refers to excluded Claims that are “... based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act...events, circumstances, situations, transactions, facts, acts, errors, omissions, or occurrences occurring, or alleged to have occurred, prior to the Retroactive Date”. In this case the parties agree that the Retroactive Date is November 30, 2021.

[78] Eckler replies that Clauses 5(f) and 6(c) clearly engage coverage for the advancement or reimbursement of defence costs in this case because the Directors and Officers were acting as Directors/Officers of the employer even when administering the plan (the employer “acts through its board”). Eckler distinguishes *Slater Steel* and points to the Supreme Court of Canada’s decision in *Re Indalex Ltd.*, 2013 SCC 6 (“*Re Indalex*”) which rejects attempts to subordinate the serious

practical implications of decisions made by Directors and Officers beneath an overly formalistic “two hat” analysis which seeks to neatly separate the conflicts of interest which may arise when Directors and Officers also purport to manage a Pension Plan. Thus, Dechamps, J. wrote at para. 65 of *Re Indalex* that:

Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a “corporate hat”. What is important is to consider the consequences of the decision, not its nature.

[79] As to the overarching controlling legal principles, I agree that insurance coverage provisions should be construed broadly and exclusions interpreted narrowly. Moreover, all of this should have occurred based on an assessment as to the true nature of the alleged claims as revealed by the pleadings. (*Progressive Homes and Scalera*).

[80] In my view, the issues are largely resolved through an assessment of the true nature of the Eckler Claims which attract coverage under the Newline D & O Liability Policy. Unlike the case of *Slater Steel*, the critical focus of the allegations relates to the decisions made by the Directors and Officers to make available and, more importantly, use funds that otherwise belonged in the Pension Plan for other, improper purposes. The alleged fiduciary breach and related conflict of interest complaint primarily involve board-level decisions, in my view.

[81] Further, under *Re Indalex*, the Court should avoid an overly formulaic or mechanistic “two hats” metaphor when assessing the conflicts which arise where Directors and Officers create a conflict of interest by leveraging their authority to effect a corporate strategy and then attempt to decide which “hat” they were wearing based on which “hat” most conveniently might avoid liability or scrutiny. Appropriate attempts should be made to address the conflict of interest in the first place.

[82] The pleadings filed by Eckler in this case are not manipulative. And, again, the gravamen of the fiduciary breach and conflict of interest claims originate at the board level with the Directors and Officers and move from there.

[83] As to the exclusions relied upon by Newline:

1. Exclusion E relating to pension legislation is broadly worded and, as such, somewhat problematic. However, here again, the true nature or substance of the claim is more distinctly targeted on the acts that are separate and distinct from the regulatory breach. These acts are also not compelled by the statutory breach and are not actionable by the Superintendent, as Eckler submits. Indeed, the Superintendent's NOID did not (and could not) address those wrongs. Moreover, the claims with respect to the Legal Expenses (and the misuse of pension assets and the related conflict of interest) are qualitatively different from the claims asserted by the Superintendent. Finally, the assessment around any equitable remedy which may ultimately be granted for the alleged fiduciary breach is also factually and analytically different from the regulatory breach. Overall and respectfully, the interpretation suggested by Newline is overly narrow and does not bar defence costs in the circumstances of this case.
2. Exclusion L regarding the retroactive date is undercut by the fact that limited cash resources were being channelled into strategic operations (not pension contributions) at the same time as underlying solvency and legal problems were mounting. Based on the information before me and for the purposes of this preliminary decision, I am satisfied that these involve discrete acts occurring after the Retroactive Date.

CONCLUSION

[84] Under the Fiduciary Liability Policy, AIG has a duty to defend The Herald and its Directors and Officers against the covered Eckler Claims raised in the Herald Action and the D & O Action.

[85] Under the D & O Liability Policy, Newline has a duty to advance defence costs to the Directors and Officers so that they might defend the covered Eckler Claims in the same actions.

[86] Finally and based on the declaratory relief sought, the covered Eckler Claims do not form part of the broad release language contained in the Saltwire and The Herald Sale Approval and Vesting Order and, instead, are carved out of that release as part of the "Insured Claims" as defined therein.

[87] The remaining relief sought by Eckler seeking a declaration regarding broader duties to indemnify for losses associated with the Eckler Claims is dismissed.

[88] Brief written submissions as to costs, should any party seek costs, shall be filed within a month of receiving this decision.

Keith, J.

