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

COURT OF APPEAL FOR ONTARIO

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

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

Respondent
Moving Party

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

December 18, 2024

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

David Rosenfeld LSO #51143A
Tel: (416) 595 2700
Email: drosenfeld@kmlaw.ca

Vlad Calina LSO #69072W
Tel: (416)595-2029
Email: vcalina@kmlaw.ca

Caitlin Leach LSO #82774T
Tel: (416) 595-2124
Email: cleach@kmlaw.ca

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

TO: **SNOWDEN LAW Professional Corp.**
Coverage Counsel
P.O. Box 19
1940-130 Adelaide Street West
Toronto, ON M5H 3P5

Marcus Snowden LSO #30868L
Tel: (416) 363-3353
Email: marcus@snowdenlaw.ca

Pearl Rombis LSO #35658A
Tel: (416) 363-3353
Email: pearl@snowdenlaw.ca

Lawyers for XL Specialty Insurance Company and Certain Underwriters at Lloyd's London Subscribing to Policy No. B0146ERINT2100865 by their coverholder Hiscox, Proposed Respondents

AND TO: **BLANEY MCMURTRY LLP**
1500-2 Queen Street East
Toronto, ON M5C 3G5

David Ullmann LSO #42357I
Tel: (416) 596-4289
Email: dullmann@blaney.com

Jason P. Mangano LSO #51986W
Tel: (416) 596-2896
Email: jmangano@blaney.com

Lawyers for Tokio Marine HCC – D&O Group, the Coverholder by HCC Underwriting Agency Ltd, HCC Syndicate 4141 trading as Tokio Marine HCC International via Agreement No. B602121HCCGFM, Proposed Respondent

TABLE OF CONTENTS

1. The interpretation of an exclusion in a standard form insurance policy is a question of law, reviewable for correctness. The answer to that question, in this case, determines the rights of 7,723 class members: if leave is not granted, the motion judge's denial of coverage stands, and the class will receive none of the unpaid wages that they are owed. If this appeal is heard, coverage will be denied only if the motion judge's decision is correct. As set out in the Applicant's moving factum, it is not.

2. The Respondents mischaracterize the Applicant's reference to the thousands of individuals affected by the motion judge's decision as an "apparent attempt to attract this Court's sympathy."[1] They do not grapple with the significance of this decision to a great number of individuals as a factor that augurs in favour of granting leave. Instead, they dismiss the relevant factor of the leave test (whether the proposed appeal is significant to the action) as one on which "this Court has not placed great weight."[2]

3. While it is "usually the case" that a dispute is of significance to the parties to it, the thousands of class members affected by a question of law in the proposed appeal set it apart.[3] To escape the conclusion that leave ought to be granted, the Respondents attempt to reframe the Applicant's proposed appeal as one of mixed fact and law, and rely heavily on two distinguishable cases. The Respondents do not respond to the merits or significance of the appeal that is actually proposed; instead, they invite this Court to dismiss the appeal using an approach to the standard of review that is fundamentally at odds with *Ledcor*.[4]

---

[1] Respondents' Factum at para. 42.
[2] Respondents' Factum at para. 56.
[3] *U.S. Steel Canada Inc. (Re)*, 2024 ONCA 363, at para. 13. ("***U.S. Steel***").
[4] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 ("***Ledcor***").

A. The Proposed Appeal is on an Extricable and Novel Question of Law

4. As argued in the Applicant's moving factum, the proposed appeal is *prima facie* meritorious. In opposing this motion, the Respondents reframe the proposed appeal to distract from its novel and legal nature. This is particularly apparent in three arguments.

5. **First**, the argument that the motion judge "was entitled to, and did, make a clear fact finding that cannot reasonably be overcome on appeal: temporally, Mr. Omarali's is a 'pre-Filing' and demonstrably not a 'post-Filing Claim'."[5]

6. The Applicant does not take issue with the motion judge's characterization of his claim or attempt to overcome that finding on appeal. As the motion judge found:

> 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.*[6]

7. The only question on the proposed appeal is whether the motion judge correctly interpreted the Prior Acts Exclusion. The application of his interpretation to the Claim is not in issue. This appeal is on an extricable question of law.

8. **Second,** the Respondents argue that a *CCAA* motion judge's discretionary order only attracts appellate intervention if the judge errs in principle or exercises discretion unreasonably.[7]

---

[5] Respondents' Factum at para. 36.
[6] Endorsement of Justice Cavanagh, dated September 20, 2024 ("**Reasons"**), at para. 34, Motion Record of the Proposed Appellant ("**MR"),** Vol. 1, Tab 3, p. 20.
[7] Respondents' Factum at para. 32.

9. The interpretation of a term in a standard form insurance policy is a question of law reviewable on a correctness standard.[8] No deference is owed. Neither the Respondents' attempt to manufacture a factual finding at issue, nor their suggestion that the motion judge's decision was "discretionary," alters the applicable standard of review.

10. The Respondents' arguments are at odds with *Ledcor*. In *Ledcor*, Wagner J. unequivocally held that the standard of review for an exclusion is correctness, even where the court below appeared to make findings of fact about, among other things, the specific occurrences to which the contract language is applied.[9]

11. Cromwell J., in dissent, would have found that the interpretation of an exclusion in a standard form policy was a question of mixed fact and law, following *Sattva*, because of the "contextual factors" that determine how the contract's terms "will apply to the myriad of situations that may arise."[10] Writing for the majority, Wagner J. specifically disagreed:

> [31] I agree that factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract. However, those considerations are generally not "inherently fact specific": *Sattva*, at para. 55. Rather, they will usually be the same for everyone who may be a party to a particular standard form contract. This underscores the need for standard form contracts to be interpreted consistently, a point to which I will return below.
>
> [32] In sum, for standard form contracts, the surrounding circumstances generally play less of a role in the interpretation process, and where they are relevant, they tend not to be specific to the particular parties. Accordingly, the first reason given in Sattva for concluding that contractual interpretation is a question of mixed fact and law — the importance of the factual matrix — carries less weight in cases involving standard form contracts.

---

[8] *Ledcor*, at para. 24; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, at para. 40; and see *Housen v. Nikolaisen*, 2002 SCC 33, at para. 33.
[9] *Ledcor*, at paras. 4, 21-22, 30-32, and see para. 108.
[10] *Ledcor*, at paras. 106-108, and see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("***Sattva***").

12. The sole question in this appeal is a question of law which, as made clear in *Ledcor*, attracts review for correctness. Deference does not apply to errors in principle or errors of law.[11] The motion judge's order was not discretionary and is not entitled to deference.

13. **Third,** the Respondents argue that the Applicant has not shown that the motion judge's "fact finding and legal interpretation in this factual context raises novelty."[12] Again, the motion judge's findings of fact regarding the nature of the Applicant's claim are not in issue. The sole issue before the motion judge was the interpretation of the Prior Acts Exclusion.[13] More specifically, whether that exclusion is triggered by the acts or omissions of (a) a person or entity insured under the policy, or (b) anyone at all.[14]

14. The Respondents, in their factum on the motion, stated, "[f]ew Canadian cases have considered prior acts exclusions in detail, and the exclusions they have considered involve language distant from the Prior Acts Exclusion."[15] The Respondents went on to cite three cases from the United States, none of which asked whether a prior acts exclusion could be triggered by the acts and omissions of a non-Insured.[16] The legal question at issue in this appeal has not been answered by other Canadian courts. It may well arise again and merits consideration by this court.

---

[11] *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 8-9.
[12] Respondents' Factum at para. 36(b).
[13] Reasons at para. 4, MR Vol 1, Tab 3, p. 16.
[14] Reasons at para. 40, MR Vol 1, Tab 3, p. 21.
[15] Factum of the Insurers, July 22, 2024, at para. 71, Supplementary Motion Record of the Proposed Appellants, Tab 1, pp. 24-25.
[16] See *Zucker v US Specialty Insurance Co* (2017), 856 F 3d 1343, Reply Book of Authorities, Tab 2; *Jayhawk Private Equity Fund II LP v. Liberty Insurance Underwriters Inc.*, 2018 US Dist LEXIS 250716 (Central District of California), Abbreviated Book of Authorities, Tab 1; and *Carolina Casualty Insurance Co. v. McGhan*, 2008 US Dist LEXIS 143800 (District of Nevada), Reply Book of Authorities, Tab 1.

B. The Cases Relied on by the Respondents are Not Helpful

15. In addition to these arguments, the Respondents rely repeatedly on two cases, neither of which is helpful and both of which are distinguishable.

i. *Nortel Networks Corporation (Re)*

16. The Respondents cite *Nortel Networks Corporation (Re)* because it concerns the interpretation of a directors and officers insurance policy in the insolvency context.[17] That is where the similarities end.

17. First and foremost, *Nortel* predated *Ledcor* (and even *Sattva*). This court, in a brief 8-paragraph decision, did not address the standard of review in any detail. On this basis alone, the case is distinguishable and of little use for identifying the standard of review applicable on the proposed appeal.

18. The question for determination in *Nortel* was also very different from that in this case. The question in *Nortel* was whether the insurer was required to pay the legal fees of Nortel's executives. The motion hinged on whether Nortel remained obliged to indemnify its directors and officers for their legal fees after the CCAA stay of proceedings. The motion judge found that that indemnification was a pre-filing claim and had been stayed. As a result, the insurer was required to pay the legal fees of Nortel's executives.

19. In *Nortel*, the motion judge's temporal characterization of the claim, and whether the claim was a "pre-filing" one, was in issue. The insurer framed its appeal as a question of fact, arguing

---

[17] 2013 ONCA 518 ("***Nortel***"), cited in the Respondents' Factum at paras. 18, 31, 33, 38-39, 46, 51-52, and 55.

"that the motion judge erred in finding the indemnification to be a pre-filing claim and therefore subject to the stay."[18] Here, the Applicant's proposed appeal does not turn on a question of fact. Unlike *Nortel*, the proposed appeal is on a pure and extricable question of law.

20. The Respondents also rely on *Nortel* to argue that the proposed appeal is not significant to the practice.[19] As explained in the Applicant's moving factum, the proposed appeal speaks to the ability of employees to recoup unpaid wages from directors and officers. How that right operates within insolvency proceedings, where an insurance policy may provide coverage, is of significance to the practice. These issues were not raised in *Nortel*: that decision provides no assistance in determining the significance of the proposed appeal.

ii. *U.S. Steel Canada Inc. (Re)*

21. In *U.S. Steel*, an order of specific performance had been made within a CCAA proceeding and was still outstanding.[20] One point raised by the proposed appeal was the interpretation of a reconveyance agreement reached between the parties.[21] There is no suggestion that this was a standard form contract; to the contrary, it appears to have been a bespoke agreement. Under *Sattva,* the default rule is that an appeal from such a contract is a question of mixed fact and law.[22] That

---

[18] *Nortel*, at para. 3 (emphasis added).
[19] Respondents' Factum at paras. 51-55.
[20] *U.S. Steel*, cited in the Respondents' Factum at paras. 28, 31, 40, and 56-57.
[21] *U.S. Steel*, at paras. 2, 8. See also *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2022 ONSC 6993, at paras. 21- 38; and *U.S. Steel Canada Inc. (Re)*, 2023 ONSC 6419, at paras. 19-20.
[22] *Sattva*, at para. 50.

the court, in *U.S. Steel*, without elaborating, said that the "motion judge's interpretation of the Reconveyance Agreement is entitled to deference" is of no assistance on this motion for leave.[23]

22. The Respondents also rely on *U.S. Steel* for the proposition that "when there is no ongoing restructuring, this fourth factor [whether the proposed appeal unduly hinders the progress of the action] is still one which weighs against granting leave."[24] The Respondents' contention that delay remains a factor even when there is nothing to delay must be rejected and is not supported by *U.S. Steel*.

23. The court in *U.S. Steel* found that delay was a factor that weighed against granting leave, despite there being no ongoing restructuring, because there remained something to delay. Over a year prior, the moving party was ordered to reconvey a parcel of land.[25] Leave to appeal that decision had been refused.[26] That reconveyance was required in order to close a transaction between the respondent and another party.[27] Granting the applicant's second leave application, from the motion judge's interpretation of the reconveyance agreement, would have further delayed that transaction.

24. The court, in denying leave based in part on the delay that an appeal would cause, quoted the motion judge: "This still has not been done; [the applicant] is effectively in continuing breach of McEwen J.'s order for specific performance. The time to conclude this transaction is nigh."[28] There is no parallel between this appeal – which asks this Court to consider the Policies for the

---

[23] *U.S. Steel*, at para. 9, and see the Respondents' Factum at para. 40.
[24] Respondents' Factum at para. 58, citing *U.S. Steel*, at para. 14.
[25] *U.S. Steel*, at para. 3.
[26] *U.S. Steel*, at para. 10
[27] *U.S. Steel*, at para. 3.
[28] *U.S. Steel*, at para. 14.

first time and raises an issue on which no Canadian or U.S. Court has opined – and the *U.S. Steel* appeal, which was a second kick at the can.

25. In this case, there is nothing left to delay and, as a result, delay cannot be a factor that weighs against granting leave. The proposed appeal is *prima facie* meritorious, as set out in detail in the Applicant's moving factum. It is on a question of law alone: no discretion is owed to the motion judge. That question affects the interests of 7,723 class members who, if leave is not granted, will not receive the unpaid wages they are owed.

26. Leave to appeal ought to be granted in this case.

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

Koskie Minsky LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

David Rosenfeld LSO #51143A
Tel: (416) 595 2700
Email: drosenfeld@kmlaw.ca

Vlad Calina LSO #69072W
Tel: (416)595-2029
Email: vcalina@kmlaw.ca

Caitlin Leach LSO #82774T
Tel: (416) 595-2124
Email: cleach@kmlaw.ca

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

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Carolina Casualty Insurance Co. v. McGhan*, 2008 US Dist LEXIS 143800 (District of Nevada).

2. *Housen v. Nikolaisen*, 2002 SCC 33.

3. *Jayhawk Private Equity Fund II LP v. Liberty Insurance Underwriters Inc.*, 2018 US Dist LEXIS 250716 (Central District of California).

4. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37.

5. *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842.

6. *Nortel Networks Corporation (Re)*, 2013 ONCA 518.

7. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

8. *U.S. Steel Canada Inc. (Re)*, 2023 ONSC 6419.

9. *U.S. Steel Canada Inc. (Re)*, 2024 ONCA 363.

10. *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2022 ONSC 6993.

11. *Zucker v. US Specialty Insurance Co* (2017), 856 F 3d 1343 (US Court of Appeals, 11th Ct.).

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

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

REPLY FACTUM OF THE PROPOSED APPELLANT, HAIDAR OMARALI

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

David Rosenfeld LSO #51143A
Tel: 416-595-2700 / Fax: 416-204-2894
drosenfeld@kmlaw.ca

Vlad Calina LSO #69072W
Tel: 416-595-2029 / Fax: 416-977-3316
vcalina@kmlaw.ca

Caitlin Leach LSO #82774T
Tel: 416-595-2124
cleach@kmlaw.ca

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