

SCC File No.:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

CELIA SANKAR**APPLICANT**

-and-

BELL MOBILITY INC.**RESPONDENT**

**MEMORANDUM OF ARGUMENT
APPLICATION FOR LEAVE TO APPEAL**

(Filed by Celia Sankar)

(Pursuant to Rule 25 of the Rules of the Supreme Court of Canada)

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PART I - OVERVIEW OF ISSUES AND STATEMENT OF FACTS

A. Overview

1. This case involves the interpretation of standard form cell phone contracts affecting approximately one million consumers. The contracts involve prepaid credits that must be paid for and loaded onto a phone before the phone can be used, unlike typical cell phone contracts that require payment after-the-fact. Prepaid credits expire after a period of time if they are not used. The core issue of contract law is whether or not Bell Mobility Inc. (“Bell”) complied with its standard form contracts through its practices of expiring customers’ credits.

2. The applicant previously sought leave to appeal to this Honourable Court. On October 20, 2016, this Court (*per* McLachlin C.J., Wagner and Gascon J.J.) remanded the case back to the Court of Appeal for Ontario pursuant to s. 43(1.1) of the *Supreme Court Act*,¹ for disposition in accordance with this Court’s recent decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,² a case involving the interpretation of a standard form insurance contract.

3. Following the remand order, the Court of Appeal heard the remanded appeal in January 2017 and confirmed its original decision in reasons dated April 12, 2017.

4. The applicant once again seeks leave to appeal to this Honourable Court from the remanded decision of the Ontario Court of Appeal. The purpose of this Court’s decision in *Ledcor* was to clarify that standard form contracts should be interpreted consistently for everyone who enters into the agreement. A standard form contract should not receive one

¹ RSC 1985, c. S-26.

² 2016 SCC 37 [“*Ledcor*”].

interpretation for one person, and a different interpretation for another. The *Ledcor* decision established that the “surrounding circumstances” of an agreement involved in the interpretation of commercial agreements, as described in this Court’s decision in *Sattva Capital Corp. v. Creston Moly Corp.*,³ is typically not applicable to standard form contracts, unless they are the same for everyone.

5. Rather than clarifying and applying these principles, the Ontario Court of Appeal’s decision confuses the *Ledcor* analysis, leading to uncertainty about the interpretation and application of standard form contracts in the class action context.

6. The first question in the interpretation of any standard form agreement is: what are the terms of the contract? This should not be a complicated exercise. However, in this case, the Court of Appeal looked well outside the standard form Terms of Service, holding that the court must consider “other documents that formed part of the contractual relationship between the parties”⁴ which were not contemporaneous with the Terms of Service. On this basis, the Court of Appeal elevated some evidence to contract terms, such as “information on the phone card”⁵ and information on “the receipt given to the customer,”⁶ which the Court of Appeal acknowledged were not contemporaneous with the Terms of Service.⁷ By contrast, the Court of Appeal held, other information that also was not contemporaneous with the Terms of Service should be discarded under the contractual analysis: “the expiry date that Bell assigned to the customer’s account, after the top-up was made,”⁸ text messages that Bell sent to all of its customers,⁹

³ 2014 SCC 53.

⁴ Reasons of ONCA, para. 24.

⁵ *Ibid.*, para. 28.

⁶ *Ibid.*

⁷ *Ibid.*, para. 24.

⁸ *Ibid.*, para. 34.

⁹ *Ibid.*, para. 33.

brochures available in Bell's stores¹⁰ or Bell's website information.¹¹ The Court of Appeal provided no guidance to explain why certain types of post-contractual information could be considered in the breach of contract analysis, but others did not.

7. The Court of Appeal's analysis in this case distorts the principles set out by this Court in *Ledcor* for interpretation of standard form contracts and will resurrect the uncertainty that existed prior to *Ledcor*. If documents that are not contemporaneous with the terms of service can be considered, how long is an appropriate time gap? Receipts qualified as non-contemporaneous documents without any analysis of timing, but text messages did not because "they were sent long after the top-up was made."¹² Likewise, "information on the phone card" qualified for analysis as terms of contract, but the expiry date that Bell immediately assigned on payment did not because the Court of Appeal held the customer may or may not have looked at this information.¹³ Did the one million class members look at their receipts and the information on the phone card? There was no evidence of this in the record.

8. The Court of Appeal's confusing analysis about what constitute the terms of contract is compounded by its analysis of class action certification in its reasons. It held: "In order for the court to determine the common issues, the contract had to be the same for all class members and the answer had to be the same for all class members. A common issue cannot be answered by considering facts that vary from class member to class member."

¹⁰ *Ibid.*, para. 36.

¹¹ *Ibid.*

¹² *Ibid.*, para. 33.

¹³ *Ibid.*, para. 34.

9. This statement is inconsistent with basic class action law from this Court¹⁴ and is inconsistent even with the basis on which this very case was certified. A common issue can exist even if the answer given to a question might vary from one class member to another. The certification judge held that variation among Bell's practices did not defeat commonality because its practices were systemic and could be examined at the common issues trial. The Court of Appeal's conclusion about certification sets the bar improbably high and raises confusion about certification of standard form breach of contract claims.

10. Finally, the Court of Appeal ignored key arguments made to this Court in its initial application for leave to appeal which were ~~against~~ ^{again} put to the Court in the remand hearing. For example, the Terms of Service contain an "entire agreement" clause. The Court of Appeal's analysis fails to explain how a contract having an entire agreement clause can incorporate other terms of contract. In addition, Bell's contracts give it the right and obligation to notify its customers of changes to their contractual entitlements by various means, including via electronic message. In both of its sets of reasons, the Court of Appeal failed to address the applicant's argument that the notices were authorized and sent pursuant to the Terms of Service. Rather than address these arguments,¹⁵ the Court of Appeal simply concluded, with neither analysis, nor citing any authority, that "the text messages had no contractual effect."¹⁶

¹⁴ *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1.

¹⁵ Reasons of ONCA, para. 17.

¹⁶ *Ibid.*, para. 33.

PART II - BACKGROUND FACTS

Certification decision

11. The plaintiff's claim was certified as a class proceeding.¹⁷ The court held the plaintiff's contractual and statutory claims were capable of determination on a common basis and that Bell's communications to its customers, as well as the language of the contracts, were common and not inherently individual issues.

Summary judgment decision

12. The parties brought cross-motions for summary judgment. The Superior Court of Justice granted Bell's motion and dismissed the plaintiff's, dismissing the class action claim in its entirety.

13. The Superior Court recognized that "many of the class members' complaints were prompted in part by the expiry date notices," but excluded notices from its contractual analysis. Instead, relying on this Court's decision in *Sattva Capital Corp. v. Creston Moly Corp.*,¹⁸ and without having had the benefit of this Honourable Court's decision in *Ledcor*, the Superior Court relied on alleged "surrounding circumstances" like brochures, point of sale displays and pamphlets, as well as receipts issued after transactions were completed, to conclude that the parties to the contract intended that customer credits would expire after the customer received the full period of cell phone service to which they had agreed (*i.e.* 30, 60 or 365 days).¹⁹ Based on its analysis of these alleged "surrounding circumstances," the court concluded there was no breach

¹⁷ *Sankar v. Bell Mobility*, 2013 ONSC 5916 ("Certification reasons").

¹⁸ 2014 SCC 53.

¹⁹ *Sankar v. Bell Mobility*, 2015 ONSC 632 ("Summary judgment reasons").

of contract.²⁰ The court declined to consider Bell's expiry date notices on the basis that the notices were akin to "subsequent representations" that could not be considered in the contract analysis without involving doctrines such as promissory estoppel or misrepresentation, both of which raise individual issues that could not be considered in a class action.

14. The Superior Court's conclusion was flawed. The case was not about whether Bell gave its customers access to its network for the appropriate length of time. It was about when and how Bell was entitled to take its customers' money. The notices were not "subsequent representations" either. They were authorized by the contract's terms of service.

15. Although the Superior Court dismissed the plaintiff's claim, it answered "yes" to the first common issue of contractual interpretation, which asked: "Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of the prepaid credits before the prepaid credits can be seized?"²¹ The court only answered "no" to the second common issue, which asked: "Did the defendant breach the terms of the contract by seizing prepaid credits before it was entitled to?"²²

Initial Court of Appeal decision

16. The Court of Appeal dismissed the plaintiff's appeal on April 4, 2016. It endorsed the Superior Court of Justice's approach to contractual analysis, holding that the court's reliance on extraneous communications for its interpretation of the contract was appropriate.²³ The Court of Appeal also endorsed the Superior Court of Justice's approach to the expiry date notices, holding that they "were not part of the factual matrix surrounding the formation of the contract. At their

²⁰ *Ibid.*, para. 22.

²¹ Summary judgment order.

²² *Ibid.*

²³ *Sankar v. Bell Mobility Inc.*, 2016 ONCA 242 ("First Court of Appeal Decision"), para. 22.

highest, they were post-contractual representations.”²⁴ Therefore, the Court of Appeal concluded, Bell’s clear and direct expiry date notices could not be considered in the breach of contract analysis. The Court of Appeal did not address the applicant’s argument that the notices were authorized and sent pursuant to the terms of the standard form contracts.

Application for leave to appeal to this Court

17. The *Ledcor* decision held that the interpretation of a standard form contract should be recognized as an exception to the Court’s holding in *Sattva Capital Corp. v. Creston Moly Corp.*, particularly in respect of the use of “surrounding circumstances” to interpret contracts.²⁵

18. After the leave materials were filed, the reasons in *Ledcor* were released. This Court disposed of the applicant’s leave application by ordering that the case be “remanded to the Court of Appeal for Ontario for disposition in accordance with *Ledcor*”.

Further submissions to the Court of Appeal for Ontario

19. The remanded appeal was heard on January 20th and decided April 12th. The Court of Appeal confirmed its original decision.

PART III - STATEMENT OF ISSUES

- A. How is the Court of Appeal’s decision inconsistent with *Ledcor*?

- B. Was the Court of Appeal’s explanation of standard form contract certification principles correct?

²⁴ *Ibid.*, para. 28.

²⁵ 2014 SCC 53. See para. 28, holding that the “surrounding circumstances” of the contract, or the factual matrix in which it was formed, “is often less important for standard form contracts because ‘the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition.’”

PART IV - ANALYSIS OF ISSUES

A. How is the Court of Appeal's decision inconsistent with *Ledcor*?

20. The central holding from this Court's decision in *Ledcor* is that standard form contracts should be interpreted consistently for everyone who may be party to them.²⁶ For this reason, contractual claims based on standard form agreements are ideal for resolution in a class proceeding. As a practical matter, class actions are the only meaningful tool that can be used to provide meaningful access to justice to persons who have contractual claims arising from standard form contracts.

21. *Ledcor* set out a principled and pragmatic framework for standardized analysis of standard form contracts. The Court of Appeal's decision in this case has seriously undermined this framework and has impaired the ability of consumers to seek class-wide determination of standard form contract disputes in the future. By concluding that relevant contractual terms may reside in different places other than the Terms of Service, the Court of Appeal effectively revived the application of *Sattva's* "surrounding circumstances" to the analysis of standard form contracts. Rather than describing receipts given to a customer and phone cards found in retail stores as part of the "surrounding circumstances," the Court of Appeal simply concluded that they were part of the Terms of Service that were common to all class members. There was no explanation for why these documents qualify as Terms of Service, as opposed to "surrounding circumstances." Nor was there any reasoning as to how receipts and phone cards qualified for treatment as contractual terms, in circumstances where the information was not contemporaneous with the Terms of Service. Indeed, the Court of Appeal's findings were belied by the record.

²⁶ *Ledcor, supra*, para. 31.

There was no evidence that the one million class members actually looked at the receipts or the information on the phone cards. At best, only a portion of the class received such cards or receipts, let alone read them. By contrast, the Court of Appeal discounted other evidence on the basis that there was no evidence that class members looked at the information²⁷ or the timing was not appropriate.²⁸ The effect of the Court of Appeal's confusing analysis and selective reliance on certain post-contractual alleged Terms of Service will result in confusion over a question as basic as "what is the Court entitled to consider in its analysis of standard form contracts?"

22. This is a basic issue of contractual interpretation that ought to have been settled with *Ledcor*. The Court of Appeal's selective characterization of certain post-contractual information, and not other, as part of the standard form Terms of Service creates confusion about the information a court is entitled to consider in its analysis of standard form contracts.

B. Was the Court of Appeal's explanation of standard form contract certification principles correct?

23. The Court of Appeal held at paragraph 23 of its remanded reasons that a common issue requires "the contract [...] to be the same for all class members and the answer had to be the same for all class members. A common issue cannot be answered by considering facts that vary from class member to class member."²⁹

24. This is an incorrect statement of law. It is inconsistent with this Court's decision in *Vivendi Canada Inc. v. Dell'Aniello*,³⁰ which held, citing this Court's decision in *Western*

²⁷ Reasons of ONCA, para. 34.

²⁸ *Ibid.*, para. 33 ("[T]hey were sent long after the top-up was made.")

²⁹ Reasons of ONCA, para. 23.

³⁰ 2014 SCC 1 ("*Vivendi*").

Canadian Centres v. Dutton:³¹ “Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be ‘common’ only where its resolution is necessary to the resolution of each class member’s claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that resolution of the common issues would be determinative of each class member’s claim.”³²

25. The Court in *Vivendi* also cited the Court’s decision in *Rumley v. British Columbia*,³³ holding that the decision meant that “a question can remain common even though the answer to the question could be nuanced to reflect individual claims. [...] A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.”³⁴

26. Thus, the Court in *Vivendi* held, “*Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member’s claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must

³¹ 2001 SCC 46.

³² *Vivendi*, *supra* note 33, para. 41 (emphasis added).

³³ 2001 SCC 69.

³⁴ *Vivendi*, *supra* note 33, para. 45 (emphasis added).

benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.³⁵

27. The Court of Appeal's observation that the "answer had to be the same for all class members" and that "a common issue cannot be answered by considering facts that vary from class member to class member" are inconsistent with the above principles. It is an incorrect statement of law affecting a basic issue of class action certification of standard form contracts. Moreover, it invites lower courts to decline to certify contractual class actions in circumstances where this Honourable Court has held that they ought to be certified.

28. This case is illustrative. It was certified on the basis that there would be varying practices affecting different members of the class in different ways. The certification judge rejected Bell's arguments that "when you consider all the permutations that would result from having three vendors, three different expiry date practices, three kinds of expiry date communications and six different methods of communication, there can be no commonality and it is 'impossible to proceed on a class-wide basis'."³⁶

29. The certification judge held: "Rather, I agree with the plaintiff that even though the defendant's practices, communications and methods of notification varied and at one point changed during the time period in question, they were not haphazard or random but systemic and uniform. [...] Far from being a morass of individual complexity, the practices can be organized into compartments and the common issues can be adjudicated accordingly. The common issues judge will have to provide nuanced answers to the common issues based on the different systemic practices in existence during the two different time-periods. And, sub-classes may have

³⁵ *Ibid.*, para. 46 (emphasis added).

³⁶ *Sankar v. Bell Mobility*, 2013 ONSC 5916, para. 69.

to be established to reflect the resulting compartments. However, it does not follow from this that it is ‘impossible to proceed on a class-wide basis’ as argued by the defendant.”³⁷

30. The certification judge’s analysis was consistent with *Vivendi*. It recognized the possibility of providing nuanced answers for different class members. However, the case would not have been certified if the principles from the Court of Appeal’s remanded decision were applied: the answer would not have been the same for all class members and the facts varied from class member to class member.

31. The Court of Appeal’s analysis of class action certification criteria is inconsistent with class action certification principles from this Court. Leave should be granted to correct the Court of Appeal’s erroneous analysis of basic certification principles that will impact class action claims involving standard form contracts.

PART V - SUBMISSIONS ON COSTS


32. The applicant requests her costs.

PART VI - ORDERS SOUGHT

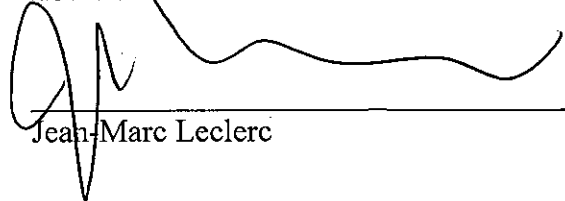
33. The applicant requests that leave be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 9, 2017



Louis Sokolov



Jean-Marc Leclerc

³⁷ *Ibid.*, para. 72.