

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

BETWEEN:

**PHYLUM CORPORATION**

Applicant  
(Appellant)

-and-

**THE DOMINION OF CANADA GENERAL INSURANCE COMPANY**

Respondent  
(Respondent)

---

**APPLICATION FOR LEAVE TO APPEAL  
(PHYLUM CORPORATION - APPLICANT)**  
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985 c. S-26)

---

**Applicant (Appellant)  
Phylum Corporation**

2-107 Welland Ave.,  
St. Catharines, ON  
L2R 2N4

T: 905-246-8491  
E: diklee@phylum.ca

**Dik Lee – representing  
Phylum Corporation**

**Respondent (Respondent)**  
**The Dominion of Canada General Insurance Company**

**Gerald A. Swaye & Associates**  
**Professional Corporation Lawyers**

901-105 Main Street East  
Hamilton ON  
L8N 1G6

Tel: (905) 524-2861  
Fax: (905) 524-2313

Stephen H. Fay

**Lawyers for the Respondent**

## TABLE OF CONTENTS

<b>TAB</b>	<b>DESCRIPTION</b>	<b>PAGE</b>
<b>1.</b>	<b>Notice of Application for Leave to Appeal</b> , dated December 22, 2014.....	1
<b>2.</b>	<b>Affidavit in Support</b> Affidavit of Mary Zgrablic in Support of the Application, dated January 26, 2015.....	4
<b>3.</b>	<b>Certificate of Application</b> , dated December 22, 2014.....	7
<b>4.</b>	<b>Lower Court Judgements and Reasons</b>	
<b>A.</b>	Judgment of the Honourable B.P. O’Marra J., Superior Court of Justice, released June 24, 2014.....	9
<b>B.</b>	Formal Order of the Superior Court of Justice, dated June 24, 2014.....	12
<b>C.</b>	Formal Order of the Court of Appeal for Ontario, Granting Dik Lee leave to represent Phylum Corporation, dated November 20, 2014.....	15
<b>D.</b>	Judgment of the Court of Appeal for Ontario, dated December 3, 2014.....	18
<b>E.</b>	Formal Order of the Court of Appeal for Ontario, dated December 3, 2014.....	19
<b>5.</b>	<b>Memorandum of Argument</b>	
	PART I: STATEMENT OF FACTS.....	22
	PART II: STATEMENT OF THE QUESTIONS IN ISSUE.....	26
	PART III: STATEMENT OF ARGUMENT.....	27
	PART IV: SUBMISSIONS IN SUPPORT OF ORDER SOUGHT CONCERNING COSTS.....	34
	PART V: ORDER SOUGHT.....	34
	PART VI: TABLE OF AUTHOTITIES.....	35
	PART VII: LEGISLATION.....	36

## TABLE OF CONTENTS

<b>TAB</b>	<b>DESCRIPTION</b>	<b>PAGE</b>
<b>6.</b>	<b>Further Documents Relied Upon</b> Affidavit of Dik Lee, including Exhibit C, Superior Court of Justice, dated June 4, 2014.....	39
<b>7.</b>	<b>Authorities</b>	
<b>A.</b>	<i>Canada v. Craig</i> , 2012 SCC 43, [2012] 2 S.C.R. 489.....	67
<b>B.</b>	<i>Krofchick et al. v. Provincial Insurance Co. Ltd et al</i> , (1978), 21 O.R. (2d) 805.....	94
<b>C.</b>	<i>Matti v. Wawanesa Mutual Insurance Company</i> , 2009 ABQB 451.....	105
<b>D.</b>	<i>Precision Drilling Corporation v. Matthews Equipment Limited</i> , 2000 ABQB 499.....	110
<b>E.</b>	<i>Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.</i> (1990), 71 D.L.R. (4 <sup>th</sup> ) 681.....	123
<b>F.</b>	<i>Sport Maska Inc. v. Zittner</i> , [1988] 1 S.C.R., 564.....	137

## PART I – STATEMENT OF FACTS

### OVERVIEW

1. The Court of Appeal for Ontario in this case, *Phylum Corporation v. The Dominion of Canada General Insurance Company*, 2014 ONCA 886, has chosen to overrule a prior decision set by the Supreme Court of Canada in *Sport Maska Inc. v. Zittreer*, [1988] 1 S.C.R. 564 where the Supreme Court of Canada held that an insurance appraisal is a valuation and not an arbitration and that an expert opinion would be required by the appointed umpire in the insurance appraisal.

2. The Saskatchewan Court of Appeal in *Shinkaruk Enterprises LTD. v Commonwealth Insurance Co. (1990)*, 71 D.L.R. (4<sup>th</sup>) 681 has adopted the decision set by the Supreme Court of Canada ruling in *Sport Maska*

“Moreover, the reasoning employed in Pfeil and Krofchick, has now been specifically approved by the Supreme Court of Canada in *Sport Maska Inc. v. Zittreer*, [1988] 1 S.C.R. 564 at 588. It may now be considered settled that an appraisal under s. 108 and condition 11 under the Act is a valuation and not an arbitration.”

*Shinkaruk Enterprises LTD. v. Commonwealth Insurance Co. (1990)*, 71 D.L.R. (4<sup>th</sup>) 681, Tab 7E, p. 126

3. The Divisional Court of Ontario in *Krofchick et al. v Provincial Insurance Co. Ltd. et al.* (1978), 21 O.R. (2d) 805 held:

“... the function of the appraisers and umpire was not to hear evidence, but rather to arrive at a decision on the basis of their own knowledge and expertise...”

*Krofchick et al. v Provincial Insurance Co. Ltd. et al.* (1978), 21 O.R. (2d) 805, Tab 7B, p. 103

4. There is a clear and significant conflict in law across the nation in the provincial courts of appeal and a continued conflict at all levels of courts across Canada regarding the appointment and role of an umpire in an insurance appraisal. The insurance appraisal is of public interest that

effects the rights of every citizen that purchases the security of an insurance policy and the appointment of an umpire for an insurance appraisal forms a part of every provincial statute in Canada.

5. Mary Zgrablic in her affidavit for support of the Applicant's Application for Leave to Appeal states:

"... the Court of Appeal ruling in *Phylum v Dominion*, which found that the umpire in this case did not possess the proper knowledge and experience to provide an expert opinion but ruled that the umpire was properly qualified and provided no reasons for that decision. The Court of Appeal for Ontario has further stated that an umpire can hear evidence from the parties setting a provincial precedent in contradicting the Supreme Court of Canada."

Affidavit of Mary Zgrablic in Support of the Application, dated January 26, 2015, Tab 2, p. 5

6. The Supreme Court of Canada in *Canada v Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 held:

"[26] Courts must proceed with caution when deciding to overrule a prior decision...No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank..."

*Canada v Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, Tab 7A, p. 84

7. The Applicant seeks leave to appeal this case so that the Supreme Court of Canada may have the opportunity to consider whether all provincial courts of appeal and lower courts are equal regarding an appointment of an umpire in an insurance appraisal and a further consideration to reaffirm past precedent set by the Supreme Court of Canada in *Sport Maska* so that there may be equality for every citizen across the nation and that each citizen will know what to expect in law given a case with similar material facts.

8. The Applicant further seeks leave to appeal so that the Supreme Court of Canada may have the opportunity to provide guidance to the lower courts and to citizens in consideration of one of the most critical questions for an insurance appraisal, what qualifications are necessary for

a person to act as an umpire in an insurance appraisal? The consideration of this question may serve as a relief to the lower courts in this area of the law.

## **BACKGROUND**

9. The Applicant, Phylum Corporation (hereinafter “Phylum”), the plaintiff in the lower court, had a fire on February 15, 2012, at a building located at 107 Welland Avenue, in the City of St. Catharines which resulted in an action arising from an insurance claim brought by Phylum against the Dominion of Canada General Insurance Company (hereinafter “Dominion”), the defendant in the lower court.

Affidavit of Dik Lee, including exhibit C, Superior Court of Justice, dated June 4, 2014, Tab 6, p. 39, para. 1

10. The Proof of Loss submitted by Phylum to Dominion describes the Property losses associated to the building, which includes Blanket Building By-Laws, Replacement Cost Endorsement and Rental Income loss, making up 86.53% (~87%) of the total loss being claimed by Phylum. Phylum was covered by an insurance policy issued by Dominion for property damage to the building and contents including Blanket Building By-Laws, Replacement Cost Endorsement and Rental Income.

Affidavit of Dik Lee, including exhibit C, Superior Court of Justice, dated June 4, 2014, Tab 6, p. 41, para. 13 and Exhibit C

11. Phylum and Dominion could not agree on the scope and amount of damages and Dominion initiated an Appraisal as per the statutory conditions in the Insurance Act. Phylum understood that the Appraisal, as defined by the Insurance Act, was a valuation and Phylum did not agree to any form of arbitration. Phylum and Dominion appointed appraisers and the appraisers for the parties were unable to agree on an umpire. Phylum brought a motion to a Judge in the Superior Court of Justice to appoint an umpire as per s. 128 of the Insurance Act.

Affidavit of Dik Lee, including exhibit C, Superior Court of Justice, dated June 4, 2014, Tab 6, p. 41-42, para. 15, 25, 26

12. At the motion heard orally on June 19, 2014, in front of the Honourable B. P. O’Marra J., Phylum argued that the Appraisal as defined in the Insurance Act is a valuation and not an arbitration and, as such, a valuation should utilize the expertise and knowledge of an expert to provide an expert opinion and that an umpire appointed in that role should be an expert to that which he testifies, much along the lines of the ruling and decisions of the Supreme Court of Canada in *Sport Maska Inc. v. Zittreer*, [1988] 1 S.C.R. 564

“[67] The fact that the third party makes a decision based on his personal expertise rather than on an adversarial procedure requiring the admission of evidence and argument by the parties suggests the existence of an expert opinion...”

*Sport Maska Inc. v. Zittreer*, [1988] 1 S.C.R. 564, Tab 7F, p. 169

13. The motions Judge overruled the precedent set by the Supreme Court of Canada in *Sport Maska* and provided no reasons why he chose to do so. The motions Judge further stated that the appointed umpire was “... a retired lawyer, I am confident that he is well aware of his ethical and professional obligations to perform his duties in a fair and even handed manner.”

Judgment of the Honourable B.P. O’Marra J., Superior Court of Justice, released June 24, 2014, Tab 4A, p. 9

14. The question of whether an umpire would be ethical and professional should be implied for any and all umpire choices. However, the question to the courts was which umpire would be most qualified to provide an expert opinion, independent of the evidence from the parties, for the valuation of damages in the insurance appraisal.

15. Phylum appealed the matter to the Court of Appeal for Ontario. The Court of Appeal for Ontario found that the umpire appointed by the motions Judge did not have the knowledge and experience in this case to provide an expert opinion (supra para. 5) but ruled that the umpire was properly qualified, providing no reasons for what made the umpire qualified.

16. A question was raised at the Court of Appeal Hearing, December 3, 2014: If the umpire did not possess the knowledge and experience to provide an expert opinion then how was the



umpire to provide a valuation in the damages for the insurance appraisal? The Court of Appeal for Ontario ruled that the umpire was to hear evidence from the parties to make his decision (supra para 5).

17. The decision of the Court of Appeal for Ontario has seriously undermined the precedent set by the Supreme Court of Canada in *Sport Maska* and, in this case, the Court of Appeal for Ontario has created an inequality in law for citizens across the nation. The Court of Appeal provided no reasons as to why it chose to overrule the precedent set by the Supreme Court of Canada in *Sport Maska* and provided little to no guidance as to what made an umpire qualified for an insurance appraisal.

## **PART II – STATEMENT OF THE QUESTIONS IN ISSUE**

18. The Applicant submits that this case raises the following important issues of law that are also of national and public importance:

- a. Conflict of Law – Is there unequal justice in the eyes of the law regarding the appointment of an umpire in an insurance appraisal?
- b. Is a Motion Judge’s decision from a lower court bound by stare decisis?
- c. Conflict of Law – Is it in the capacity of an umpire in the insurance appraisal to hear evidence and make a judgment on that evidence?
- d. What qualifications are necessary for a person to act as an umpire in an insurance appraisal?

19. The evidence on record (supra para. 1 – 8) shows that these questions are fundamental to the integrity and effectiveness of the insurance appraisal which forms a part of every provincial statute across the nation and is a part of every ‘peace of mind’ insurance policy that is purchased by a citizen.

### PART III – STATEMENT OF ARGUMENT

#### **Conflict of Law – Is there unequal justice in the eyes of the law regarding the appointment of an umpire in an insurance appraisal?**

20. The Saskatchewan Court of Appeal in *Shinkaruk* where the principle issues in the appeal arose out of a fire loss to a building owned by *Shinkaruk* which was covered by an insurance policy, the Honourable Vancise J.A. cited from the Supreme Court of Canada case *Sport Maska* and held that an insurance appraisal under the Act is a valuation and not an arbitration (supra para. 2)

21. The Divisional Court of Ontario in *Krofchick* gave consideration on the function of an umpire in an insurance appraisal and held that the function of an umpire was not to hear evidence and that it was the function of an umpire to make a decision based on his or her own knowledge and experience (supra para. 3):

22. The Court of Queen’s Bench of Alberta in *Matti v Wawanessa Mutual Insurance Company*, 2009 ABQB 451, where the insurance appraisal considered the damage of a flood, held:

“[17] Therefore, a properly appointed umpire, much like an expert witness at trial, should be an expert in the field at issue between the parties. The expert’s expertise can come either from special training, or from sufficient experience.”

“[18] ...the key for appraisers when nominating an umpire is to determine the issue that cannot be resolved, and then find a person with sufficient expertise in the field to act as an umpire to resolve the dispute.”

*Matti v Wawanessa Mutual Insurance Company*, 2009 ABQB 451, Tab 7C, p. 108

23. The Saskatchewan Court of Appeal in *Shinkaruk*, The Divisional Court of Ontario in *Krofchick*, The Court of Queen’s Bench of Alberta in *Matti* all fall in line with the Supreme Court of Canada ruling in *Sport Maska* where it held that an insurance appraisal is a valuation

and not an arbitration which suggests that an expert opinion is required in the selection of an umpire.

24. The Court of Appeal for Ontario, in *Phylum v. Dominion*, overruled the prior decision set by the Supreme Court of Canada in *Sport Maska* and set itself apart from all other courts across the nation. The Court of Appeal for Ontario found that an umpire did not possess the experience and knowledge to provide an expert opinion in a valuation for an insurance appraisal, in *Phylum v. Dominion*, and still ruled that the umpire was qualified and provided no reasons as to what made the umpire qualified and further ruled that he was to hear evidence from the parties.

### **Conclusion:**

25. If the Court of Appeal for Ontario ruling in *Phylum v Dominion* was to succeed it would set a precedent that would create an inequality across the nation. It would follow in a gross disproportionality in law. For a case with similar material facts a citizen would receive a completely different ruling in Saskatchewan and Alberta versus Ontario. For a case with similar material facts a citizen would receive a completely different ruling at the Divisional Court of Ontario versus the Court of Appeal for Ontario.

### **Is a Motion Judge's decision from a lower court bound by stare decisis?**

26. The precedent set by the Supreme Court of Canada in *Sport Maska* held that an insurance appraisal is a valuation and not an arbitration which suggests that an expert opinion is required in the selection of an umpire (supra para. 12).

27. Court of Appeal for Ontario ruled that it is the motion Judge's discretion to choose an umpire for the insurance appraisal and provided no reasoning on what made it discretionary. Further the Court of Appeal for Ontario found that the appointed umpire did not possess the appropriate knowledge and experience to provide an expert opinion for the insurance appraisal, in this case, but ruled that the appointed umpire was qualified and provided no reasons as to what made the umpire qualified (supra para. 5).

28. The motion Judge appointed an umpire that was not qualified to provide an expert opinion in the insurance appraisal in this case, *Phylum v. Dominion*, and only provided reasons that the appointed umpire was “ethical and professional” which should be implied for any and all umpires and independent of the questions of whether the umpire is experienced and knowledgeable in the matter of the insurance appraisal which may vary from case to case, dependent on what experience and knowledge were required for each case independently. The motion Judge’s ruling, if it were to succeed would seriously undermine the precedent set by the Supreme Court of Canada in *Sport Maska* (supra para. 12).

29. The Supreme Court of Canada ruling in *Canada v Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 held:

“[26] Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:

“No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.”

*Canada v Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, Tab 7A, p. 84

### **Conclusion:**

30. If the Court of Appeal for Ontario ruling was to succeed it would set a precedent that a motion Judge can overrule the Supreme Court of Canada and it would follow that little to no reasoning is required from a motion Judge in his discretion to overruling the Supreme Court of Canada or the precedent set by any other court. It would further follow that a motion Judge’s discretion is one of arbitrariness and when applied to this case, *Phylum v. Dominion*, would state that the appointment of an umpire for an insurance appraisal is in the form of a crapshoot.

**Conflict of Law – Is it in the capacity of an umpire in the insurance appraisal to hear evidence and make a judgment on that evidence?**

31. It was found by the Court of Appeal for Ontario in *Phylum v. Dominion* that the appointed umpire for the insurance appraisal did not possess the necessary experience and knowledge to provide an expert opinion for the insurance appraisal in this case (supra para. 5). A question was raised at the Court of Appeal hearing December 3, 2014, in *Phylum v. Dominion*: How would the umpire be able to provide a proper valuation to the damages if he has no experience or knowledge in that matter?

32. Mary Zgrablic in her affidavit of support and who was present at the Court of Appeal hearing on December 3, 2014, stated: "...The Court of Appeal for Ontario has further stated that an umpire can hear evidence from the parties ...", suggesting that the Court of Appeal for Ontario was ruling in the favour of an arbitration and not a valuation for the insurance appraisal which is in direct contradiction to the precedent set by the Supreme Court of Canada ruling in *Sport Maska* (supra para. 12).

Affidavit of Mary Zgrablic in Support of the Application, dated January 26, 2015, Tab 2, p. 5

33. The Divisional Court of Ontario in *Krofchick* also supports the fact that the umpire's role in an insurance appraisal is not to hear evidence (supra para. 3)

34. In *Precision Drilling Corporation v. Matthews Equipment Limited*, 2000 ABQB 499, where the issue of that case was whether the parties' contract agreement provided for dispute resolution through arbitration or dispute avoidance through valuation to settle the final purchase price of shares, the Honourable Mr. Justice D.B. Mason provided a definition for valuation:

"[29] Valuation utilizes the expertise and knowledge of an expert to provide an expert opinion as to value or assessment in order to avoid a dispute. The key factor is that the third party makes a decision founded on personal expertise, rather than an assessment of evidence and argument presented by the parties..."

*Precision Drilling Corporation v. Matthews Equipment Limited*, 2000 ABQB 499, Tab 7D, p. 120

35. The Saskatchewan Court of Appeal in *Shinkaruk* suggests that the umpire's role is one of valuation, not arbitration and held:

“...In case the parties are unable to arrive at a settlement through appraisal, they have the common law right to have the disputed questions tried in an ordinary court. ...”

*Shinkaruk Enterprises LTD. v. Commonwealth Insurance Co.* (1990), 71 D.L.R. (4<sup>th</sup>) 681, Tab 7E, p. 124

### **Conclusion:**

36. If the Court of Appeal for Ontario ruling in *Phylum v Dominion* was to succeed it would create a precedent of confusion. The citizen would not know what to expect in an insurance appraisal. Is the insurance appraisal an arbitration where an umpire can hear evidence from the parties as ruled by the Court of Appeal for Ontario in *Phylum v Dominion* or is the insurance appraisal a valuation where the umpire is to bring his or her own expertise to the insurance appraisal as ruled by the Supreme Court of Canada in *Sport Maska* which was adopted by the many other courts across the nation?

### **What qualifications are necessary for a person to act as an umpire in an insurance appraisal?**

37. The Court of Appeal for Ontario has determined that an umpire is properly qualified for the case in *Phylum v Dominion*, however, provided no guidelines as to what a properly qualified umpire entailed.

38. The Saskatchewan Court of Appeal in *Shinkaruk* provides some guidance regarding the role of an umpire for an insurance appraisal and held:

“...The umpire's role was simply to place a value on the building and on the property saved; to fix the cost of replacing the entire building, with and without an allowance

for depreciation and to fix the cost of repairing only that portion of the building that was damaged, with and without an allowance for depreciation...”

*Shinkaruk Enterprises LTD. v. Commonwealth Insurance Co.* (1990), 71 D.L.R. (4<sup>th</sup>) 681, Tab 7E, p. 124

39. The Divisional Court of Ontario in *Krofchick* and The Court of Queen’s Bench of Alberta in *Matti* all fall in line with the Supreme Court of Canada ruling in *Sport Maska* and offer guidance in the fact that an umpire for the insurance appraisal should have acquired experience and knowledge in the matters of dispute in the appraisal.

40. Provincial statutes provide little to no guidance regarding the qualifications of an umpire in the insurance appraisal. In Ontario, the *Insurance Act* s. 148 defines the appraisal:

### **Appraisal**

**11.** In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

*Insurance Act*, R.S.O. 1990 s. 148, Statutory Condition #11, Tab 5, p. 36

41. Further s. 128 of the *Insurance Act* provides some guidelines for contracts providing for appraisal:

128. (1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.

(2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire

(3) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any two determines the matters.

(4) Each party to the appraisal shall pay the appraiser appointed by the party and shall bear equally the expense of the appraisal and the umpire.

(5) Where,

- (a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so;
  - (b) the appraisers fail to agree upon an umpire within fifteen days after their appointment; or
  - (c) an appraiser or umpire refuses to act or is incapable of acting or dies,
- a judge of the Superior Court of Justice may appoint an appraiser or umpire, as the case may be, upon the application of the insured or of the insurer.

*Insurance Act*, R.S.O. 1990 s. 128, Tab 5, p. 36

42. If the Court of Appeal for Ontario ruling was to succeed it would set a precedent that a choice of umpire for the insurance appraisal is one of discretion from a motion Judge with a sense of arbitrariness with little to no guidance to courts and citizens in the determination of what qualifications are necessary for a person to act as an umpire in an insurance appraisal.

43. It would pose many conflicts and questions: How would the appraisers from opposing parties be able to decide on an umpire and fulfill the obligations of the insurance act given the fact that it is an arbitrary choice? Each party would be determined in their own choice of umpire and with no guidelines in the determination of an umpire the parties would most likely end up in front of a motion Judge to choose an umpire, or there may develop some other form of disagreement or dispute regarding the umpire at a later time in the course of the action.

44. Mary Zgrablic, in her affidavit for the support of the application for leave to appeal, submits that the Supreme Court of Canada would have an opportunity to consider:

“...one of the most critical contemporary national questions for an insurance appraisal, namely, what qualifications are necessary for a person to act as an umpire in an insurance appraisal? ... which may provide guidance to the lower courts and to citizens in attempts to avoid future disputes...”

Affidavit of Mary Zgrablic in Support of the Application, dated January 26, 2015, Tab 2, p. 6



**PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT CONCERNING COSTS**

45. The Applicant does not seek any cost to this Application for Leave to Appeal to the Supreme Court of Canada.

**PART V – ORDER SOUGHT**

46. The Applicant respectfully requests that the Court grant Leave to Appeal the Judgment of the Court of Appeal for Ontario dated December 3, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the city of St. Catharines, in the Province of Ontario this 26<sup>th</sup> day of January, 2015.

---

Phylum Corporation (Applicant)

Dik Lee – Representing

**PART VI – TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PARAGRAPH(S)</b>
<i>Canada v. Craig</i> , 2012 SCC 43, [2012] 2 S.C.R. 489	6, 29
<i>Krofchick et al. v. Provincial Insurance Co. Ltd et al.</i> (1978), 21 O.R. (2d) 805	3, 21, 23, 33, 39
<i>Matti v. Wawanesa Mutual Insurance Company</i> , 2009 ABQB 451	22, 23, 39
<i>Precision Drilling Corporation v. Matthews Equipment Limited</i> , 2000 ABQB 499	34
<i>Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.</i> (1990), 71 D.L.R. (4 <sup>th</sup> ) 681	2, 20, 23, 35, 38
<i>Sport Maska Inc. v. Zittler</i> , [1988] 1 S.C.R., 564	1, 12, 13, 17, 29, 23, 24, 26, 28, 36

## PART VII – LEGISLATION

### ENGLISH

#### Insurance Act

##### R.S.O. 1990, CHAPTER I.8

#### **Contracts providing for appraisals**

**128.** (1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer. R.S.O. 1990, c. I.8, s. 128 (1).

#### **Appraisers, appointment**

(2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire. R.S.O. 1990, c. I.8, s. 128 (2).

#### **Appraisers, duties**

(3) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any two determines the matters. R.S.O. 1990, c. I.8, s. 128 (3).

#### **Costs**

(4) Each party to the appraisal shall pay the appraiser appointed by the party and shall bear equally the expense of the appraisal and the umpire. R.S.O. 1990, c. I.8, s. 128 (4).

#### **Appointment by judge**

(5) Where,

- (a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so;
- (b) the appraisers fail to agree upon an umpire within fifteen days after their appointment; or
- (c) an appraiser or umpire refuses to act or is incapable of acting or dies,

a judge of the Superior Court of Justice may appoint an appraiser or umpire, as the case may be, upon the application of the insured or of the insurer. R.S.O. 1990, c. I.8, s. 128 (5); 2006, c. 19, Sched. C, s. 1 (1).

**Statutory conditions**

**148.** (1) The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario and shall be printed in English or French in every policy with the heading “Statutory Conditions” or “Conditions légales”, as may be appropriate, and no variation or omission of or addition to any statutory condition is binding on the insured.

**Definition**

(2) In this section,  
“policy” does not include interim receipts or binders.

**STATUTORY CONDITIONS****Appraisal**

**11.** In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

**FRENCH****Loi sur les assurances**

## L.R.O. 1990, CHAPITRE I.8

**Estimation prévue par le contrat**

**128.** (1) Le présent article s’applique à un contrat comportant une condition légale ou autre qui prévoit une estimation de façon à régler certaines questions en cas de désaccord entre l’assuré et l’assureur. L.R.O. 1990, chap. I.8, par. 128 (1).

**Nomination des estimateurs**

(2) L’assuré et l’assureur nomment chacun un estimateur, et les deux estimateurs ainsi désignés nomment un arbitre. L.R.O. 1990, chap. I.8, par. 128 (2).

**Fonctions des estimateurs**

(3) Les estimateurs règlent les questions qui font l’objet d’un désaccord et, s’ils ne s’entendent pas, soumettent leurs différends à l’arbitre. La décision écrite de deux d’entre eux règle ces questions. L.R.O. 1990, chap. I.8, par. 128 (3).

**Frais**

(4) Chaque partie à l'estimation paye l'estimateur qu'elle a nommé et assume, à part égale, les frais de l'estimation et de l'arbitre. L.R.O. 1990, chap. I.8, par. 128 (4).

**Désignation par un juge**

(5) Un juge de la Cour supérieure de justice peut désigner un estimateur ou un arbitre, selon le cas, sur requête de l'assuré ou de l'assureur, lorsque, selon le cas :

- a) une partie omet de nommer un estimateur dans un délai de sept jours francs après avoir reçu signification d'un avis écrit à cet effet;
- b) les estimateurs ne s'entendent pas sur le choix d'un arbitre dans les quinze jours qui suivent leur nomination;
- c) un estimateur ou arbitre refuse d'agir, en est empêché ou décède. L.R.O. 1990, chap. I.8, par. 128 (5); 2006, chap. 19, annexe C, par. 1 (1).

**Conditions légales**

**148.** (1) Les conditions énoncées dans le présent article sont réputées faire partie de tout contrat en vigueur en Ontario et sont inscrites en caractères d'imprimerie, en français ou en anglais, sur chaque police sous la rubrique «Conditions légales» ou «Statutory Conditions», selon le cas. Aucune modification ou adjonction à une condition légale ni aucune omission d'une telle condition ne lie l'assuré.

**Définition**

(2) La définition qui suit s'applique au présent article.

«*police*» Ne comprend pas les reçus intérimaires ni les notes de couverture.

**CONDITIONS LÉGALES****Estimation**

**11.** En cas de désaccord sur la valeur du bien assuré, du bien sauvé ou du montant du sinistre, ces questions sont tranchées par estimation conformément à la *Loi sur les assurances* avant tout recouvrement dans le cadre du présent contrat, que le droit de recouvrer prévu au contrat soit contesté ou non, et indépendamment de toutes autres questions. Il ne doit pas y avoir de droit à une estimation avant qu'une demande spécifique à cette fin n'ait été faite par écrit et que la preuve du sinistre n'ait été présentée.