A (Somewhat) Cynical View on the "Principles" of Insurance Policy Interpretation

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Scott R. Campbell[1]

Notwithstanding the Supreme Court of Canada's dictate in *Sattva*[2] that the "factual matrix" is always essential to the exercise of contractual interpretation, they softened this approach a few years later – at least in respect of standard form contracts issued by the insurance industry.

In *Ledcor Construction*,[3] the Supreme Court outlined a three-stage approach to interpreting such standard form contracts.

> Stage One - the Court should look to the language of the policy itself in order to determine whether a clear and unambiguous meaning can be found. In doing so, it is essential to look to the words in question and the policy as a whole.
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> Stage Two - if no such "clear and unambiguous" meaning emerges at Stage One, there is ambiguity. And where there is ambiguity, but only where there is ambiguity (different from *Sattva*), the Court must then assess the "reasonable expectations of the parties" and consider what would have been "contemplated in the commercial atmosphere in which the insurance policy was contracted".
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> Stage Three - if an ambiguity remains after Stage Two, then - and only then - can the Court resort to the insured-favouring principle of *contra proferentum*. In other words, the Court will then proceed to interpret the clause so to favour the insured (and against the insurer).

On the complicated facts in *Ledcor*, the Supreme Court concluded that there was an ambiguity at Stage One. At Stage Two, the Supreme Court was able to interpret the policy in favour of the insured (without having to resort to *contra proferentum*).

Before moving on, it is important to highlight that *Ledcor* made one further clarification to Canadian law. In *Sattva*, the Supreme Court mandated a focus on the "factual matrix" as a way to increase the amount of deference given to trial decisions on contractual interpretation. Rejecting the long-standing approach that questions of contractual interpretation are always subject to a "correctness" standard of review, the Supreme Court pronounced that such questions will normally be reviewable only for "palpable and overriding error". This logically follows the emphasis on facts and context to the interpretative exercise (*i.e*. it is no longer a solemn and isolated consideration of the law).

In *Ledcor*, however, the Supreme Court highlighted that "correctness" will usually govern on appeals from the interpretation of standard form contracts. To quote Justice Wagner (for the majority in *Ledcor*), this is because:

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1 Scott is a litigation partner at Stewart McKelvey in Halifax, Nova Scotia (Canada). Full disclosure – Scott argued (and lost) the *Sabean* case at the Supreme Court of Canada. His views may not be entirely objective.

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

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

> [38] For the interpretation of many contracts, precedents interpreting similar contractual language may be of some persuasive value. However, it is the intentions of the particular parties, as reflected in the particular contractual wording at issue and informed by the surrounding circumstances of the contract, that predominate, and "[i]f that intention differs from precedent, the intention will govern and the precedent will not be followed.
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> [39] These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are "highly specialized contracts that are sold widely to customers without negotiation of terms. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers. In others, a standard form agreement may be common throughout an entire industry. Either way, the interpretation of the standard form contract could affect many people, because "precedent is more likely to be controlling" in the interpretation of such contracts. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — "ensuring the consistency of the law" — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.

Three weeks after *Ledcor* was released, the case of *Sabean v Portage La Prairie Mutual Insurance Co* was argued at the Supreme Court of Canada. The backdrop to *Sabean* is as follows:

- A standard form insurance policy provides that the excess (SEF 44) insurer is entitled to deduct from an award of damages all amounts to which the plaintiff/insured is entitled to receive in the future "under a policy of insurance … providing disability benefits …"

- The question before the trial judge in Nova Scotia was whether Canada Pension Plan disability benefits are deductible by this policy language.

- Dating back to 1973, the Supreme Court of Canada had concluded (in the context of the collateral benefits rule) that such CPP benefits are payable pursuant to a policy or contract of insurance. In that particular case (known as *Canadian Pacific Ltd v Gill)*,[4] the result of doing so meant that the plaintiff was entitled to more damages.

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4 *Canadian Pacific Ltd v Gill*, [1973] SCR 654.

- In 2010, the New Brunswick Court of Appeal concluded that this SEF 44 language does not permit deduction of CPP disability benefits.[5] This result was followed by the trial judge in *Sabean*.[6]

- On appeal in *Sabean*, however, the Nova Scotia Court of Appeal reached the opposite conclusion and interpreted the policy language as permitting deduction of CPP disability benefits. Writing for the unanimous panel, Justice Scanlan highlighted that the SEF 44 provides last-ditch safety insurance and must be interpreted to preclude the overcompensation that would arise if CPP disability benefits are not deductible.[7]

- Not surprisingly, the Supreme Court of Canada granted leave to appeal (so to resolve competing appellate jurisprudence on the very same legal issue).

It was perhaps unforeseeable to the Supreme Court that it would have to grapple with the new *Ledcor* framework so quickly. But it became the focus of the *Sabean* appeal hearing in October 2016. In particular, the Justices seemed to struggle with Stage One. On several instances, defence counsel was asked questions along the lines of: Through whose lens do we view the policy language in order to find an ambiguity? The consumer? Or that of someone well-versed in the history of caselaw on this topic?

By this point in the hearing, defence counsel could see the proverbial "writing on the wall". The Supreme Court wanted to answer the case at Stage One in favour of the insured.

Presumably, this is because Stage Two would somewhat roadblock the ability to rule in favour of the insured. Looking to the commercial atmosphere in which the SEF 44 language was drafted, and noting in particular that it post-dates the caselaw which expressly characterizes CPP disability benefits as payable pursuant to a policy or contract of insurance, a Stage Two assessment would have required the Supreme Court to overrule its own long-standing decision on the characterization of CPP disability benefits. In turn, this would have created uncertainty about the scope of the collateral benefits rule on the tort side of the equation. Assuming that the Supreme Court wanted to find in favour of Mr. Sabean no matter what, any Stage Two assessment in *Sabean* could have ultimately limited the recovery of future plaintiffs in tort cases. This is because of the way in which CPP disability benefits have long been characterized as part of the "private insurance exception" in common law, thus giving rise to their non-deductibility from an award of damages against the tortfeasor.

The Supreme Court's decision in *Sabean* was released in January 2017. As predicted, the Justices unanimously answered the case at Stage One and found there was no ambiguity in the language of the SEF 44 policy. This, despite the fact that two appellate courts had reached the polar opposite interpretation on the exact same language.

The controlling feature was that the words "CPP disability benefits" were not expressly included in the deduction clause. From there, the Court observed that the so-called "average person" would not be versed in the "niceties of insurance law" (inclusive of how the Supreme Court and other Courts across the country had characterized CPP disability benefits in the past).

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5 *Economical Mutual Insurance Co v Lapalme*, 2010 NBCA 87.

6 2013 NSSC 306.

7 2015 NSCA 53.

Writing for the unanimous panel, Justice Karakatsanis reasoned as follows:

> [28] In my view, the ordinary meaning of a "policy of insurance" is limited to private contracts of insurance between an insured and a private insurance agency. An average person would not consider benefits provided under a mandatory statutory scheme to be a private insurance contract.
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> [29] The insurer submits and the Court of Appeal accepted that the meaning of "policy of insurance" under the Endorsement must be understood in the context of this Court's decision in *Gill*. Implicit in the approach urged by the insurer is the suggestion that this Court's decision in *Gill* itself supports an alternative reasonable interpretation of the disputed words at the first stage of the *Ledcor* analysis. As I shall explain, I cannot accept this as a reasonable interpretation of this insurance policy. *Gill* does not interpret or inform the ordinary words of the Endorsement. Nor would the average person applying for this insurance contemplate the distinct tort and statutory context in Gill in understanding the words of the Endorsement. The insurer relies on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy.
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> …
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> [35] … It cannot be assumed that the average person who applies to purchase this excess insurance policy would imbue the words in the Endorsement with knowledge of how they were interpreted by the courts for the purposes of provincial insurance legislation and the collateral benefits rule in tort. In this context, the purchaser is not someone with the specialized knowledge of related jurisprudence or of the objectives of the insurance industry. Thus, the history and intention of the insurance industry in drafting the Endorsement following *Gill* do not assist in the interpretation of this contract.
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> …
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> [42] The clear language of the provision, reading the contract as a whole, is unambiguous. There are no "two reasonable but differing interpretations of the policy". The mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity.

A few points emerge for consideration.

- At least in the insurance context (where standard form contracts are virtually the *sine qua non*), there is no certainty in a Court decision that interprets the scope of

policy coverage. On appeal, this decision will almost always be reviewable *de novo*.

- The adage that "ignorance of the law is no excuse" apparently no longer applies to insured persons. Given the Supreme Court's emphasis on the knowledge gap between the "average person" and the "niceties of insurance law", insured persons need not hold themselves to the same standard that is expected by all other areas of the law. Interestingly, but in the criminal law context, the Supreme Court emphasized just a few weeks later that a "reasonable member of the public" is someone who is "thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values".[8]

- As such, and irrespective of what the law might provide, insurers should be very prudent and draft policies with as much detail and certainty as possible.

At least at the conceptual level, there is a lack of principled consistency in the Supreme Court's jurisprudence on insurance law and contractual interpretation. Indeed, the only consistency can be found in the result. Time and time again, the Supreme Court will rule against the insurance industry and in favour of the insured. As defence counsel, this is an important point to keep in mind – not as a matter of law, but as a matter of reality.

In Nova Scotia at least, the result in *Sabean* has been effectively remedied. On May 2, 2017, the Nova Scotia Court of Appeal released its decision in *Tibbetts v Murphy*.[9] CPP disability benefits no longer form part of the common law exception to the collateral benefits rule in Nova Scotia. As such benefits are now deductible from the award of damages on the tort side of the equation, the SEF 44 no longer faces an obligation in relation to same.

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8 *R v Oland*, 2017 SCC 17 at para 47 (*per* Moldaver J.)

9 2017 NSCA 35.