Standard of Appellate Review for Interpretation of Contracts

A Commentary on *MacDonald v. Chicago Title Insurance*

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UPDATE 1: This issue of the standard of review in the interpretation of standard form contracts has been more recently discussed by the Supreme Court of Canada on Sept. 15, 2016 in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* See our more recent Commentary #40.

UPDATE 2. Leave to appeal to the Supreme Court of Canada was refused on Oct. 20, 2016

On Dec. 3, 2015, in *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842 the Ontario Court of Appeal addressed the issue of the standard of review to be applied on an appeal from a lower court decision involving interpretation of a contract.

This issue had recently been canvassed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633. In that decision, the Supreme Court abandoned the traditional view that the standard of review in contractual interpretation was "correctness" and substituted a standard of review of "palpable and overriding error".

However, the Ontario Court of Appeal noted that this ruling was technically *obiter* and the *Sattva* case was an unusual fact situation.

The contract being interpreted in *MacDonald* was a standard form contract of insurance. The Court of Appeal distinguished *Sattva* on that basis and held that the standard of review of standard form contracts remained "palpable and overriding error".

The gist of the Court's reasoning follows:

> [35] Thus, one of the fundamental bases underlying the treatment of contractual interpretation as a question of mixed fact and law in Sattva, being the importance of interpreting a contract in light of the factual matrix, is wholly inapplicable to the Title Policy.
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> [36] The second significant justification for treating contractual interpretation as a question of mixed fact and law relied upon by Rothstein J. in Sattva was that the interpretation of a contract usually has no impact beyond the interest of the parties:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, Southam Inc. identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal….
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> Similarly, this Court in Housen found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings….. These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law. (Sattva, at paras. 51-52.) [Citations omitted.]
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> [40] It is untenable for standard form insurance policy wording to be given one meaning by one trial judge and another by a different trial judge: see Ledcor, at para. 18. Unpredictable outcomes in litigation only serve to encourage litigation because the more a given result depends on the particular trial judge, the greater the chance that litigants will risk going to trial. Appellate courts have a valuable role to play in ensuring consistency in the law and greater predictability in litigation outcomes: see Northwest Territories, at para. 28.
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> [41] In summary, the standard of review that applies to a standard form insurance contract like the Title Policy is correctness. The rationales in Sattva that support adopting a deferential standard of review do not apply to contracts of this type, as the factual matrix does not meaningfully assist in interpreting them and their construction has broad application. For these reasons, adopting the correctness standard of review for these contracts best ensures that provincial appellate courts are able to fulfill their responsibility of ensuring consistency in the law.

Subsequently, the Ontario Court of Appeal reiterated this position on Dec. 23, 2015 in *Monk v. Farmer's Mutual Insurance Company (Lindsay)*, 2015 ONCA 911 and on Dec. 24, 2015 in *Daverne v. John Switzer Fuels Ltd.*, 2015 ONCA 919

The question that has been left open is as to the standard of review of boilerplate clauses in manuscript contracts. For instance, if a typical boilerplate hold-harmless clause is inserted into what is otherwise a custom made contract, what is the standard of review of the interpretation of the hold-harmless clause?

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