


**STANDARD OF REVIEW IN CONTRACTUAL INTERPRETATION MATTERS**

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November 10, 2016



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The Standard of Appellate Review

- Appeals are inherently difficult to win
- Role of appellate court is to correct errors
- **It is not** the role of appellate courts to rehear or retry a case <sup>1</sup>
- Nature of the alleged error determines whether and how an appellate court is permitted to interfere with the decision of a lower court

<sup>1</sup> *Housen v. Nikolaisen*, 2002 SCC 33 at paras 3-4



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The Standard of Appellate Review

- 3 main types of errors:
  - (i) error of law;
  - (ii) error of fact;
  - (iii) error of mixed fact and law.
- Different standards of review apply to each.



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## The Standard of Appellate Review

- **Error of law:**
  - Deals with scope, effect and application of a legal rule or test
  - Standard of review is “**correctness**”
  - Lower court’s decision must be correct in law
  - If legal error, Court of Appeal can replace opinion of trial judge with its own
  - Rationale is two-fold:
    - To ensure that the same legal rules are applied in similar situations
    - To recognize the role of appellate courts to refine legal rules and make law for future cases



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## The Standard of Appellate Review

- **Error of fact:**
  - Considers what took place between the parties
  - Standard is “**palpable and overriding error**”
  - Appellate court will show high deference towards findings of trial judge
  - Rationale is three-fold:
    - To limit the number, length and costs of appeals
    - To promote the autonomy and integrity of trial proceedings
    - To recognize the expertise and advantageous position of the trial judge



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## The Standard of Appellate Review

- **Mixed error of fact and law:**
  - Involves application of a set of facts to a legal standard
  - Example: breach of standard of care in negligence
  - Standard falls on a **scale between correctness and overriding error**
  - Depends on whether question is more legal or factual in nature



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Sattva Capital Corporation v. Creston Moly Corp.

- **Sattva Capital Corporation v. Creston Moly Corp.**, 2014 SCC 53
- Case considered to be a landmark decision on 2 topics:
  - i) correct approach to contractual interpretation;
  - ii) standard of review of commercial arbitration awards.



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Sattva Capital Corporation v. Creston Moly Corp.

- **Facts**
- Parties were both commercially sophisticated;
- Entered into agreement for payment to Sattva of a finder's fee in respect of acquisition of a mining property;
- Both parties agreed that a fee was payable to Sattva in shares of Creston;
- Disagreed about date to be used to determine value of shares;



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Sattva Capital Corporation v. Creston Moly Corp.

- Sattva wanted to be paid according to the "Market Price" definition in the agreement
- Creston argued that the agreement contained a "maximum amount" provision that placed a cap on which Sattva was able to receive;
- Parties decided to arbitrate the matter ;
- Arbitrator decided in favor of Sattva;



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Sattva Capital Corporation v. Creston Moly Corp.

- Creston Moly applied to Supreme Court of BC for leave to appeal;
- Under B.C. *Arbitration Act*, appeal of arbitral award is only permitted with leave and only on question of law;
- BC Supreme Court dismissed leave application (not question of law);
- Court of Appeal granted Creston Moly leave to appeal;
- Judge hearing the appeal dismissed it – said arbitrator was right;
- Court of Appeal allowed the appeal – said arbitrator’s result was “absurd”;
- Sattva appealed the Court of Appeal’s decision;
- SCC said appeal should be allowed and arbitrator’s award reinstated



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Sattva Capital Corporation v. Creston Moly Corp.

- **Contractual interpretation**
  - Historically, determining legal rights and obligations of parties under written contract was considered question of law;
  - Historical rationale no longer applies;
  - Need to use common sense approach;
  - **Overriding concern:** determine intent of the parties and scope of their understanding;
  - Have to consider both words of contract and circumstances in which the contract was made;
  - **Exercise is one of mixed fact and law**



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Sattva Capital Corporation v. Creston Moly Corp.

Scope of surrounding circumstances

- Surrounding circumstances ought to be considered in interpreting contract;
- Can’t be allowed to overwhelm words of the agreement;
- Can’t be used to deviate from the text to such a degree that you create a new agreement;
- Should consist of objective evidence of background facts at time of execution of the contract
- Shouldn’t consist of subjective intentions of the parties



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## Post-Sattva Implications

- Sattva confirmed role of factual matrix in contractual interpretation;
- Raised standard of review to palpable and overriding error
- Significantly limited appellate review of all decisions interpreting contracts
- **What about standard form contracts???**



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## Post-Sattva Decisions

*MacDonald v. Chicago Title Insurance Company*<sup>2</sup>

- Plaintiff homebuyers purchased a multi-storey home in Toronto in 2006
- Obtained a policy of title insurance at the time of purchase from Chicago Title Insurance Company
- During renovations in 2013, the plaintiffs learned that load-bearing walls on the main floor of the property had been removed during renovations undertaken by prior owners
- The unpermitted work rendered the home unsafe and immediately uninhabitable until structural work was completed

<sup>2</sup> 2015 ONCA 842 (CanLII)



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## Post-Sattva Decisions

*MacDonald v. Chicago Title Insurance Company*

- City of Toronto issued an Order to Remedy Unsafe Building
- Plaintiffs made a claim for coverage for the cost of the required structural work to Chicago Title; Claim was denied on the grounds that the plaintiffs did not have a "title" defect
- Motion for summary judgment - motions judge agreed with Chicago Title and dismissed the plaintiffs' claim for coverage
  - Title was unaffected because the title remained marketable (albeit for less than the amount paid by the plaintiffs)
  - No work order to rectify was registered against the title



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## Post-Sattva Decisions

*MacDonald v. Chicago Title Insurance Company*

- Court of Appeal for Ontario
  - Allowed the appeal and granted coverage to the plaintiffs
    - Motion judge conclusion that a work order had to be registered against title for title to be affected was incorrect
    - Motion judge misinterpreted Clause 11 of the policy, which provided coverage where title was “unmarketable” – whether a potential purchaser could refuse to close an APS after learning of the structural defect
    - Key was the illegal removal of the load bearing walls without a permit – a “latent illegality” that rendered the title unmarketable
- Important decision for the plaintiffs – but also important for the Court’s clarification of the application of *Sattva*



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## Post-Sattva Decisions

*MacDonald v. Chicago Title Insurance Company*

- Issue on motion was the interpretation of the title insurance contract
- One issue on appeal was the standard of review to be applied by the Court of Appeal
- *Sattva* distinguished
  - The importance of the surrounding circumstances depends on the nature of the contract
    - Surrounding circumstances are significant where the contract at issue was subject to negotiation between arms-length parties or parties in a special relationship (e.g. fiduciary) to understand the parties’ objective intent in entering into the contract
    - However – surrounding circumstances are far less significant in the context of a standard form contract or contract of adhesion where the parties do not negotiate terms and the contract is put before the receiving party on a “take it or leave it” basis



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## Post-Sattva Decisions

*MacDonald v. Chicago Title Insurance Company*

- Distinguishing factor between questions of law and mixed fact and law on appeal is the precedential value of the appellate court’s intervention
- Standard form contracts are often highly specialized and sold widely to customers without negotiation of terms
- The interpretation of standard form contracts applies equally to all person who are parties to the same contract – the standard of review to be applied is therefore correctness to ensure consistency of interpretation



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Post-Sattva Decisions

- The analysis by the Court of Appeal in the *MacDonald* case was similarly arrived at by appellate courts in other provinces
  - British Columbia - *Robb v. Walker*, 2015 BCCA 117 (CanLII)
  - Alberta - *Ledcor Construction Limited v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121 (CanLII)




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*Ledcor Construction Ltd. V. Northbridge Indemnity Insurance Co.*<sup>3</sup>

- Property owner retained Ledcor as construction manager over EPCOR tower in Edmonton
- Property owner had a builders’ all risks insurance policy which covered Ledcor and all subcontractors, engineers, etc.
- Ledcor retained a window cleaning company to wash construction debris off the windows of the tower
- Window cleaners caused damage to the windows by using improper tools – Northbridge denied a claim for coverage under an exclusion in the policy for the “cost of making good faulty workmanship”

<sup>3</sup> 2016 SCC 37 (CanLII)




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*Ledcor Construction Ltd. V. Northbridge Indemnity Insurance Co.*

- Trial
  - Judge concluded that the impugned work was faulty workmanship, and that the relied upon exclusion clause did not apply
  - Found the exclusion clause ambiguous and the interpretations offered by each party as equally plausible – interpreted in favour of the insured party based on the rule of *contra proferentum*
- Appeal
  - Reversed the trial judge and accepted that the exclusion applied
  - Applied a standard of review of correctness in concluding that the trial judge had improperly applied the rule of *contra proferentum* because the exclusion was not ambiguous




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*Ledcor Construction Ltd. V. Northbridge Indemnity Insurance Co.*

- Supreme Court of Canada
  - Overturned the decision on appeal and granted coverage to the insured
  - Standard form contracts are distinguishable from other contracts
  - The factual matrix and the terms of standard form contracts are sufficiently similar in many cases – the consistent interpretation of standard form contracts will be of significant precedential value to future parties and the Court
  - The interpretation of a standard form contract may constitute a question of law



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*Ledcor Construction Ltd. V. Northbridge Indemnity Insurance Co.*

- Interpretation of a standard form contract would be a question of law if:
  - (1) the appeal involved the interpretation of a contract;
  - (2) the interpretation at issue is of precedential value; and
  - (3) there is no meaningful factual matrix specific to the particular parties to assist the interpretation process



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*Post-Ledcor*

- The analysis set out in *Sattva* now has a clear exception
  - Standard of appellate review of standard form contracts will be a question of law if the *Ledcor* test is met
  - However – leaves open the possibility for standard form contracts to be interpreted as questions of mixed fact and law
    - e.g. where a meaningful factual matrix exists, or where a standard form contract has been modified
- Decision of the SCC in *Ledcor* should provide insurers and insureds with more certainty and predictability in how insurance policies will be interpreted in Court
  - The approach should ensure the consistent interpretation of insurance contracts by the Courts going forward



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**Questions?**

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