Ledcor is unlikely to settle the dust

BY ANNA WONG

SPEAKER'S CORNER

It was meant to be an opportunity to clear the air, but the Supreme Court of Canada's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 only added to the humidity when it comes to the standard of review in contractual interpretation cases.

The appropriate standard to deploy has been a subject of intense contention in the last 10 to 15 years. As the concept of factual matrix rose to prominence, the historical approach of regarding contractual interpretation as a question of law reviewed for correctness lost favour with some provincial appellate courts, while others clung tight to it.

At the height of the controversy, the top court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ushered in the modern approach by declaring that contractual interpretation is no longer to be characterized as a question of law. Instead, it is one of mixed fact and law attracting deferential review, save for the "rare" question of law that can be extricated from the interpretative process.

Subsequent to *Sattva*, appellate courts disagreed over whether it is applicable to standard form contracts. Some courts faithfully applied *Sattva*. Others, meanwhile, sidestepped *Sattva* on the basis that standard form contracts are fundamentally different from contracts where the parties had a real hand in negotiating. The Alberta Court of Appeal in *Ledcor* did exactly that and scrutinized the trial decision for correctness.

In a somewhat surprising move given how recently *Sattva* was decided, the majority of the Supreme Court proclaimed an exception to *Sattva* for standard form contracts, whose "interpretation is better characterized as a question of law subject to correctness review."

It gave two reasons for doing so: (1) the factual matrix is less relevant for standard form contracts because the parties do not negotiate the terms, and other surrounding circumstances "tend not to be specific to the particular parties" and are "not inherently fact specific"; and (2) interpretation of a standard form contract has precedential value and, therefore, fits under the definition of a pure question of law.

The trouble with the majority's reasoning is twofold.

First, it severely downplays the role that context plays in the interpretative process. Interpreting a contract is not simply a question of ascribing immutable legal meaning to the words. Rather, it involves applying the legal standard set by the contract to the facts of the situation at hand. Just because the factual matrix may be similar for many parties who signed the same standard form contract — which is not necessarily the case — does not make it any less relevant to the interpretative exercise. While a standard form contract has no relevant surrounding circumstances relating to negotiation, other contextual factors — such as the contract's purpose, the nature of the relationship it creates and the market in which the parties operate — must still be considered. Indeed, how the words apply to different situations most often turns on these contextual factors. If we accept that the interpretative process is the same for standard form contracts and bespoke contracts, then there is no reason to treat the interpretation of the former as a question of law and the latter as a question of mixed fact and law.

In undercutting the importance of the factual matrix, the majority implicitly endorses an antiquated textualist approach to interpreting standard form contracts, one that is focused on the contractual text with little to no attention paid to the context. Yet contracts are not made in a vacuum. There is always a context in which they have to be placed. Hence, the textualist approach had been abandoned in favour of a contextual one that obliges consideration of surrounding circumstances in determining what the parties meant by their agreement. Context matters, even for standard form contracts, as illustrated by *Dunn v. Chubb Insurance Company of Canada*. When *Dunn* was initially heard without factual matrix evidence, the D&O policy was interpreted as excluding the claimed defence costs (2009 CanLII 7083). The opposite result was reached when the case was reheard with such evidence (2010 ONSC 2166).

Second, it is difficult to reconcile the majority's decision with the standard of review framework set out in *Housen v. Nikolaisen*, 2002 SCC 33, in which framework was unchallenged. According to *Housen*, questions of law are "questions about what the correct legal test is," whereas questions of mixed law and fact are about "applying a legal standard to a set of facts." Contractual interpretation, as an exercise in applying interpretative principles to the words used considered in light of the factual matrix, ill fits the former. While it is not easy to draw the line between the two categories of questions, as *Housen* acknowledged, the key difference is the generality of the legal propositions involved. The greater the generality, the more it resembles a purely legal question. That a standard form contract is involved provides no guarantee of generality, for it still depends on the particular principle at issue in a particular case.

Also, *Ledcor*'s invitation for appellate intervention is out of step with the maxim anchoring the *Housen* framework: "An appeal is the exception rather than the rule." To allow for wide-ranging review of contractual interpretations when the generality of the principles engaged is not certain encourages more frequent and lengthier appeals, prejudicing litigants with fewer resources — who are more likely than not the weaker parties in take-it-or-leave-it contract situations — with little, if any, improvement in the result.

Ledcor might have temporarily quelled debate, though it is unlikely going to be the last word on the issue. As the law evolves, the aim should be to set, to the extent possible, unified principles that apply to all contractual settings and avoid creating a web of exceptions, which can lead to grey areas and, in turn, drive uncertainty and contracting costs. LT

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