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Approaching the Standard of Review for Standard Form Contracts Remains Unclear

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Case Commented On: *EnCana Oil & Gas Partnership v Ardco Services Ltd*, 2017 ABCA 401 (CanLII)

This case involves a dispute between EnCana and its payroll supplier, Ardco, over an indemnity provision in their Master Service and Supply Agreement ("Master Agreement"). In 2006, EnCana enlisted the services of Ardco to manage its contract operators. Ardco delivered these services only to EnCana; it paid and provided benefits and insurance to the contractors but was reimbursed by the larger corporation. The hiring and firing, supervision, and onsite management, including the supply of equipment, was EnCana's responsibility.

In 2007, a long-time contract employee named Rupert Cardinal and his passenger died in an accident while driving an EnCana 2006 GMC Sierra for personal use. A second passenger was seriously injured.

EnCana was liable for the claims according to section 187(2) of the *Traffic Safety Act*, RSA 2000, c T-6. The issue was whether Ardco had to indemnify EnCana for the third-party liability actions that had arisen from the accident as per the Agreement. The relevant clause was as follows:

> 18.1 Without limiting EnCana's rights and remedies hereunder or at law or in equity, *Contractor shall*:
>
> > 18.1.1 *Be liable to EnCana* and its Affiliates, and their respective employees, contractors, subcontractors, consultants, agents, representatives, directors and officers (in the remainder of this Article called "EnCana") in respect of, and
> >
> > 18.1.2.1.1 *Indemnify and hold EnCana harmless from and against any and all Claims* which may be brought against or suffered by EnCana or which it may sustain, pay or incur by reason of any matter or thing arising out of or in any way attributable to any a) breach of this Agreement by Contractor; or b) *negligent acts or omissions, tortious acts*, strict liability offences or wilful misconduct of *Contractor or any of its Personnel*, or any of their respective directors and officers in connection with, related to or arising out of the performance, purported performance or nonperformance of this Agreement *or Services hereunder* including any relating to or resulting from: (i) deficient or defective Services, (ii) damage or destruction to property, (iii) imperfections in material furnished by

> Contractor or EnCana (if reasonably obvious) or equipment, (iv) environmental damage (v) Intellectual Property rights (including infringement), (vi) confidentiality obligations (vii) non-compliance with Law or EnCana Policies (including any pertaining to environment, health or safety) (viii) any alleged claim, lien or encumbrance arising in connection with the Services (ix) failure to pay when due taxes, duties and other like charges for which Contractor is responsible, or (x**)** *any cause whatsoever*, except as otherwise provided in the remainder of this Article. (emphasis added)

Ardco lost at trial, and raised two grounds of appeal. They argued that the trial judge erred in interpreting Cardinal to be Ardco's "Personnel", as used in the contract, and in finding that Ardco was obligated to indemnify EnCana under the Agreement.

The Standard of Review for Standard Form Contract Interpretation

Ledcor Construction Ltd v Northbridge Indemnity Insurance Co, 2016 SCC 37 (CanLII), was a recent Supreme Court of Canada case that discussed the standard of review for standard form contract interpretation. The issue revolved around a standard form builders' risk insurance policy provision. Contrasting *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (CanLII), where the Court discussed interpreting contracts as questions of mixed fact and law, Justice Wagner established three criteria that justify a standard of correctness (at para 46): a standard form contract, an issue of precedential value, and no factual matrix related to the specifics of the interpretation process.

Firstly, standard form contracts are "highly specialized contracts that are sold [...] *without negotiation of terms*" (emphasis added) and used either in a company's dealings with all of its customers or throughout the industry (*Ledcor* at para 39, citing *MacDonald v Chicago Title Insurance Co of Canada*, 2015 ONCA 842 (CanLII) at para 37). In these aggregate instances, the "certainty and predictability" of consistent interpretations are beneficial for both the companies and the consumers and so courts are generally reluctant to make distinct interpretations of uniform provisions (*Ledcor* at para 40, citing *Co-operators Life Insurance Co v Gibbens*, 2009 SCC 59 (CanLII) at para 27).

Secondly, unlike where the interpretation goes no further than the parties' private contractual dispute, most cases of standard form contracts could be of "interest to judges and lawyers in the future" (*Ledcor*, at para 41, citing *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 1997 CanLII 385 (SCC) at para 37). Whereas the facts may change in subsequent cases, the applications of the provisions are usually not as fluid (*Ledcor* at para 44). As noted in *Southam*, a high degree of generality is what demarcates questions of law from questions of mixed law and fact (*Ledcor* at para 41, citing *Southam* at para 37).

Finally, courts do not commonly warrant deference where there is no factual matrix or evidence of a negotiation to assist in the interpretation of the contract. Interpretation of a standard form contract depends on the degree that the circumstances of the agreement or the intentions of the parties influenced the terms (*Ledcor*, at para 38). In private contracts, those factors may override precedents of similarly worded contracts; in standard form contracts, however, disputes over

"general proposition[s]" of high precedential value would attract a standard of correctness (*Ledcor*, at para 48, citing *Southam* at para 37).

While he concurred in the result, Justice Cromwell disagreed with the majority on the standard of review in *Ledcor*. He argued that the three factors were unnecessary in assessing what was otherwise a measurement of the contract's generality (*Ledcor*, at para 116). Specifically addressing the test's third branch, Justice Cromwell noted that, regardless of the facts at formation, standard form contracts inherently depend on a factual matrix derived from the circumstances of the particular industry, market, purpose, or nature of the contentious provision (*Ledcor*, at para 116). He preferred the standard of palpable and overriding error on this basis.

Analysis in *EnCana v Ardco*

Majority (Justice Berger and Justice McDonald)

Standard of Review

Justice Berger and Justice McDonald both agreed that the appropriate standard of review in this case was correctness, according to the *Ledcor* factors discussed above. Firstly, the parties acknowledged that the Agreement, despite it being prepared by EnCana, was a standard form document (at paras 6-7). Even though it was modulated according to the services of each company, this did not impact the classification (at para 4). Secondly, it was prepared for use with EnCana's many suppliers, therefore it required a universal application with precedential value (at para 2). Finally, there was no evidence of a negotiation, ruling out any factual matrix; on the contrary, EnCana discouraged negotiation and warned that any attempts may sever the business transaction (at para 5).

Application

The Justices applied the general rules of contractual interpretation: a literal meaning if the contract is not ambiguous, unless that meaning gives rise to absurdity; a contract must be examined as a whole, including the intentions of the parties; finally, where there is ambiguity or a contradiction to the parties' intentions, the doctrine of *contra proferentem* applies in favour of the offeree (at paras 13, 16).

The majority assumed without deciding that Cardinal fell within the definition of "Personnel" in the Agreement (at para 22). They then accepted the second ground of appeal, concluding that the claims from the incident did not fall within the scope of the indemnity provision, clause 18.1. Accepting the disputed clause as unambiguous, the Justices were satisfied with a clear and ordinary reading of the contract. In reference to the contract's definitions, "Services" (clause 1.15) meant "the Work and Goods", "Work" (clause 1.17) meant "the services, work or task to be performed for EnCana as specified in a Service Order", and "Goods" (clause 1.6) equated to "all goods […] to be provided to EnCana as specified in a Service Order" (at paras 19-20). Without a connection between driving a company vehicle on personal time and services or goods performed for or provided to EnCana "as specified in a Service Order", the contract's indemnity provision, correctly interpreted, did not apply (at para 24).

Dissent (Justice Schutz)

Standard of Review

In dissent, Justice Schutz disagreed that the standard of review was correctness and instead proceeded on a standard of reasonableness, which required a palpable and overriding error on the trial judge's part to overrule the decision. Firstly, the Agreement did not fit under the aggregate, duplicable nature of the standard form category contemplated by the Supreme Court in *Ledcor* (at paras 56-59). Secondly, while the different interpretations had significant impacts on the parties, the Agreement's uniqueness to the circumstances provided little precedential value (at para 60). Lastly, the contract was tailored to the particular circumstances and the "factual matrix" of the arrangement, had a concentrated application, and had no explicit prohibition against negotiating terms - "[Ardco] elected not to negotiate its terms" but was not "precluded from" it - defeating the third branch of the *Ledcor* test (at para 61).

Application

In regards to the first ground of appeal, Justice Schutz was satisfied with the trial judge's conclusion that Ardco, rather than EnCana, was Rupert Cardinal's employer. Despite conceding that Cardinal was "held out" to the outside world as EnCana's employee and that EnCana exercised functional control, such as onsite management, hiring and firing, and equipment supply, the trial judge nonetheless determined that Ardco was Cardinal's employer for the purposes of the Agreement (at para 69). Ardco provided Cardinal's salary, WCB benefits, and insurance, and kept Cardinal on its payroll records, represented Cardinal as its employee to government agencies, and issued T4s as his employer (at para 69).

Whether Cardinal was an employee of Ardco or EnCana was a contentious issue open to either direction; however, finding no palpable error in the lower court's weighing of the evidence, Justice Schutz found that court's decision to be reasonable (at paras 70, 77, 78). Although acknowledging that EnCana's functional control could fit just as well as Ardco's administrative control under the meaning and purpose of the Agreement, it was not the primary deciding factor (at para 75). As the contract was not a standard form, deference was owed to the trial judge's analysis of the dispute's facts and context (at para 75).

For the second ground of appeal, Justice Schutz agreed with the trial judge that the expansive language of the indemnity provision of the Agreement incorporated Cardinal's actions into one or more of the covered liabilities (at para 83). Affirming the trial judge's assessment, Justice Schutz noted that, regardless of whether or not Cardinal was off-duty, his possession of the automobile was the direct link to being employed by Ardco and providing services to EnCana under the broad language of the contract (at para 84).

Justice Schutz's acceptance of the trial judge's broad reading of the contract's provisions can be juxtaposed with Justice Berger's and Justice McDonald's narrow scope (at para 81). Applying an ordinary reading to clause 18.1, she agreed with the trial judge that "Services" was discrete from a range of other instances that triggered Ardco's duty to indemnify, such that "[r]esort to the

meaning of "Services" was not strictly necessary to trigger the indemnity provision" (at para 81). According to that clause:

> "*any* and all Claims [...] arising out of or in *any* way attributable to *any* [...] negligent acts [or] tortious acts [...] of [Ardco] or *any* of its Personnel [...] in connection with, related to or arising out of the performance, purported performance or non-performance of this Agreement *or* Services hereunder including *any* relating to or resulting from [...] *any* cause whatsoever [...]." (emphasis added)

If the incident did not fall under the scope of "Services", it fell within the broad scope of the contract (at paras 82-83). The conjunction "or" preceding "Services" demonstrated that clause 18.1 supported a wide breadth. It covered claims not only of acts related to "services or goods performed for or provided to EnCana 'as specified in a Service Order'" (see above for the majority's analysis) but arising "in any way attributable to" negligent or tortious acts "in connection with, related to or arising out of the performance, purported performance or non-performance of this Agreement" or "any cause whatsoever" (at para 82).

Alternatively, Justice Schutz agreed that Cardinal was providing services at the time of the incident regardless of whether he was off-duty. The possession of the vehicle was solely connected with, related to, or had arisen out of providing services to EnCana under the Agreement, and clocking out did not change that fact (at para 84).

Commentary

This case illuminates problems with the application of the Supreme Court's *Ledcor* test. The test itself was brought up as an exception to a general rule in a distinct set of circumstances (*Ledcor* at para 46). In *Ledcor*, the contract was a "take-it-or-leave-it" standard form all-risk builders' insurance policy. Insurance policies, although technically contracts, are distinguishable from ordinary business agreements due to their public policy effect and government-regulated nature (see *Ledcor* at para 40). *Ledcor* created a high threshold to reach before the courts could step in and affect the freedom of contract between two sophisticated business entities lacking the power imbalance seen in an insurer-insured relationship based on a correctness standard of review. I do not see how that threshold was met in this case.

Furthermore, in *Ledcor* Justice Wagner stressed that the factors relevant to standard of review for standard form contracts ultimately depend on the circumstances (at para 48). Respectfully, Justices Berger and McDonald may have treated the factors as a checklist rather than as litmus indicators. As uncovered above, the chosen standard of review could produce polar results determinative of the outcome of the dispute. With this significant impact in mind, maybe a minimal and exhaustive list of factors fails to capture the complex essence of standard form contracts. Perhaps Justice Cromwell was right in that the main consideration should rest on one feature: the degree of generality of the contract.

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