

Defining industry-specific contractual terms: Supreme Court of Canada revisits principles of contractual interpretation

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In this Update

- The Supreme Court of Canada recently released its decision in *Sabean v. Portage LaPrairie Mutual Insurance Company (Sabean)*.
- This decision, keeping in line with recent authorities, affirms that the proper approach to contractual interpretation is a practical approach that is focused on the intent of the parties and the scope of their understanding.
- In *Sabean*, the Court held that a party cannot successfully advance an interpretation of a contract based on its industry-specific knowledge of a contractual term, where the counterparty is not a usual participant in that industry.
- *Sabean* illustrates that courts will interpret contractual terms in accordance with their plain and ordinary meaning, and without resort to industry-specific knowledge, where a counterparty is not a usual participant in that industry.
- In addition, *Sabean* illustrates that in the event of a dispute as to the proper interpretation of an agreement, differing interpretations of contractual language are not necessarily indicative of an ambiguity. For an ambiguity to arise, two reasonable interpretations of a contract are required.

In recent years, there have been a series of seminal decisions issued by the Supreme Court of Canada on the principles of contractual interpretation, such as *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* (2016 SCC 37) and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (2010 SCC 4). Possibly the most significant case released by the Supreme Court is the decision in *Sattva Capital Corp. v. Creston Moly Corp.* (2014 SCC 53) (*Sattva*), where the Court held that the proper approach to contractual interpretation is a practical, common-sense approach not dominated by technical rules of construction, but rather is focused on the intent of the parties and the scope of their understanding.

The *Sattva* decision laid the groundwork for the Supreme Court's recent decision in *Sabean v. Portage LaPrairie Mutual Insurance Company* (2017 SCC 7) (*Sabean*), where the Court revisited the principles of contractual interpretation in the context of an insurance policy. The Supreme Court found that the plain and ordinary meaning of contractual terms is based on the understanding of an average person. Specifically, the *Sabean* decision establishes that a party cannot successfully advance an interpretation of a contract based on its industry-specific knowledge of a contractual term, particularly where the contractual counterparty is not a usual industry participant. The decision in *Sabean* emphasizes the need to articulate the

meaning of industry-specific terms in a contract that may be different than their plain and ordinary meaning.

The Supreme Court of Canada also reaffirmed that the doctrine of *contra proferentum* is only applied when an ambiguity exists which cannot be resolved by applying the general principles of contractual interpretation, including interpreting contractual terms in accordance with their plain and ordinary meaning.

Facts and background

The case involved an insurance claim by Mr. Sabean under his auto insurance policy's Special Endorsement for Family Protection (SEF 44) policy he had purchased through the respondent insurer. The SEF 44 provides additional coverage to an insured party in the event that an at-fault driver is underinsured.

Mr. Sabean advanced a claim with his insurer under his SEF 44 policy seeking the difference between the amount he received from the at-fault driver's insurer (\$382,000), and the total quantum of damages he had suffered as a result of the accident (\$465,000).

Clause 4 of the SEF 44 contained a provision that precluded compensation from amounts available to the insured from other enumerated sources. One such source was recovery by the insured from "any policy of insurance providing disability benefits or loss of income benefits." The issue before the Court was whether the Canadian Pension Plan (CPP) benefits constituted a "policy of insurance" such that they were deductible pursuant to clause 4.

At the trial level, the judge found that CPP benefits were a "policy of insurance." Therefore, they were not deductible. On appeal, the Nova Scotia Court of Appeal overturned the trial decision, and found that CPP disability benefits were a "policy of insurance."

The Supreme Court decision

Justice Karakatsanis, writing for the Supreme Court of Canada, overturned the decision of the Court of Appeal, and found that CPP benefits were not a "policy of insurance."

The insurer argued that the meaning of the term "policy of insurance" should be understood in the context of previous jurisprudence. The insurer relied upon the decision of the Supreme Court in *Canadian Pacific Ltd. v. Gill* ([1973] SCR 654) (*Gill*), where the court held that CPP benefits were "of the same nature" as contracts of insurance for the purpose of calculating damages in a statutory action, and also referring to the collateral benefits rule.

Notwithstanding the decision in *Gill*, the Supreme Court stated that the words of the agreement must be given their ordinary meaning as they would be understood by an "average person applying for insurance," and not as they might be perceived by an insurer versed in the particularities of insurance law. In particular, Justice Karakatsanis indicated that "an insurer is not entitled to rely on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy." The Supreme Court noted that this "average person" is not someone with specialized knowledge of related jurisprudence or of the objectives of the insurance industry. An average person applying for a SEF 44 would understand the phrase "policy of insurance" to mean an optional private insurance contract, and not a mandatory statutory scheme. Accordingly, the Supreme Court concluded that CPP benefits were not a "policy of insurance" precluding compensation.

The Supreme Court also affirmed that contracts will only be construed *contra proferentum* if

the general rules of construction cannot be used to resolve an ambiguity in the contract. When read as a whole, the Court found that SEF 44 was unambiguous and the fact that the insurer had articulated an alternative interpretation neither established the reasonableness of the insurer's interpretation nor created an ambiguity in the agreement.

Implication of the Sabeen decision

The *Sabeen* decision has two important implications. First, it illustrates that courts will interpret contractual terms in accordance with their plain and ordinary meaning, and without resort to industry-specific knowledge, where a counter-party is not a participant in that industry. Accordingly, when entering into a contract with a non-industry participant, companies would be well-served to carefully draft their contracts to ensure that terms with industry-specific meaning are clearly defined such that an average person understands its meaning.

Second, this case illustrates that in the event of a dispute as to the proper interpretation of an agreement, differing interpretations of contractual language are not necessarily indicative of an ambiguity. For an ambiguity to arise, two reasonable interpretations of a contract are required, and where one interpretation relies on specialized knowledge going beyond the clear words of the contract, the Court may find that interpretation to be unreasonable, resulting in no ambiguity as to the term's meaning.