Toronto Law Journal

Judiciary to the Bar: Make Contemporaneous Notes and Take Written Instructions

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You get to your office bright and early with a long list of tasks to complete for the day. Before even taking a sip of your morning coffee, the phone rings. A client wants your advice on something pressing. You convey your suggestions to him over the phone. Just as you are getting off the phone with that client, your colleague walks in and has a question on an area of law you specialize in. You sit and chat with your colleague and the conversation meanders from topic to topic. Just as she leaves your office, your assistant reminds you that you have a firm practice group meeting starting in 5 minutes that your attendance is required at. Before you know it, your morning is gone. Does this sound familiar?

R. v. Shofman, 2015 ONSC 6876, is a cautionary tale. In a very recent summary conviction appeal decision out of the Ontario Superior Court, Justice Kenneth Campbell in *Shofman* stressed the importance of a lawyer's "contemporaneous, reliable, objective records."[1]

The Facts

Michael Shofman was originally tried in the Ontario Court of Justice on charges of impaired driving and operating a motor vehicle with a blood-alcohol concentration greater than 80 mgs. of alcohol in 100 mls. of blood. Mr. Shofman did not testify at the trial and was convicted of the 'over 80' offence. He was sentenced to a fine of $1,500.00 and a prohibition on driving for a period of one year.

Mr. Shofman appealed his conviction, arguing that he was denied the effective assistance of counsel at trial. In his appeal, Mr. Shofman claimed that he was not permitted by his defence lawyer to decide whether to testify at trial or not. He claimed that the question of testifying was never even put to him by his lawyer and had it been, he would have chosen to testify.

The evidence presented at trial was that the appellant was in a serious single motor vehicle accident in the early morning on a March day in 2010. The police had suspicions that Mr. Shofman was intoxicated, and two breathalyzer tests taken confirmed that he was well over the legal limit. At the trial his counsel "effectively conceded that the appellant should be found guilty of the 'over 80' offence."[2] Mr. Shofman never testified, and therefore was unable to tell his side of the story.

Mr. Shofman's explanation for how and why he came to blow over the legal limit is interesting, to say the least.[3] He claims he began to drink after the accident, before the police arrived on-scene in order to calm his nerves and stay warm. Justice Campbell stated that "whether the appellant's testimony about his post-accident consumption of alcohol

[1] *R v. Shofman* 2015 ONSC 6876 at para. 49.
[2] *Ibid* at para. 2.
[3] *Ibid* at paras. 20-22.

would have been accepted or not by the trial judge is an open question, but it is not for me to determine that issue”.[4]

The crux of the issue was whether Mr. Shofman’s lawyer failed to allow the Mr. Shofman to make the decision whether to testify at his own trial and whether that failure, if it did occur, created a situation where effective assistance of counsel was lacking.

The Law

Justice Campbell set out the legal standard governing whether effective assistance of counsel was present (or not). The convicted party must establish: 1) the factual basis underpinning the claim; 2) that the act or omission of trial counsel constituted professional incompetence; and 3) that a miscarriage of justice resulted from that incompetence.[5]

The question of whether a counsel performed their duty in a competent manner is measured on an “objective reasonableness standard” with a strong presumption that the lawyer’s conduct fell within the broad range of reasonable professional assistance.[6]

Regarding the issue of an accused testifying, Justice Campbell stated that, “that law is clear that defence counsel is obliged to fully and carefully ***advise*** his or her client as to whether or not they should testify…, but that the ***ultimate decision*** in this regard must be made by the *accused,* not his or her lawyer”. [7]

The Evidence (on Appeal)

Mr. Shofman testified that he never had an opportunity to provide his version of the incident to his trial counsel. He claimed that all the meetings with his lawyer were short and that the two never actually discussed the case “at any length”, rather his counsel told him to “leave trail preparation to him”.[8] Mr. Shofman further testified that his lawyer never took any notes at any of their meetings.[9]

The trial counsel testified that he had a “very busy practice” and worked “70 to 80 hours a week”. He claimed that he conducted something in the range of 200-225 trials each year![10] In his affidavit he testified that his meetings with the accused lasted at a minimum of 30 minutes and typically closer to an hour. He testified further that at each of these meeting the two would discuss the case and “trial strategy”.[11] In cross-examination the trial counsel conceded that he had no dockets and but a single page of brief, shorthand notes for the *entire* case.[12]

[4] *Ibid* at para. 47.
[5] *Ibid* at para. 13.
[6] *Ibid* at para. 14.
[7] *Ibid* at para. 17.
[8] *Ibid* at para. 23.
[9] *Ibid* at para. 24.
[10] *Ibid* at para. 30.
[11] *Ibid* at para. 32.
[12] *Ibid* at para. 33.

The Decision

Justice Campbell found that Mr. Shofman was denied the effective assistance of counsel at his trial.[13] Further, His Honour found that the ineffective assistance of counsel prejudiced Mr. Shofman because had the decision on whether to testify been left to him, he would have elected to testify.[14]

The Lesson

The appellate judge in this case imparted strong advice to defence counsel at the end of the judgement – advice that can be applied equally to the entire legal bar, regardless of the area of practice. Justice Campbell urged counsel to adopt the "sensible practice" of taking notes of their important interactions with clients and "taking clear written instructions from their clients on critical issues to their cases".[15] The judge stressed the importance of good record keeping where a lawyer has a practice focused largely on a particular kind of matter. Without contemporaneous notes it is very likely to confuse cases with each other, especially if they are similar in nature. "Detailed notes and written instructions…permit defence counsel to confidently distinguish one similar case from the next, and reliably explain how they discharged their important professional obligations in each case".[16]

The circumstances of the *Shofman* case led Justice Campbell to take the rare step of issuing a practice note for all defence counsel, not just the trial lawyer involved in the particular case. If all lawyers heed Justice Campbell's advice, we will be better lawyers as a result and our clients will be better served:

> **A PRACTICE NOTE FOR DEFENCE COUNSEL:**
>
> **MAKE NOTES AND TAKE WRITTEN INSTRUCTIONS**
>
> [48] I am compelled to observe that this kind difficult post-trial, appellate assessment of much earlier interactions between defence counsel and their accused client would be made much simpler and less prone to potential factual errors, if defence counsel adopted the sensible practice of taking at least some notes of their important interactions with their clients, and taking clear written instructions from their clients on critical issues in their cases, such as whether or not the accused should and would be testifying. See M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (2001), at pp. 163-164; *R. v. W.E.B.*, at para. 10, *Malton v. Attia*, 2015 ABQB 135 (CanLII), [2015] 4 W.W.R. 260, at paras. 39, 67, 97-103.
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> [49] In the absence of such contemporaneous, reliable, objective records, in subsequent appellate court litigation regarding "ineffective assistance" claims, which may potentially unfold years later, trial counsel is left to try to recall the details of such interactions without the benefit of any type of aide-mémoire, and the appellate court is left to assess the reliability of such recollections without any objective verification.

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[13] *Ibid* at para. 42.
[14] *Ibid* at para. 43.
[15] *Ibid* at para. 48.
[16] *Ibid* at para. 50.

[50] This recommended practice would seem to be especially helpful in circumstances where defence counsel has a legal practice focused largely upon a particular type of case (e.g. drinking and driving cases), where it would be easy for counsel to confuse one case with another, especially where counsel defends a high volume of such cases each year. Detailed notes and written instructions would helpfully later permit defence counsel to confidently distinguish one similar case from the next, and reliably explain how they discharged their important professional obligations in each case.

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Statutory Cause of Action for Spills Affirmed by Court of Appeal

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The Ontario Court of Appeal has released a significant decision in the field of environmental civil litigation in the case of *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 (*Midwest*) on November 27, 2015. This decision is the first time the court has given such careful consideration to, and such an expansive interpretation of, the statutory right of compensation for spills under section 99 of the Ontario *Environmental Protection Act* (EPA). In the wake of *Midwest*, claims based on s. 99 of the EPA may proliferate. Additionally, this decision suggests that future courts could rely on s. 99 of the EPA to pierce the corporate veil, thereby increasing the specter of individual liability.

Background

Midwest Properties Limited (Midwest) purchased an industrially-zoned property and building in 2007. Prior to the purchase of the property, Midwest retained an environmental consultant to conduct a phase one environmental site assessment. The consultant's report did not recommend sampling and testing of soil or groundwater at the property (known as a phase two environmental site assessment).

After acquiring the site, Midwest became interested in purchasing the neighbouring property, owned by a company called Thorco Contracting Limited (Thorco) and controlled by its principal, John Thordarson. Thorco's business involved the servicing of petroleum equipment and tanks and the property had been storing, among other things, waste petroleum hydrocarbons (PHCs) since 1974. Thorco permitted Midwest to conduct phase one and two environmental site assessments on its property, which disclosed PHC contamination in concentrations exceeding Ministry guidelines. Midwest then conducted sampling and testing on its own property and discovered similar PHC contamination.

Thorco's PHC storage activities were known to the Ontario Ministry of the Environment and Climate Change (the Ministry). From 1998 to 2011, Thorco was in almost constant breach of its environmental approval and orders issued by the Ministry relating to the waste PHCs stored on the Thorco property. In 2012, the Ministry ordered Thorco and Thordarson to remediate the Midwest property. The orderees did not comply. Separately, Midwest sued Thorco and Thordarson on the basis of negligence, nuisance and the statutory right to compensation under s. 99(2) of the EPA.

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Trial Decision

As discussed in an earlier Osler update, the Ontario Superior Court of Justice dismissed Midwest's claim for damages for remediation costs stemming from the alleged migration of contaminants from the Thorco property. The court was concerned that awarding damages under the s. 99 statutory right of compensation would allow for "double recovery" where such remediation had already been ordered by the Ministry. Further, the trial judge found that Midwest had failed to prove its damages in negligence or nuisance because Midwest had not provided evidence of the environmental state of its property at the time it was acquired. Accordingly, Midwest could not prove that there had been any chemical alteration in the soil and groundwater, or that the value of Midwest's property had actually decreased.

Court of Appeal's Decision

Midwest appealed the trial decision to the Ontario Court of Appeal. Notably, the Ministry intervened in Midwest's appeal, arguing for a more liberal and expansive interpretation of s. 99 of the EPA.

The Court of Appeal allowed Midwest's appeal, set aside the trial judge's decision, and awarded damages of $1,328,000 against Mr. Thordarson and Thorco jointly and severally pursuant to s. 99 of the EPA. After further finding the respondents liable in nuisance and negligence, the court awarded $50,000 in punitive damages against Mr. Thordarson and $50,000 in punitive damages against Thorco Contracting Limited.

Recovery Under Section 99 of the EPA

The court disagreed with the trial judge's conclusion that there can be no recovery under the EPA's statutory right of compensation where there has also been an order to remediate. The court reasoned that the legislative objective of s. 99 was to establish a separate, distinct ground of liability for polluters because common law had proven to be inadequate. Importantly, the court recognized that the statutory right of compensation imposed strict liability on polluters by focusing only on the issues of who owns and controls the pollutant, and that this was a codification of the concept of "polluter pays". Further, the court held that the trial judge erred by interpreting the statutory right of compensation narrowly because this was inconsistent with the purposive and "generous" approach for environmental legislation mandated by the Supreme Court of Canada in cases such as *R. v. Consolidated Maybrun Mines Ltd.*[2] and *R. v. Castonguay Blasting Ltd.*[3]

Piercing the Corporate Veil

The Court of Appeal confirmed that the statutory right to compensation under the EPA allows for an action to be brought against "the owner of the pollutant and the person having control of the pollutant." While the company, Thorco, was clearly the "owner of the pollutant", the

[2] [1998] 1 S.C.R. 706.

[3] [2013] 3 S.C.R. 323.

principal of Thorco, Thordarson, argued that he was not personally liable due to the "corporate veil" principle. The Court of Appeal explained that a finding that a corporate principal, director or officer as a "person having control of a pollutant" will be fact-specific. In this instance, the court found that Thorco was a small business whose day-to-day operations were effectively controlled by Thordarson, such that it was appropriate to hold Thordarson liable along with the company on a joint-and-several basis, as he was a person in control of a pollutant.

Diminution of Value versus Remediation Costs as Quantum for Damages

The court acknowledged the debate in the case law regarding the appropriateness of awarding damages based on diminution of value as opposed to the cost of restoration, and provided clarity on this subject, ruling that the appropriate measure of damages is the cost to remediate the property. More specifically, the court reasoned that the restoration approach was superior as an award, given diminution of value may not adequately fund a clean-up. Additionally, awarding damages based on restoration costs is more consistent with the environmental protection objectives of the EPA as it helps ensure that sufficient funds will be available to remediate contaminated properties. Further, this approach found support in the "polluter pays" principle which has been endorsed by the Supreme Court of Canada. That is, a remediation-based approach to damages ensures that polluters must reimburse other parties for costs incurred to remediate contamination.

Nuisance, Negligence, and Punitive Damages

Although the court had already granted damages under s. 99 of the EPA, it went on to analyze the claims of nuisance and negligence. This is because the plaintiff sought punitive damages, and a court cannot consider and award punitive damages without first determining whether there is a valid civil cause of action. The statutory cause of action under s. 99 only provides for compensatory damages.

The trial judge had dismissed the nuisance and negligence claims on the basis that Midwest had failed to prove it had suffered damages. The court concluded that the trial judge had committed a palpable and overriding error in reaching this conclusion, as there was uncontradicted evidence, albeit from a remediation expert and not a property valuation expert, on the impact to Midwest's property value resulting from the human health risk created by the contamination. Further, the court concluded that the elements of nuisance was made out on the facts. That is, the migration of contamination that posed a risk to human health onto Midwest's property was clearly a substantial and unreasonable interference with the plaintiff's use or enjoyment of the land. Further, the claim of negligence was also made out as there could be "no serious suggestion" that Thorco had actually complied with the standard of care expected of a reasonable landowner, considering it had permitted spills on its property and had failed to comply with Ministry approvals and cleanup orders.

As the objectives of punitive damages are "to punish, deter and denounce a defendant's conduct" the court found that an award of punitive damages "was clearly warranted." Thorco was almost constantly out of compliance with its Certificate of Approval, and its "utter indifference" to the environmental condition of its own property as well as surrounding properties demonstrated "a wanton disregard for its environmental obligations." What's more, "this conduct has continued for decades and is clearly driven by profit."

Discussion

The Court of Appeal's decision is the first time the court has given such careful consideration to, and such an expansive interpretation of, s. 99 of the EPA. The court's willingness to give effect to s. 99 suggests there may be a proliferation of plaintiffs seeking damages under s. 99 of the EPA. What is more, the Court of Appeal seems to have set the standard for success on such a claim much lower than the standard that exists for other claims like nuisance and negligence. The court specifically stated that when the legislature created the statutory right of compensation under s. 99, it "eliminated in a stroke such issues as intent, fault, duty of care, and foreseeability, and granted property owners a new and powerful tool to seek compensation." Additionally, this decision suggests that future courts could rely on s. 99 of the EPA to pierce the corporate veil, thereby increasing the specter of individual liability. Whether future courts will limit the application of this decision to its specific and fairly egregious facts, or apply it more broadly, is unknown.

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MacDonald v. Chicago Title Insurance Company of Canada and the Resurrection of Correctness Review in Contractual Interpretation Appeals

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Background: *Sattva* sets a deferential standard for appellate review

In *Sattva Capital Corp. v. Creston Moly Corp.*, the Supreme Court of Canada held that, generally speaking, questions of contractual interpretation should be considered "questions of mixed fact and law".[1] The Court stopped short of fashioning an absolute rule for all contractual interpretation cases, recognizing that it might be possible to identify an extricable question of law such as the application of an incorrect legal principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.[2] But the Court stressed that these circumstances would be rare, and urged courts to exercise caution in characterizing questions of contractual interpretation as questions of law.[3]

Strictly speaking, *Sattva* was not a case about the standard of appellate review.[4] This has led some commentators to note that any discussion by the Court on the standard of appellate review was technically *obiter*.[5] Still, by characterizing questions of contractual interpretation as questions of law, the Supreme Court appeared to be sending a clear message to appellate courts across the country: such issues demand deference, with only very rare exceptions. In the wake of the decision, judges on some courts of appeal have been reticent to fully adopt this reading of *Sattva*.[6] Not so for the Ontario Court of Appeal, however, which has consistently interpreted *Sattva* to require the deferential "palpable and overriding" standard when reviewing issues relating to contractual interpretation.[7]

That changed with the Court of Appeal's recent decision in *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842.

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[1] [2014] 2 S.C.R. 633.
[2] *Sattva* at para 53.
[3] *Sattva* at para. 55.
[4] The issue before the Court in *Sattva* was whether a question of contractual interpretation was a "question of law" for the purposes of the leave provisions in B.C.'s *Arbitration Act* – not the actual appellate review of a question of law itself.
[5] See Earl A. Cherniak, "*Sattva* Revisited" (2015) 34:2 Adv. J. 6 at p. 7.
[6] See, for example, *Vallieres v. Vozniak*, 2014 ABCA 290 at para. 12; *Ledcor Construction Limited v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121 at para. 12 (leave to appeal granted); *Robb v. Walker*, 2015 BCCA 117 at para. 48 (per Chiasson J.A., dissenting).
[7] See, for example, *Hybridyne Power Generation Corp. v. SAS Company Global Investments Inc.*, 2015 ONCA 496 at para. 19; *Siskinds LLP v. Canadian Imperial Bank of Commerce*, 2015 ONCA 265 at para. 4; *Arone v. Best Theatrics Ltd.*, 2015 ONCA 63 at para. 23; *Martenfeld v. Collins Barrow Toronto LLP*, 2014 ONCA 625 at paras. 39-42.

Facts: dispute over interpretation of a standard-form insurance contract

Chicago Title involved the interpretation of coverage terms in a standard-form insurance contract. The insureds, the MacDonalds, argued that the policy covered a dangerous structural condition affecting their home, while the insurer, Chicago Title, took the opposite position. As with most contracts of insurance, the policy was a pre-printed contract provided by Chicago Title to the MacDonalds on a take-it-or-leave-it basis.

At first instance, the motion judge found that the terms of the insurance policy were unambiguous. He granted summary judgment against the insureds and dismissed their action against Chicago Title.[8]

The MacDonalds appealed. One of the issues before the Court of Appeal was the proper standard of review to be applied to the motion judge's decision on the question of contractual interpretation (as distinct from his determination that there was no genuine issue requiring a trial). Relying on *Sattva*, Chicago Title argued that the palpable and overriding error standard applied to appellate review on this issue, as it did not raise any extricable question of law.

Decision: *Sattva*'s reasoning does not apply

Writing for himself, Cronk and Benotto JJ.A., Hourigan J.A. rejected Chicago Title's argument. Instead, the Court of Appeal applied a correctness standard in reviewing the motion judge's conclusion on the question of contractual interpretation.[9] The Court's reasons offer one of the most thorough appellate considerations of *Sattva*'s meaning, logic and importance since the decision was rendered.

The Court begins by purporting to dismiss the argument that *Sattva*'s influence should be limited because the discussion on the standard of appellate review was *obiter*. Hourigan J.A. explains that while the Supreme Court's comments "may technically be *obiter*… it would be an error to ignore the direction of the court… As a matter of deference and respect, that guidance must be heeded."[10] At the same time, *Sattva*'s degree of influence should take account of the fact that it occurred in a unique situation: "That said, the limitations of the applicability of the case, given its unique circumstances must also be recognized. The facts of *Sattva* did not afford Rothstein J. an opportunity to consider the issue of the standard of review as it pertains to all contracts in all circumstances."[11]

Hourigan J.A. goes on to hold that two key aspects of *Sattva*'s reasoning do not apply in this case.

First, *Sattva* relied heavily on the importance of the factual matrix to support the conclusion that questions of contractual interpretation are generally questions of mixed fact and law.[12]

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[8] 2014 ONSC 7457.
[9] *Chicago Title* at para. 29.
[10] *Chicago Title* at para. 27.
[11] *Chicago Title* at para. 28.
[12] *Sattva* at paras. 47-49.

The Court of Appeal, by contrast, takes a more nuanced view. Hourigan J.A. observes that "the relative importance of the surrounding circumstances is largely dependent on the nature of the contract."[13] For the Court of Appeal, the factual matrix may be an important factor in certain cases, but it "is far less significant, if at all, in the context of a standard form contract or contract of adhesion where the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition."[14] In circumstances such as this case – where the contract "was not negotiated in any meaningful sense and it would be illusory to suggest that anything could be inferred about the meaning of the contract from the facts surrounding its formation"[15] – the factual matrix rationale from *Sattva* "is wholly inapplicable".[16]

The Court of Appeal also finds another aspect of *Sattva*'s reasoning inapplicable to the appeal before them – the proposition that the interpretation of a contract usually has no impact beyond the interest of the parties to the dispute (whereas true questions of law generally do).[17] The question of interpretation raised by the MacDonalds *did* have precedential value. As Hourigan J.A. explains:

> [S]tandard form contracts are often highly specialized contracts that are widely sold to customers without negotiation of terms. The interpretation of the Title Policy applies equally to the appellants and to all of Chicago Title's other customers who purchased the same policy, and therefore is of general importance and has precedential value in a way that the interpretation of other contracts may not.[18]

In addition to finding that two of the key rationales underlying *Sattva*'s message of deference do not apply, the Court of Appeal offers a further reason why correctness review is appropriate in this case: the role of provincial appellate courts in correcting legal errors, ensuring consistency in the law, and achieving greater predictability in litigation outcomes.[19] More specifically, Hourigan J.A. writes that 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", and that "unpredictable outcomes only serve to encourage litigation".[20]

Applying a correctness standard to the motion judge's interpretation of the insurance policy, the Court of Appeal allowed the appeal and granted summary judgment in favour of the MacDonalds.[21]

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[13] *Chicago Title* at para. 32.
[14] *Chicago Title* at para. 33.
[15] *Chicago Title* at para. 34.
[16] *Chicago Title* at para. 35.
[17] *Sattva* at paras. 51-52.
[18] *Chicago Title* at para. 37.
[19] *Chicago Title* at paras. 39-40.
[20] *Chicago Title* at para. 40.
[21] *Chicago Title* at para. 85.

Comment: the resurrection of correctness review in contractual interpretation appeals

For a time, based on the Court of Appeal's decisions applying *Sattva*, the conventional wisdom may have been that the palpable and overriding standard would govern virtually every contractual interpretation appeal in Ontario. Not anymore. *Chicago Title* marks a significant step back to correctness being applied as the standard of appellate review in certain types of contractual interpretation cases.

The decision is bound to have both a short-term and longer-term impact in this regard.

In the short-term, *Chicago Title* has effectively established a categorical rule that the correctness standard applies to the interpretation of insurance contracts in Ontario.[22] Moreover, the Court of Appeal's stated justifications for eschewing *Sattva*'s reach apply not only to standard-form insurance contracts, but also to most other widely used standard-form contracts and contracts of adhesion. It therefore stands to reason that millions of other contracts will similarly be entitled to correctness review. Those contracts govern matters as diverse as cell phones, banking, energy consumption, internet use, car leases, credit cards, payday loans, financial investments, warranties and cable television. Just in terms of the sheer number and scope of consumer contracts affected, then, *Chicago Title*'s immediate impact is quite extraordinary.

But the more interesting, if less certain, implications of *Chicago Title* are yet to come. The longer-term impact of the decision may well flow from *how* it effectively seeks to avoid the strictures of *Sattva*. Rather than suggesting *Sattva* could be undermined on technical grounds (as judges in some other provinces have done), or simply wedging the appeal before it into one of the "extricable questions of law" categories articulated in *Sattva* (as it likely could have done), the Court of Appeal justifies a different standard of review by mounting a direct attack on some of *Sattva*'s key underlying rationales. Even outside of the consumer-based, standard-form contract context, future litigants may be able to rely on these same justifications to seek correctness review in other types of cases. Litigants may also put forward different justifications as to why the rationales outlined in *Sattva* ought not to apply. In this important way, *Chicago Title* opens the door to avoiding the palpable and overriding error standard – and *Sattva*'s reach – by explaining why, at a fundamental level, the standard should not apply in certain circumstances.

A significant unresolved question is whether, and to what extent, correctness review will follow if some, but not all, of the justifications outlined in *Chicago Title* apply (or if different justifications apply). For example, a corporation that offers a vendor a 'take-it-or-leave-it' contract without any negotiations could argue for correctness on the basis that the factual matrix is insignificant – but its arguments as to precedential value and the role of appellate courts might be weak. Similarly, a case focused squarely on an unresolved issue of general contractual interpretation law may present a stronger case for correctness based on concerns about precedential value and ensuring consistency, but could also require a careful

[22] See, for example, *Daverne v. John Switzer Fuels Ltd.*, 2015 ONCA 919 at para. 12; *Monk v. Farmers' Mutual Insurance Company (Lindsay)*, 2015 ONCA 911 at para. 22.

examination of the factual matrix. Depending on how the Court of Appeal considers and weighs the various considerations militating against and in favour of correctness, the longer-term impact of *Chicago Title* in eroding *Sattva*'s general rule on appellate review may be even more significant than its immediate impact.

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The Lawyer-Client Relationship for Lawyers Practising Franchise Law

David N. Kornhauser , Macdonald Sager Manis LLP[1]

Lawyers at times engage in areas of practice for which they do not have sufficient expertise or knowledge. If, as a result of that lack of expertise or knowledge their client suffers damages, the lawyer may be found negligent and thus liable for the damages suffered. In certain practice areas, such as real estate and civil litigation, the underlying issue supporting a claim for negligence against a lawyer, may be resolvable. In certain other areas of law, including franchise–related matters, the issue giving rise to a negligence claim is less able to be rectified and the lawyer or their insurer may be responsible for the payout of damages to the client. Over the past number of years, the number of claims against lawyers arising in franchise-related matters made to LawPro, the lawyers' insurer in Ontario, has been significant and the payout on these claims has been substantial. Regrettably, based on what I am seeing in my law practice, this trend seems to be continuing.

Lawyers must be familiar with the rules of professional conduct, particularly as they relate to the lawyer's obligation to be competent in the legal services which the lawyer is being asked to provide. The Rules of Professional Conduct of the Law Society of Upper Canada were amended based upon the Federation of Law Societies Model Code of Professional Conduct, which became effective October 1, 2014.

A significant amendment was the inclusion of the word "knowledge" in the definition of "competent lawyer". Rule 3.1-2 provides that lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer. The commentary to this Rule, set out below, emphasizes that a lawyer has an obligation to be knowledgeable in area of law in which he/she practices and that the lawyer keep abreast of developments in these areas:

> Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.
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> [3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

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(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

Franchise law is a specialized area of practice, stemming from a number of factors including that there is franchise-specific legislation, currently in 5 provinces (soon to be 6 with the addition of BC) in Canada ("Franchise Legislation").[2] Given the remedies available to a franchisee under Franchise Legislation and the obligations imposed upon a franchisor[3] arising from a franchisor's failure to comply with Franchise Legislation, lawyers acting for franchise clients must be intimately familiar with Franchise Legislation and also with the case law interpreting the rights and obligations under Franchise Legislation or at common law. In addition, since the franchisor-franchisee relationship is a unique one involving areas of interdependence and areas of independence, a lawyer must have an understanding of those aspects of the franchisor-franchisee relationship which are inter-dependent and those aspects of the relationship which are independent.

The consequences of not properly advising a franchise client of its respective rights and obligations under Franchise Legislation could result in a finding of negligence against the lawyer and the payout of substantial damages. Most often when the lawyer finds out that his/her advice to a franchise client was negligent, the damages have already been suffered and cannot be rectified. These payouts on lawyer's negligence claims have historically arisen as a result of a franchisee's entitlement to post-rescission damages under Franchise Legislation, and can occur in the following circumstances:

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[2] Although Ontario is governed by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "**Wishart Act**") very often a lawyer is asked to prepare, or review, a franchise Disclosure Document that is prepared on a 'national basis' that is to comply with franchise legislation in other provinces across Canada. As such, I have used the term "Franchise Legislation" to refer to, and include, all of the provincial franchise legislation.

[3] In certain circumstances liability also attaches to a host of other persons who have some legal relationship with the franchisor as set forth in section 7 of the Wishart Act, and the equivalent provisions of other Franchise Legislation.

1) The lawyer did not advise its franchisor client of its obligation under Franchise Legislation to provide a franchise disclosure document (the "FDD") to a prospective franchisee and the franchisee subsequently rescinds its franchise agreement pursuant to Franchise Legislation as a result of the franchisor's failure to deliver an FDD and claims rescission damages from the franchisor resulting in the franchisor making a claim against its (former) lawyer for negligence and indemnification for the post-rescission damages claim.

2) The lawyer prepared an FDD for its franchisor client that failed to comply with the requirements of the Franchise Legislation. Similar to the scenario above, the franchisee who received the deficient FDD rescinds its franchise agreement pursuant to the Franchise Legislation and claims rescission damages from the franchisor who claims against the lawyer for negligence and indemnification for the post-rescission damages claim.

3) The lawyer acts for a franchisee who has either not received an FDD or has received a non-compliant FDD and fails to advise the franchisee of its rights arising under the Franchise Legislation resulting in the franchisee missing the opportunity to rescind its franchise agreement within the time provided under Franchise Legislation. In this circumstance, the lawyer may be directly liable for the post-rescission damages that it would otherwise have been able to claim against the franchisor.

Lawyers are cautioned against dabbling in areas of law for which they do not have sufficient expertise. Given the damage claims that can arise against lawyers for negligence, this is all the more true for lawyers practicing Franchise Law.