

## Awards

- Insurance defence lawyer **Philippa Samworth**, a partner at *Dutton Brock*, has been awarded this year's Advocates' Society Medal honouring her leadership and contributions to the profession and the community while serving as a member of the 5,000-member society drawn from Canada's bench and bar. Samworth, a certified specialist in civil litigation and a fellow of the American College of Trial Lawyers, is a former president of the society and is chair of its insurance committee.
- **Guy Pratte**, a partner at *Borden Ladner Gervais* in the firm's litigation and arbitration group, has been awarded the St. Yves Medal by *Pro Bono Québec*. Pratte, a founding member of *Pro Bono Québec*, was honoured at a ceremony for his longstanding commitment to pro bono work.

## Elections

- **Brian Tabor**, a partner at *Stewart McKelvey* in Halifax, was recently elected as a fellow of the American College of Mortgage Attorneys. Established in 1974, the ACMA is comprised of over 400 lawyers from North America with a focus in the mortgage law industry, expertise to medical malpractice lawyers and medical legal education to health-care professionals.

## Changes

- Calgary medical law firm *CanLNC Experts* will change its name to *Connect Medical Legal Experts* effective Oct. 15. The firm provides medical/legal expertise to medical malpractice lawyers and medical legal education to health-care professionals.

## Context, circumstances gain more weight

'Very, very deferential' stance seen by lawyer on appellate matters

KIM ARNOTT

While appellate courts have historically been willing to wade into issues of contractual interpretation, a recent Supreme Court of Canada ruling may cause a significant shift in the legal landscape, says contractual law expert Geoff Hall.

Hall, a partner with *McCarthy Tétrault* and author of *Canadian Contractual Interpretation Law*, said the high court's Aug. 1 decision in *Sattva Capital Corp. v. Creston Moly Corp.* [2014] S.C.J. No. 53 is likely to make it much more difficult to successfully appeal decisions of contractual interpretation. The court ruled that "contractual interpretation involves issues of mixed fact and law" and generally should attract a deferential standard of review.

The impact of the ruling can be clearly seen in a Sept. 10 decision by the Ontario Court of Appeal in *Martenfeld v. Collins Barrow Toronto LLP* [2014] O.J. No. 4195, said Hall.

"The Court of Appeal in the *Martenfeld* case shows a very, very deferential attitude and makes it clear they're not going to interfere with the decision at first instance unless there's a probable and overriding error," said Hall. "What's striking about that is that it's very different to the approach the Court of Appeal took just a short time ago."

While contracts were previously considered to be an issue of law, and therefore fair game for appellate court intervention, *Sattva* determined that context and circumstances are relevant factors in interpretation, he noted.

"From a litigator's perspective, it makes things interesting because your prospects of appealing if you've lost are much more limited than they previously were."



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Sarabia

Toronto, who left the partnership to join a competing firm. Justice Lax was required to interpret a provision in the partnership agreement speaking to the financial implications of such a departure.

While the agreement required *Martenfeld* to pay liquidated damages of twice his "permanent capital," the accounting firm had made changes to its financial statements and terminology around partner capital without updating the agreement to reflect the changes.

Although the court was provided with evidence of proposed amendments to the partnership agreement, those amendments were never approved or implemented.

As a result of that and other financial arrangements within the firm, Justice Lax ruled that *Martenfeld* was owed \$260,778.25 upon his departure. The firm had argued that he should pay liquidated damages of \$134,787.

Despite the increasing emphasis the courts have placed on the context surrounding the undertaking of a contract, this case demonstrates that circumstances aren't likely to overrule the actual wording of a contract, noted Luis

Sarabia, a partner with *Davies Ward Phillips & Vineberg*.

"This was a case that begged for the court to look at the surrounding circumstances. (The firm) had circulated draft revisions to the partnership agreement and there were no objections. Everybody knew how things were supposed to work, but the court said, 'Look, that's not how they worked. Here's the contract.'"

"The accounting firm paid the price for not keeping their partnership agreement up to date."

Hall agreed. "*Sattva* says, and this *Martenfeld* decision confirms that when push comes to shove, and there is conflict between the language in the agreement and the surrounding circumstances, the language in the agreement is almost always going to prevail," he said.

Although the factual circumstances in the case may not readily lend themselves to a broader application, the lawyers agreed that the decision does speak to the need for partners to accurately reflect their arrangements in written contracts.

"These things are not just boilerplates to be ignored," advised Hall. "Both the accounting firms and the professionals who are in them should be paying attention to what these agreements say."

The warning translates beyond accounting firms, noted Sarabia. "The first thing that came to my mind, being a partner in a law firm, is just how horribly wrong these partnership disputes can go."

"It's another warning to professional partnerships to ensure that their partnership agreements are always up to date and always consistent with the reality at the firm, including the financial statements."

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