

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)**

BETWEEN:

ANDREW SABEAN

APPLICANT
(Respondent)

and

PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY

RESPONDENT
(Appellant)

**RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(RESPONDENT)**

(pursuant to Section 40 of the *Supreme Court Act*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. No Issue of Public Importance

1. This case raises the following insurance contract question – are future CPP disability benefits deductible from an award of damages, pursuant to the SEF 44 family protection endorsement (the “**SEF 44**”)?
2. According to the Nova Scotia Court of Appeal, the answer is yes.
3. In reaching this decision, the Court of Appeal correctly:
 - (a) applied the important role of context to the exercise of contractual interpretation, as most recently mandated by this Honourable Court in *Sattva Capital Corp v Creston Moly Corp*;¹ and
 - (b) concluded that CPP benefits are paid pursuant to a contract / policy of insurance, consistent with this Court’s decision in *Canadian Pacific Limited v Gill*.²
4. In other words, the essential subject of this Leave Application has already been addressed and answered by this Court.
5. Accordingly, there is no issue of public importance for this Court to resolve. This Leave Application should be dismissed.

B. Concise Statement of Facts

6. The trial / adjudicative facts are largely immaterial to the broad question of whether, on the specific language of the SEF 44, future CPP disability benefits are deductible from an award of damages.

¹ *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.

² *Canadian Pacific Limited v Gill*, [1973] SCR 654.

7. Instead, the answer to this question turns on the proper interpretation of the SEF 44 standard form endorsement, which provides as follows (in part):

4. AMOUNT PAYABLE PER ELIGIBLE CLAIMANT

- a) The amount payable under this endorsement to any eligible claimant shall be ascertained by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate of the amounts referred to in paragraph 4(b), but in no event shall the Insurer be obligated to pay any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
- b) The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:
- i) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;
 - ii) the insurers of any person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;
 - iii) the Société de l'assurance automobile du Québec;
 - iv) an unsatisfied judgment fund or similar plan or which would have been payable by such fund or plan had this endorsement not been in effect;
 - v) the uninsured motorist coverage of a motor vehicle liability policy;
 - vi) any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;

- vii) any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;
- viii) any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury of death sustained;
- ix) any family protection coverage of a motor vehicle liability policy.

8. At trial, the Defendant (Respondent on this Leave Application – “**Portage**”) submitted that it should be entitled to deduct future CPP disability benefits on the basis that:

- (a) in *Canadian Pacific Limited v Gill*, this Court concluded that CPP benefits are provided *via* a contract of insurance;
- (b) in *Campbell-MacIsaac v Deveaux*,³ the Nova Scotia Court of Appeal concluded that, in order to ensure against over-compensation under an endorsement of excess / “last ditch” insurance, future benefits are properly deducted from an award of damages by an SEF 44 insurer; such that
- (c) future CPP disability benefits are (to quote the language of the SEF 44 itself) “excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from ... any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits”.

9. Accordingly, Portage submitted that the language of 4(b)(vii) of the SEF 44 clearly contemplates a deduction of future CPP disability benefits from an award of damages.

10. In contrast, the Plaintiff (Applicant on this Leave Application – “**Mr. Sabeau**”) submitted to the trial judge that the SEF 44 endorsement does not permit such a deduction. In

³ *Campbell-MacIsaac v Deveaux*, 2004 NSCA 87.

doing so, he emphasized the decision of the New Brunswick Court of Appeal in *Economical Mutual Insurance Company v Lapalme*,⁴ which concluded that an SEF 44 insurer is not entitled to deduct the value of future CPP disability benefits from an award of damages.

11. The trial judge agreed with Mr. Sabeau, relying almost exclusively on the reasons in *Lapalme*.
12. On appeal by Portage, the Nova Scotia Court of Appeal unanimously overturned the trial judge's decision on this point.
13. After considering the purpose of the SEF 44 and its wider context, Scanlan J.A. concluded that there is no ambiguity in the contractual language of clause 4(b)(vii). In his essential paragraph on this issue, Scanlan J.A. reasoned as follows:

[29] Given: (1) the law established in *Gill*, before the SEF 44 endorsement was made available, that pensions payable under the CPP [are] “of the same nature as contracts of insurance”; (2) the clear wording to the effect that SEF 44 is excess insurance – that no one is entitled to double recovery; and (3) the unimportance in the context of clause 4(b)(vii) of the use of the word “policy” as opposed to “contract”, I am satisfied there is no ambiguity. It is clear that the term “any policy of insurance” in clause 4(b)(vii) includes the provisions of the CPP governing disability benefits. Future CPP disability benefits are deductible from amounts payable by SEF 44 insurers. Thus I am satisfied the trial judge erred in adopting the reasoning in *Lapalme* and ordering that Mr. Sabeau's future CPP disability benefits were not deductible from the amount Portage is required to pay to him under the SEF 44.

14. The resulting Order for Judgment was issued by the Court of Appeal on June 4, 2015, from which Mr. Sabeau now seeks leave to appeal to this Court.

⁴ *Economical Mutual Insurance Company v Lapalme*, 2010 NBCA 87.

PART II – STATEMENT OF QUESTIONS IN ISSUE

15. On this Leave Application, Mr. Sabeau frames the question as follows: “Whether or not the Canada Pension Plan, specifically disability benefits, is a ‘policy of insurance’ within the meaning of paragraph 4(b)(vii) of the SEF 44 Endorsement.”
16. This question is premature. Pursuant to subsection 40(1) of the *Supreme Court Act*, the real issue is whether Mr. Sabeau’s question is one of sufficient public importance for consideration by this Court.

PART III – STATEMENT OF ARGUMENT

17. No doubt, there is now an inconsistency in the appellate jurisprudence on the question of whether an SEF 44 insurer can deduct the future value of CPP disability benefits. The Nova Scotia Court of Appeal says yes, while the New Brunswick Court of Appeal says no.
18. That said, and unlike *Lapalme*, the foundation of the Nova Scotia Court of Appeal’s decision is consistent with and supported by the jurisprudence of this Honourable Court.
19. In essence, Scanlan J.A. complied with the most recent mandate of this Court in *Sattva* to interpret contractual provisions with an appreciation for their contextual matrix. In doing so, Scanlan J.A. observed the following:
 - (a) in *Gill*, this Court concluded the CPP benefits are paid pursuant to a contract of insurance, because they are substantively of the same nature as insurance benefits – the CPP “is an exact substitute for a privately arranged insurance policy”;⁵

⁵ Reasons for Decision of Scanlan J.A., paras 22 – 24.

- (b) the language of the current SEF 44, complete with the clause 4(b)(vii) exclusion, post-dates the decision of this Court in *Gill*;⁶
 - (c) the purpose of the changes to the SEF 44 (and its predecessors) over time was to preclude the “double recovery permitted at common law”;⁷ and
 - (d) although *Gill* uses the language of “contract of insurance” and the SEF 44 uses the language of “policy of insurance”, there is no material difference between the two – particularly when one considers the reasons in *Gill* and the overall purpose of the SEF 44 as “last ditch” coverage.⁸
20. The Nova Scotia Court of Appeal’s decision favours substance over form when interpreting the intended purpose of clause 4(b)(vii) of the SEF 44. And in both manner and result, the decision is consistent with the legal principles that have been expressed by this Court.
21. Accordingly, there is no question of public importance. The essential subject of this Leave Application has already been addressed and answered by this Court.

PART IV – COSTS SUBMISSIONS

22. Portage seeks its costs on this Leave Application in the ordinary course.

⁶ Reasons for Decision of Scanlan J.A., paras 25 – 26.

⁷ Reasons for Decision of Scanlan J.A., para 26.

⁸ Reasons for Decision of Scanlan J.A., paras 21, 27 – 29.

PART V – ORDER SOUGHT

23. For all the foregoing reasons, Portage respectfully submits that this Court should dismiss this Leave Application, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed: September 22, 2015

STEWART McKELVEY

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Scott R. Campbell

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

CITED AT PARA.

<i>Campbell-MacIsaac v Deveaux</i> , 2004 NSCA 87	8
<i>Canadian Pacific Limited v Gill</i> , [1973] SCR 654	3, 8, 19
<i>Economical Mutual Insurance Company v Lapalme</i> , 2010 NBCA 87	10, 11, 18
<i>Sattva Capital Corp v Creston Moly Corp</i> , 2014 SCC 53	3, 19

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<i>Supreme Court Act</i> , RSC 1985, c. S-26, s. 40(1)	16
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