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In contractual disputes, after-the-fact conduct is admissible after all

To most people, a contract is a written agreement, typically signed by all parties, that sets out what different parties promise to do. But what happens that the written agreement is ambiguous? Courts have long held that evidence of the "factual matrix" of the contract—that is, the surrounding circumstances that inform the context in which a contract is created—is admissible in the interpretation of a contract. In its recent decision in *Shewchuk v Blackmont Capital Inc*, the Ontario Court of Appeal confirmed that evidence of subsequent conduct may also be admissible to interpret the agreement itself.

The plaintiff in that case was an investment advisor who worked in the Calgary office of Blackmont Capital. The plaintiff's compensation derived primarily from commissions on transactions that he arranged or executed, including from transactions that the plaintiff referred to the firm's Capital Markets group. The amount of the commission he received on any particular transaction was determined by a Compensation Plan that set out commissions that all investment advisors working at Blackmont Capital received.

The plaintiff ultimately became dissatisfied the compensation he received under the Compensation Plan. This led the plaintiff to negotiate a new agreement with his branch manager, which resulted in the execution of a letter agreement dated April 11, 2006 (which the Court referred to as the "April 11 Agreement"). The April 11 Agreement provided that the plaintiff would receive certain additional compensation over and above that provided under the standard Compensation Plan.

A dispute later arose over whether the additional compensation provided under the April 11 Agreement applied only to retail transactions, or also to capital markets transactions. The plaintiff claimed that he was entitled to a 52 percent commission under the Compensation Plan, as well as a further 10 percent commission under the April 11 Agreement, on four Capital Markets transactions that he had participated in. Blackmont disagreed. The plaintiff then brought an action against Blackmont, claiming an entitlement to those commissions under the April 11 Agreement.

The trial judge ultimately rejected the plaintiff's claim. The trial judge held that the April 11 Agreement was only intended to

apply to retail transactions, rather than capital markets transactions.

The plaintiff appealed to the Ontario Court of Appeal. The core of the plaintiff's argument on appeal related to the admissibility of certain evidence of subsequent conduct after the executed of the April 11 Agreement.

Specifically, the trial judge had heard evidence at trial that, after the execution of the April 11 Agreement, the plaintiff had engaged in ongoing attempts to negotiate compensation for deals he introduced to the Capital Markets group. Blackmont claimed that this subsequent conduct was inconsistent with the plaintiff's position that the April 11 Agreement applied to Capital Markets transactions. In his reasons, the trial judge accepted Blackmont's position and relied on that evidence to find against the plaintiff.

The plaintiff argued that the trial judge had erred in admitting and relying on the evidence of subsequent negotiations. The Court of Appeal disagreed and dismissed the appeal.

In its decision, the Court of Appeal held that a party's subsequent conduct can be relevant to interpreting a contract. However, the Court of Appeal limited the use that can be made of such evidence in two important ways.

First, the Court held that subsequent conduct will only be admissible as an aid in contractual interpretation if the Court concludes that the contract is ambiguous, having regarding to both the text of the contract and the factual matrix at the time the contract was made.

The Court's decision confirms that subsequent conduct is of secondary evidentiary value: it can only be considered if the primary sources of contractual interpretation do not yield a determinate answer. Subsequent conduct is not evidence of equal quality to either the text of the contract or the factual matrix at the time of contracting, nor can it be used to create ambiguity where none would exist based the text or the factual matrix.

Second, the Court of Appeal held that even where evidence of subsequent conduct is admissible, such evidence must be treated cautiously. The Court noted that there are inherent dangers in evidence of subsequent conduct, and the weight to be given to that evidence will depend on "the extent to which its inherent dangers are mitigated in the circumstances of the case".

The Court of Appeal set out a variety of factors that Courts can consider in deciding the weight to be given such conduct,

including:

1. Whether the subsequent conduct includes acts of both parties – acts by both parties will be more likely to confirm a meeting of the minds by both sides to the agreement;
2. Whether the acts are intentional – intentional acts are more probative than unintentional acts;
3. Whether the acts are consistent over time – a consistent course of conduct is more probative than one or a few isolated acts;
4. Whether the acts in question are those of individuals or agents of a corporation – subsequent conduct by individual employees of an organization may not be a good indicator of a corporation's overall intentions or actions;
5. Whether the evidence is unequivocal – where subsequent conduct is consistent with only one of two interpretations of the contract, it will be given greater weight; and
6. The temporal proximity of the subsequent conduct to the execution of the contract – subsequent conduct closer in time to the agreement being reached will be given greater weight.

Having regard to all of these factors, the Court of Appeal concluded that the trial judge had not erred in admitting and relying on the evidence of subsequent conduct in this case. The Court concluded that, given the ambiguities in the text of the April 11 Agreement, it was appropriate for the trial judge to consider evidence of subsequent conduct that was consistent with the factual matrix at the time the agreement was reached. Consequently, the Court of Appeal dismissed the appeal.

The Court's decision in *Shewchuk* confirms that a contract cannot be interpreted by its text alone. A broad spectrum of extrinsic evidence—both of the factual matrix at the time the contract was entered into, as well as subsequent conduct—is relevant to the interpretation of contracts. This is consistent with the contemporary trend in contractual interpretation, as best exemplified in the Supreme Court's 2014 decision in *Sattva Capital Corp v Creston Moly Corp*, which emphasizes the heavy role of surrounding factual circumstances in interpreting contracts.

The implication of the Court's decision is that lawyers should explore and lead evidence of that subsequent conduct where

subsequent conduct is highly probative. By unequivocally affirming the relevance of subsequent conduct, the Court's decision may expand the scope of discovery in certain commercial cases.

At the same time, lawyers should not be so focused on subsequent commercial conduct so as to lose sight of the plain text. While potentially relevant in the presence of an ambiguity in the text, subsequent commercial conduct will never be as good an interpretive tool as the plain text of the agreement.