File No. EB-2019-0166

ONTARIO ENERGY BOARD

IN THE MATTER OF THE *Ontario Energy Board Act*, S.O. 1998, C.15, Schedule B, and in particular Section 21(2) thereof;

AND IN THE MATTER OF the *Assessment Act*, R.S.O. 1990, c. A31, and in particular Section 25(3) thereof;

AND IN THE MATTER OF an Application by Lagasco Inc. for an Order determining whether or not the natural gas pipelines owned and operated by Lagasco Inc. in Haldimand County are gas transmission pipelines

BOOK OF AUTHORITIES THE APPLICANT, LASGASCO INC.

(October 8, 2020)

October 8, 2020

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Richard B. Swan (LSO# 32076A)
William A. Bortolin (LSO# 65426V)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for the Applicant, Lagasco Inc.

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Capcorp Planning (2003) Inc. v. Ontario (Finance)

2018 CarswellOnt 6571, 2018 ONCA 406, 141 O.R. (3d) 355, 291 A.C.W.S. (3d) 442, 39 C.C.P.B. (2nd) 1

Capcorp Planning (2003) Inc. (Appellant / Respondent) and The Minister of Revenue (Respondent / Appellant)

David Watt, S.E. Pepall, B.W. Miller JJ.A.

Heard: October 23, 2017
Judgment: April 30, 2018
Docket: CA C63074

Proceedings: reversing *Capcorp Planning (2003) Inc. v. Minister of Revenue* (2016), 2016 ONSC 5041, 2016 CarswellOnt 17427, McLean J. (Ont. S.C.J.)

Counsel: Lori Patyk, Jason DeFreitas, for Appellant
Gregory Sanders, Christopher Morris, for Respondent

Subject: Provincial Tax

APPEAL by Minister of Revenue from judgment reported at *Capcorp Planning (2003) Inc. v. Minister of Revenue* (2016), 2016 ONSC 5041, 2016 CarswellOnt 17427 (Ont. S.C.J.), allowing business's appeal from tax assessment and quashing assessment.

***Watt J.A.*:**

1 Capcorp Planning (2003) Inc. ("Capcorp") sold a health and welfare plan ("HWP"). Some employers found the HWP attractive, especially owner/manager operations where the owner or manager of the corporation was the only employee seeking coverage.

2 Under Capcorp's HWP, a participating employer agreed to pay specified expenses incurred by participating employees. When an employee incurred an expense said to be covered by the HWP, the employer submitted a claim and a cheque to Capcorp for the expense claimed and an administrative fee for Capcorp. After a review of the claim, Capcorp determined whether the expense claimed was covered by the HWP. If the claim was covered, Capcorp reimbursed the employee for the expense.

3 Capcorp did not charge retail sales tax ("RST") on any amounts employers paid and it received in respect of claims made under the HWP. The Minister of Revenue ("the Minister") considered that RST was exigible for these amounts, assessed Capcorp accordingly and required Capcorp to pay a penalty plus interest for failure to collect and remit the RST the Minister considered applicable.

4 The issues assigned to us for determination are whether RST was exigible on the amounts paid by employers under the HWP and, if so, whether Capcorp is liabile to a penalty for having failed to collect and remit the RST.

5 As I will explain, I agree with the appellant Minister that Capcorp was required to charge, collect and remit RST and is subject to penalty for having failed to do so.

THE BACKGROUND FACTS

6 The underlying circumstances are largely uncontroversial and require only brief elaboration beyond what has already been said.

The Plan and Its Participants

7 Capcorp provides insurance solutions to business owners. A typical client is the owner/manager of a small or medium-sized business with insurance needs. Capcorp determines the client's needs for life, disability, critical illness and health insurance and then offers a range of individual and group plans including third party insurance products and the HWP.

8 Individual and group plans from insurance companies supplement provincial health coverage by covering services or items not covered by OHIP, including dental and vision care and some prescription drugs. But these plans often require medical prerequisites and limit the scope of coverage for dependants, and may offer little beyond coverage provided by provincial health care.

9 The HWP, by contrast, contained less demanding medical prerequisites and offered more generous coverage for the dependants of plan members. Accordingly, it found favour with individuals who had been rejected from extended health care coverage under independent private plans.

Participation in the HWP

10 To participate in the HWP, an employer agreed to pay specified expenses incurred by a participating employee and an administrative fee to Capcorp. Since most involved in the HWP were individuals, the HWP functioned as an alternative to an individual health insurance plan for an employee.

11 To enrol in the HWP, an employer completed a Notice of Participation which identified the participating employee, any dependants, the type of benefits covered and the extent of the coverage. The relationship between Capcorp and a participating employer was governed by the Notice of Participation and the HWP Master Plan. Capcorp constantly reviewed the insurance marketplace to make better options available to its clients.

The Claims Reimbursement Procedure

12 When an employee asserted a claim for a covered expense under the HWP, the employer submitted the claim, together with a cheque for the amount of the claim and the administrative fee to which Capcorp was entitled. Capcorp reviewed the claim to determine whether it fell within the coverage provided. Where the claim related to a covered expense, Capcorp sent a cheque to the employee for the amount of the claimed expense.

The Audit and Assessment

13 An auditor from the Ministry of Revenue reviewed the records of Capcorp and found that the company had not charged, collected or remitted RST on any amounts paid by employers to Capcorp for claims under the HWP from August 1, 2005 until March 31, 2009. Capcorp was assessed a penalty of $278,625.31, including interest. The assessment was based on the auditor's determination that the HWP was a "benefits plan" subject to taxation under the *Retail Sales Tax Act*, R.S.O. 1990, c. R. 31, as amended. Capcorp, by extension, was required to charge, collect and remit RST. Failure to do so rendered the company liable to the penalty assessed.

The Objection

14 Capcorp objected. The Minister affirmed the assessment and penalty.

The Appeal

15 After the Minister confirmed the assessment, Capcorp appealed to the Superior Court of Justice under s. 25 of the *RSTA*. Capcorp contended that:

i. payments made by employers under the HWP were exempt from RST;

ii. the Notice of Assessment did not properly explain the basis for the penalty imposed on Capcorp; and

iii. Capcorp had exercised due diligence in determining its obligations to collect RST.

16 A brief summary of the relevant provisions of the *RSTA* will help illuminate the appeal judge's analysis. Further detail is provided later in these reasons, where necessary.

17 Section 2.1(1) of the *RSTA*, in relevant part, requires that "[e]very person who is resident in Ontario, or who carries on business and Ontario and who:

(a) enters into a contract of insurance with an insurer;

(b) is a person whose risk is covered by group insurance;

(c) is a planholder or member of a benefits plan;

shall pay . . . a tax at the rate of 8 percent of the premium payable" (emphasis added).

18 A "benefits plan" is defined under s. 1(1) of the *RSTA* as a funded benefits plan, an unfunded benefits plan or a qualifying trust. The term "unfunded benefits plan" is exhaustively defined in s. 1(1) to mean:

a plan which gives protection against risk to an individual that could otherwise be obtained by taking out a contract of insurance, whether the benefits are partly insured or not, and where payments are made by the planholder directly to or on behalf of the member of the plan or to the vendor upon the occurrence of the risk. [Emphasis added.]

19 The appeal judge concluded that the HWP was not a policy of insurance, group insurance, or a funded benefits plan. In his view, the HWP was most akin to an "unfunded benefits plan" for the purposes of the *RSTA*. The judge then focused on the language "a risk to an individual that could otherwise be obtained by taking out a contract of insurance" in the exhaustive definition of "unfunded benefits plan". He accepted the evidence adduced by Capcorp that most of the employers who enrolled in the HWP could not obtain health insurance that would supplement their OHIP coverage. In the absence of evidence from the Minister to contradict the testimony about the HWP constituency, the appeal judge concluded that since those who enrolled in the HWP would not be able to obtain insurance coverage, they were not required to pay RST on the amount they paid to Capcorp.

20 The essentials of the appeal judge's analysis appear in three paragraphs of his reasons:

It, therefore, seems to this Court that those persons who would not be able to obtain coverage by insurance would not be required to pay retail sales tax on the amount they paid to the Appellant. As stated in their factum at para. 66, the Respondent takes the position that:

> In order for Capcorp to "demolish" the assumptions upon which an assessment is made, it must make out at least a *prima facie* case. Only then, will the onus of proving the assumptions be shifted to the Minister, and the onus will not be "lightly or capriciously or casually shifted."

As set out in the decision of *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, 345 N.R. 284, the onus to establish a *prima facie* case "will not be lightly or capriciously or casually shifted." However, here, a *prima facie* case has been made out with regard to whether health insurance for this risk was otherwise available in regard to this Plan which is an unfunded benefits plan. Here the evidence is uncontradicted and indicates that insurance for this type of risk would not be available. There is no contradictory evidence. Therefore, it seems that a *prima facie* case has been made out. Thus, it is the Court's view that the onus has shifted to the Respondent Crown and that burden has not been met by the Respondent. At the very least, the Respondent should have provided some evidence statistically or otherwise indicating what portion of these persons would not be covered. This is particularly key in the face of the evidence that was called. It is impossible for the Court on the

> basis of the record to distinguish those who were using this Plan for convenience only and those who actually required the Plan in the sense that they could not obtain health coverage otherwise.
>
> That being the case, with no evidence to the contrary being called by the Respondent, the Court is of the view that the assessment in total has not been justified on the basis of the evidence presented. Therefore, for those reasons the assessment is quashed. [Emphasis Added.]

21 The appeal judge considered and rejected two further grounds of appeal advanced by Capcorp. He held that the nature of the penalty imposed — the amount of tax that should have been collected — was implicit in the *RSTA*. He also decided that the defence of due diligence had no application to the Minister's assessment.

THE GROUNDS OF APPEAL

22 The Minister advances two grounds of appeal, the second, an alternative to the first. The Minister submits that the appeal judge erred:

> i. in his interpretation of the definition of an "unfunded benefits plan" under the *RSTA*; and
>
> ii. in the alternative, in his consideration of the evidence, by prematurely shifting the burden of proof to the Minister, in failing to consider relevant evidence and in misapprehending the nature and sufficiency of Capcorp's evidence.

Ground # 1: The Interpretation of "unfunded benefits plan"

23 In earlier paragraphs I have canvassed relevant features of the HWP including enrolment and administration and attempted to set out the essence of the appeal judge's reasoning that underpinned his interpretation of the term "unfunded benefits plan" in s. 1(1) of the *RSTA*. No useful purpose will be achieved by their repetition here.

24 Preliminary to a summary of the arguments advanced on this issue of statutory interpretation, it is helpful to set down a more extensive outline of some of the statutory definitions that have a say in our interpretation.

The Definitions

25 For convenience, I will repeat the definition of the term "unfunded benefits plan" in s. 1(1) of the *RSTA*:

> a plan which gives protection against risk to an individual that could otherwise be obtained by taking out a contract of insurance, whether the benefits are partly insured or not, and where payments are made by the planholder directly to or on behalf of the member of the plan or to the vendor upon the occurrence of the risk.

26 Among the component parts of this definition, the terms "protection against risk to an individual", "contract of insurance", "insurance" and "planholder" are also defined, some exhaustively, others expansively. The definitions are these:

> "protection against risk to an individual" includes any undertaking to pay on death, or disability, or for supplemental health care, drugs, dental care, vision care, hearing care, or for protection against loss of income due to illness or accident or that provides any other similar benefit to an individual.
>
> "contract of insurance" includes a policy, a certificate, an interim receipt, a renewal receipt, a writing evidencing the contract, whether sealed or not, and a binding oral agreement.
>
> "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;
>
> "planholder" means, in relation to a benefits plan, the person who provides the plan, including an employer under a multi-employer benefits plan and the trustee of a qualifying trust

27 In connection with unfunded benefits plan, the term "premium" means:

(d) in respect of an unfunded benefits plan,

(i) any amounts, other than an amount that would be included in the total Ontario remuneration of the planholder under the *Employer Health Tax Act*, paid by the planholder by reason of the occurrence of a risk, less any amounts paid to the planholder by members in order to receive benefits under the plan, and

(ii) any amounts paid by members in order to receive benefits under the plan,

and includes dues, assessments, or administrative costs and fees paid for the administration or servicing of the plan to the vendor.

The Arguments on Appeal

28 The Minister begins his submissions with a reminder about the applicable standards of review: correctness for the appeal judge's interpretation of the term "unfunded benefits plan", and palpable and overriding error for the assessment of the evidence adduced and findings of fact, except for extricable errors of law or principle.

29 The Minister says that the appeal judge erred in his interpretation of the term "unfunded benefits plan". An unfunded benefits plan is simply an alternative to a contract of insurance for the purpose of obtaining protection against specified risks to an individual. Provided the protections extended by the plan could be obtained under an insurance contract, it is immaterial that a particular individual under the plan cannot get alternative insurance coverage, whether because of a pre-existing condition or otherwise.

30 The Minister submits that the appeal judge's interpretation of the term "unfunded benefits plan" is flawed for several reasons.

31 First, the appeal judge's interpretation undermines the consistency, predictability and workability of the *RSTA*. Tax statutes must be interpreted to achieve consistency, predictability and fairness. Interpretations that interfere with efficient administration and enforcement or result in pointless hardship and inconvenience must be rejected. Interpretations that bring about a more workable and practical result are preferable, providing the words of the enactment can reasonably bear that interpretation.

32 According to the Minister, the appeal judge's interpretation would result in parties' obligations under the Act changing, depending on the state of the insurance marketplace at a particular time. In a similar way, the judge's interpretation would create significant enforcement difficulties. To determine whether tax was exigible on a plan, the Minister would have to determine the historical state of the insurance market for the entire period of the audit and assess medical information about each member of the plan for the same period.

33 Second, the Minister continues, the appeal judge's interpretation creates irrational and arbitrary distinctions between those who use an unfunded benefits plan for convenience, on the one hand, and those who do so out of necessity, on the other.

34 Third, the Minister submits the appeal judge's interpretation is at odds with the statutory definition of an "unfunded benefits plan". The definition is ostensive, that is to say, it relies on the concept of a contract of insurance to explain the concept of an unfunded benefits plan. Such a plan is an alternative to a contract of insurance. The HWP is not excluded from the definition simply because it can provide a level of coverage to some individuals above and beyond what they could have obtained through a contract of insurance. After all, the legislature used the term "could", not "can", which suggests the definition focuses on the hypothetical not the actual availability of insurance to planholders.

35 Fourth, according to the Minister, the broad definition of "protection against risk to an individual" supports this interpretation. The definition suggests that an unfunded benefits plan provides a wide basket of benefits otherwise available

under a contract of insurance. But it does not exclude plans that provide additional coverage for a particular expense or a greater percentage of reimbursement.

36 Finally, the Minister says, the legislative history demonstrates that where an employer "self-insures" the cost of its employee benefits, as in the HWP, RST is exigible. The legislative history also confirms that unfunded benefits plans are provided in lieu of contracts of insurance and should therefore receive similar tax treatment.

37 Capcorp says that the appeal judge correctly interpreted the term "unfunded benefits plan" by assigning to it a meaning supported by the plain language of the phrase. In addition, the judge properly found on the uncontradicted evidence adduced that protection against risk to individuals covered by the HWP could not otherwise be obtained by taking out a contract of insurance. This was so because there were material differences in the benefits offered under the HWP and those available under contracts of insurance.

38 Capcorp also relies on general principles of statutory interpretation to support its position. The argument it advances is grounded in a textual, contextual and purposive analysis of the plain meaning of the statutory definition, harmonious with the legislation as a whole. The actual words of the taxation statute are critical to determine its meaning. Where ambiguity arises, courts must adopt the construction that favours the taxpayer.

39 In the end, Capcorp says, the appeal judge properly interpreted the applicable provisions of the *RSTA*. He relied on the precise language in the definition of "unfunded benefits plan" and rightly rejected the Minister's reliance on policy considerations to displace the plain meaning of the unambiguous language chosen by the legislator.

The Governing Principles

40 Determination of this ground of appeal requires us to interpret the term "unfunded benefits plan" as exhaustively defined in s. 1(1) of the *RSTA*. This requires a consideration not only of the general principles informing statutory interpretation, but also those specific to the interpretation of taxation statutes.

41 It has been long established that there is but one principle or approach to statutory interpretation and that is that the words of the statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the enacting legislative body: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at para. 64; *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10.

42 When we consider the written words of a statute, context inevitably plays an important role. Context involves the presumption of consistent expression, that is to say, that when different terms are used in a single piece of legislation, they must be understood to have different meanings. When the same terms are used, the same meaning should be assigned: *Agraira*, at paras. 80-81.

43 In the interpretation of tax statutes, understandably we are required to place an emphasis on textual interpretation. And this is so because of the particularity and detail of many tax provisions. Where the legislature has specified the precise conditions that must be satisfied to achieve a particular result, it is reasonable to assume that taxpayers would rely on those provisions to achieve the result they prescribe: *Canada Trustco*, at para. 11; *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada Revenue Agency*, 2007 SCC 42, [2007] 3 S.C.R. 217 (S.C.C.), at para. 16; *Aubrey Dan Family Trust v. Ontario (Finance)*, 2017 ONCA 875, 2017 D.T.C. 5128 (Ont. C.A.), at para. 13.

44 Where the words of a tax statute are precise and unequivocal, the ordinary meaning of the words predominates in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role with greater emphasis bestowed on the context, scheme and purpose of the Act. In such a way, legislative purpose may not be used to supplant clear statutory language, but may assist in arriving at the most plausible explanation of an indeterminate statutory provision: *Canada Trustco*, at para. 10; *Placer Dome Canada Ltd. v. Ontario (Minister*

of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715 (S.C.C.), at para. 23; *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.), at para. 38.

45 It is also well established that in resolving doubt about the meaning of a tax provision, the administrative practice and interpretation adopted by the Minister are important factors to be weighed, although they are not dispositive of the interpretation to be accorded to the provision: *Placer Dome*, at para. 10.

46 Another principle to keep in mind where the wording of a statute may give rise to more than one interpretation is that where one interpretation can be placed on a statutory provision that would bring about a more workable and practical result, such an interpretation is preferable if the words the legislator has chosen can reasonably bear that interpretation: *Berardinelli v. Ontario Housing Corp.* (1978), [1979] 1 S.C.R. 275 (S.C.C.), at para. 19; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 (S.C.C.), at para. 34; *Camp Development Corp. v. Greater Vancouver Transportation Authority*, 2010 BCCA 284, 7 B.C.L.R. (5th) 1 (B.C. C.A.), at para. 52.

47 Two further points will round out this brief canvass of governing principles.

48 First, the provisions of a tax statute should be interpreted in such a way as to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently: *Canada Trustco*, at paras. 11-12; *Placer Dome*, at para. 21.

49 Second, in a dispute about the proper interpretation of a tax statute, there is a residual presumption in favour of the taxpayer. But this residual presumption applies only in the exceptional case in which application of the ordinary principles of interpretation does not resolve the issue. Doubts about the meaning of a taxation statute must be reasonable. The residual presumption may not be enlisted unless the usual rules of statutory interpretation have been applied and are unavailing in an attempt to determine the meaning of the provision: *Placer Dome*, at para. 24. As I will explain, there is no need to resort to the residual presumption because the principles of statutory interpretation allow us to ascertain the meaning of the statutory provisions in issue.

The Principles Applied

50 For the following reasons, I would give effect to this ground of appeal and hold that the HWP is an "unfunded benefits plan" as the term is defined in s. 1(1) of the *RSTA*, and thus subject to RST.

51 In its essence, the dispute fastens upon the meaning to be accorded to the clause "that could otherwise be obtained by taking out a contract of insurance" within the exhaustive definition of the term "unfunded benefits plan" in s. 1(1) of the *RSTA*. The appeal judge concluded that since most employers who enrolled in the HWP would not be able to obtain insurance coverage, they were not required to pay RST on the amount they paid to Capcorp.

52 The parties occupy common ground on two of the essential ingredients of the definition of "unfunded benefits plan":

i. that the HWP is a plan; and

ii. that the HWP is a plan "which gives protection against risk to an individual".

53 I am persuaded that the HWP falls within the sweep of the definition of "unfunded benefits plan" and thus is subject to the RST assessment levied by the Minister. I will begin by examining the plain language of the definition, before assessing the broader context of the *Act* and policy considerations relevant to Capcorp's proposed interpretation.

Plain Meaning

54 In my view, the plain meaning of the definition of an "unfunded benefits plan" in s. 1(1) is ambiguous. I agree with the Minister that the definition is ostensive, in that it explains the concept of an "unfunded benefits plan" by reference to a contract of insurance. A contract of insurance protects a policy holder against defined risks. Healthcare costs beyond those covered by

a provincial healthcare plan. Prescription drug costs. Dental care. Vision care. Hearing care. Protection against income loss due to illness or accident.

55 These examples illustrate the types of "protection against risk" that may be provided through both contracts of insurance and unfunded benefits plans. The question before us is whether the term "unfunded benefits plan" includes a plan that provides protections generally available under contracts of insurance, but unavailable to specific participants because of their pre-existing medical conditions, or some other reason.

56 This question is not resolved by the plain language used to define an unfunded benefits plan in s. 1(1), contrary to Capcorp's submission. If anything, the statutory definition supports the Minister's proposed interpretation. I agree that the use of the auxiliary verb "could" in the phrase "could otherwise be obtained by taking out a contract of insurance" refers to a possibility, to potential rather than actual. What matters, it would appear, is the potential availability of a contract of insurance to protect against the risk, not congruency between the plan and contract in terms of enrolment requirements and extent of coverage.

57 Moreover, the phrase "could otherwise be obtained . . . " can be reasonably read as referring to the "protection against risk" provided by a benefits plan, and not the specific individual to whom protection is being provided. Put differently, what counts is whether the protection against risk "could otherwise have been obtained through a contract of insurance", and not whether the specific individual being insured could have obtained the coverage. It also bears mentioning that the expansive definition of "protection against risk to an individual" does not exclude from its reach a plan that provides more extensive coverage than a contract of insurance, either in terms of benefits paid or eligibility requirements.

58 For these reasons, the plain language within s. 1(1) does not resolve the interpretive issue before us.

Legislative Purpose and Efficient Administration

59 The legislative purpose for taxing benefits plans supports the interpretation advanced by the Minister. Benefits plans became subject to RST following an amendment to the *RSTA*: Bill 138, *An Act to amend the Retail Sales Tax Act*, 3rd Sess., 35th Leg., Ontario, 1994. The explanatory notes accompanying Bill 138 make clear that the legislature decided to tax benefits plans because they were adjudged to be a substitute for insurance:

> As well, those providing funded and unfunded benefits plans, in lieu of insurance, that cover risks to an individual, such as death, disability, loss of income due to illness or accident, and payments for supplemental health care, drugs, dental and other expenses, will be liable to pay tax on contributions into a funded plan or on net benefits paid out of an unfunded plan. Those who are covered under either type of plan will be liable to pay tax on the contributions they made [Emphasis Added].

60 Excerpts from the legislative debate on Bill 138 also suggest that benefits plans can be viewed as a form of self-insurance:

> Bill 138 says a benefit plan is a plan that gives protection against risk to an individual that could otherwise be obtained through insurance. Such plans would typically cover payment on death or disability, supplement health care, drugs, dental care, vision care, hearing care or protection from loss of income due to illness or accident.
>
> What's interesting about this definition, and I mentioned it just a few moments ago, is that where an employer self-insures and doesn't go out and purchase the plan but offers this benefit to their employee, the tax applies.
>
> . . .
>
> What's really interesting about this is that it clearly defines what happens when an employer self-insures. It defines what a plan is, and it's very clear that they were attempting to close any loophole that might give any flexibility [Emphasis Added]. [1]

61 Therefore, benefits plans — funded or unfunded — are taxed because the legislature has determined that such plans are substitutes for insurance, and should therefore receive similar tax treatment to contracts of insurance. Crucially, a plan does not cease to be a substitute for a contract of insurance simply because it provides protections above and beyond those that specific

plan members could have obtained in the marketplace. To hold otherwise would arbitrarily exclude some benefits plans from the scope of s. 1(1), unduly restricting the provision's reach.

62 Additionally, the interpretation by the appeal judge of the term "unfunded benefits plan" undermines the consistency, predictability and workability of the provision, an essential ingredient of the interpretation of tax legislation: see *Canada Trustco*, at paras. 11-12; *Placer Dome*, at para. 21. For example, the appeal judge's interpretation would require the Minister to determine the historical state of the insurance market for the entire period of an audit before determining whether a benefits plan should be taxable. Where an individual plan member's insurability is a deciding factor, the Minister would have to get medical information about each member to effectively audit the plan. Absent clear statutory wording, I do not accept that the legislature intended to introduce such difficulties into the process of taxing unfunded benefits plans.

63 For these reasons, I am satisfied that the appeal judge erred in his interpretation of the definition of "unfunded benefits plan" in s. 1(1) of the *RSTA*. My discussion of the second ground of appeal explains why, under the proper interpretation, the Minister's assessment must be restored.

Ground # 2: The Burden of Proof Issue

64 The second ground of appeal asserts that the appeal judge erred by prematurely shifting the onus of proof to the Minister in the absence of any evidence dislodging the initial obligation on Capcorp to "demolish" the assumptions on which the Minister relied in his assessment.

65 A brief reference to the evidence adduced before the appeal judge and his reasons will help to situate this claim of error in its appropriate surroundings.

The Evidentiary Foundation

66 On the appeal in the Superior Court of Justice, Andrew Noseworthy, the Chief Executive Officer of Capcorp, testified that the HWP was intended to replace an "individual" contract of insurance and serve as an alternative to such a contract for a certain constituency. He said that "individual" contracts of insurance do provide coverage for the costs of various services, such as prescription drugs, semi-private hospital accommodation, and vision, hearing and dental care. However, the benefits under "individual" contracts of insurance are more limited and the insured is generally required to pass a medical examination. But where there are enough employees to enter into a contract for group insurance, an individual employee's medical history will not necessarily prevent that employer from obtaining group coverage.

67 Mr. Noseworthy gave evidence that the HWP could provide unlimited coverage for all health and dental expenses, did not require a medical examination and could cover any dependent who satisfies the eligible dependent criteria for the medical expense tax credit under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). According to Mr. Noseworthy, owner-managers generally chose unlimited coverage under the HWP.

68 Mr. Noseworthy and an audit manager with the Ministry of Finance testified that, as a general rule, the health, dental and vision care covered by the HWP could be obtained by taking out a contract of insurance.

The Reasons of the Appeal Judge

69 In a passage excerpted earlier the appeal judge concluded that the evidence of Mr. Noseworthy on behalf of Capcorp established a *prima facie* case that planholders — individual owner/managers — could not obtain insurance coverage for the same risks covered by the HWP. Since the Minister had failed to adduce any contrary evidence, the appeal judge quashed the Minister's assessment.

The Arguments on Appeal

70 The Minister begins with an uncontroversial submission. In tax cases, the burden of proof rests on the taxpayer who contests an assessment to demolish the assumptions on which the assessment is grounded. The standard of proof required is

a *prima facie* case. This means that the case for the taxpayer must be supported by evidence which raises such a degree of probability in its favour that it must be accepted, if believed, unless it is rebutted or the contrary is proven.

71 In this case, the Minister continues, the evidence adduced by Capcorp fell short of the *prima facie* case standard. There was no evidence about the insurability of specific persons during the assessment period and no evidence about the state of the insurance marketplace during that same time. Said differently, in the absence of evidence to support a *prima facie* case that HWP subscribers could not obtain equivalent insurance coverage, Capcorp failed in its burden. The assessment should stand.

72 Capcorp accepts not only that the initial burden of proof settles upon it, but also the standard of proof required to discharge that burden. But a taxpayer may rebut that burden in a variety of ways. And one way is by demonstrating that the Minister's assumptions on which the assessment is grounded, that participants in the HWP could get insurance to protect against the same risks, is wrong.

73 In this case, Capcorp says, its evidence before the appeal judge demonstrated the incorrectness of the Minister's assumption. Participants in the HWP could *not* obtain the same coverage under an insurance policy. Limitations were imposed. Insurability. Extent of coverage. The failure of the Minister to adduce contrary evidence left the Minister's assumptions demolished and the assessment invalid.

The Governing Principles

74 Under s. 18(1) of the *RSTA*, where a vendor has failed to make a return or a remittance as required under the Act, the Minister may make an assessment of the tax collected by the vendor for which the vendor has not accounted and the assessed amount is deemed to be the tax collected by the vendor. Subject to being varied or vacated on an objection or appeal and subject to a reassessment, the Minister's assessment is deemed to be valid and binding on the taxpayer or vendor: *RSTA*, s. 18(8).

75 It follows from these statutory provisions that the taxpayer bears the burden of establishing that the factual findings (or assumptions) on which the Minister grounded the assessment are wrong: *Placer Dome*, at para. 25.

76 In taxation, the standard of proof is proof on a balance of probabilities: *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336 (S.C.C.), at para. 92. In making assessments, as we have already seen, the Minister proceeds on assumptions. And so it is that the initial burden settled upon the taxpayer is to "demolish" the assumptions that underpin the assessment. To do this, the taxpayer must make out at least a *prima facie* case that the Minister's assumptions are wrong: *Hickman Motors*, at paras. 92-93. It is only where this *prima facie* case has been made out, that the burden shifts to the Minister. Where the burden shifts in this way and the Minister adduces no evidence whatsoever, the taxpayer succeeds and the assessment is vacated: *Hickman Motors*, at para. 95.

The Principles Applied

77 I agree with the Minister and would give effect to this ground of appeal.

78 In large measure, the appeal judge's error in finding that Capcorp's evidence constituted a *prima facie* case that rebutted the assumptions underlying the Minister's assessment followed from the judge's error in interpreting the term "unfunded benefits plan" under s. 1(1) of the Act. Capcorp's evidence was general in nature. It revealed a lack of congruency or equivalency between the HWP and insurance coverage. In a requirement of insurability for individuals, but maybe not for groups. In the extent of coverage afforded. But the definition of "unfunded benefits plan" is not so exacting, requiring only that the protection against risk to an individual afforded by the plan "could otherwise be obtained by taking out a contract of insurance". And "protection against risk to an individual" includes *any* undertaking to pay, among other things, "for supplemental healthcare, drugs, dental care, vision care, hearing care or for protection against loss of income due to illness or accident . . . ". Capcorp's evidence fell short of establishing a *prima facie* case that these types of protections could not "otherwise be obtained through contracts of insurance", on the proper construction of the phrase.

OTHER GROUNDS OF APPEAL

79 Capcorp sought to uphold the result reached by the appeal judge — setting aside the Minister's assessment — on four additional grounds. None are availing.

80 First, Capcorp argued that each Notice of Participation submitted to it by participating employers was a "contract of insurance . . . for the life, health or physical well-being of insured individuals". The HWP, the argument goes, was therefore exempt from taxation under s. 2.1(8)(c) of the *RSTA*.

81 This submission must fail. The *RSTA* clearly distinguishes between benefits plans and contracts of insurance, at multiple points.[2] As the HWP constitutes an "unfunded benefits plan", it would be incongruous if it also qualified as a "contract of insurance" for the purposes of the *RSTA*. Indeed, Capcorp's position would render any employer benefits plan for the health and well-being of individual employees exempt from the *RSTA*, contrary to the clear indicia of legislative intent outlined above at paras. 59-60.

82 Second, Capcorp submitted that it is not liable to pay RST under s. 2.1(1) of the *RSTA*, as it is not an insurer or a planholder. This submission does not assist Capcorp. Even if Capcorp were not required to pay RST under s. 2.1(1) of the *RSTA*, it was required to collect and remit it as a vendor under s. 10 of the Act.

83 Third, Capcorp argued, as it did before the appeal judge, that it exercised reasonable diligence in determining not to pay RST. I disagree. Capcorp was only assessed for amounts of RST it should have collected. These were obligations that endured despite Capcorp's contrary interpretation of the requirements of the *RSTA*.

84 Fourth, Capcorp renewed its submission before the appeal judge that the Minister's Notice of Assessment failed to set out the grounds on which a penalty had been imposed. Like the appeal judge, I reject this submission. I agree with the appeal judge that the nature of the penalty was implicit in the Notice of Assessment; specifically, the amount of RST that Capcorp should have been collecting from employers.

CONCLUSION

85 For these reasons, I would allow the appeal, set aside the decision of the appeal judge and affirm the assessment of the Minister.

86 The Minister is entitled to costs of this appeal and the proceedings at the Superior Court. I would fix costs at $176,000, inclusive of disbursements and all applicable taxes.

***S.E. Pepall J.A.*:**

I agree.

***B.W. Miller J.A.*:**

I agree.

Appeal allowed.

Footnotes

1 Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl., 3rd Sess., No. 110 (11 April 1994), at pp. 5508-5509 (Elinor Caplan).

2 Most significantly, in s. 1(1) and s. 2.1(1).

End of Document

TAB 2

2005 BCCA 72
British Columbia Court of Appeal

Peace River Assessor, Area No. 27 v. Burlington Resources Canada Ltd.

2005 CarswellBC 275, 2005 BCCA 72, [2005] B.C.W.L.D. 1946, [2005] B.C. Stated Case 471, [2005] B.C.J. No. 248, 137 A.C.W.S. (3d) 240, 209 B.C.A.C. 59, 23 Admin. L.R. (4th) 130, 345 W.A.C. 59, 37 B.C.L.R. (4th) 151, 5 M.P.L.R. (4th) 248

In The Matter Of The Assessment Act, R.S.B.C. 1996, Chapter 20, Section 65

And In The Matter Of An Appeal To The Property Assessment Board Of British Columbia

Burlington Resources Canada Ltd. (Appellant / Respondent) and
Assessor of Area #27 - Peace River (Respondent / Appellant)

Prowse, Ryan, Smith, Thackray, Oppal JJ.A.

Heard: October 15, 2004
Judgment: February 15, 2005 *
Docket: Vancouver CA031210

Proceedings: reversing (2003), [2003] B.C.W.L.D. 791, 41 M.P.L.R. (3d) 110, B.C. Stated Case 471, 6 Admin. L.R. (4th) 82, 2003 BCSC 1272, 2003 CarswellBC 2014 (B.C. S.C. [In Chambers])

Counsel: B.J. Wallace, Q.C., G.J. Ludwig for Appellant
J.H. Shevchuk for Respondent

Subject: Public; Tax — Miscellaneous; Property; Municipal

APPEAL from decision of chambers judge reported at *Peace River Assessor, Area No. 27 v. Burlington Resources Canada Ltd.* (2003), 41 M.P.L.R. (3d) 110, B.C. Stated Case 471, 6 Admin. L.R. (4th) 82, 2003 BCSC 1272, 2003 CarswellBC 2014 (B.C. S.C. [In Chambers]), regarding proper classification of pipeline for assessment purposes.

***Smith J.A.*:**

Introduction

1 This appeal is brought with leave pursuant to s-s. 65(9) of the *Assessment Act*, R.S.B.C. 1996, c. 20 ("the *Act*"), which provides for an appeal on a question of law from a decision of the Supreme Court on a case stated by the Property Assessment Appeal Board pursuant to s-s. 65(1):

> 65 (1) Subject to subsection (2), a person affected by a decision of the board on appeal, including a local government, the government, the commissioner or an assessor acting with the consent of the commissioner, may require the board to refer the decision to the Supreme Court for appeal on a question of law alone in the form of a stated case.
>
> . . . . .
>
> (9) An appeal on a question of law lies from a decision of the Supreme Court to the Court of Appeal with leave of a justice of the Court of Appeal.

2 In issue is the proper classification of a natural gas pipeline for assessment purposes under the *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 (including amendments up to B.C. Reg. 67/2001) ("the *Regulation*"), enacted in accordance with s-s. 19(14) of the *Act*:

> (14) The Lieutenant Governor in Council must prescribe classes of property for the purpose of administering property taxes and must define the types or uses of land or improvements, or both, to be included in each property class.

3 The relevant provisions of the *Regulation* are:

> **Class 2 — utilities**
>
> 2. Class 2 property includes only
>
> (a) land or improvements used or held as track in place, right of way or a bridge for the purposes of, or for purposes ancillary to, the business of transportation by railway, and
>
> (b) land or improvements used or held for the purposes of, or for purposes ancillary to, the business of
>
> (i) transportation, transmission or distribution by pipeline,
>
> (ii) telecommunications, including transmission of messages by means of electric currents or signals for compensation,
>
> (iii) generation, transmission or distribution of electricity, or
>
> (iv) receiving, transmission and distribution of closed circuit television,
>
> except that part of land or improvements
>
> (c) included in Classes 1, 4 or 8,
>
> (d) used as an office, retail sales outlet, administration building or for an ancillary purpose, or
>
> (e) used for a purpose other than a purpose described in paragraphs (a) or (b).
>
> . . . . .
>
> **Class 5 — light industry**
>
> **5.** Class 5 property shall include only land or improvements, or both, used or held for the purpose of extracting, processing, manufacturing or transporting of products, and for the storage of these products as an ancillary to or in conjunction with such extraction, processing, manufacture or transportation, but does not include those lands or improvements, or both,
>
> (a) included in class 2 or 4,
>
> (a.1) used or held for the purposes of, or for purposes ancillary to, the business of transportation by railway,
>
> (b) used principally as an outlet for the sale of a finished product to a purchaser for purposes of his own consumption or use and not for resale in either the form in which it was purchased or any other form, and
>
> (c) used for extracting, processing, manufacturing or storage of food, non-alcoholic beverages or water.
>
> [Emphasis added]

4 The Assessor classified the pipeline as Class 2 property. The 2002 Property Review Panel affirmed the classification but the Board allowed an appeal by Burlington, the owner of the pipeline. The Board concluded that the pipeline was not Class 2 property and ordered that the assessment roll be amended to classify it as Class 5. The learned chambers judge found that the Board erred in law in so doing. For the reasons that follow, I have concluded that the chambers judge erred in law, that the Board did not err in law, and that the appeal should be allowed.

5 It should be noted that the *Act* and the *Regulation* have been amended in material respects since the decision under appeal was handed down. We were advised by counsel that the amendments were a legislative response to the decision. These reasons are based on the provisions of the legislative and regulatory scheme as they existed prior to the enactment of the amendments.

The Material Facts

6 The material facts are set out in the stated case:

> 1. The Respondent, Burlington Resources Canada Ltd. ("Burlington"), is an oil and gas producer. It owns a pipeline through which it transports gases from one of its processing plants located in north eastern British Columbia (the "Noel Plant") to another of its plants located in Alberta (the "Elmworth Plant"). The pipeline between the Noel and Elmworth plants is in two parts. The first is a 16" OD pipeline that runs from the Noel Plant to Burlington's "U" Compressor Station. The second part is a 10.75" OD pipeline that runs from the "U" Compressor Station to the Elmworth Plant. The subject of this appeal is the 16" OD pipeline only (the "Pipeline"). The issue before the Board was whether the Pipeline falls within class 2 (utilities) or class 5 (light industrial) of the *Prescribed Classes of Property Regulation*, BC Reg. 438/81 for the 2002 assessment roll.
>
> 2. The parties agreed on the following facts submitted in an agreed statement of facts:
>
> a) Burlington is the owner/operator of a 16" OD pipeline constructed in 1989 (the Pipeline) that runs outbound for a distance of 39.130 km from Burlington's Noel Plant to Burlington's "U" compressor station;
>
> b) Roll #27-59-759-036210.005 land and improvements are currently valued on the 2002 Roll at $19,000 and $6,657,000 respectively;
>
> c) Burlington is the owner/operator of a 10.75" OD pipeline that runs outbound for a distance of 29.260 km from the "U" compressor station of Burlington's Elmworth Gas Plant. 1.747 km of this pipeline is located in British Columbia and the remainder is in Alberta;
>
> d) prior to June 1999 the gas produced at the Noel Plant and carried by the Pipeline entered the Nova/Trans Canada Pipelines ("Nova") sales line at the Mountain Valley meter station just inside the Albert border for distribution to the North American natural gas market;
>
> e) Burlington was required to pay to Nova a pipeline tariff or fee for Nova's pipeline transportation service of the Noel Plant gas production;
>
> f) Burlington's decision to reroute the Noel Plant gas production to the Elmworth Plant in June 1999 was an economic one in that the price of natural gas liquids and condensate removed in the deep cut production process at the Elmworth Plant became sufficiently high to make the process economically viable;
>
> g) "sweet" gas, not "sour" gas, is produced from Brassey, Kelley Windsor, Sundown and Noel gas fields located in northeast British Columbia (the "Noel gas");
>
> h) raw "sweet" gas is processed at the Noel Plant (removal of water and condensates) and British Columbia royalty payments are calculated based on the volume of pipeline quality "sweet" gas produced;

i) gas wells owned by producers other than Burlington also produce into the Noel Plant for subsequent processing. 75%-80% of the gas volume produced is from Burlington's gas wells and 20%-25% from other gas wells;

j) Burlington charges the other producers a tariff for transporting and processing their gas because they were not involved in the construction of the various pipelines, the Noel Plant, the "U" compressor station or the Elmworth Plant;

k) after the raw gas is processed at the Noel Plant it is further processed (removal of natural gas liquids) at Burlington's deep-cut facility located in the Elmworth Plant;

l) the Noel gas is metered and co-mingled with Alberta gas just prior to the shallow cut process (dewpoint analysis to determine moisture content) at the Elmworth Plant;

m) after the shallow cut process the co-mingled gas is further processed through the deep cut facility;

n) the deep cut liquids extracted from the natural gas and the remaining volume of natural gas (now at a lower heat content) proceed through the sales meter. The natural gas outbound from the Elmworth Plant can go either to Nova and/or Alliance Pipeline Limited ("Alliance"), while outbound natural gas liquids and condensate goes to Pembina Pipelines Corporation ("Pembina") for distribution to the North American natural gas and/or natural gas liquids markets;

o) should the Elmworth Plant go off-line, Burlington would be unable to produce natural gas liquids. The gas would bypass the Elmworth Plant and go directly to Nova's and/or Alliance's pipeline systems without further processing;

p) Burlington is required to pay Nova, Alliance and Pembina a tariff or fee applied to the volume of natural gas or natural gas liquids for providing the pipeline transportation service to ship Burlington's product through their pipeline distribution systems;

q) the other producers are also required to pay Nova, Alliance and/or Pembina a tariff or fee applied to their volume of natural gas or natural gas liquids to ship their product through the pipeline distribution systems.

3. The Board found that the use of the Pipeline for the purposes of classification is not defined by the state or quality of the gas it carries, but by its origin and destination. The Board found the Pipeline is used to carry natural gas (defined in the *Act* as "a gaseous mixture of hydrocarbon and other gases received from wells, and includes that gas after refinement") from a shallow cut treatment plant to a deep cut treatment plant. With this use, the Pipeline does not fall within either the industry or the *Rights of Way Regulation* definitions of "gathering pipeline". The Pipeline does not originate at a wellhead or wellhead assembly. The Pipeline also does not fall within the industry definition of "transmission pipeline". Its destination is a treatment plant.

4. The Board found that for pipelines that are not easily categorized as either "gathering" or "transmission" pipelines it is necessary to consider all factors relevant to the Class 2 criteria in the *Regulation* and determine, on a case by case basis, whether those criteria are met.

5. The Board found that the Pipeline is used for the purpose of Burlington's undertaking to produce natural gas for its chosen market. It is not used to get the products to distribution pipelines. The natural gas is not in marketable form until the Elmworth deep cut process is completed. Except for the few days per year that the Elmworth Plant goes off-line, the Noel gas that was transported by the Pipeline to the Elmworth Plant enters the Nova, Alliance and/or Pembina pipelines in a different form than when it left the Pipeline. It has been processed into natural gas liquids and natural gas that have a lower heat content.

6. The Board found that the Pipeline is not used for the purpose of the business of transmission by pipeline. It is used for the production part of Burlington's undertaking, for the purpose of transporting natural gas for further processing into the form in which it will enter the Nova, Alliance and/or Pembina pipelines for transmission to markets.

7. The Board found the Pipeline met the requirements for Class 5. It is "used or held for the purpose of ...processing, manufacturing or transporting of [natural gas] products ..." and is not included in Class 2.

8. The Board ordered the Assessor to amend the roll so as to classify the Pipeline as Class 5 — light industry.

7 The Board submitted its reasons as part of the stated case. Accordingly, we may refer to the reasons to clarify the summary of the reasons provided in the statement of material facts.

The Reasons of the Board

8 Prior to Burlington's implementation of the deep cut process at the Elmworth Plant, the pipeline was assessed as a transmission pipeline under Class 2, since it carried marketable gas to Burlington's customers. The issue joined by the parties before the Board was whether the pipeline continued to be used for "transmission of natural gas by pipeline" within the meaning of those words in s-s. 2(b)(i) of the *Regulation*.

9 Burlington contended that the institution of the secondary processing of the gas changed the use of the pipeline for classification purposes. It submitted that the "business of transmission by pipeline" did not commence until after processing had been fully completed at the Elmworth Plant and that the pipeline should properly be assigned to Class 5 by operation of s. 5 of the *Regulation*, since it was "used ... for the purpose of ... processing" the natural gas.

10 The Assessor replied that the pipeline continued to be used for the purpose of "the business of transmission by pipeline" despite the additional processing because it continued to carry marketable gas. It argued that "gathering pipelines" carry noncommercial gas (gas that has not had its impurities removed) while "transmission pipelines" carry commercial gas. Since the pipeline leaving the Noel Plant continued to convey marketable gas as it had before, the Assessor said, it remained a transmission pipeline within s-s. 2(b)(i) of the *Regulation*, and the fact that Burlington further refined what was already marketable gas was irrelevant. According to the Assessor, Burlington's submission focussed on its use of the pipeline for its business of producing natural gas, but the proper approach was to consider the actual use of the pipeline without regard to the commercial business of which it formed a part, citing *Nelson/Trail Assessor, Area No. 21 v. Cominco Ltd.* (1998), 48 B.C.L.R. (3d) 371 (B.C. C.A.). That actual use, the Assessor submitted, is the transmission of marketable gas.

11 The Board began its analysis by referring to its decision in *Westcoast Transmission Co. Ltd. v. Assessor of Area 27 — Peace River* dated February 14, 1989 in which it had decided that "gathering pipelines", which transported natural gas from wellhead to treatment plant were not used for the "business of transmission by pipeline" under s-s. 2(b)(i) of the *Regulation* and should therefore be assigned to Class 5. The Board evoked its discussion of the meanings of "transportation", "transmission", transmission pipeline", and "gathering pipeline" in its reasons in that earlier decision, stating,

> [37] The issue of whether a natural gas pipeline falls within Class 2 or Class 5 has been considered in *Westcoast Transmission Co. Ltd. v. Assessor of Area 27 — Peace River*, *supra*, a 1989 decision of this Board. Westcoast Transmission Co. Ltd. owned and operated an integrated natural gas pipeline system, and was in the business of extraction, treatment and transmission of natural gas. (Note that in the industry "transmission" refers to the bulk movement of natural gas, while "transportation" refers to the bulk movement of oil.) Westcoast Transmission's assets included pipelines that carried "sour" natural gas from the wellhead to treatment plants, treatment plants that processed the "sour" gas into "sweet" gas, and pipelines that carried the treated "sweet" gas to markets. It received the major portion of its income from transmission of natural gas, and was regulated as a utility. The issue before the Board was whether the pipelines that carried natural gas from wellhead to treatment plants (referred to as gathering pipelines) were properly classified as Class 2 (utilities). Because Westcoast Transmission was in the business of the transmission of natural gas, the Assessor classified all of its pipelines as Class 2. Other gathering pipelines in the province were classified as Class 5 (industrial). The Board found that

the classification scheme set out in s. 26(8) [now s. 19(14)] of the *Act* and s. 2 of the Classification Regulation was based on types and uses of land or improvements, not on who owns the land or improvements. The Board concluded that Westcoast Transmission's gathering lines, like other gathering lines in the province, did not fall within Class 2. Although they were owned by a company engaged in the business of transmitting natural gas, the pipelines from wellhead to treatment plant were not used for the purposes of the business of transmission.

[38] In reaching its decision, the Board found the distinction between "gathering" and "transmission" pipelines to be helpful. The Board referred to the Rights of Way Regulation which defined "gathering pipelines" as pipelines "used to transport gas from the wellhead to the gas treatment plant." The Board also accepted the following definitions used in the natural gas industry:

- transmission pipeline - "a pipeline that conveys gas from a gathering line, treatment plant, storage facility, or field collection point in a gas field to a distribution line, service line..."

- gathering pipeline - "a pipeline that conveys gas from a wellhead assembly to a treatment plant, transmission line, distribution line, or service line."

[39] The Board concluded that "gathering lines" were intended to be included in Class 5. The pipeline in question in the Westcoast Transmission case fit squarely within both the industry and the Rights of Way Regulation definitions of "gathering pipeline". It carried gas from wellhead to a gas treatment plant.

[Emphasis added]

12 The Board noted that the parties "do not dispute that *Westcoast Transmission* decided that pipelines from a gas field to a processing plant ("gathering pipelines") fall within Class 5, and that pipelines from a processing plant to pipelines that distribute the gas to markets ("transmission pipelines") fall within Class 2". It observed, however, that the pipeline in question does neither. Rather, it said, the pipeline "carries gas from one processing plant to another". It continued,

[41] ...A gathering pipeline transports natural gas from wellhead to treatment plant (Rights of Way Regulation) or from wellhead to treatment plant, transmission line, distribution line or service line (industry definition). A transmission line conveys natural gas from a gathering line, treatment plant, storage facility, field collection point to a distribution line, service line....

13 The Board concluded that "the use of the Pipeline for the purposes of classification is not defined by the state or quality of the gas it carries, but by its origin and destination". Since the pipeline carries gas from one processing plant to another, the Board said, it

[42] ... does not fall within either the industry or the Rights of Way Regulation definitions of "gathering pipeline". The Pipeline does not originate at a wellhead or wellhead assembly. The Pipeline also does not fall within the industry definition of "transmission pipeline". Its destination is a treatment plant.

14 When pipelines are not easily categorized as either gathering or transmission pipelines, the Board reasoned, it is necessary to "consider all factors relevant to the Class 2 criteria in the Classification Regulation and determine, on a case by case basis, whether those criteria are met". The Board referred to the statement of this Court in the *Cominco* decision, *supra*, that "business" in s-s. 2(b) of the *Regulation* should be construed to mean "concern", "engagement", or "undertaking". It said,

[49] Burlington is in the business of producing natural gas. Its undertaking is to extract natural gas from gas fields, process that gas and get it to pipelines that will distribute the gas to markets. The Board understands the business of transmission by pipeline to be the business of transporting processed natural gas to markets. Thus the business of transmission occurs after the processing of the natural gas is completed. Therefore an important factor is whether the processing of the Noel gas is completed when the gas enters the Pipeline.

[Emphasis added]

15 The Board accepted that it was up to Burlington to make a business decision as to what its product would be and at what stage the product was completed and marketable. It concluded,

> [51] ...The Board finds that the Pipeline is used for the purpose of Burlington's undertaking to produce natural gas for its chosen market. It is not used to get the products to distribution pipelines, because the natural gas is not in marketable form until the Elmworth deep cut process is completed. Except for the few days per year that the Elmworth Plant goes off-line, the Noel gas that was transported by the Pipeline to the Elmworth Plant enters the Nova, Alliance and/or Pembina pipelines in a different form than when it left the Pipeline. It has been processed into natural gas liquids and natural gas that have a lower heat content.
>
> [52] The Board finds that the Pipeline is not used for the purposes of the business of transmission by pipeline. It is used for the production part of Burlington's undertaking, for the purpose of transporting natural gas for further processing into the form in which it will enter the Nova, Alliance and/or Pembina pipelines for transmission to markets.
>
> [Emphasis added]

The Questions Stated for the Supreme Court

16 The questions stated for the opinion of the Supreme Court pursuant to s-s. 65(1) of the *Act* were:

> 1. Did the Property Assessment Appeal Board ("Board") misinterpret and misapply *Assessor of Area 21 — Nelson/ Trail v. Cominco Ltd.* (1997) Stated Case 384 (B.C.C.A.) and thereby err in law when it determined that the land and improvements which are the subject of this appeal ("subject property") are not "...used or held for the purposes of, or for purposes ancillary to, the business of (i) transportation, transmission or distribution by pipeline" as those words are found in Section 2(b) of B.C. Regulation 438/81 ("Regulation")?
>
> 2. Did the Board otherwise misinterpret and misapply the words "...the business of (i) transportation, transmission or distribution by pipeline" found in Section 2 of the Regulation and thereby err in law when it determined that the subject property was not land and improvements that should be classified as Class 2 — Utility under the Regulation?
>
> 3. Did the Board err in law in paragraph 49 of its Reasons for Decision when it interpreted the phrase "business of transmission by pipeline" to mean "the business of transporting processed natural gas to markets" in the context of Section 2(b) of the Regulation?
>
> 4. Did the Board err in law when it failed to consider whether the subject property was used or held for the purposes of, or for purposes ancillary to, the business of "transportation" or, alternatively, "distribution" by pipeline in the context of Section 2(b) of the Regulation?
>
> 5. Did the Board err in law when it determined that the subject property came within Section 5 of the Regulation?
>
> 6. Did the Board err in law by not giving effect to the exclusionary wording in Section 5(a) of the Regulation?

The Reasons of the Chambers Judge

17 The chambers judge first addressed the standard of review. He noted the distinction between questions of law, fact, and mixed law and fact, quoting from *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at 766:

> [35] ...Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed fact/ and law are questions about whether the facts satisfy the legal test.

18 He concluded that all of the stated questions raise "whether there has been misinterpretation or misapplication" of the *Regulation* and that they are accordingly questions of law, citing *Prince George Assessor, Area No. 26 v. Cal Investments Ltd.*, [1993] B.C.J. No. 93 (B.C. S.C.), apprvd. *Gemex Developments Corp. v. Coquitlam Assessor, Area No. 12* (1998), 62 B.C.L.R. (3d) 354, [1998] Stated Case 386 (B.C. C.A.), where Ryan J. (as she then was) said, ¶ 18:

> For purposes of the Act a "question of law" has been defined as follows:
>
> 1. A misinterpretation or misapplication by the Board of a section of the Act.
>
> 2. A misapplication by the Board of an applicable principle of general law.
>
> 3. Where the Board acts without any evidence.
>
> 4. Where the Board acts on a view of the facts which could not reasonably be entertained. (*Crown Forest Industries*, [*Crown Forest Industries Ltd. v. Assessor of Area No. 06 — Courtenay*, [1985] B.C.J. No. 163 (Q.L.) (S.C.)] at p. 191 [This case was appealed to the Court of Appeal. It is reported at 10 B.C.L.R. (2d) 145. The court did not disapprove of the principles as set out by Southin, J. in the court below.]; *Westcoast Transmission, [Westcoast Transmission v. Assessor of Area 9 — Vancouver*, B.C.S.C. Stated Cases, Case 235, at 1357, (S.C.)] at pp. 1348-1349).
>
> 5. Where the method of assessment adopted by the Board is wrong in principle. (*Lornex Mining Ltd. v. Assessor of Area* 23 — Kamloops, [1987] B.C.J. No. 2555, No. A863217, Vancouver Registry, December 30, 1987, B.C.S.C. at p. 7).

19 The chambers judge decided that the degree of deference to be afforded to the Board on questions of law raised in this context is high and that the standard of review is patent unreasonableness. He concluded further that the meanings given by the Board (at ¶ 3-7 of the stated case) to the relevant words in ss. 2 and 5 of the *Regulation* are patently unreasonable and that no reasonable Board acting judicially could have come to the same determination. Accordingly, he answered each of the stated questions in the affirmative.

The Issues

20 First, Burlington alleges that the chambers judge was wrong to conclude that the stated questions are questions of law; in its submission, they are questions of mixed fact and law and, as such, are not appealable under s-s. 65(1) of the *Act*. As I will explain, I have concluded that the questions are questions of law. Accordingly, the next issue is whether the chambers judge applied the proper standard of review. As I will also explain, I agree with the parties that he did not. As a result, we must review the stated questions anew, applying the proper standard: *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.) ¶ 43-44.

21 On the review *de novo*, the paramount question is whether the Board erred in its interpretation of s-s. 2(b)(i) of the *Regulation*. The Assessor alleges that it did so in two respects. First, it submits that the Board misinterpreted the meanings of the words "business", "transportation", "transmission", and "distribution". As to "business", the Assessor contends that the Board misinterpreted the decision of this Court in *Cominco*, *supra*, and that it applied an erroneous principle by classifying the pipeline on the basis of Burlington's business — the commercial production and sale of natural gas — when it should have focussed on the actual use of the pipeline. As to "transportation", "transmission", and "distribution", the Assessor submits that the Board transgressed proper principles of statutory interpretation by giving the words their technical meanings in the industry. It contends as well, in a subsidiary issue, that the Board erred in law by finding the meanings given in the industry to these words without any positive evidence of those meanings.

22 Finally, Burlington contends that, if the Board classified the pipeline on the basis of its business as a producer of natural gas, as the Assessor alleges and the chambers judge found, it did not err in so doing: it submits that the *Cominco* decision was decided incorrectly. The Chief Justice convened a panel of five judges to hear this appeal on the basis of this submission.

Discussion

1. — Questions of law or mixed fact and law

23 Questions 5 and 6 of the stated case are not in issue. The parties agreed at the hearing of this appeal that these questions should not have been considered by the chambers judge because the scheme of the *Regulation* is such that the analysis must begin with a consideration of whether the pipeline falls within Class 2. The first four questions address that issue. If the pipeline is not in Class 2, it is agreed that it must be in Class 5. Accordingly, questions 5 and 6 are unnecessary and need not be considered further.

24 Questions that ask what are the applicable legal principles are questions of law. Thus, whether the Board misinterpreted the effect of the *Cominco* decision and whether it gave the words in s-s. 2(b)(i) of the *Regulation* incorrect meanings are questions of law. The first questions stated in Questions 1 and 2 (which are compound questions), Question 3, and Question 4 are such questions.

25 Questions that ask whether the facts satisfy the applicable legal tests are questions of mixed fact and law. Thus, the second questions contained in Questions 1 and 2, alleging misapplication of legal principles, are *prima facie* questions of mixed fact and law. However, as Iacobucci J. went on to say in *Southam* ¶ 35-37, in remarks following the passage quoted by the chambers judge, not every application of legal principle to facts will be a question of mixed fact and law. Rather, where the point in question is so general that the decision may have importance in the determination of future cases, the decision will raise a question of law: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) ¶36-37; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.) ¶ 28.

26 The two questions alleging misapplication of principle do not arise if the Board applied incorrect legal tests. On the other hand, if the Board's interpretation of s-s. 2(b)(i) of the *Regulation*, as informed by the decision in *Cominco*, is correct, the application of the Board's interpretation to this pipeline may have precedential value in future cases involving the classification of oil and natural gas pipelines. It may also apply in cases involving other properties, including those dealing with the production, transmission, transportation, and distribution of other products, such as electricity and telecommunications. Accordingly, the questions alleging misapplication of legal principle are also questions of law for purposes of this review.

27 I digress to observe that, while the description of questions of law set out in the *Cal Investments* decision, on which the chambers judge relied (¶18 above), is a useful list of examples, questions alleging the misapplication of legal principle will not always be questions of law. Such questions must be examined carefully to determine whether they are actually questions of law or whether they are truly questions of mixed fact and law.

28 The subsidiary question antecedent to the attribution of industry meanings to the words "transportation", "transmission", and "distribution" in s-s. 2(b)(i) is: what is the meaning given those words in the industry? This is a question of fact. However, the Assessor's allegation that there was no evidence to support the Board's findings of fact raises a question of law.

29 Finally, whether the meaning attributed in *Cominco* to "business" in s-s. 2(b) is incorrect is a question of the applicable legal test for classification of improvements under this regulatory provision. This is a question of law. Since *Cominco* establishes the meaning of the word "business" in s-s. 2(b) of the *Regulation*, this question may conveniently be considered with the questions concerning the alleged misinterpretation and misapplication of s-s. 2(b)(i).

2. — The standard of review

30 The proper standard of review, whether by way of judicial review or appeal, depends upon the level of deference intended by the legislature to be afforded to the decision-maker. That intention is to be discerned by examining the question in the context of four factors: the presence or absence of a privative clause or a statutory right of appeal; the relative expertise of the tribunal on the issue in question; the purpose of the legislation and the provision in particular; and the nature of the question — whether it is a question of law, fact, or mixed law and fact: *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), ¶ 21; *Q.*, *supra* ¶ 21. This approach has been labelled "the pragmatic and functional approach". The chambers judge did not employ the pragmatic and functional approach. He erred in failing to do so.

31 The pivotal questions on this appeal are those asking whether the Board misinterpreted the words in s-s. 2(b)(i) of the *Regulation*. If an improvement is within Class 2, it is excluded from Class 5 by virtue of s-s. 5(a). Therefore, the analysis must begin with whether the pipeline is within Class 2. Necessarily, the meanings must be ascertained of the underlined words and phrases in the locution "improvements *used* ... for the purposes of, or for purposes ancillary to, the *business* of *transportation, transmission, or distribution by pipeline*" in s-s. 2(b)(i) of the *Regulation*.

32 The proper standard of review for these questions must be determined in the context of the factors comprising the pragmatic and functional approach. There is no privative clause in the *Act*. However, there is a right of appeal, which is narrowly confined by s-ss. 65(1) and (9) to stated questions of law. Statutory interpretation and the application of principles of general law are questions of law that have traditionally been considered to lie exclusively within the expertise of the courts, while the expertise of the Board lies in the application of the provisions of the *Regulation* to property for purposes of classification for assessment purposes. Further, the purpose of the appeal procedures set out in s. 50 (to the Board) and s. 65 (to the courts) of the *Act* is to provide a scheme for the resolution of bilateral disputes between the Assessor and individual taxpayers. In this respect, the scheme resembles the court process.

33 These contextual factors identify a legislative intention that the questions of law raised in this case should be reviewed on a correctness standard with no deference afforded to the decision of the Board. The meaning of the regulatory provision is a question of pure statutory interpretation and, as McLachlin, C.J.C. said, speaking for the court in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.),

> [61] ...To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness....

34 Since the chambers judge applied the standard of patent unreasonableness to his review of the stated questions, we must re-examine them in light of the correctness standard.

3. — The interpretation and application of s-s. 2(b)(i) of the Regulation

35 As already noted, the meanings of the words "used" and "business" in s. 2 (now s-s. 2(b)) of the *Regulation* were in issue in *Cominco*. The question addressed was whether classification of an improvement as Class 2 depended upon the business of the owner of the improvement or upon the actual use of the improvement itself. The improvements under consideration were hydroelectric dams and the question was whether they were "used for the purpose of, or for purposes ancillary to, the business of generation, transmission or distribution of electricity" (s-s. 2(d), now s-s. 2(b)(iii)). This Court held that the legislative intent was that improvements should be classified on the basis of their actual use and that the word "business" should be taken to refer to the "concern" or "engagement" or "undertaking" of the improvement rather than to the "business" of the owner. Thus, although Cominco's business — its commercial enterprise — was the mining and smelting of ore, the actual use or "business" of its hydroelectric dams, which provided necessary electrical power to its mine and its smelter, was the generation of electricity. Therefore, the dams were within Class 2.

36 The Assessor submits that the Board misinterpreted or misapplied the *Cominco* decision. It contends that the Board classified the pipeline on the basis that it was used for the business of producing natural gas — Burlington's commercial enterprise — rather than on the basis of its actual use, which the Assessor submits was to "transport, transmit, or distribute" gas in the same form as it did before the institution of the secondary processing at the Elmworth Plant.

37 I do not agree that the Board misinterpreted the decision in *Cominco*. The parties agreed that the pipeline was to be classified on the basis of its actual use and the Board acknowledged that when it said,

> [56] ...The Act prescribes "use" as the determining factor in Class 2 and Class 5. The natural and ordinary meaning of "use" is actual use...

38 Moreover, the Board referred to the *Cominco* decision and acknowledged the Assessor's submissions that "it is the business use of the Pipeline, and not the nature of Burlington's business as a producer, that is determinative of whether the Pipeline falls within Class 2".

39 Thus, the Board had the correct legal test in mind.

40 The Assessor's alternative submission is that the Board misapplied the *Cominco* decision by classifying the pipeline on the basis of Burlington's business as a producer of natural gas rather than on the actual use of the pipeline, as it was required to do.

41 The Assessor submitted to the Board that Burlington's "business use" of the pipeline is the transmission of natural gas. However, the board concluded that the pipeline

> [52] ...is not used for the purposes of the business of transmission by pipeline. It is used for the production part of Burlington's undertaking, for the purpose of transporting natural gas for further processing into the form in which it will enter the Nova, Alliance and/or Pembina pipelines for transmission to markets.

42 The Assessor emphasizes the Board's statements that the pipeline is "not used for the business of transmission by pipeline", that it is "used for the production part of Burlington's undertaking", and that it is used "for the purpose of transporting natural gas for further processing". As well, it refers to the Board's statements that Burlington is "in the business of producing natural gas" and that "the business of transmission by pipeline [is] the business of transporting processed natural gas to markets" (¶ 49 of the Board's reasons reproduced at ¶ 14 above). Thus, it says, the Board focussed incorrectly on Burlington's business in making the classification decision.

43 I would reject that submission. In my view, the Board used the word "business" in different senses in the quoted phrases. When it said that Burlington is "in the business of producing natural gas" the Board was referring to Burlington's commercial enterprise, which was a relevant context for the determination of the actual use of the pipeline. In the phrase "the business of transmission by pipeline [is] the business of transporting processed natural gas to markets", it used the word "business" in the functional sense of the "concern", "engagement", or "undertaking" of the pipeline. The Board's observations that the pipeline was used "for the production part of Burlington's undertaking" and "for the purpose of transporting natural gas for further processing" further clarify that it had in mind the actual use of the pipeline as the decisive classification factor.

44 The Board's use of the word "undertaking" to describe Burlington's commercial enterprise — which is a word chosen by the Court in *Cominco* to distinguish between the commercial business of the owner of an improvement and the "business" of the improvement itself — unfortunately tends to obscure the Board's stated reasoning. However, it is clear from a reading of ¶ 52 and the Board's reasons as a whole that it based its classification decision on the actual use of the pipeline, as it was required to do. Thus, nothing of substance flows from this flawed expression of the Board's reasons.

45 This conclusion makes it unnecessary to deal with Burlington's alternative submission that *Cominco* was decided incorrectly. Nevertheless, I will say that I see no merit in the submission. Burlington submits that in *Cominco* this Court read the word "business" out of s-s. 2(b) of the *Regulation* and effectively gave the word no meaning, contrary to the principle of statutory interpretation that presumes that each word in a legislative provision has meaning. That submission is based on a misunderstanding of the decision. What the Court said, as I have already explained, is that "business" in s-s. 2(b) does not mean the business of the owner of the improvement, in the sense of the owner's commercial enterprise; rather, it means the business of the improvement under consideration for classification, in the sense of the "concern", "engagement", or "undertaking" — that is, the actual use — of the improvement. I see no reason to doubt the correctness of that decision.

46 In the result, I would answer Question 1 "No".

47 The Assessor's real complaint is that the Board erred in its determination of the actual use of the pipeline. In the Assessor's submission, the actual use of the pipeline was to "transport, transmit, or distribute" gas in the same form as it did before the

implementation of the secondary processing at the Elmworth Plant. Thus, the foundation of this submission is that the Assessor misinterpreted the meaning of the words in s-s. 2(b)(i) of the *Regulation.* This leads to a discussion of Questions 2 and 3.

48 The Assessor's objection to the Board's interpretation of s-s. 2(b)(i) is that it applied the technical industry meanings of the words "transportation, transmission, or distribution by pipeline" in the absence of any evidence of those meanings. In the Assessor's submission, the Board should have given the words their ordinary meanings. This submission encompasses two decisions of the Board antecedent to the application of s-s. 2(b)(i) to the facts. The first in sequence was the Board's findings as to the meanings attributed in the natural gas and pipeline industry to the terms in question. The second was the implicit decision that the legislative intent behind s-s. 2(b)(i) of the *Regulation* was to use the words in the way they are used in the industry. The latter question is one of statutory interpretation and is clearly a question of law to which the correctness standard of review applies.

49 As to the first or subsidiary question, the Assessor does not take the position that the industry meanings of "transportation", "transmission", and "distribution" by pipeline found by the Board are wrong. Rather, its position is simply that proof of technical meanings is essential and, in the absence of evidence of the industry meanings, the Board erred in adopting them. It is noteworthy that the Assessor did not take this position before the Board. Rather, it accepted the industry meanings, at least implicitly. Its position was that transmission pipelines carry marketable gas and that this pipeline was used for the purpose of the business of transmission because the gas was in marketable form when it entered the pipeline after the first stage of processing at the Noel Plant. The Assessor should not now be permitted to rely on the absence of evidence of a fact that it not only did not put in issue but that it accepted for purposes of its argument before the Board. Nevertheless, it is expedient to address the Assessor's submission on its merits.

50 The Assessor now objects, as it did before the chambers judge, that the Board relied on its reasons in the *Westcoast Transmission* case, *supra*, for the meanings of the disjunctive phrases "transportation, transmission, or distribution by pipeline" and characterizes the Board's error as relying on "evidence from another hearing".

51 I do not view the Board's reference to the industry meanings of "transmission pipeline" and "gathering pipeline" and to the industry meanings of "transportation", "transmission", and "distribution" set out in its earlier decision in the *Westcoast Transmission* case as relying on the evidence called in that case. Rather, although it did not expressly say so, the Board was simply taking notice of factual matters that are within the scope of its core expertise. The Board is not bound by the ordinary rules of evidence (s. 56 of the *Act*). It has expertise derived from its specialized knowledge about the classification of properties and from experience and skill gained in the repeated application of the provisions of the *Regulation* to particular properties. It would be unrealistic to expect the Board to put aside its institutional memory on matters of general application and, in my view, the Board is entitled to draw on such experience: see, e.g., *Canadian National Railway v. Bell Telephone Co.*, [1939] S.C.R. 308 (S.C.C.), at 317; *Maslej v. Canada (Minister of Manpower & Immigration)* (1976), [1977] 1 F.C. 194 (Fed. C.A.), at 198.

52 This is not a case where the Assessor was denied natural justice by the Board's reliance on evidence that it had no opportunity to challenge or contradict, as in *MacMillan Bloedel Ltd. v. Sunshine Coast Assessor, Area No. 7*, [1985] B.C. Stated Case 206 (B.C. S.C.) at 1153-54 [1985] B.C.J. No. 1575 (B.C. S.C.), on which the Assessor relies. In that case, the Board relied on evidence called in another hearing as to the value of a competitor's pulp mill as evidence of the value of the appellant's pulp mill. The factual findings impugned in the instant case, on the other hand, are general in nature and are not confined to particular disputes between particular parties. In these circumstances, no prejudice to the Assessor results from the Board's taking notice of the industry meanings of the words in question in the absence of positive evidence led to establish those meanings.

53 In my view, there was a basis for the Board's findings as to the industry meanings of the words in question. Accordingly, I would reject the submission that the Board erred in law by reaching these factual conclusions without any evidentiary foundation.

54 I turn next to the question whether the *Regulation* uses the words in the technical senses in which they are used in the industry. The Board decided that it does. This is a question of law on which the Board must be correct. I have concluded that it was.

55 The Assessor submits that the Board failed to interpret s-s. 2(b)(i) of the *Regulation* in accordance with the well-established preferred approach to statutory interpretation: see, e.g., *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.):

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

56 The Assessor refers to several dictionary definitions of the words "transportation", "transmission", and "distribution" in support of its submission that the Board failed to give them their ordinary meaning. These definitions suggest that "transportation" connotes the conveying or moving of something from one place to another; "transmission" the sending, transferring, or passing on of something from one place to another; and "distribution" the dispersal or apportionment "among consumers effected by commerce". Since the Board concluded that the pipeline "is used for the purpose of transporting natural gas for further processing into the form in which it will enter the Nova, Alliance and/or Pembina pipelines for transmission to markets" (¶ 52 of the Board's reasons reproduced at ¶ 15 above), the Assessor contends that it erred in law in failing to classify the pipeline as Class 2 because it was, on that finding, used for "the purposes of ... the business of transportation ... by pipeline" within the meaning of that phrase in s-s. 2(b)(i).

57 I would reject that submission. It fails to consider the words in their context in the *Regulation* itself and in the regulatory scheme.

58 I note first that the phrases "transportation by pipeline", "transmission by pipeline", and "distribution by pipeline" all connote the transportation of gas in the ordinary sense of the carrying or conveying of gas from one place to another. If that were the meaning of "transportation" intended by the legislature in s-s. 2(b)(i), the words "transmission or distribution" would be unnecessary in order to give effect to the purpose of the regulatory provision. However, it is presumed that the legislature intends every word to have a meaning. Further, the words are set out in the disjunctive, implying an intention that they should have different meanings. These are indications that the words do not bear the ordinary dictionary meanings suggested by the Assessor.

59 Moreover, light is shed on the intended meaning by s-s. 2(b)(iii) of the *Regulation*, which applies to "the business of generation, transmission or distribution of electricity". The *Concise Oxford Dictionary* 8th ed. (Oxford: Clarendon Press, 1992) contains the following definition at p. 1296:

> **transmission line** a conductor or conductors carrying electricity over large distances with minimum losses.

The parallel grammatical construction of s-ss. 2(b)(i) and (iii) suggests that the legislative intent underlying the use of the words "transmission by pipeline" in s-s. 2(b)(i) of the *Regulation* was that the phrase should signify a pipeline "carrying natural gas over large distances with minimum losses", which accords with the industry meaning given that phrase and suggests that the industry meaning has become an ordinary meaning.

60 As well, a pattern of treating the production plant as functionally separate from the facilities that deliver the product to customers by "transmission" is consistently repeated in s-s. 2(b)(i) to (iv) of the *Regulation*. Thus, s-ss. 2(b)(ii), (iii), and (iv) of the *Regulation* speak respectively of "the business of telecommunications, including transmission of messages by means of electric currents or signals for compensation"; "the business of generation, transmission or distribution of electricity"; and "the business of receiving, transmission and distribution of closed circuit television". This syntactical pattern reinforces the suggestion that "transmission" in s-s. 2(b)(i) describes a pipeline that conveys the product of the processing plant to the customers.

61 Similarly, s. 20.1 of the Act, which deals with special valuation rules for dams, electric power plants, and substations, defines "substation" as "a facility at which electric current is switched, transformed or converted... (b) between a power plant and

a transmission system, or (c) between a transmission system and a distribution network." The congruence between an electric power plant and a natural gas processing or refining plant in this symmetrical construction is apparent.

62 This consistent treatment of production and its antecedents as functionally separate from transportation or transmission and distribution to markets is seen as well in the *Rights-Of-Way Valuation Regulation*, B.C. Reg. 218/86, which was mentioned by the Board at ¶ 41 of its reasons (reproduced at ¶ 12 above). At the time of the Board's decision (it has since been amended in material respects), it provided, in part,

> **Interpretation**
>
> 1. In this regulation "gathering pipelines" means pipelines for the transportation of
>
> (a) natural gas from the final point of well-head preparation to the intake-valve at the scrubbing, processing or refining plant, or
>
> (b) petroleum or petroleum products from the delivery-valve to the intake-valve at the refining, processing or storage facilities which precede transfer of the oil to a transportation pipeline.

Thus, the *Rights-of-Way Valuation Regulation* recognizes a functional separation between the gathering of natural gas in "gathering pipelines" and the "processing or refining plant". Moreover, s-s. 1(b) of this regulation signifies that when petroleum and petroleum products leave the refining, processing, or storage plants they are carried in "transportation pipelines", which is consistent with the Board's finding as to the meaning of that phrase.

63 These provisions are all contained within a legislative and regulatory scheme for the assessment and taxation of property that includes improvements used in industries that distribute their products to users through conduits and conductors emanating from production plants. They demonstrate, in my view, that the industry meanings of the words in question have been used throughout the scheme and, specifically, in s-s. 2(b)(i) of the *Regulation*.

64 The Assessor submitted, however, that this interpretation should be rejected as it would lead to an absurd result and would undermine stability in the classification system. It argued that this interpretation will have the effect of enabling owners to convert large transmission pipelines into Class 5 properties simply by installing a scrubbing or processing plant near the terminus of the line. Thus, the Assessor contended, the classification of the pipeline would vary from time to time depending on the vagaries of the market for natural gas and its by-products. This, it said, could not have been the legislative intention.

65 The Board rejected those submissions. It said,

> [55] ...Classification ultimately depends on the facts that arise in each case and how those facts fit within the classification scheme set out in the Act and regulations.
>
> [56] The Assessor asks the Board to determine the use of the Pipeline based on what is reasonable in the circumstances and not on the vagaries of the market. The Act prescribes "use" as the determining factor in Class 2 and Class 5. The natural and ordinary meaning of "use" is actual use. The use of the Pipeline may indeed change in the future, as it did in June 1999. The Act contemplates change, and imposes a duty on the Assessor to classify and value property on an annual basis.

66 I would reject this submission for the reasons given by the Board.

67 I would also reject the Assessor's submission that the Board's statement in ¶ 52 of its reasons that the pipeline is used "for the purpose of transporting natural gas for further processing" required the Board to find that the pipeline was used for the purposes of "transportation by pipeline" within s-s. 2(b)(i). The Board's use of "transporting" in the quoted phrase was in its ordinary sense of carrying something from one place to another; it did not use the word in its industry sense of "transportation by pipeline".

68 Applying the Board's interpretation of s.-s. 2(b)(i) of the *Regulation* to the facts found by the Board, it is my view that the Board correctly decided that the pipeline in question was not used for the purpose of the business of transportation, transmission or distribution of natural gas.

69 It follows, that the Board did not err in law in its interpretation or its application of the meaning of the words "the business of transportation, transmission or distribution by pipeline". Accordingly, I would answer Questions 1, 2, and 3 of the stated case in the negative.

70 Question 4 must also be answered in the negative. The Board's finding that "transportation by pipeline" refers to the bulk transportation of petroleum and petroleum products precludes a finding that the pipeline was used for "transportation" of natural gas or for a purpose ancillary thereto. Further, the Board's finding that transmission of natural gas follows after its production necessarily implies that transmission precedes distribution to users. That conclusion precludes a finding that the pipeline was used for distribution by pipeline. Moreover, there is no merit in the submission that the Board should have considered whether the pipeline was used for a purpose ancillary to the business of distribution by pipeline. Such an interpretation would ignore the functional separation reflected in the regulatory scheme between gathering, production, and transmission and distribution of natural gas to markets by elevating the distribution by pipeline to a position of dominance such that gathering, production, and transmission uses would be ancillary to it. That cannot have been the legislative intent.

Conclusion

71 Accordingly, I would answer the questions on the stated case as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: No

Question 5: Not necessary to answer.

Question 6: Not necessary to answer.

72 I would therefore allow the appeal, set aside the judgment below, and restore the decision of the Property Assessment Appeal Board.

***Prowse J.A.*:**

I agree.

***Ryan J.A.*:**

I agree.

***Thackray J.A.*:**

I agree.

***Oppal J.A.*:**

I agree.

Appeal allowed.

Footnotes

* A corrigendum issued February 16, 2005 has been incorporated herein.

TAB 3

2012 ONCA 592
Ontario Court of Appeal

Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)

2012 CarswellOnt 11221, 2012 ONCA 592, [2012] O.J. No. 4196, 112 O.R. (3d) 354, 15 C.C.L.I. (5th) 1, 220 A.C.W.S. (3d) 409, 296 O.A.C. 199, 354 D.L.R. (4th) 457, 38 M.V.R. (6th) 76

The Wawanesa Mutual Insurance Company, Plaintiff (Appellant) and Axa Insurance (Canada), Respondent (Respondent)

Karen M. Weiler, R.A. Blair, Paul S. Rouleau JJ.A.

Heard: May 17, 2012
Judgment: September 11, 2012
Docket: CA C54858

Proceedings: affirming *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)* (2011), *(*sub nom. *Wawanesa Mutual Insurance v. Axa Insurance)* 107 O.R. (3d) 395, 2011 CarswellOnt 10667, 2011 ONSC 4181, 3 C.C.L.I. (5th) 145 (Ont. S.C.J.)

Counsel: Kevin D.H. Mitchell, John Bradbury, for Appellant
Linda Matthews, Laura Hodgins, for Respondent

Subject: Insurance; Civil Practice and Procedure; Corporate and Commercial; Public

APPEAL by insurer from judgment reported at *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)* (2011), *(*sub nom. *Wawanesa Mutual Insurance v. Axa Insurance)* 107 O.R. (3d) 395, 2011 CarswellOnt 10667, 2011 ONSC 4181, 3 C.C.L.I. (5th) 145 (Ont. S.C.J.), dismissing insurer's appeal from findings of tribunal regarding effect of loss transfer provisions of *Insurance Act* on insurer generated medical assessments.

***Karen M. Weiler J.A.*:**

Introduction

1 The issue in this case is whether the expense of insurer generated medical assessments conducted to assess a claimant's entitlement to benefits under the *Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996*, O. Reg. 403/96 (the "1996 *SABS*"), is recoverable under s. 275(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, as payments "in relation to such benefits paid". For the reasons that follow, I hold that insurer generated medical expenses are not subject to indemnification under s. 275(1) of the *Insurance Act* and I would dismiss the appeal.

2 Section 275(1) of the *Insurance Act* provides that:

> The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification *in relation to such benefits paid by it* from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which responsibility to pay the statutory accident benefits arose.
>
> [Emphasis added].

Thus, the insurer responsible for the payment of statutory accident benefits ("Statutory Benefits") is entitled to indemnification "in relation to such benefits paid by it" from the insurers of certain classes of automobiles, including heavy commercial trucks.

3 The indemnification in s. 275(1) is commonly referred to as the "loss transfer provision" because it creates a mechanism to transfer the first party insurer's loss (arising from the payment of Statutory Benefits) to the second party insurer. Indemnity is paid according to the respective degree of fault of each insurer's insured: s. 275(2). There is no indemnity for the first $2000 of Statutory Benefits paid: s. 275(3). Disputes between insurers are resolved through arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17: s. 275(4).

4 As of March 1, 2006, when an insured person submits an application for any benefit to its insurer, the insurer is required to pay the benefit in full within a matter of days, or, under s. 42 of the 1996 *SABS*, have the insured assessed by "persons chosen by the insurer who are members of a health profession or are social workers or who have expertise in vocational rehabilitation". For ease of reference, I refer to these s. 42 examinations as insurer generated medical assessments.

5 Before I provide an overview of the facts leading to the appeal in this case and the decisions of Arbitrator Samworth and Greer J. of the Superior Court, it is necessary to provide some background on s. 275(1) of the *Insurance Act* and its relationship to insurer generated medical assessments.

Background: Section 275(1) of the Insurance Act

(1) Part of Ontario's no-fault auto-insurance scheme

6 Section 275(1) of the *Insurance Act* came into existence in June, 1990 when the first threshold no-fault auto-insurance scheme was introduced in Ontario under the *Ontario Motorist Protection Plan* (OMPP). The *Statutory Accident Benefits Schedule*, a series of regulations and schedules under the *Insurance Act*, governs the provision of first party benefits to people injured as a result of the use or operation of a motor vehicle. [1] ,

7 As stated by this Court in *Lento v. Castaldo* (1993), 15 O.R. (3d) 129 (Ont. C.A.), at para. 6, the amendments to the *Insurance Act* were enacted for the purpose of:

> ... significantly limiting the right of the victim of a motor vehicle accident to maintain a tort action against the tortfeasor. The scheme of compensation provides for an exchange of rights wherein *the accident victim loses the right to sue unless coming within the statutory exemptions, but receives more generous first party benefits, regardless of fault, from his or her own insurer.* The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, *the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault*.
>
> [Emphasis added].

8 The *Lento* court also expressed the opinion, at para. 9, that the legislation was essentially remedial. In the words of Jennings J. in *Guardian Insurance Company v. Jevco Insurance Company*, unreported decision, November 20, 2000, at p. 2, "this is remedial legislation, designed to get needed funds to an insured expeditiously and with a minimum of fuss".

9 From the insurers' perspective, the legislative changes to the *Insurance Act* meant that the costs of claims would largely be determined by the injuries to their own insured rather than being limited to their insured's degree of negligence. As a result, an insurer that predominantly provides insurance to, say, motorcyclists, faced greatly increased costs because their insured are highly vulnerable to suffering injuries. By contrast, the costs of an insurer that primarily insures heavy commercial trucks decreased because their insured are relatively less likely to suffer injury. See: *State Farm Automobile Insurance Company v. Markel Insurance Company of Canada*, unreported arbitration decision of Arbitrator Samis, February 4, 2011; Bulletin No. A-11/94, Property & Casualty — Auto, Loss Transfer: standardized forms and procedures, Ontario Insurance Commission, D. Blair Tully, Commissioner, June 6, 1994, at p. 2 (the "1994 Bulletin").

(2) The 1992 and 1994 Interpretation Bulletins

10 The former Ontario Insurance Commission (now the Financial Services Commission of Ontario), issued two interpretation bulletins after the loss transfer provision in s. 275(1) was first introduced in 1990. The first bulletin, issued July 7, 1992, states that "[t]he purpose of loss transfer is to balance the costs of no-fault benefits between different classes of vehicles": Bulletin No. A-9/92, Property & Casualty — Auto, Loss Transfer, Ontario Insurance Commission, Donald C. Scott, Commissioner, July 7, 1992, at p. 1 (the "1992 Bulletin").

11 Using a question and answer format, the 1992 Bulletin described the way that loss transfer should operate. One of the questions was: "Does the second-party insurer reimburse the first-party insurer for loss adjustment expenses and other claims-related expenses incurred by the first-party insurer?" The answer was: "No. Reimbursement is only made for the *actual benefit paid*." [Emphasis added].

12 The 1994 Bulletin was released following amendments to the SABS provision in s. 268 of the *Insurance Act*. The 1994 Bulletin introduced a "Notice of Loss Transfer" form and a "Request for Indemnification" form. It also used a question and answer format to describe how the indemnification process was supposed to work. The 1994 Bulletin contains the following question and answer, at p. 4:

> Which statutory accident benefits may be the subject of a loss transfer indemnification request?
>
> First party insurers are entitled to be reimbursed for all accident benefit payments made under the *Statutory Accident Benefits Schedule*, subject to the $2000 deductible discussed below. Now that the new *Schedule* is in effect, loss transfer is now available for the following kinds of benefits:
>
> • the cost of any assessment conducted under the *Schedule*;
>
> • the cost of services provided by a case manager related to the coordination of medical, rehabilitation and attendant care services; and
>
> • all expenses covered by the *Schedule*

13 The new Schedule referred to in the 1994 Bulletin was the *Statutory Accident Benefits Schedule — Accidents After December 31, 1993 and Before November 1, 1996*, O. Reg. 776/93. It first introduced s. 57(1) which reads as follows:

> The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person in obtaining and attending an examination or assessment for the purpose of this Regulation or in obtaining a certificate or report for the purpose of this Regulation, including,
>
> (a) fees charged by a person who conducts an examination or assessment or provides a certificate or report; and
>
> (b) transportation expenses incurred in attending an examination, including transportation expenses for an aide or attendant.

(3) Interpretation of s. 275(1) by Arbitrator Ayers and Mandel J. in Jevco

14 The change between the 1992 and 1994 Bulletins led to the issue of loss transfer in relation to insurer generated medical assessments being raised in *Jevco Insurance Co. v. Prudential Insurance Co.* (January 23, 1995), E.A. Ayers Member (Ont. Arb. Bd.), unreported arbitration decision of Arbitrator Ayers, Q.C., January 23, 1995, aff'd (1995), 22 O.R. (3d) 779 (Ont. Gen. Div.), by Mandel J.

15 Jevco took the position that the words "in relation to" in s. 275(1) are broad enough to include insurer generated medical assessments. If the legislature intended to restrict indemnification to the *actual benefits paid* to or on behalf of the insured, it would have used the word "for" instead of the phrase "in relation to". Jevco argued that an earlier arbitration decision (which

relied heavily on the 1992 Bulletin in holding that s. 275(1) was not intended to include insurer generated medical assessments) ought to be revisited in light of the 1994 Bulletin.

16 Jevco argued that the new Schedule referred to in the 1994 Bulletin did not alter the basic no-fault benefits to which insureds were entitled under the predecessor legislation. Rather, the Ontario Insurance Commission simply changed its position with respect to whether the costs of first-party insurer generated medical assessments were recoverable from the second party insurer.

17 On the other hand, Prudential argued that the 1994 Bulletin only dealt with assessments conducted at Designated Assessment Centres (DACs) which were to be set up around the province. These were the assessments referred to in s. 57 of the "new Schedule". Unlike insurer generated medical assessments, DAC assessments were intended to be totally independent and for the benefit of the insured.

18 Arbitrator Ayers agreed with Prudential's position. He concluded, at p. 8, that:

> Unlike section 64(5)(a) [now s. 42 of the 1996 *SABS*] of the Schedule which contemplates an examination of the insured by a health practitioner of the insurer's choice, the [DAC] assessments contemplated by the Act are to be totally independent of both the insurer and the insured and, presumably, of benefit to both.

19 The arbitrator held that the insurer generated assessments that Jevco was seeking reimbursement for were part of the insurer's loss control efforts and "usually of little or no benefit to the insured." Accordingly, he dismissed Jevco's claim for indemnification.

20 On appeal, Mandel J. upheld the arbitrator's decision and dismissed Jevco's claim. Mandel J. observed that the insurer generated assessment is one in which the insured does not have a say. While insurers are to adopt a co-operative role in the medical treatment of their insured, such examinations are part of loss control efforts as opposed to benefits administration. Such loss control efforts were never intended by the legislature to be indemnified and transferred to the automobile insurer. These costs were not directed to the payment of no-fault benefits, but to limiting them.

21 Mandel J. acknowledged that the words "in relation to" in s. 275(1) may be very wide in scope. However, the apparent purpose of the provision was not to indemnify an insurer in the position of Jevco for insurer generated medical assessments. On *Jevco's* interpretation, an insurer would be entitled to the costs directly connected to the payment of Statutory Benefits, including overhead. Mandel J. determined that there was no connection between administration costs incurred for the purpose of limiting Statutory Benefits and the costs of Statutory Benefits paid.

22 Finally, Mandel J. also considered s. 275(3) of the *Insurance Act*. That section provides that there is to be no indemnification for the first $2,000 of no-fault benefits paid. He held that it would be absurd if Jevco paid out $1,000 in no-fault benefits and could not recover these costs but *could* claim indemnification for the entire cost of medical assessments. If the legislature had intended insurer generated medical assessment costs to be indemnified under s. 275(1) then the wording of s. 275(3) would so indicate. Mandel J.'s decision was not appealed.

(4) Indemnification of insurer generated medical assessments since Jevco

23 Following Mandel J.'s decision in *Jevco*, it appears that no court decisions have dealt with the issue of whether indemnification can be claimed for insurer generated medical assessments until now. However, Between November 1, 1996 and March 1, 2006, the question of whether the first party insurer could claim indemnification for the expense of a medical assessment at a DAC was raised in several arbitrations with decisions going both ways. For example, *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* [(August 23, 2005), M.G. Jones Member (Ont. Arb.)], unreported arbitration award of Arbitrator Guy Jones, August 23, 2005 held that, unlike insurer generated medical assessments, medical assessments at a DAC were not purely loss control measures and were recoverable; on the other hand, *State Farm Mutual Automobile Insurance Co. v. ING Insurance Co.* (February 16, 2005), C. Brown Member (Ont. Arb. Bd.), unreported arbitration decision of Arbitrator Brown, February 16, 2005, held that DAC medical assessments came within the ratio of *Jevco Insurance Co.* and were not recoverable.

24 The 1996 *SABS* retained the DAC features until a series of amendments that came into force on March 1, 2006. Following those amendments, DACs were abolished. Now when an insured submits an application for a benefit, the insurer is required, pursuant to s. 42 of the 1996 *SABS*, to either pay the benefit in full within a matter of days, or notify the insured person that the insurer requires the insured to be examined.

25 Having set out the history of s. 275(1) of the *Insurance Act* and its relationship to insurer generated medical assessments, I turn to the facts of this case.

Overview

(1) Facts

26 In this case the appellant, Wawanesa Mutual Insurance Company (Wawanesa), and the respondent, Axa Insurance Company (Canada) (Axa), are both automobile insurers. In two separate motor vehicle accidents, one occurring on October 6, 2005, and one occurring on August 21, 2006, a Wawanesa insured driver of a car was injured by an Axa insured driver of a heavy commercial truck. Wawanesa was responsible for paying Statutory Benefits to its insured drivers pursuant to the 1996 *SABS*.

27 Axa conceded that its insured was 100 per cent at fault in both accidents and agreed that the loss transfer provisions of the *Insurance Act* applied. Thus, Axa was required to indemnify Wawanesa for the Statutory Benefits it paid to its insured drivers. The issue that is the subject of this appeal concerns Wawanesa's claim for indemnification in relation to the cost of insurer generated medical assessments. Axa refused to indemnify these costs on the basis that they were not "in relation to a benefit" paid to the insured. Pursuant to s. 275(4) of the *Insurance Act*, the dispute proceeded to private arbitration.

(2) Arbitrator Samworth's Award

28 After reviewing the 1996 *SABS* in light of the 2006 amendments, Arbitrator Samworth summarized Wawanesa's argument that insurer generated medical assessments were no longer part of "expenses relating to loss control". Wawanesa took the position that, as a result of the 2006 amendments to the 1996 *SABS*, insurer generated medical assessments were now mandatory because the first party insurer was required to pay Statutory Benefits within a limited time or request a medical examination of the insured. Thus, the assessments are now part of a comprehensive scheme dealing with benefit entitlement. They became a different class of expense when the DAC assessment process was abolished and should be recoverable under s. 275(1) of the *Insurance Act*.

29 Arbitrator Samworth found Wawanesa's argument compelling and consistent with the 1994 Bulletin. However, she held that she was bound by the decision of Mandel J. in *Jevco* and ordered that Wawanesa was not entitled to recover the cost of insurer generated medical assessments despite the legislative changes to the 1996 *SABS* that took effect on March 1, 2006. She concluded that, "absent a concurrent change to Section 275 of the *Insurance Act*, which did not occur, I do not see any way around Justice Mandel's decision and I feel I remain bound by it." Thus, whether the costs of insurer generated medical assessments were mandatory or optional, they were not subject to indemnification.

(3) The decision of Justice Greer

30 Wawanesa appealed from Arbitrator Samworth's decision to Greer J. of the Superior Court of Justice. Wawanesa sought a declaration that insurer generated medical assessment expenses were recoverable under s. 275(1) as a result of the 2006 amendments to the 1996 *SABS*.

31 Justice Greer held that the issue before her was a question of law, and the standard of review was correctness. After summarizing Arbitrator Samworth's award and the positions of the parties, she dismissed the appeal. She held, at para. 23:

> I see no real change in the nature and scope of the new insurer examinations. Some change of wording in the Schedule is not, in my view, sufficient to make the substantial change in how the Act and *Schedules* and Bulletins are to be interpreted. *Jevco*, *supra*, is still good law and will remain so until the legislation is changed.

Analysis

Standard of Review

32 The only issue before the court is the proper interpretation of s. 275(1) of the *Insurance Act*. In particular: whether the cost of insurer generated medical assessments are recoverable as payments made "in relation to" Statutory Benefits paid to an insured. As Greer J. observed, this issue raises a question of law and the standard of review is correctness. See *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 50. Thus, this court must undertake its own analysis to determine whether the words "in relation to such benefits paid by it" in s. 275(1) of the *Insurance Act* provide for first party insurers to be indemnified for insurer generated medical assessments. I set out the proper approach to this analysis below.

The Purposive Approach to Statutory Interpretation

33 The Supreme Court of Canada has consistently endorsed Elmer Driedger's purposive approach to statutory interpretation: see *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26; *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.), at para. 36. As Driedger explains, at p. 87 of his *Construction of Statutes*, 2d ed., (Toronto: Butterworths, 1983):

> [T]he words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

34 The purposive approach to statutory interpretation requires the court to take the following three steps: (1) it must examine the words of the provision in their ordinary and grammatical sense; (2) it must consider the entire context that the provision is located within (*Bell ExpressVu Ltd. Partnership*, at para. 27); and (3) it must consider whether the proposed interpretation produces a just and reasonable result (*Bapoo v. Co-operators General Insurance Co.* (1997), 36 O.R. (3d) 616 (Ont. C.A.), at para. 8).

35 The factors comprising the "entire context" include the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue: Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 3d. ed., (Scarborough: Thomson Canada Limited, 2000) at p. 387. A just and reasonable result promotes applications of the Act that advance its purpose and avoids applications that are foolish and pointless (Ruth Sullivan, *On the Construction of Statutes*, 5th ed., (Canada: LexisNexis, 2008), at p. 299).

36 I turn now to the application of the purposive approach to determine the proper interpretation of s. 275(1) of the *Insurance Act*.

(1) The ordinary and grammatical meaning of the words

37 For ease of reference s. 275(1) is again reproduced below:

> The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

38 As I have explained, s. 275(1) entitles the insurer responsible for the payment of SABS "to indemnification in relation to such benefits paid by it" from the insurers of certain classes of automobiles whose insured are responsible for the accident.

39 Here, Wawanesa, the insurer responsible for the payment of SABS, argues that s. 275(1) cannot be limited to the payment of Statutory Benefits alone. If this was what the legislature intended, it could simply have said that the first party insurer is entitled to indemnification "of" such benefits paid. Instead the legislature used the phrase "in relation to" such benefits paid.

40 I agree that the phrase "in relation to" would be superfluous if it only encompassed indemnification for the actual Statutory Benefits paid. For that reason, Axa does not dispute that the amount the insured pays for a medical assessment in support of his or her claim to establish entitlement to Statutory Benefits is, by virtue of s. 57 of O. Reg. 776/93, "in relation to such benefits paid". In addition, the transportation expenses paid by the insured to attend a s. 57 assessment, including transportation expenses for an attendant to go with the claimant, are "in relation to" Statutory Benefits and subject to indemnification.

41 Wawanesa relies on *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 39, in support of its argument that the words "in relation to" are words of "the widest possible scope". Thus, insurer generated medical assessments ought to be in the same position as medical assessments in support of an insureds' claim to establish entitlement to Statutory Benefits under s. 57.

42 I have difficulty with this argument for two reasons: (1) *Nowegijick* involved the interpretation of a statutory income tax provision respecting the Crown and Aboriginal people. That context is unique and no meaningful analogy can be drawn to the context that s. 275(1) of the *Insurance Act* is situated within; (2) the phrase "in relation to" conveys a connection between two related subjects. In my view, Statutory Benefits paid to an insured, and the cost of an insurer generated medical assessment, are not connected in the manner the appellant suggests. I explain each of these concerns in turn.

43 In *Nowegijick*, Dickson J. (as he then was) interpreted the phrase "in respect of such property" as it was used in s. 87 of the *Indian Act*, R.S.C. 1970, c. I-6. Dickson J. rejected the interpretation provided in a Revenue Canada Bulletin and held that the wages of an Indian, earned off the reserve, were personal property and exempt from income tax. In so holding, he explained, at p. 36, that:

> [T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

44 The Supreme Court of Canada has underscored the importance of the *sui generis* fiduciary obligation owed by the federal Crown to First Nations with respect to dealings involving First Nations' lands and property: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.), at paras. 72 to 85. The presumption that ambiguities in statutes relating to Indians should be resolved in favour of Indians arises as a function of that unique relationship.

45 Wawanesa and Axa are not in a fiduciary relationship towards one another. They may owe each other a duty of good faith, but that does not create a presumption in favour of the insurer responsible for the payment of SABS. Rather, any dispute respecting indemnification and loss transfer is to be resolved by private arbitration before a neutral third party. The insurance context is distinct from the Aboriginal context and the broad construction of the words "in respect of" in *Nowegijick* cannot necessarily be imputed to the words "in relation to" at issue in this case.

46 My second concern relates to the "connection" between SABS paid and insurer generated medical assessments. After setting out the unique context in which s. 87 of the *Indian Act* is interpreted, Dickson J. held, at p. 39 that:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression *intended to convey some connection between two related subject matters*.
>
> [Emphasis added].

47 Dickson J.'s reasoning indicates that, like the words "in respect of", the words "in relation to" are intended to convey some connection between two related subject matters. In this case that connection must be between the Statutory Benefits paid and the cost of the insurer generated medical assessment. Wawanesa argues that these two subjects are connected because an insurer generated medical assessment is used to determine if Statutory Benefits are paid to an insured. I do not think the analysis can stop there.

48 In this case the "connection" only exists if Statutory Benefits are actually paid. If Wawanesa denies Statutory Benefits to its insured as a result of an insurer generated medical assessment, it cannot seek indemnification from Axa for the cost of the assessment. This is true even though Wawanesa may have saved Axa a great deal of money. The legislature could not have intended that if the insurer generated medical assessment saves all of the Statutory Benefits from being paid unnecessarily, there is no indemnification for the cost of the assessment, *but* if the insurer generated medical assessment only saves some Statutory Benefits from being paid unnecessarily, there is full indemnification for the cost of the assessment. The supposed "connection" leads to an anomalous result.

49 Furthermore, the "connection" should be between insurer generated medical assessments and the Statutory Benefits paid by the first party insurer to the named classes of persons, *its insured*. The cost of an insurer generated medical assessment is not paid to the insured. Rather, it is paid to the doctor who conducted the examination on behalf of the first party insurer. Again, I find that the "connection" analogy does not fit with the plain wording of s. 275(1).

50 In conclusion, I agree that the ordinary meaning of the words "in relation to" in s. 275(1) encompasses more than the Statutory Benefits paid by an insurer to its insured. However, I am not satisfied that those words are necessarily broad enough in scope to include insurer generated medical assessments. Before I reach a final conclusion on this point I must consider the entire context in which the words of s. 275(1) are situated.

(2) Consideration of the entire context

51 I set out much of the relevant context to be considered in the discussion of the background of s. 275(1) at the outset of my reasons. However, some further discussion is necessary.

The 1992 and 1994 Interpretation Bulletins

52 In this case the entire context includes the *Insurance Act* as well as the subordinate regulations and schedules. The purpose of s. 275(1) is an integral part of that context. Thus, regard must be had to the 1992 and 1994 Bulletins which were issued by the body responsible for administering the *Insurance Act* and its regulations, and for advising the Minister of Finance. The Supreme Court of Canada took an analogous approach to resolving doubt about the meaning of a tax provision in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 (S.C.C.), Lebel J. (writing on behalf of the court) observed, at para. 10, that "the administrative practice and interpretation adopted by the Minister, while not determinative, are important factors to be weighed".

53 Wawanesa submits that the proposed interpretation of s. 275(1) is supported by the 1994 Bulletin. That Bulletin was intended to provide insurers with a clear understanding of how loss transfer works. It stated, at p. 4, that "loss transfer is now available for [...] the cost of any assessment conducted under the *Schedule*".

54 I am not persuaded by this aspect of Wawanesa's argument for three reasons. Firstly, there are two bulletins that must be considered. The 1992 Bulletin states that the second-party insurer does not reimburse the first-party insurer for loss adjustment expenses and other claims-related expenses incurred by the first-party insurer. Reimbursement is only made for the actual benefits paid. If there was a shift in the Insurance Commissioner's interpretation of s. 275(1) between 1992 and 1994, it may be reflective of ambiguity in the statute itself and, as held in *Placer Dome Canada Ltd.*, at para 40, "cannot be relied upon as an interpretive tool except to support the view that the statutory definition falls short of being clear, precise and unambiguous."

55 Unlike *Placer Dome Canada Ltd.*, this is not a situation where the Commissioner decided that its interpretation in 1992 was incorrect. Nor did it result in a change in administrative practice between insurers. Despite the 1994 Bulletin, the cost of insurer generated medical assessments has not been subject to indemnification when Statutory Benefits are paid, nor has it been subject to any court challenge since *Jevco Insurance Co.*, until now.

56 Secondly, closer examination of the wording of the 1994 Bulletin does not lead to the construction Wawanesa wishes to place on it. There is an old saying that "he who pays the piper calls the tune." On Wawanesa's interpretation of s. 275(1), that

means the second party insurer who indemnifies the first party insurer ought to be able to request an insurer generated medical assessment for the purpose of determining whether an insured is entitled to continue receiving Statutory Benefits. However, the 1994 Bulletin does not contemplate this scenario.

57 The 1994 Bulletin provides that the second party insurer should be entitled to receive: (1) a summary of Statutory Benefits paid in respect of a request for indemnification; and (2) basic information about the condition of the person receiving accident benefits. It was not anticipated that the second party insurer would be entitled to receive "detailed medical and other personal information about the insured person".

58 Further, the 1994 Bulletin makes it clear that the second party insurer is not entitled to "dispute the accident benefits payments made by the first party insurer to its insured". Rather, the second party insurer can only dispute the reasonableness of a payment and its obligation to reimburse the first party insurer for that payment. Most significantly, the 1994 Bulletin contemplates first and second party insurers taking a co-operative approach to determining when an insurer generated medical assessment is necessary. It states:

> A second party insurer may be more willing to pay requests for indemnification if it is certain that the first party insurer is employing loss control measures. *Second party insurers are not prohibited from reaching agreements with first party insurers on loss control measures and reimbursement for the cost of employing these measures.* However, it is the responsibility of the first party insurer to ensure that benefits are paid correctly and promptly. The second party insurer should not be in a position to dictate claims handling decisions in respect of a claim where loss transfer applies.
>
> [Emphasis added.]

59 If the 1994 Bulletin contemplated that insurer generated medical expenses would automatically be subject to indemnity, there would be no need to say that first party insurers and second party insurers are permitted to enter into agreements for the cost of "loss control measures".

60 The third reason that I reject Wawanesa's argument respecting the 1994 Bulletin is that I understand the 1994 Bulletin to relate indemnification for the cost of "any assessment" to the "new Schedule now in effect". The 1994 Bulletin prefaced the statement that the cost of any assessment is subject to indemnification by saying "[n]ow that the *new* Schedule is in effect, loss transfer is now available for the following kinds of benefits". Insurer generated medical assessments existed prior to the new Schedule. However, the new Schedule introduced s. 57 of O. Reg. 776/93 for the first time. As I have explained, that provision requires the insurer to pay for expenses incurred by the insured in attending a medical assessment to determine his or her entitlement to Statutory Benefits, as well as transportation expenses incurred in attending the assessment.

61 For these reasons, I am satisfied that the existing interpretation of the regulatory regime, which disallows indemnification for insurer generated medical assessments, is in accordance with the directions of the insurance industry's regulator as contained in the 1992 and 1994 Bulletins.

The 2006 amendments to the 1996 SABS

62 Wawanesa submits that each time the loss transfer regulatory scheme is changed the interpretation of s. 275(1) of the *Insurance Act* ought to be re-examined. Prior to 2006, insurer generated medical assessments were considered a loss control mechanism. Wawanesa asserts that with the abolition of DACs in 2006 and other changes to the 1996 *SABS*, insurer generated medical assessments "became a mandatory component of benefit administration rather than an optional loss control mechanism". This constitutes a substantial change.

63 I would dismiss this submission because it is inconsistent with two principles of statutory interpretation. First, regulations and schedules are subordinate to the statute. If there is any conflict between them, the statute prevails: *Belanger v. R.* (1916), 54 S.C.R. 265 (S.C.C.). Thus, a change to the *SABS* regulatory scheme set up under the *Insurance Act* does not necessarily require a re-interpretation of the loss transfer provisions in the Act.

64 Second, where two reasonable interpretations of a statute are available and one of these would result in a substantial change to the law, the court will prefer the interpretation that does not alter the law: *Dreidger*, at p. 143. I am not satisfied that the 2006 amendments to the 1996 *SABS* constituted a substantial change to the law, thus the existing interpretation of s. 275(1) should not change. I would adopt Axa's argument that insurer generated examinations may not have been explicitly mandatory prior to the 2006 amendments. However, in practice, a first party insurer could not terminate or deny Statutory Benefits without a medical opinion suggesting that the insured was no longer entitled to such benefits. Despite the absence of mandatory language in the regulations and schedules prior to 2006, insurers who terminated benefits without a medical assessment faced the risk of being held to have acted in bad faith.

65 For these reasons, I am not satisfied that the interpretation of s. 275(1) with respect to first party insurer generated medical examinations ought to change as a result of the 2006 amendments to the 1996 *SABS*.

(3) The existing interpretation of s. 275(1) leads to a just and reasonable result

66 Wawanesa argues that the object of s. 275(1) is to shift the cost of paying benefits from the first party insurer to the second party insurer. Thus, an interpretation that allows the cost of insurer generated medical assessments to be indemnified furthers the object of the statute and produces a just and reasonable result. In addition, the only parties directly affected by such an interpretation are the insurers.

67 I disagree. Wawanesa's argument ignores the remedial aspect of the legislation mentioned earlier at para 8, namely to put Statutory Benefits into the hands of an insured person as soon as possible. For this reason the legislation allows the cost of an insured's medical assessment to be indemnified pursuant to s. 57 of O. Reg. 776/93.

68 Contrary to the remedial aspect of the no-fault legislative scheme, the payment of Statutory Benefits is likely to be delayed if first party insurers are automatically indemnified for the cost of insurer generated medical assessments. In these circumstances, first party insurers would be more likely to seek a medical assessment of the insured, even in situations where it would not currently be considered necessary. With the abolition of DACs in 2006, a tool that was used to achieve a more co-operative approach to the management of the care of an insured was removed from the no-fault auto-insurance scheme. It would not be just or reasonable to interpret s. 275(1) in a manner that further diminishes the likelihood of an expeditious payment of Statutory Benefits to an injured insured.

69 By contrast, the current interpretation of s. 275(1) encourages agreements between first and second party insurers respecting the cost of insurer generated medical assessments. Wawanesa could face a challenge from Axa if it did not act reasonably and simply paid Statutory Benefits without exercising its right to an insurer generated medical assessment in appropriate cases. Wawanesa incurs the risk that it will not be indemnified for Statutory Benefits at all if it does not require an insurer generated medical assessment where appropriate. Thus, there is an incentive for Wawanesa to enter co-operative agreements with Axa to share the cost of insurer generated medical assessments and ensure that Satutory Benefits are paid appropriately. This accords with the text of the 1994 Bulletin and results in a real benefit to both insurers. I am satisfied that this result is both just and reasonable.

Conclusion

70 For the reasons I have given I would dismiss the appeal. Section 275(1) of the *Insurance Act* does not entitle first party insurers to indemnification for the cost of insurer generated medical assessments. The interpretation urged by Wawanesa does not accord with the ordinary wording of the provision, its history and context, or the rules of statutory interpretation. When the purpose of the *Insurance Act* as a whole is considered, the current interpretation of s. 275(1) produces a result that is both just and reasonable. I agree with Greer J. that an amendment to s. 275(1) of the *Insurance Act* is necessary if the cost of insurer generated medical assessments is to be indemnified by a second party insurer.

71 I would award the costs of the appeal to Axa and fix those costs at $10,000 on a partial indemnity basis inclusive of disbursements and all applicable taxes.

***Paul S. Rouleau J.A.*:**

I agree

***R.A. Blair J.A.* (dissenting):**

Overview

72 I have had the opportunity of reading the draft reasons of my colleague, Justice Weiler. Respectfully, I take a different view of the appeal.

73 My colleague has very carefully outlined the history and contours of Ontario's insurance scheme for the payment of statutory benefits to persons injured in automobile accidents, and for the sharing of the costs of those benefits as amongst insurers through what is called the "loss transfer provision" contained in s. 275(1) of the *Insurance Act*, R.S.O. 1990, c. I.8. I need not repaint that picture here.

74 For convenience, though, I set out the provisions of s. 275(1):

> The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to *indemnification in relation to such benefits paid by it* from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which responsibility to pay the statutory accident benefits arose.
>
> [Emphasis added.]

75 The appeal raises one issue only: whether the disbursement incurred by a first insurer for a medical assessment conducted to gauge whether a claimant is entitled to benefits under the *Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996*, O. Reg. 403/96 (the "1996 *SABS*"), is a payment made by that insurer "in relation to" the benefits paid to the claimant, when those benefits are paid. If it is such a payment, the insurer is entitled to be indemnified for that payment under s. 275(1).

76 In my view it is. I would allow the appeal for the following brief reasons.

Analysis

77 I accept the purposive and contextual approach to statutory interpretation and the principles to be applied in conducting that exercise, as set out by my colleague. They are well-established by *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26, and the related jurisprudence. In my view, however, the interpretation that I place on the words "in relation to" in this context is faithful to the modern approach.

78 The words "in relation to" (coupled with the words "in respect of") have been held by the Supreme Court of Canada to be "words of the widest possible scope ... *probably the widest of any expression* intended to convey some connection between two related subject matters" (emphasis added): *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 39, per Dickson J. Respectfully, I do not accept, as my colleague suggests, that Dickson J. meant to limit his words only to the context of an aboriginal dispute over the payment of income tax. There is nothing in the context of his discussion of the issues in *Nowegijick* to suggest that was his intention.

79 Nor do I accept that there is no connection between a disbursement that the first insurer must now incur before it can deny payment of statutory benefits where entitlement may be in doubt — and, therefore, if the assessment favours the claimant, before it can decide to pay — and the benefits ultimately paid. Clearly, there is. The benefits would not have been paid without the assessment and the assessment would not have been made had the first insurer not paid for it. To say that there is no connection

between the expense of the assessment and the payment of the benefits based on the assessment is to take a very narrow view of the words "in relation to". It is simply not consistent with according them "the widest possible scope" of meaning as called for in *Nowegijick*.

80 My colleague's approach follows that of Mandel J. in *Jevco Insurance Co. v. Prudential Insurance Co.* (1995), 22 O.R. (3d) 779 (Ont. Gen. Div.). That decision was not appealed and appears to have governed the practice in the loss transfer payment area in the intervening years. In it, Justice Mandel held that the cost of insurer generated medical assessments was not a benefit under the SABS Schedule but, rather, was part of the first insurer's "loss control efforts" and administrative expenses and, therefore, not recoverable under s. 275(1). There has been some controversy in the arbitration community over this result, but in the end, arbitrators have concluded that they were bound by the decision in *Jevco*.

81 In this case, for example, as my colleague notes, Arbitrator Samworth found the appellant Wawanesa's argument that insurer generated medical assessments should be the subject of indemnification under s. 275(1) compelling. Wawanesa's contention was that such medical examinations are now in effect mandatory because, since the 2006 amendments to the 1996 SABS, the first insurer is required either to pay the statutory benefits within a limited period of time, or to request a medical examination of the insured to enable it to assess the claim. The payment for the assessment is therefore part of a comprehensive scheme dealing with benefit entitlements rather than part of the first insurer's loss control measures. Arbitrator Samworth concluded, however, that she was bound by the decision in *Jevco* and dismissed the appellant Axa's claim.

82 Respectfully, in my view, *Jevco* was wrongly decided.

83 Much of the analysis of Mandel J. in *Jevco* turned on his view that "[t]he apparent purpose of the legislation is the indemnification of *benefits actually paid* and not administration costs" (at p. 783) (emphasis added). The view that the legislation encompasses indemnification only for *benefits actually paid* is simply incorrect, based on the clear language of s. 275(1). Had the legislature intended the loss transfer provisions to embrace only benefits actually paid, the section would provide for "indemnification *for* such benefits" and not for indemnification "*in relation to*" such benefits paid. Indeed, my colleague accepts that the wording of s. 275(1) encompasses more than the actual statutory benefits paid. What is "more" is a function of the scope of the phrase "in relation to such benefits paid by it", and on this appeal concerns only whether it is wide enough to include the cost of insurer generated medical assessments. I am satisfied that it does.

84 Several concerns appear to underlie the view that s. 275(1) encompasses only indemnification for actual statutory benefits paid.

85 First is the opinion expressed by Mandel J. and by my colleague that the disbursement incurred for an insurer generated medical assessment is a component of that insurer's "administrative costs" and part of its "loss control efforts", and therefore not something that is related to the payment of no-fault statutory benefits. While I agree that the legislature did not intend that the first insurer be reimbursed for its general overhead and administrative costs, I do not think it follows that characterizing the cost of insurer generated medical assessments in this fashion necessarily leads to the conclusion that the disbursement is not made "in relation to [the statutory] benefits paid by it".

86 A thing or concept may stand "in relation to" more than one thing or concept. As a simple example, the spokes on a wheel are situated "in relation to" the hub of the wheel, but they are also situated "in relation to" the rim. Here, the issue is not whether the disbursement for the insurer generated assessment is a payment made "in relation to" the first insurer's loss control efforts, or even to its administrative costs in a broad sense. The issue is whether the payment is made "in relation to" the statutory benefits paid. One does not preclude the other, in my view.

87 Second is the view that permitting the first insurer to be indemnified under s. 275(1) for the expense of an insurer generated medical assessment would contravene the purpose of the loss transfer provisions by shifting a broad range of "administrative costs" to the second insurer. To the extent that such a disbursement may form part of the first insurer's administrative costs, in a broad sense, it remains a discrete, specific expense related to the particular claim at issue and therefore falls within the

parameters of the indemnification provided by s. 275(1), in my view. I do not think there is a bright line between "administrative costs" and "[statutory] benefits paid."

88 Third is the suggestion underlying the reasons in *Jevco* and those of my colleague that indemnification of the first insurer under s. 275(1) is limited to payments that are made by or on behalf of the insured and cannot encompass payments made by the first insurer, in effect on its own behalf, to satisfy itself that the benefits ought to be paid. If that view were correct, however, the legislature would have used the words "indemnification in relation to such statutory benefits paid *to or on behalf of the insured*." It did not.

89 In terms of a payment made "in relation to" a statutory benefit paid, I see no difference in principle between the cost of an *insurer* generated medical assessment, the cost of an *insured* generated medical assessment, and the cost of a mandatory DAC assessment under the former regime. It is accepted that the first insured is entitled to indemnification for the latter two. Yet all are equally obtained for the purpose of assessing whether the insured is, or is not, entitled to the statutory benefits claimed and the extent of those benefits.

90 There is no doubt that the no-fault regime enacted under the *Insurance Act* constitutes "remedial legislation, designed to get needed funds to an insured expeditiously and with a minimum of fuss", as Jennings J. so succinctly put it in *Guardian Insurance Company v. Jevco Insurance Company*, (20 November 2000), 00-CV-197938, at p.2. The issue raised on this appeal does not truly evoke the remedial nature of the legislation, however. It brings into play a contest between two insurers as to how the loss provisions are to be shared. The purpose of those provisions is simply to spread the cost of the payment of no-fault benefits between the insurers of different classes of vehicles in a more even-handed manner, and to do so in a way that does not interfere with the expeditious payment of statutory benefits to the injured insured. I am satisfied that indemnifying the first insurer for the cost of an insurer generated medical assessment is completely consistent with the purpose of the loss transfer scheme.

91 Much was made in argument over the differences between the 1992 and 1994 Interpretation Bulletins issued by the Ontario Insurance Commission regarding the loss transfer provision in s. 275(1). I do not think they are particularly helpful in deciding the correct interpretation of the words "in relation to" in that provision, however.

92 In the 1992 Bulletin, the Commission stated that reimbursement was to be made only "for the actual [statutory] benefits paid": Ontario Insurance Commission, *Property & Casualty — Auto, Loss Transfer*, Bulletin No. A-9/92 (6 July 1992) at p. 2 (Commissioner: Donald C. Scott). This interpretation is simply wrong for the reasons I have articulated. Whatever ambiguity there may be in the words "in relation to", it is perfectly clear that they do not confine the indemnification only to "the actual benefits paid." Otherwise the legislature would have used the word "for" rather than the phrase "in relation to." As noted above, my colleague recognizes this.

93 In the 1994 Bulletin — after certain amendments had been made to the SABS regime — the Commission stated that loss transfer was now available, amongst other things, for "the cost of *any* assessment conducted under the Schedule" (emphasis added), presumably including an insurer generated medical assessment: Ontario Insurance Commission, *Property & Casualty — Auto, Loss Transfer*, Bulletin No. A-11/94 (6 June 1994) at p. 4 (Commissioner: D. Blair Tully) (the "1994 Bulletin"). The wording of s. 275(1) had not changed, however.

94 While I agree that the administrative practice and interpretation adopted by a responsible agency may be factors for consideration in interpreting legislative provisions — see *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 (S.C.C.), at para. 10 — I do not see how they can be of much assistance when the agency has taken completely opposite interpretations of the same wording in the legislation on different occasions.

95 Finally, I do not think that the "new Schedule" referred to in the 1994 Bulletin is determinative of the issue here. In my opinion — while it may have reinforced the mistaken view that indemnification was intended only for payments made by or on behalf of the insured — the new Schedule has little bearing on whether the indemnification provision in s. 275(1) of the *Insurance Act* encompasses the payment of insurer generated medical assessments.

96 Section 57(1) of the new Schedule rearticulated the first insurer's obligation to reimburse its insured by providing that the insurer "pay all reasonable expenses *incurred by or on behalf of an insured person* in obtaining and attending an examination ... including, (a) fees charged by a person who conducts an examination or assessment or provides a certificate or report" (emphasis added). Section 57(1) provides for obligations as between the first insurer and its insured, however; it does not address whether a medical assessment generated by the first insurer, essentially on its own behalf, for the purpose of determining whether to pay the benefit in question is a payment made "in relation to" that benefit when paid. In that regard, I do not think that Greer J. erred in determining that the change in the new Schedule was not sufficient to drive a different interpretation respecting indemnification for the insurer generated medical assessment. Section 57(1) simply does not deal with that question.

Disposition

97 For all of the foregoing reasons, I would allow the appeal and vary the Order of Greer J. dated July 7, 2011, to grant the appeal from the arbitration award of Arbitrator Samworth. I would remit the matter to the Arbitrator to determine the quantum of the insurer generated medical assessments in question, with the direction that Wawanesa is entitled to be indemnified for the expenses of such medical assessments paid by it in relation to the statutory benefits that it has paid to its insured pursuant to s. 275(1) of the *Insurance Act*.

98 I would award the costs of the appeal to the appellant, fixed in the amount of $10,000, inclusive of disbursements and all applicable taxes.

Appeal dismissed.

Footnotes

1 At present there are four different *Statutory Accident Benefits Schedules* in place governing different time periods: *Statutory Accident Benefits Schedule — Accidents After December 31, 1993 and Before November 1, 1996*, O. Reg. 776/93; *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*, R.R.O. 1990, Reg. 672; *Statutory Accident Benefits Schedule Accidents on or after November 1, 1996*, O. Reg. 403/96 (the "1996 *SABS*"); *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10.

TAB 4

2006 SCC 49
Supreme Court of Canada

Astrazeneca Canada Inc. v. Canada (Minister of Health)

2006 CarswellNat 3436, 2006 CarswellNat 3437, 2006 SCC 49, [2006] 2 S.C.R. 560, [2006] S.C.J. No. 49, 151 A.C.W.S. (3d) 682, 272 D.L.R. (4th) 577, 354 N.R. 88, 52 C.P.R. (4th) 145, J.E. 2006-2157

Apotex Inc., Appellant and AstraZeneca Canada Inc. and Minister of Health and Attorney General of Canada, Respondents

Apotex Inc., Appellant and AstraZeneca Canada Inc. and Minister of Health and Attorney General of Canada, Respondents and Canadian Generic Pharmaceutical Association and Canada's Research-Based Pharmaceutical Companies, Interveners

Abella J., Bastarache J., Binnie J., Charron J., Deschamps J., Fish J., LeBel J., McLachlin C.J.C., Rothstein J.

Heard: May 11, 2006
Judgment: November 3, 2006
Docket: 30985

Proceedings: reversing *Astrazeneca Canada Inc. v. Canada (Minister of Health)* (2005), 2005 FCA 189, 40 C.P.R. (4th) 353, 2005 CarswellNat 3609, [2006] 1 F.C.R. 297, 2005 CarswellNat 1399, 254 D.L.R. (4th) 690, 2005 CAF 189, 336 N.R. 166 (F.C.A.); allowed leave to appeal *Astrazeneca Canada Inc. v. Canada (Minister of Health)* (2005), 348 N.R. 195 (note), 2005 CarswellNat 3346, 2005 CarswellNat 3347 (S.C.C.); reversing *Astrazeneca Canada Inc. v. Canada (Minister of Health)* (2004), 2004 CarswellNat 3245, 2004 FC 1277, 263 F.T.R. 161, 36 C.P.R. (4th) 519, 2004 CF 1277, 2004 CarswellNat 5842 (F.C.)

Counsel: Harry B. Radomski, Andrew R. Brodkin, Miles Hastie, for Appellant
Gunars A. Gaikis, Yoon Kang, Nancy P. Pei, Colin B. Ingram, for Respondent, Astrazeneca Canada Inc.
Peter M. Southey, Frederick B. Woyiwada, for Respondents, Minister of Health and Attorney General of Canada
Edward Hore, Kevin Zive, for Intervener, Canadian Generic Pharmaceutical Association
Patrick S. Smith, Henry S. Brown, Q.C., for Intervener, Canada's Research-Based Pharmaceutical Companies

Subject: Intellectual Property

APPEAL by A Inc. from judgment reported at *Astrazeneca Canada Inc. v. Canada (Minister of Health)* (2005), 2005 FCA 189, 40 C.P.R. (4th) 353, 2005 CarswellNat 3609, [2006] 1 F.C.R. 297, 2005 CarswellNat 1399, 254 D.L.R. (4th) 690, 2005 CAF 189, 336 N.R. 166 (F.C.A.), allowing appeal from judgment dismissing application to quash notice of compliance.

***Binnie J.*:**

1 On January 27, 2004, the respondent Minister issued to the appellant Apotex Inc. a notice of compliance ("NOC") permitting Apotex to manufacture and sell a copy-cat version of a drug containing omeprazole. The drug was originally developed and marketed as *Losec 20* by the respondent AstraZeneca Canada Inc. The patent on omeprazole itself, which is used to treat stomach conditions related to hyperacidity, expired in 1999. AstraZeneca began to market *Losec 20* in Canada in 1989 but withdrew it in September 1996 because it had developed what it considered to be a superior drug using omeprazole magnesium. Apotex wants approval to market the older *Losec 20* product.

2 Nevertheless, AstraZeneca seeks to quash the NOC issued to Apotex on the basis of two patents which it (or a related company) obtained and registered with the Minister after *Losec 20* was withdrawn from the market (hereafter referred to as the 037 and 470 patents). The basis of AstraZeneca's objection at this stage is not patent infringement but the alleged

failure of Apotex to comply with the much litigated *Patented Medicines (Notice of Compliance) Regulations* SOR/93-133, (the "*NOC Regulations*"), which are reproduced in the Appendix. The *NOC Regulations* provide an innovator drug company like AstraZeneca with procedures to freeze for the purpose of assuring patent compliance the access of copy-cat patented medicines to market "in addition to" whatever remedies a patent owner has under the ordinary law of patents.

3 The response of Apotex is that the later patents have nothing to do with the version of *Losec 20* it copied, which did not (and could not) have incorporated the 037 or 470 technology. The NOC Apotex received on January 27, 2004 does not approve the use by Apotex of that technology. Apotex copied the 1989 product and contends that in that respect all NOC regulatory requirements have been satisfied. Apotex argues that even if it had wanted to copy the 037 and 470 technology, it could not have done so "[to] demonstrat[e] bioequivalence" within the meaning of the *NOC Regulations* because AstraZeneca never produced a product incorporating the technology taught by the two subsequently issued and listed patents. Apotex could not copy a product that did not exist. Kelen J. accepted the argument of Apotex that the *NOC Regulations* were only concerned with patents relevant to the innovator product actually copied, and not with subsequently issued and listed patents from which, under the federal new drug approval process, a generic manufacturer could receive no benefit ((2004), 263 F.T.R. 161, 2004 FC 1277 (F.C.),). He therefore dismissed AstraZeneca's application to quash the Apotex NOC. The Federal Court of Appeal reversed, Sharlow J.A. dissenting ([2006] 1 F.C.R. 297, 2005 FCA 189 (F.C.A.)). In my view, Kelen J. and Sharlow J.A. reached the correct conclusion. I would allow the appeal. The procedural delays afforded AstraZeneca by the majority decision of the Federal Court of Appeal overshoot the provisions and purpose of the *NOC Regulations*. The NOC 9427-A1114-195 issued by the Minister on January 27, 2004 is valid.

A. Brief Chronology of Events

June 19, 1989	NOC issued to AstraZeneca for *Losec 20* (DIN 00846503)
April 27, 1993	Apotex files an abbreviated new drug submission (ANDS) seeking approval for Apo-omeprazole alleging bioequivalence with the then version of *Losec 20*
(Apotex argues that any patent activity by AstraZeneca that post-dates the 1993 filing of its ANDS comparing its omeprazole product to AstraZeneca's 1989 *Losec 20* product is irrelevant.)	
February 9, 1996	AstraZeneca files application for the 037 patent
September 10, 1996	AstraZeneca withdraws *Losec 20* from the market, and so advises the Minister
December 16, 1997	Apotex refiles for NOC
November 10, 1998	AstraZeneca files application for the 470 patent
January 22, 1999	AstraZeneca files a Supplementary New Drug Submission (SNDS) for approval of use of *Losec 20* for treatment of *H. Pylori*
June 4, 1999	AstraZeneca obtains NOC permitting it to claim treatment for *H. Pylori* as a new approved use of *Losec 20*
July 12, 2000	AstraZeneca files SNDS for corporate change of name
October 24, 2000	Name change NOC issued
February 26, 2002	470 patent issues
March 8, 2002	470 patent added to Register in relation to both SNDS dated January 22, 1999 and the SNDS dated July 12, 2000
April 16, 2002	037 patent issues
February 27, 2003	037 patent added to Register in relation to both the SNDS dated January 22, 1999 and the SNDS dated July 12, 2000
January 27, 2004	NOC issued to Apotex for Apo-omeprazole

5 Although the July 12, 2000 SNDS seems to have been of a purely administrative nature, the Minister permitted the patents to be listed against it. The position of Apotex is that the listing of the 037 and the 470 patents was and is in any event irrelevant to the Apotex application.

6 The Minister concluded, and it is no longer disputed, that throughout the period September 10, 1996 to the present, AstraZeneca's *Losec 20* has been off the Canadian market. To the extent that there is a demand for an "omeprazole only" product, it is not being met by AstraZeneca.

B. AstraZeneca's New Patents

7 The trial judge thought it curious that despite the withdrawal of *Losec 20* AstraZeneca continued to list new patents in association with omeprazole 20 mg capsules. He found that "[n]o other brand name company has attempted to list patents in this manner in Canada, making this a novel situation" (para. 5).

8 Kelen J. then quoted an undated internal memorandum from a departmental official to the Deputy Minister of Health:

> To date, the administrative policy has been to address all patents listed for a drug. However, this is the first time a patent has been listed for a supplemental new drug submission introducing a change to a drug which was clearly never marketed, and to which the generic could not have made a comparison.
>
> The Patent Unit is recommending that Apotex should not be required to address the 470 patent. [Emphasis added; para. 14.]

Kelen J. agreed with Apotex that even if the 037 and the 470 patents were properly added to the register, the listing of such after-acquired patents was irrelevant to the Apotex application.

9 *The 037 patent*, applied for on February 9, 1996 and issued April 16, 2002 describes a new "oral pharmaceutical dosage form" of several compounds, including omeprazole, consisting of a core material "that contains a proton pump inhibitor" and an outer polymer coating, the two layers being separated by a water soluble salt. The patent also describes "a new efficient process" for the manufacture of such a dosage in one step.

10 *The 470 patent*, applied for on November 10, 1998 and issued February 26, 2002 teaches that "surprisingly ... the substance omeprazole can exist in more than one crystal form" and describes how a new "form A" of omeprazole can be prepared and utilized, offering such advantages as being "more stable" than the previously used crystalline form. It follows that AstraZeneca must have taken the position before the Commissioner of Patents (and accepted by him) that the new "form A" of omeprazole was patentably distinct and different from the form of omeprazole used in the 1989 version of *Losec 20*.

11 As stated, neither of these inventions was incorporated into AstraZeneca's 1989 *Losec 20* product to which Apotex made reference to establish bioequivalence. Apotex could not have, and did not attempt to, piggy-back on any clinical and testing work done by AstraZeneca in relation to the 037 and 470 patents listed against its subsequent NOCs issued seven years after the original Apotex application for *its* NOC. As Kelen J. found, "a generic drug cannot be expected to compare itself to a drug which is not available on the Canadian market. The generic drug manufacturer could not obtain such a drug" (para. 46).

C. Legislative Overview

12 The *NOC Regulations* lie at the intersection of two regulatory systems with sometimes conflicting objectives. First, is the law governing approval of new drugs, which seeks to ensure the safety and efficacy of new medications before they can be put on the market. The governing rules are set out in the *Food and Drugs Act*, R.S.C. 1985, c. F-27 ("*FDA*") and the *Food and Drug Regulations*, C.R.C. 1978, c. 870. The *FDA* process culminates (if successful) in the issuance of a NOC to an applicant manufacturer by the Minister of Health on the advice of his officials in the Therapeutic Products Directorate. The *FDA* objective is to encourage bringing safe and effective medicines to market to advance the nation's health. The achievement of this objective is tempered by a second and to some extent overlapping regulatory system created by the *Patent Act*, R.S.C. 1985, c. P-4. Under that system, in exchange for disclosure to the public of an invention, including the invention of a medication, the innovator is given the exclusive right to its exploitation for a period of 20 years. Until 1993, the two regulatory systems were largely kept distinct and separate.

13 The problem perceived by Parliament in 1993 was that if a generic manufacturer waits to begin its preparation of a copy-cat medicine for regulatory approval until the patent expires, the *FDA* approval process will likely add at least two years to the effective monopoly of the patent owner, which is two years of monopoly longer than the *Patent Act* contemplates. On the other hand, if the generic manufacturer tries to work the patented invention *prior* to the expiry of the patent, even if solely to

satisfy the *FDA* requirements for a NOC, it will infringe the patent, thus inviting litigation by the patent owner (and this is a very litigious industry).

14 The solution arrived at by Parliament in Bill C-91 (1993) was to introduce an exemption from the owner's patent rights which permits the generic manufacturers to work the patented invention within the 20-year period ("the early working exception") to the extent necessary to obtain a NOC effective at the time the patent(s) expire (s. 55.2(1)) and to "stockpile" generic product towards the end of the 20-year period to await lawful market entry (s. 55.2(2)). (The stockpiling exception was repealed by S.C. 2001, c. 10, s. 2(1) (in force July 12, 2001.)

15 Recognizing that the "early working" and "stockpiling" exceptions could be abused, Parliament balanced creation of these exceptions with implementation of a summary procedure designed to strengthen the protection of patent owners against generic competitors *within* the 20-year patent period. The legislative solution is found in s. 55.2 of the *Patent Act* as follows:

> 55.2 (1) It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product. [The "early working" exception.]
>
> (2) It is not an infringement of a patent for any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) to make, construct or use the invention, during the applicable period provided for by the regulations, for the manufacture and storage of articles intended for sale after the date on which the term of the patent expires. [The "stockpiling" exception.]
>
> (3) The Governor in Council may make regulations for the purposes of subsection (2), but any period provided for by the regulations must terminate immediately preceding the date on which the term of the patent expires.
>
> (4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2) including, without limiting the generality of the foregoing, regulations
>
> (a) respecting the conditions that must be fulfilled before a notice [e.g. of compliance] ... may be issued ...
>
> (b) respecting the earliest date on which a notice [e.g. of compliance] ... may take effect ...
>
> (c) governing the resolution of disputes between a patentee or former patentee and any person who applies for a notice [e.g. of compliance] ... as to the date on which that notice ... may be issued or take effect.

The grant of the regulation-making power in s. 55.2(4) is thus expressly limited to prevention of infringement by a person who takes advantage of the "early working" exception (s. 55.2(1)) or (until its repeal) the stockpiling exception (s. 55.2(2)).

16 The *NOC Regulations* were enacted pursuant to s. 55.2 (4). Their history and general structure were discussed by this Court in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26 (S.C.C.) (the "*Biolyse*" decision). Serendipidously, our judgment was released the day following the decision of the Federal Court of Appeal in this case. For present purposes, the important aspect of the *Biolyse* decision is the emphasis it placed on the need to interpret the *NOC Regulations* with careful regard to the limited purposes set out in the aforesaid s. 55.2(4) of the *Patent Act*.

17 The general scheme of the *NOC Regulations* is to create a Patent Registry within the Department of Health in which an innovator drug company like AstraZeneca may have patents listed relevant to its various drug submissions for regulatory approval (s. 4). A generic manufacturer that is not prepared to await the expiry of what are alleged to be the relevant patents must challenge their validity or applicability to its proposed product (s. 5). The challenge is to be embodied in a notice of allegation, which will generally trigger an application in the Federal Court by the patent owner to prohibit the issuance of a NOC based on (in its view) the relevance, validity and applicability of the listed patents (s. 7). The unusual feature of the *NOC Regulations* is that mere initiation by the patent owner of its application for prohibition freezes ministerial action for 24 months

unless the prohibition proceedings are earlier disposed of, which seems to be rare (s. 7(1)(*e*)). As pointed out in the majority judgment in *Biolyse* (at para. 24):

> [u]nder this procedure, the court hearing the prohibition application has no discretion to lift the stay even if it thinks the innovator's case for interim relief is weak. Nor does the court have a discretion to leave the contending parties to their remedies under the *Patent Act*. The "[generic manufacturer]" application for a NOC simply goes into deep-freeze until the statutory procedures have played themselves out. For these reasons, Iacobucci J. described the regime as "draconian" in *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1998] 2 S.C.R. 193, at para. 33.

18 If, as Apotex says, it did not have the advantage of an "early working" of the after-listed 037 and 470 patents, because they came too late and were not incorporated in any product available to Apotex to copy, it is difficult to see in principle why in respect of *those* patents Apotex should be subject to the *NOC Regulations* regime, with a consequent further delay of two years, and perhaps longer. The Apotex submission has already been pending since April 27, 1993.

D. The New Drug Approval Process

19 The *Food and Drugs Regulations*, C.R.C. 1978, c. 870, and departmental policies require drug manufacturers to submit different types of new drug submission ("NDS") for different purposes. The two principal forms of submission are the NDS, filed by an innovative drug manufacturer for a new drug product, and the ANDS, filed by a generic manufacturer that claims its product is the "pharmaceutical equivalent" of a previously approved "Canadian reference product" (s. C.08.002.1(1)(*a*)). A SNDS may be submitted for substantive or for purely administrative reasons. Unlike the situation in *Biolyse*, the intention of the applicant Apotex from the outset was to produce a generic (i.e. copy-cat) version of the AstraZeneca product marketed as *Losec 20* in 1989. In this case, Apotex makes no pretence of originality.

E. Scope of Regulatory Protection

20 The scope of the protection to which AstraZeneca is entitled as a person who has filed a NDS is predicated on the patent list established under s. 4(1). As stated in *Biolyse*, at para. 58: "The patent list becomes the minefield that the generic'copy-cat'manufacturer must navigate to obtain a NOC." The list of relevant patents is to be filed by the "first person" (i.e. the innovator pharmaceutical company) at the time of its NDS (s. 4(3)), or updated within 30 days of issuance of a new patent(s) that had been applied for prior to filing for a submission but not issued until afterwards (s. 4(4)). The 037 and 470 patents fall into this "after-issued" category. (I note in passing that the 30-day limit seems not to have been observed in the case of the 037 and 470 patents, but nothing turns on that here.) Section 4 reads in relevant part as follows:

> **Patent List**
>
> 4. (1) A person who files or has filed a submission for, or has been issued, a notice of compliance in respect of a drug that contains a medicine may submit to the Minister a patent list certified in accordance with subsection (7) in respect of the drug.
>
> (2) A patent list submitted in respect of a drug must
>
> (a) indicate the dosage form, strength and route of administration of the drug;
>
> (b) set out any Canadian patent that is owned by the person ... that contains a claim for the medicine itself or a claim for the use of the medicine and that the person wishes to have included on the register;
>
> (c) contain a statement that, in respect of each patent, the person applying for a notice of compliance is the owner ...
>
> (d) set out the date on which the term limited for the duration of each patent will expire pursuant to section 44 or 45 of the *Patent Act*; and

> (e) set out the address in Canada for service on the person of any notice of an allegation ...
>
> (3) Subject to subsection (4), a person who submits a patent list must do so at the time the person files a submission for a notice of compliance.
>
> (4) A first person may, after the date of filing of a submission for a notice of compliance and within 30 days after the issuance of a patent that was issued on the basis of an application that has a filing date that precedes the date of filing of the submission, submit a patent list or an amendment to an existing patent list, that includes the information referred to in subsection (2).
>
> (5) When a first person submits a patent list or an amendment to an existing patent list in accordance with subsection (4), the first person must identify the submission to which the patent list or the amendment relates, including the date on which the submission was filed.
>
> (6) A person who submits a patent list must keep the list up to date but may not add a patent to an existing patent list except in accordance with subsection (4).
>
> (7) A person who submits a patent list or an amendment to an existing patent list under subsection (1) or (4) must certify that
>
> (a) the information submitted is accurate; and
>
> (b) the patents set out on the patent list or in the amendment are eligible for inclusion on the register and are relevant to the dosage form, strength and route of administration of the drug in respect of which the submission for a notice of compliance has been filed.

21 I emphasize the words in s. 4(5) that in the case of patents added afterwards, "the first person must identify *the* submission to which *the* patent list or *the* amendment relates, including *the* date on which *the* submission was filed". In addition, s. 3(3) provides that "[n]o information submitted pursuant to section 4 shall be included on the register until after the issuance of *the* notice of compliance in respect of which the information was submitted". These provisions, it seems to me, provide an important key to understanding the scheme. Entry of the "Patent list" does not destroy the linkage between the patent and the submission(s) to which it relates, nor to the NOC to which the submission(s) are directed. Specific patents are associated with one or more NDS, ANDS or SNDS, which in turn (if approved) give rise to specific NOCs, which in turn approve a specific manufacturer's product, which a generic manufacturer may seek to copy. There is no linkage between the 037 and 470 patents and the submissions that lead to the *Losec 20* product copied by Apotex. Those after-acquired patents were listed in relation to a SNDS dated January 22, 1999 by AstraZeneca for a new medical use for *Losec 20* (treatment of *H. Pylori*), a use for which the Apotex product is *not* approved, and to an administrative SNDS submitted by AstraZeneca dated July 12, 2000, which submission has nothing at all to do with the technology incorporated in *Losec 20*.

22 Thus understood, the s. 4(1) patent list in relation to a medication that goes through various stages of development may become over time a list of lists, or lists within a list. Section 4(5) ensures the Minister's ability to identify the precise patents relevant to the "early working" by a generic manufacturer of its copy-cat product. This identification is important heaving regard to the limited purposes for which the *NOC Regulations* are authorized by s. 55.2(4) of the *Patent Act*.

23 AstraZeneca relies on *Eli Lilly Canada Inc. v. Canada (Minister of Health)*, [2003] 3 F.C. 140, 2003 FCA 24 (Fed. C.A.), for the proposition that a patent list is submitted in respect of a drug and not in respect of any particular submission. This is also the view taken by the majority judgment of the Federal Court of Appeal in this case. On this view a "first person" could carry on "evergreening" its product indefinitely by the addition of new patents of marginal significance which would trigger an indefinite series of 24-month statutory freezes even though such subsequently listed patents are not the subject of "early working" by the generic manufacturer, and from which (as in the circumstances here) the generic manufacturer derives no advantage. As this case further illustrates, AstraZeneca even managed to piggy-back the 037 and 470 patents onto an administrative SNDS. An

interpretation that would freeze the generic product out of the market vacated by AstraZeneca in 1996 for a further two years or more in these circumstances flies in the face of the limited purpose authorized by s. 55.2(4) of the Act. It is not to be presumed that s. 4(5) of the *NOC Regulations* insisted on linking particular patents to particular submissions for no purpose.

F. Obligation of the Generic Applicant for a Notice of Compliance

24 When Apotex decided to seek approval to manufacture and market a copy-cat version of *Losec 20* in 1993, it saved itself a lot of time and expense by showing that its proposed product was "bioequivalent" to the AstraZeneca *Losec 20* product, for which AstraZeneca had done the research and clinical work to permit it to be "marketed in Canada pursuant to a notice of compliance". If the Apotex product is bioequivalent, Parliament reasoned, the research and clinical work that shows AstraZeneca's *Losec 20* to be safe and effective equally shows the Apotex copy-cat product to be safe and effective.

1. Standard of Review

25 The outcome of this appeal turns on conflicting interpretations of the *NOC Regulations*. On a question of legal interpretation, the Minister's opinion is not entitled to deference. The Federal Court of Appeal properly found that the standard of review on the point in issue is correctness.

2. Principles of Statutory Interpretation

26 It is now trite law that the words of an Act and regulations are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. Further, the scope of a regulation such as the provisions of the *NOC Regulations* is constrained by its enabling legislation, in this case s. 55.2(4) of *Patent Act* (*Biolyse*, at para. 38).

3. The Grammatical and Ordinary Sense of the Words

27 The generic manufacturer's obligations are set out in s. 5(1) of the *NOC Regulations*:

> 5. (1) Where a person files or has filed a submission for a notice of compliance in respect of a drug and compares that drug with, or makes reference to, another drug for the purpose of demonstrating bioequivalence on the basis of pharmaceutical and, where applicable, bioavailability characteristics and that other drug has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the register in respect of the other drug,
>
> (a) state that the person accepts that the notice of compliance will not issue until the patent expires; or
>
> (b) allege that
>
> (i) the statement made by the first person pursuant to paragraph 4(2)(*c*) is false
>
> ,
>
> (ii) the patent has expired
>
> ,
>
> (iii) the patent is not valid, or
>
> (iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

28 I accept the linguistic point made by Noël J.A. in the Federal Court of Appeal that the words "in respect of which" in s. 5(1) refer to "the other drug", i.e. the Canadian reference product, and not to a particular patent list or amended patent list. However, it seems to me that the "other drug" is the drug to which the generic manufacturer makes reference "for the purpose of demonstrating bioequivalence". If that "other drug" evolves over time by means of patentably distinct inventions, the safety and efficacy of a new product containing those patentably distinct inventions must be established to the satisfaction of the Minister of Health (not the Commissioner of Patents). Thus in *Biolyse* the Minister was not prepared to accept as bioequivalent a drug made with the medicine *paclitaxel* sourced from the yew species *taxus canadensis* in substitution for *paclitaxel* sourced from a different species of yew. In matters of drug approval, bioequivalence requires proof, not conjecture. If Apotex claims bioequivalence with *Losec 20* it is important to be precise about what generation of *Losec 20* is the comparator drug.

29 As stated, however, the majority judgment of the Federal Court of Appeal proceeded on the basis that "the drug" was *Losec 20* and that Apotex was required to address all patents listed against *Losec 20* in the Patent Register, including the 037 and 470 patents. On this view, presumably, Apotex would have to address new patents as fast as AstraZeneca could have them added to the *Losec 20* patent list, regardless of their relevance to the issue of "early working" and "bioequivalence". Sharlow J.A. adopted a narrower view, excluding from consideration the 037 and 470 patents. Considering the entire context, there is a measure of textual ambiguity as to what "another drug" and "the other drug" refers to, and this ambiguity seems to have given rise to the disagreement between Noël J.A. and Sharlow J.A. in the court below.

30 Ambiguity does not have to manifest itself in the text of s. 5(1). Rather,

> ...one must consider the "entire context" of a provision *before* one can determine if it is reasonably capable of multiple interpretations ... [Emphasis added.] (*Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 29)

31 As to the 037 and 470 patents, the question is whether the reference in s. 5(1) to "another drug for the purpose of demonstrating bioequivalence" and "the other drug" against which patents are listed is a reference to Losec 20 in *any* of its formulations, including formulations never brought to market (which is the AstraZeneca position); or does it mean, more narrowly, the *Losec 20* drug based on the June 19, 1989 NOC which Apotex copied (as Apotex contends).

G. The Regulatory Context

32 At the time of the Apotex ANDS in 1993, its Canadian reference product was the version of *Losec 20* brought to market in Canada by AstraZeneca pursuant to the June 19, 1989 NOC. Section C.08.001.1 of the *Food and Drug Regulations* defines "Canadian Reference product" as

> (a) a drug in respect of which a notice of compliance is issued pursuant to section C.08.004 and which *is marketed* in Canada by the innovator of the drug,
>
> (b) a drug, *acceptable to the Minister*, that can be used for the purpose of demonstrating bioequivalence on the basis of pharmaceutical and, where applicable, bioavailability characteristics, where a drug in respect of which a notice of compliance has been issued pursuant to section C.08.004 cannot be used for that purpose *because it is no longer marketed in Canada*, or
>
> (c) a drug, acceptable to the Minister, that can be used for the purpose of demonstrating bioequivalence on the basis of pharmaceutical and, where applicable, bioavailability characteristics, in comparison to a drug referred to in paragraph (a); (*produits de référence canadien*).

33 It is significant that this series of definitions draws distinctions between a drug which *is* marketed in Canada (subs. (*a*)) and a drug "acceptable to the Minister that ... cannot be used for that purpose" [i.e. as a reference drug] because it is *no longer* marketed in Canada (subs. (*b*)). Under (*b*), unlike (*a*), the Minister is given a discretion based on nothing but the fact that the product to which reference is made has been withdrawn from the market. As a practical matter, there was no AstraZeneca

omeprazole product on the market after 1996 which Apotex *could* copy. However, Apotex had obtained samples prior to 1996 sufficient to demonstrate bioequivalence to the earlier technology incorporated in *Losec 20*. As stated, that product did not incorporate the 037 and 470 patent inventions.

34 I agree with Noël and Malone JJ.A. that "[t]he fact that a first person does not presently occupy the market has no bearing on the question whether a second person's proposed drug will infringe" (para. 54). However, as Noël J.A. also conceded, "it is the actual drug, *from which samples can be taken* and used for comparative purposes, that is relevant to the application of subsection 5(1) of the NOC Regulations" (para. 46 (emphasis added)).

35 In my opinion, the rules governing acceptable "comparator" drugs give a further important clue to the legislative intention. If, as subs. (*b*) says, a drug cannot be used as a comparator unless acceptable to the Minister "because it is no longer marketed in Canada", it seems obvious that a drug cannot be used as a comparator if it has *never* been marketed in Canada. That is the significance of the fact that AstraZeneca has *never* had a product on the market based on AstraZenaca's later submissions in relation to which the 037 and 470 patents were listed.

36 Viewed in this light, it seems to me inescapable that the expression "another drug" in s. 5(1) refers to the actual comparator drug - not a drug that never became available for comparison - and that the words "with respect to each patent on the register in respect of *the* other drug" carries the same meaning.

37 The whole obligation incurred by the generic manufacturer under the *NOC Regulations* is based on its "early working" of patents embodied in "another drug for the purpose of demonstrating bio-equivalence". The only drug that fits the description is the version of *Losec 20* approved in the June 19, 1989 NOC.

H. The Broader Statutory Purpose

38 I repeat that Parliament's stated purpose in authorizing the *NOC Regulations* was to permit the early working of the *patented invention* (s. 55.2(4)). As Apotex did not make use of the patented inventions taught by the 037 and 470 patents, Apotex is not on this occasion within the mischief aimed at by the *NOC Regulations*.

39 By imposing the 24-month delay called for by the *NOC Regulations*, the decision of the Federal Court of Appeal undermines achievement of the balance struck by Parliament between the objectives of the *FDA* and regulations thereunder (making safe and effective drugs available to the public) and the *Patent Act* and its regulations (preventing abuse of the early working exception to patent infringement). Given the evident (and entirely understandable) commercial strategy of the innovative drug companies to evergreen their products by adding bells and whistles to a pioneering product even after the original patent for that pioneering product has expired, the decision of the Federal Court of Appeal would reward evergreening even if the generic manufacturer (and thus the public) does not thereby derive any benefit from the subsequently listed patents. In my view, s. 5(1) of the *NOC Regulations* requires a patent-specific analysis, i.e. the generic manufacturer is only required to address the cluster of patents listed against submissions relevant to the NOC that gave rise to the comparator drug, in this case the 1989 version of *Losec 20*.

40 If AstraZeneca had brought to market a *Losec 20* product pursuant to the later NOCs and if Apotex had made reference to that modified product for the purpose of demonstrating bioequivalence, Apotex would have been required to file a notice of allegation with respect to the 037 and 470 patents.

41 However, it is clear that AstraZeneca did not market any product pursuant to the subsequent NOCs and that the preconditions to any obligations of Apotex under s. 5(1) were therefore not triggered.

I. The Apotex Product Cannot Claim the Advantages of the 037 and 470 Patents

42 Apotex acknowledges that its NOC dated January 27, 2004 does not permit Apotex to produce a product formulated or manufactured in accordance with the 037 and 470 patents, nor to claim that the Apotex product is indicated for the treatment of *H. Pylori*. This opinion deals only with the obligations of Apotex under the *NOC Regulations*. AstraZeneca seemed to suggest

at various points during the oral hearing that Apotex is indeed infringing AstraZeneca patents. If this be so (and there is no evidence before us either way), then of course AstraZeneca retains all its remedies under the *Patent Act*, including, in appropriate circumstances, an interlocutory injunction. The only patent-related consequence of the present decision is to deny AstraZeneca the benefit of a 24-month freeze without any proof of patent infringement.

J. Conclusion

43 I would allow the appeal. The order of the Federal Court of Appeal is set aside and the order of the Federal Court, Trial Division is restored. Apotex is entitled to its costs in this Court and in the courts below. The Minister is entitled to his costs in this Court and in the Federal Court of Appeal.

Appeal allowed.

APPENDIX

Patent Act, R.S.C., 1985, c. P-4, s. 55.2

Infringement

. . . . .

[Exception]

55.2 (1) It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.

(2) [Repealed, 2001, c. 10, s. 2(1)]

(3) [Repealed, 2001, c. 10, s. 2(1)]

[Regulations]

(4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1), including, without limiting the generality of the foregoing, regulations

(a) respecting the conditions that must be fulfilled before a notice, certificate, permit or other document concerning any product to which a patent may relate may be issued to a patentee or other person under any Act of Parliament that regulates the manufacture, construction, use or sale of that product, in addition to any conditions provided for by or under that Act;

(b) respecting the earliest date on which a notice, certificate, permit or other document referred to in paragraph (*a*) that is issued or to be issued to a person other than the patentee may take effect and respecting the manner in which that date is to be determined;

(c) governing the resolution of disputes between a patentee or former patentee and any person who applies for a notice, certificate, permit or other document referred to in paragraph (*a*) as to the date on which that notice, certificate, permit or other document may be issued or take effect;

(d) conferring rights of action in any court of competent jurisdiction with respect to any disputes referred to in paragraph (*c*) and respecting the remedies that may be sought in the court, the procedure of the court in the matter and the decisions and orders it may make; and

(e) generally governing the issue of a notice, certificate, permit or other document referred to in paragraph (*a*) in circumstances where the issue of that notice, certificate, permit or other document might result directly or indirectly in the infringement of a patent.

[Inconsistency or conflict]

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and

(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict.

[For greater certainty]

(6) For greater certainty, subsection (1) does not affect any exception to the exclusive property or privilege granted by a patent that exists at law in respect of acts done privately and on a non-commercial scale or for a non-commercial purpose or in respect of any use, manufacture, construction or sale of the patented invention solely for the purpose of experiments that relate to the subject-matter of the patent.

Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 4-8:

Patent List

4(1) A person who files or has filed a submission for, or has been issued, a notice of compliance in respect of a drug that contains a medicine may submit to the Minister a patent list certified in accordance with subsection (7) in respect of the drug.

(2) A patent list submitted in respect of a drug must

(a) indicate the dosage form, strength and route of administration of the drug;

(b) set out any Canadian patent that is owned by the person, or in respect of which the person has an exclusive licence or has obtained the consent of the owner of the patent for the inclusion of the patent on the patent list, that contains a claim for the medicine itself or a claim for the use of the medicine and that the person wishes to have included on the register;

(c) contain a statement that, in respect of each patent, the person applying for a notice of compliance is the owner, has an exclusive licence or has obtained the consent of the owner of the patent for the inclusion of the patent on the patent list;

(d) set out the date on which the term limited for the duration of each patent will expire pursuant to section 44 or 45 of the *Patent Act*; and

(e) set out the address in Canada for service on the person of any notice of an allegation referred to in paragraph 5(3)(*b*) or (*c*), or the name and address in Canada of another person on whom service may be made, with the same effect as if service had been made on the person.

(3) Subject to subsection (4), a person who submits a patent list must do so at the time the person files a submission for a notice of compliance.

(4) A first person may, after the date of filing of a submission for a notice of compliance and within 30 days after the issuance of a patent that was issued on the basis of an application that has a filing date that precedes the date of filing of the submission, submit a patent list, or an amendment to an existing patent list, that includes the information referred to in subsection (2).

(5) When a first person submits a patent list or an amendment to an existing patent list in accordance with subsection (4), the first person must identify the submission to which the patent list or the amendment relates, including the date on which the submission was filed.

(6) A person who submits a patent list must keep the list up to date but may not add a patent to an existing patent list except in accordance with subsection (4).

(7) A person who submits a patent list or an amendment to an existing patent list under subsection (1) or (4) must certify that

(a) the information submitted is accurate; and

(b) the patents set out on the patent list or in the amendment are eligible for inclusion on the register and are relevant to the dosage form, strength and route of administration of the drug in respect of which the submission for a notice of compliance has been filed.

5(1) Where a person files or has filed a submission for a notice of compliance in respect of a drug and compares that drug with, or makes reference to, another drug for the purpose of demonstrating bioequivalence on the basis of pharmaceutical and, where applicable, bioavailability characteristics and that other drug has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the register in respect of the other drug,

(a) state that the person accepts that the notice of compliance will not issue until the patent expires; or

(b) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(*c*) is false,

(ii) the patent has expired,

(iii) the patent is not valid, or

(iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

. . . . .

(2) Where, after a second person files a submission for a notice of compliance but before the notice of compliance is issued, a patent list or an amendment to a patent list is submitted in respect of a patent pursuant to subsection 4(4), the second person shall amend the submission to include, in respect of that patent, the statement or allegation that is required by subsection (1) or (1.1), as the case may be.

(3) Where a person makes an allegation pursuant to paragraph (1)(*b*) or (1.1)(*b*) or subsection (2), the person shall

(a) provide a detailed statement of the legal and factual basis for the allegation;

(b) if the allegation is made under any of subparagraphs (1)(*b*)(i) to (iii) or (1.1)(*b*)(i) to (iii), serve a notice of the allegation on the first person;

(c) if the allegation is made under subparagraph (1)(*b*)(iv) or (1.1)(*b*)(iv),

(i) serve on the first person a notice of the allegation relating to the submission filed under subsection (1) or (1.1) at the time that the person files the submission or at any time thereafter, and

(ii) include in the notice of allegation a description of the dosage form, strength and route of administration of the drug in respect of which the submission has been filed; and

(d) serve proof of service of the information referred to in paragraph (*b*) or (*c*) on the Minister.

Right of Action

6(1) A first person may, within 45 days after being served with a notice of an allegation pursuant to paragraph 5(3)(*b*) or (*c*), apply to a court for an order prohibiting the Minister from issuing a notice of compliance until after the expiration of a patent that is the subject of the allegation.

(2) The court shall make an order pursuant to subsection (1) in respect of a patent that is the subject of one or more allegations if it finds that none of those allegations is justified.

(3) The first person shall, within the 45 days referred to in subsection (1), serve the Minister with proof that an application referred to in that subsection has been made.

. . . . .

(5) In a proceeding in respect of an application under subsection (1), the court may, on the motion of a second person, dismiss the application

(a) if the court is satisfied that the patents at issue are not eligible for inclusion on the register or are irrelevant to the dosage form, strength and route of administration of the drug for which the second person has filed a submission for a notice of compliance; or

(b) on the ground that the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process.

. . . . .

(9) In a proceeding in respect of an application under subsection (1), a court may make any order in respect of costs, including on a solicitor-and-client basis, in accordance with the rules of the court.

(10) In addition to any other matter that the court may take into account in making an order as to costs, it may consider the following factors:

(a) the diligence with which the parties have pursued the application;

(b) the inclusion on the certified patent list of a patent that should not have been included under section 4; and

(c) the failure of the first person to keep the patent list up to date in accordance with subsection 4(6).

Notice of Compliance

7(1) The Minister shall not issue a notice of compliance to a second person before the latest of

(a) [Repealed, SOR/98-166, s. 6]

(b) the day on which the second person complies with section 5,

(c) subject to subsection (3), the expiration of any patent on the register that is not the subject of an allegation,

(d) subject to subsection (3), the expiration of 45 days after the receipt of proof of service of a notice of any allegation pursuant to paragraph 5(3)(*b*) or (*c*) in respect of any patent on the register,

(e) subject to subsections (2), (3) and (4), the expiration of 24 months after the receipt of proof of the making of any application under subsection 6(1), and

(f) the expiration of any patent that is the subject of an order pursuant to subsection 6(1).

(2) Paragraph (1)(*e*) does not apply if at any time, in respect of each patent that is the subject of an application pursuant to subsection 6(1),

(a) the patent has expired; or

(b) the court has declared that the patent is not valid or that no claim for the medicine itself and no claim for the use of the medicine would be infringed.

. . . . .

(4) Paragraph (1)(*e*) ceases to apply in respect of an application under subsection 6(1) if the application is withdrawn or discontinued by the first person or is dismissed by the court hearing the application.

(5) If the court has not yet made an order under subsection 6(1) in respect of an application, the court may

(a) shorten the time limit referred to in paragraph (1)(*e*) on consent of the first and second persons or if the court finds that the first person has failed, at any time during the proceeding, to reasonably cooperate in expediting the application; or

(b) extend the time limit referred to in paragraph (1)(*e*) on consent of the first and second persons or, if the court finds that the second person has failed, at any time during the proceeding, to reasonably cooperate in expediting the application.

8(1) If an application made under subsection 6(1) is withdrawn or discontinued by the first person or is dismissed by the court hearing the application or if an order preventing the Minister from issuing a notice of compliance, made pursuant to that subsection, is reversed on appeal, the first person is liable to the second person for any loss suffered during the period

(a) beginning on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations, unless the court is satisfied on the evidence that another date is more appropriate; and

(b) ending on the date of the withdrawal, the discontinuance, the dismissal or the reversal.

(2) A second person may, by action against a first person, apply to the court for an order requiring the first person to compensate the second person for the loss referred to in subsection (1).

. . . . .

(4) The court may make such order for relief by way of damages or profits as the circumstances require in respect of any loss referred to in subsection (1).

(5) In assessing the amount of compensation the court shall take into account all matters that it considers relevant to the assessment of the amount, including any conduct of the first or second person which contributed to delay the disposition of the application under subsection 6(1).

Appeal allowed.

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