File number: 36575

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

BETWEEN:

ANDREW SABEAN

APPELLANT
(Respondent)

and

PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT
(PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

STEWART McKELVEY
900 – 1959 Upper Water Street
Halifax NS B3J 3N2
Tel: 902.420.3200
Fax: 902.420.1417
Email: snorton@stewartmckelvey.com

Scott C. Norton, Q.C.
Scott R. Campbell
Counsel for the Respondent

GOWLING WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa ON K1P 1C3
Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Jeff Beedell
Ottawa Agent for Counsel for the Respondent

KIMBALL BROGAN
121 Front Street
Wolfville NS B1P 1A6
Tel: 902.542.5757
Fax: 902.542.5759
Email: dkimball@kblaw.ca

Derrick J. Kimball
Sharon L. Cochrane
Counsel for the Appellant

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa ON K2P 0R3
Tel: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Marie-France Major
Ottawa Agent for Counsel for the Appellant

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case raises the following insurance contract question – are future Canada Pension Plan disability benefits deductible from an award of damages, pursuant to clause 4(b)(vii) of the SEF 44 family protection endorsement (the "**SEF 44**")?

2. According to the Nova Scotia Court of Appeal, the answer is yes.

3. In reaching this decision, the Court of Appeal correctly:

   (a) applied a contextual and purposive analysis, consistent with the governing principles of insurance contract interpretation endorsed by this Honourable Court; and

   (b) concluded that CPP benefits are payable under a policy of insurance, consistent with the long-standing paradigm at common law that they share the essential characteristics of insurance.

4. The Court of Appeal reached the correct result in law. By allowing the deduction of CPP disability benefits, the decision below avoids the mischief of over-compensation that is mandated by the spirit, intent, context and policy language of the SEF 44.

5. Accordingly, this appeal should be dismissed.

B. Facts

6. The trial / adjudicative facts are largely immaterial to the question before this Honourable Court. They were accurately summarized in the decisions below.

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

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

vii) any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;

viii) any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury of death sustained;

ix) any family protection coverage of a motor vehicle liability policy.

8. At trial, the parties agreed that CPP benefits already received are deductible under the SEF 44 given the opening language of clause 4(b) – they are "actually recovered by the eligible claimant from any source".

9. As for future payments, the Defendant (Respondent on this appeal – "**Portage**") submitted that clause 4(b)(vii) permits the deduction of CPP disability benefits from the award of damages on the basis that:

(a) in *Canadian Pacific Limited v Gill*,[1] this Court concluded that CPP benefits are provided *via* a contract or policy of insurance;

(b) in *Campbell-MacIsaac v Deveaux*,[2] the Nova Scotia Court of Appeal concluded that, in order to ensure against over-compensation under an endorsement of excess / "last ditch" insurance, future benefits are properly deducted from an award of damages by an SEF 44 insurer; such that

(c) future CPP disability benefits are (to quote the language of the SEF 44 itself) "excess to any amounts the eligible claimant is entitled to recover (whether such

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1 *Canadian Pacific Ltd v Gill*, [1973] SCR 654.

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

> entitlement is pursued or not) from ... any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits".

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

11. In contrast, the Plaintiff (Appellant on this appeal) submitted to the trial judge that the SEF 44 endorsement does not permit such a deduction. In doing so, he emphasized the decision of the New Brunswick Court of Appeal in *Economical Mutual Insurance Company v Lapalme*,[3] which concluded that an SEF 44 insurer is not entitled to deduct the value of future CPP disability benefits from an award of damages.

12. The trial judge agreed with the Appellant, relying almost exclusively on the reasons in *Lapalme.*

13. On appeal by Portage, the Nova Scotia Court of Appeal unanimously overturned the trial judge's decision on this point.

14. After considering the purpose of the SEF 44 and its wider context, Justice Scanlan concluded that there is no ambiguity in the contractual language of clause 4(b)(vii). In his essential paragraph on this issue, Justice Scanlan reasoned as follows:

> [29] Given: (1) the law established in *Gill*, before the SEF 44 endorsement was made available, that pensions payable under the CPP [are] "of the same nature as contracts of insurance"; (2) the clear wording to the effect that SEF 44 is excess insurance – that no one is entitled to double recovery; and (3) the unimportance in the context of clause 4(b)(vii) of the use of the word "policy" as opposed to "contract", I am satisfied there is no ambiguity. It is clear that the term "any policy of insurance" in clause 4(b)(vii) includes the provisions of the CPP governing disability

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[3] *Economical Mutual Insurance Company v Lapalme*, 2010 NBCA 87.

> benefits. Future CPP disability benefits are deductible from amounts payable by SEF 44 insurers. Thus I am satisfied the trial judge erred in adopting the reasoning in *Lapalme* and ordering that Mr. Sabean's future CPP disability benefits were not deductible from the amount Portage is required to pay to him under the SEF 44.[4]

15. The resulting Order for Judgment was issued by the Court of Appeal on June 4, 2015, from which the Appellant now appeals to this Court.

PART II – STATEMENT OF QUESTIONS IN ISSUE

16. Portage agrees with the statement of the sole question in issue at paragraph 13 of the Appellant's factum, namely that:

> The issue before this Honourable Court is whether or not the Canada Pension Plan, specifically CPP disability benefits, is a 'policy of insurance' within the meaning of clause 4(b)(vii) of the SEF 44 Endorsement.

17. For the reasons that follow, Portage submits that the answer is yes – clause 4(b)(vii) of the SEF 44 contemplates and encompasses the deduction of CPP disability benefits.

18. They are therefore deductible by the SEF 44 insurer.

PART III – STATEMENT OF ARGUMENT

19. By way of a roadmap, this statement of argument will proceed as follows:

    (a) Portage will first deconstruct the essence of the Appellant's position on this appeal.

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[4] Appellant's Record, page 37.

(b) Portage will then present the governing principles of insurance policy interpretation and outline how the Appellant avoids the necessary approach.

(c) Portage will conclude with a discussion about why CPP disability benefits are properly considered as payable under a policy of insurance.

A. Deconstructing the Appellant's Argument

20. While this case arises from the commission of a tort (motor vehicle accident), this case is about a contract. What principles animate the interpretation of the SEF 44? How does one delineate the scope of the agreement? That is the focus of this appeal.

21. The distinction between tort and contract is important, because the Appellant essentially suggests that the former should drive the analysis of the latter. The Appellant's argument on this appeal appears to go as follows:

(a) On the tort side of the equation, CPP disability benefits are not deductible from the award of damages. The award of damages therefore contemplates some degree of over-compensation, which arises from the common law application of the rule endorsed by this Court in *Gill* and its progeny.

(b) The SEF 44 should ensure full recovery of the award of tort damages in the face of an underinsured motorist. Clause 4(b)(vii) should be read in this context, noting that it makes no explicit references to the Canada Pension Plan.

(c) In this light, CPP disability benefits should not be deducted under the SEF 44. To conclude otherwise would jeopardize the plaintiff's full recovery of the award of tort damages.

22. This argument sidesteps the contextual and purposive nature of the required exercise in contract interpretation. Notably, the SEF 44 has been expressly confirmed as an indemnity-only policy of excess / "last ditch" insurance, which does not allow for double recovery or over-compensation.[5]

23. The Appellant's approach favours form over substance. It draws technical and unprincipled distinctions, and ultimately converts the SEF 44 into windfall insurance.

24. In direct response to the articulation of the Appellant's argument above, Portage's submissions can be summarized as follows:

    (a) This appeal is not about the treatment of CPP disability benefits on the tort side of the equation. That said, a central theme emanates from the common law rule: CPP disability benefits share the essential characteristics of private insurance, *i.e.* a premium (or contribution) is made in return for the promise of payment upon the occurrence of a risk. These benefits are therefore considered payable pursuant to a policy or contract of insurance.

    (b) The purpose of the SEF 44 is to provide "safety net" coverage according to its own terms, keeping in mind that "indemnity" is the lens through which the SEF 44 must be interpreted. The SEF 44 post-dates the judicial treatment of CPP disability benefits as payable pursuant to a policy of insurance at common law, and there is nothing in the language of clause 4(b)(vii) to direct a differential treatment.

    (c) The SEF 44 does not purport to ensure full recovery of the award of damages in tort. The SEF 44 insurer is taken to know that the award of damages

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[5] See *eg Campbell-MacIsaac, supra.*

contemplates some degree of over-compensation in relation to CPP benefits. By referring to a "policy of insurance" in clause 4(b)(vii), the value of future CPP disability benefits must therefore be deducted in order to avoid double recovery.

25. With this in mind, it is helpful to now consider the principles that animate the interpretation of insurance contracts (including, in particular, the SEF 44).

B. Interpretation of Insurance Contracts

26. In addition to the general principles of contractual interpretation, insurance contracts are also subject to certain specific principles.

27. In the words of this Court:

> [27] Insurance policies form a special category of contracts. As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding. Nevertheless, through its long history, insurance law has given rise to a number of principles specific to the interpretation of insurance policies. These principles were recently reviewed by this Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera* ... They apply only where there is an ambiguity in the terms of the policy.
>
> [28] First, the courts should be aware of the unequal bargaining power at work in the negotiation of an insurance contract and interpret it accordingly. This is done in two ways: (1) through the application of the *contra proferentem* rule; (2) through the broad interpretation of coverage provisions and the narrow interpretation of exclusions. These rules require that ambiguities be construed against the drafter. In most policies, the drafter is the insurer and the insured is essentially required to adhere to the terms set out by the insurer. ... In any event, as I will find that there is no ambiguity in the Policy, it will be unnecessary to resort to these principles.
>
> [29] Second, the courts should try to give effect to the reasonable expectations of the parties, without reading in

> windfalls in favour of any of them. In essence, "the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract" ...
>
> [30] Finally, the context of the particular risk must also be taken into account.[6]

28. The jurisprudence has been aptly summarized by Geoff Hall in his seminal text on contractual interpretation, noting the "eight special principles" that emerge:

> Thus the principles of interpretation which apply to insurance contracts are the same as those generally applicable to commercial contracts, but at the same time eight special principles also govern the interpretive process:
>
> 1. The court should look at the words of the contract to determine if there is ambiguity.
>
> 2. The court should ascertain the intention of the parties concerning specific provisions by reference to the language of the entire contract.
>
> 3. The court should construe ambiguities found in the insurance contract in favour of the insured (the *contra proferentem* rule).
>
> 4. The court should limit the construction in favour of the insured by reasonableness.
>
> 5. Coverage provisions should be construed broadly and exclusion clauses should be construed narrowly.
>
> 6. It is desirable, at least where a policy is ambiguous, to give effect to the reasonable expectations of the parties.
>
> 7. Policies of insurance should be interpreted in a manner consistent with the general economic purpose of insurance.

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[6] *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21 [emphasis added].

> 8. There is an increased willingness to rely on precedent, including in some cases American authorities, for insurance contracts than there is for other types of contracts.[7]

29. On this appeal, the parties disagree about the effect and application of these principles. The Appellant equivocates on whether clause 4(b)(vii) is ambiguous and suggests that it should be treated as an exclusion clause in any event. In doing so, the Appellant avoids a more comprehensive and contextual interpretation.

30. With particular reference to the SEF 44, this Court has confirmed that it is a policy of indemnity and nothing more.[8] It therefore "limits the insured's recovery to her actual losses."[9]

31. As such, the presumption against windfall or double recovery takes on a front-and-centre role in the interpretive exercise. The "excess", "last ditch" or "safety net" nature of the SEF 44 permeates the entire assessment of whether future CPP disability benefits are deductible.

32. In determining that long-term disability payments are deductible under clause 4(b)(vii) of the SEF 44, the Nova Scotia Court of Appeal has highlighted the need to avoid an interpretation that would result in over-compensation. With specific reference to this Court's decision in *Somersall v Friedman* and the governing principles of interpretation, Justice Saunders observed that "[a]ny analysis and interpretation of the SEF 44 endorsement and its provisions must be consistent with those principles, that is that an

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7 GR Hall, *Canadian Contractual Interpretation*, 2d ed (Markham: LexisNexis, 2012) at 204.

8 *Somersall v Friedman*, 2002 SCC 59.

9 D Boivin, *Insurance Law*, 2d ed (Toronto: Irwin Law, 2015) at 50.

insured is not to profit from the insurance and therefore is not entitled to double recovery."

33. To quote at length from this decision in *Campbell-MacIsaac*:

> [53] In the recent case of *Somersall v. Friedman* ... the [Supreme] Court had to make certain findings regarding the interpretation of the SEF 44. In its analysis the Court considered the nature of the coverage and its objective. The Court found the SEF 44 was a policy of indemnity, such that an insured is to receive no more and no less than full indemnity thus limiting the insurer's liability to the actual loss proved and denying an insured "profit" or overcompensation under the policy. In my opinion these are important principles to be applied when interpreting the whole of the SEF 44 and those of its provisions engaged in this case.
>
> [54] While the specific issue under consideration in *Somersall* was whether a limits agreement entered into between the injured insured claimants and the tortfeasor precluded a claim by the claimants for compensation under their SEF 44 endorsement against their own insurer, the analysis and observations of the Court are most instructive and in my opinion apposite in this appeal.
>
> [55] It has been consistently recognized by the courts that SEF 44 coverage is "last ditch" or "safety net" coverage. It is, as its own provisions make clear, "excess" insurance. The principle that SEF 44 protection is "excess" coverage only and ought not to provide a "windfall" or double recovery ...
>
> ...
>
> [57] From these and other authorities, I conclude that the SEF 44 endorsement is an indemnity policy which is intended to cover Dr. Campbell-MacIsaac up to the extent of her loss, such that she is to receive no more and no less than full indemnity. She can in no way profit from the insurance. Any analysis and interpretation of the SEF 44 endorsement and its provisions must be consistent with those principles, that is that an insured is not to profit from the insurance and therefore is not entitled to double recovery.

> [58] In addition, I hold the view that the specific terms of the SEF 44 endorsement should be read in the context of the wording of the entire endorsement and not in isolation. As well, the terms of the endorsement must be interpreted in light of its overall purpose, that it is "last ditch," "safety net" and "excess insurance."
>
> ...
>
> [62] In the result, particular words and phrases should not be lifted from the contract and considered in isolation. They must be interpreted within the context, scheme and objectives of the entire endorsement which is to provide "last ditch," "safety net" and "excess" protection to Dr. Campbell-MacIsaac that is "no more and no less than full indemnity" and without profit or windfall or double recovery, all in keeping with "the mutual obligations created by the SEF 44" endorsement.
>
> ...
>
> [78] Such an interpretation reflects the excess coverage protection intended by the SEF 44 endorsement for damages not recoverable from the inadequately insured motorist, but not in a way that would enable the plaintiff to obtain a profit or windfall at the insurer's expense. Any other interpretation would in my view render meaningless and would not reflect the true intent of the parties when they entered into this contract of insurance ...[10]

34. It is clear that ambiguities in an insurance policy should generally be resolved in favour of the insured. This is limited, however, by the contextual condition of reasonableness and the presumption against windfalls. Before the *contra proferentem* rule can be applied, there must remain an ambiguity after the actual language of the contract has been assessed through the proper lens.

35. In this case, Portage submits that there is no ambiguity in clause 4(b)(vii). The phrase "any policy of insurance providing disability benefits" either includes or does not include CPP disability benefits. After the phrase is interpreted in accordance with the principles

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[10] *Campbell-MacIsaac*, *supra* [emphasis added].

outlined above, one is left with a clear and unambiguous answer. To any extent that any ambiguities could possibly remain (which is not the case), context and reasonable expectations continue to control the outcome in favour of deduction.[11]

36. It is also clear that exclusion clauses should generally be construed narrowly in an insurance contract. In this case, the Appellant contends (without any analysis or authority) that clause 4(b)(vii) is an exclusion clause and should therefore be construed in favour of the insured.[12]

37. Contrary to this bald assertion, clause 4(b)(vii) cannot be properly characterized as an exclusion clause. It does not exclude coverage. Rather, it fixes the amount of payout once coverage has been found to exist.

38. In other words, deductions are not exclusions because they are actually contingent upon the existence of coverage in the first place. This is consistent with the general description of exclusion clauses as outlining the parameters of coverage (as opposed to quantum). According to Brown and Donnelly:

> Exclusions specify events or circumstances which, if they happen in a way that relates to the loss, result in there being no coverage. The insurer must establish that a claim is excluded. Some exclusions deny coverage if the loss is caused or contributed to by a particular peril. For example a homeowner's insurance contract may provide coverage for damage attributable to flooding unless it is caused by the backup of a sewer. In such a contract sewer backup is an excluded peril. Other exclusions refer to subject matter not covered or to more general situations like a clause in an automobile insurance contract stating that there can be no

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[11] This is consistent with the statement of Justice LeBel in *Jesuit Fathers of Upper Canada*, *supra* at paras 29 & 30 that: "[T]he courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them … the context of the particular risk must also be taken into account."

[12] At para 37 of his factum, the Appellant writes: "It is submitted that clause 4(b) is an exclusionary clause and should be interpreted narrowly as referenced in *Somersall* above."

> successful claim if the damage happened while the vehicle was being driven by an unlicensed driver. Another example is a provision in a fire insurance contract denying coverage if the fire happens while the premises are unoccupied.[13]

39. But again, and even if clause 4(b)(vii) could be properly characterized as an exclusion clause (which it cannot), it would be inconsistent with the governing principles to allow this single factor to command the outcome.

40. Keeping these interpretive principles in mind, the question on this appeal is: when clause 4(b)(vii) of the SEF 44 refers to "any amounts the eligible claimant is entitled to recover ... from any policy of insurance providing disability benefits or loss of income benefits or medical expenses or rehabilitation benefits", does this include CPP disability benefits?

41. Portage submits that the answer is yes.

42. This is because:

(a) CPP disability benefits share the essential characteristics of insurance.

(b) The language of clause 4(b)(vii) post-dates the judicial characterization of CPP benefits as payable under a policy of insurance.

(c) Because of their treatment as payable under a policy of insurance at common law, CPP benefits are not generally deductible from an award of damages in tort.

(d) This results in over-compensation on the tort side of the equation, such that the SEF 44 insurer is taken to know that such amounts should be deducted from its payout as the excess or "last ditch" insurer.

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[13] C Brown & T Donnelly, *Insurance Law in Canada*, vol 1 (Toronto: Carswell, updated 2015) at 7.3(b), page 7-13 [emphasis added].

(e) This is the only conclusion that is consistent with the context and purpose of the SEF 44, namely that it is "excess coverage only and ought not to provide a windfall or double recovery".[14]

(f) Otherwise, the insured receives a windfall that is contrary to reasonable expectations. To quote this Court's decision in *Jesuit Fathers of Upper Canada*: "the courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them."[15]

43. As a component of context and reasonable expectations, the sequence of events is important. The Court of Appeal highlighted this point in the decision below:

> [24] The Court concluded [in *Canadian Pacific Ltd v Gill*] that pensions payable under the CPP "…are so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute".
>
> [25] Subsequent to *Gill*, Ontario's *Insurance Act* was amended making private insurers responsible to provide coverage with respect to underinsured drivers. A standard endorsement form, SEF 42, was drafted by the insurance industry and became available October 1, 1981 ...
>
> [26] SEF 42 contained no limitation analogous to s.4(b)(vii) of the SEF 44 endorsement and so made no attempt to prevent double recovery from any form of disability insurance. SEF 42 was withdrawn by the insurance industry as a direct result of judicial interpretations which expanded coverage in a way it had not anticipated and was unwilling to accept, such as the "stacking" of policy limits. If left undisturbed, the industry felt the decisions

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[14] *Campbell-MacIsaac*, *supra* at para 57.

[15] *Jesuit Fathers of Upper Canada*, *supra* at para 29. See also *Consolidated-Bathurst v Mutual Boiler*, [1980] 1 SCR 888 at 901-902, where Justice Estey observes: "the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract."

> would result in insurers having to pay for losses far in excess of what was originally intended, necessitating an astronomical increase in premiums ... As a result, the insurance industry made the more restrictive SEF 44 endorsement available as of February 1, 1985. Among the changes designed to limit coverage was clause 4(b)(vii), which "effectively precludes the double recovery permitted at common law" ...
>
> ...
>
> [29] Given: (1) the law established in *Gill*, before the SEF 44 endorsement was made available, that pensions payable under the CPP [are] "of the same nature as contracts of insurance"; (2) the clear wording to the effect that SEF 44 is excess insurance - that no one is entitled to double recovery; and (3) the unimportance in the context of clause 4(b)(vii) of the use of the word "policy" as opposed to "contract", I am satisfied there is no ambiguity. It is clear that the term "any policy of insurance" in clause 4(b)(vii) includes the provisions of the CPP governing disability benefits. Future CPP disability benefits are deductible from amounts payable by SEF 44 insurers ...[16]

44. In this light, it is helpful to now trace the development and treatment of CPP benefits through the jurisprudence. Consistent with "special principle" #8 (set out at paragraph 28 of this factum), this is particularly because of the importance of precedent to the interpretation of insurance contracts.

C. CPP and the Essential Characteristics of Insurance

45. This final component of the statement of argument considers the following three points: (i) the historical treatment of CPP benefits at common law; (ii) the need for consistent

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[16] Appellant's Record, pages 36 – 37 [emphasis added]. At paras 59 – 61 of his factum on this appeal, the Appellant complains that the Court of Appeal referred to secondary materials "not submitted by the parties or argued before the Court" and that the "parties were not given the opportunity to comment on this material" regarding the historical development of the SEF 44. The Appellant was fully aware of Portage's argument on sequence and the need to avoid double recovery under the SEF 44. The Appellant neglects to mention that the Court of Appeal expressly requested and received post-hearing submissions on the historical development of the SEF 44.

treatment; and (iii) why the decision in *Lapalme* is an anomaly and should be disregarded.

46. Ultimately, Portage submits that the characterization of CPP disability benefits must be consistent and should not change depending upon the legal question (*i.e.* tort versus contract). Otherwise, results-driven reasoning will triumph over substance.

(i) Historical Treatment of CPP Benefits

47. In 1973, this Court confirmed in *Gill* that CPP death and disability benefits are paid or payable under a contract of insurance.[17]

48. At issue was whether the CPP death benefit is deductible from a derivative award of tort damages under the British Columbia *Families' Compensation Act*, subsection 4(4) of which provided as follows:

> In assessing damages there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance.[18]

49. After tracing the historical treatment of similar benefits in England, this Court noted that CPP benefits are subject to the common law "private insurance exception" to the principle against over-compensation in tort law.[19]

50. This Court highlighted that CPP death and disability benefits share the essential characteristics of insurance. That is, a premium (or contribution) is made in return for

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[17] *Gill*, *supra* at 669 – 670. See also *Gignac v Neufeld* (1999), 43 OR (3d) 741 (CA) at para 33.

[18] This provision is quoted in *Gill*, *supra* at 669 [emphasis added].

[19] This exception is referred to by many labels, most commonly as part of the so-called "collateral benefits rule".

the promise of payment upon the occurrence of a risk, namely an event which may or may not occur at any given time.

51. For the unanimous Supreme Court, Justice Spence quoted from the speech of Lord Reid in the seminal House of Lords decision in *Parry v Cleaver*:[20]

> What, then, is in the nature of a contributory pension? Is it in reality a form of insurance or is it something quite different? [Example quoted is omitted.] The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income.
>
> But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance, what he gets back depends on how things turn out. He may never be off duty and may die before retiring age, leaving no dependents. Then he gets nothing back. Or he may, by getting a retirement or disablement pension, get much more back than has been paid in on his behalf. I can see no relevant difference between this and any form of insurance. So, if insurance benefits are not deductible in assessing damages and remoteness is out of the way, why should his pension be deductible?[21]

52. Because CPP benefits are also so much akin to or an exact substitute for private insurance, Justice Spence reasoned that they are to be considered "paid or payable under a contract of assurance or insurance". On the language of subsection 4(4) of the *Families' Compensation Act*, they are therefore not deductible from an award of tort damages.

53. On this point, Justice Spence wrote:

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[20] *Parry v Cleaver*, [1970] AC 1 (HL).

[21] *Gill*, *supra* at 667 [emphasis added]. See also at 668, where Justice Spence refers to the following comments in the speech of Lord Pearce: "Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their 'character' is the same …"

> It is true that the state pension in the United Kingdom is not an exact counterpart of the Canada Pension Plan but it is on a like basis, that is, persons in the class of pensionable persons are required by statute to make a contribution to the pension plan; the employer makes contribution, and then a pension is payable on retirement or upon becoming disabled, or a pension is payable to the widow and dependent children upon the death of the contributor. The plan, therefore, is an exact substitute for a privately arranged insurance policy made between the deceased person and an insurance company with the benefits payable upon the death or disablement of the insured.
>
> There is an element of risk to both the contributor under the Canada Pension Plan and to the Government which pays the benefits under the plan. It may well be that a person who is a contributor may make but a few payments and then become disabled and be paid pension amounts over a long period, on the other hand, the contributor may contribute for a very long number of years and then upon retirement die within a few months so that very little pension benefit is obtained.
>
> There are, of course, many forms of insurance and surely one of them may be considered to be the social insurance now exemplified by the Canada Pension Plan. In so far as the word "contract" is concerned, there is, in result, a contract between the contributor to the Canada Pension Plan and the Government which, by virtue of the statute, exacts from such contributor weekly deductions from his wages.[22]

54. Since the release of *Gill* in 1973, this Court has broadly revisited on three occasions the question of whether certain amounts should be deducted from an award of tort damages (particularly where the absence of a deduction would result in over-compensation to the plaintiff).

55. In doing so, this Court has affirmed the continued application of *Gill* and has characterized its ratio as part of the "private insurance exception" to the general tort principle that a plaintiff should not be compensated for more than his or her loss.

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[22] *Gill*, *supra* at 669 – 670 [emphasis added].

56. In *Ratych v Bloomer* (1990), Justice McLachlin (as she then was, and for the majority) referred to *Gill* and noted that: "this Court, in dealing with a fatal accidents problem expressly approved the principles set out in *Parry* and held that Canada Pension Plan payments should not be deducted from the plaintiff's damages".[23]

57. In dissent, Justice Cory highlighted that funds recovered under an "insurance policy" are not deductible from the award of tort damages at common law. By reference to *Gill*, such funds include those payable as CPP death or disability benefits.

58. Justice Cory wrote:

> Since the early part of this century, the *Bradburn* rule[24] has been consistently applied by Canadian courts ... In addition, this Court in both *Canadian Pacific Ltd. v. Gill* ... has cited, with approval, the following statement of Lord Pearce in *Parry v. Cleaver*, *supra*:
>
> > If one starts on the basis that *Bradburn's* case (1874), L.R. 10 Ex. 1, decided on fairness and justice and public policy, is correct in principle ...
>
> Thus it can be seen that the principle that the funds that a plaintiff recovers under an insurance policy, for which he or she has paid the premiums, are not deductible is firmly established.
>
> ...
>
> This Court has held that Canada Pension Plan payments and payments from an employer's private pension plan should not be deducted from a plaintiff's damages.[25]

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[23] *Ratych v Bloomer*, [1990] 1 SCR 940 at 970.

[24] Referring to the Exchequer Division decision in *Bradburn v Great Western Rail Co*, [1874-80] All ER Rep 195, as the initial authority in favour of the "private insurance exception".

[25] *Ratych*, *supra* at 949 – 951 [emphasis added].

59. In *Cunningham v Wheeler* (1994), Justice Cory reiterated his characterization of *Gill* as an affirmation of the "private insurance exception". By reference again to the English authorities, Justice Cory wrote (for the majority):

> In *Canadian Pacific Ltd. v. Gill*, ... this Court affirmed the principle first set out in ***Bradburn's*** case and adopted in *Parry v. Cleaver* that the proceeds of insurance should not be deducted from a plaintiff's damages.
>
> I think the exemption for the private policy of insurance should be maintained.[26]

60. Nearly twenty years after *Cunningham*, a majority of this Court again referred to *Gill* as falling within the "private insurance exception" at common law.[27]

61. All to say, this Court has consistently referred to CPP benefits as falling within the scope of the "private insurance exception" on the tort side of the equation. This should come as no surprise, because CPP benefits continue to share the essential characteristics of private insurance (as identified in *Gill*). Nothing has changed.[28]

62. The same holds true in the lower courts across the country, where CPP benefits are repeated characterized as insurance proceeds.

63. As just a few examples:

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[26] *Cunningham v Wheeler*, [1994] 1 SCR 359 at 400 [emphasis added].

[27] See *IBM Canada Limited v Waterman*, 2013 SCC 70 at paras 43 – 47.

[28] In a different context, this Court has also referred to CPP benefits as "paid on the same basis as an insurance claim" and characterized the Canada Pension Plan as a "quasi-contractual insurance scheme": see *Sarvanis v Canada*, 2002 SCC 28 at paras 35 – 36.

(a) In *Cugliari v White*, the Court of Appeal for Ontario (*per* Justice Charron, as she then was) referred to both *Gill* and *Cunningham* and concluded that: "CPP disability benefits can be considered akin to a private policy of insurance."[29]

(b) In *Fraser v Hunter Estate*, the Nova Scotia Court of Appeal (*per* Chief Justice Glube) noted that: "Canada Pension Plan benefits have, for many years, been found to be a form of insurance".[30]

(c) In *Lomax v Weins*, the Supreme Court of British Columbia (*per* Justice Smith, as she then was) confirmed that: "It is well established that CPP disability benefits ... are in the nature of private insurance and therefore fall within the private insurance exception".[31]

(d) In *Khairati v Prasad and Mohan*, the Supreme Court of British Columbia again confirmed that CPP disability benefits are payable under a policy of insurance. In the words of Justice Coultas:

> I find that the Canada Pension Plan Disability Benefits properly fit within the "insurance exception" and therefore should not be deducted from any damage award. The Canada Pension Plan is set up in the same manner as an insurance plan and direct costs can easily be traced to the plaintiff. This position is supported by high authority. The Supreme Court of Canada in *Gill Estate v. Canadian Pacific Ltd* ... decided that Canada Pension Plan benefits fall under the "insurance exception" and thus should not be deducted from damage award. I note that the Supreme Court of Canada in *Ratych* and [*Cunningham*] did not alter the decision in *Gill*, in any way. As a result of its continued

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[29] *Cugliari v White* (1998), 38 OR (3d) 641 (CA) at para 30. See also *Richard v Arsenault*, 2002 NBQB 94 at paras 58 – 60.

[30] *Fraser v Hunter Estate*, 2000 NSCA 63 at para 25.

[31] *Lomax v Weins*, 2004 BCSC 1051 at para 58.

> applicability *Gill* has been followed in British Columbia in two relatively recent Court of Appeal decisions ...[32]

(ii) The Need for Consistent Treatment

64. In this light, the question becomes – because CPP disability benefits share the essential characteristics of insurance on the tort side of the equation, do they fail to maintain this essential character for purposes of clause 4(b)(vii) of the SEF 44?

65. The Appellant says yes. He submits that this Court's decision in *Gill* can only be read in the context of statutory interpretation. Because this Court was engaged in the remedial interpretation of subsection 4(4) of the *Families' Compensation Act*, the Appellant submits that the result in *Gill* cannot translate over to the contractual canvass.

66. In doing so, the Appellant adopts a technical view and effectively asserts that CPP benefits are stripped of their essential character (as payable under a policy of insurance) on the contract side, at least when the result would be unfavourable to the insured.

67. In response, Portage submits that there is no principled reason for this distinction. This is because the essential character of CPP disability benefits does not hinge upon the outcome, irrespective of whether viewed through the tort lens or the contract lens.

68. Indeed, the governing principles of interpretation mandate a more contextual and nuanced approach. Particularly given the purpose of SEF 44 coverage as excess indemnity insurance and the long-standing treatment of CPP benefits as "private insurance" at common law, a consistency of characterization is required in order avoid double recovery.

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[32] *Khairati v Prasad and Mohan*, 2002 BCSC 360 at para 311 [emphasis added].

69. To be clear – Portage does not submit that CPP disability benefits are payable under a "policy of insurance" simply because this Court has said that they are payable as such for the purpose of subsection 4(4) of the *Families' Compensation Act.*

70. Rather, and with reference to the reasons articulated by Justice Spence in *Gill* and its common law development, CPP benefits are considered payable under a "policy of insurance" because of their essential character. A premium (or contribution) is made in return for the promise of payment upon the occurrence of a risk.

71. This is the principled and substantive approach that the Court of Appeal adopted below.

72. The decision below also aligns with the decision of the Court of Appeal for Ontario in *Gignac v Neufeld*. After a substantive read of this Court's decision in *Gill*, Justice Charron dismissed any technical or results-oriented distinctions and concluded that CPP disability benefits are deductible by the insurer because they fit within the statutory language of "any valid policy of insurance".[33]

73. In this case, the Appellant says that the SEF 44 could have easily and expressly referred to CPP disability benefits in clause 4(b)(vii).

74. But given the long-standing treatment of CPP benefits as "insurance" at common law, along with the principles that animate its interpretation, the SEF 44 does not need to be so exacting. In this context, and contrary to the Appellant's assertion, Portage submits that the SEF 44 would have to include specific language to <u>permit</u> the windfall / double recovery that will result by not allowing a deduction under clause 4(b)(vii).

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[33] *Gignac*, *supra*.

75. For all these reasons, the proper weight of context, reasonable expectations, substance and jurisprudence discredit the Appellant's submissions on this appeal.

(iii) *Lapalme* is an Anomaly

76. In light of the foregoing, the Appellant is left with sole reliance on the decision of the New Brunswick Court of Appeal in *Lapalme*.

77. Notwithstanding that it remains a virtual anomaly in its characterization of CPP disability benefits as something other than insurance proceeds,[34] there remain a number of difficulties with *Lapalme*.

78. First, and with great respect to the New Brunswick Court of Appeal, the decision lacks the necessary appreciation of context as mandated by the governing principles of interpretation. In failing to give weight to the essential purpose of the SEF 44 as "last ditch" insurance, the decision in *Lapalme* has the effect of fundamentally changing the nature of excess insurance.

79. Indeed, and despite the expressed emphasis on context in *Lapalme*,[35] the decision ultimately comes down to a "bluntly stated" reliance on the textual meaning of "policy of insurance".[36]

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[34] Portage is aware of only one other judicial decision, by which CPP benefits were not characterized as payable under a "contract of insurance": see *Fowler v North American Life Assurance Company*, 1999 CanLII 13895 (NL SCTD). This decision does not involve the SEF 44, and it therefore does not include any discussion on the SEF 44 purpose, context or reasonable expectations against windfalls or double recovery.

[35] See *eg* paras 87 and 91 of *Lapalme*, *supra*, where the court writes: "Context is pivotal" and "Just as significantly, the larger context joins in arguing against Economical's proposed interpretation of the expression 'policy of insurance'".

80. At least in New Brunswick, an insured under the SEF 44 endorsement is entitled to a windfall, contrary to the reasonable expectations endorsed by this Court in *Jesuit Fathers of Upper Canada*. To refresh, Justice LeBel confirmed that "courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them."[37] There is nothing in the language of the SEF 44 (either in New Brunswick or Nova Scotia) to indicate that the insured should be entitled to a windfall.

81. Second, the decision in *Lapalme* suggests that "no reasonable insurer" would expect an insured to have to provide details of coverage under the CPP,[38] so "policies of insurance" in the SEF 44 can only refer to private schemes of insurance as opposed to those provided by a public benefits scheme.

82. There is a practical response to this point. Because CPP benefits are universally available to all employed (or formerly employed) Canadians, it can be safely assumed that both the SEF 44 insurer and insured is aware of this insurance. In contrast, the SEF 44 insurer would have no automatic knowledge about the variety of private insurance schemes to which the insured has access.

83. Third, the decision in *Lapalme* places a one-dimensional emphasis on clause 4(b)(viii) of the standard SEF 44 endorsement. That clause permits a deduction in relation to amounts the insured is entitled to receive from "any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained".

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[36] *Lapalme*, *supra* at para 90.

[37] *Jesuit Fathers of Upper Canada*, *supra* at para 29.

[38] *Lapalme*, *supra* at para 92.

84. To the New Brunswick Court of Appeal, the existence of this provision suggests that it would be redundant to conclude that CPP disability benefits are also deductible under clause 4(b). To quote from *Lapalme*:

> [93] … If the expression "policy of insurance" were designed to cover legislation providing for disability benefits, Clause 4(b)(viii) would have been unnecessary. It provides for the deduction of "amounts" the eligible claimant is entitled to recover from "any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained". Laws of that nature provide for the payment of disability benefits, yet the drafters chose to reference those laws explicitly in 4(b)'s list. It is trite law that courts must strive to give meaning to every contractual clause and word …

85. In response, Portage submits that clause 4(b)(viii) necessarily exists "for greater certainty" so to ensure that the insured cannot circumvent the overriding purpose of SEF 44 coverage and obtain double recovery in relation to future loss of wages.

86. This "greater certainty" is particularly necessary, because workers' compensation benefits do not arise from a conventional policy or contract of insurance. Rather, and despite the reference to workplace compensation as "a public insurance plan", the resulting benefits arise from the "historic trade-off" by which the worker gives up her right to a cause of action in tort against the employer in return for a more efficient and guaranteed form of recovery.[39]

87. In other words, the employer is the insured and the worker receives benefits by virtue of the employer's capacity in this regard *via* the statutory regime. As such, and given the unique history and framework of workers' compensation benefits, clause 4(b)(viii) is necessary to clarify that double recovery is not permitted.

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[39] See *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44 at paras 26 – 30.

88. Put more simply, and quite unlike CPP disability benefits, the workers' compensation regime does not share the essential characteristics of insurance from the worker's perspective.

89. Fourth, the New Brunswick Court of Appeal ultimately deferred to an interpretation of the SEF 44 endorsement that favours the insured. In doing so, the decision in *Lapalme* relies upon the interpretive rule of *contra proferentem.*[40]

90. By its own reasons, the New Brunswick Court of Appeal acknowledged that the *contra proferentem* rule can only be relied upon to resolve an ambiguity among plausible interpretations. In the words of Chief Justice Drapeau:

> [28] As is well known, the Supreme Court of Canada has repeatedly emphasized that, although effect must be given to unequivocal contractual wording, adhesionary contracts of insurance, such as the NBEF 44, stand to be interpreted "*contra proferentum* [*sic*], or in favour of the insured" where general rules of contract interpretation fail to resolve the ambiguity at the root of the dispute between the parties.

91. In response, there is no ambiguity in the language of clause 4(b)(vii) of the SEF 44 endorsement. Rather, and as already discussed, the interpretive principles prevail against over-compensation in the circumstances.

92. The Nova Scotia Court of Appeal's decision favours substance over form when interpreting the intended purpose of clause 4(b)(vii) of the SEF 44. And in both manner and result, the decision is consistent with the proper legal principles that animate the interpretation of insurance contracts.

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[40] *Lapalme*, *supra* at paras 28 and 90.

93. For these reasons, Portage submits that this Court should confirm and declare that the value of future CPP disability benefits is deductible from an award of damages, pursuant to clause 4(b)(vii) of the SEF 44 endorsement.

PART IV – COSTS SUBMISSIONS

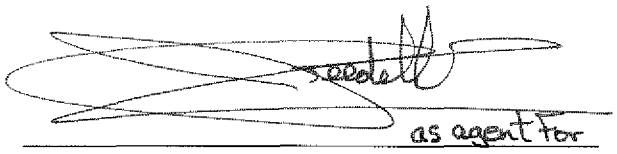
94. On success in this appeal, Portage submits that it is entitled to an award of costs in the ordinary course, inclusive of costs on the application for leave to appeal.

PART V – ORDER SOUGHT

95. For all the foregoing reasons, Portage respectfully submits that this appeal should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed: May 26, 2016



STEWART McKELVEY

Scott C. Norton, Q.C.
Scott R. Campbell

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

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Commentary	**Paragraph(s)**
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D Boivin, *Insurance Law*, 2d ed (Toronto: Irwin Law, 2015)	30
GR Hall, *Canadian Contractual Interpretation*, 2d ed (Markham: LexisNexis, 2012)	28

PART VII – STATUTORY PROVISIONS

No statutory provisions are directly at issue.

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