SUPREME COURT OF CANADA

CITATION: Sabean *v.* Portage La Prairie Mutual Insurance Co., 2017 SCC 7

APPEAL HEARD: October 5, 2016
JUDGMENT RENDERED: January 27, 2017
DOCKET: 36575

BETWEEN:

Andrew Sabean
Appellant

and

Portage La Prairie Mutual Insurance Company
Respondent

CORAM: McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: (paras. 1 to 44) — Karakatsanis J. (McLachlin C.J. and Moldaver, Wagner, Gascon, Côté and Brown JJ. concurring)

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SABEAN *v.* PORTAGE LA PRAIRIE MUTUAL INS. CO.

Andrew Sabean *Appellant*

v.

Portage La Prairie Mutual Insurance Company *Respondent*

Indexed as: Sabean *v.* Portage La Prairie Mutual Insurance Co.

2017 SCC 7

File No.: 36575.

2016: October 5; 2017: January 27.

Present: McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Insurance — Automobile insurance — Excess insurance policy — SEF 44 Endorsement — Deductions — Insured awarded damages for injuries sustained in motor vehicle accident — Tortfeasor's insurance coverage inadequate to cover quantum of jury award — Clause of insured's Endorsement stipulating that amounts recoverable under "any policy of insurance providing disability benefits or loss of

income benefits or medical expense or rehabilitation benefits" must be deducted from shortfall of damages award in determining amount payable by insurer — Whether Canada Pension Plan is a "policy of insurance providing disability benefits" within meaning of Endorsement.

S, who was injured in a motor vehicle accident was awarded damages of $465,400 by a jury. The tortfeasor's insurer paid S approximately $382,000, leaving a shortfall of more than $83,000. S claimed that amount from his own insurer under the provisions of his SEF 44 Endorsement. The insurer sought to deduct S's future Canada Pension Plan ("CPP") disability benefits under cl. 4(b)(vii) of his SEF 44 Endorsement. The trial judge found that CPP benefits were not benefits from a "policy of insurance" under the Endorsement and thus would not be deducted from the amount payable. The Nova Scotia Court of Appeal disagreed, concluding that the CPP was a "policy of insurance" under the Endorsement.

Held: The appeal should be allowed.

The clear language of cl. 4(b)(vii) of the SEF 44 Endorsement, reading the contract as a whole, is unambiguous. Future CPP disability benefits are not disability benefits from a "policy of insurance" within the meaning of the provision and are not deductible from the amounts payable by the insurer. The overarching purpose of the Endorsement is to provide the "excess" coverage that arises where an underinsured motorist cannot pay the full amount of a court judgment. The Endorsement indemnifies insureds for any shortfall in the payment of a judgment for

damages against an underinsured tortfeasor, subject to specified deductions. With respect to amounts that the eligible claimant is "entitled to recover", cl. 4 (b) specifies nine sources that give rise to deductions from the amount payable by the insurer, none of which include the CPP. The ordinary meaning of a "policy of insurance" in cl. 4(b)(vii) is clear. It refers to a private insurance policy purchased by the insured. An average person applying for this additional insurance coverage would understand a "policy of insurance" to mean an optional, private insurance contract and not a mandatory, statutory scheme such as the CPP.

The insurer cannot rely on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy. The overriding principle for the interpretation of standard form insurance contracts is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language. The words used must be given their ordinary meaning, as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law. This Court's decision in *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, does not support an alternative reasonable interpretation of the disputed words. The reasoning in *Gill* is confined to a distinct interpretive context, far removed from the Endorsement at issue. Thus the ordinary meaning of the words "policy of insurance" in cl. 4(b)(vii) does not include the CPP regime.

Cases Cited

Distinguished: *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Gignac v. Neufeld* (1999), 43 O.R. (3d) 741; **referred to:** *Economical Mutual Insurance Co. v. Lapalme*, 2010 NBCA 87, 366 N.B.R. (2d) 199; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551; *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663; *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Parry v. Cleaver*, [1970] A.C. 1; *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Chilton v. Co-operators General Insurance Co.* (1997), 32 O.R. (3d) 161.

Statutes and Regulations Cited

Canada Pension Plan, R.S.C. 1985, c. C-8.

Families' Compensation Act, R.S.B.C. 1960, c. 138, s. 4(4).

Insurance Act, R.S.O. 1990, c. I.8.

R.R.O. 1990, Reg. 676.

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Canadian Oxford Dictionary, 2nd ed., by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 2004, "insurance policy".

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Merriam-Webster's Collegiate Dictionary, 11th ed. Springfield, Mass.: Merriam-Webster, 2003, "policy".

APPEAL from a judgment of the Nova Scotia Court of Appeal (Beveridge, Hamilton and Scanlan JJ.A.), 2015 NSCA 53, 359 N.S.R. (2d) 392, 1133 A.P.R. 392, 386 D.L.R. (4th) 449, 23 C.C.E.L. (4th) 117, 48 C.C.L.I. (5th) 171, [2015] I.L.R. I-5749, [2015] N.S.J. No. 230 (QL), 2015 CarswellNS 472 (WL Can.), setting aside a decision of Murray J., 2013 NSSC 306, 338 N.S.R. (2d) 14, 1071 A.P.R. 14, [2013] N.S.J. No. 656 (QL), 2013 CarswellNS 944 (WL Can.). Appeal allowed.

Derrick J. Kimball and *Sharon L. Cochrane*, for the appellant.

Scott R. Campbell and *Scott C. Norton*, *Q.C.*, for the respondent.

The judgment of the Court was delivered by

KARAKATSANIS J. —

I. Introduction

[1] This case involves the interpretation of the Nova Scotia SEF 44 Endorsement, an excess insurance policy. This Endorsement is a standard form contract that exists in similar terms across the country. Canadians purchase these policies, sometimes called Special or Family Protection Endorsements, in addition to their existing automobile insurance coverage. These endorsements indemnify insureds for any shortfall in the payment of a judgment for damages against an underinsured tortfeasor, subject to the deductions set out in the Endorsement. The scope of one such deduction is at issue in this appeal.

[2] The Endorsement stipulates that future benefits from a "policy of insurance providing disability benefits" are deducted from the shortfall in determining the amount payable by the insurer (cl. 4(b)(vii)). The issue in this appeal is whether the Canada Pension Plan (CPP) is a "policy of insurance" for that purpose.

[3] The trial judge in this case found that CPP benefits were not benefits from a "policy of insurance" under the Endorsement and thus would not be deducted from the amount payable by the insurer. The Nova Scotia Court of Appeal disagreed, concluding that the CPP was a "policy of insurance" under the Endorsement.[1]

[1] The New Brunswick and Nova Scotia Courts of Appeal each came to different conclusions on this point. The New Brunswick Court of Appeal in *Economical Mutual Insurance Co. v. Lapalme*, 2010 NBCA 87, 366 N.B.R. (2d) 199, found that CPP benefits were not a "policy of insurance" under the New Brunswick equivalent of the Endorsement.

[4] I agree with the trial judge. The ordinary meaning of the words at issue is clear, reading this Endorsement as a whole. An insurer cannot rely on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy. An average person applying for this additional insurance coverage would understand a "policy of insurance" to mean an optional, private insurance contract and not a mandatory statutory scheme such as the CPP. Thus, future CPP disability benefits do not reduce the amount payable by the insurer under the Endorsement.

[5] I would allow the appeal.

II. Background

[6] The appellant, Andrew Sabean, was injured in a motor vehicle accident in 2004. In May 2013, a jury awarded Mr. Sabean damages for his injuries in the amount of $465,400. The amount he received from the tortfeasor's insurer was about $382,000, leaving a shortfall of more than $83,000. Mr. Sabean claimed under the excess coverage provisions of his SEF 44 Endorsement with the respondent, Portage La Prairie Mutual Insurance Company (Portage).

[7] Clause 4(b)(vii) of the Endorsement stipulates that amounts recoverable under "any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits" are to be deducted from the shortfall of

the damages award in determining the amount payable by the insurer to the eligible claimant.

[8] Mr. Sabean is entitled to receive future CPP disability benefits. Portage took the position that those amounts were to be deducted as recoverable benefits from a "policy of insurance" under cl. 4(b)(vii) in determining the amount payable by Portage. Mr. Sabean disagreed.

[9] Justice Murray of the Nova Scotia Supreme Court held that future CPP disability benefits did not fall within the meaning of "any policy of insurance providing disability benefits" in cl. 4(b)(vii) of the Endorsement and therefore were not to be deducted from the amount payable by the insurer: 2013 NSSC 306, 338 N.S.R. (2d) 14. The trial judge relied upon the New Brunswick Court of Appeal's reasoning in *Economical Mutual Insurance Co. v. Lapalme*, 2010 NBCA 87, 366 N.B.R. (2d) 199, at paras. 89-94, that the language and larger context of the New Brunswick equivalent to the SEF 44 Endorsement supported its interpretation of cl. 4(b)(vii) to mean that a "policy of insurance providing disability benefits" did not include CPP disability benefits.

[10] Justice Scanlan of the Nova Scotia Court of Appeal, writing for Justices Beveridge and Hamilton, allowed the appeal on that issue: 2015 NSCA 53, 359 N.S.R. (2d) 392. Relying in part on this Court's decision in *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, the Court of Appeal concluded that future CPP disability benefits were to be treated as disability benefits recoverable under a "policy of

insurance". It reasoned that cl. 4(b)(vii) clearly included CPP disability benefits as a "policy of insurance" after considering the drafting history of the SEF 44 Endorsement following *Gill* and the principle against double recovery in the context of the Endorsement as an excess insurance provision.

III. Issue

[11] Is the Canada Pension Plan a "policy of insurance providing disability benefits" within the meaning of cl. 4(b)(vii) of the SEF 44 Endorsement?

IV. Analysis

[12] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity: *Ledcor*, at para. 50. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra*

proferentem, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.

[13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[14] The SEF 44 Endorsement is a standard form contract. Sometimes called Special or Family Protection Endorsements, these excess insurance policies are purchased in addition to existing automobile insurance coverage. The terms of these endorsements are not negotiated. In this context, the Endorsement is a "take-it-or-leave-it" proposition: *Ledcor*, at para. 28, quoting *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 33.

[15] An insured pays an additional premium for the protection of the excess coverage provided under the Endorsement, which indemnifies the insured for any shortfall in the payment of a judgment for damages against an underinsured tortfeasor: *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109, at paras. 16-19. However, the amount owed under the Endorsement is not necessarily the full amount of the shortfall owed by the underinsured tortfeasor. The terms of the Endorsement provide for specific deductions from the shortfall in order to determine

the amount payable by the insurer to the eligible claimant. This appeal is about the scope of one of the deductions.

[16] Clause 2 of the Endorsement describes the purpose of the insuring agreement:

> In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile.

[17] Clause 4(a) of the Endorsement stipulates the formula for determining the amount payable by the insurer to the eligible claimant:

> 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) . . . .

[18] The amounts to be deducted from the amount payable are set out in cl. 4(b) of the Endorsement:

> The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:

(i) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;

(ii) the insurers of any person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;

(iii) the Société de l'assurance automobile du Québec;

(iv) an unsatisfied judgment fund or similar plan or which would have been payable by such fund or plan had this endorsement not been in effect;

(v) the uninsured motorist coverage of a motor vehicle liability policy;

(vi) any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;

(vii) <u>any policy of insurance providing disability benefits</u> 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 or death sustained;

(ix) any Family Protection Coverage of a motor vehicle liability policy; [Emphasis added.]

[19] The insurer submits that it is the overarching purpose of the Endorsement to prohibit overcompensation or double recovery because it is in the nature of "excess insurance". However, an excess insurance policy provides coverage in excess to losses covered by a primary insurance policy. "Excess" for the purposes of an excess insurance policy does not mean that the purpose of the Endorsement is to preclude "overcompensation". The "excess" coverage is defined by the terms of the contract.

[20] By the terms of the contract, the overarching purpose of the Endorsement is to provide the "excess" coverage that arises where an underinsured motorist cannot pay the full amount of a court judgment. The insurer indemnifies eligible claimants against the shortfall arising from a damages award (cl. 2). The amount that the claimant is entitled to receive in damages has already been determined by the court in accordance with relevant legal principles — here, tort principles. The Endorsement designates this amount — the judgment — as the scheme's starting point for calculating the amount payable (cl. 2).

[21] However, the Endorsement only indemnifies part of the shortfall. The amount payable by the insurer to the eligible claimant under the Endorsement is not the full amount of the shortfall that an underinsured motorist is unable to pay. Clause 4(a) establishes the formula for determining the amount payable by the insurer to the eligible claimant. Clause 4(a) provides that coverage is the amount of damages the eligible claimant is entitled to recover, subject to the deductions in cl. 4(b) (and subject to the overall limit of coverage in cl. 3). Deductions stipulated under the Endorsement are therefore subtracted from the shortfall. Thus, it falls to the language of the contract to determine the extent of the indemnification — the limits of the excess coverage — under the Endorsement.

[22] The introductory words in cl. 4(b) require that amounts "actually recovered" "from any source" are deductible from the amount payable to the claimant, except amounts from a policy of insurance payable on death. The term "any

source" is broad and includes CPP disability benefits. However, with respect to amounts that the eligible claimant is "entitled to recover", cl. 4(b) specifies nine sources that give rise to deductions.

[23] What then is the correct interpretation of "any policy of insurance providing disability benefits" under cl. 4(b)(vii) of the Endorsement, reading the contract as a whole?

[24] The dictionary meaning of the words "policy of insurance" refers to a private contract purchased as a policy of insurance. In the *Canadian Oxford Dictionary* (2nd ed. 2004), an "insurance policy" has been defined as "a contract of insurance" and "a document detailing such a policy and constituting a contract": p. 783; see also *Collins Canadian Dictionary* (2010), at p. 469. The *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), defines a "policy" as "a writing whereby a contract of insurance is made" (p. 960).

[25] In contrast, CPP benefits are benefits provided under federal legislation: *Canada Pension Plan*, R.S.C. 1985, c. C-8. Under that legislation, contributions are mandatory for all employed Canadians over the age of 18. CPP benefits are payable as a retirement pension, as a disability benefit or as a death benefit.

[26] The use of the word "policy" (i.e. "motor vehicle liability policy") in cl. 4(b), paras. (v) and (ix), clearly indicates a private contract of insurance. Paragraphs (iii) ("the Société de l'assurance automobile du Québec") and (viii) ("any Worker's

Compensation Act") clearly refer to amounts provided under legislation. The contract could have included the legislated CPP disability benefits under cl. 4(b)(vii); it referred specifically to legislated amounts in a number of other enumerated sources. Had the contract done so, an average person would have known exactly what they applied for as insurance, and what was and was not covered by the premiums paid under the Endorsement.

[27] It also follows that CPP death benefits are not benefits pursuant to a "policy of insurance" payable on death for the purposes of the introductory words in cl. 4(b). Therefore, where the eligible claimant has actually recovered CPP death benefits, the amount of those benefits is deducted from the amount payable under the Endorsement. Obviously, such an interpretation does not work to the advantage of the eligible claimant in the context of death benefits. However, the mere effect of different consequences arising from the meaning of a term used in different places in a contract does not create ambiguity.

[28] In my view, the ordinary meaning of a "policy of insurance" is limited to private contracts of insurance between an insured and a private insurance agency. An average person would not consider benefits provided under a mandatory statutory scheme to be a private insurance contract.

[29] The insurer submits and the Court of Appeal accepted that the meaning of "policy of insurance" under the Endorsement must be understood in the context of this Court's decision in *Gill*. Implicit in the approach urged by the insurer is the

suggestion that this Court's decision in *Gill* itself supports an alternative reasonable interpretation of the disputed words at the first stage of the *Ledcor* analysis. As I shall explain, I cannot accept this as a reasonable interpretation of this insurance policy. *Gill* does not interpret or inform the ordinary words of the Endorsement. Nor would the average person applying for this insurance contemplate the distinct tort and statutory context in *Gill* in understanding the words of the Endorsement. The insurer relies on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy.

[30] In *Gill*, this Court dealt with the deductibility of Canada Pension Plan death benefits from a damages award arising from an action initiated under the *Families' Compensation Act*, R.S.B.C. 1960, c. 138. Section 4(4) of the Act provided that "[i]n 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." The Court held that benefits under the CPP are "so much of the same nature as contracts of insurance" that they should not be deducted from a damages award arising from a successful statutory action under the Act: *Gill*, at p. 670.

[31] However, *Gill* was decided in a very different context. *Gill* was concerned with the interpretation of a remedial statute. This Court applied a broad and liberal interpretation approach to determine whether to deduct CPP survivor

death benefits from a damages award arising from a successful statutory action.[2] In doing so, this Court referred to the collateral benefits rule and the assessment of an award of damages in tort to inform its interpretation of the scope of the damages under the statute.

[32] In the tort context, the collateral benefits rule assists in fixing an award of damages. As a general rule, the compensation principle holds that an injured person should be compensated for the full amount of his or her loss but no more: *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 948. Thus, some benefits received by an injured person as a result of the tort are deducted from a damages award in order to prevent overcompensation. However, the collateral benefits rule is an exception to this general principle. At common law, the collateral benefits rule acknowledges that it would be unfair to allow the tortfeasor to benefit from the insurance held by the plaintiff because he or she has paid premiums for the eventuality: *Parry v. Cleaver*, [1970] A.C. 1 (H.L.); *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1.

[33] This Court concluded in *Gill* that, for the purpose of the collateral benefits rule and the assessment of an award of damages in tort, CPP benefits were "an exact substitute for a privately arranged insurance policy" (p. 669). Thus, the Court referred to the collateral benefits rule to inform its interpretation of the statute and concluded that benefits under the CPP are "so much of the same nature as

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[2] I note that under cl. 4(b) of the Endorsement, amounts actually recovered from a policy of insurance payable on death are not deductible from the amount owed to the eligible claimant under the Endorsement.

contracts of insurance" that they should not be deducted from a damages award arising from a successful statutory action under the *Families' Compensation Act*.[3]

[34] In my view, the reasoning in *Gill* is not applicable here at the first stage of *Ledcor* and does not assist in interpreting this contract. *Gill* is confined to a distinct interpretive context far removed from the Endorsement at issue.

[35] First, it is wrong to rely on *Gill* to illustrate that insurance companies amended their policies in light of that judgment and thus intended to include CPP benefits. It cannot be assumed that the average person who applies to purchase this excess insurance policy would imbue the words in the Endorsement with knowledge of how they were interpreted by the courts for the purposes of provincial insurance legislation and the collateral benefits rule in tort. In this context, the purchaser is not someone with the specialized knowledge of related jurisprudence or of the objectives of the insurance industry. Thus, the history and intention of the insurance industry in drafting the Endorsement following *Gill* do not assist in the interpretation of this contract.

[36] Second, while the rationale and history of the collateral benefits rule is relevant to the determination of an appropriate award of damages, the fixing of the quantum of damages is not at issue in this contract. The amount that the appellant is

[3] This Court has also confirmed that similar benefits were not deductible from tort damages pursuant to the collateral benefits rule in tort. In *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, the Court found that disability benefits received under a collective agreement were not deductible from an award of damages in tort.

entitled to receive in tort damages has already been determined by the court. The Endorsement designates this amount — the judgment — as the starting point for calculating the amount payable (cl. 2). In *Progressive Homes* this Court reasoned that "[t]he focus of insurance policy interpretation should first and foremost be on the language of the policy at issue. General principles of tort law are no substitute for the language of the policy" (para. 35). Whether a contract prohibits overcompensation or double recovery beyond what has already been determined in tort for the purpose of fixing the legal judgment is a question resolved through principles of contract interpretation. To the extent that the language of the Endorsement precludes overcompensation resulting from recoverable amounts, it does so in the nine enumerated sources. There is no overcompensation or double recovery of the judgment debt under the Endorsement.

[37] Third, the decision in *Gill* is confined to a distinct statutory context. When interpreting a statute, the court searches for the intention of the legislature. In interpreting a standard form policy of insurance, the court is concerned with the ordinary meaning of the contract as it would be understood by the average insured.

[38] Similarly, the statutory context was relied upon by the Ontario Court of Appeal in *Gignac v. Neufeld* (1999), 43 O.R. (3d) 741. The regulation entitled *Uninsured Automobile Coverage*, R.R.O. 1990, Reg. 676, under the *Insurance Act*, R.S.O. 1990, c. I.8, provided limited coverage in the event that an insured was injured by an uninsured motorist. The Court of Appeal reasoned that the clear legislative

intention underlying the Regulation was to prevent double recovery and that therefore the CPP must fall within the ambit of a "policy of insurance" so that any CPP benefits would be deducted from the damages owed to the insured. Like *Gill*, this interpretation relied upon the intent of the legislature and the statutory context.

[39] For these reasons, the meaning of "contract of assurance" in *Gill* — and of "policy of insurance" in *Gignac* — is confined to a distinct interpretive context and does not inform the ordinary meaning of "policy of insurance" in the Endorsement.

[40] In *Lapalme*, Chief Justice Drapeau correctly concludes that the ordinary meaning, and not *Gill*, governs the interpretation of "policy of insurance" under a standard form excess insurance policy:

> The scheme by which disability benefits are recoverable under the *Canada Pension Plan* may well be a "substitute" for a disability insurance policy, "tantamount", "comparable", "similar" or "akin" to schemes under policies of disability insurance for the purposes of the collateral benefits rule in tort, but that does not morph the *Canada Pension Plan* into a "policy of insurance" for Clause 4(b)(vii) purposes. [Emphasis deleted; para. 94.]

[41] In sum, with respect to amounts that the eligible claimant is "entitled to recover", cl. 4 (b) specifies nine sources that give rise to deductions from the amount payable by the insurer, none of which include the CPP. The ordinary meaning of a "policy of insurance" in cl. 4(b)(vii) of the Endorsement is clear. It refers to a private insurance policy purchased by the insured. Portage has asked this Court to read into those clear words the jurisprudence related to the collateral benefits rule in tort so that

a “policy of insurance” would also include the CPP regime. As noted above, I cannot agree. Thus, the ordinary meaning of the words “policy of insurance” in cl. 4(b)(vii) does not include the CPP regime.

[42] The clear language of the provision, reading the contract as a whole, is unambiguous. There are no “two reasonable but differing interpretations of the policy”: B. Billingsley, *General Principles of Canadian Insurance Law* (2nd ed. 2014), at p. 147; *Chilton v. Co-operators General Insurance Co.* (1997), 32 O.R. (3d) 161, (C.A., at p. 169). The mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity.

V. <u>Conclusion</u>

[43] Canada Pension Plan disability benefits are not disability benefits from a “policy of insurance” within the meaning of cl. 4(b)(vii) of the SEF 44 Endorsement. Thus, future CPP disability benefits are not deductible from the amounts payable by the insurer under the Endorsement.

[44] I would allow the appeal with costs to the appellant in this Court and the Nova Scotia Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Kimball Brogan, Wolfville, Nova Scotia.

Solicitors for the respondent: Stewart McKelvey, Halifax.