COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Burlington Resources Canada Ltd. v. Peace River (Assessor of Area #27),*** 2005 BCCA 72

Date: 20050215
Docket: CA031210

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

Between:

Burlington Resources Canada Ltd.

Appellant/Respondent

And

Assessor of Area #27 – Peace River

Respondent/Appellant

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray
The Honourable Mr. Justice Oppal

B.J. Wallace, Q.C. and G.J. Ludwig	Counsel for the Appellant
J.H. Shevchuck	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 15 October 2004
Place and Date of Judgment:	Vancouver, British Columbia 15 February 2005

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Thackray
The Honourable Mr. Justice Oppal

Reasons for Judgment of the Honourable Mr. Justice Smith:

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.
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> 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.
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> 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 non-commercial 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 ***Assessor of Area 21 – Nelson/Trail v. Cominco Ltd.*** (1997), 48 B.C.L.R. (3d) 371 (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 and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748 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 ***British Columbia (Assessor of Area No. 26 – Prince George) v. Cal Investments Ltd.***, [1993] B.C.J. No. 93 (Q.L.) (S.C.), apprvd. ***Gemex Developments Corp. v. Assessor of Area 12- Coquitlam*** (1999), 62 B.C.L.R. (3d) 354, (1998) Stated Case 386 (C.A.), where Ryan J. (as she then was) said, ¶ 18 (Q.L.):

> 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: ***Dr. Q. v. College***

of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226; 2003 SCC 19 ¶ 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 ¶36-37; ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33 ¶ 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 ¶ 21; ***Dr. 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,

> [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 at 317; ***Maslej v. Minister of Employment and Immigration***, [1977] 1 F.C. 194 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 Limited v. Assessor of Area 7 – Sunshine Coast*** (1985) Stated Case 206 at 1153-54, [1985] B.C.J. No. 1575 (Q.L.)(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 Express Vu Limited Partnership v. Rex***, [2002] 2 S.C.R. 559, 2002 SCC 42:

> [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.

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Madam Justice Prowse"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Mr. Justice Thackray"

I agree:

"The Honourable Mr. Justice Oppal"