Date: 20080421

Docket: A-605-06

Citation: 2008 FCA 142

CORAM: **DÉCARY J.A.**
NADON J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

GENERAL MOTORS OF CANADA LIMITED

Respondent

Heard at Toronto, Ontario, on January 23, 2008.

Judgment delivered at Ottawa, Ontario, on April 21, 2008.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DÉCARY J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a judgment of Mr. Justice Miller of the Tax Court of Canada dated December 1, 2006, 2006 TCC 638, which allowed the respondent's appeal from the Minister's reassessment of its 1996 taxation year. More particularly, the Tax Court concluded that the respondent was entitled to deduct in its 1996 taxation year the unexpended $7,741,002 portion of a fund established by agreement between the respondent, General Motors of Canada Ltd. (GM) and

the National Automobile Aerospace and Agricultural Implement Workers Union of Canada (the CAW), referred to as the Special Canadian Contingency Fund (the SCCF).

[2] At issue in this appeal is whether the unexpended $7,741,002 of the SCCF constitutes a contingent liability, as the appellant submits, or whether it constitutes, as the respondent submits, an absolute liability on the part of GM to pay arising in 1996. This issue is the same issue which our Court addressed in *General Motors of Canada v. Canada*, 2004 FCA 370 (*General Motors of Canada Ltd.* (FCA)), albeit with respect to GM's 1995 taxation year. I will return to that decision later in these Reasons.

THE FACTS

[3] GM entered into collective agreements with the CAW. In 1996, the taxation year at issue, two agreements were in force. Appendix "H" thereof, entitled "Memorandum of Understanding covering Special Canadian Contingency Fund" (the MOU), was attached to each of the agreements and provided for amounts to be accrued to the SCCF in respect of overtime worked during the year by GM's CAW-represented employees.

[4] More particularly, by reason of the MOU, the 1993 Collective Agreement which applied prior to October 22, 1996 required that GM accrue to the SCCF $2.00 per overtime hour worked by all covered employees in excess of five percent of straight time hours worked calculated on a twelve month average. That amount was increased to $2.35 in the1996 Collective Agreement which applied to the remainder of the 1996 taxation year. The total amount accrued at the end of the 1996

taxation year was $15,156,711, of which $7,741,002 accrued to the SCCF during the 1996 taxation year.

[5] As provided in the MOU, the amount accrued in the SCCF was to be spent for the benefit of CAW members to support child care programs, the Legal Services Plan and to finance the Canadian Supplemental Unemployment Benefit Plan, if needed, or to fund other initiatives to be agreed upon by GM and the CAW. At the end of the collective agreement period, the use of the unexpended portion of the fund was to be renegotiated. The funds accrued in the SCCF were not put in a bank account separate from GM's working capital nor were they contributed to a trustee. During the 1996 taxation year, a total of $6,419,193 was paid out of the accrued balance in the SCCF. This amount was deducted in the 1996 taxation year and there is no dispute in regard thereto.

[6] In computing its income on its financial statements, GM deducted the unexpended amount of $7,741,002 and included this amount as part of its labour costs for the purpose of reporting to its shareholder, General Motor Corporation. GM also deducted the amount for tax purposes. However, the appellant was of the view that the unpaid amount was a contingent liability pursuant to 18(1)(e) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (the Act) and could not be deducted in the 1996 taxation year.

[7] As I indicated earlier, the issue of whether the unexpended amount accrued in the SCCF constitutes an absolute liability to pay arising in 1996 and thus deductible, was raised in respect of GM's 1995 taxation year. GM's appeal to the Tax Court of Canada (*General Motors of Canada Ltd.*

v. Canada, 2003 TCC 815) (*General Motors of Canada Ltd.* (TCC)) and to the Federal Court of Appeal (*General Motors of Canada Ltd.* (FCA)) was dismissed, and leave to appeal to the Supreme Court of Canada (*General Motors of Canada Ltd. v. Canada*, [2005] S.C.C.A. No. 3 (QL)) was denied. Both the Tax Court of Canada and this Court were of the view that the language used in the MOU created a liability that was contingent on the occurrence of certain events. Accordingly, the amount claimed was a contingent liability and not deductible pursuant to paragraph 18(1)(e) of the Act.

[8] After these decisions were rendered, section 2 of the MOU was amended on March 24, 2005, to have retroactive effect. GM submits that the new version of the MOU clearly establishes an absolute liability on its part, whereas the appellant argues that notwithstanding the amendment, the amount accrued in the SCCF remains a contingent liability. I should point out that there is no issue before us regarding the rectification itself.

THE TAX COURT DECISION

[9] Proceeding on an Agreed Statement of Facts, the parties requested that the Tax Court determine the following question: is the amount of $7,741,002 accrued but not paid out of the SCCF a contingent liability despite the rectification of paragraph 2 of Appendix H of the collective agreements?

[10] Miller J. reformulated the question before him because he was of the opinion that it should not be limited to the section 2 rectification and the question of contingent liability. In his view, the issue was whether the MOU created, as overtime hours were worked, an obligation to pay.

[11] The Judge determined that there were two differences between the case before him and the one before the Tax Court and this Court with respect to the 1995 taxation year: the wording of section 2 of the MOU and the evidence concerning the intention of both GM and the CAW.

[12] With respect to the words used in section 2 of the MOU, Miller J. was of the opinion that they did not establish an absolute obligation to pay or expend amounts from the SCCF. The only absolute obligation resulting from the wording of section 2 was, in his view, to calculate or add the amount accrued to the SCCF during the 1996 taxation year

[13] Because of his view that the words found in section 2 of the MOU were ambiguous as to whether the agreement to expend arose at the time when overtime hours were worked or when the specific object of the expenditure was identified, Miller J. turned to the extrinsic evidence adduced by GM with respect to the intent of both GM and the CAW. On the basis of the affidavit evidence of James Cameron, GM's Director of Labour Relations and that of Sym Gill, Director of the CAW's Pensions and Benefits Department, he held that GM and the CAW intended to create, as overtime hours were worked, an absolute liability to expend amounts from the SCCF. This led the learned Judge to conclude that the nature of the obligation which the parties intended to be absolute in section 2 was an obligation to expend amounts from the SCCF.

[14] Miller J. then turned to sections 3 to 5 of the MOU to determine whether those sections negated the absolute liability created in section 2. In his view, sections 3 to 5 did not negate the absolute obligation to pay. He held that those sections went to the manner in which the liability was to be discharged, in other words, when and how would the funds be spent? In his view, the obligation to spend was not contingent on events which might or might not occur. Indeed, if amounts were not paid during the term of a collective agreement, they would be used later for the benefit of CAW members and for CAW purposes.

[15] Finally, Miller J. addressed two concerns raised by Malone J.A. in *General Motors of Canada Ltd. v. Canada* (FCA). First, Miller J. opined that the fact that the funds were not contributed to a trustee or set aside from working capital was not determinative of the issue. Second, he held that there was an identifiable creditor, the CAW, which could have brought a claim against GM in the event that it went bankrupt at the end of 1996.

[16] Although reluctant to reach a conclusion contrary to that reached by this Court in *General Motors of Canada Limited* (FCA) with respect to the 1995 taxation year, Miller J. held that the respondent was entitled to deduct the unexpended portion of the SCCF.

THE SUBMISSIONS OF THE PARTIES

A. Appellant's submissions

[17] The appellant submits that there was no basis for Miller J. to depart from the conclusion previously reached by this Court and the Tax Court for GM's 1995 taxation year that the

unexpended amount of the SCCF was a contingent liability. The wording of section 2 of the MOU did not alter the obligations that were determined by the two Courts. According to the appellant, the respondent did not have an obligation to pay unless one of the following conditions was satisfied:

a) the reaching of certain financial thresholds;

b) the receipt of a request for funding of a program; or,

c) the reaching of an agreement by GM and the CAW to use the funds otherwise.

[18] As a result, the Appellant submits that the unexpended amount of the SCCF was a contingent liability.

[19] The appellant submits that Miller J. erred by considering the stated intention of the parties to determine the nature of the obligation between GM and the CAW. Indeed, extrinsic evidence can be used to determine the intention of the parties only when the terms of the written agreement are ambiguous. The appellant submits that in this case, there was no ambiguity in the MOU concerning the unexpended amount of the SCCF. The appellant underlines that Miller J. was able to interpret section 2 of the MOU and conclude that this section failed to establish that GM was liable to do anything more than calculate an amount. According to the appellant, Miller J. should have stopped the analysis once he arrived at that conclusion.

B. Respondents' submissions

[20] The respondent begins its submissions by pointing out that the appellant does not argue that Miller J. misinterpreted the relevant test for determining whether a liability is contingent, adding

that it is clear that the learned Judge did not misinterpret that test. In the respondent's view, the Appellant simply does not agree with Miller J.'s conclusion that the facts at issue were not the same as those underlying the 1995 taxation year. The respondent submits that the rectification of section 2 of the MOU constitutes "new facts" and that the previous litigation with respect to the 1995 taxation year must be viewed with caution. The respondent points out that the previous version of section 2 of the MOU did not specifically provide that GM's obligation to add to the SCCF accrued as overtime hours were worked, that all amounts accrued had to be used exclusively for CAW purposes and did not clarify that the role of sections 3 to 5 was to determine the particular purpose for which the funds were to be used. Therefore, according to the respondent, GM's obligation was not conditional upon the occurrence of the events mentioned in sections 3 to 5 of the MOU. If the amount was not paid during the term of a collective agreement, it was to be used for the benefit of CAW members and for CAW purposes, and it was not be possible for GM to retain the amount.

[21] The respondent also submits that since Miller J. found that section 2 of the MOU was ambiguous, he properly considered the evidence before him concerning the parties' intent, adding that Miller J. did not conclude that section 2 did not establish an absolute liability to pay, but rather that the words of section 2 "alone" did not establish such an obligation.

[22] The respondent further submits that the fact that GM can deduct an amount for tax purposes, even if the amount is not yet paid at the end of the year, is prescribed by the cardinal principle of our tax system that businesses should employ the accrual method in calculating their income. In the respondent's submission, the deduction of the accruals to the SCCF in the year the overtime work is

performed is also consistent with GM's financial statements and represents the most accurate picture of GM's profit.

[23] Finally, the respondent submits that directing funds to a qualified trustee or otherwise segregating funds is not a necessary precondition to a deduction; rather, it is only one of the ways it can be deducted.

THE ISSUE

[24] The main issue in this appeal is whether Miller J. erred in concluding that the unexpended portion of the SCCF was not a contingent liability in 1996 within the meaning of paragraph 18(1)(e) of the Act. Underlying that issue is whether the Judge erred in considering evidence extrinsic to the collective agreement because of his view that the words of section 2 of the MOU were ambiguous.

ANALYSIS

[25] There is no issue in this case as to what constitutes a contingent liability pursuant to paragraph 18(1)(e) of the Act. The test to determine whether a legal obligation is contingent was enunciated as follows by Sharlow J.A. in *Wawang Forest Products Ltd. v. Her Majesty the Queen*, [2001] 2 C.T.C. 233 (FCA):

> 11 The generally accepted test for determining whether a liability is contingent comes from *Winter v. Inland Revenue Commissioners* (1961), [1963] A.C. 235 (U.K. H.L.), in which Lord Guest said this (at page 262):
>
> > I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.
>
> […]

> 16 Returning to the *Winter* test, the correct question to ask, in determining whether a legal obligation is contingent at a particular point in time, is whether the legal obligation has come into existence at that time, or whether no obligation will come into existence until the occurrence of an event that may not occur.

[26] Thus, the question before Miller J. was whether GM had, pursuant to the MOU, an obligation to pay as overtime hours were worked or whether GM's obligation to pay only arose upon the occurrence of certain events, such as the reaching of certain financial thresholds, the receipt of a request for funding of a program or the reaching of an agreement by GM and the CAW to use the funds otherwise. Hence, as noted by the appellant, this tax dispute is on timing.

[27] As I have already indicated, Miller J. found section 2 of the MOU to be ambiguous and, as a result, turned to the extrinsic evidence which led him to conclude that the rectification of section 2 modified GM's liability to pay from a contingent to an absolute liability.

[28] I begin with the Judge's determination that the words of section 2 were ambiguous and therefore allowed him to consider the extrinsic evidence. In *General Motors of Canada Ltd. v. Canada* (FCA), at paragraph 14 of his Reasons, Malone J.A. indicated that the determination of whether the unexpended portion of the SCCF was a contingent or absolute liability to pay was a mixed question of fact of law that was reviewable on a standard of palpable and overriding error. However, with respect to the issue of whether the Judge was correct in considering extrinsic evidence, I am of the view that the proper standard is that of correctness.

[29] In *MacDougall v. MacDougall* (2005), 262 (4th) 120, the appeal before the Ontario Court of Appeal pertained to the proper interpretation of a spousal support section of a marriage contract, i.e. the interpretation of a variation provision in a domestic contract. Thus, the Court of Appeal had to determine on what standard it would review the Trial Judge's interpretation. The appellant contended that the question before the Court raised a question of law and was thus reviewable on a standard of correctness because it related to the legal effect to be given to the words of the contract. The respondent argued that the question before the Court was a mixed question of fact and law which should be reviewed on a standard of palpable and overriding error.

[30] After reviewing a number of Ontario Court decisions in the light of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, Lang J.A. wrote at paragraphs 30 to 33 of her Reasons for the Court:

> 30 To begin with, the trial judge must apply the proper principles of contract interpretation, including consideration of the clause in the context of the entirety of the contract. A failure to follow the proper principles, including a failure to apply a fundamental principle of interpretation, would be an error of law attracting review on the standard of correctness.
>
> 31 To the extent that this task of interpretation includes consideration of extrinsic evidence, or a determination of the factual matrix, the trial judge is involved in making a finding of fact, or drawing inferences from a finding of fact. Further, the trial judge's "interpretation of the evidence as a whole" is one involving factual or inferential determinations. See Amertek Inc. v. Canadian Commercial Corp. (2005), 200 O.A.C. 38 at para. 68. Such questions of fact are entitled to deference and are not to be overturned except in the case of palpable or overriding error, or its "functional equivalents": "clearly wrong", "unreasonable", and "not reasonably supported by the evidence". See H.L. v. Canada, [2005] 1 S.C.R. 401 at para. 110.
>
> 32 In interpreting the contract, the trial judge also applies the legal principles to the language of the contract in the context of the relevant facts and inferences. This requires the application of law to fact. This has been said to be a question of mixed fact and law. See Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78 at paras. 19-21 (C.A.); Amertek, supra, at para. 68.

> 33 Accordingly, in reviewing the trial judge's interpretation of a contract, the appellate court must first classify the question as one of fact, law, or mixed fact and law. If the question is an inextricable intertwining of both fact and law, the question can be said to be one of mixed fact and law. […]
>
> [Emphasis added]

[31] I agree entirely with Lang J.A.'s comments that if the Judge misdirects himself with respect to a principle of interpretation or fails to properly apply such a principle, such error will constitute an error of law reviewable on a standard of correctness. In order to determine whether Miller J. erred in principle, a review of the authorities pertaining to the admissibility of extrinsic evidence in the context of the interpretation of a contractual document will be useful.

[32] In *Eli Lilly and Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 and in *United Brotherhood of Carpenters and Joiners of America, Local 579, v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, the Supreme Court of Canada addressed that very issue. At issue in *Eli Lilly*, above, was whether a supply agreement entered into by Apotex Inc. and Novopharm Ltd. constituted a sublicence so as to justify the termination by Eli Lilly of Novopharm's compulsory licence for the drug nizatidine. Writing for the Court, Iacobucci J. enunciated the following at paragraphs 54 to 59:

> 54 The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.), at p. 350:

> . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself .... [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses. . . ."

56 When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this Court, in *Joy Oil Co. v. The King*, [1951] S.C.R. 624, at p. 641:

> . . . in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.

57 In my view, there was no ambiguity to the contract entered into between Apotex and Novopharm. No attempt was made to disguise the true purpose of the arrangement, or the circumstances surrounding its drafting. Clearly, the agreement was meant to minimize the deleterious effects of the amendments to the Patent Act, which were expected to and did eventually place severe restrictions on the former scheme of compulsory licensing, by maximizing the access of each party to as wide a variety of patented medicines as possible. This was to be accomplished by obliging each party to obtain such material for the other in the event that one party possessed a licence which the other lacked and could no longer readily obtain. All of this is evident on a plain reading of the recitals to the supply agreement. Leaving aside the question of circumventing the legislation, which has no bearing on the interpretation of the contract, the parties' intentions are clear on the face of the agreement. Accordingly, it cannot properly be said, in my view, that the supply agreement contains any ambiguity that cannot be resolved by reference to its text. No further interpretive aids are necessary.

58 More specifically, there is no need to resort to any of the evidence tendered by either Apotex or Novopharm as to the subjective intentions of their principals at the time of

> drafting. Consequently, I find this evidence to be inadmissible by virtue of the parol evidence rule: see *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.), at pp. 502-3.
>
> 59 Moreover, even if such evidence were required, that is not the character of the evidence tendered in this case, which sheds no light at all on the surrounding circumstances. It consisted only of the subjective intentions of the parties: Mr. Dan's subjective intention at the time of drafting and Dr. Sherman's subjective intention to implement the agreement in a certain way.
>
> [Emphasis added]

[33] In *United Brotherhood of Carpenters and Joiners of America*, above, the issue was whether the interpretation of certain provisions of a collective agreement by an arbitrator and his consideration of extrinsic evidence in reaching that interpretation were patently unreasonable. At paragraphs 42 and 43 of his Reasons for the Court, Sopinka J. made the following comments:

> 42 The general rule prohibiting the use of extrinsic evidence to interpret collective agreements originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.
>
> 43 One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term. (See *Leggatt v. Brown* (1899), 30 O.R. 225 (Div. Ct.).) However, determining when one falls within the scope of this exception is far from easy, as even what can be said to constitute a patent ambiguity is unclear. Some authorities have held that there must be more than the arguability of different constructions of the agreement (*Re Milk & Bread Drivers, Local 647, and Silverwood Dairies Ltd.* (1969), 20 L.A.C. 406), while others suggest that the appropriate test is a lack of clear preponderance of meaning stemming from the words and structure of the agreement (*Re Int'l Ass'n of Machinists, Local 1740, and John Bertram & Sons Co.* (1967), 18 L.A.C. 362). An ambiguity is to be distinguished from an inaccuracy, a novel result or a mere difficulty in construction. There is also the issue of whether an ambiguity need be a patent one to warrant the introduction of extrinsic evidence or whether a latent ambiguity involving the uncertain application of

> otherwise clear words to the facts of the case is sufficient. If a latent ambiguity is taken to be sufficient, the further question arises as to whether extrinsic evidence may be introduced for the purpose of determining the existence of the ambiguity. The difficulties faced by courts of law in resolving these issues are magnified in the case of arbitrators charged with the interpretation and application of a collective agreement, as these individuals are often not only untrained in the law themselves but are required to adjudicate upon arguments made by lay persons.
>
> [Emphasis added]

[34] After stating that extrinsic evidence is admissible where there is ambiguity in the contract, Sopinka J. writes that determining whether a provision is ambiguous is "far from easy". Although Sopinka J. indicates that some cases have sown doubt as to whether arguability of different constructions of a contract constitutes ambiguity, the prevailing case law seems agreed that ambiguity exists when a contractual provision or words thereof are capable of being understood in more ways than one (see G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto, Thomson Carswell, 2006), p 446, Note 43). In that regard, G.H.L. Fridman, summarizing the relevant case law, says at pp. 445-446:

> … the court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, and not one that is itself created by the evidence that is sought to be adduced.

However, it can be said with certainty that ambiguity in a written document does not result simply because the document at issue poses difficulties in interpretation.

[35] More recently, in *Gilchrist v. Western Star Trucks Inc.* [2000] 73 BCLR (3d) 102 at 108, Saunders J.A., writing for the British Columbia Court of Appeal, summarized the relevant principles as follows:

> The goal in interpreting an agreement is to discover, objectively, the parties' intentions at the time the contract was made. The most significant tool is the language of the agreement itself. The language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations may the Court consider other matters such as the post-contracting conduct of the parties.
>
> [Emphasis added]

[36] A number of propositions emerge from the above authorities. First, failing a finding of ambiguity in the document under consideration, it is not open to the Court to consider extrinsic evidence. Second, where extrinsic evidence may be considered, that evidence must pertain to the "surrounding circumstances which were prevalent at the time". Third, even where there is ambiguity, evidence only of a party's subjective intention is not admissible.

[37] With these principles in mind, I now turn to the question of whether the Judge erred in considering extrinsic evidence as an aid to interpreting the MOU. In my view, the Judge made two errors of law in concluding as he did. First, he erred in finding that section 2 of the MOU was ambiguous and, as a result, that he could consider the extrinsic evidence. Second, I am of the view that, in any event, the evidence tendered by GM was not admissible.

[38] To answer the question which was before him, the Judge was required to interpret the MOU. As I indicated earlier, only section 2 thereof was amended. Sections 3, 4 and 5 remained the same. [Note that the underlined and struck out portions of the MOU are the portions rectified by the 2005 rectification]:

APPENDIX "H"

MEMORANDUM OF UNDERSTANDING
COVERING SPECIAL CANADIAN CONTINGENCY FUND

ENTERED into this twenty-ninth day of September 1993
BETWEEN:
General Motors of Canada Limited, referred to hereinafter as "Company"
AND:
National Union CAW, and its Locals No. 222, 1973, 199, 303, 1163, 27, and 636, said National Union CAW and said Local Unions being referred to jointly hereinafter as "Union".

The Company and the Union agree that:

1. The Special Canadian Contingency Fund will be continued during the term of the 1993 Master Agreement.

2. ~~Such~~ The Company's obligation to add to such Special Canadian Contingency Fund will ~~equal an accrual by the Company of~~ be computed as two dollars ($2.00) per overtime hour worked by all covered employees in excess of five percent (5%) of straight time hours worked by such covered employees calculated on a twelve month rolling average. For greater certainty, the Company and the Union agree that the Company's obligation to add to the Special Canadian Contingency Fund, as provided in this Section 2, accrues and becomes absolute as the overtime hours described in the immediately preceding sentence are worked. The Company and the Union agree that the amounts accrued to the Special Canadian Contingency Fund are to be utilized exclusively for the benefit of members of the Union and other appropriate Union purposes, the specific uses to be determined as provided in Sections 3, 4 and 5, below.

3. During the term of the 1993 Master Agreement, the Special Canadian Contingency Fund will be utilized primarily in support of the negotiated Child Care Programs, the Legal Services Plan and to finance the CSUB Plan, and then only if needed. It may also be used to fund jointly agreed to initiatives as determined by the President, National Union CAW and the Vice President and General Director of Personnel. At any point in time, the Special Contingency Fund Balance shall be equal to the cumulative accrual calculated in Section 2 above, less the cumulative utilization calculated in this Section 3. The cumulative accrual and utilization shall include balances carried forward from prior Agreements.

4. The use of the SCC Fund for support of the CSUB Plan would be determined solely by the amount of the Credit Unit Cancellation Base (CUCB) as determined from time

to time under the CSUB Plan for the purpose of determining the cancellation rate of Credit Units on the payment of Regular Benefits under the CSUB Plan.

In the event that such CUCB amount otherwise would fall below the applicable amount that would require an increased Credit Unit cancellation rate from 3.33 to 5.00 Units for Employees with one but less than five years Seniority, the Company will make weekly contributions to the CSUB Fund from the balance in the SCC Fund. Such additional contribution amount from the SCC Fund would be an amount that, together with the amount of regular Company contributions to the CSUB Fund that week, would be sufficient to pay all CSUB Benefits then due and payable and still keep such CUCB from falling below the amount requiring the increased cancellation rate described above. At any time the balance of the SCC Fund is exhausted, the regular provisions of the CSUB Plan would apply.

5. As of the end of the 1993 Master Agreement period, the parties would negotiate the usage of any accrual then remaining in the Special Canadian Contingency Fund.

Yours truly,

W.E. Tate
Vice President and
General Director of Personnel

B. Hargrove
President National
Union CAW

[39] For ease of reference, I reproduce, side by side, both versions of section 2 of the MOU:

Appendix “H” to the 1993 Collective Agreement : “MEMORANDUM OF UNDERSTANDING COVERING CANADIAN CONTINGENCY FUND”, dated September 29, 1993.	Appendix “H” to the 1993 Collective Agreement : “MEMORANDUM OF UNDERSTANDING COVERING CANADIAN CONTINGENCY FUND”,as modified on March 24, 2005.
2. Such Special Canadian Contingency Fund will equal an accrual by the Company of <u>two</u> dollars <u>($2.00)</u> per overtime hour worked by all covered employees in excess of five percent (5%) of straight time hours worked by such covered employees calculated on a twelve month rolling average.	2. The Company's obligation to add to such Special Canadian Contingency Fund will be computed as two dollars ($2.00) per overtime hour worked by all covered employees in excess of five percent (5%) of straight time hours worked by such covered employees calculated on a twelve month rolling

_____ Appendix “H” to the 1993 Collective Agreement : “MEMORANDUM OF UNDERSTANDING COVERING CANADIAN CONTINGENCY FUND”, dated October 22, 1996: 2. Such Special Canadian Contingency Fund will equal an accrual by the Company of two dollars and thirty-five cents ($2.35) per overtime hour worked by all covered employees in excess of five percent (5%) of straight time hours worked by such covered employees calculated on a twelve month rolling average.	average. For greater certainty, the Company and the Union agree that the Company's obligation to add to the Special Canadian Contingency Fund, as provided in this Section 2, accrues and becomes absolute as the overtime hours described in the immediately preceding sentence are worked. The Company and the Union agree that the amounts accrued to the Special Canadian Contingency Fund are to be utilized exclusively for the benefit of members of the Union and other appropriate Union purposes, the specific uses to be determined as provided in Sections 3, 4 and 5, below.

[40] I begin by setting out Malone J.A.’s interpretation of the unrectified provisions of the MOU and of section 2 thereof in particular, which led him to the conclusion that the parties had not created an absolute liability to pay on the part of GM with respect to its 1995 taxation year. At paragraphs 19, 24 and 25 of his Reasons in *General Motors of Canada Ltd.* (FCA), Malone J.A. wrote:

> [19] Key to the Tax Court Judge's decision was his determination that while GM had a legal duty to accrue the Overtime Balance, there was no obligation in 1995 to pay out any part of that amount. The only obligation, according the Tax Court Judge, was to make a bookkeeping entry and no more. The appellant says that this amounts to a legal error in that the Tax Court Judge ignored the meaning of the words 'accrual' and 'fund' used in article 2 as well as the legal right of the CAW to enforce the provisions of the MOU through an arbitration process. GM urges that the wording of article 2, properly interpreted, establishes an absolute liability.
>
> …
>
> [24] It is not disputed that in an accounting context, the Closing Balance in the Contingency Fund was properly treated as an expense in GM's 1995 audited financial

> statements and was recorded among "other current liabilities" in those statements. However, it must be remembered that what is recorded as an obligation for accounting purposes may not be considered an absolute liability at law if a creditor with a legally enforceable claim cannot be identified.
>
> [25] In my view, the requirement that General Motors accrue amounts in the Contingency Fund did not create an absolute liability in 1995. General Motors was not obliged to contribute $2 per relevant overtime hour worked to a qualified trustee or to otherwise segregate or set aside any amount from its ordinary working capital. All GM was required to do during that year was to maintain a running account in which it accumulated amounts as specified by article 2. It was only upon the occurrence of various contingent events, as outlined in articles 3 and 4, that General Motors became legally obligated to pay a sum of money. Similarly, article 5 did not create an absolute liability; it simply provided that the parties would be obligated to negotiate the usage of any accrual remaining in the Contingency Fund at the end of the collective agreement.
>
> [Emphasis added]

[41] Miller J. could not reach a similar conclusion in respect of GM's 1996 taxation year because of his reading of the modified MOU in the light of the extrinsic evidence. In his view, the nature of the obligation to be found in section 2 of the MOU was an absolute liability on the part of GM to pay. The Judge's reasoning appears clearly from paragraphs 11, 12, 13, 17 and 18 of his Reasons:

> [11] I shall first review the words of the MOU. The words in section 2 speak in terms of an "obligation to add to such SCCF" and "the company's obligation to add to the SCCF as provided in this section 2 accrues and becomes absolute". Section 2 goes on to stipulate that "the amounts accrued to the SCCF are to be utilized exclusively ...". Notwithstanding Mr. Meghji's earnest representations to the contrary, this wording is not determinative as to the nature of the absolute obligation. The wording is not written in terms of an absolute obligation to pay or expend the fund, or even set aside funds: the absolute obligation, according to the words, is to "add to the SCCF". That, according to the document, is the obligation that is absolute. The parties cannot add any more or any less to the SCCF. They must add to this notional fund a set, determinable amount. And I purposely call it a notional fund, as it exists only by way of bookkeeping. There is no segregated fund. There is no separate bank account. But there is a determinable amount. According to the words in section 2, that determinable amount can only be used for "Union members' benefit and other Union purposes as determined in sections 3, 4 and 5".

[12] While Mr. Meghji suggests I need look no further than section 2 to find an absolute liability, I am not convinced, based on the words of section 2 alone, that the absolute liability is an absolute liability to do anything more than calculate an amount. Sections 3, 4 and 5 indicate what is to be done with the amount so calculated. The Appellant argues that the obligation to add to the SCCF is to be construed as an absolute liability for the amount; that is the expression the Appellant used in argument - "absolute liability for the amount in issue". Section 2 however does not state anywhere an absolute liability to pay. Does "liability" implicitly mean liability to pay? Section 2 does oblige GM to do something and that obligation is "absolute"; the obligation is to add to the SCCF as overtime hours are worked.

[13] The words of section 2 stipulate that such added amount is to be utilized a certain way, more particularly determined in sections 3, 4 and 5. Those following sections make it clear the fund was to be spent on child care programs, legal service and to finance the CSUB, "and then only if needed". I interpret the words of section 2 as reflecting an intention to oblige GM to calculate a certain amount for a fund, and that fund is agreed by GM and the Union to be spent for the benefit of Union members and other Union purposes specifically on:

(i) programs, if needed;
(ii) initiatives to be agreed upon between the parties; and
(iii) a renegotiated basis at the end of the collective agreement period.

I conclude the words are ambiguous as to whether the agreement to expend arises at the time overtime hours are worked, or when the specific object of the expenditure is identified.

[…]

[17] The parties have put before me an Agreed Statement of Facts wherein both the Appellant and the Respondent agree that the rulings of the Tax Court of Canada and the Federal Court of Appeal were "inconsistent with the belief of the parties that they had created an absolute liability". The parties also submitted in a Joint Book of Documents, affidavits of Mr. Cameron and Mr. Gill indicating in precise terms the nature of the absolute liability. Given such a statement in the Agreed Statement of Facts and the joint submission of the affidavits, and what I consider to be ambiguity in the language of section 2, I am prepared to give considerable weight to the affidavit evidence. And that evidence is unambiguous in that the parties to the MOU intended to create, as overtime hours were worked, an absolute liability to expend the fund.

[18] Returning then to the intention I attempted to ascertain solely from a review of section 2, I believe some significant clarification can now be given. Unlike the finding in the previous decisions of this Court and the Federal Court of Appeal of an obligation to calculate, combined with an agreement to agree, I find the nature of the obligation that the

> parties intended to be absolute in section 2 was an obligation to expend the fund: GM agreed in 1996 to expend $7.7 million in the future. The words of Appendix H can easily be read consistently with this stated intention of GM and CAW.
>
> [Emphasis added]

[42] Before considering the extrinsic evidence which GM sought to adduce, the Judge had to *a priori* determine whether clause 2 was ambiguous in the legal sense. To do so, in the words of Lang J.A. in *MacDougall*, above, he had to apply the proper principles of contract interpretation, i.e. in this case, determine whether there was ambiguity in the legal sense. In my respectful opinion, he failed in that task and, as a result, he made an error of law. The Judge clearly had no difficulty understanding the words of section 2. Rather his difficulty was with the legal consequences flowing from his interpretation of that section.

[43] My reading of the modified section 2 of the MOU leads me to the view that as it now reads, it is not substantially different from its previous version. As Miller J. himself recognizes at paragraph 11 of his decision, the absolute obligation found at section 2 is "… to 'add to the SCCF'. That, according to the document, is the obligation that is absolute". He goes on to say: "The parties cannot add any more or any less to the SCCF. They must add to this notional fund a set, determinable amount. And I purposely call it a notional fund, as it exists only by way of bookkeeping". In other words, according to Miller J., the obligation created by section 2 is the same which this Court found in respect of GM's 1995 taxation year (see paragraph 25 of Malone J.A.'s Reasons in *General Motors of Canada Ltd.* (FCA)). Of significance is paragraph 12 of Miller J.'s Reasons, where he states in no uncertain terms:

> 12. While Mr. Meghji [counsel for GM in *General Motors of Canada Ltd.* (FCA)] suggests I need look no further than section 2 to find an absolute liability, I am not convinced, based on the words of section 2 alone, that the absolute liability is an absolute liability to do anything more than calculate an amount. Sections 3, 4 and 5 indicate what is to be done with the amount so calculated.
>
> [Emphasis added]

[44] The fact that the amount accrued or added to the SCCF as per section 2 of the MOU had to be used solely for the purposes described in sections 3 to 5, sections which were not modified in 2005, was clearly considered and dealt with by this Court in respect of GM's 1995 taxation year.

[45] Notwithstanding his finding concerning the nature of the absolute liability created by the words of section 2 of the MOU, Miller J. concluded that the words thereof were ambiguous "as to whether the agreement to expend arises at the time overtime hours are worked, or when the specific object of the expenditure is identified" (paragraph 13 of his Reasons). Having concluded without difficulty that GM's obligation was to "add to the SCCF" and "to calculate a certain amount for a fund", the Judge could not, in my view, conclude that there was ambiguity in the wording of section 2.

[46] In other words, the words of section 2 were not capable of being understood in more senses than one. In my respectful view, the Judge fell in the trap which Fridman refers to in *The Law of Contract in Canada*, above, when he says at page 446, that "the ambiguity found by the court must not be one that results from the evidence which the parties wish to present". Although GM and the CAW say, by way of the affidavits of Messrs. Cameron and Gill, that their purpose in creating the

SCCF was to create an absolute liability to pay on the part of GM as overtime hours were worked, that intention did not make its way into the MOU, i.e. the words of section 2 do not reveal the intention which both GM and the CAW say was theirs.

[47] In effect, section 2, as modified, simply creates, as its former version did, an obligation to add the overtime worked to the SCCF. Sections 3 and 4 provide that the amount has to be paid for certain purposes, conditionally to the occurrence of certain events, and section 5 obliges the parties to negotiate the use of any accrual remaining in the SCCF. In my view, there is nothing ambiguous in the words of section 2 of the MOU as modified on March 24, 2005. I therefore conclude that the Judge was not entitled to consider the extrinsic evidence adduced by GM.

[48] Consequently, Malone J.A.'s rationale for concluding that the former version of section 2 did not give rise in 1995 to an absolute liability to pay on the part of GM is entirely apposite in respect of the modified MOU. Thus, since GM's obligation under the MOU is simply to add to the SCCF amounts as overtime work is performed and that it did not have, in 1996, an obligation to pay out any part of that amount, such payment being conditional to the occurrence of the events specified in sections 3 and 4 of the MOU, I conclude that GM's obligation is contingent and therefore the unexpended portion of the SCCF is not deductible pursuant to paragraph 18(1)(e) of the Act.

[49] Before concluding, I wish to briefly address what, in my view, constitutes a second error of law on the part of the Judge. As I indicated earlier in these Reasons, it is my opinion that the Judge

could not, in any event, consider the extrinsic evidence placed before him by GM. That evidence, in the form of affidavits of Messrs. Cameron and Gill, clearly falls within the type of evidence which Iacobucci in *Eli Lilly*, above, held to be inadmissible. The affidavits simply purport to set out the subjective intentions of both GM and the CAW. They shed no light on the "surrounding circumstances". In my view, extrinsic evidence, when admissible, must be restricted to facts relevant at the time of execution of the document, or prior thereto and, possibly in some cases, to facts occurring after the execution of the document. Clearly, the proof tendered by GM does not fall within that category. Because the Judge did not consider the question of whether the evidence sought to be adduced by GM was admissible, he failed to characterize the nature of that evidence.

DISPOSITION

[50] I would therefore allow the appeal with costs, set aside the Tax Court decision and refer the matter back to the Minister of National Revenue for reconsideration and reassessment on the basis that GM is not entitled to deduct the unexpended portion of the SCCF of approximately $7,741,002.

"M. Nadon"

J.A.

"I agree.
Robert Décary J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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