

Federal Court of Appeal



Cour d'appel fédérale

Date: 20231024

Docket: A-2-21

Citation: 2023 FCA 211

**CORAM: WEBB J.A.
LASKIN J.A.
GOYETTE J.A.**

BETWEEN:

**NORTHBRIDGE COMMERCIAL
INSURANCE CORPORATION**

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on December 14, 2022.

Judgment delivered at Ottawa, Ontario, on October 24, 2023.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**LASKIN J.A.
GOYETTE J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Northbridge Commercial Insurance Corporation (Northbridge) issued insurance policies to trucking companies that operated in Canada and the United States. The policies provided insurance coverage for accidents and other insurable events. Northbridge claimed input tax credits (ITCs) in relation to a portion of the GST/HST (which for ease of reference will be

referred to as GST) that it paid in respect of its general head office and overhead costs on the basis that it was making zero-rated supplies in relation to such policies.

[2] For the insurance policies in issue in this appeal, section 2 of Part IX of Schedule VI of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA) prescribes that a supply made by a financial institution of a financial service related to any particular policy will be a zero-rated supply to the extent that such policy relates to “risks that are ordinarily situated outside Canada” (paragraph 2(d)). The sole issue in this appeal is the interpretation of “risks that are ordinarily situated outside Canada” for the purposes of paragraph 2(d).

[3] If the insurance policies issued by Northbridge related to risks that are ordinarily situated outside Canada, the supply of the insurance policies would be zero-rated supplies to the extent that such policies related to such risks. Northbridge would be entitled to claim ITCs in relation to the GST it paid to acquire property or a service for consumption, use or supply in the course of making that zero-rated supply.

[4] Northbridge’s claim for ITCs was, however, denied by the Minister of National Revenue. Northbridge’s appeal to the Tax Court of Canada was dismissed (2020 TCC 132) on the basis that “risks” for the purposes of paragraph 2(d) means the objects of the insurance policy (the trucks in this case) and there was insufficient evidence to determine if the trucks were ordinarily situated outside Canada.

[5] Northbridge has appealed this Judgment of the Tax Court and for the reasons that follow I would allow this appeal.

I. Background

[6] Northbridge is licensed to provide various types of insurance policies. The relevant policies in this appeal are those issued to commercial trucking companies. The policies provided coverage for a company's fleet of trucks and trailers in the event of an accident and for other insurable events. Certain policies also included coverage for the cargo that was being transported.

[7] The policies issued provided coverage for insurable events that occurred while the vehicle was travelling in any Canadian province or the lower 48 states of the United States.

[8] The premiums charged by Northbridge for the insurance policies were calculated annually, based on Northbridge's "actuarial best estimate of the potential of loss applicable to each Policy (the 'Loss Calculation')" (paragraph 12 of the Partial Agreed Statement of Facts). Northbridge's "Loss Calculation is location specific and estimated based on the states or provinces within North America in which an Insured's Vehicles may travel" (paragraph 18 of the Partial Agreed Statement of Facts).

[9] As part of this analysis, the US states were divided into seven different groups based on a historical loss analysis. Wyoming was the only state in the group with the lowest claims costs.

Massachusetts, New York and Texas were grouped together as the states with the highest claims costs. The base rate varied for each group of states with the rate for Wyoming being the lowest base rate and the rate for Massachusetts, New York and Texas being the highest base rate. The mileage driven in the states within each group was a factor in determining the premium for the insurance policies. The final premium amount was determined based on a number of different factors.

II. Decision of the Tax Court

[10] The main issue before the Tax Court was whether “risks” in paragraph 2(d) of Part IX of Schedule VI of the ETA means:

- (a) the objects of the insurance policy;
- (b) the perils covered by the insurance policy; or
- (c) the chance of a peril occurring that is covered by the policy.

[11] The Tax Court Judge completed a textual, contextual and purposive analysis and concluded that “risks” means the objects of the insurance, *i.e.*, the trucks in this case.

[12] Having found that “risks” means the objects of the insurance, the Tax Court Judge stated:

[72] ... section 2 is a very unique section under which an apportionment happens within a given supply on an object-by-object basis. The Appellant should

have made a separate apportionment for each policy on a vehicle-by-vehicle basis for the vehicles covered by that policy.

[73] All of the evidence presented at trial was global evidence. I do not have any specific evidence regarding the individual policies in issue, let alone evidence regarding the vehicles covered by those policies. Without this evidence, it is impossible for me to determine whether the supply of any given policy was partly zero-rated. This lack of evidence is a sufficient basis for me to dismiss the appeals and I do so on that basis.

[13] Northbridge's appeal was dismissed.

III. Issue and Standard of Review

[14] The issue in this appeal is the interpretation of paragraph 2(d) of Part IX of Schedule VI of the ETA. Since this is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

[15] An insurance policy is a financial instrument (paragraph (c) of the definition of financial instrument in subsection 123(1) of the ETA). The issuance of a financial instrument is a financial service (paragraph (d) of the definition of financial service in subsection 123(1) of the ETA). The supply of a financial service is an exempt supply for the purposes of the ETA, unless it is included in Part IX of Schedule VI (section 1 of Part VII of Schedule V).

[16] No GST is collectible in relation to exempt supplies (section 165 of the ETA and the definitions of taxable supply and commercial activity in subsection 123(1) of the ETA) and no ITCs can be claimed for any GST paid on any goods or services acquired in connection with the making of exempt supplies (section 169 of the ETA and the definition of commercial activity in subsection 123(1) of the ETA).

[17] Part IX of Schedule VI provides that certain supplies of financial services will be zero-rated supplies. No GST is payable by a recipient of a zero-rated supply (subsection 165(3) of the ETA), but since a zero-rated supply is not an exempt supply, to the extent a person is carrying on a business that involves the making of zero-rated supplies (or other taxable supplies), ITCs may be claimed by that person in relation to GST paid to acquire goods and services used in making the zero-rated supplies (or other taxable supplies). The general rule to determine the amount of such ITCs that may be claimed is found in section 169 of the ETA. Section 141.02 of the ETA is also a relevant provision in determining the amount of ITCs that a financial institution may claim.

[18] The distinction between exempt supplies and zero-rated supplies is, therefore, the ability to claim ITCs. In this appeal, the issue is whether Northbridge is entitled to claim any ITCs in relation to the GST it paid for general head office and overhead costs.

[19] Section 2 of Part IX of Schedule VI provides that the following financial services are zero-rated supplies:

2 A supply made by a financial institution of a financial service that relates to an insurance policy issued by the institution (other than a service that relates to investments made by the institution), to the extent that

(a) where the policy is a life or accident and sickness insurance policy (other than a group policy), it is issued in respect of an individual who at the time the policy becomes effective, is a non-resident individual;

(b) where the policy is a group life or accident and sickness insurance policy, it relates to non-resident individuals who are insured under the policy;

(c) where the policy is a policy in respect of real property, it relates to property situated outside Canada; and

(d) where the policy is a policy of any other kind, it relates to risks that are ordinarily situated outside Canada.

2 La fourniture par une institution financière d'un service financier lié à une police d'assurance établie par l'institution, à l'exception d'un service lié aux placements de l'institution, dans la mesure où :

a) s'agissant d'une police d'assurance-vie, d'assurance-accident ou d'assurance-maladie (sauf une police collective), la police est établie au titre d'un particulier qui, au moment de l'entrée en vigueur de la police, est un particulier non résidant;

b) s'agissant d'une police collective d'assurance-vie, d'assurance-accident ou d'assurance-maladie, la police concerne des particuliers non résidants qui sont assurés aux termes de la police;

c) s'agissant d'une police visant un immeuble, la police concerne un immeuble situé à l'étranger;

d) s'agissant d'un autre type de police, la police concerne des risques qui sont habituellement situés à l'étranger.

[20] To the extent that any insurance policy that Northbridge issued related to risks that are ordinarily situated outside Canada, Northbridge would have made zero-rated supplies. Since these supplies would be zero-rated supplies, Northbridge would be entitled to claim ITCs. Since the Tax Court Judge found, however, that Northbridge was only making exempt supplies, there was no entitlement to claim any ITCs.

[21] As noted above, the issue in this appeal is whether the insurance policies that are relevant to this appeal related “to risks that are ordinarily situated outside Canada” for the purposes of paragraph 2(d).

[22] The provisions of the ETA are to be interpreted based on a textual, contextual and purposive analysis (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 10). The role of this Court is to determine the interpretation of the provision in issue that was intended by Parliament. In this appeal, it is difficult to separate the textual analysis from the contextual and purposive analysis so the following will address the textual, contextual and purposive analysis collectively.

[23] The Tax Court Judge stated that there are three possible interpretations of the word “risks” in paragraph 2(d) of Part IX of Schedule VI of the ETA – the object of the insurance, the perils covered by the insurance policy and the chance of a peril occurring.

[24] The Tax Court Judge rejected the perils as a possible meaning for “risks” in paragraph 27 of his reasons:

[27] When the word "risks" is viewed within the phrase "risks that are ordinarily situated outside Canada", it becomes clear that "risks" cannot mean the perils insured against. How does one possibly determine where the perils insured against are ordinarily situated other than by reference to the object of the insurance? Say an insurance company insures a painting against theft. If "risk" simply means the peril of theft, then how does one determine whether theft is ordinarily situated outside Canada? Theft is unfortunately universal. It is not situated anywhere.

[25] I do not agree with his conclusion.

[26] The ETA is a highly detailed statute. Part IX of the ETA (the GST provisions) sets out a detailed tax regime in sections 122 to 363.2. In addition, there are 12 schedules (I to X, including II.1 and III.1). Section 2 of Part IX of Schedule VI only applies to financial institutions that issue insurance policies. It does not apply to a person who acquires an insurance policy. Since this section is limited to financial institutions that issue insurance policies, in my view, the word “risks” should be interpreted from the perspective of the insurance companies.

[27] In *Canada v. Resman Holdings Ltd.*, [2000] 3 CTC 442, 2000 CanLII 15312 (FCA) (leave to appeal to the Supreme Court of Canada refused May 24, 2001, 28080), the issue was the interpretation of “accumulation” for the purposes of subsection 66.1(6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA). This Court found that “accumulation”, in the context of the highly detailed statutory provisions of the ITA, was to be given the meaning that would be understood in the industry:

[34] The Crown argues that the word "accumulation" was intended to be read in the sense it [*sic*] which it would be understood in the industry. In my view, that is the correct approach to a word as general as "accumulation" when it is used in the context of highly detailed statutory provisions that are intended to be of use to a particular industry.

[28] An insurance policy is a contract of insurance (definition of insurance policy in subsection 123(1) of the ETA). Black’s Law Dictionary, 11th ed., 2019, defines insurance as:

1. A contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency. • An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk. Although indemnification provisions are most common in insurance policies, parties to any type of contract may agree on indemnification arrangements. 2. The amount for which someone or something is covered by such an agreement.

[29] The Supreme Court of Canada in *Somersall v. Friedman*, 2002 SCC 59, defined risk in relation to liability insurance as a future event which may result in a loss:

[16] The purpose of liability insurance generally is to spread risk among those who, as policyholders, pay premiums for this coverage. Risk was defined by L'Heureux-Dubé J., adopting the language of Malouf J.A., in *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, at p. 668, as [TRANSLATION] "a future event, certain or uncertain, which may occasion loss". In *University of Saskatchewan v. Fireman's Fund Insurance Co. of Canada* (1997), 158 Sask. R. 223 (C.A.), Sherstobitoff J.A., at paras. 33-34, defined risk as "the peril insured against", or "the hazard or chance of misfortune or loss at some time in the future". He noted that "[i]f the misfortune or loss has already occurred, it is no longer a risk, but a certainty." Thus, the insurer crafts a policy which provides the policyholders with protection against a specified risk or future peril in return for the periodic payment of a premium. To provide this protection, the insurer undertakes to be prepared to pay out to the insured up to the maximum quantum of loss that could be suffered were the risk to occur, usually set at some cap.

[30] Similarly, as noted by the Tax Court Judge, the definition of "insurance" for the purposes of the *Insurance Act*, R.S.O. 1990, c. I.8, equates risk with the peril insured against:

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;

[31] The Tax Court Judge also noted that several provinces (Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Saskatchewan and Prince Edward Island) also adopt a definition of insurance that is similar to the definition in the Ontario statute.

[32] The critical element of an insurance policy issued by an insurance company is the indemnification against risk of loss, damage or liability. From the perspective of the insurance company, the risk is that a claim will be made by the insured as a result of the occurrence of an insurable event and payment of that claim will have to be made. For Northbridge, the risk was that a claim (or claims) would be made by its customers arising as a result of accidents involving its customers' vehicles. The risk to Northbridge was not the vehicle, *per se*, but rather that the vehicle would be involved in an accident (or other insurable event), which would result in a claim.

[33] The use of "risks" within the phrase "risks that are ordinarily situated outside Canada" when viewed from the perspective of insurance companies does not, in my view, alter the interpretation of risks as the perils or the events which would give rise to a claim. The Tax Court Judge acknowledged in paragraph 37 of his reasons that "'ordinarily situated' means usually, commonly or customarily situated".

[34] The risk of a claim arising from an accident (or other insurable event) is linked to a geographic location. An accident (or other insurable event) occurs at a particular location. Insurance coverage is provided for accidents (or other insurable events) that occur within a certain geographic area. In this case, the area was large – the provinces of Canada and the 48

lower states of the U.S. However, the area was limited. For example, if a vehicle was involved in an accident in Mexico or Alaska, the accident would be situated outside the area covered by the insurance policy.

[35] When an insurance policy is issued there would not, at that time, be any insured event that has occurred. A policy covers accidents that occur after the insurance policy is issued. When a policy is issued it would not be known where any particular accident would occur during the term of the policy. It may well be that a particular trucking company would not have an accident (and hence it would not have any claim) in a particular year.

[36] Because the insurance contract is issued before any insured event occurs, the question for paragraph 2(*d*) is simply whether the policy relates to risks that are usually situated outside Canada. Since the policies issued by Northbridge in part related to accidents (and other insurable events) that are usually situated outside Canada, the supply of a portion of the policies qualified as a zero-rated supply.

[37] The Tax Court Judge and the respondent rely on the wording of the other paragraphs of section 2, which all link the insurance policy to the object of the insurance. Paragraph (*a*) applies to a life or accident and sickness insurance policy issued in respect of a non-resident, paragraph (*b*) applies to a group life or accident and sickness insurance policy that relates to non-residents, and paragraph (*c*) applies to an insurance policy in respect of real property situated outside Canada. None of these paragraphs use the word “risks”.

[38] While paragraphs (a) to (c) refer to the object of the insurance, since the essential element of insurance is the indemnification of a party in the event of a loss arising from an insurable event, it is also relevant to consider where the potential claim would be paid and hence where the financial service of paying that claim would be rendered. Paragraph (a) is restricted to a life or accident and sickness insurance policy issued in respect of a non-resident. Therefore, any payment of a claim under this policy would be made to a non-resident.

[39] Likewise, paragraph (b) only applies to the extent that a group life or accident and sickness insurance policy relates to non-residents, and hence the payment of a claim would be made to a non-resident. Paragraph (c) is restricted to a policy in respect of real property situated outside Canada. For real property that is located outside Canada, any claims related to the repairs to be done to that property would be made to persons in the country where the property is located.

[40] Paragraphs (a), (b) and (c) all reflect an exported service covering non-residents and real property situated outside Canada. They all reflect the payment of a claim outside Canada.

[41] The general rules related to exports and the purpose behind making exported goods and services zero-rated are set out in the August 1989 *Goods & Services Tax Technical Paper* issued by the Department of Finance:

Consistent with the principle that the tax should only apply to consumption in Canada, exports of goods and services will be zero-rated (see Section 2.6). This will ensure that exports are completely relieved of GST. [page 54]

...

As with all other goods and services, financial services provided to nonresidents will be zero-rated. This will ensure that Canadian firms providing financial services remain competitive on world markets.

The rules for financial services will primarily affect a specific group of registrants—such as banks, trust companies, insurers, financial co-operatives and investment dealers—since the vast majority of financial services are provided by these institutions. In addition to exempt financial services, these institutions will normally make taxable and zero-rated supplies. Accordingly, under the general GST rules, they will have to allocate their inputs in order to determine their input tax credit entitlements. The tax paid on their purchases will be eligible for input tax credits to the extent they are for use in making a taxable or zero-rated supply. ... [page 141]

...

The location of the supply of insurance services will be determined by the location of the risk. The insurance of foreign risks by a resident insurer will be considered to be an exported service, and as such, will be zero-rated. Accordingly, input tax credits will be allowed for purchases to the extent they are reasonably allocable to the supply of these zero-rated services. [page 148]

[42] In general, exported goods and services are to be “relieved of GST”. This is accomplished by providing that no tax is payable on the supply of such goods or services and the exporter is entitled to recover any GST paid on any goods or services acquired for the purpose of making such supply.

[43] In the context of insurance policies, the purpose of section 2 of Part IX of Schedule VI is to make a supply of an insurance policy a zero-rated supply to the extent that the policy relates to risks that are ordinarily situated outside Canada. This would treat that portion of the policy as an exported service allowing the insurance company to claim ITCs. Since an insurance policy is an agreement to indemnify a person against certain losses, to the extent that those losses would

ordinarily occur outside Canada, the payment of the claim for those losses would generally be made to persons outside Canada, and this should be treated as an exported service.

[44] Therefore, for Northbridge, to the extent that the insurance policies that it issues cover claims arising from accidents or other insurable events that generally occur in the United States, such policies should be viewed as exported supplies of insurance. The insurable event giving rise to a claim, occurs outside Canada. Any claims arising as a result of an accident in the United States would result in payments to a person outside Canada to repair the vehicles or to compensate individuals who were injured. This is an exported service of indemnifying loss arising as a result of an insurable event occurring outside Canada.

[45] As a result, in my view, “risks” means the risk of a claim arising from an accident or other insurable event. To the extent that any insurance policy issued by Northbridge covered such risks that were ordinarily situated in the United States, the supply of such a policy would be a zero-rated supply. The risks would be ordinarily situated in the United States based on the historical data for claims arising from accidents in the United States.

[46] The next question is to what extent were the policies issued by Northbridge, policies that related to risks that were usually situated outside Canada. This determination would be based on the chance or likelihood of an accident occurring in the United States and the potential loss arising from such accident.

[47] The Tax Court Judge noted:

[81] There was extensive evidence regarding how [Northbridge] priced its insurance policies. That methodology would have been very relevant had I concluded that "risks" meant the chance of a claim in respect of a given vehicle. However, since I have concluded that "risks" means the vehicles themselves, I would not have considered it.

...

C. Calculation of Input Tax Credits

[83] Having found that [Northbridge] was only making exempt supplies, there is no need for me to consider whether [Northbridge] correctly claimed ITCs. Part of the ITC issue involves section 141.02. To my knowledge, that section has not previously been considered by this Court. It is better to leave that task for another day.

[48] Since "risks" means the perils covered by an insurance policy, the relevant question is to what extent does such policy relate to accidents (and other insurable events) that are usually situated or occur outside Canada. The insurance policy is for a fleet of trucks. The analysis is not a vehicle-by-vehicle analysis as proposed by the Tax Court Judge. Rather, it is an analysis of the policies issued by Northbridge.

[49] The Tax Court Judge noted in paragraph 81 of his reasons, how Northbridge priced its policies would be relevant in determining the extent to which its policies relate to risks ordinarily situated outside Canada. The pricing of its policies would reflect the chance of an accident (or other insurable event) occurring outside Canada that would be covered by the policy and the potential loss that would be covered.

[50] In order to determine to what extent Northbridge's insurance policies covered potential claims arising from accidents that usually occur outside Canada, it would be necessary to

examine the evidence that the Tax Court Judge did not consider. This evidence and the potential application of 141.02 of the ETA should be addressed by the Tax Court Judge.

V. Conclusion

[51] I would, therefore, allow the appeal, with costs here and in the Tax Court, and set aside the Judgment issued by that Court. I would refer the matter back to the Tax Court to determine the amount of ITCs that Northbridge is entitled to claim for each reporting period that is under appeal.

“Wyman W. Webb”

J.A.

“I agree.

J.B. Laskin J.A.”

“I agree.

Nathalie Goyette J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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GOYETTE J.A.

DATED: OCTOBER 24, 2023

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