Date: 20080522

Docket: A-273-07

Citation: 2008 FCA 188

CORAM: **RICHARD C.J.**
SEXTON J.A.
EVANS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ATCO ELECTRIC LTD.

Respondent

Heard at Edmonton, Alberta, on April 22, 2008.

Judgment delivered at Ottawa, Ontario, on May 22, 2008.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: RICHARD C.J.
EVANS J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

Introduction

[1] This is an appeal by Her Majesty the Queen (the "appellant") of the decision of Justice Sheridan (the "Tax Court Judge") in *Queen v. ATCO Electric Ltd.* 2007 TCC 243, which allowed the appeal by ATCO Electric Ltd. (the "respondent" or "taxpayer") of reassessments in respect of the 1997 and 1998 taxation years. The decision below also allowed the respondent's appeal for the 2000 tax year but that finding was not appealed before this Court.

[2] The respondent is in the business of the generation, transmission, distribution and retailing of electric energy throughout the Province of Alberta. It operates “integrated” coal-fired generating stations, where coal mines are exploited specifically to provide a source of fuel for the manufacture of electricity in adjacent power plants. In order to obtain the treatment it seeks under the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp.) (the “Act”) and the *Income Tax Regulations* C.R.C. c. 945 (the “Regulations”) the respondent needs to show that the assets, upon which it claims special Capital Cost Allowance treatment, are required to put coal into its “prime metal stage or its equivalent” (“PMSE”).

[3] As a result, this appeal primarily concerns the meaning of PMSE as provided in the Act and the Regulations. The parties agree that this expression can be understood as encompassing the point where the production processes have produced a marketable, saleable commodity which meets the specification of its consumers. However, they disagree on how to precisely determine when a commodity has become a marketable one.

[4] In the decision under appeal, the Tax Court Judge concluded that whether a particular commodity is marketable can depend on the circumstances of the particular taxpayer, including the market reasonably available to the taxpayer. The appellant, on the other hand, advocates an approach that would not consider those particular circumstances. That is, every metal would have its own “prime metal stage” and each mineral resource have its particular “equivalent of a prime metal stage,” irrespective of other circumstances.

[5] For the reasons that follow, I would reject the appellant's approach and would dismiss the appeal.

Facts

[6] During the tax years in question the respondent owned the Battle River Generating Station and jointly owned the Sheerness Generating Station, both of which are in Alberta. The stations are coal-fired electricity generating stations that the respondent operates to produce electric energy.

[7] The generating stations are fuelled by thermal coal that is extracted from adjacent mines, which were also owned, jointly or wholly, by the respondent. The specific type of coal mined – sub-bituminous coal – has a low energy content, which renders the coal ideal for fuelling generating stations but uneconomical for transport. Thus the mines were exploited specifically to provide a source of fuel for the manufacture of electricity in the adjacent power plants: such an arrangement is known as an "integrated" coal-fired generating station. The location of the generating station also created a market for the coal. The fact that the respondent owned (or jointly owned) both the mines and the generation stations is atypical for this industry.

[8] For ease of reference the process of the extracting and processing of the coal at the integrated mines in question can be broken down into six stages:

- **Strip Mining** – First, layers of top soil and earth are removed to expose the coal deposit below. Large pieces of coal are pushed out and broken into chunks which can be loaded into over-sized trucks.
- **Blending –** Second, the trucks transport the coal into a metal-lined cone-shaped pit, from which sub-bituminous coal of varying quality is blended into a conveyor system.

- **Primary Crushing** – Third, the blended sub-bituminous coal is crushed to a size not in excess of 6 inches and then stockpiled onto a "reclaim pile."

- **Secondary Crushing** – Fourth, the coal is crushed to a size not in excess of 1 inch; also, electro-magnets remove metals from the coal to improve its efficient combustion.

- **Pulverizing** – Fifth, while in a bunker the coal is crushed in a mill to a baby-powder fineness; this process also ends up removing pyrites and other waste products which could not be burned.

- **Combustion** – Sixth, the coal is ready to be blown by air from the pulverizer to a nozzle tip which introduces the fuel into the combustion chamber to commence the process to generate electricity.

[9] In computing its income tax liability under Part I of the Act, the respondent computed its resource profits based on an imputed rate of return on coal handling equipment used up to the point that the coal had been pulverized inside the power plants and classified the equipment utilized up to that point as Class 41 assets pursuant to the Regulations. This was done on the basis that the PMSE had not been reached until after the "Pulverizing" stage.

[10] In reassessment the Minister computed the respondent's resource profits on the basis that the PMSE was reached after the "Primary Crushing" stage (that is, after the point the thermal coal had reached the reclamation stockpiles). The Minister also classified the assets used during the process after the "Primary Crushing" stage as constituting "generating or distributing equipment and plant (including structures) of a producer or distributor of electrical energy" so as to be a Class 1(m) asset instead of a Class 41 asset. As a result, under the Minister's reassessment the respondent was only entitled to deduct 4 percent of its assets' undepreciated capital cost as opposed to 25% if the asset were designated as a Class 41 asset. The respondent appealed that reassessment.

Relevant Legislative Provisions

[11] The provisions related to the calculation of resource profits and determining the appropriate class for the respondent's assets clarify that the crux of this appeal lies in the appropriate interpretation of the phrase "prime metal stage or its equivalent."

[12] Paragraph 20(1)(*a*) of the Act permits the taxpayer to deduct such part of the capital cost of property as is allowed by the Regulations. Pursuant to subparagraphs 1100(1)(*a*)(i) and (xxvii) of the Regulations, Class 1 assets may be deducted at a rate of 4% of their undepreciated capital cost and Class 41 assets, at 25%. Class 41(*b*)(i) in Schedule II of the Regulations includes property acquired after 1987 for the purpose of gaining or producing income from a mine. Subparagraph 1104(5)(*a*)(i) of the Regulations provides a definition of the expression "income from a mine" for the purposes of, *inter alia*, Class 41:

For the purposes of paragraphs 1100(1)(*w*) to (*ya*), subsections 1101(4a) to (4d) and Classes 10, 28 and 41 of Schedule II, a taxpayer's "income from a mine", or any expression referring to a taxpayer's income from a mine, includes income reasonably attributable to	Pour l'application des alinéas 1100(1)*w*) à *ya*), des paragraphes 1101(4a) à (4d) et des catégories 10, 28 et 41 de l'annexe II, le revenu qu'un contribuable tire d'une mine comprend le revenu qu'il est raisonnable d'imputer :
(*a*) the processing by the taxpayer of	*a*) au traitement par le contribuable des substances suivantes :
(i) ore (other than iron ore or tar sands ore) all or substantially all of which is from a mineral resource owned by the taxpayer <u>to any stage that is not beyond the prime metal stage or its equivalent</u>,	(i) le minerai – sauf le minerai de fer et le minerai de sables asphaltiques – tiré en totalité ou en presque totalité d'une ressource minérale appartenant au contribuable, <u>jusqu'à un stade ne dépassant pas celui du métal primaire ou son</u>

	équivalent,
…	[…]

[Emphasis added.]

[13] Paragraph 20(1)(*v.1*) of the Act permits the deduction of a resource allowance as defined by section 1210 of the Regulations. The calculation of the resource allowance depends upon a number of variables, including "gross resource profits" which is defined in subsection 1204(1) of the Regulations:

(1) For the purposes of this Part, "gross resource profits" of a taxpayer for a taxation year means the amount, if any, by which the total of	(1) Pour l'application de la présente partie, les bénéficies bruts relatifs à des ressources d'un contribuable pour une année d'imposition correspondent au montant éventuel par lequel le total
…	[…]
(*b*) the amount, if any, of the aggregate of his incomes for the year from	*b*) du montant, s'il en est, de l'ensemble de ses revenues pour l'année tires
…	[…]
(ii) the production and processing in Canada of	(ii) de la production et du traitement au Canada
(A) ore, other than iron ore or tar sands ore, from mineral resources in Canada operated by him to any stage that is not beyond the prime metal stage or its equivalent,	(A) du minerai, à l'exception du minerai de fer ou du minerai de sables asphaltiques, tiré de ressources minérales au Canada que le contribuable exploite, jusqu'à un stade du métal primaire ou son équivalent,
…	[…]

exceeds the aggregate of the taxpayer's losses for the year from the sources described in paragraph (b), where the taxpayer's incomes and losses are computed in accordance with the Act on the assumption that the taxpayer had during the year no incomes or losses except from those sources…	dépasse le total de ses pertes pour l'année provenant des sources visées à l'alinéa *b*), à condition que ses revenus et pertes soient calculés conformément à la Loi, selon l'hypothèse que ses seuls revenus et pertes pour l'année provenaient de ces sources…

[Emphasis added.]

[14] Mineral resources include coal deposits (s. 248(1) of the Act).

Decision Below

[15] The Tax Court Judge allowed the taxpayer's appeal with respect to taxation years 1997 and 1998.

[16] As a preliminary matter, the Tax Court Judge decided that a report issued by the appellant's expert, John Mossop (the "Mossop Report"), was not admissible as it violated the principle outlined by Dussault, J. in *Oligny v. The Queen* 96 DTC 1744 which states that "…it is the responsibility of the judge, not of an expert, to interpret the *Act* and to give the words that are used therein their rightful meaning". She also concluded that even had the Mossop Report been admitted, she would have preferred the evidence of the respondent's expert. The Tax Court Judge made these determinations only after Mr. Mossop gave oral evidence to the Court.

[17] Turning to the definition of PMSE, the Tax Court Judge, looking at the relevant legislation, concluded that the wording of clause 1204(1)(*b*)(ii)(A) in the Regulations contemplated an approach

that considers the circumstances of each case in determining when the PMSE had been reached. She concluded this based on the failure of Parliament to add the expression “for that ore” after PMSE, as well as the decision to not define PMSE, even though the term has no industry-accepted meaning.

[18] She subsequently turned to the scant jurisprudence articulating the meaning of PMSE: the decision of Justice Mahoney in *Canadian Pacific Ltd. v. Canada* (1994), 171 N.R. 64, [1994] F.C.J. No. 933 (QL) (C.A.) (“*Canadian Pacific*”) and the dissenting judgment of Justice Linden in *Gulf Canada Resources Ltd. v. Canada* (1996), 192 N.R. 283, [1996] F.C.J. No. 110 (QL) (C.A.) (“*Gulf Canada*”). The Tax Court Judge decided that “the Federal Court of Appeal was careful to couch its conclusions in terms of the particular facts of each case” (at para. 39). This reflected an approach that, in interpreting PMSE, necessitated scrutinizing the specific requirements of the taxpayer’s consumers in assessing the marketability and saleability of what is being produced and processed.

[19] The Tax Court Judge also indicated that it would not make either commercial or common sense to ignore the circumstances of the taxpayer’s business in applying the existing jurisprudence. She stated, at paragraph 46 of her reasons:

> Rather than setting a prime metal stage benchmark for bituminous sand that would apply in all cases, the overall effect of Justice Linden’s analysis is to underscore the importance of the specific requirements of the consumer in assessing the marketability and saleability of what is being produced and processed. The evidence shows that the determination will necessarily be subject to an infinite range of variables including such things as the kind of ore produced, its quality, its location relative to the consumer, the economics of its transport, technological developments and the market demand, at any given moment, for the product which the ore is required to produce. [Footnote omitted.]

[20] Reviewing the evidence, the Tax Court Judge was satisfied that the taxpayer was engaged in the production and processing of sub-bituminous coal up to and including its pulverization. She rejected the appellant's contention that PMSE was reached after the "Primary Crushing" stage since there was no alternative, viable market for the taxpayer's sub-bituminous coal in its reclaim pile condition.

Issues

[21] The ultimate question in this appeal is to determine whether the Tax Court Judge erred in deciding that the PMSE can be interpreted to include the individual circumstances of the taxpayer, including the marketability of the product. The issue of whether the Tax Court Judge erred by excluding the evidence of the appellant's expert must also be dealt with.

Standard of Review

[22] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 ("*Housen*"), the Supreme Court of Canada explained that the standard of review to be applied by appellate courts varies in relation to the nature of the question at issue. For questions of law, a standard of correctness is applied (*Housen*, paragraph 8). For questions of fact, a standard of palpable and overriding error should be used (*Housen*, paragraph 10). For questions of mixed fact and law, a standard of palpable and overriding error is generally applied, unless an extricable error of law can be identified, in which case a standard of correctness is used (*Housen*, paragraphs 27-28).

[23] The parties agree that the interpretation of the phrase “prime metal stage or its equivalent” is a question of law.

Analysis

Did the Tax Court Judge err in deciding that the PMSE can be interpreted to include the individual circumstances of the taxpayer?

[24] The provisions to be interpreted in this appeal were enacted largely to provide tax incentives for the resource sector to flourish in light of the high-risk nature of resource exploration and the prohibitive capital costs involved in their extraction. Justice Linden in *Gulf Canada* at para. 30 said:

> Resource industries have for a number of years been subject to favourable taxation. Canada possesses a vast quantity of natural resources. It has been felt that the national interest is served by encouraging the development of the resource sector. But resource activities are risky and expensive. Recognizing this, Parliament has developed a series of tax incentives for the resource sector. A number of special provisions relating to the treatment of various expenditures and of income, including incentives available in computing that income, have been made available to certain businesses that qualify as resource activities. Included among these is paragraph 1204(1)(*b*) of the Regulations, which sets out five resource income "sources". Qualifying under any of these source descriptions allows the particular industry access to special income-side resource treatment.

[25] The complication in the present case lies in the integrated nature of the generating stations at Battle River and Sheerness with the mines. The difficult question that must be answered by this Court is, as articulated by the appellant, “the determination of the point at which mining activities end and electricity manufacturing activities begin…” To add further difficulty, not only is PMSE undefined in the Act or the Regulations, it is common ground between the parties that the phrase does not have a technical or trade meaning in the industry. Finally, because sub-bituminous coal is a

non-metallic ore, it cannot actually have a prime metal stage, but only an equivalent thereto (Tax Court Judge's reasons, at para. 31).

[26] As indicated earlier, this Court has engaged in a jurisprudential analysis of PMSE only twice, in the cases of *Canadian Pacific* and *Gulf Canada* (per Justice Linden, dissenting).

[27] In *Canadian Pacific*, the taxpayers transported metallurgical coal from mine sites to smelters and thermal coal from mine sites to power generating plants. They attempted to argue that the transportation of the coal was integral to the coal's processing to the equivalent of the prime metal stage, even though the taxpayers did not conduct this processing. Indeed, by the time the coal was loaded on the railcars of the taxpayers, the coal had already been sold by the mining company to the ultimate purchaser who did the final processing. All the taxpayers did was to transport the coal from the seller to the buyer. However, the taxpayers claimed that the transportation alone entitled them to rebates of tax paid on diesel fuel used to power the transporting trains pursuant to the *Excise Tax Act* R.S.C. 1985, c. E-15, as am. ("*Excise Tax Act*"). This Court explored the meaning of PMSE as understood in the *Excise Tax Act* at para. 30 where Mahoney J.A. stated:

> In my opinion, <u>when metallurgical and thermal coal has been processed to the condition in which it meets the specifications of its consumers and they buy and take delivery of it as coal in that condition</u>, it has certainly reached the equivalent of the prime metal stage within the contemplation of the definition of "mining" in subsection 49.01(1) of the *Excise Tax Act.* I would not exclude the possibility that it had reached that stage sooner but that is not the issue here. [Emphasis added.]

The Court concluded that, despite the fact that additional processing of the coal occurred after it was delivered to the customers, the state of PMSE had been reached since the coal already met the specifications of the customers. As a result, the taxpayers were not entitled to such rebates.

[28] The other decision to consider the meaning of PMSE was the dissenting opinion of Justice Linden in *Gulf Canada*. This case centred around the calculation of the taxpayer's resource profits pursuant to the Regulations. The taxpayer was a petroleum producer, and had claimed deductions for a capital cost allowance and a related interest expense with respect to assets used for the purposes of producing synthetic crude oil from the bituminous sands deposits in Northern Alberta. The taxpayer's operations had three distinct phases: the mining of the sands, the extraction of bitumen from the sands, and the transformation of that bitumen so as to obtain synthetic crude oil. Subsection 1204(3) of the Regulations states that incomes or losses derived from, *inter alia*, processing petroleum "from a natural accumulation of petroleum" cannot be used to calculate "gross resource profits" under section 1204 in the Regulations. The majority concluded that while profits relating to the mining of the sands could constitute gross resource profits, the same could not be said for the extraction and transformation operations because they constituted the processing of petroleum. This analysis by the majority therefore has no bearing on the case before this Court, and I would also note that there was no need for the majority to interpret what the PMSE would be in such a context.

[29] Justice Linden, dissenting, concluded that subsection 1204(3) did not apply because a bituminous sands deposit constituted a "mineral resource" pursuant to section 248(1) of the Act, and could therefore not constitute petroleum for the purposes of the Act. Since this was the point of contention between he and the majority, Justice Linden's analysis on PMSE is not necessarily divergent from the majority's judgment as the majority had no need to consider this issue.

[30] The next step in Justice Linden's analysis, therefore, was to consider what constituted the PMSE in the context of obtaining synthetic crude oil from bituminous sands. After citing with approval the definition provided by this Court in *Canadian Pacific*, Justice Linden continued at paragraph 41:

> In my view, the equivalent of the prime metal stage for mineral production is that point where the production processes have produced a marketable, saleable commodity which meets the specification of its consumers.

Again, it must be emphasized that, having concluded that the operations in question were operations whereby petroleum was processed within the meaning of subsection 1204(3) of the Regulations, the majority did not need to engage in this analysis.

[31] As a final note, Justice Linden, at paragraph 43, emphasized that the equivalence is not of a "…'technical' nature, but of an economic one. It is that point in the work where the mining operation has produced a product to sell."

[32] The parties agree with the tests as articulated in *Canadian Pacific* and by Linden J.A. in *Gulf Canada*; the contention between the parties is how to interpret these tests. The appellant adopts Justice Linden's holding in *Gulf Canada* that the PMSE is reached at that point where the production processes have produced a marketable, saleable commodity which meets the specification of its consumers. However, it submits that this test establishes a "commodity-based, or objective, test that places the point of PMSE to be before an individual consumer conducts its own activities in using the coal and not a 'subjective', or individual business circumstances-based, test."

In effect, the appellant argues that every mineral resource has its own PMSE unrelated to the circumstances of the taxpayer processing the resource. The respondent, on the other hand, takes the position that the determination of the PMSE requires an examination of the facts of the actual production and processing operation for each specific taxpayer, as well as the market faced by that taxpayer.

[33] I agree with the position of the respondent for three reasons: a case-by-case approach to the PMSE is (1) consistent with the jurisprudence on this issue; (2) a logical methodology given the fact that determining the marketability of a resource cannot necessarily be universally determined; and (3) consistent with the CRA's original stance on this issue.

[34] It is clear that the test employed by Justice Linden was one where the marketability of the commodity is discerned within the context of the circumstances of the taxpayer. In *Gulf Canada* Justice Linden's analysis was focused on, and limited to, a consideration of Syncrude's specific operations. For instance, he stated, at paras. 41-2:

> In my view, the equivalent of the prime metal stage for mineral production is that point where the production processes have produced a marketable, saleable commodity which meets the specification of its consumers.
>
> According to this meaning, the equivalent of the prime metal stage for bituminous sand is crude oil. The only marketable product created by the Syncrude plant is synthetic crude oil. This was confirmed by the evidence, which was accepted by the Trial Judge, who stated:
>
> > All three production components of the plant were needed to make a product that could be transported (pipelined) to market (distant refineries). Mined ore itself had no value because there was no market for it. Similarly, bitumen had no value because there was no way of moving it from the Syncrude site to market. Upgrading was needed to convert the bitumen to a pipelineable product.

> Therefore, the only marketable product created by the Syncrude mine is crude oil. The complete Syncrude operation is geared toward the production of marketable crude oil. All aspects of the Syncrude operation, then, are contemplated by clause 1204(l)(*b*)(ii)(B). They are all resource activities. The two deductions at issue in this case, therefore, are properly related to the resource profits computation. They fall specifically under paragraph 1204(1)(*f*) as "deductions for the year ... reasonably [] regarded as applicable to the sources of income described in paragraph (b)." [Emphasis added.]

In my opinion, Justice Linden's approach to defining PMSE is the correct one for this Court to adopt. Justice Linden's test demands consideration of the circumstances of the individual taxpayer to determine whether the production processes have produced a marketable, saleable commodity which meets the specifications of the taxpayer's reasonably contemplated customers.

[35] I say this in spite of the following comments from Justice Mahoney in *Canadian Pacific*, emphasized by the appellant, at para. 30:

> In my opinion, when metallurgical and thermal coal has been processed to the condition in which it meets the specifications of its consumers and they buy and take delivery of it as coal in that condition, it has certainly reached the equivalent of the prime metal stage within the contemplation of the definition of "mining" in subsection 49.01(1) of the *Excise Tax Act*. I would not exclude the possibility that it had reached that stage sooner but that is not the issue here. The crushing, pulverizing and blending, in the case of metallurgical coal, and the crushing, pulverizing and drying, in the case of the thermal coal, done by the steel and electricity producers were not integral to the processing of coal to the equivalent of the prime metal stage. [Emphasis added.]

The above underlined quote could not be applied *mutatis mutandis* to the facts of the case at bar. It must be emphasized that there was a finding of fact in *Canadian Pacific* to the effect that the coal already met the specifications of the customers prior to the pulverizing stages. Thus there could be no issue as to whether the coal was marketable at the time the coal was loaded on the rail cars. Because it was purchased, and therefore clearly marketable, it could be said to have reached the prime metal stage or its equivalent.

[36] The same cannot be said with respect to the case at bar. As pointed out by the respondent's expert, Donald Downing, because the mine and the generator were considered as an integrated project, after the "Primary Crushing" stage the coal could not have been considered to meet the specifications of the mine's only real customer: the generating station. In his report, Mr. Downing indicated that "These mines… were developed in concert with the adjacent generating stations and were intended only to supply those stations with coal" (Appeal Book, pg. 2775). Highlighting the evidence from his report, he stated (Appeal Book, pgs. 2991 – 2992):

> Q: And the next question you were asked to consider is, [a]t what stage of processing, if any, is the coal mined for use at the Sheerness and Battle River Generating Stations a recognized commodity with a marketable value? And what is your conclusion in that regard?
>
> A: The conclusion is that the coal that is mined at Battle River and Sheerness is not a recognized commodity with a marketable value in an open market area. And I make that opinion in the context of the integrated coal mine and generating station, a situation which these two operations represent. The mines and the generating stations were conceived together as projects. One would not exist without the other. The planning and operation of the mine is closely dovetailed with the planning and operation of the generating station. It is true small tonnages of coal that are mined at the two operations are sold to Alberta residents for domestic use, but that is not an open-market sale. It's as dictated by regulation, and it represents a very small amount of the coal produced at the mines. The relatively low energy contents of these subbituminous coals means that they do not travel well, in that the relatively low energy content makes it difficult for these coals to be transported long distances to markets. And when you look at the degree of integration between the mines and the generating stations, the lack of an open market for these coals and the fact that very little of the coal is actually sold to other than the generating stations, within that context, the coal does not represent a marketable commodity.
>
> Q: Now, the third question you were asked to consider is, [a]t what stage of processing is the coal mined for use at the Sheerness and Battle River Generating Stations able to be used to generate electricity? And what is your conclusion in that regard?
>
> A: My opinion is that the point at which the coal can be used is immediately after leaving the third stage of crushing or pulverizing, and prior to that, it cannot be used in these generating stations. [Emphasis added.]

[37] Even the appellant's expert, John Mossop, conceded in cross-examination that the coal had no marketable value after the "Primary Crushing" stage (Appeal Book, pages 3203-4 & 3220):

> Q: With respect to the coal, is it your understanding… I'm asking you with respect to the coal on the stockpile. Is there a buyer and a seller for that coal at the stockpile? And if there are, who would those people be?
>
> A: At that particular place… there is not.
>
> Q: And so it's not possible, really, to determine a market value for the coal at the stockpile, correct, based on the definition of market value that we just discussed?
>
> A: That's true.
>
> […]
>
> Q: And I think you've already agreed with me, sir, that at the pile, the stockpile, there is no market value to the coal either at Sheerness or Battle River in the way we've defined market value?
>
> A: No. That's true.

The definition of "market value" referred to above – admitted by Mr. Mossop – was "the price which a willing seller is prepared to pay and which a willing buyer who at arm's length is prepared to accept" (Appeal Book, page 3203).

[38] Even if the *Canadian Pacific* case could be capable of being read for the proposition that PMSE necessarily encompasses a universal, commodity-based, approach (and I say it cannot), logic dictates that such an approach be disregarded. That is made clear from Justice Linden's justification for his case-by-case approach to the definition of PMSE, who notes, at paragraphs 49-50:

> A second observation that supports the conclusion that all of Syncrude's operations are resource activities concerns the need to view the Income Tax Act as specifically designed for commercial realities. The Act is replete with references to practical, commercial concepts. The resource provisions themselves talk of "production in reasonable commercial quantities," of "property acquired for the purpose of gaining or producing income from a mine," of "carrying on an active business," of "the production of crude oil from bituminous sands," of "resource profits," of "incomes and losses from production from mineral resources," of "bituminous sands deposits coming into production in reasonable commercial quantities," of "the development of a mine for the purpose of gaining or producing income from the extraction of material from a bituminous sands deposit." Each of these references imports practical commercial concepts.
>
> The resource scheme is written with an eye to commercial realities. This is significant presently for the following reason. Parliament has clearly contemplated Syncrude-type operations through the "mineral resource" definition. Such bituminous sands operations are very few and far between in Canada. Notwithstanding their scarcity, they receive specific mention in the Act. They are described in paragraph 1204(1)(b). But I note that in this description they are called income "sources." By naming bituminous sands activities "sources," Parliament seems to have assumed that they comprise commercial operations. This assumption is consistent with the commercial underpinning of the resource taxation scheme. [Emphasis added.]

[39] In the case at bar, the commercial reality is that the only reason for the mines at Battle River and Sheerness is to supply coal to the nearby, integrated generating stations. Thus the mines would not have been brought into production were it not for the decision to locate the generating plants close by. Such a context demonstrates the potential absurdity of adopting a universal, commodity-based approach. It is self-evident that different mining endeavours operating in different locales will face different viable markets due to variations in transportation costs, labour costs, quality of the resource produced and the availability of nearby markets. It is also obvious that different markets may well present distinct demands with respect to such resources, thus impacting what constitutes the equivalent of the prime metal stage for a mineral resource in that market. The notion of a universal PMSE would ignore such commercial realities.

[40] Finally, it is also worth noting, although not determinative, that the CCRA (as it then was) did take the position that idiosyncrasies could be a factor in their Ruling on the Meaning of "the prime metal stage or its equivalent", dated May 7, 1990 which stated that, "…the 'prime metal stage' of a specific ore, although generally constant throughout an industry, can change in certain circumstances, not only among different taxpayers but among different products sold by the same taxpayer." See also CRA Document 9826855, "Prime Metal Stage or its Equivalent", dated February 1999:

> The determination of whether or not certain metals which are recoverable from an ore body have been 'processed to any stage that is not beyond the prime metal stage or its equivalent' can only be determined by reviewing all of the relevant facts relating to a specific mining operation.

Such rulings, while lacking the force of law, may assist the interpretation of statutory provisions: *London Life Insurance Co. v. Canada* (2000), 266 N.R. 130, [2000] F.C.J. No. 2121 (QL) (C.A.) at para. 30.

Did the Tax Court Judge err by excluding the evidence of the appellant's expert?

[41] It is not necessary for me to decide whether or not the Tax Court Judge erred in law by deeming the Mossop Report inadmissible, as the Tax Court Judge preferred the evidence of the respondent's expert in any event. The appellant did not argue that the Tax Court Judge made a palpable and overriding error in preferring the evidence of the respondent's expert, Donald Downing. From the record before me, I agree with the Tax Court Judge.

[42] More importantly, the evidence provided by Mr. Mossop in cross-examination supports the contentions of the respondent and actually contradicts his own report. Mr. Mossop had concluded, at page 4 of his report, that when the coal is placed in the stockpile (after the “Primary Crushing” stage) “it can be considered as the equivalent stage as prime metal because it is a recognized commodity with a market value to a customer.” However, as indicated earlier he conceded in cross-examination that after the “Primary Crushing” stage the coal had no marketable value (Appeal Book, pages 3203-4 & 3220).

[43] The prime issue in this appeal was whether the coal had reached a marketable value after the “Primary Crushing” stage, and because Mr. Mossop ultimately agreed with the respondent’s expert that the coal had not did not have a marketable state, the exclusion of his report becomes unimportant. Hence, I do not need to deal with the law relating to exclusion of an expert report.

Conclusion

[44] For the reasons above, I would dismiss the appeal with costs.

"J. Edgar Sexton"
J.A.

"I agree
J. Richard C.J."
"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-273-07
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE G. SHERIDAN DATED MAY 4, 2007, NO. 2004-1170(IT)G	
STYLE OF CAUSE:	*Her Majesty The Queen v. ATCO Electric Ltd.*
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 22, 2008
REASONS FOR JUDGMENT BY:	Sexton J.A.
CONCURRED IN BY:	Richard C.J. Evans J.A.
DATED:	May 22, 2008

APPEARANCES:

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