Noteworthy Decision Summary

Decision: WCAT-2006-04059 **Panel**: Heather McDonald **Decision Date:** October 30, 2006

Assessments – Classification system – Classification units and classification criteria – Inescapability exception – Policy item AP1-37-1 of the Assessment Manual – Sections 39 and 42 of the Workers Compensation Act

Where an employer rents land to different companies in several different industry classifications, the "inescapability inclusion exception" in policy item AP1-37-1 of the *Assessment Manual* (AM) cannot apply because there is no single industry classification to which the employer's classification can be the "same". Affiliation in the sense of common directors and/or family connections between two firms is not a necessary or a sufficient condition of "inescapability" in this policy.

The employer held four pieces of industrial property and rented them to four other companies, which owned buildings on the property through which they operated mills and businesses. The employer collected rent only. Reasoning that the four companies were "associated" or "affiliated" with the employer in the sense of common directors and/or family relationships, the Workers' Compensation Board, operating as WorkSafeBC, (Board) and the Review Division of the Board (Review Division) applied the "inescapability" exception in assessment item AP1-37-1 of the AM to change the employer's classification from "Property Management" to "Wooden Component Manufacture". Item AP1-37-1 states that "where a firm's operations are an inescapable part of another firm's operations, the firm's classifications will be the same as that of the other firm regardless of ownership"; however, it does not require that the firms in question have common ownership. The Review Division decision was grounded largely on the finding that without the land rented by the employer to the firms, the firms could not operate their businesses. The employer appealed.

The panel concluded that the problem with the Review Division finding was that the same thing could be said of any corporate landlord which leases land to another firm that builds warehouses, stores and offices on the leased land. It would be difficult for any of those businesses to continue operating if the land on which they established their businesses was no longer available to them. But simply because of that, it would not be correct to find that under item AP-1-37-1, the corporate landlord was an "inescapable part of" the operations that leased some of its land. Furthermore, it is clear from the wording of item AP1-37-1 and the analyses in previous WCAT decisions that "affiliation" in the sense of common directors and/or family connections between two firms is not a necessary nor a sufficient condition of "inescapability" under this policy; this is because there are numerous examples of two firms with common directors and/or family connections with completely separate business operations.

Where an employer leases land to different companies in different classifications, the "inescapability" exception in item AP1-37-1 cannot apply. Trying to apply the exception leads to an unworkable outcome because there is no single industry classification to which the employer's classification can be the "same". When there was no single industry classification in which the employer's operations were integrated with other business operations, this is a signal that the employer's operations do not meet the "inescapability" test in item AP1-37-1. The Review Division erred in interpreting and applying the "inescapability" exception in item AP1-37-1 by failing to inquire into the employer's business operations as a whole and to take

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

into account all relevant considerations, such as those referred to in Practice Directive 1-37-1(A).

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Introduction

The employer is appealing a May 9, 2005 decision of the Review Division, WorkSafeBC (Board). In that decision, the review officer confirmed a November 5, 2004 decision by a Board assessment officer. The assessment officer changed the employer's classification from classification unit (CU) 762032 (Property Management – administration only) to CU 714032 (Wooden Component Manufacture – not elsewhere specified), effective January 1, 2005. The 2005 base assessment rate for CU 762032 is $0.18 per $100 of assessable payroll. The 2005 base assessment rate for CU 714032 is $5.61 per $100 of assessable payroll.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submits that the Review Division decision is based on errors of fact, improper interpretation and application of Board policy, and a failure to consider all the evidence. By way of remedy, the employer requests WCAT to find that effective January 1, 2005, the employer's classification should be restored to CU 762032 (Property Management).

Issue(s)

Did the Review Division err in confirming the Board's decision to change the employer's classification from CU 762032 to CU 714032, effective January 1, 2005?

Jurisdiction

WCAT's jurisdiction in this appeal arises under section 239(1) of the *Workers Compensation Act* (Act), as an appeal of a final decision made by a review officer of an assessment matter under section 96.2 of the Act.

A management consultant represented the employer in these appeal proceedings. In the notice of appeal, the employer requested a "read and review" process, indicating that it would provide written submissions or further evidence. I agree that an oral hearing is unnecessary in this case. Although there are evidentiary matters to be resolved, credibility is not an issue. The evidence regarding the employer's activities during the relevant time period can be provided by way of written submissions. As well, the case turns on interpretation and application of law and policy more so than resolving conflicts in evidence. For example, a central conflict in this case relates to the meaning of the phrase "an inescapable part of another firm's operations" in item AP1-37-1 of the

Assessment Manual ("Manual" or "assessment policy.") My view is that written documentation will be sufficient for me to decide the appeal.

Section 253(1) of the Act states that on an appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 250 of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT has jurisdiction to consider the record in the proceedings before it, to consider new evidence, and to substitute its own decision for the final decision under appeal. Thus, this is an appeal by way of a rehearing. This is the final level of appeal.

Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the Board's board of directors that is applicable in the case. Section 251 provides that WCAT may refuse to apply a policy only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the directors) is exhausted.

In this decision I have used initials and other types of abbreviations to identify individuals and firms, so that this decision does not refer to their actual names and indeed, even the initials used may not be the actual initials of those involved.

Applicable Law and Policy

Section 39(1) of the Act provides that every year the Board must, for the purpose of creating and maintaining an adequate accident fund, assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll or by unit of production or in a manner the Board considers proper, sufficient funds. Section 39(2) of the Act states the Board may make assessments in the manner and form and by the procedure it considers adequate and expedient, and may be general as applicable to a class or subclass, or special as applicable to an industry or part or department of it. Section 42 of the Act provides, among other things, that the Board must establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just.

The relevant policy in this appeal is found in assessment policy effective January 1, 2003. I am satisfied that in their decisions both the Board assessment officer and the review officer referred to the correct version of assessment policy to determine whether the employer was appropriately classified.

Manual policy AP1-37-1 (The Classification System) states in part as follows:

> The classification system is based on the principle that the cost of producing a product or providing a service includes the cost of injuries or diseases incurred by the workers doing the work. The system is based on industrial undertaking rather than on occupation or hazard. If a specific product is being manufactured, the classification is the same, regardless of whether the manufacturing is done by the employer's workers or subcontracted out to another firm. A classification therefore includes all occupations within the industry, including office or clerical staff.
>
> The terms classes, subclasses and further subclasses are used in section 37 of the Act. For the purposes of describing the Board's classification system, a sector is equivalent to a class, a rate group is equivalent to a subclass, and an industry group and a classification unit are equivalent to further subclasses.
>
> **(b) Classification units**
>
> The Board classifies all employers and independent operators into classification units. Not all classification units are large enough to have the financial credibility to stand alone for assessment rate making purposes; they must be grouped together to provide an adequate insurance base.
>
> Employers and independent operators are assigned to classification units on the basis of the industry in which the firm is operating. In assigning the classification, some of the factors considered are the type of product or service being provided, the processes and equipment that are used, and the type of industry with which the firm is in competition. Occupations of individual workers may be reviewed when assigning the classification, but only as an indicator of the type of industry being carried on. The fact that an employer contracts out parts of an industry to other employers does not mean that the employer cannot be classified in that industry. The assessment classification system should not unfairly discriminate between firms competing for the same business.
>
> *Where a firm's operations are an inescapable part of another firm's operations, the firm's classification will be the same as that of the other firm regardless of ownership.*
>
> *If the firm's operations do not fall within this category, but are ancillary, or an extension or add-on phase, to another firm's operations, the classification will be the same as the other firm's if there is a degree of common ownership. Even if the firm is separately registered, the two firms*

> *will be regarded as one firm for the purpose of classification. The multiple classification criteria will then be applied…*
>
> [italic emphasis added]

Manual policy AP1-37-3 (Classification – Changes) provides that it is the responsibility of each firm to provide timely, complete and accurate information to the Board regarding changes in the firm's operations, and to act promptly on information requests and information provided by the Board. The policy goes on to indicate that there are three main reasons for a change in a firm's classification: change in operations with a misclassification as a consequence; no change in operations but the firm is nevertheless misclassified; and misclassification based on the firm's non-compliance with reporting requirements. The effective date of a change in a firm's classification depends on the reason for the change.

Background and Evidence

The employer registered with the Board in January 2001. A Notepad report dated January 18, 2001 states that information provided by the employer's controller indicated that the employer held four pieces of industrial property and rented it to four "affiliated" companies. The employer collected rent only, but did not own the buildings on the property which were owned by the other companies. The employer did not do any repairs to the buildings or property.

The employer's representative has clarified in submissions to WCAT that in January 2001 the employer's controller did not report to the Board that the employer had four "affiliated" companies. The representative says that the Board officer chose the word "affiliated," not the employer's controller. The representative also points out that in several later Notepad reports (March 12, 2001; March 20, 2002; March 15, 2004 and April 4, 2004) that the Board referred to only two companies as "associated with" or "related to" the employer. These companies were H Ltd. and Mill Ltd. I accept and am satisfied with the appellant representative's explanation that during the initial registration phone call of January 18, 2001, the employer controller did not use the terms "affiliated" or "affiliate" to describe the employer's relationship with all four companies to which it rented land.

On the basis of the employer's information in the initial phone call to register on January 18, 2001, the Board registered the employer in CU 762032 (Property Management.)

In June 2004, the Board conducted an audit of the employer's books and records for the 2003 assessment year. The classification worksheet completed by the assessment officer states that "This [employer] holds a number of pieces of industrial/commercial property and rents them out to a number of other companies. The majority of total revenue is from associated or related companies. A smaller portion comes from

unrelated companies – one of which is owned and operated by the son of the principal shareholder."

The classification worksheet completed by the assessment officer checked off as "confirmed" that the employer provided the rental service "to the public at large." The worksheet indicated, however, that revenue from four affiliated companies was greater than 50.0% of its total income. The worksheet identified the four "affiliated" companies as: H Ltd., Mill Ltd., Point Ltd. and Lumber Ltd.

I note that the audit worksheets illustrate that in the year 2001, the employer received a very small percentage of its total revenue as rental income from another firm, "X Enterprises." In 2002, the employer received approximately 2.5% of its total revenue from X Enterprises as rental income. In 2003, the audit year in question, again the employer received approximately 2.5% of its total revenue from X Enterprises as rental income. In 2004, the employer received approximately 3.0% of its total revenue from X Enterprises as rental income and approximately 5.0% of its total revenue as rental income from another firm "Pet. Ltd.," so that approximately 8.0% of its total revenue in 2004 came from firms that the Board considered to be "unaffiliated" with the employer. From the evidence on the classification worksheet completed by the assessment officer, X Enterprises and Pet. Ltd. were the firms that comprised the firms in the "public at large" to which the employer provided rental services.

Under the classification worksheet's heading "Full Reason and/or Explanation for Classification Change," the assessment officer wrote:

> The provision of land used by an associated operating company is an inescapable aspect of the operating company's operation rather than an industry unto itself. While there is rental income from unaffiliated sources, this represents less than 50% of the total revenue and thus does not affect the classification. As is the case with any associated company formed to provide management or other services integral to the primary industry of the operating company, the operating company's industry classification is the appropriate choice. The associated companies are in two industry classifications, but the large majority of payroll and assessment is in CU 714032. In view of this, that becomes the primary industry of [the employer]. Multiple classifications are not indicated according to policy. [The employer's controller] correctly described the relationships when this account was established and the Employer Service Representative did not apply the correct classification at the time of initial registration. As there is "outside" rental income, ongoing registration is allowed.

The assessment officer found that the reason for the classification change was Board error, and as the change involved an assessment "rate up" situation, according to assessment policy AP1-37-3, the effective date for the change would be January 1 of

the year following the year the error came to the Board's attention. In this case, the effective date would be January 1, 2005.
In his letter dated November 5, 2004 to the employer, the assessment officer referred to assessment policy AP1-37-1 and stated in part as follows:

> In essence, [the employer] is providing the land upon which the operating companies' mills and businesses operate. The use of this kind of property is an inescapable part of operating such a business. There is a degree of common ownership with the majority of the operating companies who rent land from [the employer]. Because of these factors, we consider the operations of [the employer] to be in the same industry as the operating companies. Since the related operating companies are in the majority operating in the Lumber Remanufacturing industry, we will be changing the classification of [the employer] to CU 714032 "Wooden Component Mfg" effective January 1, 2005.

The employer requested the Review Division to review the assessment officer's November 5, 2004 decision. In a submission dated March 2, 2005 on behalf of the employer, the representative referred to the definition of "associated" in the Board's 2004 *Guide to Completing your Employer Payroll and Contract Labour Report* (Guide). Item C in that Guide asks employers to provide the names and Board account numbers of "associated companies operating in B.C." The explanation for item C says that associated companies are "companies with common shareholders and different operations."

The representative submitted that relying upon the Board's own definition in the Guide, the only two companies associated with the employer are H Ltd. and Mill Ltd., which the employer had confirmed in several Notepad reports and had reported as such to the Board. The representative stated that there "is absolutely no common ownership between any of the other companies" to whom the employer rented its industrial properties.

The representative submitted that the assessment officer used the words "associated," "affiliated" and "related" as if they were one and the same. The representative argued that these terms are not the same for legal, income tax or Board purposes. He said that Board policy only referred to "associated" companies and in turn to "common ownership/shareholders."

The representative enclosed a breakdown of the employer's rental revenues for the fiscal years 2000 through 2004. He said that in every year except 2000, the percentage of revenue derived from "associated" companies (that is, H. Ltd. and Mill Ltd.) was less than 50.0%. The representative submitted that the assessment officer had erred in concluding that more than 50.0% of the employer's revenue was derived from associated companies.

The review officer sent a memo dated March 16, 2005 to the Board's assessment policy manager, requesting an explanation for the assessment officer's finding that Point Ltd. and Lumber Ltd. were "associated," "related" or "affiliated" with the employer. Further, the review officer indicated that the assessment officer's decision was unclear in that although he referred to the paragraph in assessment policy AP-1-37-1 that discusses one firm's operations being an "inescapable part of another firm's operations," that policy paragraph does not specifically require common ownership between the firms. The review officer observed that the next immediate paragraph in the policy requires "a degree of common ownership" but refers to operations of a firm that are "ancillary," an "extension" or an "add on phase" to another firm's operations. The review officer requested an explanation of the general basis for the decision.

A Board research and evaluation analyst (analyst) provided a response dated April 5, 2005. She referred to Practice Directive 1-37-1(A) "Classification Criteria," which states that the "inescapable part of another firm's operations" phrase is an exception to the rebuttable presumption in assessment policy AP1-37-2 that a firm will be classified in a single classification based upon the industry in which it is operating. This Practice Directive came into effect May 1, 2003. It states that the "inescapable inclusion exception" requires a three-part test to be satisfied:

(1) The employer's operations are a core-business operation of the other firm;

(2) The other firm cannot continue to subsist if the employer's operations are severed from that other firm's operations; and

(3) The employer's operations are clearly integrated into that firm's core-business operations; and, for this purpose, the following factors must be considered:

a. The employer's routines, skills, and competencies

b. The degree of captivity of the employer

c. The employer's actual and potential client base

d. The presence or absence of a functioning sales department and budget

e. The presence or absence of a functioning marketing department and budget

f. The absence or diminishment of accounts receivable

g. The integration of information technology systems

h. Whether the employer's processes and equipment are specific to the employer and the other firm or are industry-wide

i. The nature and extent of competing firms within the employer's industry

j. The degree of direction and control exerted by the other firm on the employer whether or not the other firm is represented on the employer's Board of Directors.

The analyst stated that it appeared from the November 5, 2004 decision that the assessment officer found that the "inescapable inclusion exception test" was met, because:

> The employer owns the land on which the mills are built, but does not own the buildings that house the mill operations. It would be difficult for the other firms to continue operating the mills if the land on which they were built was no longer available to them.

The analyst then referred to *WCAT-2005-01448* (March 22, 2005), reported on WCAT's website www.wcat.bc.ca, for the proposition that the term "affiliation" does not require a connection between the two firms in the sense of common ownership or a relationship of inescapability. The analyst indicated that the definition of "affiliation" set out in *WCAT-2005-01448* includes "a commercial or business relationship wherein the two firms have a related business purpose." The analyst said that in this case, one of the two shareholders of Point Ltd. is also one of the employer's shareholders. The second shareholder of Point Ltd. is the sole shareholder of Lumber Ltd. The analyst stated that it was arguable that the employer, Point Ltd. and Lumber Ltd. are affiliated as the three firms are controlled by the same group of people. In making these statements regarding share ownership, the analyst did not refer to specific identities and did not indicate the source of her information regarding share ownership.

In a letter dated April 18, 2005, the employer's representative responded to the analyst's memorandum. The representative stated that the panel in *WCAT-2005-01448* gave a personal opinion regarding a definition of "affiliation" while commenting that assessment published policy lacked a definition and recommending that the Board amend policy to provide one. The representative submitted that *WCAT-2005-01448* does not support the Board's position in this case.

The representative also disagreed with the analyst's statement that Point Ltd. had two shareholders. The representative indicated that the employer believed Point Ltd. had three shareholders, not two. Further, the employer's position was that the employer, Point Ltd. and Lumber Ltd. are not controlled by the same group of people. The representative stated that the Board had not provided evidence to support its position

regarding control; in particular it had not identified the shareholders of Point Ltd. In any event, submitted the employer's representative, without a "broader published definition" of "affiliation," the analyst's assertion is meaningless in stating that it is "arguable" that the employer, Point Ltd. and Lumber Ltd. are "affiliated."

The review officer then asked the assessment policy manager to arrange Ministry of Finance corporate searches for six companies, indicating that he was particularly interested in the names and addresses of shareholders, directors and officers. The six companies included the employer and the four companies earlier discussed in this decision, as well as another company which I will identify as "Gem Ltd." There was no company search information obtained about X Enterprises and Pet. Ltd., the two firms that the Board accepted were not affiliated with the employer, but formed part of the "public at large" to which it provided property rental services.

The B.C. Company search revealed the following:

Gem Ltd.: CC, Director and Secretary
GC, Director and President
(The surnames "C" are identical)

Lumber Ltd.: GC, Director, Secretary and President

(The surname "C" is identical to the surname of all the directors of Gem Ltd., and GC has the same name (first and surname) and address as the GC who is the director and president of Gem Ltd.)

The employer: EC, Director and Secretary
GC, Director
SC, Director
LC, Director and President
SP, Director

(Again, the "C" surnames are all the same. GC has the same first name, surname and address as the GC of Gem Ltd. and Lumber Ltd.)

Mill Ltd.: LC, Director and President
EC, Secretary

(EC has the name as EC who is a director of the employer, although the listed addresses are different. LC has the same name as the LC who is a director of the employer and one of the addresses listed for him here is the same as listed on the employer's search record.)

Point Ltd.:	LC, Director RAS, Director and Secretary GC, President (GC has the same name as the GC who is a director of Gem Ltd., Lumber Ltd., and the employer, and the same address. LC has the same name as the director LC of Mill Ltd., H Ltd. and the employer, with the same address.)
H Ltd.:	LC, Director and President EC, Secretary (LC and EC have the same names and addresses as the LC and EC referred to in the searches for Point Ltd. and the employer. Their names are the same as the LC and EC in the Mill Ltd. search, but the address for EC is different on the Mill Ltd. search.)

An April 23, 2005 email from an Assessment Department officer to the Assessment Department policy manager advised that company registry search information provides director information, but does not identify shareholders. She stated that while directors of small, private companies are usually officers and shareholders, shareholder information cannot be verified without obtaining paper copies of the share certificates. (This leads to the question of whether in the memorandum dated April 5, 2005 from the Board's analyst, when she referred to shareholders, did she in fact intend to refer to directors.)

The employer's 2003 and 2004 payroll and contract labour reports to the Board identify H Ltd. and Mill Ltd. as "associated companies operating in B.C." As earlier noted, the explanation in the 2004 Guide says that associated companies are "companies with common shareholders and different operations."

The Board's audit of the employer's records for the 2003 assessment year indicate that dividends were paid by the employer to GC, SC, SP, and EC, indicating that they were shareholders of the employer. The Board's audit did not refer to evidence about the shareholders of the other five companies.
In a letter dated May 4, 2005, the employer's representative reviewed the results of the Board's company searches, noted that the listings did not contain information about share ownership, and stated that the listings of officers and directors were of limited value in this case. The employer maintained its position that the employer, Point Ltd. and Lumber Ltd. were not controlled by the same group of people.
In the Review Division decision dated May 9, 2005, the review officer referred to the corporate search and stated as follows:

> This information does not establish definite ownership of the various companies but does show that most of the directors and officers of these

> companies bear the same last names. Persons with the same first and last names, often with the same addresses, occur in different combinations. The report of the audit on the employer also advises that dividends were paid to two of these persons, establishing that they at least were shareholders of the employer. This information as a whole indicates that there is a likelihood of common shareholders in these companies but that there is at least a sufficient basis for inferring that the companies are associated, related or affiliated.

The review officer noted that assessment policy AP1-37-1 does not refer specifically to situations where companies are "affiliated," "related" or "associated." He said that the exact term did not matter, as the question was the policy significance, if any, of the types of relationships between the employer and the other firms.

The review officer decided that the employer's situation fell within policy AP1-37-1's exceptional situation that an employer will be given the same classification as another firm, regardless of the exact nature of the employer's activities, if the employer's operations are an "inescapable part of another firm's operations." The review officer observed that this policy exception does not require that there be common ownership between the two firms.

The review officer acknowledged that it was important to consider the employer's business as a whole and in particular the persons for whom those services are performed, and not to simply consider in isolation the nature of the activities carried on by the employer. He gave the example of a firm of bookkeepers or accountants whose functions might be regarded as an "inescapable" part of another firm's operations and therefore within the first exception. He stated that this could result in a firm of chartered accountants having multiple classifications corresponding to the classifications of all of its clients, even though the firm might obviously be offering its services to the general public. The review officer said that the "policy setting out the two exceptions" in AP1-37-1 must be read together with the other relevant policies so as to be limited to situations where an employer is not offering its business to the general public, but is wholly or mainly serving one or more related companies. The review officer stated that the purpose of the two exceptions in AP1-37-1 is to prevent an employer gaining an unfair competitive advantage by transferring certain related types of activities to other firms paying lower assessments. Assessment policy states that the assessment classification system should not unfairly discriminate between firms competing for the same business. There is no concern if an employer transfer activities to another firm that performs those activities as a business for the general public since any employer can make use of the services of such firms.

The review officer concluded that the service provided by the employer in this case, namely the use of its land, was an inescapable part of the business of the companies for which it provides the service. He stated that those companies could not carry on the business without the use of the land in question. He also found that the employer was

not carrying on a land rental business with the general public. Whether or not the companies in question were under common ownership with the employer, they were at least connected through family or other relationships. As the "inescapable" exception in AP1-37-1 did not require common ownership, the issue of common ownership did not need to be decided.

Therefore the review officer found the employer to be properly classified in CU 714032. He denied the employer's request for review.

On appeal to WCAT, the employer submits that the review officer did not consider or give weight to the evidence that in every year except 2000, considerably less than 50.0% of the employer's revenues were derived from the two "associated companies," H Ltd. and Mill Ltd.

The employer submits that the review officer has thus erred in concluding that the employer is not carrying on a land rental business with the general public. Further, if the employer's business is in fact an "inescapable part" of the business of the companies for which it provides the service, then the employer argues that under assessment policy AP1-37-1, the employer should have several classifications that match the classifications of each of the six companies to whom it rents its lands. The employer says that is an unworkable outcome, and surely cannot be the intent of assessment policy.

The employer also argues that it is wrong to infer or presume that control or common ownership exists simply because the directors and officers of various companies bear the same last names. The employer says that the true test is whether there is common ownership of the shares of the companies. The employer says that there is not in this case and the Board has failed to provide evidence to the contrary.

Analysis, Reasons and Findings

My analysis of the assessment officer's November 5, 2004 decision and the review officer's May 9, 2005 decision is that they both decided that the employer's operations were an "inescapable part of" the operations of four other "associated" or "affiliated" companies, being H. Ltd., Mill Ltd., Point Ltd., and Lumber Ltd. The employer's position is that it is associated or affiliated only with two companies, namely H Ltd. and Mill Ltd., because those are the only companies with which it had a common ownership. The employer's position is that because its revenues from H Ltd. and Mill Ltd. were less than 50.0% of its total revenues during the relevant audit period, its operations were not an inescapable part of their operations.

My first observation is that the applicable policy referred to by the assessment officer and the review officer, namely assessment policy AP1-37-1, describes the situation of a firm's operations being an "inescapable part of another firm's operations." As the review officer pointed out, this policy does not require that the firms in question have common

ownership. I further point out that neither does the policy state that it requires a relationship of "association" or "affiliation" between the two firms, whatever the definition of those terms might be. See *Appeal Division Decision 2001-0299* (February 13, 2001), reported on the Board's website www.worksafebc.com. In that decision, the panel was dealing with the previous version of AP1-37-1 in the former assessment policy 30:20:10, which was very similar to AP1-37-1. That policy at that time stated in part as follows:

> Where a firm's operations are an inescapable part of another firm's operations (e.g. sales, administration, management, etc.) the firm's classification will be the same as the other firm regardless of ownership.

In *Decision 2001-0299*, the evidence was that firm "X" took over warehousing services for a supermarket that the supermarket had formerly itself operated. There was no common ownership between the supermarket and firm X. The Board also found that there was no affiliation between the supermarket and X (I note that "affiliation" is not defined in the decision.) Firm X had no other business operations apart from the warehousing services it provided to the supermarket. Firm X did not offer warehousing services to the public at large, only to the supermarket. Firm X had no other source of revenue except that provided by the supermarket. Firm X submitted that it did not have the means to generate revenue from another source since the supermarket owned the warehouse facility and a restrictive covenant prevented X's principal from engaging in the business of public warehousing. Firm X's position was that its existence was "inextricably linked" to the supermarket, its only client. In deciding that the operations of firm X were an inescapable part of the supermarket's operations, the panel stated in part as follows:

> …it is impossible to divorce the employer's operation from its relationship with the Supermarket. The nature of the employer's industrial activity is the integral and exclusive service it provides to the Supermarket. As the employer has pointed out, it exists to fulfill the Supermarket's inventory management needs. The employer has no other clients.
> At the oral hearing, the director of the Assessment Department stated that the issue of whether a firm's operations are an inescapable part of another firm's operations is always a "discretionary" one. However, the CCMs referred to by the employer as well as previous Appeal Division decisions provide some guidelines for applying the test of "inescapability". They indicate, for example, that one sign of "inescapability" is whether an employer's operations are "captive" in the sense that the employer performs services such as management or sales for only one firm in a particular industry….In this case that sign of inescapability is evident.

In *Decision 2001-0299*, therefore, the panel found that the "inescapable part of another firm's operations" test in assessment policy applied, albeit that there was no common ownership or other relationship of "affiliation" between firm X and the supermarket. The evidence in the decision did not refer to common directors or family connections

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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between firm X and the supermarket. Instead, the panel focused on the relationship between X's *operations* and the *operations* of the supermarket, in order to determine whether a relationship of "inescapability" existed between them. The policy's test refers to a firm's *operations,* and that is where the adjudicative focus should be.

In a more recent decision, *WCAT-2006-03360* (August 29, 2006), reported on WCAT's website www.wcat.bc.ca, an employer with a contract to provide pre-boarding security services to an airport argued that its industry classification should be the same as that of the airport. The employer in that case relied on assessment policy AP1-37-1's "inescapable part of another firm's operations" test to argue that its business operations in providing pre-screening security services for an airport were an inescapable part of the airport's operations. In that case, there was no suggestion of common ownership or other relationship of affiliation between the airport and the employer, apart from their business relationship. The evidence in the decision did not refer to common directors or family connections between the employer and the airport as a corporate entity. The panel noted that the employer provided security services to other clients as well. The panel found that the employer's security operations were not an inescapable part of the airport's operations, stating:

> The employer provides security services at the airport. Although those services are certainly important and, in today's world, integral and necessary for a commercial airport's operations, security services of the type provided are not unique to the airport or airline industry. The employer competes with other providers of security services and not with airports.

At this juncture, what is important to note about *WCAT-2006-03360* is that in applying AP1-37-1's test of "inescapable part of another firm's operations," the issues of common ownership between the firms and/or formal affiliation by way of common directors or family connections, were not relevant to the test. The panel (and indeed the employer, too) focussed on the business *operations* of the employer and its relationship to the airport's business *operations*. Again, it was the relationship between the business operations of the two firms that was critical in applying AP1-37-1's test of inescapability.

It is clear from the wording in AP1-37-1 as well as the analyses in *Appeal Division Decision 2001-0299* and *WCAT-2006-03360* that "affiliation" in the sense of common directors and/or family connections between two firms, is not a requirement of "inescapability" in assessment policy AP1-37-1. I would also suggest that affiliation" in the sense of common directors and/or family connections between two firms, is not sufficient to establish "inescapability" under assessment policy AP1-37-1. This is because there are numerous examples of two firms with common directors and/or family connections with completely separate business operations. Therefore, it is neither a necessary nor a sufficient condition of "inescapability" in AP1-37-1 that two firms have common directors and/or have family connections.

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With this background in mind, it is perplexing that the assessment officer, the Board research and evaluation analyst, the review officer, and even the employer's representative, have placed so much emphasis on whether or not the employer was "affiliated," "related" or "associated" with the other companies listed on the company searches. I am not saying that evidence of connections between two firms will never have relevance in an inquiry regarding the inescapability of one firm's operations vis-à-vis another firm's operations, just that it is important not to unduly restrict an inquiry about a firm's business operations to one or two considerations, or to place too much emphasis on one factor such as, for example, family connections or directors in common.

The assessment officer also did not refer to Practice Directive 1-37-1(A), "*Classification Criteria.*" This Practice Directive came into effect on May 1, 2003, and therefore it was in effect at the time the assessment officer made the original decision that found the employer's operations to be an inescapable part of the operations of the four other companies. As earlier described in this decision, the Practice Directive sets out a three-part test to satisfy the "inescapability" test in AP1-37-1: (1) the employer's operations must be a core-business operation of the other firm; (2) the other firm cannot continue to subsist if the employer's operations are severed from that other firm's operations; and (3) the employer's operations are clearly integrated into that other firm's core-business operations; and for this purpose ten factors "must be considered" as follows:

a. The employer's routines, skills and competencies;

b. The degree of captivity of the employer;

c. The employer's actual and potential client base;
d. The presence or absence of a functioning sales department and budget;

e. The presence or absence of a functioning marketing department and budget;

f. The absence or diminishment of accounts receivable;

g. The integration of information technology systems;

h. Whether the employer's processes and equipment are specific to the employer and the other firm or are industry-wide;

i. The nature and extent of competing firms within the employer's industry;

j. The degree of direction and control exerted by the other firm on the employer whether or not the other firm is represented on the employer's Board of Directors.

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In *WCAT-2006-03844* (October 11, 2006), a WCAT reconsideration panel considered an original panel's reference to Practice Directive 1-37-1(A), stating in part as follows:

> Practice guidelines issued by the Board's administration do not have the status of policy under section 82 of the Act. As such, they are not binding pursuant to section 99(2) or section 250(2) of the Act. Nevertheless, they may serve a useful purpose in promoting consistency in decision-making by both Board officers and WCAT. A WCAT panel may elect not to follow a Board practice directive, if the panel considers that some different approach better accords with the purposes of the Act or published policy.

In that decision, the reconsideration panel found that the original panel had placed too much emphasis on part of criterion 3(c) in Practice Directive AP1-37-1(A), in focusing on the potential client base of the employer in that case. In that regard, the reconsideration panel referred to assessment policy AP1-37-1's "present tense" language that indicates industry classification is based on the actual nature of a firm's operations. In particular, policy AP1-37-1 requires classifications to be assigned on the basis of the industry in which an employer "is operating," with considerations that include the type of service or product "being provided," and the type of industry with which an employer "is in competition." The reconsideration panel went on to state as follows:

> I am unable to reconcile the policies regarding the classification of an employer by reference to its actual business activities, with consideration as to how the employer might change its business activities in the future. In this case, the employer's evidence was that it had tried to obtain other clients but was not successful in this…Irrespective of whether the employer might have the potential to obtain other clients, the evidence…was that the employer worked exclusively for a single client. There does not appear to have been any evidence before the WCAT panel that the employer was actively engaged in seeking to obtain other clients during the time period in question…
>
> I find that consideration of the employer's potential client base, in the sense of the employer's potential to enter into new contracts in the event its contract with the supermarket were to be terminated, was patently unreasonable, and involved the improper importation of an extraneous consideration. I find no basis in the Act or policy for basing an employer's classification on consideration as to how it might change the nature of its operations in the future, as opposed to being based on the actual nature of its operations during the time period in question.

With that caveat in mind, I have nevertheless found Practice Directive 1-37-1(A) to be helpful. Read in its entirety without an undue emphasis on any one factor, the Practice Directive's guidelines illustrate that the "inescapability" test in assessment

policy AP1-37-1 requires, at the very least in the third part of the three-part test it offers, a comprehensive analysis of the business operations of the employer compared with the business operations of the other firm. This analysis is to determine whether the employer's operations are "clearly integrated" in the other firm's "core-business operations," so that the employer's operations "cannot be escaped or avoided" from that of the other firm's operations. In my view, that overall approach in Practice Directive 1-37-1(A) is consistent with the "inescapability" exception in assessment policy AP1-37-1.

Given my earlier conclusion that "affiliation" in the sense of common directors and/or family connections between two firms, is not a necessary or sufficient condition of "inescapability" in assessment policy AP1-37-1, it is not strictly necessary for me to address the Board analyst's discussion of the term "affiliation" in her April 5, 2005 memorandum. But because the analyst referred to *WCAT-2005-01448* as offering a definition of "affiliation" for Board assessment policy, I think it important to clarify that matter. In that decision, the panel noted that in 2001, the Board's form 1800 (employer's registration form), defined affiliated firms as those with "common ownership." The panel also noted that the Board's assessment published policy did not have a definition of affiliation, and recommended that the Board's Policy and Research Bureau consider providing such a definition, with appropriate changes to Board registration forms. Further, in the context of interpreting the phrase *"commercial or manufacturing affiliations"* in the classification unit description for CU 763005 (Construction Management Consulting), the panel suggested that the word "affiliations" "includes a type of commercial relationship or business connection with another firm that might bias a consultant's judgment in giving advice to a client." The panel expressly stated that:

> At least as used in the context of the classification unit description for CU763005, I find that the phrase "commercial or manufacturing affiliations" does not require an association or affiliation in the sense of common ownership or inescapability of business operations between two firms.

CU descriptions do not form part of Board published policy, and in providing that limited definition of "commercial or manufacturing affiliations" as used in the description for CU 763005, the panel was not purporting to offer a general definition of "affiliation" for purposes of Board assessment policy. Instead, the panel recommended that the Board's Policy and Research Bureau take up the task. And in the result, the decision in *WCAT-2005-01448* was not based on a finding that the operations of one firm were an "inescapable part of" another firm's operations, nor that there was common ownership between the two firms, but rather on the basis that in applying the general criteria for industry classification in AP1-37-1, the appellant's business operations fell squarely within the CU description 721028 (Industrial/Commercial Construction). Therefore, the employer's representative is correct in submitting that *WCAT-2005-01448* does not assist in the resolution of the issues in this case.

By way of historical interest, subsequent to *WCAT-2005-01448*, the Board did amend assessment policy by providing definitions for "affiliation" and "control." See *Resolution 2005/05/17-01*, (*Resolution*, published on the Board's website), effective June 1, 2005, with the amendments applicable to all decisions made on or after June 1, 2005. The *Resolution* amends two experience rating policies in the Manual. Policy AP1-42-3 (Transfer of Experience Between Firms) provides definitions for four terms (affiliation; control; firm; business operations), stating that the terms "assist in interpreting policy." Those definitions state as follows:

> *Affiliation*
>
> Firms are affiliated where:
>
> - directly or indirectly through one or more intermediaries or by other means, one firm controls the other firm, or both firms are controlled by the same person or group of persons, or
>
> - the firms are controlled by family members, immediate, extended, or equivalent.
>
> Where an original firm's business operations or assets are split between multiple successor firms, affiliation is determined on the basis of the relationship between the original firm and each individual successor firm.

> *Control*
>
> Control is the ability or power, actual or potential, direct or indirect through intermediaries, to direct or cause the direction of the management of a firm's business operations, through the ownership of voting securities, by contract, or by other means.
>
> *Firm*
>
> A firm is any person or entity carrying on a business. An "original firm" is one that moves assets or business operations to one or more other firms. A "successor firm" is one receiving assets or operations from an original firm.
>
> *Business Operations*
>
> The commercial, industrial, or professional activities of a firm; which generally comprise its assets and activities respecting property, plant(s), equipment, products, or services.

These policy amendments came into effect after the dates of both the assessment officer's decision and the review officer's decision, and I am not suggesting that they apply to the issues in this appeal proceeding. It is interesting, though, that the current assessment policy definition of "affiliation" is linked to control in the sense of ability to direct or to cause the direction of the management of a firm's business operations. This definition would seem to require more than evidence that two firms have a director or two in common (even if they might have a family relationship) and a "likelihood" of some common shareholders.

Turning to the Review Division decision dated May 9, 2005, I agree with the employer's submission that the decision is based on erroneous interpretation and application of Board assessment policy and an error of fact. Although the review officer acknowledged that in determining "inescapability" under assessment policy AP1-37-1, it is important to consider the employer's business as a whole, I am satisfied that he did not make such an inquiry. In particular, he did not refer to the guidelines in Practice Directive 1-37-1(A) or make any similar type of comprehensive inquiry to determine whether the employer's operations were an inescapable part of the operations of any of the other firms in question.

As with the Board assessment officer's decision, the review officer's decision regarding "inescapability" is based mainly on the evidence that the employer rented land to the other firms. For example, I note that in the classification worksheet, the assessment officer stated that: "The provision of land used by an associated operating company is an inescapable part of the operating company's operation rather than an industry unto itself." In his letter dated November 5, 2004, the assessment officer stated that "In

essence, [the employer] is providing the land upon which the operating companies' mills and businesses operate. The use of this kind of property is an inescapable part of operating such a business." Similarly, the Board analyst, in her April 5, 2005 memorandum, indicated that the assessment officer's finding that the "inescapability" test in AP1-37-1 was met was based on the fact that "the employer owns the land on which the mills are built, but does not own the buildings that house the mill operations. It would be difficult for the other firms to continue operating the mills if the land on which they were built was no longer available to them." And the review officer, after finding that there was a sufficient basis for inferring that the employer was "associated, related or affiliated" to the other companies in question, later made a separate finding that the "service provided by the employer (namely the use of its land) falls within the first of the two exceptions [in AP1-37-1]; its business is an inescapable part of the business of the companies for which it provides the service. These companies could not carry on the business without the use of the land in question."

The Review Division decision does not provide a reasoned explanation between the "connections" or "relationships" the employer had with the four firms in question, and the finding of "inescapability" of the employer's operations with the operations of those firms. The decision with respect to "inescapability" is grounded largely on the finding that without the land rented by the employer to the firms, the firms could not operate their businesses.

The problem with those findings made by the assessment officer and the review officer is that the same thing could be said of any corporate landlord that leases land to another firm. Consider the situation of a university, or an aboriginal land firm, or the property division of a corporate city, any of which may lease land on a long-term basis to other firms that build warehouses, stores and offices on the leased land from which the firms conduct a variety of types of businesses. It would be difficult for any of those businesses to continue operating if the land on which they established their businesses was no longer available to them. But simply because of that, it would not be correct to find that under policy AP1-37-1, the city, university or aboriginal land firm was an "inescapable part of" the operations of, say, a retail shoe store company that leased some of its land. And even if one of the directors of the shoe company was one of the directors of the university or aboriginal land firm, assessment policy AP1-37-1 would still require a focussed inquiry into whether or not the operations of the land lease business was an "inescapable part of" the shoe store business.

I agree with the review officer that the purpose of the "inescapability" exception in AP1-37-1 is to prevent an employer from gaining an unfair competitive advantage by transferring certain related types of activities to other firms paying lower assessments. He noted that such a concern does not arise if an employer is providing its services to the general public. I find that the review officer erred, however, when he found that the employer in this case was not carrying on a land rental business with the general public as well as with certain firms to which it had some "connections." This finding directly

contradicted the finding of the assessment officer recorded on the classification worksheet, who confirmed that the employer rented "to the public at large."

The majority of the employer's income from its property leasing business did come from companies that the Board considered to be "related" to the employer. But that does not mean that the employer did not have other clients. Indeed, the evidence is that while in 2001 the employer received only a very small percentage of its total revenue from other sources, in 2002 and 2003 the percentage had grown, and by 2004, there were at least two other clients providing almost 8.0% of the employer's total revenue. This evidence does not suggest that the employer's business operations were "captive" with respect to any one of the firms from which it obtained rental income, nor that the employer was restricting its property rental business to only firms to which it had "connections." To the contrary, the evidence suggests a growing clientele and source of revenue from clients to which the employer had no connections.

In this case, the Board originally classified the employer in CU 762032 (Property Management (administration only), as the "types of services" in the CU description include the service of renting property. The evidence in this case is that the employer does exactly that: it rents land in different locations to different firms, and earns rental income from those firms.

In order for the "inescapability" test in AP1-37-1 to apply so as to rebut the "presumption" or "general rule" in policy AP1-37-1 that the employer should be assigned to a single classification unit based on the industry in which the employer is ostensibly operating (i.e. CU 762032), there must be evidence that the employer's business operations are inescapable from another firm's operations, so that according to policy AP1-37-1, the *employer's classification will be the same as that of the other firm*.

As Practice Directive 1-37-1(A) points out, policy AP1-37-1 envisions that an employer's operations are so clearly integrated into another firm's business operations that the two must share the *same* industry classification because the operations of the employer are "inescapable" from the operations of the other firm. I agree with the submission of the employer's representative that in a case such as this, where the employer leases land to different companies in several different industry classifications (some companies which the employer may have "connections" with and some with which it has no "connections" at all), the "inescapability" exception in policy AP1-37-1 cannot apply. Trying to apply the exception leads to an unworkable outcome, because there is no single industry classification to which the employer's classification can be the "same."

As both the assessment officer and the review officer observed, in this case there were two different industry classifications applicable to the four "related" companies. I note, as well, that the business of one of the other "non-related" companies indicates a third industry classification among the employer's clients when viewed as an entire group. With at least two, maybe three, industry classifications among the employer's clients, how could one apply the "inescapability" exception in policy AP1-37-1 and ensure that

the employer's industry classification is the "same" as the other firms? The review officer supported the assessment officer's decision to choose the industry classification with the majority of payroll and assessment, making that the employer's primary industry. I find that choice was a revision of policy AP1-37-1, and thus an error of policy. When there was no single industry classification in which the employer's operations were integrated with other business operations, this was a signal that the employer's operations did not meet the "inescapability" test in AP1-37-1.

Conclusion

For the foregoing reasons, I find that the Review Division erred in confirming the decision of the Board assessment officer that applied the "inescapability" exception in assessment policy AP1-37-1 to change the employer's industry classification from CU 762032 to CU 714032. I have found that the Review Division decision of May 9, 2005 erred in interpreting and applying the "inescapability" exception in assessment policy AP1-37-1 by failing to inquire into the employer's business operations as a whole, by restricting the inquiry to only two considerations, and by not taking into account other relevant considerations about business operations of the employer and other firms, such as those referred to in Practice Directive 1-37-1(A).

There was insufficient evidence before the review officer to rebut the presumption (or to find an exception to the general classification rule) that the employer was correctly classified in CU 762032. Similarly, there is insufficient evidence before me in these appeal proceedings to change the employer's industry classification from CU 762032. Accordingly, I vary the Review Division decision dated May 9, 2005 by finding that the employer's industry classification should revert, effective January 1, 2005, to CU 762032.

The employer did not request reimbursement for any expenses of the appeal proceeding, and my review of the file does not disclose any such expenses. Accordingly, I make no award in that regard.

Heather McDonald
Vice Chair

HM/mm