Dynamic Industries Ltd. v. The Queen

Court (s) Database: Tax Court of Canada Judgments
Date: 2004-04-13
Neutral citation: 2004 TCC 284
File numbers: 2002-1707(IT)G
Judges and Taxing Officers: Theodore E. Margeson
Subjects: Income Tax Act

Docket: 2002-1707(IT)G

BETWEEN:

DYNAMIC INDUSTRIES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of

Steven Martindale (2002-1688(IT)I) on September 19, 2003

at Cranbrook, British Columbia.

Before: The Honourable Justice Theodore E. Margeson

Appearances:

Counsel for the Appellant: Kenneth R. Hauser

Counsel for the Respondent: Karen A. Truscott

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1997, 1998 and 1999 taxation years are dismissed, with costs.

Signed at Vancouver, British Columbia, this 13th day of April, 2004.

"T.E. Margeson"

Margeson, J.

Docket: 2002-1688(IT)G

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and

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Citation: 2004TCC284

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Docket 2002-1688(IT)I

AND BETWEEN:

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REASONS FOR JUDGMENT

Margeson, J.

[1] These are the reasons for judgment in two cases, *Dynamic Industries Ltd. v. Her Majesty the Queen*, 2002-1707(IT)G, hereinafter referred to as "Dynamic" and *Steven Martindale v. Her Majesty the Queen*, 2002-1688(IT)I hereinafter referred to as "Martindale".

[2] In computing income for its 1997, 1998 and 1999 taxation years, Dynamic deducted certain expenditures as business expenses. By Notice of Reassessment dated March 21, 2001, the Minister of National Revenue ("Minister") reassessed Dynamic for the 1997, 1998 and 1999 taxation years, respectively, and in doing so, disallowed certain expenses claimed by Dynamic, and included certain amounts in the company's income. The amounts of the adjustments were $45,392.07, $42,868.68 and $59,178.93, respectively.

[3] In so reassessing Dynamic, the Minister took the position that it was a "personal services business" as defined by the *Income Tax Act* ("*Act*") and therefore would only be eligible to deduct certain specified expenditures.

[4] The issues as quite succinctly put by counsel for the Respondent and not disagreed with by counsel for the Appellant are:

(a) Whether Dynamic was a corporation carrying on a personal services business, as defined by subsection 125(7) of the *Act*, during the 1997, 1998 and 1999 taxation years;

(b) Whether the Minister properly disallowed a portion of the expenses claimed by Dynamic for those years, on the basis that the company was precluded from deducting such amounts, as they were restricted expenditures, pursuant to the limitations set out in paragraph 18(1)(*p*) of the *Act*; and

(c) Whether the Minister correctly reassessed Martindale to include automobile benefits in his income for the 1998 and 1999 taxation years, pursuant to paragraphs 6(1)(*e*) and (*k*) and subsection 6(2) of the *Act*.

Evidence

[5] Martindale testified that he was the construction manager of Dynamic. He graduated from high school in 1978 and then attended welding college and received a certificate. He then went to ironworkers' school in Vancouver and took courses in construction estimating. He first became involved in Dynamic in 1983 as a result of some advice received from a former employer.

[6] Exhibit A-1 was introduced, by consent, subject to any specific objections made during the hearing. Martindale said that between November 1, 1996 and October 31, 1999 his wife and one Michael Baxter were shareholders of Dynamic. In 1995 Martindale ceased to be a shareholder of Dynamic. In 1998 his wife, Sherry, became a shareholder so that Martindale could be a worker for the union. Michael Baxter ceased to be active in Dynamic's day-to-day operations in 1996, but is still a shareholder because he gives a lot of work to Dynamic when his company is unable to do it.

[7] Before l995, Martindale had earlier worked for Dynamic on and off. He worked more for Dynamic because he could pursue jobs himself which an ironworker through the union hall could not and he could accept the contract jobs that an ironworker could not. Ironworkers cannot pursue work themselves but must go on a sign-up list and wait until their turn comes up to be called. However, he, as Dynamic, could pursue these contracts personally.

[8] He would give a set price to do a certain job whereas the ironworker could only accept an hourly wage. Dynamic secured work on a cost plus basis, contract price basis and a daily rate basis plus expenses. In a cost plus contract, there is a set rate per hour but there is no limit on the number of hours worked. The cost plus type of contract was the most prevalent. There was a fixed profit margin of ten per cent.

[9] Dynamic could work on non-union jobs even though they must hire union workers through Local 97. Dynamic could negotiate any rate with a general contractor depending on the conditions existent at any time. Ironworkers cannot negotiate their rate. Martindale was free to work when he wanted to, and could pursue the types of jobs that he wanted to do. Between 1984 and 1995 Dynamic provided welding services, fabrication and erection services. They started doing construction management projects in 1998. Between 1984 and 1995 Dynamic also provided subcontracting service to two other companies. He compiled a list of those companies from the company's books. They are shown at Tab 2 in Exhibit A-1.

[10] He referred to Tab 3 of Exhibit A-1 with reference to G & R Industries Ltd. and he said that between 1988 and 1991 some of the jobs referred to therein had time penalties. The penalty comes off of the contract price per week. They had six to seven persons to do this work for G & R Industries Ltd. to a value of $95,000.

[11] He was familiar with the documents at Tab 3 and said that those were invoices from Dynamic to other general contractors. He referred to other parts of the exhibit with respect to the different rates and means of remuneration that were used with different companies.

[12] Martindale was referred to the invoice from Dynamic to Southern Interior Installation Ltd. ("S.I.I.L.") dated November 1, 1993 and the reference therein to wages for $7,970.50. He was asked why he used the term "wages". He said they were wages but he did not know whether they were for him alone. A cheque would have been issued to Dynamic. To him, wages and labour meant the same thing.

[13] Between 1983 and 1995 Dynamic had a few dozen employees in total but at any one time there would be one to eight employees depending on the contracts that they had. They had a payroll book (time book), which is at Tab 4 and referable to the period from May 1988 to 1994. This was accepted into evidence. These were the amounts paid to Dynamic's employees during that time.

[14] Tab 5 contained a list of employees of Dynamic, which was accurate for the period between 1983 to 2003. This was accepted into evidence. Roy Magee, who was referred to in the time book, worked for Dynamic between 1985 and 1991. Earl Welch, also referred to in the time book, was mostly an ironworker for S.I.I.L.

[15] Martindale was referred to the period of November 1, 1996 to October 31, 1999 and he said there were very limited skilled trades available in the Elk Valley area for this ironwork project. For that project they needed to bring in employees. There was not much accommodation available in Sparwood or elsewhere in the Elk Valley area.

[16] S.I.I.L. did maintenance in the coal mines. Between the period November 1, 1996 to October 31, 1999 most of their work was in the coal mines. Dynamic also worked for S.I.I.L. in 1999. In 1994 Dynamic did a small amount of work for S.I.I.L. or its predecessors. In 1994 this witness worked for Dynamic and also for another company, Construction Management Limited. He did not want to subcontract to Dynamic although he was asked to do so. It was a good chance for this witness to get experience as a construction manager.

[17] In 1995 Dynamic went back to doing contract work with S.I.I.L. who had picked up large contracts with Fording Coal ("Fording"). Between 1995 and 1999 Dynamic worked for no one else except S.I.I.L. who had the lion's share of Fording's projects and was busy enough working for them. Dynamic did project work for S.I.I.L. If S.I.I.L. did not get the job and Dynamic had provided contract work for it, they did not get paid. Sometimes Fording did not provide much management on the job to S.I.I.L. That prompted this witness to look after S.I.I.L.'s best interests. He got along well with Fording's engineers and employees with one exception.

[18] From October 1993 their services to S.I.I.L. were based upon a cost plus basis, $45 per hour, plus living expenses, plus G.S.T. This was agreed upon in 1993.

[19] He signed the invoices from Dynamic to S.I.I.L. located at Tab 6. After January 27, 1997 Dynamic did not rent their truck to S.I.I.L. They obtained their own. All invoices are similar. The billing date was not regular. He referred to the invoices at Tab 7 from November 1997 to September 1998 as invoices to S.I.I.L. Further invoices at Tab 8 were to S.I.I.L. and were from November 1998 to October 1999. These were based upon cost, plus living allowance, plus G.S.T. These were accepted into evidence.

[20] From November 1, 1996 to October 31, 1999 Martindale was familiar with other sub-contracts with S.I.I.L. He knew their terms and he saw the invoices. The invoices at Tab 9, to S.I.I.L. from various other sub-contractors were identified and accepted into evidence. He reviewed this work referred to in the invoices. Sub-contractors would be paid by S.I.I.L. This was on a cost plus basis. These were not all of the invoices from S.I.I.L. as there could have been some that were not on a cost plus basis. S.I.I.L. paid Dynamic's invoices fairly regularly. The documents found at Tabs 10 and 19 were identified by this witness and placed into evidence.

[21] It was well understood that Fording would pay all invoices of S.I.I.L. but there may have been some delay, especially during shut downs. Steve Martindale and Sherry Shkwarok typically loaned money to Dynamic until S.I.I.L. paid their accounts. This witness was a member of the Local 97 Trade Union as were S.I.I.L.'s employees. The 1998 agreement carried on until the 2000 agreement was signed. As this witness had worked as a foreman he would have received $23 plus per hour. Dynamic was not paid by S.I.I.L. every week.

[22] He was asked what security there was to ensure that Dynamic would be paid by S.I.I.L. His answer was that the ironworkers had the pick of the jobs and the backing of Local 97. The agreement required the posting of funds in some cases to ensure payment of wages to the workers. Living out allowance would be paid to him if he worked Fridays and Mondays and it would be paid for seven days per week. If he had been an ironworker he would have received a certain amount and he also received a certain amount from Dynamic as shown at Tab 19 which he prepared. This was a spread sheet of Dynamic with respect to profit.

[23] Referring to Tab 17 he said that the wage scale for journeymen in 1998 was $24.36 and for a foreman it was $24.36 plus 10%. If he had been an ironworker employee acting as foreman of S.I.I.L. in 1999 he would have received $23.91 plus 10% per hour plus a holiday pay of 12%. Twenty-nine dollars and forty-six cents was the highest rate he could have received as an ironworker.

[24] Dynamic's charge-out rate was $45 per hour but there were deductions that had to be taken by Dynamic from this amount and the net profit to Dynamic as shown at Tab 19 of $4.07 was really the gross profit. Their hourly rate was set in 1995.

[25] He was asked what calculations he had made for the year 1993 with respect to the relevant wages he would have received as an ironworker and those he received from Dynamic. He said that he received information from the union as to what the rate was and it almost corresponded to what he used. In 1993 Dynamic's gross profit was much higher. In fact its expenses were lower (the remittances to ironworkers also went up).

[26] Tab 20 was not accepted into evidence. Tab 21 was accepted into evidence. This was the payroll book between 1995 and 2000 prepared by Dynamic. He referred to the month of November 1996 with respect to the wages plus the living out allowance of Martindale for a certain period. Tabs 22 and 23 were accepted into evidence and these were cheques from S.I.I.L. to Dynamic. He analysed the amounts paid between November 1996 and November 1, 1999. Tab 24 contained the yearly breakdown of the living out allowance and the monthly pay (gross wages plus living out allowance paid by Dynamic). Tab 25 was an auditor's report prepared by Jeff Orlik, which was given to this witness by his counsel and it was accepted into evidence. If Dynamic workers were negligent, Dynamic paid for the changes which resulted therefrom. However, there was no warranty work done in the years in question. The travel allowance amounts shown in 1999 were not correct. In 1998, living out allowance was not included (he said he did not have this explained to him).

[27] In 1998 and 1999 he spent five days a week or more at Sparwood for 50 weeks per year. In Sparwood he rented an apartment. There was no other reasonable place for him to live. He leased it monthly. The distance between Cranbrook and Sparwood was 80 miles. In 1998 and 1999 he spent several weekends in Sparwood.

[28] In 1998 and 1999 he drove the "Jimmy". He drove it from Cranbrook to Sparwood. He drove it to work. Mine sites are in terrible condition. You cannot get into a vehicle that has been there without having it cleaned.

[29] In 1998 and 1999 they had a Camaro, a Chevrolet pick-up and a motor home. During this period of time when he was at home he drove the Jimmy on some occasions but had better vehicles at home. He needed a four-wheel-drive to go to the mine. He did not need the Jimmy on a regular basis. He did not drive it a whole lot.

[30] In cross-examination Exhibit R-1 was admitted by consent. Martindale said that he was a member of Local 97 and has been a member since 1982. It is advantageous for him to be a member. There is no restriction on Dynamic in obtaining union jobs so long as Dynamic uses union members. The unit bargains for the union members but this witness bargains independently for Dynamic. If a member turns down a job his name goes to the bottom of the list. If Dynamic turns down work it may affect him later on.

[31] He was referred to Exhibit A-1, Tab 2 and said that that was a list of the companies that Dynamic did work for. Sherry did the word processing. He was referred to Tab 3 for the year 1999 and he said that Sherry and he did the minutes. The writing is in Jim Paul's handwriting. Dynamic's invoices do not show a breakdown of the services. There is no reason to do so. Some did daily time cards and some did not.

[32] Tab 5 was a list of employees of Dynamic between the years 1983 and 2003. His two sons are listed as assistants. They were originally cleaners and then became employees when they were old enough. Between 1997 and 1999 they were 13 and 16 years of age. They did casual work. None of the names on the list were full-time employees except himself and Sherry. She was full-time/part-time. She was an accountant, bookkeeper, loaned money to Dynamic, was a driver, was a safety coordinator and helped on the truck as well. Between 1997 and 1999 she was doing payroll, accounting and banking. The work was mostly administrative in nature. She helped him transport equipment. They did not rent much equipment over those three years.

[33] Between the years 1995 and 1999 Dynamic worked continually for S.I.I.L. and in 1995 and 1996 it worked only for S.I.I.L. If S.I.I.L. did not get the bids, then Dynamic did not get paid. In 1993 they set the rate at $45 plus 10% mark-up. There was no hourly rate change between the years 1995 and 1999. They were not greedy and did not want to "kill the golden goose". He is familiar with the rates that S.I.I.L. charges the mines.

[34] The documents at Tab 9 were other invoices submitted to S.I.I.L. other than their own. He reviewed them. There was no reason for more or less detail in the invoices. Between 1997 and 1999 S.I.I.L. had dozens of sub-contractors and Dynamic as well. Some of them would have invoiced S.I.I.L. for all three years.

[35] He referred to Tab 10 which was a cheque drawn on the account of S.I.I.L. made payable to Steve Martindale and then the name was changed to Dynamic Industries. The amount was for $5,000 and was dated September 15, 1997 and referred to the term "bonus". He said this was a mistake. The $5,000 bonus should have been put in as income. He never did any work on the payroll for S.I.I.L.

[36] He was referred to Tab 12 and he said that these were delayed payments from S.I.I.L. to Dynamic. All of these were paid in the end without interest. The same thing can be seen at Tab 14 for 1993. He did not do the same thing for the intervening years. Things had slowed down in 1998.

[37] He was referred to Tab 19 which was a spread sheet for Dynamic for the year 1999. This sheet reflected the most money that he could get out of S.I.I.L. as an employee. If S.I.I.L. went broke, Dynamic may not have been paid. He was referred to Tab 24 which was a payroll for Dynamic showing the living out allowance and the gross pay in 1996 and 1997. They decided to pay him a round figure of $4,500 rather than having it vary. Dynamic sometimes received a bonus from S.I.I.L. He did not know if other subcontractors did. It was 80 miles to Sparwood. He rented an apartment there first in 1997 and 1998. He still leases it.

[38] Tab 25 was the auditor's report for 1997 to 1999. The wages paid to him were allowed and the wages paid to Sherry were not. Tab 1 of Exhibit R-1 was an income tax return for the year 1995 and 1996 for Dynamic. Tab 2 was an income tax return for Dynamic for the period November 1, 1996 to October 31, 1997. This return showed that the major job with the company was contract welding although he said that there was a change to project management.

[39] Tab 3 contained a return for October 31, 1998. The office was in his residence that year. Tab 4, the return for the year ending October 31, 1999 showed that promotion expenses for season tickets for hockey.

[40] With respect to the Declaration of Conditions of Employment forms, this was a mistake and they used the wrong form. The employment expenses related to the use of the Jimmy.

[41] He identified the documents from Tab 6 to Tab 10. With respect to Tab 8 for 1998, the wrong information was provided. This was submitted in 1999 for the year 1998. Tab 16 was a computer printout reference for Dynamic from the general ledger dated October 31, 1997. This would have been given to CCRA by Dynamic. Tab 17 was a general ledger excerpt as at October 31, 1998 for Dynamic. Tabs 1, 2, 3, 4, 5, 6, 7, 8, 9, 16 and 17 were all accepted into evidence. Tab 15 was not.

[42] He is still employed through Dynamic as a construction manager. The S.I.I.L. projects may last from two days to six months. He provides knowledge of the industry, his own specific skills and his expertise of construction projects to clients. When there was no work for S.I.I.L. he looked elsewhere for work but did not obtain any in the years in question. He may have had to divide his time between different sites. S.I.I.L. employees and sub-contractors all reported to him.

[43] During 1997, 1998 and 1999 S.I.I.L. received 90% of the work from Rawding. It was very rare that he was not at the work sites for any reason. He could have hired someone else to come and work for him. Dynamic was doing work in British Columbia that was fairly unique to Dynamic but this witness could still hire someone else to replace him. However, he did not have to in 1997, 1998 or 1999. He had no decision making authority with respect to what S.I.I.L. was going to pursue. He had no written contract with S.I.I.L. or Dynamic. He stayed in Sparwood during the week. The general contractors were liable for all sub-trades but it is their decision as to whether S.I.I.L. covers them or not. The last time that Dynamic had its own coverage was in 1997 and 1998.

[44] At the site anyone could bring a problem to Dynamic's attention. He had no regular meetings with S.I.I.L. It was always *ad hoc*. They were not on site. It was a group effort as to who was in charge when the Larsons were away. There was no Declaration of Conditions of Employment for 1995 due to an incompetent accountant.

[45] Gayle Edith Larson was from Fruitvale and indicated that she was self-employed. She is the owner of S.I.I.L. and she does all of the books herself. Her husband is an ironworker and not a shareholder.

[46] Between 1995 and 1999 S.I.I.L. did most of the work for Fording, to the extent of 95% and upwards. It rated projects, targeted the price and calculated the time involved. There is no assurance of obtaining a job. Dynamic played an important role in them getting the work. She sits down with "Jim" and discusses matters. They valued Dynamic's opinion. If they do not get the contract they would not bill Fording for the time spent.

[47] Ironworkers are paid weekly for the hours worked. S.I.I.L. paid the subs once per month, 30 days after receipt of the invoice.

[48] They used Dynamic and other sub-contractors between November 1, 1996 and October 31, 1999. They treated Dynamic the same as other subs. Dynamic would oversee the ironworkers' who are the mine's employees and also would oversee S.I.I.L.'s employees. Those employees were told where and when to go. Dynamic was not told. Dynamic had no specific hours to work. The ironworkers did. The ironworkers only were involved in getting the job done and were not involved in construction. They were not involved in completing forms or doing accounting, etc.

[49] S.I.I.L. would give her a time card so she could send a bill with respect to the right job. Between November 1, 1996 and October 31, 1999 their relationship with Fording and Dynamic was the same. Almost every day Steve checked in with them. He may not have checked in every day. He would also check in with Fording, probably more than with them. S.I.I.L. was audited and Phil was reassessed for his living out allowance as well as others. In April 2003 Jim's case went to court and he won it.

[50] She was referred to Exhibit A-1, Tab 26 which was admitted into evidence. These were the Reasons for Judgment in the case of *Larson v. Canada*, [2003] T.C.J. No. 447. The Court found that it was temporary work and there was no chance of permanence.

[51] In 1997, 1998 and 1999 her husband drove a 1997 diesel to work and did use it for personal purposes. It was filthy.

[52] In cross-examination, she said that she was the sole shareholder of S.I.I.L. and her husband has never been a shareholder. She was referred to Exhibit R-1, Tab 15 with respect to the bonus payable by S.I.I.L. and she said that reference was in her accountant's handwriting. The bonus was payable by S.I.I.L. to Dynamic. Dynamic was integral to the operation of S.I.I.L. They were helpful to S.I.I.L. There were no employees. This was a way of showing their appreciation. No other sub-contractor except Dynamic was paid a bonus.

[53] Then she agreed that Dynamic may not have been treated the same as other subcontractors because the others were not so keen to work with S.I.I.L. Dynamic and Mr. Martindale were key to the sub-contractors' work. Other employees of S.I.I.L. would have been subject to lay-off if no contracts were coming in.

[54] The first work done by Dynamic for S.I.I.L. would have been in 1993. However, in the years in issue Dynamic was probably not working for anyone else. S.I.I.L. was very busy. If needed, Mr. Martindale would have been there. Part of Dynamic's job was to watch the dollars.

Argument on Behalf of the Appellant Re Dynamic Industries Ltd.

[55] With respect to the first issue as to whether or not the Appellant was a corporation carrying on a personal services business, the Appellant referred to the provisions of paragraph 18(1)(*p*) of the *Act*. This provision limits the expenses that a personal services business might claim in any taxation year. In particular, this allows the deduction of

(i) salary, wages or other remuneration paid in the year to an incorporated employee of the corporation;

(ii) the cost to the corporation of any benefit or allowance provided to an incorporated employee in the year.

[56] He referred to the provisions of subsections 248(1); paragraphs 125(7)(*a*) and (*b*) as being the relevant provisions regarding the definition of "personal services business". The question is whether or not during the period from November 1, 1996 to October 31, 1999 Mr. Steven Martindale would "reasonably have been regarded as an officer or employee" of S.I.I.L.

[57] He submits that the answer to that question is "no" in light of the Federal Court of Appeal's decision in *Wolf v. The Queen*, [2002] CarswellNat 556 and in light of the Tax Court of Canada's decision in *Sara Consulting and Promotional Limited v. The Queen,* [2001] T.C.J. No. 773, dockets 2000-3982(EI) and 2000-3984(CPP), and in *TSS-Technical Service Solutions Inc. v. Canada*, [2002] T.C.J. 101, dockets 2000-3366(EI) and 2000-3367(CPP). The issue in the present case, according to him, is the same as in *Wolf (supra).*

[58] The facts as found by Desjardins, J.A. in *Wolf (supra),* are substantially similar to the facts set out in the testimony of Mr. Steve Martindale and Ms. Gayle Larson in the present case. Here, the contract between Dynamic and S.I.I.L. was an oral one and not in writing. If in the opinion of S.I.I.L. or Fording, Steve Martindale did not provide his services in a workman-like and professional manner, S.I.I.L. could terminate its agreement with Dynamic. Furthermore, as in *Wolf (supra)*, the renewal of the contract between S.I.I.L. and Dynamic was dependent entirely on the workload available at Fording, i.e. if S.I.I.L. had no work orders from Fording then S.I.I.L.'s contract with Dynamic could, and would, be terminated.

[59] Payment to Dynamic was much the same in the present case as in *Wolf (supra),* in that during the years in question, S.I.I.L.'s contracts with Fording were usually on a "cost plus" basis which was a pre-negotiated amount per hour plus a 10% mark up and Dynamic's contract with S.I.I.L. was on a similar "cost plus" basis. Dynamic was paid at a rate of $45 per hour for straight time, $63 for overtime and $85 per hour for double time. This rate was more than what S.I.I.L.'s ironworkers were paid, both on a gross and net basis. S.I.I.L. paid Dynamic a living out allowance, although for fewer days than the living out allowance S.I.I.L. paid its ironworkers.

[60] On some occasions Dynamic was also paid a bonus subject to the successful completion of Fording work orders. Further, the method of the payment in the case was similar to the method of payment in *Wolf (supra)* although here Dynamic billed its hours plus living out allowance to S.I.I.L. who in turn billed Fording by marking up Dynamic's billed amount by 10%. Once S.I.I.L. had a sufficient cash flow as a result of Fording paying its bills, S.I.I.L. would pay Dynamic's bills.

[61] The working conditions were basically similar. In the present case, Mr. Martindale and Ms. Larson both testified that Mr. Martindale discussed the progress and problems of the projects which he was managing with representatives of Fording (either Fording staff engineer or Fording's owner representative) and with Jim and Gayle Larson of S.I.I.L. During the years in question, Dynamic/Steve Martindale worked on a variety of Fording projects at all of Fording's mine sites. As in *Wolf (supra)*, Dynamic and Steve Martindale were subject to minimal supervision by S.I.I.L. or Fording. No one told Mr. Martindale how to manage each specific project. Once Mr. Martindale accepted management of a project he pursued it on his own. Mr. Martindale was often called upon to interact, not only with Jim Larson from S.I.I.L., but also with a supervising engineer or owner's representative from Fording.

[62] Similar to *Wolf (supra)*, during the years in question, the Appellant used tools and equipment provided by S.I.I.L. except for the vehicle which Dynamic provided. In prior years, Dynamic had used its own tools for which it had charged S.I.I.L. and Dynamic had rented other tools and equipment to S.I.I.L. Given the profit associated with this activity, Dynamic would have liked to continue this equipment rental. However, once S.I.I.L. was financially capable of purchasing its own tools and equipment it stopped renting tools and equipment from Dynamic. Furthermore, the vast majority of the work performed by Dynamic/Steve Martindale could only be performed at the mine site using materials provided by S.I.I.L. or Fording.

[63] Similar to *Wolf (supra)*, Dynamic/Steve Martindale was treated differently from S.I.I.L.'s employees in that "S.I.I.L.'s employees were members of Local 97 of the Ironworkers Union and as such were required to be paid a specified amount per hour for each hour they were at a mine site. They had to be paid once a week. In contrast, Dynamic/Steve Martindale were not paid for anything that S.I.I.L. could not in turn bill Fording for

(i.e. work not done at Fording's work site such as going through drawings and planning workloads for the next day, contract estimates and for contracts not already ordered to S.I.I.L., etc.).

[64] Dynamic/Steve Martindale were required to fix any errors in their work without charge. None of S.I.I.L.'s employees did this non-payable "warranty" work.

[65] S.I.I.L. had to provide sufficient security to the union that it was capable of meeting its ironworkers payroll. S.I.I.L. only paid Dynamic and other subcontractors when S.I.I.L. had sufficient cash flow to do so.

[66] S.I.I.L. employees' standard work day was from 8:00 a.m. to 4:30 p.m. Mr. Martindale worked those hours which were necessary to complete a project. This might entail working less than eight hours per day or working more than eight hours per day, with the start time for such working days at Mr. Martindale's choosing.

[67] S.I.I.L.'s ironworker foremen were not concerned with how much a particular project cost nor with documenting such projects. In contrast, Dynamic/Steve Martindale were concerned with project cost overruns and properly documenting project steps.

[68] As in *Wolf (supra)*, Dynamic/Steve Martindale were in an identical position as the worker there. Furthermore, Dynamic was at risk of being sued by S.I.I.L. for damages resulting from Mr. Martindale's negligence on a project. There was a risk that S.I.I.L. might not be able to pay Dynamic's bills. S.I.I.L.'s steel workers did not face such litigation risks nor a risk of non-payment. Further, in this case, given the nature and depth of skilled trade persons available in the Sparwood and Elkford area and the nature of the Fording projects, S.I.I.L. would hire numerous other sub-contractors needed for a given Fording project (i.e. plumbers, electricians, instrument control specialists, etc.). Dynamic/Steve Martindale were treated the same as these other sub-contractors. Dynamic's invoices to S.I.I.L. during 1997, 1998 and 1999 which are set out in Exhibits A-6, A-7 and A-8 are substantially similar to those sample invoices issued by other sub-contractors to S.I.I.L., which were set out behind Exhibit A-9.

[69] In the present case, Dynamic's contract with S.I.I.L. lasted only as long as S.I.I.L.'s contract with Fording, which could range from a few days to a few months, depending on the project. In *Wolf (supra)*, the taxpayer worked on Canadair projects for six years between January 31, 1990 and 1995. In the present case, Dynamic/Steve Martindale worked on S.I.I.L.'s Fording projects continuously and exclusively since 1995. It should also be noted that 90% of S.I.I.L.'s work during this period of time was for Fording. Dynamic/Steve Martindale's continuity of work, and S.I.I.L.'s continuity of work, was attributable to the fact that Fording undertook considerable capital expenditures commencing in 1995. Neither Dynamic nor S.I.I.L. had to look for work elsewhere. This has all changed recently with Fording's sale and the reduction of capital expenditures at the mine sites.

[70] Counsel submitted that the factual conclusion in the present case is substantially similar to the facts in *Wolf (supra)* and consequently the reasons for the decision in *Wolf (supra)* are equally applicable in the present case.

[71] Similar to the findings in *Wolf (supra)*, the present case indicates that Mr. Martindale was assigned a project, he knew what had to be accomplished and he was a master of "how to do it", even though this alone does not establish a lot of subordination. Further, the ownership of tools test was found to be a neutral factor in *Wolf (supra)* and that should equally be true here.

[72] With respect to the financial risk and opportunity for profit test, Madam Justice Desjardins concluded that this test indicated an independent contractor relationship since Mr. *Wolf (supra)* did take risks. This is exactly the same situation that Dynamic/Steve Martindale were in. For example, in 1999 Dynamic's charge outright to S.I.I.L. was the same as when it was first negotiated in 1993, $45 per hour. Even so, in 1999 Dynamic still made $4.07 more than when Mr. Martindale had been an ironworker employed by S.I.I.L. In 1993 this profit component was higher. Furthermore, Dynamic was at risk for being sued for negligence, not getting paid for work on unsuccessful bids and not getting paid for issued invoices. Dynamic and Mr. Martindale had no job security - Dynamic only had work from S.I.I.L. as S.I.I.L. had work from Fording. However, Dynamic and

Mr. Martindale did have greater flexibility in finding work than when he was an ironworker employee since he could avoid the union call-out list and he could work on non-union jobs. Furthermore, Dynamic and Mr. Martindale could work on a basis other than an hourly rate and when work was done at an hourly rate, they were free to negotiate a rate higher than that stipulated by the union. The risk factors in this case were Mr. Martindale's and his wife's, which was similar to the factual situation in *Wolf (supra)*.

[73] Regarding the integration test, although they were found to be inconclusive in *Wolf (supra)*, in the case at bar, although Dynamic and Mr. Martindale were an integral part of S.I.I.L.'s business activities during the years in question, this is not relevant. What is relevant is to consider the integration test from Dynamic/Mr. Martindale's perspective. Dynamic and Mr. Martindale were at S.I.I.L. to provide a temporary helping hand in the limited field of expertise, namely, Mr. Martindale's project management expertise. In the present case, Dynamic's business stood independent of S.I.I.L.'s and Mr. Martindale made sure they looked after Dynamic's best interests first, before S.I.I.L. For example, Mr. Martindale testified that in one project he advised Fording not to proceed with its intended course of action of contracting with S.I.I.L. to undertake the project since the project was not necessary. Mr. Martindale advised Fording in this manner so as not to imperil his and Dynamic's position with Fording, even though it meant less work for S.I.I.L. Once S.I.I.L. completed a Fording project, Dynamic was out of a job until another project came along or until Dynamic was successful in pursuing another contract with another general contractor.

[74] As in *Wolf (supra)* Dynamic/Mr. Martindale had "non-standard" employment. As a result of his many years of running Dynamic, Mr. Martindale's work routine emphasized higher profit coupled with higher risk, mobility and independence. This is an even stronger argument in the present case than in *Wolf (supra)* since Mr. Wolf did not have a long history of running his own business but Martindale did. Given the similarity in facts with *Wolf (supra)* Mr. Martindale cannot "reasonably" be regarded as being an employee of S.I.I.L. having regard to the "traditional" analysis used by Madam Justice Désjardins. Dynamic is therefore not a personal services corporation.

[75] Counsel also discussed the reasons for the decision of Décary, J.A. in *Wolf, (supra)*, who set out the difference between a contract of service and a contract for services when discussing the ruling case of *Wiebe Door Services Ltd. v. M.N.R*., [1986] 3 F.C. 553 (F.C.A.) and the most recent case of *671122 Ontario Limited v. Sagaz Industries Canada Inc*., [2001] F.C. 59 as to whether the person who has been engaged to perform the services is performing them as a person in business on his own account. The learned Justice then indicated in the final analysis, in civil law as well as in common law, one ends up looking into the terms of the relevant agreements and circumstances to find the true contractual reality of the parties.

[76] The Court must look at the total relationship of the parties and conclude what the intention of the parties is. Was Martindale performing his professional service as a person in business on his own account? Décary, J. said, "In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of the work and when the terms of the contract reflect those intentions, contracts can generally be characterized as contracts for services". He referred to some of these characteristics such as a lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[77] In the present case, counsel argued that the intent of Dynamic and S.I.I.L. was that Dynamic be an independent contractor. Dynamic has always maintained that this was their intent, as evidenced by the following statement from page 7 of the Respondent's audit report which comprises Exhibit A-1, Tab-25:

The representative Randall Ball and the shareholder Sherry Shkwarok were unaware of the possibility that the corporation activities were considered a personal services business. They mentioned that it was not their intent to fall into these tax ramifications as the corporation had numerous clients in the past. The auditor has countered (that) intent has little bearing in the circumstances.

However, it is clear that commencing in 1983, particularly since 1988, Dynamic/Steve Martindale was used to and wanted the freedom of running his own business and the opportunity of making more money and was willing to sacrifice security in return. S.I.I.L. wanted the flexibility of being able to terminate the relationship at

will and avoid the fixed benefit costs associated with employees. Thus, the contract between Dynamic and S.I.I.L. was a contract for services and not a contract of service. Using Mr. Justice Décary's analysis, Mr. Martindale cannot reasonably be regarded as an employee of S.I.I.L.

[78] Counsel referred to the analysis in *Sara Consulting, supra* and *TSS-Technical Service Solutions, supra* and the Supreme Court of Canada decision in *Shell Canada v. The Queen*, 99 DTC 5669 in support of his position that the Court should not re-characterize legal relationships in the absence of clear and credible evidence that the description of a relationship is other than as agreed between arm's length parties. The description agreed upon by the parties must stand.

[79] In the present case, S.I.I.L. and Dynamic/Martindale considered Dynamic/Martindale to be an independent contractor and there is no clear and credible evidence that this description does not properly reflect its actual legal effect.

[80] Counsel referred to the Reasons of Noël, J.A. in *Wolf (supra),* where the learned Justice considered the traditional analysis and the non-traditional analysis and concluded that where the parties labelled the relationship in a certain way in the hope of achieving a tax benefit, where was no sham or window dressing of any sort in the case and where the parties' action reflected their understanding of the relationship as being that of an independent contractor and their actions were consistent therewith, the Court should not disregard their understanding.

[81] In the present case Dynamic and S.I.I.L. labelled the relationship in a certain way with a view to achieving a tax benefit. There was no sham or window dressing. Mr. Martindale had operated Dynamic for 12 years as an independent business prior to providing services to S.I.I.L. On commencing to provide services to S.I.I.L. in 1995 Mr. Martindale and S.I.I.L. continued to view Dynamic as an independent contractor with all the risks and benefits.

[82] In conclusion, based upon the facts and reasons in *Wolf (supra)*, and given the similarity of facts between the present case and the facts in *Wolf (supra)*, counsel submitted that Mr. Martindale cannot "reasonably" be regarded as an employee of S.I.I.L. during the years in question, regardless of whether the "traditional analysis" in *Wiebe Door Services Ltd, supra,* is used or the non-traditional analysis as adopted by Décary, J.A. As a result, Dynamic does not fall within the definition of a "personal services business" set out in subsection 125(7) of the *Act* which in turn precludes the application of paragraph 18(1)(*p*) of the *Act*. The Appellant's appeal should be allowed in full, with costs in that regard.

Deductions Allowed if Dynamic is a Personal Services Business

[83] Counsel argued that the provisions of subparagraph 18(1)(*p*)(ii) refers to "the cost to the corporation" of the benefit or allowance. It is therefore submitted that the "benefit" or "allowance" provided to the incorporated employee need not be taxable to that employee in order for the cost of that benefit or allowance to be deductible by the company.

[84] The Minister apparently did allow the deduction of the wages which were paid to Mr. Martindale but not the "cost" to Dynamic of the benefit of providing an automobile to Mr. Martindale, nor has Dynamic been allowed to deduct the amount of living out allowances provided to Mr. Martindale during the years in question.

[85] For its fiscal year ended October 31, 1997 the cost to Dynamic of providing Mr. Martindale with an automobile, set out on page 4 of Exhibit A-1, Tab 25, amounted to $9,786.71. In addition to this amount, Dynamic should be allowed to deduct its living out allowance payments of $19,565.00 which are established by Exhibits A-1, Tab 21 and Tab 22 and summarized in Tab 24.

[86] For its fiscal year ended October 31, 1998 the cost to Dynamic of providing Mr. Martindale with an automobile as set out on page 5 of Exhibit A-1, Tab 25 amounted to $10,286.81. In addition to this amount, Dynamic should be allowed to deduct its living out allowance payments of $16,800 which are established by Exhibits A-1, Tab 21 and Tab 23 and summarized in Exhibit A-1, Tab 24.

[87] For its fiscal year ended October 31, 1999 the cost to Dynamic of providing Mr. Martindale with an automobile, as set out on page 5 of Exhibit A-1, Tab 25, amounted to $7,316.58.

[88] In addition to this amount, Dynamic should be allowed to deduct its living out allowance payments of $19,100 which are established by Exhibit A-1, Tab 21 and summarized in Exhibit A-1, Tab 24.

[89] The Appellant also asks for costs.

Argument by the Appellant - Steven Martindale

[90] The Appellant has been reassessed to Tax pursuant to the provision of paragraphs 6(1)(*e*) and 6(1)(*k*) of the *Act* for his 1998 and 1999 taxation years to include in his income a standby charge and operating benefit which totalled $7,416 in each of the taxation years as a result of the Appellant's employer, Dynamic making available to the Appellant the use of a 1994 GMC Jimmy automobile.

[91] This liability for a standby charge, under paragraph 6(1)(*e*) depends upon the calculation of a "reasonable standby charge". The issue before the Court in this case is whether:

1) the Appellant was required by Dynamic in that particular year to use a 1994 GMC Jimmy in connection with or in the course of his employment with Dynamic;

2) all or substantially all of the distance travelled with the 1994 GMC Jimmy in that particular taxation year was in connection with or in the course of the Appellant's employment with Dynamic.

[92] In order for the Appellant to claim the deduction he must be able to answer in the affirmative to both of these questions.

[93] The Respondent in the Reply has not set out any assumptions with respect to this issue which the Respondent relied on in assessing the Appellant. In each of the 1998 and 1999 years, Dynamic was providing project management services to S.I.I.L. with respect to construction repair contracts which Fording had awarded to S.I.L.L. at Fording's three mine sites located in the Elk Valley in south-eastern British Columbia.

[94] In order for Dynamic to provide these project management services, its employee, the Appellant, was required to travel to Sparwood, as well as from Sparwood to any of Fording's three mine sites. The Appellant and Mrs. Gayle Larson both testified that given the road conditions on the highway between Cranbrook and Sparwood, a four-wheel-drive was a necessity. Also, the Appellant and Mrs. Larson testified that the Appellant needed a four-wheel-drive vehicle to travel to and around the three Fording mine sites located in the Elk Valley.

[95] In the present case, the distance travelled by the Appellant between his residence and Cranbrook and Sparwood meets both of the requirements since the distance travelled was "in connection with or in the course of the office of employment". As the Appellant testified, in any given day he would have to drive around a particular mine site and may have to be at more than one site. To do these duties he needed a 1994 GMC Jimmy and its four-wheel-drive capabilities.

[96] Due to the distance involved and the road conditions and travelling between Sparwood and Cranbrook, it was not feasible for the Appellant to drive to and from his home in Cranbrook every day. Thus, the Appellant's travel between Cranbrook and Sparwood was "in connection with" his employment with Dynamic.

[97] Because the Appellant was working at more than one Fording mine site in each of the 1998 and 1999 years, the Appellant's travel between Cranbrook and Sparwood was also "in the course of" the Appellant's employment with Dynamic. Travel which occurs "in the course of employment" has specifically been dealt with by the Courts in connection with employee travel expense deductions set out in paragraph 8(1)(*h*) of the *Act*. The Federal Court Trial Division dealt with such travel in *The Queenv. Wright*, (1980) Carswell Nat. 520.

[98] In *Wright, supra*, the Federal Court, Trial Division, reviewed the case law and it was generally held that an employee going to and returning from his work is not considered to be travelling "in the course of his

employment". In paragraph 6, the Federal Court, Trial Division, did note one exception of this general rule: [t]he result is different where the employee is obliged to perform his duties in more than one place. In such case he comes within the words of the statute namely: "He is ordinarily required to carry out the duties of his employment in different places." Such situation is dealt with by Cattanach, J. in *The Queen v. E. E. Deimart*, [1976] C.T.C. 301, 76 DTC 6187 where he states at page 310 [DTC at 6193]:

It is a variant on the category of itinerant jobs that the concept of two places of work had been introduced particularly in *Owen v. Pook*, (1969) 2 All E.R. 1, and *Taylor v. Provan*, (1973) 1 All E.R. 1201, both decided by the House of Lords. Basically, that variant is that if a man has to travel from one place of work to another place of work he may deduct the expense of this travel because he is travelling on his work, but not those of travelling from either place of work to his home or vice versa unless his home happens to be a place of work. For this concept to apply, the facts must be that the work or the job must be done in two places. It is not enough that the man might choose to do part of the work in a place separate from where the job is objectively located.

[99] In the present case, the Appellant, in 1998 and in 1999, was employed at all three of Fording's coal mine sites and had to be able to travel to these various mine sites. The Appellant testified that some of these mine sites were up to 50 miles (80 km) apart. It is submitted that the Appellant's requirement to work at different places of work brings him within the exception identified above and results in the Appellant's travel between Cranbrook and Sparwood in the mine sites to be considered travel "in the course of" his employment.

[100] Furthermore, it was the Appellant's unchallenged testimony in 1998 and 1999 that he only used the 1994 GMC Jimmy in respect of his employment duties as set out above. For personal travelling, the Appellant used either a Chevrolet pick-up, a Camaro or a motor-home personally owned by the Appellant and his wife. The Appellant also testified, as did Gayle Larson, that given the condition of the coal mines, specifically that coal dust covered the interior and exterior of the vehicles, vehicles driven at the mine sites were not suitable for personal use.

[101] In conclusion, it is respectfully submitted that in each of the 1998 and 1999 taxation years, all mileage driven by the Appellant in the 1994 GMC Jimmy were in connection with or in the course of his employment with Dynamic and with the result that the amount applicable to item A in the formula set out in calculating the reasonable standby charge in subsection 6(2) of the *Act* is zero. The result is that there was no reasonable standby charge during the years in question and therefore no taxable benefit under paragraph 6(1)(*e*) and (*k*) of the *Act*.

[102] The Appellant's appeal should be allowed with costs.

Argument on Behalf of the Respondent

[103] Counsel took the position that it is undisputed that Martindale is the incorporated employee of Dynamic, that his spouse Sherry Shkwarok is a specified shareholder of Dynamic, that Dynamic did not employ, throughout the years under appeal, more than five full-time employees (as it employs only Mr. Martindale full-time and Ms. Shkwarok part-time), and that Dynamic is not associated with S.I.I.L., the corporation to which it provides services.

[104] The only remaining issue is whether Martindale, as the incorporated employee of Dynamic, "would reasonably be regarded as an officer or employee of the person or partnership to whom or to which services were provided but for the existence of the corporation".

[105] It is unreasonable and artificial to categorize Martindale's services to S.I.I.L. through Dynamic as those of an independent contractor. In providing his services as a project manager, Martindale was in fact the equivalent to an employee of S.I.I.L. Therefore Dynamic is a "personal services business" as defined by subsection 125(7) of the *Act*. Consequently, the Appellant is limited to the deductions described in paragraph 18(1)(*p*) of the *Act*. A personal services business falls on a continuum, with each entity being entitled to a certain level of deductibility of expenses:

Employee Personal Services BusinessIndependent Contractor

No deductionLimited expense deductionFull expense deduction

[106] She agreed that Dynamic is entitled to deductions for salary, wages or other remuneration paid to its incorporated employee Martindale during their 1997, 1998 and 1999 taxation years, and that indeed those amounts were allowed by the Minister upon reassessment.

[107] Counsel referred to the case of *David T. McDonald Company Limited v. M.N.R.*, 92 DTC 1917 (T.C.C.) in reference to the purpose of the legislation which in general was to remove the income advantages previously available to "incorporated employees" such as low tax rates, the deferral of tax at personal rates on that income and the possibility of splitting income among family members.

[108] It is clear that Dynamic has been involved in income splitting. The Notice of Appeal at paragraphs 15, 16 and 17 contain the detailed listing of the expenses claimed by the company for each of the three taxation years, and by far the greatest expense claim was for wages and benefits. Comparison of this expense as against the total amount of expenses claimed for each year show that in 1997 wages and benefits were 72.5% of the total expenses; in 1998 it was 53.9% and in 1999 they were 47.0%.

[109] Furthermore, the T-4 amounts reported were evenly split between Martindale and Sherry Shkwarok, each reporting 50% of the wages and benefits paid by Dynamic, even though the evidence established that the respective contributions to the workings of the company were not at all equal. Clearly this is income splitting - the very situation that the legislation was designed to address and prevent.

[110] In the taxation year 1997 the Minister disallowed $32,912; in 1998 $23,108.04 and in 1999 $27,822.50 which was the difference between the total wages paid and those wages paid to Sherry Shkwarok.

[111] Whether or not Dynamic is a "personal services business" is a question of fact. The narrow question is whether, without the interposition of Dynamic between S.I.I.L. and Martindale, in light of the services provided by Martindale to S.I.I.L., would Martindale be reasonably regarded as a self-employed individual carrying on a business on his own account?

[112] Counsel relied upon the case of *Tedco Apparel Management Services Inc. v. The Queen*, 91 DTC 1391 (T.C.C.) at page 35 to support the proposition that the word "reasonably", even in a taxing statute, should not be strictly construed but be construed in light of all the circumstances. She reviewed cases such as *Wiebe Door Services Ltd., supra,* with respect to the master-servant relationship; and pointed out that, as she put it, "the four-in-one test should not be slavishly applied" and what one must look for at all times is the total relationship of parties. Upon this relationship one must carefully weigh all of the relevant factors.

[113] As referred to in *Moose Jaw Kinsmen Flying Fins Inc. v. M.N.R.*, 88 DTC 6099 (F.C.A.) the components of the four-in-one test are "useful subordinates in weighing all of the facts" but different weight must be given to different circumstances as the facts dictate.

[114] She discussed the various elements of the four-in-one test set out in *Wiebe Door Services Ltd., supra*. Here, Martindale was a highly skilled professional who did not need much control or supervision. The nature of the tasks required that he be given a great deal of latitude to perform his work but he was still subject to the overall direction of S.I.I.L., the company holding the projects with Fording. This is entirely typical for persons occupying managerial positions.

[115] The control test is somewhat inconclusive.

Ownership of Tools (Equipment and Knowledge)

[116] She submitted that the "tools" analysis is not determinative on its own but tends to tip the scale in favour of the Respondent's position. Without the interposition of Dynamic, Martindale would be reasonably seen as an employee of S.I.I.L. Martindale attended at the offices of S.I.I.L. to perform work for them and for Dynamic and he used their office facilities while on site and Dynamic paid no rent for such use. Further, S.I.I.L. had acquired the type of equipment that had once been supplied by Dynamic and they owned the tools and equipment made available to Martindale for his use, which is consistent with the relationship that evolved into an employment situation.

[117] It is unreasonable that S.I.I.L. would not provide Martindale with office space in which to perform his employment duties or would even fail to provide to him, at its own cost, the usual accessories commensurate to his position with the company, such as parking, administrative, technical or maintenance services.

[118] If one applies the "tools" test to Martindale himself, the equipment that he used as officer and director of S.I.I.L. are indistinguishable from those he employed in his capacity as an incorporated employee of Dynamic.

[119] Martindale was attractive to S.I.I.L. because of his extensive experience related to construction project management and his knowledge of S.I.I.L.'s business and his own contacts within the industry since he had provided services to S.I.I.L. through Dynamic prior to the years under appeal, commencing in 1993, then working exclusively for S.I.I.L. as of 1995. His experience and training made him just as marketable as an employee as he would have been as a contractor. His specialized knowledge of S.I.I.L.'s business made him particularly desirable as an employee to that company.

[120] In summation on the so-called "tools" test, counsel said that the result is not definitive but an analysis of the evidence supports the Respondent's submission that without the interposition of Dynamic, he would reasonably have been seen as an employee of S.I.I.L.

Chance of Profit/Risk of Loss

[121] In this case, as in *Placements Marcel Lapointe Inc. v. M.N.R.*, 93 DTC 821 (T.C.C.) Martindale was to be reimbursed for his employment expenses by Dynamic. S.I.I.L. would reimburse Dynamic for all travelling and other expenses actually and properly incurred in connection with Martindale's duties. Since all expenses of Martindale were reimbursed to him, there was no chance of loss. The evidence showed that Dynamic was actually reimbursed by S.I.I.L. for its expenses in 1997, 1998 and 1999.

[122] The risk of loss to both Martindale and Dynamic were significantly diminished because of the insurance and indemnification protection through S.I.I.L. If this is so, even though Dynamic might have been vulnerable as a result of Martindale's gross negligence, this is not a real risk of loss. Risk of loss is a term used in the analysis of employee/independent contractor and bears on the notion of a person's risk or chance of participating in profits and exposure to the risk of loss. These are true *indicia* of business conducted on one's own account and not merely as the employee of another. The more likely the chance to share in profits and the larger the share of the loss, the more likely is there to be an independent contractor relationship.

[123] Dynamic received substantial annual remuneration and the arrangement was indefinite. These are factors in support of the Respondent's submission that Dynamic had no risk of loss in its relationship with S.I.I.L. as that term is understood in the context of an employee/independent contractor relationship.

[124] Further, the lack of insurance indemnification coverage for Martindale and Dynamic for gross negligence is more reflective of coverage available in the insurance industry and the standards imposed by the union on its members than as *indicia* of any risk of loss as that term must be understood in that context.

[125] The long-term relationship with S.I.I.L. supports the Respondent's view that, but for the interposition of Dynamic, Martindale would be seen as providing services directly to S.I.I.L. The type of remuneration paid by S.I.I.L. to Dynamic is more consistent with a salary than it is with a contract for services. In fact, the existence of a long-term relationship is completely incompatible with the entire notion of risk of loss. If it could be said

that Dynamic faced any loss of opportunity as a result of its operations, then that is a loss of profit but not a risk of loss.

[126] She pointed out that Exhibit R-15 contemplates a discretionary payment of a bonus and this form of remuneration is more indicative of an employer/employee relationship than an independent contract relationship.

[127] There was no revenue risk to Dynamic. There were no amounts at risk because the payment structure was based on a standard monthly invoice and a definite amount, billed monthly, with a possibility of bonuses, and this is far more indicative of an employer/employee relationship.

[128] Similarly, there was no chance of profit to Dynamic in its dealings with S.I.I.L. given the remuneration and bonus model chosen by the parties. This supports the Respondent's position that, for the interposition of Dynamic, Martindale would reasonably be seen as an employee of S.I.I.L.

[129] In the end result, a fair analysis of the evidence on the chance of profit and risk of loss factors, indicate a contract of service rather than an independent contractor situation.

Integration

[130] From the prospective of Dynamic, it cannot be said that Martindale's work performance through Dynamic, was only an accessory to S.I.I.L.'s business. Martindale was instrumental in the operations of S.I.I.L. and played a key role in the company. He was an integral part of its business and services provided by him were essential to the business operations of S.I.I.L. and Fording. S.I.I.L.'s business was an integral part of Dynamic's activities in 1997, 1998 and 1999, as 100% of the company's income for those years was derived from that source. However, it is clear that there was a high degree of integration, even from the "employee" prospective.

[131] Other considerations have to be taken into account during the years in question including the fact that Martindale and his spouse were the only employees of Dynamic during those years. S.I.I.L. relied on the specialized and particular knowledge and skills that only Martindale could supply.

[132] Although the arrangement with S.I.I.L. did not prohibit Dynamic's right to hire employees other than Martindale, in reality it was Martindale's work and skill that was its focus. Ass confirmed in *Alexander v. M.N.R.,* 70 DTC 606 at page 10, "Normally the servant must be obliged to provide his own work and skill, and perform the tasks personally without the ability to delegate". In the case at bar there was no evidence that any employee of Dynamic other than Martindale could be capable of performing his particular functions. This is tantamount to the requirement that he provide his own work and skill.

[133] Even though there was no amount paid to Martindale as a straight salary, the remuneration paid by S.I.I.L. to Dynamic was calculated on a regular basis and most closely resembles a "salary". If it were not for the existence of Dynamic, Martindale would reasonably be seen as receiving that salary for his services to S.I.I.L.

[134] The flat remuneration, reimbursement for expenses, indemnification and insurance provisions, plus the bonus arrangement between Dynamic and S.I.I.L., all approximate salary, wages or other remuneration paid to an employee, rather than fees paid to an independent contractor.

[135] In spite of the argument of the Appellant that Dynamic's services were available to the public, there were very few indications that Dynamic was actively engaged in expanding its business. The Respondent submits that to third parties, there was no Dynamic Industries Ltd., there was only Martindale as a *de facto* employee of S.I.I.L.

[136] Renewal of the contract between Dynamic and S.I.I.L. was dependent on the workload available at Fording. However, that is also true for ironworker employees from the union. All would be subject to lay-off over lack of work, and therefore it does not assist in distinguishing an independent contractor from an employee. Lay-offs are a risk of the industry and do not mark Martindale as self-employed.

[137] The remuneration paid to Martindale as an employee of Dynamic at $45 per hour would have been comparable to a package of wages and benefits for a similarly situated person in a unionized position such as the employee.

[138] It is common for senior level employees in supervisory or managerial positions to perform work for which they are not paid or to work at irregular hours. If it was an independent contractor situation, Dyamic would be more likely to be able to bill S.I.I.L. for the work done by Martindale or otherwise limit his hours of work.

[139] The difference between Martindale's accountability on the job site versus that of the other workers, does not arise from the fact that he was allegedly self-employed and the other persons were employees, but this arises from the fact that he was in a unique managerial position held in common with no other person, whereas the other employees were not. Further, risk of liability or non-payment flowed from the union versus non-union arrangement, not from the absence of an employment relationship.

[140] One of the most compelling parts of the evidence at trial was the payment of bonuses to Dynamic by S.I.I.L. (e.g. $15,000 bonus in 1997, as shown in Exhibit R-15). These bonuses were paid to Dynamic just as they were paid to S.I.I.L.'s own employees, many of whom were family members. Such significant payments cannot be ignored, as they set Dynamic apart from any other sub-contractors involved with S.I.I.L. on its projects. Indeed, in cross-examination, Gayle Larson admitted that Dynamic was treated differently from all of the sub-contractors in this respect. It is also important to note the regularity and consistency of the billing of $4,500 on a monthly basis in the year under appeal as compared to the billings in earlier years. The recent payment system is more similar to regular pay cheques in its nature than to true invoices, which may partly explain the generality of the invoices, as they do not specify particular tasks or projects.

Respondent's Argument re: Martindale

[141] Counsel referred to *Wright*, *supra*. and disagreed that this stood for the proposition that Martindale was travelling "in the course of" or "in connection with" his employment with Dynamic. This was not a special work site as defined by the *Act*. Therefore, there is no statutory provision that would allow him to claim that he was in receipt of a non-taxable allowance. Travel to and from the employee's home and the place of employment is considered to be personal. Therefore, the Minister properly included automobile benefits in his income for the 1998 and 1999 taxation years and correctly calculated the amount of such benefits at $7,416 in each year.

[142] The Minister conceded that he should have allowed a corresponding deduction to Dynamic with respect to the automobile benefits assessed to Martindale for the 1998 and 1999 taxation years. That deduction is predicated upon the fact that Mr. Martindale has been properly reassessed to include the automobile benefits in his income for those years, and therefore they constitute permissible deductions to the company, pursuant to paragraph 18(1)(*p*) of the *Act*.

[143] The Appellant conceded at the hearing that Dynamic was required to include the amount of $4,672.90 in its income for the 1998 taxation year, as such amount represents a bonus of $5,000 (less GST) received by the company which it had failed to report during that year.

Living Out Allowance

[144] With respect to this matter counsel took the position that this is not properly before the Court. This was not an audit adjustment processed by the Minister, nor was it objected to after the assessments were issued. It was not included as an issue in the Notice of Appeal and the pleadings were never amended to put this matter in issue. This Court should not consider this matter further.

Conclusion

[145] Mr. Martindale would reasonably be perceived as providing services to S.I.I.L. as an employee and not as an independent contractor based upon the totality of the evidence with respect to the relationship between the parties, as required by *Wiebe Door Services Ltd., supra* but for the existence of Dynamic. He was not an

independent contractor. As a "personal services business", Dynamic is restricted to those deductions set out in paragraph 18(1)(*p*) of the *Act*. The appeals for the Appellant's 1997 and 1998 and 1999 taxation years must be dismissed.

[146] What was involved here was income splitting. This should be guarded against. The most substantial expenses were wages and benefits. They were apportioned equally to the two unequally contributing employees of Dynamic.

[147] The most important factors in this particular case are the integration and control factors. These give the best indication of lack of independence of Dynamic with regards to S.I.I.L. It is clear that the decision-making was primarily S.I.I.L.'s and that the financial ties between Dynamic and S.I.I.L. were extremely close.

[148] S.I.I.L. was the only client of Dynamic during the years in question, and Dynamic derived 100% of its revenue from S.I.I.L. for all three years under appeal.

[149] The Appellant places too much reliance upon the decision in *Wolf (supra)*. One should not compare that case and the case at bar on a fact-to-fact basis. It is more appropriate to derive legal principles and apply them to the facts at hand. Secondly, in *Wolf (supra)* the Federal Court of Appeal did not create any point of departure from the standard tests outlined in *Wiebe Door Services Ltd., supra*. Very importantly, the two cases can be distinguished.

[150] In *Wolf (supra)*, the Court was not called upon to consider subsection 125(7) of the *Act*. That case was strictly an employee versus independent contractor situation and the Court did not have the option of considering the "middle ground" of a personal services business, as Mr. *Wolf (supra)* was an individual operating in his own right, not operating through a corporation. To him, success in his appeal was an all or nothing proposition. In the case at bar, Dynamic most clearly matches the "middle ground". It is a personal services corporation, which entitles it to certain deductions (e.g. Mr. Martindale's own wages and benefits), but not to all of the other amounts claimed as business expenses, especially wages and benefits paid to the spouse.

[151] The Respondent submitted that a "personal services business" status is not a permanent designation. Status may change depending upon the circumstances. However, in the circumstances of this case, Dynamic came to work exclusively for S.I.I.L. in 1995. Martindale's relationship with Dynamic changed, and Dynamic and S.I.I.L. became highly interdependent. The previous temporary, uncertain, project situation became the permanent, steady, long-term working relationship, no longer limited to specific projects.

[152] The Minister did not reassess Dynamic for the 1995 or 1996 taxation years, but any transition in its status to a personal services business was completed by 1997, 1998 and 1999 which are the years under appeal. Neither Martindale nor Dynamic worked for anyone else but S.I.I.L. at any point during those years. This change occurred as a matter of objective facts. The intentions of the parties were demonstrated, even if the tax consequences may have been unintended.

Rebuttal

[153] Counsel for the Appellant said that the legislation in question was clearly focused on the situation where the taxpayer in question was already an employee of someone and then converts to an incorporated entity. That is not the situation here. Dynamic had been carrying on business since 1983 and extensively since 1988. Dynamic and Martindale's relationship with S.I.I.L. during the years in question and before that time was consistent with Dynamic's operations as an independent contractor since 1983 and did not involve any conversion.

[154] The Respondent's submission that Dynamic was involved in income splitting as evidenced by the percentage that the denied wages are of the total denied amount, is flawed in two respects. First, that line of argument would lead to the absurdity that any company which has paid employees could be said to be "involved in income splitting". Second, this makes no allowance for the fact that many businesses will have wage expenses as being the bulk of their total expenses.

[155] Even though the T-4 amounts of Martindale and Sherry Shkwarok were similar, it has never been argued that she did not provide legitimate services and that the amounts that she received were unreasonable. There was evidence given with respect to what services she provided to the business and these were numerous and significant. She discussed the business operations with Mr. Martindale on a daily business. These were all necessary for Dynamic's successful operation. She was entitled to receive a reasonable salary.

[156] Counsel took issue with the submission that the majority of Martindale's duties were performed from S.I.I.L.'s office. The testimony indicated that he spent the vast majority of his time at the Fording mine sites where particular projects were being carried out. Further, the ownership of tools (equipment and knowledge) analysis does not tip the scales towards the position of the Respondent. As in *Wolf (supra)*, the tools were a neutral factor.

[157] The fact that S.I.I.L. acquired the same type of equipment that had once been supplied by Dynamic is not evidence that the relationship evolved into an employment situation. It is only consistent with the fact that S.I.I.L. had become profitable and could buy its own equipment. Dynamic wanted to rent equipment to S.I.I.L. to maximize its profits but S.I.I.L. wanted to use its own equipment to maximize its own profit.

[158] The argument that Mr. Martindale's experience in training made him just as marketable as an employee as he would be as a contractor and that this specialized knowledge made him understandably desirable as an employee supports the Appellant's argument that Dynamic was an independent contractor. Both the Appellant and Martindale knew he was a valuable resource (tool) and the only way to fully capitalize on this resource was to be in business on his own account and not just as an employee of S.I.I.L. He took the position that this was an example of the "tools test" supporting his submission of an independent contractor rather than as an employee of S.I.I.L.

[159] Since the relevant issue is whether Martindale could reasonably be considered an employee of S.I.I.L., it is the amount and timing of payments between Dynamic and S.I.I.L. which are relevant, not the timing and payments between Dynamic and Martindale and Sherry Shkwarok. Therefore, the decision in *Placements Marcel Lapointe Inc*., *supra,* and the importance of a fixed and definite wage supports the Appellant's arguments that it was an independent contractor situation because even though Martindale and Sherry Shkwarok received what might be considered a "fixed and definite wage" from Dynamic, Dynamic did not have "fixed and definite wages" from S.I.I.L. This can be seen from Exhibits A-6, A-7 and A-8, which varied as to amounts and the timing of their issue.

[160] With respect to reimbursement of expenses, the only relevant reimbursement of expenses are between Dynamic and S.I.I.L. This was based upon the "cost plus" contracts between Dynamic and S.I.I.L. Most of the other contracts of S.I.I.L. were likewise. There was evidence that S.I.I.L. could potentially sue Dynamic for any damages S.I.I.L. suffered as a result of Martindale's negligence and that such a risk did not exist for S.I.I.L.'s ironworkers' union employees. This economic reality results from the operation of the market place. To use the Respondent's own words, the risk of being sued, with no insurance coverage, is a "vulnerability of loss" and a "true *indicia* of business conducted on one's own account and not merely as the employee of another. This risk of loss source should be relevant in applying the chance of profit, risk of loss test.

[161] Dynamic's arrangement with S.I.I.L. was not indefinite in term. Dynamic worked for S.I.I.L. on a project by project basis dependent entirely upon S.I.I.L. getting purchase orders for work from Fording. The fact that Dynamic received a series of contracts from S.I.I.L. is only indicative of the large amount of work S.I.I.L. received from Fording. This fact is only consistent with Dynamic and S.I.I.L. and all other contractors in the Elk Valley benefiting from a positive business cycle which is completely compatible with the notion of chance of profit or risk of loss since positive business cycles are usually followed by negative business cycles.

[162] The payment of a discretionary bonus is not a form of remuneration which is inconsistent with an independent contractor relationship.

[163] Counsel would not admit that invoices to S.I.I.L. which comprise Exhibits A-6, A-7 and A-8, involve a "standard monthly invoice, in a definite amount, billed monthly" and there was always a possibility that S.I.I.L.

would not be able to pay these amounts without any recourse to a surety bond.

[164] The remuneration and bonus models chosen by the parties are virtually the same as remuneration models which existed between S.I.I.L. and its other sub-contractors and between S.I.I.L. and Fording.

[165] The Respondent is not applying the integration test properly. The integration test must be applied from Dynamic/Martindale's perspective.

[166] It is not particularly relevant that Dynamic relied on the particular skills of one employee, Martindale. Many small business depend upon the skills of one particular person.

[167] Counsel described as factually incorrect the Respondent's position that the remuneration paid by S.I.I.L. to Dynamic was calculated on a regular basis and that this most closely resembles a "salary" component one would reasonably expect to be accorded to someone in Martindale's position. He argued that what Dynamic paid to its employees was a salary per month plus the applicable living out allowance amount for the month. On rare occasions it also paid a bonus to its employees. However, Dynamic's bills to S.I.I.L. and S.I.I.L.'s payment of these bills were not consistent in amount or timing (see Exhibits A-6, A-7, A-8, A-10 and A-11).

[168] The fact that Dynamic was not actively engaged in expanding its business by engaging new clients, is nothing more than a reflection of the fact that the company was busy enough doing work for S.I.I.L. With respect to the Respondent's argument that the remuneration payable to Martindale as an employee of Dynamic at $45 would have been comparable to a package of wages and benefits for a similarly situated person in a unionized position as employee, the Appellant said that Dynamic's rate with S.I.I.L. involved a gross profit before other operating expenses of $8.03 when compared with what the highest paid unionized ironworker would receive. There was always a gross margin even though it may have declined between 1997 and 1999.

[169] The reality of the marketplace is that independent businesses incur marketing expenses, including non-remunerated prospecting efforts, in order to get business. Counsel took issue with the Respondent's position that as to an independent contractor's situation Dynamic would be more likely to bill S.I.I.L. for all tasks done by Martindale or to limit his hours of work.

[170] The Respondent was confused on the matter of the $4,500 per month amounts as these were amounts paid by Dynamic to its employees, not amounts billed and paid between Dynamic and S.I.I.L.

[171] The decision-making with respect to Dynamic's business and what was best for it was Martindale's and Sherry Shkwarok's and no one else's. S.I.I.L. did not have primary decision-making power for Dynamic even though 100% of Dynamic's revenues were obtained from S.I.I.L., no more than it could be argued that Fording had primary decision-making over S.I.I.L. and Dynamic since S.I.I.L. derived the vast majority of its revenue from Fording.

[172] Counsel reiterated that the decision in the *Wolf (supra)* case was equally applicable to the facts in the present appeal. Further, the decision in *Wolf (supra)* and the reasons therefore are of more relevance than *Wiebe Door Services Ltd., supra, s*ince it was decided in 1987 and *Wolf (supra)* was decided in 2002. There has been a considerable change in commercial practices between 1986 and 2002. He again relied upon the comments of Décary, J.A. at paragraph 118 of the *Wolf (supra)* case.

Analysis and Decision

[173] The Court has found this to be a difficult case. It has been made difficult because, as counsel for the Respondent suggests, this is not a simple case of deciding whether the worker was an employee or an independent contractor. The factual situation is clouded because there was an intervening entity. The worker in this case was an incorporated employee of Dynamic. None of the other cases referred to were in the same category and consequently when deciding the remaining issue, that is, whether Martindale as the incorporated employee of Dynamic, "would reasonably be regarded as an officer and employee of the person or partnership to whom or to which services were provided but for the existence of the corporation", this must be taken into

account. Further, unlike other cases which have been cited, and unlike the cases where the provisions of paragraph 125(7)(*b*) of the *Act* are not involved, in this case the Court must interpret the word "reasonably", in light of all the circumstances and not in a restrictive way.

[174] The Court must take into account the purpose of subsection 125(7), which generally was to remove the income tax advantages which had been available to the "incorporated employee" before the implementation of this section. This analysis is referred to by Mogan, J. in *David T. McDonald Company Limited, supra*.

[175] Both counsel here have made detailed, weighty and substantial submissions. Each has interpreted the factual situation as they see it in support of their equally opposite positions and they come to equally opposite conclusions.

[176] In so far as counsel for the Appellant is concerned, he took the view that the factual situation in the case at bar is identical to the factual situation in *Wolf (supra),* but it is always dangerous to rely on this proposition because it is very rare that any two situations are identical. They may be similar, they may be close, but very rarely are they identical.

[177] In the case at bar, unlike the case in *Wolf (supra)*, what is involved is an incorporated employee and an interpretation of a "personal services business". The Court in *Wolf (supra)* did not have to make such a consideration. This is a substantial difference. Further, counsel for the Appellant seemed to be suggesting that the Federal Court of Appeal, in *Wolf (supra)*, was departing from legal principles established by *Wiebe Door Services Ltd., supra,* and the cases that have followed since that time and believed that this Court should be more influenced by the *Wolf* decision than by the principles laid out in *Wiebe Door Services Ltd, supra.* This Court is not of the opinion that the Federal Court of Appeal in *Wolf* was creating any new law or was intending to depart from the principles as set out in *Wiebe Door Services Ltd. supra,* and followed thereafter, and most recently confirmed by the Supreme Court of Canada in *Sagaz, supra.* In that case, the Court confirmed that there is no single test for determining the proper relationship that exists but one must examine all of the possible factors bearing on the nature of the relationship between the parties. As this Court has always held, not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally, there is no magic formula for trying to determine which factor will control any particular case.

[178] The Supreme Court did confirm that the central question is whether or not "the person engaged to perform the services is performing them as a person in business on his own account". In making this determination, the level of control that the employer has over the worker's activities will always be a factor but other factors to consider include "whether or not the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her task". It is clear from these statements that the analysis set out in *Wiebe Door Services Ltd., supra,* is alive and well and indeed this Court has always found that in most cases an analysis of those various factors go a long way to allowing the Court to answer the question properly. Again, though, the case at bar is a hybrid where the Court has to consider factors that the Court in *Wiebe Door Services Ltd., supra,* and *Sagaz, supra,* did not have to consider. That makes the analysis more complicated in this case.

[179] In so far as the effect of the reasoning in *Wolf* is concerned, even though it was decided long after *Wiebe Door Services Ltd, supra,* this Court does not believe that *Wolf* stands for the proposition proposed by counsel for the Appellant that the reasons are far more relevant than *Wiebe Door Services Ltd., supra,* since it was decided in 1978 and *Wolf* was decided in 2002. He suggested that there has been a considerable change in commercial practices between 1986 and 2002.

[180] It may also be pointed out that in *Wolf,* the Appellant had a signed contract with Kirk-Mayer in which he was described as a consultant and independent contractor and in which he agreed to provide the service to Canadair Limited. Although this is not essential, it is certainly a differentiating factor from the present case. In the present case we have only the indication of the incorporated employee as to the status that the Appellant and S.I.I.L. intended to create. In *Wolf*, Desjardins, J. A. was convinced, obviously relying considerably on the written contract, that the Appellant was more interested in higher profit, higher risk, mobility and independence.

That is why he claimed the status of a contractor in the provision of his services. Further in the decision of Décary, J.A., he concurred in the result, although for different reasons and said that one must not lose sight of the forest because of the trees and what must always remain the essence is the search for the total relationship of the parties.

[181] His recitation of the non-exhaustive list of categories, is a clear reference to the reasoning in *Wiebe Door Services Ltd., supra,* that the weight of each factor will depend on the particular facts and circumstances of the case. He took a great deal of consolation from the fact that the parties had gone to the effort of creating a written contract in which they clearly set out their intention and he was able to say with certainty that *Wolf*, was performing his professional services as a person in business on his own account. This was not a departure from the principles developed in earlier cases.

[182] Noel, J. A. also concurred in the result only but he again placed a great deal of weight on the relationship which the parties had created. He acknowledged that it was a close case where the relevant factors pointed in both directions with equal force, and in such a situation, the parties' contractual intent, and in particular, their mutual understanding of their relationship could not be disregarded. However, he also considered the tests set out in *Wiebe Door Services Ltd., supra,* and determined that they were not conclusive either way. He was satisfied that the Appellant had given up benefits which usually accrue to an employee including job security and hopes of a better pay.

[183] This Court cannot come to such a definitive conclusion on the basis of a written contract because one does not exist here and the only *indicia* of what the intentions of the parties were was the *viva voce* evidence of the incorporated employee.

[184] Counsel for the Respondent seemed to place a great deal of weight on the fact that the legislation was intended to prevent the situation of income splitting which she contended was what the Appellant in the present case was doing. The Court agrees that that is a factor to be considered in the present case but it is not conclusive. If a person purports to be an independent contractor, the person who employs him likewise purports to hire an independent contractor rather than an employee, if the parties go about acting in the relationship in conformity with such an avowed intention and one of the results of that independent contractor situation is to allow the parties to divide their income in such a way that it resembles income splitting, that factor alone does not change a relationship from one of independent contractor to that of employee based upon the legislation alone, although it must certainly be borne in mind when considering the total situation.

[185] It is necessary to review the facts in relation to the tests set out in *Wiebe Door Services Ltd., supra*, the conditions of employment which existed at the time as borne out by the evidence and how they bear on the nature of the relationship between the parties. As indicated in *Sagaz, supra,* there is no magic formula in determining which factors will be treated as the determining ones. However, with respect to the most important question the Court asked in *Sagaz, supra,* "whether the person who has been engaged to perform those services is performing them as a person in business on his own account", in light of the existence of the incorporated employee here, the answer to that question is at best elusive.

[186] The case at bar is a prime example of a situation where no one single test or even a combination of tests would be sufficient to answer the question posed. We must go further and examine the conditions of employment, the purported intention of the parties, the absence of a written contract setting out specifically the relationship between the parties and the legislation involved in this case. Where the Appellant has indicated that the real intention was to create an independent contractor situation, one must ask, has he done otherwise?

[187] The Court will now proceed to analyze the various factors that have been referred to in *Wiebe Door Services Ltd., supra,* and the other cases.

<u>Ownership of tools (equipment)</u>

[188] An analysis of this factor, although not determinative on its own, does tend to tip the scale in favour of the position of the Respondent. It is true that the witness called on behalf of the Appellant did not testify that he used

the office facilities of S.I.I.L. while on site to perform work for them but it is more probable that he used their facilities and there was no evidence that Dynamic paid any rent for such use. It was admitted by counsel for the Appellant that Dynamic used none of its own tools or equipment performing work for S.I.I.L. as S.I.I.L. had acquired its own tools and equipment which had formerly been rented to it by Dynamic.

[189] The Court does not accept the argument of counsel for the Appellant that it was only business reality that S.I.I.L. had wanted to improve its own financial situation and consequently it was no longer desirous of renting tools and equipment from Dynamic as it had done earlier. This is indicative of S.I.I.L. providing the tools and equipment which were made available to Martindale for his use and is consistent with the Respondent's conclusion that the relationship, which in earlier years had been that of independent contractor had evolved into an employment situation during the years in question.

[190] As indicated, there was no specific evidence before the Court with respect to S.I.I.L. providing Martindale with office space, parking facilities, administrative facilities, technical or maintenance services but they had to be provided by someone. The only reasonable conclusion would be that these services were indeed provided by S.I.I.L.

[191] The skill, training and ability to provide certain services by Martindale would have made him equally desirable whether he was a contractor or an employee so nothing is determined by that factor.

Chance of Profit and Risk of Loss

[192] Martindale and Dynamic were both reimbursed by S.I.I.L. for all of the travelling and other expenses which were incurred by Martindale in the performance of his duty so that there was no real chance of loss in that regard by either Martindale or Dynamic. That factor is consistent with an employer-employee relationship. The Court is satisfied that there was some risk of loss by Martindale/Dynamic because they would have been responsible if they suffered damages as a result of the actions of Martindale/Dynamic but this burden was somewhat lessened because of the insurance and indemnification protection through S.I.I.L. This becomes a non-factor. On the other hand, there was no chance that Dynamic/Martindale stood to share in the profits of S.I.I.L. It was a set form of remuneration provided for services provided by Dynamic through Martindale and the only way they could increase their remuneration would be to work harder or longer or change the rate. This is not a real "chance of profit" as that term has come to be understood in the *Wiebe Door Services Ltd., supra,* analysis.

[193] Even though Dynamic's arrangement with S.I.I.L. was not definite in term and Dynamic worked for S.I.I.L. on a project by project basis, the Court is still satisfied that there was a stability of relationship that existed for the whole period of time that is in issue here and that Dynamic/Martindale basically worked only for S.I.I.L. during that period of time.

[194] This is indicative not only of the large amount of work that S.I.I.L. was receiving from Fording but is more indicative of the non-likelihood of Dynamic/Martindale having to search for work, new contracts, and compete against other contractors as one would expect in a competitive market such as that which existed during the period in question.

[195] This situation would appear to be contrary to the Appellant's argument that Dynamic/Martindale was giving up the degree of security that he might otherwise have had if he were an employee.

[196] The Court is satisfied that the type of remuneration paid by S.I.I.L. to Dynamic is more consistent with a salary than it was with a contract for services. Further, of significance, is the fact that a discretionary bonus was paid by S.I.I.L. to Dynamic. The Appellant argued that this was not indicative of an employer/employee relationship but it was clear from the evidence given that in respect to a bonus, Dynamic was treated differently than other subcontractors who did not receive such a bonus. The Court is satisfied that the payment of such a bonus here is more indicative of an employer/employee relationship than that of an independent contractor. If this had been part of the alleged contract for services it would not have been discretionary, it would have been included in the agreement.

[197] Even though the receipt of revenue by Dynamic depended upon the completion of a series of contracts from S.I.I.L., these in turn depended upon S.I.I.L. obtaining contracts from Fording. The invoices to S.I.I.L. from Dynamic more closely resembled standard monthly invoices rather than completion of a certain amount of work under a set contract even though they might have been similar to the remuneration models which existed between S.I.I.L. and other subcontractors and between S.I.I.L. and Fording. They still projected a regular monthly billing more than they did production of an invoice sent upon the completion of a set amount of work in accordance with a previously conceived contract.

[198] On the balance of probabilities, an analysis of the risk of loss and chance of profit factors indicate a contract of service rather than an independent contractor situation.

Integration

[199] The Court is convinced that Martindale's work through Dynamic for S.I.I.L. made him an integral part of S.I.I.L.'s operations. His services were essential to the business operations of S.I.I.L. and Fording. Even though it might be argued that in many small business where there are independent contractors, they rely heavily on the particular skills of one employee, in this case, during the period in question Martindale was the only employee of Dynamic and his skills and abilities were an important and integral part of the operations of S.I.I.L.

[200] Martindale testified that he was free to hire other persons to provide his work and skill. He did not have to perform the tasks personally. He indicated that on another occasion, not during the years in question, he was able to hire himself out to other persons. However, it is significant that in the years in question he provided all of the services and skill personally and there was no indication that he intended to have someone else provide those skills nor indeed was there any evidence that he was free to do so. It is the years in question that are at the root of the issues here, not other years. The Court is satisfied that it was unlikely that either party contemplated Martindale substituting the service of someone else for him even if such a person could be found. On the balance of probabilities, the Court is satisfied that he was required to provide his own skill and ability.

[201] With respect to the method of payment to Martindale, the Court is satisfied that the remuneration paid by S.I.I.L. to Dynamic did resemble to a large extent, salary, rather than amounts billed on the basis of a contract for services and if Dynamic did not exist, Martindale could reasonably have been seen to have been receiving a salary for his service to S.I.I.L.

[202] Again, we are dealing with the specific years in question and not what happened in other years. During the years in question Dynamic was not involved in seeking out any new business. Indeed it did not have time to seek out any new business because it was involved completely in the work of S.I.I.L. and Fording. For all intents and purposes there was no indication that during the period in issue, Dynamic's services were available to the public. Again, the only employee of Dynamic during the years in question was Martindale and he had all of the appearances of an employee of S.I.I.L.

[203] It was argued that Martindale had to work irregular hours and that he might work without pay. It is true that many supervisory or managerial people might work likewise and not be paid even if they are employees. However, if Martindale were working under a contract of service, one would have thought that this would have been a clear term of the contract for services.

[204] When one considers all of these factors taken together, one must conclude that they are tilted in favour of an employee relationship rather than that of an independent contractor.

[205] If one goes further and takes into account the legislation with respect to a personal services corporation, the intention of the legislation against income splitting and the fact that what was accomplished here was in fact income splitting, the case is even more compelling. It is clear that for each of the three taxation years in issue, the greatest expense claim was for wages and benefits and these T4 amounts were evenly split between Martindale and Sherry Shkwarok, each reporting 50 percent of the wages and benefits paid by Dynamic.

[206] Counsel for the Appellant argued that Sherry Shkwarok was very important to Dynamic and that she deserved the salary that she got but the evidence was very general The description of the work that she did was very general. There was no evidence presented from which the Court could safely conclude that the value of her work was equal to that of Martindale. The only other reason she would receive equal remuneration for unequal work would be to accomplish income splitting which the legislation was designed to prevent.

[207] As the Court has already indicated, the issues in question are relative to the years 1997, 1998 and 1999 and not before or after. The Court is satisfied that if Dynamic was not a "personal services business" prior to the years in question, there was a change in the relationship between Martindale, Dynamic and S.I.I.L. so that the Court has to conclude, in light of the services provided by Martindale to S.I.I.L., that Martindale could not be reasonably regarded as a self-employed individual carrying on a business on his own account. That is the answer to the first issue.

[208] With respect to the second issue, in light of the answer to the first question, the Court concludes that the Minister properly disallowed a portion of the expenses claimed by Dynamic for those years, on the basis that the company was precluded from deducting such amounts, as they were restricted expenditures, pursuant to the limitations set out in paragraph 18(1)(*b*) of the *Act*.

[209] The third issue is whether or not the Minister correctly reassessed Martindale to include automobile expenses in his income for the 1998 and 1999 taxation years, pursuant to paragraphs 6(1)(*e*) and (*k*) and subsection 6(2) of the *Act*. In order for the Appellant to be successful here, he must satisfy the Court, on the balance of probabilities, that he was required by Dynamic for the years 1998 and 1999 to use the 1994 GMC Jimmy in connection with and in the course of his employment with Dynamic. Further, he must satisfy the Court, on the balance of probabilities, that all, or substantially all of the distance travelled by the 1994 GMC Jimmy in those particular taxation years were in connection with or in the course of his employment with Dynamic.

[210] The Court is satisfied that the Appellant has not been successful in this regard. The Court is satisfied that all, or substantially all of the use to which the vehicle was put in the years in question, was related to the Appellant's travel to and from his work. It may well be that the work site was a dirty one and that a vehicle similar to the vehicle in question may have been required for the Appellant to travel to and from his work but when he was travelling to his place of work, he was travelling from home or his office to the place of work. Therefore, the travel is considered to have been personal.

[211] Further, there was insufficient evidence for the Court to conclude that the Appellant was required by Dynamic in that particular year to use a 1994 GMC Jimmy in connection with or in the course of his employment with Dynamic. Indeed, no evidence was given on that point. The Court can only conclude that although it was convenient for the Appellant to make use of the vehicle for the purpose of going back and forth to his work, this was not required by Dynamic.

[212] It is true that the Appellant, during the years in question, had the use of either a Chevrolet pick-up, a camaro or motor home and that they were used by both himself and his wife. This does not in any way establish on the balance of probabilities that the use made by the Appellant of the GMC Jimmy provided by Dynamic was anything other than personal.

[213] Counsel referred to *Wright, supra*, and argued that the Federal Court, Trial Division, reviewed the case law and decided that an employee going to and returning from his work is not considered to be travelling "in the course of his employment". However, the Federal Court noted one exception to this general rule and that was that where an employee is obliged to perform his duties in more than one place, he is ordinarily required to carry out the duties of his employment in different places. In the present case he argued, the Appellant, in 1998 and 1999 was employed at all three of Fording's coal mine sites and had to be able to travel to these various mine sites. Some of these mine sites were up to 50 miles (80 kilometers) apart. Counsel believed that the Appellant met the exception identified above. He travelled between Cranbrook and Sparwood.

[214] The Court is satisfied that the present factual situation does not permit such an interpretation and the exception referred to in the case above does not assist the Appellant here. The appeal in that regard is dismissed.

[215] The Minister did concede that he should have allowed a corresponding deduction to Dynamic with respect to the automobile benefits assessed to Martindale for the 1998 and 1999 taxation years and that such an allowance was given upon reassessment. They were held to be permissible deductions to the company, pursuant to paragraph 18(1)(*p*) of the *Act*.

[216] As indicated, the Appellant conceded at the hearing that Dynamic was required to include the amount of $4,672.90 in its income for the 1998 taxation year, such amount representing the bonus of $5,000 (less Goods and Services Tax) received by the company which it had failed to report during that year.

[217] The only remaining issue is the question of the living out allowance. The Court is satisfied that this matter is not properly before the Court. This was not an audit adjustment processed by the Minister as indicated by counsel for the Respondent. It was not objected to after the assessments were issued and it was not included as an issue in the Notice of Appeal. Further, the pleadings were never amended to put this matter in issue. The Court will not consider this matter further. The appeal in that regard is dismissed.

[218] The end result then is the appeals are dismissed and the Minister's assessments are confirmed, with costs.

Signed at Vancouver, British Columbia, this 13th day of April, 2004.

"T. E. Margeson"

Margeson, J.

CITATION:2004TCC284

COURT FILE NOS.:2002-1707(IT)G and 2002-1688(IT)I

STYLE OF CAUSE:

Dynamic Industries Ltd. v. The Queen

Steven Martindale v. The Queen

PLACE OF HEARING:Cranbrook, British Columbia

DATE OF HEARING:September 19, 2003

REASONS FOR JUDGMENT BY:The Honourable Justice T. E. Margeson

DATE OF JUDGMENT:April 13, 2004

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