

Federal Court of Appeal Decisions

Dynamic Industries Ltd. v. Canada

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Docket: A-247-04

Citation: 2005 FCA 211

CORAM: RICHARD C.J.

SHARLOW J.A.

MALONE J.A.

BETWEEN:

DYNAMIC INDUSTRIES LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, B.C., on March 16, 2005.

Judgment delivered at Ottawa, Ontario, on June 3, 2005.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

RICHARD C.J.

MALONE J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of a judgment of the Tax Court of Canada dated April 13, 2004, dismissing an income tax appeal for the 1997, 1998 and 1999 taxation years: *Dynamic Industries Ltd. v. Canada*, 2004 D.T.C. 2550. Dynamic Industries Ltd. (Dynamic) was reassessed for those years to disallow the deduction of certain expenses pursuant to paragraph 18(1)(p) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) on the basis that Dynamic carried on a personal services business.

[2] The central question in this case is whether paragraph 18(1)(p) applies to Dynamic in the years under appeal. If the answer is yes, the appeal must fail. If the answer is no, the appeal must succeed.

FACTS

[3] Dynamic is a British Columbia corporation, incorporated on August 11, 1983. Its head office is in Cranbook, British Columbia. Since its incorporation, Dynamic has carried on the business of providing steel work services in Alberta and British Columbia. At all material times, the shares of Dynamic have been owned by Mr. Steven Martindale or his spouse, Ms. Shkwarok.

[4] Mr. Martindale and Ms. Shkwarok have been employees of Dynamic from the outset. Mr. Martindale provided the services of an iron worker and a construction manager, as needed. Ms. Shkwarok provided administrative services.

[5] Mr. Martindale is a certified ironworker, and a member of the Local 97 Ironworkers Union. In 1988, Mr. Martindale transferred his shares of Dynamic to Ms. Shkwarok to facilitate Dynamic becoming a "contractor signatory" to the Ironworkers, Local 97 Standard Collective Agreement. This was done because the constitution of the Ironworkers Union did not permit a member of the Union to be an owner of a contractor signatory. At approximately the same time, Mr. Martindale began working full time for Dynamic.

[6] As a contractor signatory, Dynamic was able to provide steel work services to both union and non-union companies, as long as those employed by Dynamic were union members. As an employee of Dynamic, Mr. Martindale, was therefore able to obtain work for himself in two ways, through Local 97 and through Dynamic as a contractor signatory company.

[7] When providing work as a union member through Local 97, Mr. Martindale participated in the dispatch process with approximately 500 other members on the union list. That process consisted of signing up on the union list and waiting for the member's name to move to the top of the list at which time a dispatcher would call a member's name for a particular project. Should the member turn down the particular assignment, the member's name would then go to the bottom of the list and the member would have to repeat the wait. Through the dispatch process, union members were assigned work exclusively to union sites or to a contractor signatory company. They were paid an hourly wage as set out in the schedule of rates for foremen and journeymen in the ironworker agreement book.

[8] If a contractor to whom a union member was assigned did not pay the member's wages, the member could look to the union to recover the wages. The union had collected bonds or certified cheques from the employer contractors to cover any shortfall in wages. In this way a union member had the security of being paid.

[9] This system was the only process for members of the Ironworkers Union to obtain employment as ironworkers. Members were not able to pursue such work personally, accept piecemeal work or negotiate hourly wages on their own. Other issues with respect to hours of work, overtime, holiday pay, travel expenses, living-out allowances, lay-offs and safety provisions were covered by the collective agreement.

[10] As construction manager for Dynamic, Mr. Martindale pursued and negotiated construction contracts for Dynamic on a per job basis. Mr. Martindale chose what work he wanted to do through Dynamic, where he wanted to do it and for what amount. Dynamic was able to charge hourly or daily rates, or accept cost-plus contracts or fixed-price contracts. These options would not have been available for any of the work offered through Local 97.

[11] In the case of a cost-plus contract for Dynamic, Mr. Martindale would negotiate a fixed profit margin, typically 10%, on top of the hourly rate applicable to his services. Mr. Martindale testified that the profit margin would vary according to different factors such as the remoteness of the job location and the seasonal climate conditions. Under a cost-plus contract, Dynamic would be compensated for each hour worked by Mr. Martindale at the negotiated rate, and Mr. Martindale would be paid accordingly by Dynamic.

[12] In the case of a fixed-price contract for Dynamic, Mr. Martindale would negotiate a certain set price for a job. The negotiated price would be based on an estimate of the number of hours of work and the costs anticipated to complete the job. If the job required less time or lower costs to complete the work than Mr. Martindale estimated, then Dynamic would gain on that contract. However, if the job required more hours to complete or if costs were greater than estimated, Dynamic would find itself in a loss position.

[13] Mr. Martindale considered fixed-price contracts to be more risky for Dynamic than cost-plus contracts, because of the potential for underestimating time or costs. The risk would be even greater in the presence of uncontrollable factors in a job, such as weather conditions or uncertainty in delivery or engineering.

[14] However, either kind of contract entailed a risk of non-payment. Unlike Mr. Martindale's work as a member of Local 97, work obtained through Dynamic was not covered by any surety. If a contractor to whom Dynamic was providing services became insolvent or otherwise unable to pay, Dynamic would have to turn to outside legal remedies to recover amounts owing to it.

[15] As Mr. Martindale's experience in the industry progressed he worked less through Local 97 and more through Dynamic. Working with Dynamic was more lucrative for Mr. Martindale because of the flexibility in choosing work and the ability to negotiate. Also, Mr. Martindale could not have obtained, through the union hall, a position equivalent to construction manager.

[16] Dynamic began by providing welding services, fabrication and erection services to various general contractors. As Mr. Martindale gained further experience, Dynamic undertook construction management projects and provided subcontracting services to a variety of companies between 1988 and 1995. Depending on the demands of a particular job, Dynamic would employ other workers in addition to Mr. Martindale. The number of workers varied between one and eight at any given time.

[17] One of the contractors Dynamic worked for beginning in 1990 was Southern Interior Maintenance Installation Ltd., a corporation owned by Mr. Jim Larson and his spouse, Ms. Gail Larson, neither of whom are related to Mr. Martindale or Ms. Shkwarok. Dynamic billed Southern Interior on a cost-plus project at \$38 per hour. In 1993, Dynamic negotiated a fixed-price contract for a small job with Southern Interior and in late 1993 Dynamic also negotiated another cost-plus contract at \$45 per hour plus living-out expenses.

[18] Dynamic later provided services to S.I.I.L. Maintenance Ltd. (SIIL), a corporation owned by Ms. Larson alone. Ms. Larson's husband, Mr. Jim Larson, was a member of the Ironworkers Union and a full time employee of SIIL. SIIL provided mostly maintenance work in coal mines.

[19] In 1994, Mr. Martindale took a position with Construction Management Ltd. of Calgary, acting as the representative of Fording Coal Ltd. He held that position for the duration of that year. Fording was the owner of three of the five mines in the Elk Valley, and was one of the largest employers in the industry at the time. In this position, Mr. Martindale was responsible for the management of Fording's operation of the project. The experience gave Mr. Martindale an opportunity to gain experience necessary to run and manage a large job and to gain the trust of Fording's management.

[20] Beginning in 1995, SIIL was awarded its largest contracts to date with Fording. Dynamic provided SIIL with project management services in relation to those contracts. Dynamic, through Mr. Martindale, worked with SIIL to develop schedules, cost-estimates and time-lines for project proposals which were then used to bid on jobs with Fording. Mr. Martindale had no decision making authority with respect to what jobs SIIL chose to pursue. The management of SIIL would decide on its own if it wanted to bid for a particular job. If SIIL wanted to pursue a bid, Dynamic would put together the estimates of costs, time, equipment and people needed for a job and then SIIL would present the bid to Fording. If SIIL was awarded the contract, Dynamic had responsibilities which included coordinating the timing and sequence of sub-contracting work to be done as outlined in the proposals. Dynamic performed this construction management work at a pre-negotiated cost-plus contract price. If SIIL was not awarded the contract, Dynamic received no compensation for the time spent in preparing the estimates and proposals.

[21] The contract between SIIL and Dynamic was not written. However, it is common ground that Dynamic was paid on a cost-plus basis for the work performed by Mr. Martindale at the rate of \$45 per hour, with overtime rates of \$63 per hour or \$82 per hour, depending upon the circumstances, plus a living-out allowance, and GST. The living out allowance was based on a specified rate for each day worked by Mr. Martindale, rather than the seven day living-out allowance that the union members working through Local 97 would have been entitled to. These rates were first set in 1993 and remained unchanged until 1999. The rate was calculated so that SIIL made a 10% profit over what it charged to Fording.

[22] Dynamic also charged SIIL \$1000 per month for use of a truck, until SIIL purchased its own truck in 1997.

[23] If Dynamic had to fix an error it had made, the work was treated as "warranty work" by Dynamic. SIIL had no obligation to compensate Dynamic for the time or costs entailed in such warranty work. Overhead costs incurred to operate Dynamic were also not compensated by SIIL.

[24] Mr. Martindale testified that he believed that Dynamic was covered by the liability insurance carried by SIIL. It is not clear what potential liabilities he believed were covered. SIIL's insurance contracts were not entered into evidence.

[25] SIIL hired dozens of other subcontractors and ironworkers as employees to work as the needs of the various projects demanded. Typically, the other subcontractors would invoice SIIL once a month for work performed. SIIL normally required subcontractors, including Dynamic, to fill out time cards to indicate to which job their time was being billed. SIIL paid its ironworker employees weekly for hours worked which were typically 8 am to 4:30 pm. Those employees were told where they were needed and what was expected from them for the day, either by mine personnel or other SIIL employees.

[26] SIIL was awarded most of Fording's maintenance work between 1995 and 1999. During that period, approximately 95% of SIIL's work came from Fording. The amount of work available to Dynamic as a result of SIIL's increased work meant Dynamic had no need to look elsewhere for additional contract opportunities. The jobs with SIIL varied in length between two days to six months. Different jobs could overlap with each other.

[27] From 1995 to 1999, which includes the years under appeal, SIIL was the only source of income for Dynamic, except for a small amount of interest on invested money. Mr. Martindale testified that there was enough work, Dynamic made enough money and it wasn't slow enough at any one time that he needed to seek out other work for Dynamic, or for himself as a member of Local 97.

[28] Although Dynamic provided services to SIIL, Mr. Martindale considered it to be in his interests to be aware of Fording's interests at the same time. In one instance, Mr. Martindale counselled Fording not to give SIIL a particular job, because he felt that the job would be an unnecessary use of Fording's resources. Although Mr. Martindale was not in an employment relationship with Fording, he was conscious that Fording was the largest employer in the Elk Valley and he did not want to jeopardize the trust he built with Fording in his previous position as Fording's owners representative. Because Fording was also interested in the progress of the various jobs, Mr. Martindale would frequently keep Fording abreast of daily developments on the job sites.

[29] The contracts between Dynamic and SIIL did not require Mr. Martindale to keep regular hours of work, and he received no direction as to where he would work at any particular time. Mr. Martindale used his discretion as to when and where he was needed. There were no regular reporting sessions between Dynamic and SIIL. Mr. Martindale would keep SIIL informed on an *ad hoc* basis frequently, often daily, but there were no formal reporting requirements.

[30] Dynamic invoiced SIIL for its project management work and the truck rental at various intervals. In the years under appeal, Dynamic issued 33 invoices to SIIL. The invoiced amounts for services ranged from slightly over \$1,300 to over \$15,000, with the most typical amounts falling within a range of approximately \$8,000 to \$10,000. There was no regular schedule on which the invoices were submitted or paid. Dynamic would sometimes accept partial payment and wait for the balance of the payment to be made at a later date.

[31] Dynamic understood that SIIL did not always have funds immediately available to pay all of its contractors, subcontractors and suppliers, particularly on shutdown operations where the payroll increased sharply. SIIL had to first invoice Fording and then once SIIL received money from Fording, SIIL would be able to satisfy its outstanding invoices. Dynamic did not charge interest on the outstanding balance of the invoice.

[32] Dynamic was given no form of security from SIIL to ensure payment of its invoices. However, Mr. Martindale believed that Fording would pay all of its contractors and eventually SIIL would have the money to

pay Dynamic. The record indicates that at times payment from SIIL were delayed for as long as three months. SIIL was grateful for the flexibility and patience Dynamic gave to them in making their payments.

[33] If a situation arose where Dynamic did not have enough money to pay its employees while it awaited payment from SIIL, Dynamic would borrow money from Mr. Martindale or Ms. Shkwarok, and repay it once it received payment from SIIL.

[34] On at least one occasion, SIIL gave Dynamic a bonus in gratitude for Dynamic's hard work and the integral role Dynamic played in the success of SIIL. Similar bonuses were given to other people who were neither employees nor subcontractors of SIIL, but who had been helpful to the operation of the company. These other people included Ms. Larson's family members and a neighbour.

[35] During the years under appeal, Dynamic was providing unique services in southeastern B.C. and Mr. Martindale was integral to the success of the business of Dynamic. Mr. Martindale testified that there would be other people he could have hired or did in fact hire in later years to replace him should he have been unable to provide his services because of sickness or other leave.

[36] Dynamic undertook a small amount of business promotion in 1999. The company purchased two season passes for the local hockey league which Mr. Martindale would give to various people in the industry. The need to advertise was small because Mr. Martindale knew all of the major players, but pleasing some of those major players was important.

[37] In late 1999 SIIL's share of the work in the Elk Valley began tapering off. As a result, the work of Dynamic began expanding outside the valley with other contractors beginning in 2000. As at the date of the hearing in the Tax Court in 2003, Mr. Martindale was actively negotiating and performing additional contracts with several companies other than SIIL.

[38] In 2001, Dynamic was reassessed for 1997, 1998 and 1999 to disallow certain deductions on the basis of paragraph 18(1)(p) of the *Income Tax Act*. Dynamic appealed to the Tax Court, unsuccessfully, and now appeals to this Court.

THE LAW

[39] The provisions of the *Income Tax Act* relating to personal services businesses were enacted to deny certain tax advantages that may be obtained by providing services through a corporation, rather than personally. These provisions are directed primarily at the situation exemplified by *Sazio v. Minister of National Revenue*, [1969] 1 Ex. C.R. 373, [1968] C.T.C. 579, 69 D.T.C. 5001 (E.C.).

[40] Ralph Sazio was employed as the head coach of a professional football club for a three year period ending on December 9, 1965. In 1964, he resigned from that position. The football club instead retained a corporation, Ralph J. Sazio Limited, to provide coaching services. It was understood that those services would be provided personally by Mr. Sazio, and that he would not perform similar services for a competing football club. The corporation was owned by Mr. Sazio and his wife. Mr. Sazio was an officer and director of the corporation, and received remuneration from the corporation.

[41] The Crown's position in *Sazio* and similar cases was (and still is) that the interposition of a corporation between the recipient of a service and the individual who personally performs the service could result in unreasonable tax advantages, resulting in part from a corporate income tax rate that is significantly lower than the personal tax rate, and in part from opportunities for income splitting. Mr. Sazio was reassessed for 1965 on the basis that the contractual arrangements between the football club and Mr. Sazio's corporation

should be ignored because there was no *bona fide* business purpose for them, that Mr. Sazio should have been taxed as though he were still an employee of the football club, and that the money paid to Mr. Sazio's corporation should be taxed in Mr. Sazio's hands because it was in substance his salary.

[42] Mr. Sazio's appeal was allowed by Cattanach J. His decision foreshadowed what has become a well-established proposition, that a tax motivation does not affect the validity of a transaction for tax purposes: *Walls v. Canada*, [2002] 2 S.C.R. 684; *Backman v. Canada*, [2001] 1 S.C.R. 367; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Canada v. Antosko*, [1994] 2 S.C.R. 312; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536.

[43] Cattanach J. based his conclusion on the following considerations. First, there is no reason in law why a corporation cannot provide football coaching services. Second, the use of a corporation to provide the services of a single person is well recognized and accepted. Third, absent proof of sham, the separate legal existence of a corporation, and its legal rights and obligations, must be respected for income tax purposes.

[44] The rejection of the business purpose test appeared to make it easier for a person to provide services through a *Sazio*-type arrangement, rather than personally, thus obtaining the related tax advantages. The government still believed that such a result was not reasonable. The enactment of the definition of "personal services business", and related provisions such as paragraph 18(1)(p), was intended to deny, in part, the tax advantages of such arrangements. The term "personal services business" is defined in subsection 125(7) of the *Income Tax Act*. That definition reads as follows (my emphasis):

125 (7) In this section, ...

125 (7) Les définitions qui suivent s'appliquent au présent article. ...

"personal services business" carried on by a corporation in a taxation year means a business of providing services where

« entreprise de prestation de services personnels » S'agissant d'une entreprise de prestation de services personnels exploitée par une société au cours d'une année d'imposition, entreprise de fourniture de services dans les cas où:

(a) an individual who performs services on behalf of the corporation (in this definition and paragraph 18(1)(p) referred to as an "incorporated employee"), or

a) soit un particulier qui fournit des services pour le compte de la société -- appelé "employé constitué en société" à la présente définition et à l'alinéa 18(1)p);

(b) any person related to the incorporated employee

b) soit une personne liée à l'employé constitué en société,

is a specified shareholder of the corporation and the incorporated employee would reasonably be regarded as an officer or employee of the person or partnership to whom or to which the services were provided but for the existence of the corporation, unless

est un actionnaire déterminé de la société, et où il serait raisonnable de considérer l'employé constitué en société comme étant un cadre ou un employé de la personne ou de la société de personnes à laquelle les services sont fournis, si ce n'était de l'existence de la société, à moins:

(c) the corporation employs in the business throughout the year more than five full-time employees, or

c) soit que la société n'emploie dans l'entreprise tout au long de l'année plus de cinq employés à temps plein;

(d) the amount paid or payable to the corporation in the year for the services is received or receivable by it from a corporation with which it was associated in the year.

d) soit que le montant payé ou payable à la société au cours de l'année pour les services ne soit reçu ou à recevoir par celle-ci d'une société à laquelle elle était associée au cours de l'année.

[45] A corporation's income from a personal services business does not qualify for the small business deduction, which means that it is taxed at a higher rate than other business income of a corporation.

[46] Also, in computing the income of a corporation from a personal services business, no deductions are permitted except remuneration paid to the corporation's "incorporated employee" (the person referred to in paragraph (a) of the definition of "personal services business"), certain expenses relating to the incorporated employee, and certain legal expenses. These restrictions on the deductibility of business expenses are set out in paragraph 18(1)(p), which reads as follows:

18. (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of ...

18. (1) Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien, les éléments suivants ne sont pas déductibles: ...

(p) an outlay or expense to the extent that it was made or incurred by a corporation in a taxation year for the purpose of gaining or producing income from a personal services business, other than

p) une dépense, dans la mesure où elle est engagée ou effectuée par une société au cours d'une année d'imposition en vue de tirer un revenu d'une entreprise de prestation de services personnels, à l'exception:

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

(i) du salaire, du traitement ou d'une autre rémunération versé au cours de l'année à un actionnaire constitué en société de la société,

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

(ii) du coût, pour la société, de tout autre avantage ou allocation accordé à un actionnaire constitué en société au cours de l'année,

(iii) any amount expended by the corporation in connection with the selling of property or the negotiating of contracts by the corporation if the amount would have been deductible in computing the income of an

(iii) d'un montant dépensé par la société et lié à la vente de biens ou à la négociation de contrats par la société, lorsque le montant aurait été déductible dans le calcul du revenu d'un actionnaire constitué en société pour une année

incorporated employee for a taxation year from an office or employment if the amount had been expended by the incorporated employee under a contract of employment that required the employee to pay the amount, and

d'imposition tiré d'une charge ou d'un emploi s'il l'avait dépensé en vertu d'un contrat d'emploi qui l'obligeait à verser le montant,

(iv) any amount paid by the corporation in the year as or on account of legal expenses incurred by it in collecting amounts owing to it on account of services rendered

(iv) d'un montant versé par la société au cours de l'année au titre des frais judiciaires ou extrajudiciaires engagés par elle en recouvrement des sommes qui lui étaient dues pour services rendus,

that would, if the income of the corporation were from a business other than a personal services business, be deductible in computing its income;

qui serait, si le revenu de la société était tiré d'une entreprise autre qu'une entreprise de prestation de services personnels, déductible dans le calcul de son revenu;

[47] In the most common situation involving paragraph 18(1)(p) of the *Income Tax Act*, no deduction is permitted for such ordinary business expenses as rent, telephone costs, administration and office costs, and remuneration to any employee other than the "incorporated employee". In this case, for example, most of the disallowed expenses over the three years under appeal represent remuneration paid to Ms. Shkwarok for administrative services. That expense was disallowed only because the Crown considered Dynamic to be carrying on a personal services business. There is no allegation that Ms. Shkwarok did not perform administrative services for Dynamic, or that her remuneration for those services was unreasonable.

[48] Nothing in the *Income Tax Act* provides offsetting relief to the application of paragraph 18(1)(p). Thus, for example, Ms. Shkwarok would have been taxed on the remuneration she received from Dynamic, even though Dynamic was not permitted to deduct it.

APPLYING THE LAW TO THE FACTS

[49] It is agreed that paragraph 18(1)(p) of the *Income Tax Act* applies in this case only if Dynamic carried on a "personal services business", as defined in subsection 125(7) of the *Income Tax Act*, during the years under appeal. Dynamic will have met that definition during any period in which Mr. Martindale (who the Crown says is the "incorporated employee" of Dynamic), would reasonably be regarded as an employee of SIIL, but for the existence of Dynamic. This hypothetical question arises from the words between paragraphs (b) and (c) of the definition of "personal services business", in what legislative drafters have been known to call the "mid-amble" (refer to the underlined portion of the definition, quoted above).

[50] This case requires consideration of *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, [1986] 2 C.T.C. 200, 87 D.T.C. 5025 (F.C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983, the leading cases in which the central question is whether an individual is providing services to another person as an employee, or as a person in business on his or her own account. I refer to this as the "*Sagaz* question" (*Sagaz*, paragraph 47). The factors to be taken into account in determining the *Sagaz* question will depend upon the particular case, but normally they will include the level of control the employer has over the worker's activities, whether 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 undertaken by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[51] The Judge dealt with the *Sagaz* factors under three headings, "ownership of tools", "chance of profit and risk of loss", and "integration". Counsel for the appellant has taken issue with a number of the conclusions the Judge reached with respect to these specific factors, and has also submitted that the Judge failed to consider the control factor.

[52] The position of the Crown with respect to these issues is that the determination of whether Dynamic carried on a "personal services business" is one of fact, not to be disturbed by this Court in the absence of a palpable and overriding error. I do not agree with this characterization of the issue. The evidence is substantially uncontradicted and the facts are undisputed. What is in issue is whether the Judge correctly applied the law to those facts. That is a question of mixed law and fact: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. Appellate intervention in such a case is justified if the application of the law to the facts discloses an error in principle: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraph 37.

1. Ownership of tools

[53] The Judge found that the "ownership of tools" factor favoured the position of the Crown because SIIL provided Mr. Martindale with office space, parking facilities, administrative facilities, and technical and maintenance services. The difficulty with this conclusion is that it is speculative. The record discloses no evidence to support this conclusion.

2. Chance of profit and risk of loss

[54] The Judge concluded that the evidence relating to the chance of profit and risk of loss also supported the Crown's position. In reaching this conclusion, the Judge appeared to focus on the fact that Mr. Martindale did not stand to share in the profits or losses of SIIL. With respect, that misses the point. The "chance of profit and risk of loss" factor is intended to reveal whether the activities of Mr. Martindale entail the kind of risks that are more typical of those borne by a business enterprise than an employee. The business enterprise is not that of SIIL, but that of Mr. Martindale himself. To quote *Sagaz* (at paragraph 47), it is "the worker's opportunity for profit in the performance of his or her tasks".

[55] Mr. Martindale was remunerated for the services he provided to SIIL on a basis that in certain respects resembled that of an hourly employee. The remuneration was based on an hourly rate, with higher rates for overtime, and additional amounts to cover certain direct costs of the work. Also, at one point Mr. Martindale received a gratuitous bonus.

[56] On the other hand, the manner in which the remuneration in this case was determined is also consistent with the kind of cost-plus contract that is commonly used by a subcontractor carrying on a business like that of Mr. Martindale. As well, there are three significant aspects of Mr. Martindale's remuneration that were not typical of an employment relationship. First, Mr. Martindale was not compensated for the time spent on working on estimates for SIIL if the estimate did not result in a contract. Second, Mr. Martindale was not remunerated on a regular or timely basis, with the result that he was compelled to provide his own financing to compensate for the delays. Third, the costs of "warranty work" (work required to correct Mr. Martindale's errors) were required to be borne by Mr. Martindale, rather than SIIL.

[57] On balance, the manner in which Mr. Martindale was remunerated point away from the existence of an employment relationship. I conclude that the Judge erred in finding the contrary.

3. Integration

[58] The Judge found that Mr. Martindale's contribution to SIIL during the years under appeal made him an integral part of the operation of that corporation, and thus more like an employee rather than a person carrying on business on his own account. However, in reaching that conclusion, the Judge failed to consider the substantial body of evidence that the construction management business was carried on for a number of years before the years under appeal, and also afterward.

[59] In the years under appeal, there was no change in the method in which the construction management business was conducted. In fact, the only thing that was unique about the years under appeal was that SIIL monopolized the services of Mr. Martindale because of the demands of their own contracts with Fording. In my view, the Judge was wrong to consider those years in isolation from the entire history of the business built up by Mr. Martindale, in which services were provided to numerous enterprises apart from SIIL.

[60] From 1988 and into the early part of the 1990s, Mr. Martindale was seeking to avoid the limitations of being an ironworker employed solely through the union hall. He was developing the skills of an entrepreneur and a construction manager, which resulted in more and better opportunities for him than he could have achieved as an ironworker obtaining work through Local 97. This would suggest that if Dynamic did not exist, Mr. Martindale might have chosen, once he had learned the skills of project management in the early 1990s, to pursue various opportunities as a project manager through his own business, rather than as an employee of anyone. In that event, it would be reasonable to conclude that, during 1997, 1998 and 1999, the services he provided to SIIL would have been provided as an independent contractor, rather than an employee.

[61] The fact that most favours the Crown's position is that during the years in question and in the two prior years, Mr. Martindale provided services only to SIIL. However, the monopolization of Mr. Martindale during that period did not arise because SIIL and Mr. Martindale were forging a relationship resembling that of employer and employee. Rather, it arose because SIIL was particularly successful during that period in obtaining work from Fording. There was no reason to believe that SIIL could reasonably expect that situation to continue, and in fact it did not continue after 1999.

4. Control

[62] The Judge did not mention the factor of control, that is, the degree to which SIIL controlled Mr. Martindale's activities as construction manager. In the context of this case, this was a significant factor, and it should have been addressed. The evidence on this point favours the position of Mr. Martindale. It establishes that Mr. Martindale was substantially independent, and that SIIL exercised no meaningful control over his activities.

CONCLUSION

[63] Overall, the Judge failed to correctly apply all of the *Sagaz* factors to the facts in this case. It is my view, based on the considerations discussed above, that it would not be reasonable to conclude that, but for the existence of Dynamic, Mr. Martindale would have provided his services to SIIL as an employee in 1997, 1998 and 1999.

[64] I would allow this appeal with costs in this Court and in the Tax Court. I would set aside the judgment of the Tax Court, and make an order referring this matter back to the Minister for reassessment on the basis that paragraph 18(1)(p) of the *Income Tax Act* does not apply to the appellant in 1997, 1998 or 1999.

_____(s) "K. Sharlow"

J.A. "I agree.

J. Richard C.J."

"I agree.

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

Appeal from an Order of the Tax Court, dated April 13, 2004. Tax Court Docket: 2002-1707(IT)G

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REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

RICHARD C.J.

MALONE, J.A.

DATED:

June 3, 2005

APPEARANCES:

Mr. Kenneth R. Hauser

FOR THE APPELLANT

Ms. Karen Truscott

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kenneth R. Hauser Law Corporation

FOR THE APPELLANT

Kamloops, British Columbia

Mr. John Sims

FOR THE RESPONDENT

Deputy Attorney General of Canada

Vancouver, British Columbia
