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Personal Services Businesses in the Oil and Gas Sector

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Abstract

Audit scrutiny of potential "personal services businesses" ("**PSB**") is on the rise. Workers reassessed under these rules are denied a deduction for most expenses incurred to earn income and denied access to the small business deduction.

A government committee recently reviewed the PSB rules from the perspective of incorporated workers in Quebec's information technology sector. The committee recommended that the *Income Tax Act* be amended, at least for the benefit of the information technology sector, to "ensure tax fairness". However, no amendments have been proposed.

This paper considers the PSB rules from the perspective of the oil and gas sector and concludes that unique characteristics of the oil and gas sector reduce the risk that workers will fall off-side the PSB rules. The paper also reviews the tax policies that underlie the PSB and related rules. In most cases, there is little policy support for reassessing oil and gas workers who provide services through a corporation.

Introduction

On the surface, the PSB rules were introduced to prevent employees from interposing a corporation on an employment relationship in order to gain tax advantages that are generally available for small businesses but not for employees, such as a greater ability to deduct expenses and a lower tax rate where profit remains in the corporation.[1]

Below the surface, the PSB rules devour considerable resources of taxpayers, advisors, the CRA, the Department of Justice, and the Court without serving any clear, principled policy objective. This may sound harsh, but consider what a PSB reassessment accomplishes.

First, the PSB rules prohibit an "incorporated employee" from deducting most expenses incurred to earn income. This result is unfair. An equitable system would allow all taxpayers to deduct expenses reasonably incurred to earn income. Employees have long been denied the right to deduct such expenses based on the policy rationale of preserving administrative simplicity. The PSB rules extend this inequity to certain workers who provide their services through a corporation. This is a very complicated way to maintain administrative simplicity.

Second, the PSB rules prohibit access to the small business tax rate. This prohibition begs the question: who *is* intended to benefit from the small business tax rate? There is little government direction regarding the size, structure or type of business that is to benefit from the small business tax rate. Further, many businesses that benefit from the lower rate involve individual workers providing services through a corporation, making the dividing line unclear.

A Parliamentary committee recently studied the PSB rules and Quebec's IT sector. The committee concluded that the rules "appear to have penalized IT professionals who have chosen to become an entrepreneur and to incorporate", and recommended:[2]

> the federal government examine the *Income Tax Act* with a view to propose legislative amendments in such a manner that reflects the realities of the modern labour market, particularly in terms of small IT companies, in order to ensure tax fairness for those small business owners who are deemed to be "incorporated employees." …The Committee feels that incorporated self-employed individuals should be taxed fairly and believes that the recommendation should be implemented expeditiously.

Regardless of the purpose of the PSB rules, they exist and must be considered in circumstances where an individual worker provides services to an oil and gas company ("**OilCo**") and such services are provided through the worker's corporation ("**WorkerCo**"). The PSB rules ask: if WorkerCo did not exist, would the worker be an employee of OilCo?

In the oil and gas sector, the answer to this hypothetical question is often a resounding "no". This is in large part because of the clear intention of the parties that the worker is to bear more risks and responsibilities as compared to an employee.

The tax policies underlying the PSB and related rules

Why employees cannot deduct expenses incurred to earn income: simplicity

Employees are mistreated under the *Income Tax Act*.[3] If you are an employee, you likely incur significant expenses to earn income. Take, for example, your cost for transportation to work. Absent very limited circumstances, employees are not entitled to any deduction for such an expense, despite the fact that the expense is incurred for the sole purpose of earning income.

The Act deliberately adopts this inequity – businesses are allowed to deduct most expenses incurred to earn income but employees are not. Tax equity requires that taxpayers with the same ability to pay tax pay the same amount. Inequity exists for employees because, as a result of the inability to deduct expenses incurred to earn income, an employee pays more tax than a worker who earns the same amount of income through their own business.

Inequity for employees has a long history in Canada.[4] Decades ago, the Act was unclear. After an employee was allowed to deduct expenses in a 1946 Court case, the Act was amended to ensure that employees were *not* entitled to deduct expenses incurred to earn income.[5] In 1958, a journalist incurred significant expenses (that were not reimbursed) in his work and he pleaded with the Court to fix the inequity and allow his deductions.[6] The Court, however, had no authority to reverse the policy adopted by Parliament.

In 1966, the *Carter Commission*[7] reported that the distinction between employed and contracted individuals was an "unfair discrimination". The Commission reported that "administrative simplicity" was the main justification for the existence of the distinction between employees and self-employed individuals.[8] Although conceding that "*the task of assessment would be enormous if each employee submitted an itemized claim for his or her actual expenses*", the Commission recommended that all reasonable expenses incurred for the purpose of producing income should be deductible.[9]

The Commission's recommendation was rejected based on the following rationale:

> [T]he government proposes to make more provision in the law for the expenses legitimately incurred in earning wages or salaries. However, **it has reached the conclusion that claims for expenses on the broad basis suggested by the commission would either impose record-keeping on millions of employees or deny them the ability to submit acceptable claims. It would also produce an impossible processing task in tax administration** with inevitable long delays in making refunds.[10]

The policy rational that it is an "impossible burden" for employees to document their expenses has been criticized by many.[11] In response to the general awareness of the inequity faced by employees, the government adopted a flat rate deduction that was intended as a compromise to improve equity without adding much complexity.

The following is a short history of this simple flat-rate deduction for employees:

- Starting in 1972, employees were entitled to a deduction equal to 3% of their income, up to a maximum of $500.[12]
- This deduction was eliminated in 1987 with the explanation that the basic personal exemption was to be increased at the same time.[13] However, since the basic personal exemption is available to both employed and self-employed, the elimination of the employment deduction reinstituted the inequity for employees.
- From 1987 to 2006, employees were not entitled to a basic deduction for expenses incurred to earn income.
- In 2006, the Canada Employment Credit was introduced and remains in place.[14]

The rational for the current employment credit is: "*to introduce a new non-refundable tax credit in recognition of work-related expenses incurred by employees*."[15] As a credit (as opposed to a deduction) the value of the $1,000 credit to an employee is at the lowest marginal rate of 15%.[16] As such, employees currently receive a credit valued at about $150 per year (which, in downtown Calgary, will cover an employee's parking for about a week). In addition to this token credit, a handful of miscellaneous credits exist for particular interest groups, which are not available to most employees.[17]

The small credit for employees reduces inequity, but not by much. The policy decision to favour administrative simplicity over equity remains entrenched. This policy decision is easy to lose sight of when considering the PSB rules.

The PSB rules serve to extend inequity by denying certain incorporated workers from deducting expenses incurred to earn income.[18] Where a taxpayer and the tax authority both incur considerable time and expense to deal with a PSB dispute, the policy rationale of "administrative simplicity" is not well served.

Here's $3 billion – please start a business, any business

Another decision of Parliament relevant to the PSB rules is the decision to promote small businesses. Canada spends more than $3 billion annually as a "tax expenditure", meaning foregone tax revenue, on small businesses. As a tax expenditure, this expense has nothing directly to do with the tax

system (in the sense of raising revenue), but rather it is a government spending program embedded in the Act.

The largest tax expenditure for small business owners is the small business deduction, which annually directs about $3 billion to small business owners in the form of reduced tax rates.[19] Under the heading "Low tax rate for small businesses", in the 2012 federal government report "*Tax Expenditures and Evaluations 2012*" it is identified that Canada has allocated more than $20 billion in tax benefits to small businesses owners in recent years:[20]

	Year	Estimated Cost
Low tax rate for small businesses:	2007	$ 4.1
	2008	$ 4.4
	2009	$ 4.3
	2010	$ 4.1
	2011	$ 3.8
	2012	$ 2.9
		$23.6 billion

Some argue that such assistance is necessary to counteract the disproportionately high compliance and financing costs faced by small businesses.[21] Others argue that such assistance is unprincipled and harmful to the economy because it incents companies to stay small, causes entrepreneurs to unduly focus on tax implications rather than business growth and causes growing businesses to split up into multiple smaller and less efficient divisions to maximize the tax benefit.[22] Precisely how the small business deduction impacts the Canadian economy, whether positive or negative, is unclear.[23]

Regardless of whether the small business deduction is a good idea or not, it is firmly entrenched in the Act. Denying "incorporated employees" access to this $3 billion incentive program is one of the main reasons for the PSB rules. As such, the purpose of the small business deduction is an important consideration underlying the PSB rules.

Applying the PSB rules would be easier if there was a clear, strategic policy objective for the small business deduction. However, despite the enormous size of the tax expenditure, there is little detail regarding who precisely is to benefit from this tax expenditure or what precisely the lower rate is intended to achieve. Instead of precise, strategic objectives, each time the government increases the small business limit, the rationale provided is a generic statement regarding assistance for small businesses. For example:

> "In order to provide additional tax relief to small businesses."[24]
>
> "To support the growth of small businesses."[25]
>
> "This provision helps small CCPCs retain more of their earnings for reinvestment and expansion… In order to provide additional support to small businesses [the limit will be increased]."[26]

In the absence of a clear strategic purpose for this $3 billion annual expenditure, it is helpful to look at who benefits from this tax incentive. When the Mintz Committee released its study on business taxation in Canada, it reported the following taxable income levels of the companies that benefited from the small business deduction:[27]

68% earned taxable income of less than $50,000;

14% earned taxable income from $50,000 to $100,000;

15% earned taxable income from $100,000 to $200,000; and

3% earned taxable income over $200,000.

In light of these statistics, and keeping in mind that only corporations can claim the small business deduction, it appears that many taxpayers who benefit from the small business deduction are workers who incorporate to provide their services. There is no bright line separating workers who are intended to benefit from the small business deduction and workers who are prohibited under the PSB rules from deducting expenses incurred to earn income.

The absence of clear direction regarding the size, type or nature of activities that are intended to benefit from small business deduction, makes the PSB rules difficult to apply.

The PSB test

The legislated disregard for legal relationships

In most circumstances, taxpayers are subject to tax based on legal relationships. The PSB rules are an exception to this rule – the fact that a worker provides their services through a corporation is disregarded.

A worker runs afoul of the PSB rules where the answer to the following hypothetical question is yes: if WorkerCo did not exist, would the worker be an employee of OilCo? This hypothetical question arises from the definition of a PSB which provides:

> "**personal services business**" carried on by a corporation in a taxation year **means a business** of providing services **where**
>
> (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
>
> (b) any person related to the incorporated employee
>
> 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 <u>but for</u> the existence of the corporation**, unless
>
> (c) the corporation employs in the business throughout the year more than five full-time employees, or
>
> (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[28]

If WorkerCo carries on a PSB, the consequences are significant. WorkerCo's entitlement to the small business tax rate will be denied, which results in an increased tax bill of $11,000 for every $100,000 of taxable income.[29] In addition, like an employee, WorkerCo will be prohibited from deducting most expenses incurred to earn income. If WorkerCo has significant taxable income and several years are in dispute, the tax bill can be crippling.

In most cases, the hypothetical question posed by the PSB definition is answered based on whether the worker is better characterized as a contractor or an employee. The most common test for such characterization is the "Wiebe Door" test.

The modern Wiebe Door test

The leading case on the distinction between employees and independent contractors remains *Wiebe Door Services Ltd. v. MNR*[30] as modified by appellant cases including *67112 Ontario Ltd. v. Sagaz Industries*[31] and *Royal Winnipeg Ballet v. Canada*.[32] The history and application of this test has been thoroughly canvassed in earlier commentary.[33]

The distinction between an employee and an independent contractor is not obvious. There is no single distinguishing factor. When considering the many relevant factors, set out further below, the Supreme Court of Canada has advised that:[34]

> The central question is whether the person who has been 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 the employer has over the worker's activities will always be a factor. However, other factors to consider include 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 held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

Stated differently: is the worker really carrying on their own separate business? The list of relevant factors to consider includes (each "yes" suggests an employee characterization):

(a) **Control** of the manner in which the work is completed – *Is the worker told when, where and how to do the work?*

(b) Ownership of **tools** needed to complete the work – *Is the worker provided with all or most of the tools necessary to complete the work?*

(c) The extent to which the worker has a **chance of profit or a risk of loss** – *Is the worker's compensation fixed such that: (i) there is little opportunity for meaningful swings in income, up or down; and (ii) are expenses (health, dental, travel, meals, marketing etc.) either covered or reimbursed?*

(d) **Integration** of the worker into the payor's business – *Is there only one business being carried on (that of OilCo) and the worker is part of that business, rather than carrying on their own separate business?*

(e) The **intention** of the parties – *Do the parties lack evidence to substantiate an intention to carry on an independent contractor relationship?*

The characterization of a worker as either a contractor or employee is one of the most litigated tax issues. Rarely do all of the factors point in a consistent direction and there is often room for disagreement. The CRA[35] and the jurisprudence offer a wide range of questions to consider when working through each of the factors.

When structuring a relationship with a worker, each of the factors should be considered. Often the relationship can be adjusted to be more clearly characterized as a contractor relationship if that is the intention of the parties. For example, factors such as eliminating any reimbursements and ensuring the worker is responsible for providing their own tools may be factors that can be adjusted to reduce the likelihood of investing time, effort and expense to dispute this issue later.

Diverse legal policies inform the Wiebe Door test

The modern *Wiebe Door* test draws from a number of different areas of law, including negligence, contract and employment. Understanding what was at issue in the cases that consider the division between employees and contractors provides context for this distinction under the Act. The three main areas of law are set out below.

Tort law / Negligence. A payor corporation is far more likely to be responsible for damages caused by an employee as opposed to damages cause by an independent contractor. Many cases arise where a worker causes damage and the party suffering the damage seeks to have the person characterized as an employee such that the deep pockets of the payor corporation may be held liable. This was the issue in *Sagaz* where the Court explained the policy:[36]

> …the main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm. Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account.

In the tax context, the concept of liability is relevant to the extent a worker is exposed to a risk of loss. Where WorkerCo is liable for its own work product and pays for its own insurance, such potential liability is a factor that indicates the worker is a contractor and not an employee.

Employment Law. Employment law is protectionist in the sense that employees are generally in a weaker bargaining position than the payor business and the law steps in to set minimum standards in many respects: hours of work; minimum pay; vacation time or pay; and, severance obligations on termination without cause. Employment law has even created a new category of "dependent contractor" to offer protections to certain contractors who are dependent on one payor.[37]

In the oil and gas sector, the severance obligation for employees is extremely significant because of the disproportionately risky and cyclical nature of the oil and gas sector. For many oil and gas companies, hiring workers on certain projects on a contract basis is done for the practical reason that the business cannot reasonably bear the severance liability associated with inevitable downturns. Where both WorkerCo and OilCo bear their own risks associated with potential downturns, this indicates a contractor relationship.

Contract Law. When a relationship is unclear and disputes arise, principles of contract law and contractual interpretation intervene to determine the rights and responsibilities of each of the parties. Contract law ensures that the rights and responsibilities are precisely as the parties agreed, with some exceptions.

In the tax context, the terms of the parties contract is an important factor. However, the PSB rules step away from contract law with respect to the existence of WorkerCo; the PSB rules are applied assuming that WorkerCo did not exist. Aside from this express exception, the contract executed by the parties is a relevant consideration.

Each of these three areas of law serves a different purpose: to direct liability where appropriate; to protect workers; and to hold parties to their agreement. Knowing the divergent purposes for the employee/contractor distinction helps to inform the application of this test in the tax context.

(a) *Tort law / Negligence*. Where a worker has clearly and intentionally taken on liability that would be borne by OilCo if the worker was an employee of OilCo, this indicates a contractor relationship.

(b) *Employment Law*. Where the parties clearly and intentionally agree that employment law protections do not extend to the worker, this indicates a contractor relationship.

(c) *Contract Law*. An agreement between the parties that establishes a contractor relationship is a relevant consideration, subject to the exception under the PSB rules that the existence of WorkerCo must be ignored.

What does the Tax Court scorecard look like?

The PSB rules have been addressed in at least 23 decisions of the Tax Court of Canada and Federal Court of Appeal. A brief summary of these cases is set out in Appendix A.

Success at the Tax Court has been fairly evenly divided, with the exception that taxpayers succeeded in the only two cases to reach the Federal Court of Appeal, *Dynamic Industries Ltd.*[38] and *Aniger Consulting Inc*.[39]

Circumstances where a PSB was found to exist

Ten cases were located in which the Tax Court of Canada determined that WorkerCo was carrying on a PSB. In these cases, the worker generally fell into one of three categories:

(a) Most commonly, cases where the taxpayer benefited from clear "employee" type benefits (*ex. regular, timely remuneration linked directly to hours worked, regular office hours, reimbursement of expenses, health and dental benefits, guaranteed pay in the event of illness, and a long term expectation of work*).[40]

(b) Cases where the services provided by the consulting corporation were not sufficiently defined (*ex. evidence was not produced to clearly establish a separate business*).[41]

(c) Cases where the worker participated in management of the payor corporation and did not produce evidence that more than one business existed.[42]

Circumstances where a PSB was found not to exist

Thirteen cases were located, including two Federal Court of Appeal cases, where the taxpayer was found *not* to be carrying on a PSB. Many similarities emerge from these cases as factors suggesting a contractor relationship: responsibility for own expenses; minimal control and supervision; intention to have a separate business; irregular payments; provision of own tools; obligation on the worker to self-insure; absence of employee protections; no reimbursement for expenses; a detailed written agreement confirming the parties' rights, responsibilities and intentions; and, no long term guarantee of work for the individual worker.

In most cases where the taxpayer succeeded there were still some facts indicating an employment relationship such as:

(a) The worker had a prior employment relationship[43] or a hybrid relationship[44] with the payor corporation;

(b) The worker was integral to the business carried on by the payor corporation either because they held or performed the services of a senior manager, held themselves out as a representative of the payor corporation or was essentially regarded as the face of the payor corporation;[45] and

(c) The worker enjoyed some "employee" style benefits, such as remuneration on a regular basis, increased remuneration for overtime hours, or reimbursement of some expenses.[46]

A review of these cases illustrates that the application of the PSB rules can be difficult, for taxpayers and the tax authority, as most cases have factors that point in different directions.

Useful comparables: recent cases where a PSB existed

The relevant facts of two recent cases where the taxpayer was unsuccessful are set out below. These cases serve as a useful measuring stick against which the facts of other potential cases can be compared to help determine the risk that a WorkerCo is carrying on a PSB.

In *609309 Alberta Ltd. v. R.*, 2010 TCC 166, a worker, Mr. Stan Nance, worked at the Nova Chemicals Cogeneration Plant in Joffre, Alberta for Spantec Constructors Ltd. ("**Spantec**"). He provided services through a corporation which was held to be carrying on a PSB:[47]

(a) Mr. Nance had been an employee of Spantec in the years prior to the incorporation of 609309 Alberta Ltd*., A prior employment relationship is not a helpful characteristic*;

(b) Spantec terminated the employment relationship and then issued a letter to Mr. Nance indicating that Spantec wanted to continue to have Mr. Nance working on an hourly basis and that Spantec would cover all "associated employment expenses," *Oilco covering all expenses is not helpful*;

(c) The "Personal Services" contract entered into by Mr. Nance and Spantec provided that Mr. Nance would receive an hourly wage of $44, he would be provided a pick-up truck for transportation to work, and he would be reimbursed for "all related fuel and maintenance charges", *Oilco covering all expenses is not helpful*;

(d) Spantec dictated the hours, days and location that Mr. Nance would work, specifically on site Monday to Thursday, 10 hours per day, *Dictating the hours, days and location of the work is not helpful*;

(e) Spantec provided Mr. Nance with a $75 per day "living out allowance", *Paying a living allowance is not helpful*;

(f) Mr. Nance provided "no evidence of what was done in the home office", *Workers providing services at their own location is helpful*; and

(g) Spantec reimbursed Mr. Nance personally for all expenses and these expenses were submitted on "Spantec employee expense claim" forms signed by Mr. Nance, *Reimbursing expenses is not helpful.*

In *1166787 Ontario Ltd. v. R*,[48] Ms. Vanessa Lee provided services to a division of Signature Vacations Inc. through her numbered corporation 1166787 Ontario Limited. Ms. Lee was hired to manage a particular division of Signature called "Encore Cruises". The Tax Court concluded that Ms. Lee's corporation was carrying on a PSB based on the following:[49]

(a) Ms. Lee was hired "to manage, supervise and direct the business of Encore" and was found to be integral to Signature's cruise business, *A singular role of business manager is not a helpful characteristic*;

(b) Ms. Lee was reimbursed for all expenses, *Reimbursing expenses is not helpful*;

(c) Ms. Lee was part of the management team, and her business card referred to her position as Encore Managing Director and provided her telephone number, fax number and email address at Encore Cruises, *If the worker holds themselves out as a representative of OilCo they are more likely to be an employee*;

(d) Ms. Lee had signing authority on Encore's bank account and had authority to sign contracts on behalf of Encore, *If the worker has signing authority for OilCo they are more likely to be an employee*;

(e) Under the initial contract, Ms. Lee's fee was an annual amount, but was to be paid in advance in monthly instalments and was subject to an annual cost of living increase, *Where worker's fees resemble employees (regular, fixed amounts subject to a cost of living increase) this is not a helpful characteristic*;

(f) Ms. Lee's bonus entitlement was not reduced if she was unable to perform her duties as result of illness, *If workers have employment like protections such as health and dental benefits or guaranteed payments in the event of illness, this is not a helpful characteristic*; and

(g) Signature provided the tools necessary to complete the work, *If OilCo provides the worker with all or a majority of the tools needed, this is not a helpful characteristic.*

Application in the oil and gas sector

Cyclical nature of the industry

The cyclical oil and gas sector provides great opportunities and great risks. Risk is often managed in part by spreading the risk as broadly as practical. From the perspective of OilCo, hiring a contractor rather than an employee serves this function and allows greater flexibility. When a downturn hits, both OilCo and WorkerCo face the risks associated with the lack of work, rather than OilCo paying potentially crippling severance amounts.

Each situation is unique and there are many reasons for preferring either a contractor relationship or an employment relationship. In the oil and gas sector, WorkerCo's willingness to take on additional risks and responsibilities compared to employees is often the most significant factor.

- *Additional Risks*: The absence of employment law protections is significant, particularly the absence of any severance obligation; the absence of any long-term guarantee of work beyond the current contract term; and, the absence of any guaranteed payment in the event of non-performance.

- *Additional Responsibilities*: Workers who provide their services to an OilCo through a corporation are generally responsible for their own set up and corporate compliance costs, cost of tax filings, bookkeeping costs, general administrative costs such as marketing, as well as insurance where applicable (health, dental and with respect to operations) and other costs incurred to earn income.

Where an OilCo hires a WorkerCo and these addition risks and responsibilities are born by the worker, it is a strong indication that a contractor relationship exists and the PSB rules should not apply.

Further, if OilCo provides evidence that it would not have hired the worker as an employee and would have only hired the worker as a contractor, then the answer to the hypothetical question posed by the PSB rules is no and the PSB rules should not apply

The risk and reward of incorporated workers

From a worker's perspective, a contractor relationship is often preferred in the oil and gas sector for reasons including:

- The work may simply not exist for employees but is available for contractors.

- Contractors are often paid a higher rate in part as recognition that they are taking on risks and responsibilities not born by employees.

- Often contractors are entitled to work for different companies, which allows greater opportunity for movement and profit for entrepreneurs.

- Often contractors are provided greater flexibility and control over how their work is carried out and often the range of pay is subject to more entrepreneurial swings, both up and down, as compared to an employee.

To approach the PSB question from the perspective of the worker, if the worker clearly intended to participate in the oil and gas sector as a contractor the answer to the hypothetical question posed by the PSB rules should be no – however, intention is often not considered by the CRA or the Courts under the PSB rules.

Intention should not be ignored

Much discussion exists regarding whether the parties "intention" should be considered a relevant factor. The Federal Court of Appeal in *Wolf v. R.*,[50] confirmed intention was a relevant factor in the determination of whether Mr. Wolf was an employee or an independent contractor. Noël J.A. stated:

> …in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.[51]

Décary J.A. agreed, noting that:

> When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search.[52]

This approach was followed again by the Federal Court of Appeal in *Royal Winnipeg Ballet* where Sharlow J.A. stated "it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive." [53]

However, *Wolf v. R* and *Royal Winnipeg Ballet* address the broad question of whether a worker is an employee or an independent contractor. Whether a WorkerCo is carrying on a PSB is a more narrow question and, to date, the Tax Court of Canada has not held that intention is a relevant factor. In *609309 Alberta Ltd. et al. v. R.*,[54] the Tax Court provided the following rational for disregarding intention:

> In the context of a personal services business determination, the intention of the parties is not a helpful or relevant test for at least three reasons. Firstly, the section is an anti-avoidance provision aimed at denying the reduced small business corporate tax rate and associated tax deferral to certain corporations' businesses. The sought-after reduced rate and tax deferral could not be achieved to begin with unless the parties intended an independent contractor relationship. The anti-avoidance nature of the personal services business restrictions are discussed at length by Sharlow J.A. in *Dynamic Industries Ltd. v. R.*, 2005 FCA 211. Since the service provider in a personal services business is by definition a corporation, there is no employment alternative. Thirdly, the wording of subsection 125(7) definition requires a court to ignore the actual relationship and reasonably guess what the parties would have done had they done otherwise. Both of these considerations cause me to conclude that a subsection 125(7) personal services business determination is quite different from the ordinary *Employment Insurance*, *Canada Pension Plan* and income tax determination of whether the known, real and actual relationship between a worker and a payor constitutes employment or an independent contractor relationship.[55]

The Tax Court's reasoning was in part based on a trend that Boyle J. observed in recent case law in which Courts either did not view intention as a relevant consideration (as in *1166787 Ontario Limited v. R.*[56]), or did not speak to the parties' intentions at all (as in *Dynamic Industries Ltd. v. R.*[57] and *758997 Alberta Ltd. v. R.*[58]).

Although it is clear that the existence of WorkerCo must be ignored (as this is expressly required by the PSB rules), it is not clear that the intention should be entirely ignored. The essence of the analysis is whether the worker is carrying on a separate business. The intention of the parties regarding the nature of the relationship appears directly relevant to whether the worker was carrying on a separate business. Future cases will refine whether and to what extent intention is relevant under the PSB rules. However, it seems impractical to disregard intention altogether when carrying out this flexible, fact-based analysis.

APPENDIX A: CASE SUMMARIES

Cases where the taxpayer was found to be carrying on a PSB

Gomez Consulting Ltd. v. Her Majesty the Queen, 2013 TCC 135

In *Gomez Consulting*, the appellant carried on the business of providing information technology consulting services. In 2006 through 2008, the appellant entered into agreements with AQR Management Services Inc. for the provision of computer services by Luis Gomez Almeida ("Luis"), the principal of the appellant corporation, to the Canada Revenue Agency and the Canadian Mortgage and Housing Corporation (collectively, the "Clients"). The Minister reassessed on the basis that the appellant was carrying on a PSB. The appellant's argument relied heavily on the parties' intention. The Tax Court of Canada remarked that the courts have not been consistent in their application of intention as a factor, but in any event, the facts of the case were sufficient to conclude that the appellant had been carrying on a PSB. The appellant did not solicit any additional business while under contract with the Clients and could not subcontract without the Clients' approval. The appellant was paid on a *per diem* basis, and Luis was required to record his hours on a timesheet, with any overtime to be approved by the Clients. Luis was required to report to the Clients' premises, where he had an office, a telephone, and access to the Clients' networks. He reported to a team leader for all of his work. Neither Luis nor the appellant made any investment to provide the services, nor incurred any operating expenses in providing the services, and the only risk of loss to Luis or the appellant was the potential insolvency of AQR or of the Clients, which was not likely.

609309 Alberta Ltd. v. R., 2010 TCC 166

In *609309 Alberta Ltd. v. R.*, an individual worker, Mr. Stan Nance, worked at the Nova Chemicals Cogeneration Plant in Joffre, Alberta for Spantec Constructors Ltd. ("Spantec"). He provided his services through a corporation. Mr. Nance had been an employee of Spantec in the years prior to the incorporation of 609309 Alberta Ltd., and upon his termination, Spantec indicated it wished to continue to have Mr. Nance working on an hourly basis and Spantec would cover all "associated employment expenses." The "Personal Services" contract entered into by Mr. Nance and Spantec provided for an hourly wage of $44, the use of a company pick-up truck and reimbursement for "all related fuel and maintenance charges." Mr. Nance was required to work Monday to Thursday, 10 hours per day in his work space at Spantec's offices. Mr. Nance received a living allowance from Spantec, and was reimbursed for all expenses. These expenses were submitted on "Spantec employee expense claims." On that basis, the Court found that Mr. Nance had been carrying on a PSB.

1166787 Ontario Limited v. R., 2008 TCC 93

In *1166787 Ontario Limited v. R.*, Ms. Vanessa Lee provided services to a division of Signature Vacations Inc. ("Signature") through her numbered corporation 1166787 Ontario Limited ("1166"). Mrs. Lee was hired to manage a particular division of Signature called "Encore Cruises". The Tax Court concluded that this was a PSB because Ms. Lee was truly integrated in to Signature's business, much in the manner of a competent professional employee. Ms. Lee's business card, telephone number, fax and email address were all connected to Encore, and described her as Managing Director of Encore. She was an authorized signatory on the Encore bank accounts and had

the authority to bind Encore by contract. Her bonus entitlement was not reduced if she was unable to perform her duties (for example, if she became ill and could not work). What's more, Ms. Lee's supplies and tools were provided by Signature, which supervised and controlled her activities on a daily basis.

Carreau c. La Reine, 2006 TCC 20

In *Carreau c. La Reine*, the Court found Mr. Francois Carreau to be carrying on a personal services business through his numbered corporation 9043-5769 Quebec Inc. ("9043"). Mr. Carreau provided computer technician services only to 9043, who provided services to Sodefi Informatique Inc. ("Sodefi"), who in turn provided services to its sole client, Hydro-Quebec. Mr. Carreau was obliged to maintain the same working schedule as the Hydro-Quebec employees who were on his team, and was required to notify the IT team leader if he was ill or intended to take vacation time. The Court remarked that Mr. Carreau's "Mandatory presence at assigned places of work in accordance with a schedule established so that the Appellant can communicate with other Hydro employees accordingly leads me to believe that the Appellant was substantially integrated into the Hyrdo corporation."[59]

W.B. Pletch Company Limited v. R., 2005 TCC 400

In *W.B. Pletch Company Limited v. R.*, Mr. Gary Pletch was an employee of Thyssen Elevator Limited ("Thyssen"), a company that was acquired by a German corporation. Mr. Pletch was to continue as the President of Thyssen and was a director of 13 companies related to Thyssen. Mr. Pletch provided services through W.B. Pletch Company Limited which was paid $12,500 monthly for his services, with annual bonus based on performance. During that time, Mr. Pletch also worked full-time on his ranch. The significant performance bonuses received by Mr. Pletch allowed the Court to conclude that "there is a chance of profit in this case that might well support a finding of an independent contractor relationship".[60] That said, it was not enough to outweigh the remaining factors, which led the Court to conclude Mr. Pletch more closely resembled an employee. The long-term nature of Mr. Pletch's relationship with Thyssen as a full-time worker, and his contract provided for a fixed vacation. Mr. Pletch looked after all of Thyssen's business in Canada, he assessed and supervised managers, he evaluated personnel, he had the authority to direct the operations of Thyssen, and generally his duties were consistent with that of senior management who perform no business on their own account.

In the Court's view, Mr. Pletch still could have carried on a dual role of employee and consultant; however, "that the parties made no effort to differentiate roles is fatal, in my view, to the Appellant's case. I see no room to suggest that the contract is divisible so as to create two sources of income nor was that argued by counsel."

758997 Alberta Ltd. v. R., 2004 TCC 755

The case of *758997 Alberta Ltd. v. R.*, involves an engineer at Nova's Joffre Plant, Walter Pielasa. Mr. Pielasa incorporated 758997 Alberta Ltd. ("758") and entered into a contract with a staffing company, The Design Group Staffing Inc. ("DGS"). Mr. Pielasa had previously entered a contract personally with DGS for "temporary employment for an indefinite amount of time." DGS contracted with Bantrel Inc. who was in charge of construction projects for Nova. Mr. Pielasa was required to complete timesheets that were to be approved by Bantrel and submitted to DGS. His tools were

provided, and if he did complete any work on his home computer, the work would need to be converted before it would be of any use to Nova. Mr. Pielasa was told "what to do, when and where to do it and in some respects, how to do it." Mr. Pielasa had to be on site a Nova's plant working with a group organized by Bantrel and could not determine where he would do his work.

He was paid hourly, and DGS offered a benefits plan that included extended health coverage but 758 did not opt in. DGS issued a T4 for the wages paid to Mr. Pielasa. On the basis of all of those factors, the Court concluded that Mr. Pielasa was carrying on a PSB.

***Bruce E. Morley Law Corporation v. R.*, [2002] C.T.C. 2483**

In *Bruce E. Morley Law Corporation v. R.*, Mr. Morley was one of three senior executives of Clearly Canadian Beverage Corporation ("**CCBC**") that incorporated with the intention of carrying on a dual role as an employee of CCBC and at the same time providing consulting services through a corporation. The other two employees of CCBC successfully carried out this hybrid relationship. Their cases are discussed further below: CCBC President, Douglas Mason, in *Criterion Capital Corporation v. R.*,[61] and CCBC Vice-President, Stuart Ross, in *S & C Ross Enterprises Ltd. v. R*.[62]

Although the Court was prepared to accept that a hybrid relationship could exist, "The contract in the case at bar [between CCBC and the alleged PSB] was to provide administrative services that were to have been provided by Morley as vice-president of legal services."[63] It was not clear that Mr. Morley's corporation carried on any services outside the scope of Mr. Morley's services in his office as vice-president.

***Placements Marcel Lapointe Inc. v. M.N.R.*, [1993] 1 C.T.C. 2506**

In *Placements Marcel Lapointe Inc. v. M.N.R.*, Mr. Lapointe was offered employment as a construction project estimator for a construction company, but rejected the offer and countered that he would work as a contractor though his corporation ("**Placements**"). Under the agreement bewteen the parties, Placements was to receive 25% of the construction company's profits. In one year, there was a loss and the construction company paid Placement's expenses.

***Tedco Apparel Management Services Inc. v. MNR*, [1991] 2 C.T.C. 2669**

In *Tedco Apparel Management Services Inc. v. MNR*, Ted Cohen was hired, through "Tedco" to manage a garment business. The relationship lasted from 1980 to 1987, and in 1986 Mr. Cohen became an employee. From 1986-onward, performed the same services as he had done in years prior. He was paid based on commission, he sold the garment business' products, he had access to a company car and a corporate credit card and he received reimbursements for expenses including meals, hotels, gas, travel and vehicle repairs. The Court found that Mr. Cohen had been treated like the officer of a subsidiary, activating the PSB rules.

***533702 Ontario Ltd. v. MNR*, [1991] 2 C.T.C. 2102**

In *533702 Ontario Ltd. v. MNR*, Mr. Dick Brouwer was involved in a plumbing business which had a showroom. His wife's company, the taxpayer in issue, was hired to manage the showroom. There

was no agreement regarding payment, in fact, her payment was not addressed until after year end. There was no documentation to support the relationship – no agreement, no invoices; in fact "there was not one page of documentary evidence entered on behalf of the appellant."

Cases where the taxpayer was found not to be carrying on a PSB

Peter Cedar Products Ltd. v. R., 2009 TCC 463

This decision involved three PSB cases that were heard together. The three companies provided services to Anglo American Cedar Products Ltd. ("Anglo"). Three individuals were employees of Anglo and in 2000 they reorganized to provide their services through their respective corporations. The three individuals made up the entire sales team for Anglo's cedar shakes and shingles business. After the reorganization, they provided the same services as they had while they were employees, however, they did have "greater discretion and greater control over the purchases of product after the reorganization". What's more, after the reorganization, their commission was based on total profit, not just the volume of sales. If a loss was incurred, the three new corporations would share in the loss.

Robertson v. R., 2009 TCC 183

In *Robertson v. R.*, engineer Rick Robertson's corporation provided services to Stebnicki, Robertson & Associates Ltd. ("SRA"). All paperwork to clients was on SRA letterhead, invoices went through SRA and SRA obtained the insurance for Mr. Robertson's company. However, Mr. Robertson had to bring in his own work and his company paid its own expenses. Mr. Robertson's company billed SRA the same amount every two weeks for Mr. Robertson's services. At the end of the year either a bonus or dividend was declared in order to reduce SRA's income to $0. In 2001 and 2002, Mr. Robertson's company received bonuses of $175,000 and $207,000 respectively.

The Tax Court remarked that "Counsel for the Appellants submitted that the most significant tools that any professional has is his education, experience and insight, and certainly the ownership of those tools rested with Robertson. I agree."

Galaxy Management Ltd. v. R., 2005 TCC 674

In *Galaxy Management Ltd. v. R.*, the Court had to consider whether a long term employee had effectively switched to independent contractor status. The paperwork executed by the former employee, Mr. Lawrence Yue, his company Galaxy Management Ltd. ("Galaxy") and Mr. Yue's former employer was "poorly drafted and unclear... cobbled together using inappropriate precedents" (para. 17). However, the Court found that, in substance, the parties intended to and did in fact transform the relationship into one of independent contractor. Mr. Yue became responsible for his own expenses, including an office, computer, camera and phone.

Dynamic Industries Ltd. v. R., 2005 FCA 211

Mr. Martindale was an ironworker who incorporated and worked for "SIIL," a company that worked primarily for Fording Coal. Mr. Martindale was compensated on a "cost plus" basis per hour (with increased overtime rates) on an irregular basis. He had carried on a consulting business with SIIL for

several years prior to those in issue, and SIIL exercised little control of Mr. Martindale, who was responsible for all of his work, including correcting his errors.

Applying *Wiebe Door* and *Sagaz,* the Federal Court of Appeal concluded that Mr. Martindale was entitled to the small business deduction despite the fact that he was compensated hourly with higher rates for overtime, received additional amounts to cover "certain direct costs of the work", and had at one point received a gratuitous bonus. The Court also overlooked the fact that Mr. Martindale had only provided services to one corporation, SIIL, during the years under appeal.

Criterion Capital Corporation v. R., [2001] 4 C.TC. 2844

In the years at issue, Mr. Mason, who was the President and CEO of CCBC, received considerable salary, stock options and retirement contributions from his employment with CCBC. The focus of his employment was oriented towards the day-to-day operations of CCBC. During that time, Mr. Mason also provided consulting services to CCBC through his corporation, Criterion. Through Criterion, Mr. Mason sought out new financing opportunities and new business opportunities.

Criterion had its own office, office supplies, and exercised its right to provide services to other businesses. The consulting services were provided at Criterion's offices in a manner determined by Mr. Mason independently of CCBC. Mr. Mason provided the tools and knowledge necessary and Criterion was not reimbursed for its expenses. The consulting arrangement was clearly defined and the Court refused to apply the PSB provisions.

S & C Ross Enterprises Ltd. v. R., [2002] 4 C.T.C. 2598

In *S & C Ross Enterprises Ltd. v. R.*, as in *Criterion*, Mr. Ross was responsible for day-to-day activities as an employee of CCBC, and provided advice in respect of analyzing financial statements with respect to a proposed acquisition as a consultant. His consulting services were provided with his own tools (which he rented from CCBC), and he was not reimbursed for expenses, which created a risk of loss. What's more, Mr. Ross exercised his right to provide consulting services to other businesses.

Mr. Ross and Mr. Mason had clearly defined consulting relationships, which assisted in protecting their interests and avoiding the application of the PSB rules.

Gitchee Gumee Consultants Ltd. v. Canada, [1995] 2 C.T.C. 2764

In *Gitchee Gumee Consultants Ltd. v. Canada*, a tenured professor took a two-year leave of absence from teaching and accepted a contract to advise the Saskatchewan Department of Education in connection with home schooling. He was paid on a fee per day and was reimbursed for all expenses. He provided the services at his home office as well as at an office provided by the Department.

Healy Financial Corp. v. R., 94 D.T.C. 1705

Christopher Healy was a director, a 50% shareholder, and the president of Network Personnel Inc. ("Network"). The Court concluded that Mr. Healy's corporation was not carrying on a PSB because he

had no office at Network's premises and he was rarely involved in the day-to-day operations of Network.

Crestglen Investments Limited v. MNR, [1993] 2 C.T.C. 3210

In *Crestglen Investments Limited v. MNR*, a worker was hired to manage a shopping plaza through his corporation. The Court pointed to the lack of supervision, the "inexactitude" of the remuneration and the worker having an office in his home as factors indicating the use of a PSB.

Société de Projets ETPA v. MNR, [1993] 1 C.T.C. 2392

In this case, Mr. Paquin, a long-term employee of a marketing company, incorporated and continued to provide the same services as a commissioned salesman through the corporation. Mr. Paquin held himself out as a representative of the corporation and did his work largely unsupervised. An important factor identified by the Court was that the payor corporation stopped contributing to the worker's pension plan.

David T. MacDonald Co. v. MNR, [1992] 2 C.T.C. 2607

A 20-year employee of a shoe importing company incorporated and then provided his services as a general manager consultant. He received an annual fee, payable in monthly installments which was to increase based on the cost of living. He had a company car and could sign some documents on behalf of the payor corporation. However, he was not closely supervised, and if sales were poor for a prolonged period of time, his contract would be terminated. The Court did not apply the PSB rules.

Huschi v. MNR, [1989] 1 C.T.C. 2057

John Huschi was hired, through his corporation, to manage two radio stations. He was paid monthly on a commission basis. The payor agreed to cooperate in respect of annual holidays and fringe benefits. The Court reviewed the analysis from *Wiebe Door* and concluded that Mr. Huschi was not carrying on a PSB.

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[1] Department of Finance, *Explanatory Notes to a Bill Amending the Income Tax Act*, December 1982, 86(9).

[2] Standing Committee on Finance, *Servant or Master? Differing Interpretations of A Personal Services Business,* (Ottawa: Finance, 2010) online: http://www.parl.gc.ca. The recommendation was not accepted.

[3] *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.) ("the Act"), s. 8(2).

[4] See Dale T. Briggs, *Expense Deducibility: Are We All on the Same Page?* 2012 Atlantic Provinces Tax Conference, (Toronto: Canadian Tax Foundation, 2012) 5 1-27.

[5] *Bond v. MNR*, [1946] Ex CR 577, overruled by s. 6(6) of the *Income War Tax Act*.

[6] *J.D. Harbron v. MNR* (1958), 18 Tax ABC 385.

[7] Canada, *Report of the Royal Commission on Taxation*, vol. 3 (Ottawa: Queen's Printer, 1966).

[8] *Royal Commission*, *supra* note 7, vol. 3, 284-85.

[9] *Ibid.* vol. 3, 290.

[10] E.J. Benson, *Proposals for Tax Reform* (Ottawa: Queen's Printer, 1969), at 16.

[11] See for example: Gwyneth McGregor, *Employees' Deductions Under the Income Tax Act*, Canadian Tax Paper no. 21 (Toronto: Canadian Tax Foundation, 1960) and F.E. LaBrie, *The Principles of Canadian Income Taxation* (Don Mills, ON: CCH Canadian, 1965).

[12] Under SC 1977-78, c. 1, s. 4, the initial $150 maximum was increased to $250. SC 1979, c. 5, s. 1 increased the maximum to $500. SC 1984, c. 1, s. 3(1) increased the 3% limit to 20%.

[13] Canada, Department of Finance, *The White Paper: Tax Reform 1987* (Ottawa: Department of Finance, 1987).

[14] Federal budget, *Notice of Way and Means Motion*, May 2, 2006.

[15] *Ibid.* at Resolution (5) "Canada Employment Credit".

[16] Indexed for inflation since 2007 under s. 117.1 of the Act.

[17] See, for example: s. 8(f) commissioned salesperson expenses; s. 8(h) certain travel expenses; s. 8(p) musical instrument expenses for musicians; s. 8(q) expenses incurred by artists; and s. 8(r) mechanics tools.

[18] Paragraph 18(1)(p) of the Act.

[19] Department of Finance Canada, *Tax Expenditures and Evaluations 2012*, (Ottawa: Government of Canada, 2012) online: http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp1201-eng.asp at page 22.

[20] *Ibid.*

[21] F. Vaillancourt and J. Clemons, "Compliance and Administrative Costs of Taxation in Canada," in *The Impact and Cost of Taxation in Canada: Case for a Flat Tax*, ed. by J. Clemens, Fraser Institute, 2008, 55-102; see also G. Akerlof, "The Market for Lemons: Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics*, 48(3), 1970, pp. 488-500.

[22] Duanjie Chen and Jack Mintz, *Small Business Taxation: Revamping Incentives to Encourage Growth*, (2011)4:7 SPP Research Papers at p. 1: "In contradiction to the widely held view that small business tax concessions encourage growth, such small business tax relief could actually be antithetical to growth by creating a "taxation wall." First, it could result in the breakup of companies into smaller, less efficient-sized units in order to take advantage of tax benefits even if there are economic gains to growing in size. Second, it could encourage individuals to create small corporations in order to reduce their personal tax liabilities rather than grow companies. And third, it could lead to a "threshold effect" that holds back small businesses from growing beyond the official definition of "smallness," regardless of the criteria for measuring size (e.g., the size of revenue or assets, or the number of employees)."

[23] *Ibid.*, at 5: "Despite claims that small businesses are responsible for much job creation, there are few studies to support such claims. …it is critical that the federal and provincial governments should undertake the equivalent of a "tax expenditure" analysis to determine the effectiveness of current incentives to small business since so little evidence is available to support them.

[24] Federal Budget 2009 (increased the limit to $500,000), *Federal Budget 2009*, (Ottawa: Finance, 2009) online: http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp1201-eng.asp at Annex 5 "Tax Measures: Supplementary Information and Notices of Ways and Means Motions".

[25] Federal Budget 2006 (increased the limit to $400,000) *Federal Budget 2006*, (Ottawa: Finance, 2006) online: http://www.fin.gc.ca/budget06/bp/bpc3b-eng.asp.

[26] Federal Budget 2004 (increased the limit to $300,000) *Federal Budget 2004*, (Ottawa: Finance, 2004) online: http://www.fin.gc.ca/budget04/bp/bpa9a-eng.asp.

[27] Canada: Technical Committee on Business Taxation, *Report*, 1997, Ottawa: Finance Canada (available at http://www.fin.gc.ca) at 5.9. In addition, 36% of the companies that claimed the small business deduction paid salaries of less than $100,000 and 9% of such businesses paid no salaries at all.

[28] *Income Tax Act*, *supra* note 3, s. 125(7). Emphasis added.

[29] For 2013, the general corporate tax rate in Alberta is 25% (15% federal and 10% provincial) and the small business tax rate applicable to the first $500,000 of taxable income is 14% (11% federal and 3% provincial).

[30] 87 DTC 5025.

[31] [2001] 2 SCR 983.

[32] 2006 FCA 87.

[33] See for example: Dale T. Briggs, Expense Deducibility: *Are We All on the Same Page? 2012 Atlantic Provinces Tax Conference*, (Toronto: Canadian Tax Foundation, 2012) 5 1-27; Kurt Wintermute, "A Worker's Status as Employee or Independent Contractor", (2007) 34 Canadian Tax Foundation Conference Report, 1–37. Timothy W. Clarke, The Employee/Independent Contractor Conundrum, 2004 *British Columbia Tax Conference*, (Vancouver: Canadian Tax Foundation, 2004), 10:1-33; Lara Friedlander, *What has Tort Law got to do with it? Distinguishing Between Employers and Independent Contractors in the Federal Income Tax, Employment Insurance, and Canada Pension Plan Contexts*, (2003) 51: 4 Canadian Tax Journal 1467-1519; and, Joanne Magee, *Whose Business Is It?*, (1997) 45:3 Canadian Tax Journal, 584–603.

[34] *Sagaz*, *supra* note 31 para. 47.

[35] See, for example: Canada Revenue Agency, RC4110, *"Employee or Self-Employed?"* online: http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-12e.pdf.

[36] *Sagaz*, *supra* note 31 para. 35.

[37] In *McKee & Bribet Holdings Inc. v Reid's Heritage Homes Ltd*., 2009 ONCA 916, the main issue was whether Ms. McKee was an employee or a contractor. RHH argued that Ms. McKee was not an employee and as such was not entitled to reasonable notice. In its judgment, the Court of Appeal recognized the existence of a third category of worker (the dependent contractor) and held that a dependent contractor can be "defined by economic dependency in the work relationship requiring, *inter alia*, some reasonable notice of termination".

[38] 2005 FCA 211.

[39] 2011 FCA 349.

[40] See for example, *Gomez Consulting Ltd. v. the Queen*, 2013 TCC 135; *609309 Alberta Ltd. v. R.*, 2010 TCC 166; *Carreau c. La Reine*, 2006 TCC 20; *758997 Alberta Ltd. v. R.*, 2004 TCC 755; *Placements Marcel Lapointe Inc. v. MNR*, [1993] 1 CTC 2506; and *Tedco Apparel Management Services Inc. v. MNR*, [1991] 2 CTC 2669.

[41] See for example, *W.B. Pletch Company Limited v. R.*, 2005 TCC 400 and *Bruce E. Morley Law Corporation v. R.*, 2002 DTC 1547, [2002] CTC 2483. In *W. B. Pletch*, the worker provided advisory and executive services through his corporation and was found to be operating a personal services business because the arrangement failed to differentiate between the two roles. In *Bruce E. Morley*, the worker's corporation was contracted to provide the same services that the worker was obligated to provide to the payor corporation as vice president of legal services. The contracts failed to show that the worker's corporation provided any services outside of his services as an officer of the company. See also *533702 Ontario Ltd. v. MNR*, 91 DTC 982, [1991] 2 CTC 2102, where the absence of any documentary evidence was given significant weight.

[42] See for example, *1166787 Ontario Ltd. v. R.*, 2008 TCC 93.

[43] See *Peter Cedar Products Ltd. v. R.*, 2009 TCC 463; *Galaxy Management Ltd. v. R.*, 2005 TCC 674 and *Société de Projets ETPA Inc. v. MNR*, [1993] 1 CTC 2392.

[44] See *Criterion Capital Corporation v. R.*, [2001] 4 CTC 2844 and *S & C Ross Enterprises Ltd. v. R.*, [2002] 4 CTC 2598.

[45] See *Peter Cedar*; *Healy Financial Corp. v. R.*, [1994] 2 CTC 2168; *Crestglen Investments Limited v. MNR*, [1993] 2 CTC 3210; *David T. MacDonald Co. v. MNR*, [1992] 2 CTC 2607 and *Huschi v. MNR*, [1989] 1 CTC 2057.

[46] See *Robertson v. The Queen*, 2009 TCC 183; *Dynamic*; *MacDonald*; *Huschi* and *Gitchee Gumee Consultants Ltd. v. Canada*, [1995] 2 CTC 2764.

[47] *609309 supra* note 40 paras. 4, 10-12 and 15.

[48] 2008 TCC 93.

[49] *Ibid.* paras. 5-6, 9, 12 and 26-29.

[50] [2002] 3 CTFCA 96.

[51] *Ibid.* para. 122.

[52] *Ibid.* para. 119.

[53] *Royal Winnipeg Ballet*, *supra* note 32 para. 64. In a strong dissent, Evans J.A. stated that "When a dispute arises over the proper legal character of a contract, there are good reasons to attach little if any weight to the parties' understanding of it, or to their objective in entering into the contract."

[54] *609309*, *supra* note 40.

[55] *Ibid.*, para. 23.

[56] *1166787*, *supra* note 41.

[57] *Dynamic Industries*, *supra* note 38.

[58] *758997*, *supra* note 40.

[59] *Carreau c. La Reine*, 2006 TCC 20, para. 26.

[60] *W.B. Pletch Company Limited v. R.*, 2005 TCC 400, para. 10.

[61] [2001] 4 CTC 2844.

[62] [2002] 4 CTC 2598.

[63] *Bruce E. Morley Law Corporation v. R.*, [2002] CTC 2483, para. 44.