Docket: 2013-2175(IT)G

BETWEEN:

IVAN CASSELL LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 15, 2015,
at Corner Brook, Newfoundland and Labrador

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Bruce S. Russell, Q.C Megan Seto
Counsel for the Respondent:	Melanie Petrunia

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2008, 2009 and 2010 taxation years, by notices dated May 7, 2013 and June 3, 2011, is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 3rd day of March 2016.

"J.R. Owen"

Owen J.

Citation: 2016 TCC 53
Date: 20160303
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REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] This is an appeal by Ivan Cassell Limited ("ICL") of the reassessment of its 2008, 2009 and 2010 taxation years[1] by notices of reassessment dated May 7, 2013 for 2008 and 2009 and June 3, 2011 for 2010 (collectively, the "Reassessments"). During these three taxation years (collectively, the "Taxation Years"), Mr. Ivan Cassell provided services to Western Petroleum Newfoundland Limited ("WPNL") in his capacity as president of ICL.

[2] The Reassessments denied ICL's claim for the small business deduction provided for by subsection 125(1) of the *Income Tax Act* (the "ITA") and also applied paragraph 18(1)(*p*) of the ITA to deny the deduction of certain expenses

[1] The fiscal period of ICL was February 1 to January 31. Accordingly, the 2008 taxation year of ICL was February 1, 2007 to January 31, 2008, the 2009 taxation year of ICL was February 1, 2008 to January 31, 2009 and the 2010 taxation year of ICL was February 1, 2009 to January 31, 2010.

incurred by ICL, all on the grounds that ICL's business of providing services to WPNL was a "personal services business" ("PSB") as defined in subsection 125(7) of the ITA.

[3] ICL concedes that Mr. Cassell was an incorporated employee and a specified shareholder of ICL for the purposes of the PSB definition and that the exceptions in paragraphs (*c*) and (*d*) of the PSB definition do not apply. The sole issue in this appeal is whether Mr. Cassell would reasonably be regarded as an officer or employee of WPNL but for the existence of ICL.

II. Facts

[4] Mr. Ivan Cassell testified on behalf of ICL. The Respondent did not call any witnesses.

[5] Mr. Cassell's background is primarily in the retail side of the oil and gas business.[2] During the 1970s and early 1980s, he worked for, among others, major oil and gas companies, typically managing their relationships with independent agents that sold their products in the retail market.

[6] Mr. Cassell incorporated ICL in August 1983 to operate a home comfort centre for Imperial Oil. ICL is owned 75% by Mr. Cassell and the balance is held by his spouse and daughter. After a couple of years of conducting that business through ICL, Mr. Cassell went to work for Ultramar for about six years as a supervisor. In that capacity, he looked after all the independent retail agents of Ultramar located on the west coast of Newfoundland and in southern Labrador.

[7] In 1990, Mr. Cassell left his employment with Ultramar. At that time, Ultramar was streamlining its retail business and was offering for sale areas of retail business outside the major urban centres in Newfoundland. ICL purchased one of these areas in 1990. From that point in time forward, Mr. Cassell concentrated on growing ICL's retail oil and gas business, in large part by having that corporation acquire gas stations in areas that the major oil companies were leaving. From 1990 until 2005, the retail oil and gas business of ICL was carried on under the business name Western Petroleum.

[2] Mr. Cassell described the retail side of the oil and gas business as including home heating oil delivery, commercial diesel fuel, retail gasoline, delivery of marine diesel, and anything else to do with the retail side of the business. The business did not include oil or gas wells or the production of oil or gas.

[8] WPNL was incorporated in 2005. The direct shareholders of WPNL are two other corporations each of which holds 50% of the common shares and 50% of the preferred shares issued by WPNL. One of the shareholders of WPNL is Cassell Holdings Ltd. The common shares issued by that corporation are owned by the Cassell Family Trust (2005) and the preferred shares are owned 50% by ICL and 50% by Mr. Cassell's spouse. The other corporate shareholder of WPNL is owned by persons dealing at arm's length with ICL and Mr. Cassell.

[9] In 2005, ICL transferred the Western Petroleum business to WPNL. WPNL continued to grow the Western Petroleum business and, from 2005 to 2010, the business expanded from the west coast of Newfoundland to the whole of Newfoundland. Mr. Cassell estimated that during the taxation years in issue WPNL employed from 50 to 67 individuals, depending on the time of year. Mr. Cassell testified that the functions that ICL performed for WPNL after the transfer of the Western Petroleum business to WPNL were essentially the same as the functions that he had performed as an employee of ICL prior to the transfer of that business.[3]

[10] Mr. Cassell was the president and a director of WPNL during the Taxation Years. The vice-president of WPNL during the same period was Mr. Luke Reynolds, who was also a director of WPNL. Mr. Reynolds was subsequently bought out and he retired. The head office of WPNL was in Stephenville, Newfoundland.

[11] Mr. Cassell testified that he did not have any specific duties to perform for WPNL in his capacity as president and a director of WPNL. In addition, he was not paid any remuneration by WPNL, did not have an office at any of WPNL's locations and did not hold himself out as an officer or director of WPNL in his dealings with others. Mr. Cassell did, however, sign documents in his capacity as a director of WPNL.

[12] Mr. Cassell personally performed management services for WPNL in his capacity as president of ICL. According to Mr. Cassell, ICL did not receive specific direction from WPNL regarding these services. Typically, Mr. Cassell would meet weekly with Mr. Reynolds to determine the direction that WPNL should take for the following week. In cross-examination, Mr. Cassell stated that

[3] Lines 17 to 21 of page 59 of the transcript of the hearing held at Corner Brook, Newfoundland and Labrador, on October 15, 2015 (the "Transcript").

"anything that we would do on behalf of Western [WPNL] would be consulted between myself and Luke Reynolds".[4]

[13] Mr. Cassell had the use of a car and pick-up trucks owned by WPNL. These vehicles were also available to the employees of WPNL. If Mr. Cassell attended the head office of WPNL, he would work at a makeshift desk that was comprised of a desktop placed on banker's boxes.

[14] Mr. Cassell maintained an office in his residence in Steady Brook, Newfoundland, which is about 90 km from WPNL's head office in Stephenville. There he would type letters and receive faxes and e-mails. Any letter typed for WPNL would be on WPNL letterhead and any letter typed for ICL would be on ICL letterhead.

[15] Mr. Cassell testified that after the transfer of the Western Petroleum business to WPNL, ICL provided "management" services to WPNL under an oral agreement. In cross-examination, Mr. Cassell accepted the Respondent's description of these services as "involvement in negotiations, banking, negotiating contracts, dealing with suppliers".[5] Mr. Cassell would travel to meet with the suppliers.

[16] The oral agreement between ICL and WPNL was replaced with a written agreement at some point after 2010. A copy of the written agreement was entered into evidence by ICL as Exhibit A-1. Mr. Cassell stated that the oral agreement in place prior to the execution of the written agreement "was basically the same as right here, as this in writing".[6] The agreement stated that it was executed on the "1st day of February, 2005". In cross-examination, Mr. Cassell agreed that the agreement was prepared after 2010 but said that it "had to be backdated for then".[7]

[17] WPNL paid ICL a monthly fee for the services performed by Mr. Cassell. For ICL's 2008 taxation year, the monthly fee was $20,000. This was increased to $30,000 a month for ICL's 2009 and 2010 taxation years. In addition, WPNL paid ICL a further $400,763 in 2008, $460,310 in 2009 and $536,737 in 2010. Mr. Cassell described the additional lump sum payments as a "success fee" that was

[4] Line 28 of page 44 and lines 1 and 2 of page 45 of the Transcript.
[5] Lines 4 to 8 of page 51 of the Transcript.
[6] Lines 13 and 14 of page 15 of the Transcript.
[7] Lines 3 to 8 of page 50 of the Transcript.

paid only if WPNL had a good year and the payment did not breach covenants provided by WPNL to its bank.[8]

[18] During the three Taxation Years, ICL had office expenses of $2,517, $0 and $121 and paid professional fees of $800, $4,797 and $12,641. ICL also paid a salary to Mr. Cassell's spouse of $60,000, $62,000 and $125,000.

[19] In cross-examination, Mr. Cassell conceded that the written agreement (Exhibit A-1) provided for the payment of the monthly fee but did not provide for the payment of the "success fee". In addition, while the written agreement required ICL to submit to WPNL a monthly invoice, in fact no invoices were submitted by ICL to WPNL in respect of the services provided by ICL during the Taxation Years. It emerged from Mr. Cassell's testimony that the matter of the need for invoices was raised by a Canada Revenue Agency auditor after 2010.

[20] Mr. Cassell testified that, as far as he could recall, at some point in 2008 or 2009, "success fees" were not paid by WPNL to ICL because of WPNL's covenants with the bank.[9] He also stated that these same covenants did not affect bonuses payable to senior employees of WPNL, such as the operations manager and the sales manager. In cross-examination, Mr. Cassell was not able to identify the actual year(s) of non-payment. He agreed, however, that WPNL paid ICL a total of $640,763 in ICL's 2008 taxation year and $820,310 in ICL's 2009 taxation year and that these totals included the monthly fees payable for those years and success fees of some $400,763 and $460,310.[10]

[21] Mr. Cassell testified that ICL also did management and consulting work for a company called West Coast Excavating Limited ("WCEL"), of which he was president. He described WCEL as a contracting company that does municipal work and sand and gravel. In cross-examination, Mr. Cassell agreed that he was not paid by WCEL in his capacity as president of that corporation. With respect to the consultancy services provided by ICL, Mr. Cassell acknowledged that there was no written agreement between ICL and WCEL and that ICL did not invoice WCEL for its services. He also acknowledged that no formal distinction was drawn between his appointment as president of WCEL and WCEL hiring ICL as a management consultant.

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[8] Lines 12 to 15 of page 27 of the Transcript.
[9] Lines 16 to 28 of page 27 and lines 1 to 21 of page 28 of the Transcript.
[10] Lines 5 to 28 of page 48 and lines 1 to 9 of page 49 of the Transcript.

[22] Throughout the Taxation Years, ICL owned six commercial properties that were leased to arm's length third parties. Exhibit A-2 contains copies of four leases identified by Mr. Cassell as pertaining to four of these properties. Two of the properties were leased by ICL as a gas bar, restaurant and convenience store, one of the properties was leased by ICL as a gas bar and convenience store and the fourth property was leased by ICL to a funeral home. In addition to these properties, Mr. Cassell testified that there were two other properties, both of which were leased as a gas bar and convenience store. The six properties were located at or near Crabbes River, Stephenville, Deer Lake, Springdale, Roddickton and Corner Brook, Newfoundland.

[23] Mr. Cassell testified that the leased properties were low maintenance but would require ICL's attention approximately once every six weeks to three months "if there was no problem", for example, if a gas pump needed repair. In addition, an ICL representative would visit each property two or three times a year. All but one of the properties was within an approximate two-hour drive of Steady Brook. The sixth property was much further away. Any e-mail communication or preparation of correspondence regarding the six properties would take place at Mr. Cassell's home office in Steady Brook.

[24] In cross-examination, Mr. Cassell acknowledged that some of the properties owned by ICL generated income for WPNL and that some of the tenants of these properties were not paying the rent owed to ICL. However, ICL did not pursue the delinquent tenants for this rent because the properties generated income for WPNL. In re-examination, Mr. Cassell explained that provincial regulations limited the margins available to gas station operators and that it was better for ICL to forgo the rent in favour of potentially higher management fees than to drive the tenant out of business by demanding payment of the rent. As well, he testified that some delinquent tenants were pursued for the rent and that the decision whether or not to pursue a delinquent tenant was made on a case-by-case basis.

A. The Position of the Appellant

[25] The Appellant submits that it is not the case that Mr. Cassell would reasonably be regarded as an officer or employee of WPNL but for the existence of ICL. Mr. Cassell would not be an officer because the definitions of "office" and "officer" in the ITA, taken together, require that to be an officer Mr. Cassell must be entitled to a fixed or ascertainable stipend or remuneration. The Appellant submits that Mr. Cassell is not so entitled, and that, in the absence of ICL, he would not be entitled to either a fixed stipend or fixed remuneration.

[26] With respect to whether Mr. Cassell would be considered an employee, the Appellant submits that the factors described in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (FCA) (*Wiebe Door Services*) and confirmed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (Sagaz Industries) are applicable. The Appellant identifies these factors as the degree of control, ownership of tools, chance for profit and risk of loss. The Appellant submits that, when these factors are applied to the facts, it is clear that Mr. Cassell would not have been an employee of WPNL had there been no ICL. Specifically, Mr. Cassell was not controlled by WPNL in his work; he worked out of his home office and did not have an office provided by WPNL; and ICL could profit from the provision of services to WPNL by being efficient. With respect to the risk of loss, the Appellant pointed to Mr. Cassell's testimony regarding WPNL's failure to pay ICL.

B. The Position of the Respondent

[27] The Respondent submits that, in a case such as this, the factors in *Wiebe Door Services* must be approached with caution and that the totality of the circumstances must be considered. When that is done, it is clear that Mr. Cassell would have been an employee of WPNL but for the existence of ICL. Specifically, the Respondent noted that, in cross-examination, Mr. Cassell conceded that WPNL did not differentiate between Mr. Cassell's role as its president and his role as a provider of services on behalf of ICL. The Respondent submitted that, by virtue of the decision of Hershfield J. in *W. B. Pletch Company Limited v. The Queen*, 2005 TCC 400 (Pletch), the failure to differentiate between the roles played by Mr. Cassell as president of WPNL and as a service provider through ICL was fatal to the Appellant's case.

[28] The Respondent submitted, that even if the factors identified in *Wiebe Door Services* are applied, they still lead to the conclusion that the business of ICL was a PSB during the Taxation Years. With respect to control, the Respondent points to the requirement in the written services agreement that ICL perform the services to the satisfaction of WPNL and to the weekly meetings between Mr. Cassell and Mr. Reynolds in which the direction for the following week was discussed. The Respondent also submits that, as V. Miller J. observed in *1166787 Ontario Limited v. The Queen*, 2008 TCC 93 (1166787), there is little expectation that management services provided by a high-level professional will be closely supervised.

[29] The Respondent submits that the ownership of tools is not particularly relevant given the nature of the services provided. However, the provision of an

automobile is consistent with employee status. With respect to the risk of loss, the Respondent submits that there was little risk of loss given that ICL was entitled to be compensated for certain expenses. With respect to the opportunity for profit, the monthly fee and annual bonus payable to ICL was the same fee arrangement as in *1166787*, in which V. Miller J. describes the payment structure as "not the commercial risk or chance of profit that a proprietor has for running her own business." The Respondent also submits that the lack of investment (other than in time) and the lack of advertising demonstrate little entrepreneurial risk, and that the only risk was the potential failure of WPNL.

III. Analysis

[30] The issue in this case is whether ICL's business of providing management services to WPNL is a PSB or "personal services business". If it is, the income from that business is not eligible for the small business deduction provided for by subsection 125(1) of the ITA, and outlays or expenses incurred to gain or produce income from that business are subject to the limitations on deductibility set out in paragraph 18(1)(*p*) of the ITA.

[31] The definition of "personal services business" in subsection 125(7) of the ITA states:

> "personal services business" carried on by a corporation in a taxation year means a business of providing services where
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> > (*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 but for 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;

[32] ICL concedes that Mr. Cassell is an "incorporated employee" and a specified shareholder of ICL for the purposes of the PSB definition and that the exceptions in paragraphs (*c*) and (*d*) of the PSB definition do not apply. ICL denies that Mr. Cassell would reasonably be regarded as an officer or employee of WPNL but for the existence of ICL.

[33] The PSB definition was considered by the Federal Court of Appeal in *Dynamic Industries Ltd. v. The Queen*, 2005 FCA 211 (Dynamic Industries). With respect to the history of the relevant provisions of the ITA, Sharlow J.A. observed (at paragraphs 39 and 44):

> 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* . . . .
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> . . .
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> 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. . .

[34] Sharlow J.A. went on to state that the issue raised by the definition – in this case, whether Mr. Cassell would reasonably be regarded as an officer or employee of WPNL but for the existence of ICL – required consideration of the decisions in *Wiebe Door Services* and *Sagaz Industries* (at paragraph 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.

[35] For the sake of completeness, I would add to the two cases cited by Sharlow J.A. the subsequent decision of the Federal Court of Appeal in *1392644 Ontario Inc. o/a Connor Homes v. M.N.R.*, 2013 FCA 85 (Connor Homes).

[36] In *Sagaz Industries*, the issue was whether Sagaz Industries (SI) was vicariously liable for a bribery scheme perpetrated by a consultant of SI. In the circumstances of the case, this turned on whether the consultant was an employee of SI or an independent contractor.

[37] In considering this issue, Major J. first described the policy basis for imposing vicarious liability on SI for the acts of an employee but not for the acts of an independent contractor:

> . . . 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 addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. Each of these policy justifications is relevant to the ability of the employer to control the activities of the employee, justifications which are generally deficient or missing in the case of an independent contractor. . . . However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. For the reasons discussed below, reliance on control alone can be misleading, and there are other relevant factors which should be considered in making this determination.[11]

[38] It is of particular note that, even though Major J. identified control as an important policy basis for the imposition of vicarious liability on employers for the acts of employees, he did not consider control to be the only basis for determining whether an individual was an employee or an independent contractor. In fact, he cautioned that "reliance on control alone can be misleading". This is particularly so when one is addressing circumstances involving services provided by a professional or by an owner or high-level manager of the business receiving the services.

[39] Major J. then undertook a detailed review of the distinction between an employee and an independent contractor. He started by noting that MacGuigan J.A. thoroughly reviewed the relevant case law in *Wiebe Door Services*, which decision Major J. cited favourably many times in his consideration of the issue.

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[11] *Sagaz Industries*, *supra*, at paragraph 35.

MacGuigan J.A.'s review identified the various tests that had been adopted by the courts since the mid-nineteenth century: the control test, the entrepreneur test, the organization test and the enterprise risk test. In the end, however, drawing on the analysis of MacGuigan J.A., Major J. concluded that no one test was conclusive:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . . " (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:
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> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose. . . . The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
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> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. ***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.[12] [Emphasis added.]

[40] More recently, in *Connor Homes*, the Federal Court of Appeal reaffirmed the correct approach to the employee versus independent contractor analysis, but also addressed the role of common intention:

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[12] *Sagaz Industries*, *supra*, at paragraphs 46 and 47.

> The ultimate question to determine if a given individual is working as an employee or as an independent contractor is deceivingly simple. It is whether or not the individual is performing the services as his own business on his own account . . . .
>
> . . .
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> MacGuigan J.A. redefined the integration test by providing that it applied only from the worker's perspective, and he considerably limited its use. Significantly, however, MacGuigan J.A. established the principle that there are no specific and determinative criteria that can be used, but rather "[w]hat must always remain the essence is the search for the total relationship of the parties": *Wiebe Door* at p. 563. He concluded that there is only one test: "I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, *supra*, calls 'the combined force of the whole scheme of operations', even while the usefulness of the four subordinate criteria is acknowledged": *ibid* at p. 562. In essence, the question to be addressed is "[w]hose business is it?": *ibid* at p. 563.
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> Major J., writing for the Supreme Court of Canada in *Sagaz*, approved the approach of MacGuigan J.A. in *Wiebe Door*, and added that 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.": *Sagaz* at para. 47. In making this determination, no particular factor is dominant and there is no set formula. The factors to consider may thus vary with the circumstances and should not be closed. Nevertheless, certain factors will usually be relevant, such as the level of control held by the employer over the worker's activities, and whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.
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> . . .
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> The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.[13]

[41] With respect to common intention, the Court stated:

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[13] *Connor Homes* at paragraphs 23, 28, 29 and 41.

> . . . *Royal Winnipeg Ballet* stands for the proposition that what must first be considered is whether there is a mutual understanding or common intention between the parties regarding their relationship. Where such a common intention is found, be it as independent contractor or employee, the test set out in *Wiebe Door* is then to be applied by considering the relevant factors in light of that mutual intent for the purpose of determining if, on balance, the relevant facts support and are consistent with the common intent. . . .
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> . . .
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> . . . properly understood, the approach set out in *Royal Winnipeg Ballet* simply emphasises the well-know[n] principle that persons are entitled to organize their affairs and relationships as they best deem fit. The relationship of parties who enter into a contract is generally governed by that contract. Thus the parties may set out in a contract their respective duties and responsibilities, the financial terms of the services provided, and a large variety of other matters governing their relationship. However, the legal effect that results from that relationship, *i.e.* the legal effect of the contract, as creating an employer-employee or an independent cont[r]actor relationship, is not a matter which the parties can simply stipulate in the contract. In other words, it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so.[14]

[42] I will first consider the role of common intention in the application of the PSB definition. As observed by Mainville J.A. in *Connor Homes*, the importance of common intention or mutual understanding is rooted in the principle that parties are entitled to organize their affairs and relationships as they deem fit. Importantly, however, common intention or mutual understanding can only be relevant to the analysis if the parties to the arrangement under scrutiny have an agreement (written or oral) with one another.[15] Here, the relevant agreement is between ICL and WPNL. In circumstances such as these, there can be no mutual understanding or common intent to consider in assessing whether Mr. Cassell would reasonably be regarded as an employee of WPNL but for the existence of ICL. The hypothetical circumstance imposed by the PSB definition in order to achieve its anti-avoidance objective simply precludes any such analysis.[16]

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[14] *Connor Homes* at paragraphs 33 and 36.

[15] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paragraph 47, the Supreme Court of Canada reiterated that the goal of contractual interpretation is to determine "the intent of the parties and the scope of their understanding" (the Court cited *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 at paragraph 27 and also referred to *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 at paragraphs 64 and 65). In the absence of an agreement between the parties relevant to the employee/independent contractor analysis, there is nothing to determine.

[16] See, also, the analysis of Lyons J. in *C.J. McCarty Inc. v. The Queen*, 2015 TCC 201.

[43] As to whether Mr. Cassell would reasonably be regarded as an officer or employee of WPNL but for the existence of ICL, the above cases make clear the fact that "no particular factor is dominant" and that "there is no set formula". Instead, the factors to consider are open-ended and vary with the circumstances. This approach is particularly appropriate for the interpretation of the PSB definition, which requires the assessment of the relationship to be made in light of a hypothetical (i.e., the non-existence of ICL). Such a hypothetical situation can only properly be addressed by considering all the facts and circumstances to determine whether the "incorporated employee" was acting in a manner consistent with being an employee of the entity receiving the services or with being an independent contractor.

[44] I also note that while the PSB definition asks whether Mr. Cassell would reasonably be regarded as an officer or employee of WPNL but for the existence of ICL, the base test in the jurisprudence asks whether the individual is performing the services in issue as a person in business on his own account. I believe, however, that it is a simple matter to adapt this test to the language of the PSB definition by asking whether, taking into consideration all the circumstances, Mr. Cassell would reasonably be regarded as carrying on a business on his own account if ICL did not exist.

[45] In this case, the circumstances lead me to the inexorable conclusion that if the existence of ICL were ignored, Mr. Cassell would reasonably be considered to be an employee of WPNL. I reach this conclusion on the basis of the following considerations:

1. The stated objective of Mr. Cassell in providing services to WPNL was to grow the business of WPNL. Mr. Cassell made no mention of growing the services business of ICL and no evidence was provided suggesting that growing ICL's services business was a material objective of Mr. Cassell. If ICL were ignored, the objective of providing the services would be the growth of WPNL's business and not the growth of a services business of Mr. Cassell.

2. For the taxation years in issue, ICL did not conduct its services business in a business-like manner. Specifically, ICL did not have a written agreement with WPNL; ICL did invoice WPNL for the services it provided to WPNL; ICL did not charge or collect HST on the fees paid to it by WPNL; and ICL did not advertise its services business. If the existence of ICL were ignored, there is no evidence of

business-like activity to support the conclusion that Mr. Cassell would reasonably be regarded as providing the services as a person in business on his own account.

3. Mr. Cassell testified that he also provided management services to WCEL in his capacity as president of ICL. However, ICL had no written agreement with WCEL and did not invoice WCEL. As well, no evidence was provided that ICL was in fact paid by WCEL for any services it may have provided. Consequently, the provision of services to WCEL does not support the conclusion that Mr. Cassell would reasonably be considered to be conducting a management services business on his own account if the existence of ICL were ignored.

4. ICL leased properties to arm's length third parties. This activity was distinct from the provision of management services by ICL. Nevertheless, the earning of rent by ICL was clearly subordinated to the profitability of WPNL's business, as demonstrated by the failure of Mr. Cassell to pursue any action regarding defaults in paying rent when to have done so would have negatively affected the profitability of WPNL's business. These facts only serve to confirm that Mr. Cassell's focus was solely on the profitability of WPNL's business. An individual in business on his own account would not have such a focus.

5. Mr. Cassell confirmed that the functions he performed for WPNL following the transfer of the Western Petroleum business to WPNL were the same as the functions he had performed as a senior employee of ICL when the Western Petroleum business was owned by ICL. He also confirmed that the objective of these functions was to grow the Western Petroleum business.

6. The compensation received by ICL was similar to the compensation that might have been paid to a senior employee of WPNL – a fixed monthly amount and an additional amount (which I will call a "performance bonus") based on the profitability of WPNL's business. In addition, the performance bonus appears to have been at the discretion of WPNL as there is no provision for this bonus in the

written agreement between ICL and WPNL.[17] If the existence of ICL is ignored, the compensation structure is consistent with Mr. Cassell being an employee of WPNL rather than an independent contractor. In particular, an independent contractor is unlikely to negotiate a performance bonus that is at the discretion of the service recipient.

7. The compensation structure was such that any opportunity to profit from the provision of services to WPNL was tied to the success of WPNL's business and not to the services that ICL provided to WPNL through Mr. Cassell. This is consistent with the conclusion that any profit earned by ICL resulted from the business of WPNL, not from a business that Mr. Cassell would reasonably be regarded as conducting on his own account, if the existence of ICL were ignored.

8. The compensation structure also ensured that ICL was not exposed to a risk of loss. If one disregards the salary paid to Mr. Cassell's spouse, the expenses of ICL's business were miniscule in comparison to the monthly fees it received from WPNL. Moreover, the only substantive economic risk faced by ICL was the risk inherent in WPNL's business, which governed WPNL's ability to pay the monthly fees. If the existence of ICL were ignored, Mr. Cassell would not bear any real risk of loss under the compensation arrangements with WPNL. The fact that WPNL may have failed to pay a "success fee" in one or more years does not alter this conclusion given the nature and magnitude of the expenses incurred to provide services to WPNL and the magnitude of the monthly fees paid by WPNL for those services.

9. Mr. Cassell was not subject to significant control by WPNL. However, he did have weekly meetings with Mr. Reynolds to discuss the direction of WPNL's business for the following week. This is consistent with the degree of control that might be exerted over a senior employee of WPNL.

10. The nature of Mr. Cassell's activities for WPNL did not require Mr. Cassell to supply any tools. However, Mr. Cassell was provided with the non-exclusive use of WPNL vehicles consistent with his need to travel to conduct WPNL's business.

[17] Mr. Cassell testified that the written agreement entered into evidence as Exhibit A-1 reflected the terms of the oral agreement that was actually in place during the Taxation Years and that this was the reason the written agreement was backdated to February 2005.

11. Mr. Cassell did not have a dedicated office at WPNL's premises. However, he did have a makeshift space available to him as the need arose.

12. Mr. Cassell maintained a home office but that can be explained by the fact that ICL also had rental properties to manage.

[46] In light of all of these considerations, I have concluded that Mr. Cassell would reasonably be regarded as an employee of WPNL but for the existence of ICL. Stated in the language of the central question identified in *Wiebe Door*, *Sagaz* and *Connor Homes*, I find nothing in the totality of the circumstances to suggest that Mr. Cassell would reasonably be considered to be carrying on a services business on his own account if ICL did not exist. The business that is the focus and raison d'etre of Mr. Cassell's activities is the business of WPNL. If ICL did not exist, the only business to which the services relate would be that of WPNL and Mr. Cassell would reasonably be considered an employee of that business. Accordingly, ICL's business of providing management services to WPNL during its 2008, 2009 and 2010 taxation years was a "personal services business" and the appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 3rd day of March 2016.

"J.R. Owen"

Owen J.

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