

Docket: 2008-3986(IT)G

BETWEEN:

ART BILOUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with
Yorkton Distributors (1976) Ltd. (2008-3987(IT)G)
on December 13 and 14, 2010, at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant: Ronald Balacko
Counsel for the Respondent: John Krowina

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is allowed, with costs, and the reassessment of the Minister of National Revenue is vacated.

Signed at Ottawa, Canada, this 11th day of March 2011.

“G. A. Sheridan”

Sheridan J.

Docket: 2008-3987(IT)G

BETWEEN:

YORKTON DISTRIBUTORS (1976) LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

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Appeals heard on common evidence with
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on December 13 and 14, 2010, at Regina, Saskatchewan

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Appearances:

Counsel for the Appellant: Ronald Balacko
Counsel for the Respondent: John Krowina

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, with costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of March 2011.

“G. A. Sheridan”

Sheridan J.

Citation: 2011TCC154
Date: 20110311
Docket: 2008-3986(IT)G

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Docket: 2008-3987(IT)G

AND BETWEEN:

YORKTON DISTRIBUTORS (1976) LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The primary issue in these appeals is whether Yorkton Distributors (1976) Ltd. is entitled to business expense and capital cost allowance deductions for a building and snowmobiles which it claims were used to promote its canola seed and farm chemicals business in the 2003 and 2004 taxation years. The building and the snowmobiles it housed are referred to collectively herein as the “Snowmobile Museum”.

[2] The Minister does not dispute that Yorkton Distributors incurred the expenses as claimed but says that no portion of such amounts are deductible because their purpose was not for gaining or producing income as required under paragraph 18(1)(a) of the *Income Tax Act*. According to the Minister, such expenditures were

for the personal benefit of Yorkton Distributors' principal shareholder, Art Bilous, who was reassessed under subsection 15(1) for an interest benefit of \$2,784 in 2004.

[3] The Minister did not challenge the Appellants' evidence that in 2003 and 2004, Yorkton Distributors had sales of \$10 million and \$13 million¹, respectively, or that, since its acquisition by Mr. Bilous in 1976, the company has been in an increasingly profitable situation.

[4] As a result of the reassessments, Yorkton Distributors' net business income for 2003 and 2004 was increased by \$27,282 and \$35,163, respectively, pursuant to subsections 3, 9 and 18 of the *Act*. For ease of reference, the expenses claimed by Yorkton Distributors and the portion disallowed by the Minister together with the capital cost allowance adjustments in respect of Yorkton Distributors' Class 1 and 10 assets for the construction of the building and the purchase of snowmobiles, respectively, are reproduced below from subparagraphs 12(y) to (kk) of the Reply to the Notice of Appeal:

2003 Taxation Year

Chemical Purchase Expenses:

Total claimed:	\$ 60,929
Disallowed Snowmobile Museum amount:	\$ 8,177

Insurance Expenses:

Total claimed:	\$ 68,686
Disallowed Snowmobile Museum amount:	\$ 2,959

Capital Cost Allowance, Class 1 (Quonset):

Total claimed for Class 1 assets:	\$ 8,489
Disallowed	\$ 1,729

Capital Cost Allowance, Class 10 (Snowmobiles):

Total claimed for Class 10 assets:	\$ 118,993
Disallowed	\$ 14,417

2004 Taxation Year

Chemical Purchase Expenses:

Total claimed:	\$ 62,441
Disallowed Snowmobile Museum amount:	\$ 62,441

Insurance Expenses:

¹ Exhibit A-4.

Total claimed:	\$ 77,198
Disallowed Snowmobile Museum amount:	\$ 454
Repair & Maintenance Expenses:	
Total claimed:	\$ 58,487
Disallowed Snowmobile Museum amount:	\$ 1,389
Capital Cost Allowance, Class 1 (Quonset):	
Total claimed for Class 1 assets:	\$ 8,810
Disallowed	\$ 1,659
Capital Cost Allowance, Class 10 (Snowmobiles):	
Total claimed for Class 10 assets:	\$ 120,764
Disallowed	\$ 28,547

[5] The Minister's alternative position is that even if Yorkton Distributors did incur such expenses for the purpose of gaining or producing income, the amounts were not reasonable and ought not to be allowed under section 67 of the *Act*. There are, however, no assumed or alleged facts in the Reply pertaining to the unreasonableness of the amounts expended by Yorkton Distributors.

[6] The appeals were heard together on common evidence. Testifying for the Appellants were Mr. Bilous and his brother Rick Bilous (to avoid confusion, Art Bilous is referred to hereafter as "Art"; his brother, Rick Bilous, as "Rick"). Rick is the operations manager of Yorkton Distributors and as such, was generally knowledgeable about the business including the products sold by the company, its sales and market share, and the nature of its clientele. Rick has been interested in snowmobiles since his boyhood days.

[7] Also called was Jack MacKay, a Chartered Accountant practicing in the Yorkton area for some 30 years. As the Appellants' accountant and a former snowmobile enthusiast, Mr. MacKay was knowledgeable about the company's financial and tax history as well as its advertising expenditures and the Appellants' respective involvement in snowmobiling and community events. Many of his clients are farmers, a good number of whom own snowmobiles for farm chores as well as for recreation.

[8] Another of the Appellants' witnesses was Dan Reeves. From 1994 to 2009 Mr. Reeves was the Yorkton sales representative for InterAg, a division of Bayer Crop Science. He was the distributor of Bayer transgenic canola seed and crop protection products to independent retailers like Yorkton Distributors. Mr. Reeves is also a snowmobiler.

[9] The last of the Appellants' witnesses was Ben Hudye, the principal of Hudye Soil Services. Like Yorkton Distributors, Hudye Soil Services is an independent retailer of transgenic canola and farm input products. Its main branch is in Norquay, Saskatchewan, about 100 kilometers northeast of Yorkton just outside Yorkton Distributors' market area.

[10] Testifying for the Respondent was Grant Varley, a Canada Revenue Agency employee with some 10 years experience as an auditor and appeals officer. In reviewing the Appellants' objections, Mr. Varley relied on the audit report and the information provided by the Appellants', effectively the same as the materials filed as Exhibit A-6. He summarized his basis for upholding the Minister's reassessments as follows:

A ... the final conclusion was that the predominant purpose, intent behind the museum and the skidoos was primarily personal in nature. Throughout the review, it was an assessment of the business aspects of it, the personal aspects of it, reviewing the documents that had been given to me. Much of the binder of pictures, not all of them, but some of them [in Exhibit A-6] are newer since the objection, but many of those same types of items were submitted to me. The magazine articles, the -- I believe the letter from the mayor was in there, those items. I reviewed all of those and came to the conclusion that it was primarily personal.²

[11] In response to my question, Mr. Varley stated that he had had no discussions either in person or by telephone with Art or any of the other witnesses during his review of the Appellants' objections.

[12] All of the witnesses were straight-forward and credible in the presentation of their evidence.

[13] The evidence of the Appellants' witnesses regarding Yorkton Distributors' business operation, including the products sold, the needs and interests of its clientele, the competitiveness of the local market and the role played by the Snowmobile Museum in its overall advertising strategy has persuaded me, on a balance of probabilities, that Yorkton Distributors incurred the expenses claimed for the purpose of earning business income.

Facts

² Transcript, page 322, lines 4-18.

[14] Yorkton Distributors is located in Yorkton, Saskatchewan. When Art bought the company from his former employer in 1976, it was essentially in the business of selling bulk fuel to local farmers and had sales of approximately \$80,000 annually.

[15] Over the last decade, Yorkton Distributors has changed its focus from bulk fuel to the sale of transgenic canola seed and crop protection products, typically herbicides, insecticides and fungicides. In 2001, its canola seed and crop input sales were around \$5 million annually; by 2003-2004, they averaged \$11 million; as of the hearing date they were over \$20 million.

[16] Transgenic canola seed is canola that has been genetically altered to be resistant to the otherwise lethal effects of “non-selective” herbicides such as “Round Up”. Originally patented by Monsanto, Round Up’s active ingredient is glyphosate. Since the expiry of Monsanto’s patent, many other companies have used that chemical ingredient to manufacture their own crop protection products. While sold under different brand names, these products are all essentially the same. As a result, competition among manufacturers for the retail market is fierce. To gain a competitive edge, the manufacturers rely on, among other things, the promotional efforts of their regional distributors to sell their products to local retailers like Yorkton Distributors and Hudye Soil Services.

[17] As the regional distributor for Bayer Crop Science, Dan Reeves employed various strategies to attract the business of the local independent retailers. Aware that many of his retail customers and fellow distributors shared his enthusiasm for snowmobiling, sometime in the late 1990’s Mr. Reeves established the “Big Dog Run”, an annual event to promote the sort of Bayer farm input products sold by Yorkton Distributors. As well as raising money for breast cancer research, the event combined informational presentations and networking opportunities with an opportunity to enjoy the snowmobile trails in the Yorkton area. As a distributor in the Yorkton area for some 15 years, Mr. Reeves had observed the local retail market firsthand:

A Well, like I say, it's a competitive marketplace. To sell to farmers, they always have a -- generally speaking, they always have kind of an “everybody's-out-to-get-me” attitude, so what I mean, to break that, you got to build trust with the grower, and one way to build trust with the grower is building a relationship with him. To build a relationship, you do events like snowmobile derbies, stuff like that, golf tournaments, whatever, but with the snowmobile derby, you can bring them into a snowmobile museum like Yorkton Distributors

has, and what a -- what a way to start forging a stronger relationship with a grower, a customer.³

[18] Competing with Yorkton Distributors to build a relationship with local growers were seven or eight other businesses, including the Yorkton Co-op, Richardson-Pioneer, Cargill, P&H, and Viterra. Unlike Yorkton Distributors, many of these companies were primarily in the grain-marketing business. As an incentive to farmers to market their grain through their system, their crop protection products were sometimes used as 'loss leaders', on sale at significantly reduced prices.

[19] In 2003 and 2004, Yorkton Distributors' client base was three to four hundred farmers living within a 100-kilometer radius of Yorkton. Their farms ranged in size from a few thousand to in excess of 30,000 acres of land. Expressed in terms of its canola seed and crop protection requirements, a 10,000-acre farm represents a sale of approximately two million dollars' worth of product. Mr. Hudye explained the intensity of the competition for a share of that market:

A ...-- when you look at the marketplace and you start to segment it, you know, ten percent of the growers in western Canada grow 90 percent of the product. Now, that's -- that's quite a statistic because if you're in agro retailing, you want to associate yourself with the ten percent obviously, that's where the business is.⁴

[20] To associate itself with the interests of its clientele, Hudye Soil Services tried "... to involve [itself] in their interests, you need to find whatever it is that's going to give you the edge to be the person that [the farmers] prefer to do business with rather than your competitors"⁵. It was with this in mind that Hudye Soil Services sponsored trips to farm conferences for its major customers and hosted dinners for their wives in recognition of their influence on farm product purchases. Hudye Soil Services also partnered with others in the agricultural industry to establish an annual event known as the "Field of Dreams", a tour of experimental crops to demonstrate how new techniques, practices and products could increase productivity. The partners in the project established test strips or field-scale plots in the local area. When the crops were ready in July, Hudye Soil Services hosted a day-long event for its clients to tour the test fields to witness the beneficial effect of the products the company sold. The event averaged 500 to 700 participants. While Mr. Hudye could not say definitively

³ Transcript, page 38, lines 23-25 to page 39, lines 1-12.

⁴ Transcript, page 312, lines 3-10.

⁵ Transcript, page 308, lines 13-18.

if the “Field of Dreams” project was an effective marketing tool, he was convinced that:

A ... anything today in the ag industry that gets you additional sales or additional market share is what's working. I mean, if -- if you had a definition of what works or what doesn't work, I guess if your sales are going down and you're losing market share, then maybe the Field of Dreams wouldn't be working very well. But in our case, that isn't the case at all. Our sales continue to increase, and so does our market penetration, so we're real happy with it.⁶

[21] It was in the hope of enjoying the same sort of success that Yorkton Distributors harnessed Art's personal interest and notoriety in snowmobiling to promote its business.

[22] Art lives on a farm approximately 10 kilometers northwest of Yorkton. Within a kilometer of the farm lies the Trans-Canada Trail, a hiking trail that extends across the country. In winter, it transforms itself into the Trans-Canada Snowmobile Trail, providing residents of the Yorkton area with access to some 300 kilometers of groomed snowmobile trails.

[23] Until arthritis began to slow him down, Art was an active snowmobiler. He is proud to have been a founding member of the “Yorkton Sno-Riders Snowmobile Club”, Saskatchewan's first snowmobile club. He also helped establish the provincial association of snowmobile enthusiasts, the Saskatchewan Snowmobiling Association.

[24] Yorkton Distributors was similarly involved with the development of such organizations. In the early days of the Yorkton Sno-Riders, Yorkton Distributors paid for the club's trail grooming machine; the company also sold Saskatchewan Snowmobiling Association memberships on its business premises. Yorkton Distributors was a long-time sponsor of a Yorkton snowmobile derby to raise money for Camp Easter Seal known as “Timmy's Snowarama”. As a result of such involvement, over the years, both Art and Yorkton Distributors received many Certificates of Appreciation for their support of snowmobiling as a sport as well as their contribution to charitable events at the community and provincial level.

[25] In 1998, Yorkton Distributors started collecting vintage snowmobiles, the jewel in the crown being a racing sled originally owned by Jacques Villeneuve. A great admirer of Villeneuve's snowmobiling prowess, Art described him as an “icon”

⁶ Transcript, page 311, lines 11-21.

in Quebec, on par with such greats as Maurice Richard and Jacques Plante. Yorkton Distributors' acquisition of the machine and its restoration to its former greatness caused quite a stir among local snowmobile enthusiasts.

[26] By 2001, Yorkton Distributors had acquired 15 other older-model snowmobiles and was rapidly running out of room to store them. It became clear that a separate facility would be needed to house them. Because of municipal restrictions on the use of snowmobiles within the Yorkton city limits, the limited space available on the company's site and the proximity of Art's farm to the Trans-Canada Snowmobile Trail, it was decided to construct the building on Art's farm rather than Yorkton Distributors' commercial property which was, in any case, leased from its former bulk fuel supplier, Shell.

[27] In 2001, Yorkton Distributors commenced construction of a 40 x 60 foot steel building known as a "quonset"⁷. Although it would take another three years to complete, in the first year of construction the quonset was heated and insulated and suitable for housing the snowmobiles. It was equipped with basic kitchen facilities; folding chairs, tables and barbecues would later be acquired and kept on site for events. The interior of the Snowmobile Museum featured signage for Yorkton Distributors as well as "Super-Trac's Racing", a sort of informal label adopted by Yorkton Distributors to enhance the profile of its racing snowmobiles. The Super-Trac's Racing label was also used on promotional items Yorkton Distributors gave to its customers, items like hats and jackets. (Indeed, at the hearing of these appeals, Rick was wearing a jacket with the Super-Trac's Racing logo which, at the request of counsel for the Respondent, he displayed for the Court. Counsel for the Respondent accurately observed for the record that the jacket bore no reference to Yorkton Distributors.) The Snowmobile Museum had no exterior signage. Because public tours of the Snowmobile Museum were arranged upon request rather than having regular hours of operation, exterior signage seemed unnecessary; security was another concern, given its relatively isolated location on the Bilous farm.

[28] Over the next two years, Yorkton Distributors purchased another 25 vintage snowmobiles for refurbishment. The snowmobiles were repaired, painted and detailed to restore them to their original condition. Meanwhile, heavy-duty shelving for their display was constructed and installed in the quonset. A detailed description was prepared for each snowmobile outlining such things as its provenance, technical specifications, racing history and anecdotal snippets of interest to snowmobilers. Also on display was a photo showing Jacques Villeneuve and the mayor of Yorkton

⁷ See photographs in Exhibit A-6.

(from his former days as sportscaster) along with a letter from the mayor dated March 2003 commending Art for his dedication to the sport.

[29] Meanwhile, Art and Yorkton Distributors remained as active as ever in the snowmobiling community in the Yorkton area and beyond. Like many in the Yorkton area, Art attended the annual provincial snowmobile shows in Regina and Saskatoon; his company, Yorkton Distributors, was a regular exhibitor at the shows. In 2003 and 2004, Yorkton Distributors transported the Villeneuve snowmobile and 20 other vintage sleds in semi-trailers bearing the Yorkton Distributors logo to the show where they were displayed along with the Super-Trac's Racing signage.

[30] By 2003, Art's involvement in snowmobile associations and events had attracted the attention of both the Yorkton media⁸ and specialized snowmobiling magazines like *SnoRiders West*⁹. *SnoRiders West* was published in British Columbia and was automatically distributed as part of the licensing process to all registered snowmobile owners in Western Canada. As well as recounting Art's personal interest in snowmobiling, the development of the sport in Saskatchewan and the Snowmobile Museum in Yorkton, the articles in these publications sometimes referred his connection to Yorkton Distributors and/or Super-Trac's Racing.

[31] Art's notoriety in snowmobiling circles often provided a conversation opener for him with Yorkton Distributors' customers. A good number of them had snowmobiles for use on their farms and/or for recreational purposes. While Yorkton Distributors advertised its products in newspapers, radio and television, so did its competitors. Yorkton Distributors could not match the dramatic price reductions its grain-marketing competitors could offer. Having no stomach for making 'cold calls' to potential customers and lacking the staff to carry out an aggressive business solicitation campaign, Art felt that to be competitive, his company needed to find a different advertising strategy. Attributing Yorkton Distributors' past success to the creation of trust and respect between the company and the farmers it served, it occurred to him that the Snowmobile Museum could provide a way to enhance that relationship:

A ... And I know for a fact, like, the -- it doesn't matter where you go, uptown or down or on the street, everybody wants to talk about snowmobiles. And [the customers] come into the office, well, that's the number one thing is, "So, have you got any new sleds, Art?" and I says, "Well, yeah." It's a

⁸ Exhibit A-6, at Section 8.

⁹ Exhibit A-6, at Section 5.

conversation. I think it makes people more comfortable dealing with you but -- because it's a -- they're spending their hard-earned cash kind of a thing, and I honestly believe some days, like, if I was there sitting on the other side of this table writing a cheque for \$10,000 or \$50,000, \$100,000, I would want to be comfortable that that money is being well spent kind of thing. Sure [the customers are] paying for your products, but also the -- it's -- we're known in Yorkton for supporting a lot of charity and organizations too kind of thing, and I think that's a trade-off kind of thing. And has the museum helped? Yes, it has. Like, the museum is associated with me, Yorkton Distributors and Super-Trac's Racing is all one identity kind of thing...¹⁰ [Transcript edited for punctuation and clarity of reference.]

[32] In the Yorkton area, winters are long, cold and snowy. Such conditions make for good snowmobiling and provide farmers with the time to turn their minds to planning next year's crop. Hoping to capitalize on this happy coincidence, in the winter of 2003, Yorkton Distributors collaborated with its Bayer products distributor, Mr. Reeves, to use the Snowmobile Museum as a featured stop on the Big Dog Run trail ride. The same event was held at the Snowmobile Museum in 2004. Mr. Reeves testified that the inclusion of the Snowmobile Museum in the event provided a unique promotional opportunity for Bayer products, a nice change from the usual manufacturer-sponsored golf tournaments or curling bonspiels.

[33] While, strictly speaking, Mr. Reeves' other clients were not customers of Yorkton Distributors, there was a certain amount of commercial back and forth between Yorkton Distributors and the other independent retailers in respect of their inventory. They and Yorkton Distributors also benefited from the product information and networking opportunities the event provided.

[34] In 2003 the Snowmobile Museum also figured in a strategy to spice up a Bayer product promotion event which, according to Mr. Reeves, had gotten a little "stale". For many years prior, Mr. Reeves had hosted what was known as the "Puma Pizza and Pop Day" to promote a Bayer weed spray called "Puma" sold by Yorkton Distributors. The event was held in early June, timed to coincide with when farmers were making decisions about weed sprays for their crops. Among the collection of snowmobiles in the Snowmobile Museum was a vintage machine by the same name as the featured product, Puma Weed Spray. Yorkton Distributors supplied the Puma snowmobile to use in the herbicide display at the promotional event.

[35] Because in 2003 and 2004 the idea of using the Snowmobile Museum to promote Yorkton Distributors was still in its early stages, no other official events

¹⁰ Transcript, page 207, lines 6-25 to page 208, lines 1-5.

were held there. However, tours were available upon request through the Yorkton Distributors office and Art estimated that in each of 2003 and 2004, he would have taken some 300 people through the Snowmobile Museum, usually in groups of three or four. While among those visiting the Snowmobile Museum were a few tourists and some snowmobile engineers from Bombardier in Quebec and the Yamaha plant in Japan, the great majority of visitors to the Snowmobile Museum were from the Yorkton area, including customers and suppliers of Yorkton Distributors.

[36] In the years following 2003 and 2004, Yorkton Distributors continued to develop its use of the Snowmobile Museum. Product information events were held at the Snowmobile Museum site. Typically, the event would feature a morning of educational and promotional activities followed by an afternoon of snowmobiling on the nearby Trans-Canada Snowmobile Trail. At day's end the participants would return to the Snowmobile Museum to socialize while looking at the machines on display. In 2010, a summer event was held at the Snowmobile Museum, a crop tour similar to Hudye Soil Services' "Field of Dreams". Participants gathered at the Snowmobile Museum and were then taken on a tour of local crops which had been seeded and treated with Yorkton Distributors' products. It being summer, the participants travelled from crop to crop on all-terrain vehicles rather than snowmobiles. At day's end, they returned to the Snowmobile Museum for a barbecue and tour of the snowmobiles on display.

[37] Prior to the construction of the Snowmobile Museum, Yorkton Distributors had had to host such events in rented facilities: during the winter, in local hotel meeting rooms; for summer outdoor events, in large tents erected on its commercial site in Yorkton. Because the Snowmobile Museum was equipped with basic kitchen facilities and had folding tables and chairs and barbecues, staging such events off-site was no longer necessary. The opportunity for participants to view the snowmobiles on display provided an added incentive for their attendance.

[38] In 2003 and 2004 Yorkton Distributors claimed the expenditures in respect of the construction of the Snowmobile Museum and the related expenses. These claims were initially accepted by the Minister. In 2007, an audit was conducted and in October 2007, the reassessments under appeal were issued.

Analysis

[39] The first issue is whether the amounts claimed by Yorkton Distributors were properly deductible as having been incurred by the company "for the purpose of gaining or producing income" as required by paragraph 18(1)(a) of the *Act* and

paragraph 1102(1)(c) of the *Income Tax Regulations*. Even if that question is answered in the affirmative, it remains to consider to what extent, if any, the amounts claimed were “reasonable” under section 67 of the *Act*.

1. Whether the Amounts Are Deductible under Paragraph 18(1)(a).

[40] The test for the deduction of expenses under paragraph 18(1)(a) was expressed by Iacobucci, J. in *Symes v. R.*, 1993 CarswellNat 1178 as: “... did the appellant incur child care expenses for the purpose of gaining or producing income from a business?”¹¹ To make this determination, the Court was required to “... look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances”¹² and must not be guided “only by a taxpayer’s statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure”¹³. There followed a non-exhaustive list of criteria which Justice Iacobucci found helpful in his analysis of the childcare expense deduction, including whether it was a type ordinarily allowed by accountants or normally incurred by others in the same business; whether the expense would have been incurred by the taxpayer even if not engaged in the pursuit of business income; whether the expense was essentially a “lifestyle” choice; and whether the need to incur the expense would exist in the absence of the business activity¹⁴.

[41] The application of these factors to the present matter, argued Counsel for the Respondent, led to the conclusion that the Snowmobile Museum expenses were not incurred by Yorkton Distributors for the purpose of earning income. I am not convinced this is so. The *Symes* criteria were used to determine whether child care expenses, as a category, could be considered a business deduction. The Court did not turn its mind to the particular nature of the childcare used by the taxpayer. Here, the Snowmobile Museum expenses were claimed as advertising and promotion, a category which easily qualifies as such on the *Symes* factors. Beyond that, however, the criteria are not particularly helpful in the present analysis.

¹¹ At paragraph 73.

¹² At paragraph 74.

¹³ At paragraph 74.

¹⁴ At paragraphs 75-79.

[42] What remains to be determined is whether there is objective evidence to substantiate Yorkton Distributors' subjective claim that the Snowmobile Museum expenses were incurred to advertise and promote its business.

[43] The Appellants relied on two cases in which the *Symes* test had been applied to find that advertising expenses were properly deductible: *Matt Harris & Son Ltd. v. R.*, [2001] 1 C.T.C. 2513. (T.C.C.). and *Ross v. R.*, [2005] 3 C.T.C. 2281. (T.C.C.).

[44] In *Matt Harris*, the corporate taxpayer was engaged in a wood cutting business in New Brunswick. Its principal, Mr. Harris, was a stock car and snowmobile enthusiast who personally raced the machines. The bulk of the company's advertising was focussed on his participation in these events. They were very popular in New Brunswick and regularly reported in the local newspapers and on television. In such circles, Mr. Harris was a celebrity, so much so that other businesses paid to have their company logos on his company's vehicles.

[45] In *Ross*, Sarchuk, J. applied the approach taken in *Matt Harris* to allow the deduction of certain employment expense deductions under paragraph 8(1)(f) of the *Act*.¹⁵ The taxpayer was employed as a securities salesman and broker; he claimed a deduction for expenses related to the buying and breeding of thoroughbred racing horses, including veterinary fees, stable fees, and the transportation of horses. As in the *Matt Harris* case, the taxpayer candidly acknowledged his personal interest in the activity for which business expenses had been claimed but argued that it was through his involvement in thoroughbred racing that he made the client contacts that generated his employment income.

[46] In both cases, the Court was satisfied on the evidence presented that the purpose for which the taxpayer incurred the expenses claimed was to earn business income. In *Matt Harris*, the taxpayer's purpose "... was to promote the name of its business and to increase its wood and lumber business through contacts [made at stock car and snowmobile racing events] ..." ¹⁶. In *Ross*, "... the Appellant's testimony establishes that there was a direct relationship between the commission income earned in that taxation year and his thoroughbred involvement." ¹⁷ In both cases the

¹⁵ The Minister had reassessed to restrict the Appellant's losses under s.31 of the *Act* but the decision ultimately turned on the application of paragraph 8(1)(f); see paragraph 20 for the details which are not relevant to the case at bar.

¹⁶ At paragraph 54.

¹⁷ At paragraph 17.

Court rejected the notion that an owner's personal interest in the promotional activity precluded the attendant expenses from being deductible; as Sarchuk, J. wrote in *Ross* at paragraph 16:

A business may opt to advertise an activity in which its owner (or principal shareholder of the corporation owning the business) has a keen interest or a degree of personal satisfaction. There is no reason why the expense of a particular form of advertising should be disallowed by the fisc solely because of the owner's interest satisfaction or, as in the appeal at bar, participation in the advertising or remoteness from its business. The fact that an owner ... may experience a vicarious satisfaction from the form of advertisement does not necessarily lead to the conclusion that the cost of the advertisement should be disallowed. If the expense of the advertisement, whatever it is, is incurred for the purpose of gaining or producing income from its business and the expense is reasonable in the circumstances, the expense ought to be deductible in computing income. This is what the *Act* dictates. [Emphasis appeared in original.]

[47] While conceding the principles drawn from *Matt Harris* and *Ross*, counsel for the Respondent, citing paragraph 52 of *Matt Harris*, argued that Art's admission of his personal interest in snowmobiling placed a greater than usual onus on Yorkton Distributors to legitimize its expenses in respect of the Snowmobile Museum. If, indeed, there is such a heightened onus, then I am satisfied that burden has been met.

[48] In rejecting the notion that the Snowmobile Museum had any business purpose, counsel for the Respondent also submitted that the best that could be said of its usefulness as part of Yorkton Distributors' promotional efforts was that it had a "business effect", a description used by Bédard, J. in *Hébert et al. v. The Queen*, 2007 DTC 854 (T.C.C.). In that case, the corporate taxpayer had claimed promotional expenses in respect of a fleet of "high-priced sports recreational vehicles" owned by its principal, a corporate lawyer. The Court dismissed the appeals on the basis of the principal's utter lack of credibility¹⁸ and his failure to provide reliable objective evidence in support of his company's claim of a business purpose:

Assessing the credibility of the Appellant Hébert has played an important role in my decision, given the lack of documentary or objective evidence filed by the Appellants. Note that I have given little probative value to the testimony of the Appellant Hébert. During the examination, the Appellant Hébert simply made general statements that were not verifiable and, often, were unlikely. During cross-examination, conducted very methodically by counsel for the Respondent, the

¹⁸ At paragraph 62.

Appellant Hébert's explanations became evasive, vague, ambiguous, elusive, questionable, unintelligible, and difficult.¹⁹

[49] I have no similar concerns in the present case. Unlike Mr. Hébert, the Appellants' witnesses were credible and their testimony supported by documentation. On cross-examination, their responses were candid, detailed and clear.

[50] I am satisfied that, at least in Yorkton Distributors' marketing area, the names Art Bilous, Yorkton Distributors and Super-Trac's Racing were synonymous. Like the principal of the corporate taxpayer in *Matt Harris*, Art's dual notoriety as the principal of Yorkton Distributors and a snowmobile enthusiast provided an opportunity for the company to use the Snowmobile Museum as part of its promotional strategy. One result was that Yorkton Distributors benefited from what was essentially free advertising in the articles which appeared in the snowmobiling magazines that were distributed as a matter of course to all registered snowmobile owners, including those in Yorkton Distributors market area. That notoriety made the Snowmobile Museum a useful advertising tool even for third parties, as shown by the evidence of Mr. Reeves, the Bayer distributor.

[51] Because in 2003 and 2004 Yorkton Distributors had only just begun to use the Snowmobile Museum for advertising and promotional purposes, the number of activities was more limited than it would be in later years. However, the fact remains that, in the taxation years under appeal, the Snowmobile Museum and/or the snowmobiles in it were used by Yorkton Distributors to break the ice with customers at Yorkton Distributors business premises; to build rapport with the company's clientele while touring customers through the Snowmobile Museum; to promote Yorkton Distributors' association with Bayer products in the Big Dog Run; to highlight the availability of the Bayer weed spray at Yorkton Distributors in the Puma display; and to attract attention to the company's promotional display at the annual provincial snowmobile shows attended by, among others, people from its market area.

[52] Mr. MacKay's uncontradicted evidence was that, from the time Art acquired Yorkton Distributors in 1976, the business experienced steady growth and always showed a profit. Throughout that time, the company employed a variety of advertising strategies. In 2003 and 2004, the Snowmobile Museum was added to that promotional bundle; Yorkton Distributors continued to see an increase in sales. In subsequent years, the company increased its usage of the Snowmobile Museum in its

¹⁹ At paragraph 48.

advertising; sales continued to increase. Between 2001 and 2010, Yorkton Distributors' market share increased from approximately 15 to 40 per cent.

[53] Counsel for the Respondent submitted that since none of the Appellants' witnesses were qualified experts, the Court should disregard any of their testimony regarding the effectiveness of the Snowmobile Museum as an advertising strategy. Quite so. However, I did not understand the Appellants' witnesses to say there was a definitive connection between the Snowmobile Museum and the increase in Yorkton Distributors sales. Even had they been qualified to give their opinions, such testimony would have been icing on the evidentiary cake. The *Symes* decision makes clear that there is no obligation on the taxpayer to establish "a causative relationship between a particular expense and a particular receipt"²⁰ or even, to show that it ever bore fruit.

[54] The real force of the Appellants' evidence was to show that each business devised its own plan for its particular advertising needs. The "Big Dog Run" established by Mr. Reeves to promote Bayer products and the "Field of Dreams" project used by Hudye Soil Services to showcase its merchandise served the same purpose the Snowmobile Museum did for Yorkton Distributors: to get customers in the door. In *Matt Harris*, Rip, J. (as he then was) noted that business decisions are the province of the business person, not the Canada Revenue Agency:

The tax authority has no business telling a businessperson how to run that person's business. Advertising expenditures take many forms: radio, television, newspapers (local, provincial, national), sponsorship or ownership of sports teams, tournaments, community events ... the list is endless. A form of advertising that is beneficial to one business is not necessarily favourable to another business or even a business' competitor. Each business must have the freedom to choose its own form of advertising.²¹

[55] Although counsel for the Respondent urged me to do so, I am unable to see a distinction between Yorkton Distributors' use of the Snowmobile Museum and the lumber company in *Matt Harris* sponsoring a racing car or a securities salesman in *Ross* maintaining a stable of thoroughbreds. If such a distinction does exist, it is only that in the present case, the evidence of a connection between the promotional activity and the company's customers is even stronger than in either of those cases. I agree with the submission of counsel for the Appellants that Yorkton Distributors'

²⁰ At paragraph 57.

²¹ Above, at paragraph 50.

use of the Snowmobile Museum to promote its business is no different in kind from, for example, the pharmaceutical company that pitches its products to doctors on the golf course or large corporations who pay to affiliate themselves with major sporting events. The essence of the Yorkton Distributors' strategy was to exploit to its financial advantage an interest that Art and, by association, the company shared with its clientele.

[56] Having regard to all the circumstances, I find that the Snowmobile Museum was used by Yorkton Distributors in 2003 and 2004 for the purpose of gaining or producing income from its business.

2. Whether the amounts were "reasonable" under section 67.

[57] In *Hammill v. R.*, 2005 FCA 252, the Federal Court of Appeal commented *in obiter* on the proper application of section 67 following the Supreme Court of Canada's decision in *Stewart v. R.*, 2002 SCC 46. Noël, J.A. wrote that "... in the appropriate circumstances, [s.67] can be used to deny the whole of an expense, if it is shown to be unreasonable". The Court went on to say that "[what] is contemplated is a quantitative review of the expenditure."

[58] Counsel for the Respondent argued that the Snowmobile Museum expenditures were unreasonable because they outstripped significantly the promotional use to which it was put in 2003 and 2004. He queried why Yorkton Distributors had simply not, for example, continued its former practice of renting hotel meeting rooms and tents to host its promotional events or limited its inventory of snowmobiles to the Villeneuve machine and just a few others. Would it not have been more reasonable, counsel submitted, for Art to have underwritten the cost of the Snowmobile Museum and for Yorkton Distributors to have rented the facilities from him as and when required?

[59] The first difficulty I have with this argument is that it is not supported by the Minister's pleadings: while the Reply identifies one of the issues to be decided as whether the expenses were reasonable under section 67, there are no assumptions of fact or other allegations in the Reply as to why the amounts claimed, or some portion thereof, were not reasonable. Indeed, there is not even the bare statement that the expenses were not reasonable in the circumstances. However, assuming it was incumbent upon Yorkton Distributors to show the quantum of the expenditures was reasonable, I am satisfied that the company has met its burden. In response to the alternatives proposed by counsel for the Respondent on cross-examination, Art justified the company's decision by saying that having only a few snowmobiles, no

matter how famous, would not have been sufficient to maintain the interest of Yorkton Distributors' pool of existing and potential customers over the long term. As for renting facilities, while less expensive in the short term, that strategy also involved a cost to the company. The variety of the snowmobile collection and their display on an event-friendly site made the Snowmobile Museum a venue unlike any of the other local alternatives for promotional events and provided potential for growth.

[60] The other concern I have with the Respondent's argument is that the proposed alternatives offend the principle in *Keeping v. R.*, [2001] 3 C.T.C. 120 (F.C.A.), that in assessing the reasonableness of particular expenses, it is "... not the place of the courts to second-guess the business acumen of a taxpayer whose commercial venture turns out to be less profitable than anticipated."²² In that case, Rothstein, J.A. (as he then was) went on to say that the trial judge erred "[i]n basing his decision [that the expenses claimed were not reasonable] on profit margins, potential market opportunities and costs, as well as the appellant's approach to operating his distributorship" - and this, in circumstances where the taxpayer's efforts resulted in a loss.

[61] Given the clear evidence of Art's long experience in the seed and farm chemical business; his knowledge of Yorkton Distributors' competitors and the local marketplace; and his understanding of its clientele - how am I to substitute my judgment for Yorkton Distributors' regarding how best to employ its advertising strategy? Other businesses in the area used similar promotional events; indeed, they attempted to benefit by association with the Snowmobile Museum. Finally, there is the company's success; unlike the taxpayer in *Keeping*, Yorkton Distributors was a consistently profitable business whose sales - for whatever reason - only continued to improve from the time it began using the Snowmobile Museum as a promotional tool. As Art put it:

... Can we gauge that [the effectiveness of the strategy] in any way? I don't think in any advertising you can gauge -- honestly say that for every dollar you -- I always say, my words is, like, for every dollar we spend we got maybe ten to twenty back, and that's through our business being successful.²³

[62] In his thorough review of the jurisprudence dealing with section 67, counsel for the Respondent referred the Court to, among others, the decision in *Cipollone v.*

²² At paragraph 5.

²³ Transcript, page 227, lines 14-20.

R., [1995] 1 C.T.C. 2598. In that case, Bowman, J. rejected as unreasonable the expenses claimed by self-styled humourist “Dr. Phela Goodstein” of amounts ranging from \$6,693 to \$14,588 over a period when her revenues were between \$85 and \$3,653. While satisfied under the pre-*Stewart* jurisprudence that there was a business, the Court found that the expenses claimed for such things as automobile expenses and clothing were disproportionate and therefore, unreasonable, given the kind of revenues the business was generating.

[63] In the recent Informal Procedure case of *Williams v. R.*, 2009 TCC 93, Webb, J. found expenses claimed by a childcare business for such items as sub-contractors to assist the sole proprietor in her duties and advertising to promote what was by then a failing business were “reasonable”, notwithstanding that they were well in excess of the revenues for the taxation years under appeal.

[64] A similar conclusion was reached in another Informal Procedure appeal, *Ankrah v. R.*, [2003] 4 C.T.C. 2851 (T.C.C.). Like Justice Webb, Woods, J. was guided in her decision by the *Keeping* prohibition against second-guessing the business judgment of the taxpayer.

[65] Considered in light of the above cases, it is difficult to see how the expenses claimed by a consistently profitable business like Yorkton Distributors for expenses which are significantly less than total revenues can be seen as unreasonable. What is clear is that each case depends on its own facts.

[66] Returning, then, to the language of *Hammill*, it would not be appropriate in the circumstances of the present matter to conclude that the expenses incurred by Yorkton Distributors were to any extent unreasonable.

Conclusion

[67] For the reasons set out above, Yorkton Distributors’ appeals of the 2003 and 2004 taxation years are allowed, with costs, and the reassessments are referred back to the Minister for reconsideration and reassessment in accordance with these Reasons for Judgment.

[68] In view of this result, no benefit was conferred on the company’s shareholder, Art Bilous under subsection 15(1) of the *Act*. Accordingly, his appeal of the 2004 taxation is allowed, with costs, and the reassessment is vacated.

Signed at Ottawa, Canada, this 11th day of March 2011.

“G. A. Sheridan”

Sheridan J.

CITATION: 2011TCC154

COURT FILE NOS.: 2008-3986(IT)G; 2008-3987(IT)G

STYLE OF CAUSE: ART BILOUS AND HER MAJESTY THE QUEEN AND BETWEEN YORKTON DISTRIBUTORS (1976) LTD AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Regina, Saskatchewan

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REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

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