Docket: 2006-1940(IT)G

BETWEEN:

489599 B.C. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on April 14, 2008 at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Gordon S. Funt and Michelle Moriartey
Counsel for the Respondent:	Karen A. Truscott

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed, with costs, and the assessments 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 6th day of June 2008.

"Diane Campbell"

Campbell J.

Citation: 2008TCC332
Date: 20080606
Docket: 2006-1940(IT)G

BETWEEN:

489599 B.C. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] These appeals are from the reassessments in respect to the Appellant's 2003 and 2004 taxation years. The Appellant filed its income tax returns in those taxation years on the basis that it was not a personal services business and claimed the small business deduction under subsection 125(1) of the *Income Tax Act* (the "*Act*") and also claimed the full amount of its business expenses as a deduction from income for those years. The Minister of National Revenue (the "Minister") reassessed the Appellant, concluding that it was a personal services business and denying the small business deduction and restricting the claim for the business expenses, pursuant to paragraph 18(1)(*p*) of the *Act*.

[2] The parties filed the following Agreed Statement of Facts and Definition of Issues:

TAX COURT OF CANADA

BETWEEN:

489599 B.C. LTD.

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AGREED STATEMENT OF FACTS AND DEFINITION OF ISSUES

A. **FACTS:**

1. Throughout its 2003 and 2004 taxation years, 489599 B.C. Ltd. ("489") was a duly incorporated company resident in Canada. The taxation years of 489 ended January 31, 2003 and January 31, 2004 respectively.

2. Throughout 489's 2003 and 2004 taxation years, Gerald Clark and Barbara Clark were married to each other, and were the only shareholders of 489, each holding 50% of the issued shares.

3. During its 2003 and 2004 taxation years, 489 provided management consulting, purchasing and administrative services to Anglo American Cedar Products Ltd. ("Anglo"), a duly incorporated company resident in Canada, pursuant to an agreement entered into between 489 and Anglo on January 1, 2000. The services provided by 489 to Anglo included production, sales support, purchasing, financial, legal and miscellaneous services.

4. In order to provide these services to Anglo throughout each of its 2003 and 2004 taxation years, 489 employed in its business five employees who regularly worked 5 days per week, 7.5 hours per day.

5. In addition, for its 2003 and 2004 taxation years, 489 employed in its business two further employees. The first employee, Barbara Clark, throughout each taxation year worked 15 hours per week. Attached as Schedule A hereto is a table outlining the hours worked by the second employee, Sunny Donatelli, in 489's 2003 and 2004 taxation years. Sunny Donatelli was paid on an hourly basis. All other employees of 489 were paid an annual salary.

6. Throughout 489's 2003 and 2004 taxation years, Gerald Clark was the President and a director of Anglo, for which he was paid a fee of $10,000 per annum. He was also the President and a director of 489.

7. For its 2003 and 2004 taxation years, 489 filed and computed its income on the basis that it was not carrying on a "personal services business" as defined in subsection 125(7) of the *Income Tax Act* (Canada) (the "Act").

8. By Notices of Reassessment dated August 17, 2005, the Minister of National Revenue (the "Minister") reassessed 489 for its 2003 and 2004 taxation years, and disallowed as a deduction all of 489's business expenses other than those which could be properly claimed by a "personal services business" pursuant to paragraph 18(1)(p) of the Act. The reassessments and their confirmation were based on the Minister concluding that in those years 489 was a "personal services business" within the meaning of subsection 125(7) of the Act. This conclusion in turn was based on the Minister concluding that:

(a) Gerald Clark provided the services to Anglo on behalf of 489 and was therefore an "incorporated employee" of 489 for the purposes of the Act;

(b) Gerald Clark and Barbara Clark were "specified shareholders" for the purposes of the Act, and Gerald Clark "would reasonably be regarded as an officer or employee of Anglo but for the existence of 489";

(c) 489 and Anglo were not "associated corporations" within the meaning of subsection 256(1) of the Act;

(d) The 5 employees who regularly worked 5 days per week, 7.5 hours per day, as described in paragraph 4 above, were "full-time employees" for the purposes of the Act;

(e) Sunny Donatelli was a "part-time employee" and not a "full-time employee" for the purposes of the Act; and

(f) 5 full-time and 1 or more part-time employees employed throughout these years did not constitute "more than five full-time employees" for the purposes of the definition of "personal services business" in subsection 125(7) of the Act.

9. The Appellant does not dispute the conclusions reached by the Minister in paragraphs 8(a) through (d) of this Statement of Agreed Facts and Definition of Issues. The Appellant disputes the conclusions reached by the Minister in paragraphs 8(e) and (f) of this Statement of Agreed Facts and Definition of Issues.

B. **ISSUES:**

10. The Appellant agrees that the $5,000 and $17,507 amounts set forth in paragraph 8(p) of the Respondent's Reply are not deductible.

11. The issues to be decided are therefore:

(a) in its 2003 taxation year, did 489 employ in its business throughout the year "more than five full-time employees" such that the definition of "personal services business" in subsection 125(7) of the Act does not apply by virtue of paragraph (c) of that definition; and

(b) in its 2004 taxation year, did 489 employ in its business throughout the year "more than five full-time employees" such that the definition of "personal services business" in subsection 125(7) of the Act does not apply by virtue of paragraph (c) of that definition.

C. **DISPOSITION:**

12. If paragraph 11(a) is answered in the affirmative, the Appeal for the 2003 taxation year should be allowed, other than the adjustments for the $5,000 amount described in paragraph 10 above.

13. If paragraph 11(a) is answered in the negative, the Appeal for the 2003 taxation year should be dismissed.

14. If paragraph 11(b) is answered in the affirmative, the Appeal for the 2004 taxation year should be allowed, other than the adjustments for the $17,507 amount described in paragraph 10 above.

15. If paragraph 11(b) is answered in the negative, the Appeal for the 2004 taxation year should be dismissed.

This Statement of Agreed Facts and Definition of Issues is agreed to by the parties for the purpose of this action and any appeal therefrom but shall not bind the parties in any other action. No evidence inconsistent with this Statement of Agreed Facts may be adduced at the hearing of this action or any appeal therefrom except through further agreement by the parties.

DATED at the City of Vancouver, in the Province of British Columbia, this 9th day of April, 2008.

"Gordon S. Funt"

Gordon S. Funt
Counsel for the Appellant

DATED at the City of Vancouver, in the Province of British Columbia this 9th day of April, 2008.

"Karen A Truscott"
Karen A. Truscott
Counsel for the Respondent

SCHEDULE A

Sunny Donatelli worked the following hours as an employee of 489 during its 2003 taxation year (ending January 31, 2003):

Pay Period End[1]	Hours Worked
2002-02-08	64.00
2002-02-22	66.00
2002-03-08	60.50
2002-03-22	61.00
2002-04-05	59.50
2002-04-19	57.00
2002-05-03	61.00
2002-05-17	45.50
2002-05-31	64.00
2002-06-14	62.00
2002-06-28	54.50
2002-07-12	23.00
2002-07-26	50.50
2002-08-09	48.00
2002-08-23	70.50
2002-09-06	68.50[2]
2002-09-20	0.00
2002-10-04	6.00[3]
2002-10-18	0.00
2002-11-01	9.00
2002-11-15	0.00
2002-11-29	12.00
2002-12-13	15.00
2002-12-27	12.00

[1] Each pay period is two weeks in duration.
[2] Sunny Donatelli was temporarily laid off by 489 on September 6, 2002.
[3] On October 1, 2002 Sunny Donatelli resumed working for 489.

2003-01-10	42.50
2003-01-24	56.50
2003-02-07	63.00[4]

Sunny Donatelli worked the following hours as an employee of 489 during its 2004 taxation year (ending January 31, 2004):

Period End	Hours Worked
2003-02-07	63.00[4]
2003-02-21	50.50
2003-03-07	62.50
2003-03-21	60.00
2003-04-04	60.50
2003-04-18	60.00
2003-05-02	68.50
2003-05-16	60.00
2003-05-30	60.00
2003-06-13	61.00
2003-06-27	60.00
2003-07-11	60.00
2003-07-25	60.00
2003-08-08	60.00
2003-08-22	60.00
2003-09-05	61.50
2003-09-19	0.00
2003-10-	60.00

[4] This pay period overlaps 489's 2003 and 2004 taxation years, and is therefore indicated on the chart for each year.

03	
2003-10-17	60.50
2003-10-31	60.00
2003-11-14	60.00
2003-11-28	60.00
2003-12-12	60.00
2003-12-26	75.00
2004-01-09	60.00
2004-01-23	60.00
2004-02-06	60.00

[3] This appeal involves the interpretation of the definition of "personal services business" as contained in subsection 125(7) of the *Act*. The only matter in dispute with respect to the criteria that must be satisfied, before the statutory definition of personal services business will be applied, is whether the Appellant employed "more than five full-time employees" in each of the relevant taxation years. If the Appellant employed more than five full-time employees in each of these years then the definition of personal services business contained in subsection 125(7) will not apply because of the exception contained in paragraph 125(7)(*c*). The importance of this finding for the Appellant will determine whether its activities fall within the definition of personal services business and, if they do, the Appellant will not be carrying on an active business in those years. Therefore, if the Appellant is not carrying on an active business then, of course, it is not entitled to claim the small business deduction or to claim its full business expenses, because its claim will be restricted by paragraph 18(1)(*p*) of the *Act*.

[4] The definition of "personal services business" contained in subsection 125(7) of the *Act* states:

> "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 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; …

The focus in this appeal is on paragraph 125(7)(*c*) and more particularly the wording "more than five full-time employees".

[5] The Appellant's position is that it is not a personal services business because it satisfies the wording contained in paragraph 125(7)(*c*) by employing five full-time employees and at least one part-time employee throughout 2003 and 2004 taxation years (Appellant's Written Argument, paragraph 3).

[6] The Respondent's position is that the Appellant was a personal services business because it did not employ more than five full-time employees as required by the provision since the wording of the statute requires that there be "at least six full-time employees". Therefore the employment of part-time employees can not satisfy this provision. The Respondent contends that a full-time employee must be defined as an individual that is regularly employed working regular working hours of each working day throughout the taxation years in question. Since neither of the Appellant's part-time employees satisfies this requirement, the Appellant, although it had five full-time employees, was carrying on a personal services business within the meaning of subsection 125(7) because it did not employ "at least six full-time employees" in each of the taxation years (Respondent's Written Submissions, paragraphs 7 and 8).

[7] The consequences attached to a conclusion that a corporation is earning its income as a "personal services business" is explained in the Federal Court of Appeal decision, *Dynamic Industries Ltd. v. The Queen*, 2005 DTC 5293 at paragraphs 45-48:

> [45] A corporation's income from a personal services business does not qualify for the small business deduction, which means that it is taxed at a higher rate than other business income of a corporation.
>
> [46] Also, in computing the income of a corporation from a personal services business, no deductions are permitted except remuneration paid to the corporation's "incorporated employee" (the person referred to in paragraph (a) of the definition of "personal services business"), certain expenses relating to the incorporated employee, and certain legal expenses. These restrictions on the deductibility of business expenses are set out in paragraph 18(1)(*p*) …
>
> [47] In the most common situation involving paragraph 18(1)(*p*) of the *Income Tax Act*, no deduction is permitted for such ordinary business expenses as rent, telephone costs, administration and office costs, and remuneration to any employee other than the "incorporated employee". In this case, for example, most of the disallowed expenses over the three years under appeal represent remuneration paid to Ms. Shkwarok for administrative services. That expense was disallowed only because the Crown considered Dynamic to be carrying on a personal services business. There is no allegation that Ms. Shkwarok did not perform administrative services for Dynamic, or that her remuneration for those services was unreasonable.
>
> [48] Nothing in the *Income Tax Act* provides offsetting relief to the application of paragraph 18(1)(*p*). Thus, for example, Ms. Shkwarok would have been taxed on the remuneration she received from Dynamic, even though Dynamic was not permitted to deduct it.

Consequently, if I determine that the Appellant is a personal services business, it will be restricted to a claim of those expenses listed in 18(1)(*p*) and will not be eligible for the small business deduction because it will not be considered an “active business”.

[8] My decision is dependent upon my interpretation of the expression “more than five full-time employees”. Put another way, does the provision require at least six full-time employees, as the Respondent contends, or will it be satisfied by five full-time employees plus one or more part-time employees, as the Appellant argues. In the alternative, the Appellant contends, that if I agree with the Respondent and find that the provision requires six full-time employees, then Sunny Donatelli, one of the employees classified as part-time, who generally worked 30 hours per week except for vacation, sick leave and a lay-off period, occasioned by a fire, was working in a full-time capacity for the Appellant in the relevant years.

[9] The rules of interpretation were recently reiterated by the Supreme Court of Canada in *Imperial Oil Ltd. v. Canada*, 2006 SCC 46:

> 24 This Court has produced a considerable body of case law on the interpretation of tax statutes. I neither intend nor need to fully review it. I will focus on a few key principles which appear to flow from it, and on their development.
>
> 25 The jurisprudence of this Court is grounded in the modern approach to statutory interpretation. Since *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (S.C.C.), [1984] 1 S.C.R. 536, the Court has held that the strict approach to the interpretation of tax statutes is no longer appropriate and that the modern approach should also apply to such statutes:
>
> > [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act . . . .
> >
> > (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Stubart*, at p. 578, *per* Estey J.; *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62 (CanLII), [2001] 2 S.C.R. 1082, 2001 SCC 62, at para. 36, *per* Iacobucci J.)
>
> 26 Despite this endorsement of the modern approach, the particular nature of tax statutes and the peculiarities of their often complex structures explain a continuing emphasis on the need to carefully consider the actual words of the *ITA*, so that taxpayers can safely rely on them when conducting business and arranging their tax affairs. Broad considerations of statutory purpose should not be allowed to displace the specific language used by Parliament (*Ludco*, at paras. 38-39).
>
> 27 The Court recently reasserted the key principles governing the interpretation of tax statutes — although in the context of the "general anti-avoidance rule", or "GAAR" — in its judgments in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (CanLII), [2005] 2 S.C.R. 601, 2005 SCC 54, and *Mathew v. Canada*, 2005 SCC 55 (CanLII), [2005] 2 S.C.R. 643, 2005 SCC 55. On the one hand, the Court acknowledged the continuing relevance of a textual interpretation of such statutes. On the other hand, it emphasized the importance of reading their provisions in context, that is, within the overall scheme of the legislation, as required by the modern approach.
>
> 28 In their joint reasons in *Canada Trustco*, the Chief Justice and Major J. stated at the outset that the modern approach applies to the interpretation of tax statutes. Words are to be read in context, in light of the statute as a whole, that is, always keeping in mind the words of its other provisions:
>
> > It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and

> in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (S.C.C.), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10]

29 The Chief Justice and Major J. then addressed the underlying tension between textual interpretation, taxpayers' expectations as to the reliability of their tax and business arrangements, the legislature's objectives and the purposes of specific provisions or of the statute as a whole:

> As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe. [para. 11]
>
> (See also *Mathew*, at paras. 42-43.)

[10] Both the Federal Court of Appeal and the Federal Court – Trial Division have dealt with this same wording in discussing the definition of "specified investment business", the sister provision of paragraph 125(7)(*c*). The definition of "specified investment services", also contained in subsection 125(7), has the same exception as in the definition of "personal services business". The Respondent relied on the decision of Muldoon, J. in *The Queen v. Hughes & Co. Holdings Limited*, 94 DTC 6511, where the Trial Court considered whether a specified investment business

required “at least six full-time employees” or “five full-time employees plus one or more part-time employees”. At page 6518 of that decision, Muldoon, J. states:

> 39 The statutory provision prescribes that "the corporation employs in the business throughout the year more than five full-time employees". The defendant's view of this is that Parliament really meant to express the notion of "employment" in a fluid-measure sense, like "more water", "more wheat", or indeed "less water" or "less wheat, oats, barley" and so on, instead of meaning individual employees. The defendant's view seemed to be that one could have "more than five full-time employees" by supplementing, complementing or "topping up" the five with a few part-timers. That might well produce more employment than that needed for more than five full-time employees, but that is not what Parliament meant as this Court construes subparagraph 125(7)(e)(i). The statutory phrase yields its (quite transparent) meaning by keeping all the words and introducing no new ones, but by re-arranging the word order, thus "full-time employees, more than five". It means more full-time employees than five [full-time employees]. The subject matter bears no reference to any employees other than full-time employees: it does not even contemplate part-time employees.
>
> 40 A most telling judicial interpretation of the same construction, but in a different subject matter, was performed by Mr. Justice Dysart in the Shenowski case supra cited by the defendant. He was construing the 1931 version of section 750 of the Criminal Code, which provided that:
>
> (a) if a conviction or order is made more than fourteen days before a sittings of the court to which an appeal is given, such appeal shall be made to that sittings; but if …
>
> Now, it having been established in this case that subparagraph 125(7)(e)(i) does not even contemplate a part-time employee, much less a part or fraction of an employee, it is instructive to note how Dysart, J. construed the above-recited section 750(a) of the Code:
>
> The phrase 'more than fourteen days before' has been held by Supreme Court of Nova Scotia to mean at least 15 clear days: Rex v. Johnston (1908) 13 C.C.C. 179; and there is no authority cited to me, or known to me, which is at variance with that decision.
>
> …
>
> It follows that the phrase 'fourteen days before the sitting' means 14 whole days exclusive of any part of the day of the sittings; and that, because there are no fractions of days 'more than fourteen days' must mean <u>at least</u> 15 whole days. (Emphasis added)
>
> ([1932] 1 W.W.R. pp. 193-94)

[11] With respect, I believe Muldoon, J.'s conclusions are incorrect. First, it is clear that in paragraph 39 of his reasons, he rearranged the words used in the *Act* in order to support his conclusions by stating that the word "more" modified "full-time employees". This goes directly against the rules of interpretation to which I refer in paragraph [9] of my Reasons. Second, he relied on a criminal case to support his conclusion that "more than five" meant "at least six". The decision in *Shenowski* (*Rex v. Shenowski*, [1932] 1 W.W.R. 192), in considering the 1931 version of section 750(a) of the *Criminal Code*, determined that "more than fourteen days" used in that section meant "at least fifteen clear days". Muldoon, J., in the *Hughes* case, cited the paragraph (as referenced in my quote from his decision) where the Court in *Shenowski* explained that there existed at the time a well established legal practice regarding time computation. However, Muldoon, J. neglected to include the most relevant portion of that decision in *Shenowski* as it relates to this issue, where Dysart, J. states:

> **9** In reckoning the number of days elapsing *between* two events, the days on which those events themselves occur are not, as a general rule, to be included. The reason is that in law days are regarded as points or short periods of time exactly coinciding in duration with the events themselves, so that there is no possible fraction of a day either before or after the event itself to be included in the reckoning: *Lester v. Garland* (1808) 15 Ves. Jun. 248, at 257, 33 E.R. 748; *Pugh v. Leeds (Duke)* (1777) 2 Cowp. 714, at 720, 98 E.R. 1323; *In re Railway Sleepers Supply Co.* (1885) 29 Ch. D. 204, 54 L.J. Ch. 720.

While there is the legal practice for computation of time that existed in the criminal case of *Shenowski*, there is no similar practice I know of respecting people and more particularly employees. Therefore Muldoon, J.'s reliance upon the principles in *Shenowski* is misplaced. Third, the intent of Parliament in using the phrase "more than five" in paragraph 125(7)(*c*) cannot mean "at least six full-time employees" as Muldoon, J. has concluded. The expression "more than" is used over 200 times in the *Act* and has been considered by this Court on several occasions. For example, in *Burton v. Canada*, 2005 TCC 762, the Court found that an assessment completed "more than" two years after the Appellant ceased to be a director was statute barred. The assessment was dated April 26, 2004 but the Appellant had resigned in February 2002. As we can see "more than two years" used in subsection 227.1(4) was not interpreted to mean "at least three years". The phrase "more than" is also used in other sections of the *Act*, such as section 122.3, which deals with the overseas employment tax credit, applicable to residents of Canada working abroad for a specified employer throughout a period of "more than 6 consecutive months". At paragraph 9 of *Interpretation Bulletin IT-497R4*, the position adopted by Canada Revenue Agency (the "CRA") is that this period means 6 consecutive months "plus one day" and not

"at least seven consecutive months". Fourth, Muldoon, J. had effectively disposed of the appeal when he determined that the employee in question was not a full-time employee of the taxpayer and therefore the taxpayer corporation employed only four full-time employees and not five full-time employees. However, he went on to address the possibility of an appellate court finding against him and concluding that the employee was a full-time employee, bringing the number to five full-time employees and necessitating the need to then address the issue of a number of part-time employees which is the issue in the present appeal. I am of the view that his comments in regard to part-time employees can be considered *obiter*.

[12] Although I believe that Muldoon, J. incorrectly re-arranged the wording of the provision to justify his conclusion, even if this did not affect his end result, equating the phrase "more than five" to mean "at least six" cannot be supported when one looks at the overall scheme of the *Act* and the intent of Parliament. I agree with the Appellant's submissions that, if Parliament meant "at least six" employees, it simply would have stated it. There are many other provisions within the *Act* where the phrase "at least" is employed by Parliament. Some of those are contained in section 19, paragraph 110.6(1.2)(*a*), subsection 127.1(2.2), paragraph 147(2)(*g*) and paragraph 248(1)(*e*) of the definition of automobile. Consequently, the presumption of consistent expression as described in *Driedger on the Construction of Statutes* (3rd ed.) (Markham: Butterworths Canada Ltd., 1994) at page 163, has to be applied in this appeal. It seems to be Parliament's intent to carefully, consistently and accurately delineate between the use of the phrases "more than" and "at least" within the *Act*. I do not believe that it was Parliament's intention that these terms be used interchangeably in this provision. If Parliament had intended "at least six full-time employees" within the context of this provision, it would have used those words. I believe the fact that Parliament chose the words "more than five full-time employees", supports Parliament's obvious recognition that Canada's workplace today is comprised of both full-time and part-time employees.

[13] Before leaving my discussion of Muldoon, J.'s decision in *Hughes*, there are several cases which have referenced *Hughes* regarding the expression "more than five full-time employees. Margeson, J. in the *Ben Raedarc Holdings Limited et al. v. The Queen*, 98 DTC 1218, case approved Muldoon, J.'s comments in *Hughes* stating at page 1225 that "… to avoid "specified investment business status", a taxpayer must have "more than five full-time employees". This clearly means at least six full-time employees." With respect, I do not agree with Margeson J.'s comments. However, they are *obiter* because the Court did not have to conclude on that issue as it had decided that there were only four full-time employees.

[14] Beaubier, J. in *Woessner et al. v. The Queen*, 99 DTC 1039, quoted Muldoon, J. in *Hughes* and simply concluded that he had the same situation before him. Beaubier, J. was deciding whether residential building managers were full-time employees of the corporation such that, in addition to the three full-time employees, the corporation would have more than five full-time employees. However, he did not consider the issue of part-time employees which is before me.

[15] In *Lerric Investments Corp. v. The Queen*, 2001 DTC 5169, Rothstein, J. at paragraph 18 made the following comments concerning the *Hughes* decision:

> **18** I am not convinced of the correctness of the view expressed in *The Queen v. Hughes & Co. Holdings Limited* (1994), 94 D.T.C. 6511, at 6518, that the "more than five full-time employees" requirement means at least six full-time employees and could not be met by a single corporation employing five full-time employees and one part-time employee. All that is necessary is that the employer employs more than five full-time employees. However, I think that an approach which allocates fractions of full-time employees of co-ownerships or joint ventures to a co-owning or joint venturing corporation to satisfy the "more than five full-time employees" requirement would involve reading words into the provision that were not placed there by Parliament.

In *Lerric*, the Court was deciding whether the Appellant fulfilled the requirement of “more than five full-time employees” by employing two full-time employees and sharing the expenses of fifteen others. Since the Court was not considering the question of whether a part-time employee fulfills the requirement of “more than five full-time employees”, Rothstein, J.’s comments are *obiter*. However, these remarks suggest that there is no uniform consensus on the approach to be taken and that ambiguity exists regarding the meaning to be assigned to this expression.

[16] In the case of *Baker et al. v. The Queen*, 2005 DTC 5266, in considering whether six individuals were part-time or full-time, the Court at paragraph 14 stated:

> **14** In my view, the conclusion by Muldoon J. in *Hughes and Co.*, *supra*, at page 6517, that the term "full-time" employment in the definition of "specified investment business" is used in contra-distinction with "part-time" employment, is correct. This distinction reflects the broad consideration which Parliament had in mind when it provided for a minimum of five full-time employment throughout the year. Only full-time employment, as opposed to part-time employment, qualifies.

I do not believe the Court was commenting on what will constitute “more than five full-time employees”. It made no statement on the requirement that the additional

employee should be a full-time or a part-time employee. It states only that the five employees referenced in the provision are all required to be full-time employees. My conclusion here is supported by the following passage at paragraph 11 of that decision:

> **11** The requirement that the taxpayer employ five full-time employees, as embodied in the definition of "specified investment business", must be analysed in the light of the object and purpose of this definition. …

I view the decision in *Baker* as confirmation only, that it is not possible to replace the requirement of five full-time employees by numerous part-time employees and with that I agree.

[17] The dictionary definitions of “full-time” certainly assist in a determination of whether a corporation employs the minimum of “five full-time employees” but beyond that they are not useful because I do not believe that the provision requires a sixth full-time employee. The Respondent’s position is that “more than five” means “at least six”. At paragraph 15, Bowman, J. in *Lerric Investments Corp. v. The* Queen, 99 DTC 755, in commenting on the Crown’s contention that “more than five means at least six”:

> … As a pure matter of mathematics this is not correct. Five point two is more than five.

In this regard the presumption of consistent expression must apply. Where Parliament has not used the term “at least” in the provision, I do not believe an interpretation should be applied that would elevate the phrase “more than five” to mean “at least six”. In this respect, I am mindful of Bowman J.’s comments in *Lerric Investments*, regarding the object and spirit of the Legislation, which were quoted with approval in the Federal Court decision in *Lerric Investments*. I believe that Parliament meant to establish a test that a corporation must meet of “more than five full-time employees” in order to be considered an active business that would qualify it for the deduction. But beyond establishing this requirement, Parliament did not go further, as it could have done, because it was cognizant of the very real possibility of part-time employees. Therefore I believe that my interpretation is in keeping with the spirit and intent of the Legislation and what Parliament had in mind when enacting this provision. Common sense dictates that Parliament would have used entirely different wording if it had meant that, for a corporation to be an active business, it had to employ “at least six full-time employees”. It did not use this wording for a reason and, that is, Parliament intended that employment of part-time employees

throughout the year could tip the scales in favour of a corporation being an active business where it employed five full-time employees. I believe this simply reflects Parliament's recognition of the existence of part-time as well as full-time employees within the landscape of the Canadian workforce.

[18] In the particular facts of this case, the parties agreed that the Appellant employed five full-time individuals [paragraph 8(d), Agreed Statement of Facts]. The Agreed Statement of Facts also refers to the employment of two further employees, Barbara Clark and Sunny Donatelli (paragraph 5). Barbara Clark worked throughout each taxation year for 15 hours weekly. It was also agreed at paragraph 8(e) that Sunny Donatelli was a part-time employee. I have concluded that "more than five full-time employees" did not require the Appellant to employ six full-time individuals throughout the 2003 and 2004 taxation years to be excluded from the definition of personal services business. Parliament's use of the expression "more than" is consistent with Parliament's use of this expression in other sections of the *Act*. The Appellant fulfilled the requirement of hiring "throughout the year more than five full-time employees" by employing "part-timers". The issue of what constitutes part-time employment need not be addressed here as admissions have been made in the Agreed Statement of Facts. That is left for another day.

[19] There is certainly ambiguity within the case law regarding the interpretation of the expression "more than five full-time employees". The principle affirmed in *Johns-Manville Canada Inc. v. The Queen*, 85 DTC 5373 that such ambiguity should be resolved in favour of the taxpayer has application here. This principle has been narrowed in *Corporation Notre-Dame de Bon-Secours v. Communaute Urbaine de Québec et al.*, 95 DTC 5017. This rule of statutory interpretation was also recently reaffirmed by Chief Justice Bowman in *943372 Ontario Inc. v. The Queen.*, 2007 TCC 294. Where such ambiguity exists within the case law the taxpayer must be given the benefit. However I believe Parliament employed the expressions "more than five" and "throughout the year" to distinguish between a corporation for which the definition of personal services business applies and one to which it does not. Alternate wording could have been chosen ("at least six full-time") but Parliament did not do so. In my view, although the case law contains ambiguity, the provision is capable of only one interpretation.

[20] Accordingly the appeals are allowed, with costs, to the Appellant.

Signed at Ottawa, Canada, this 6th day of June 2008.

"Diane Campbell"

Campbell J.

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APPEARANCES:

Counsel for the Appellant:	Gordon S. Funt and Michelle Moriartey
Counsel for the Respondent:	Karen A. Truscott

COUNSEL OF RECORD:

Counsel for the Appellant:

Name:	Gordon S. Funt and Michelle Moriartey
Firm:	Fraser Milner Casgrain LLP, Vancouver, British Columbia
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada