

Docket: 2022-3029(EI)

BETWEEN:

ROBERT DIRK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on April 16, 2024 at Calgary, Alberta

Before: The Honourable Justice Pierre Archambault, Deputy Judge

Appearances:

For the Appellant:                      The Appellant himself

Counsel for the Respondent:      Kerrin Rodrigues

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**JUDGMENT**

The appeal of Mr. Dirk is allowed and the decision of the Minister is varied such that Mr. Dirk is considered to have held insurable employment during the Relevant Period while working for both the Payer and BV.

Signed at Vancouver, British Columbia, this 8<sup>th</sup> day of July 2024.

“Pierre Archambault”

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Archambault D.J.

Citation: 2024 TCC 95  
Date: 20240708  
Docket: 2022-3029(EI)

BETWEEN:

ROBERT DIRK,

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and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Archambault D.J.

#### **I. Overview**

[1] Mr. Dirk appeals a decision of the Minister of National Revenue (**Minister**), dated October 12, 2022, under the *Employment Insurance Act*, S.C. 1996, c. 23 (**Act**). The Minister decided that Mr. Dirk was not engaged in insurable employment while working for Kaz Minerals Russia, LLC (**Payer**) from August 24, 2021, to May 31, 2022 (**Relevant Period**). He concluded that Mr. Dirk was employed outside of Canada and did not meet the conditions outlined in section 5 of the *Employment Insurance Regulations*, S.O.R./96-332 (**Regulations**), more particularly that the Payer did not have any place of business in Canada and was not a resident here. There are no issues with respect to the other conditions set out in section 5 of the Regulations.

#### **II. Decision of the Minister**

[2] This is what appears in the summary of the appeal officer report:<sup>1</sup>

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<sup>1</sup> Which report is found in the Respondent's book of proceedings and case law at Tab 1, page 13.

By regulations made in accordance with subsection 5(4) of the EIA, paragraph 5(1)(d) of the EIA<sup>2</sup> can be used to include an employment that is not insurable under paragraph 5(1)(a).

Section 5 of the EIR<sup>3</sup> states the following:

Paragraph 5(a) of the EIR requires that for the employment to be insurable, it must be held by a person who ordinarily resides in Canada. In this case, although the worker was living and working in the Russian Federation, he maintained significant residential ties with Canada. Therefore, this criteria was met since the worker is considered ordinarily resident of Canada.

Paragraph 5(b) of the EIR states that the employment outside of Canada must be by an employer who is resident of Canada or has a place of business in Canada.

In general, an employer's place of business is the location where the employer carries on business. The location in Canada that is determined to be the head office of a business would also be considered a place of business of the employer.

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<sup>2</sup> Section 5 of the Act provides as follows:

5. (1) Types of insurable employment — Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, ...

(d) employment included by regulations made under subsection (4) or (5); and

...

(4) Regulations to include employment — The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment

(a) employment outside Canada or partly outside Canada that would be insurable employment if it were in Canada; ... [Emphasis added.]

<sup>3</sup> Section 5 of the Regulations provides as follows:

5. Employment outside Canada, other than employment on a ship described in section 4, is included in insurable employment if

(a) the person so employed ordinarily resides in Canada;

(b) that employment is outside Canada or partly outside Canada by an employer who is resident or has a place of business in Canada;

(c) the employment would be insurable employment if it were in Canada; and

(d) the employment is not insurable employment under the laws of the country in which it takes place. [Emphasis added.]

A place of business may also be any other location owned or leased by the employer or for which the employer has obtained a license and where the employer or one or more of its employees work or report to work, or from which one or more of the employees are paid.<sup>4</sup>

Paragraph 5(c) of the EIR states that the employment must be insurable if it were in Canada. It has already been determined that the worker provided his services to payer under a contract of service. Therefore, this criteria was met since the employment would have been insurable if it occurred in Canada.

Paragraph 5(d) of the EIR states that employment outside of Canada is included in insurable employment if the employment is not insurable under the laws of the country in which it takes place. In this case, although Russia, offered benefits to citizens of the Russian Federation, the worker was Canadian citizen who did not qualify for any social benefits. Therefore, this criteria was met since the worker was not covered under the laws of the Russian Federation.

#### Conclusion

After impartially reviewing all the information relating to this appeal, it has been determined that this employment was not insurable. The employment services were performed outside of Canada and was not insurable employment because the conditions of section 5 of the Employment Insurance Regulations were not met.

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<sup>4</sup> This definition of a “place of business” appears to apply in part the definition of “establishment in Canada” under the *Canada Pension Plan Regulations*, C.R.C., c. 385 (the “CPP Regulations”):

**15 (1)** In this Part, ...

*establishment in Canada*, with respect to an employer, means any office, warehouse, factory, oil well, gas well, mine, workshop, farm, timber land, pier, wharf, school, college, club, residence, hotel, motel, restaurant, tavern, bar or any other place or premises in Canada that is owned, leased or licensed by the employer and where the employer or one or more of his employees works or reports for work or from or at which one or more of his employees are paid; (*établissement au Canada*)

[Emphasis added.]

See further discussions below.

This decision is issued in accordance with subsection 93(3) of the Employment Insurance Act and is based on paragraph 5(1)(a)<sup>5</sup> of the Employment Insurance Act and section 5 of the Employment Insurance Regulations.

Accordingly, the worker's appeal is dismissed, and the ruling dated July 28, 2022, for the period of August 24, 2021, to May 31, 2022, is confirmed.

[Footnotes added.]

[3] It should be stated at the outset of these reasons that the appeal officer considered that Mr. Dirk only had one employer during the Relevant Period. The evidence has disclosed that in fact he had two different employers at different times in the Relevant Period. First, he was employed with the Payer from August 24, 2021, to February 14, 2022 (the **Second Period**) (for close to 6 months). Second, he was employed with Kaz Minerals Projects B.V. (**BV**) from February 15, 2022, to May 31, 2022 (the **Third Period**) (for 2.5 months). With the consent of counsel for the respondent, this appeal covers these two employments for the Relevant Period. Prior to this period, Mr. Dirk had worked in Vancouver for BV from October 1, 2018, to August 23, 2021 (the **First Period**) (for close to 3 years), which period is outside the Relevant Period and is not the object of this appeal. However, the facts relating to the First Period are relevant for disposing of this appeal.

[4] The appeal officer justified her conclusion that the conditions in paragraphs 5(a), (c) and (d) of the Regulations were satisfied by referring to the relevant facts supporting her conclusion, but did not do so with respect to her conclusion that the condition in paragraph 5(b) was not met. It seems, on the basis of the testimony of Mr. Dirk, that the appeal officer felt bound by an interpretation of the Minister:

A Well, and the agent told me ... for the director when she called to see if it was a case or not, she said that ... there is no legal definition of place of business so this must be heard from the courts ... because need to make a ruling on it. ... She ... said, I can't overturn the CRA because ... there is no legal definition. ... So she didn't have a basis to overturn it.<sup>6</sup>

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<sup>5</sup> This may be a typo. Paragraph 5(1)(d) of the Act seems more appropriate.

<sup>6</sup> Pages 73 to 74 of the hearing transcript.

This discomfort of the appeal officer might also be explained by the fact that section 5 of the Regulations does not get to be often applied. The parties were only able to identify

[5] There is no issue that the Payer and BV were not residents of Canada as the evidence did not disclose that their management and control were in Canada and Mr. Dirk did not claim otherwise. Therefore, the only issue in this appeal is whether the Payer and BV had a place of business in Canada during the Relevant Period.

### III. FACTS

#### *(a) Admissions*

[6] At the outset of the hearing, Mr. Dirk admitted all the facts outlined in section 9 of the Reply to the Notice of Appeal (**Reply**), except the facts in paragraph 9 x. During the hearing, counsel for the respondent informed the Court that she was withdrawing paragraph 9 x. Here is that section:

9. In making the Decision, the Minister relied on the following assumptions of fact:

a. the Payer<sup>7</sup> was a Russian corporation that designed and operated mineral mines in several international locations;<sup>8</sup>

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the two cases mentioned by counsel for the respondent that deal with that particular section. In my 31-year career at the Court, I do not remember hearing a case dealing with employment outside of Canada.

<sup>7</sup> The Payer is defined in paragraph 1 c of the Reply, reproduced below in footnote 14, as Kaz Minerals Russia LLC.

<sup>8</sup> Although it does not have much impact on this appeal and this statement was admitted by Mr. Dirk, his testimony was to the effect that the Payer was incorporated to satisfy Russian legislation in order to operate the mining project in Russia. Originally, BV was to develop the project until the mining operations were ready to start (see page 27 of the hearing transcript).

As to be expected, Kaz Minerals (**Kaz Holding**), the parent company of the Payer, had several other subsidiaries (and not simple offices, contrary to the statement in paragraph 9 b, two subsidiaries for two large projects in Kazakhstan and one for a large mine in Kyrgyzstan (see the hearing transcript at page 23). Therefore, it is more likely that it is Kaz Holding, and not the Payer, that had several mines in international locations through different subsidiaries.

- b. the Payer was a subsidiary of Kaz Minerals that had offices in the United Kingdom, Kazakhstan, Russia, and Kyrgyzstan;
- c. the Appellant was an employee of the Payer;
- d. the Appellant was hired by the Payer under a written contract;
- e. the Appellant's employment contract with the Payer stated the Payer's business address and the Appellant's work location was in Russia;<sup>9</sup>
- f. the terms of the Appellant's employment contract with the Payer were governed by the laws and Labour code of the Russian Federation;
- g. the Appellant left Canada to begin work in Russia on August 23, 2021;
- h. the Appellant performed services as a mining director during the Period;<sup>10</sup>

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Laypeople often have difficulties in distinguishing the separate legal entities of companies. This can be illustrated here by the confusion that seems to exist in narrating the events that took place. The reason for the confusion may be that "Kaz Minerals" was not formally defined in section 9 of the Reply, except to the extent that this name is used in paragraph 9 b of the Reply to refer to the parent company. Paragraph 9 t of the Reply also appears to state that Kaz Minerals (now defined by me as Kaz Holding) was a party to a consulting agreement with an engineering firm based in Vancouver, Fluor Canada (**Fluor**), when Mr. Dirk had stated in his appeal documents (and during his testimony) that it was BV that was party to this agreement.

Given that the appeal officer did not testify, we do not have the benefit of her explanations as to why the "Minister" assumed as a fact that "Kaz Minerals" was the company party to the consulting agreement with Fluor (why Kaz Holding and not BV). I also believe that Mr. Dirk was confused by the use of "Kaz Minerals" when he admitted paragraph 9 t. He most likely thought that it referred to "Kaz Minerals Projects BV". In his testimony at pages 28 to 30 of the hearing transcript, he stated that BV had the contract with Fluor and had a branch office in the Fluor Vancouver office.

<sup>9</sup> It is to be noted that the Minister did not assume as a fact in section 9 of the Reply that the Payer did not have a place of business in Canada. The statement in paragraph 9 e of the Reply seems to adopt a narrow meaning of place of business, as if it is limited to a principal place of business or head office.

<sup>10</sup> "Period" is defined in paragraph 1 c of the Reply as the Relevant Period. See this paragraph reproduced in footnote 14 below.

- i. the Appellant was responsible for the design and geological exploration of a mining project located in Peschanka (Russia);
- j. the Appellant's subordinates were located in Russia;
- k. the Appellant resided in an apartment while in Russia;
- l. the Appellant was provided with a living allowance from the Payer for the Russian residence;
- m. the Appellant was paid a salary of approximately \$525,000, paid in U.S. dollars and Russian rubles;
- n. the Appellant was paid twice per month in accordance with Russian law;
- o. the Payer withheld tax from the Appellant's pay;
- p. the Payer did not withhold EI premiums from the Appellant's pay;
- q. the Worker's employment was not insurable in Russia;
- r. the Appellant maintained his Canadian residency;
- s. the Appellant returned to his residence in Calgary, Alberta for his time off from work;
- t. Kaz minerals was a party of a contract with Fluor for engineering, procurement, construction and management services;<sup>11</sup>
- u. the office of Fluor was located in Vancouver, British Columbia;
- v. the Appellant attended the office of Fluor on one occasion during the Period;
- w. the Appellant ceased employment with the Payer on May 31,<sup>12</sup> 2022 because Canadian sanctions prohibited Canadians from working as consultants or

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<sup>11</sup> See my comments in footnote 8 dealing with paragraph 9 a of the Reply.

<sup>12</sup> When Mr. Dirk admitted this paragraph, he stated that it was partially true. He should have said that he denied it or indicated which portion was true. This illustrates the difficulties for laypeople representing themselves without the help of a knowledgeable lawyer, even when the judge tries to explain to the layperson the legal process. Here the crux of the statement was that he ceased employment with the Payer on May 31, 2022, when the fact is it happened on February 14, 2022. On May 31, 2022, he ceased employment with BV.



employees in the oil, gas, petroleum, construction or mining sectors in the Russian Federation;

x. ~~Alina Abushakhmanova, head of Human Resources for the Payer, confirmed that the Payer's office was in Moscow and that no office was located in Canada; and~~

y. there was no record of the Payer in the Canada Revenue Agency database during the Period.

[7] It is useful to reproduce some of the facts outlined in the Notice of Appeal documents that were admitted<sup>13</sup> or acknowledged or that were characterized as not an issue<sup>14</sup> by the respondent. They are set out in three sections:

**Section 1: Ref. #: WEB828299**

**Reason for the Appeal**

See attached. The appeal indicated the employment was not insurable, because the employer did not have a Place of Business in Canada. I do not believe this

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<sup>13</sup> The admitted portion is in bold characters to make it easier to see which portion of those facts was admitted.

<sup>14</sup> The acknowledged or not in issue portion is underlined to make it easier to see which portion of those facts was acknowledged or not in issue. Here is section 1 of the Reply:

1. With respect to the page titled Tax Court of Canada, Ref.#: WEB828299, Reason for the Appeal, the ACG:

a. acknowledges that the decision of the Minister was based on the employer not having a place of business in Canada;

b. acknowledges the Canada Revenue Agency (the "CRA") definition of place of business as shown on the canada.ca website;

c. has no knowledge of and does not put in issue the different classifications of employment with Kaz Minerals; however, says for greater clarity, that the period in question for this appeal is from August 24, 2021 to May 31, 2022 (the "Period") and that the employer was Kaz Minerals Russia LLC (the "Payer"); and

d. says the remainder of the paragraph consists of reasons or argument for the appeal and does not contain any allegations of fact to either admit or deny, but so far as there are allegations of fact, they are denied. [Emphasis added.]

assessment aligns with the CRA#s published definition for Place of Business. I had three different classifications of employment with Kaz Minerals. I would like to further request the CRA evaluate each period separately, to determine whether each period of employment was insurable. Place of Business Reconsideration As per the attached and published Canada Revenue Agency definitions, a Place of Business<sup>15</sup> is defined as #Means any premises, facility, or installation used to carry on business, whether or not it is used exclusively for that purpose. Premises, facilities, or installations may be considered to be a place of business whether they are owned or rented, or, in some cases, where they are simply available to the business#.

## Section 2: Notice of Appeal – CASE GB222240833490<sup>16</sup>

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<sup>15</sup> This is the definition of “place of business” (**CRA Website Definition**), found in <https://www.canada.ca/en/revenue-agency/services/tax/businesses/definitions-letter-a-business.html>.

<sup>16</sup> Here is section 2 of the Reply:

2. With respect to the letter from the Appellant with the subject heading NOTICE OF APPEAL – CASE GB222240833490 dated December 7, 2022, the AGC:

a. **admits** to the facts in the first, second, third, and fifth unnumbered paragraphs in the letter, however, denies that the decision of the Minister does not align with the definition of place of business from the canada.ca website;

b. has no knowledge of and does not put in issue the different classifications of employment in the fourth unnumbered paragraph of the letter commencing with “I had three different classifications”; however, says for greater clarity, that the Minister did not determine insurability for employment outside the Period in this appeal;

c. says with respect to the sixth unnumbered paragraph of the letter commencing with “Kaz Minerals KPBV was employed by...” the AGC:

i. admits Fluor Canada (“Fluor”) had an office in Vancouver;

ii. has no knowledge of and puts in issue the remainder of the alleged facts in this paragraph.

d. says with respect to the remainder of the letter, the AGC admits that the Appellant’s employment with the Payer ceased on May 31, 2022, and says the remaining allegations of fact consists of reasons or argument for the appeal and does not contain any allegations of fact to either admit or deny, but so far as there are allegations of fact, they are denied.

Service Canada requested that the CRA complete a determination if my employment from August 24, 2021 to May 31, 2022 was insurable. The CRA made a negative determination on July 28, 2022, which I subsequently appealed. The appeal was denied in a letter dated October 12 2022.

The letter of October 12th noted it was denied for the following reason:

**‘Paragraph 5(b) of the EIR states that the employment outside of Canada must be by an employer who is a resident of Canada or has a *place of business* in Canada.**

**The appeal indicated the employment was not insurable, because the employer did not have a *Place of Business* in Canada.** I do not believe this assessment aligns with the CRA’s published definition for Place of Business.<sup>17</sup>

**I had three different classifications of employment with Kaz Minerals.** I would like to further request the CRA evaluate each period separately, to determine whether each period of employment was insurable.

#### **Place of Business Reconsideration**

**As per the attached and published Canada Revenue Agency definitions, a *Place of Business* is defined as “Means any premises, facility, or installation used to carry on business, whether or not it is used exclusively for that” purpose. Premises, facilities, or installations may be considered to be a place of business whether they are owned or rented, or, in some cases, where they are simply available to the business”.**

Kaz Minerals KPBV was employed by Kaz Minerals Russia, to manage the engineering design company in Canada. As part of Kaz Minerals KPBV agreement with Fluor Canada (to perform engineering and design of facilities), Kaz Minerals KPBV had 14 office spaces and 2 meeting rooms in **Fluor Canada’s 1185 W Georgia St, Vancouver Canada office**. Kaz Minerals KP[B] had between 10 and 14 employees permanently based in these offices. On a regular basis Kaz Minerals Russia also utilized these offices and meeting rooms for; engineering reviews, procurement meetings with vendors, one on one

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[Emphasis added.]

<sup>17</sup> In paragraph 2 of the Reply, the Attorney General of Canada “denies that the decision of the Minister does not align with the definition of place of business from the canada.ca website”.

meetings with Kaz Minerals KPBV employees, and client reviews. These meetings were detailed in my previous appeal and subsequent interviews.

### Periods of Review

My employment with Kaz Minerals KPBV **was terminated on May 31, 2022**. My employment with Kaz Minerals was for two different entities in different locations at various periods, so I would like to request the assessment be broken in to three periods:

- i) October 1, 2018 – August 23, 2021 – Kaz Minerals KPBV in Vancouver Canada
- ii) August 24, 2021 – February 28, 2022 – Kaz Minerals Russia in Moscow, Russian Federation
- iii) February 28, 2022 – May 31, 2022 – Kaz Minerals KPBV in Moscow, Russian Federation

For period (i) – this employment was in Canada

For period (ii) – the employment was in Moscow, Russian Federation with Kaz Minerals Russia. However, as detailed above, Kaz Minerals Russia had a *Place of Business* ‘simply available’ to the business in Canada in accordance with the CRA place of business definition.

For period (iii) – the employment was in Moscow, Russian Federation with Kaz Minerals KPBV. KPBV had between 10 to 14 employees working in Russia from February 2018 to June 14, 2022, and had office spaces and conference rooms provided to them in 1185 W Georgia St, Vancouver, Canada. Kaz Minerals KPBV had a *Place of Business* ‘rented’ in Canada in accordance with the CRA Place of Business definition.

### **Section 3: Employment Insurance Ruling letter, August 9, 2022**

#### **Ruling Number CE2219 9164 6235<sup>18</sup>**

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<sup>18</sup> Section 3 of the Reply provides as follows:

3. With respect to the documents attached to the Notice of Appeal, in sequence: the Notice of Appeal to the Minister dated August 9, 2022, the rulings decision letter dated July 28, 2022, the Minister’s decision letter dated October 12, 2022, along with its attached “Summary”, the AGC says the documents speak for themselves. However, the AGC says the attached definition of “Place of business” from the Canada.ca website is in the nature of evidence, which was improperly attached to the Notice of Appeal and puts the Appellant to proof of

I received a letter on July 28, 2022 indicating a decision was made on the insurability of my employment with Kaz Minerals Russia LLC from August 24, 2021 to May 31, 2022.

I understand the ruling was that the employment was not insurable. My understanding the ruling was made due to Section 5, paragraph b which requires a foreign company to have a place of business in Canada. I would like to formally request an appeal of the ruling, as I believe further clarification on the 'Place of Business' for Kaz Minerals Russia LLC is required.

I would like to clarify, that Kaz Minerals Russia LLC did have a place of business in Canada.

Kaz Minerals Ltd has several entities registered for tax purposes while operating in different countries. Both Kaz Minerals KPBV and Kaz Minerals Russia LLC worked on the Kaz Minerals Peschanka Copper Project, which is a projection the Russian Federation. Kaz Minerals KPBV had approximately 9 to 14 employees working full time in the Fluor Canada office spaces from February 2018 until May 2022. Kaz Minerals Russia LLC also used these offices as their place of business in Canada. The office spaces were located on the 3rd, 4th and 14th floors of 1185 W Georgia, Vancouver, BC.

I myself worked full time in these office from October 2018 to August 2021 as an employee of Kaz Minerals KPBV, and they were available to me if required while in Canada. My supervisor, Mian Khalil, the General Director of Kaz Minerals Russia LLC, would work periodically in these offices as well when work in Canada was required. I understand Mian last used these office in March 2022 while meeting with some of his reports as well as completing work reviews with Fluor Canada. The Deputy Director for Kaz Minerals Russia LLC, Andrew Batterson would periodically meet with his reports working for Kaz Minerals KPBV in this office, as well as perform engineering reviews with Fluor Canada. The Director of HR for Kaz Minerals Russia LLC, Sergey Starostinskiy, worked

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any allegations of fact contained therein, on which the Appellant intends to rely upon.

[Emphasis added.]

I disagree with the last statement that "the attached definition of 'Place of business' from the Canada.ca website is in the nature of evidence". A government statement appearing on a public website that is readily available to the public does not need to be introduced as evidence. This is the case for any document that may help in interpreting a legislative provision. Counsel for the respondent agreed during the hearing that Mr. Dirk could produce that public statement during submissions. (Page 70 of the hearing transcript.)

in these offices in March of 2020 and the Director of Engineering for Kaz Minerals Russia, Anton Shabunin worked in these offices in December of 2018.<sup>19</sup>

[Emphasis added.]

*(b) Testimony and documentary evidence*

[8] Only Mr. Dirk testified at the hearing. I found him to be a credible witness who for the most part repeated what he wrote in his various communications with the Minister when he appealed the initial ruling.

[9] As mentioned above in paragraph [4], the appeal officer did not explain in her report why she concluded that neither the Payer nor BV had any place of business in Canada: is it because she did not find the information credible or because she misinterpreted the scope of that expression in paragraph 5(b) of the Regulations? She also did not testify to clarify this question. What is odd is that the respondent “does not put in issue the different classifications of employment” but states that Mr. Dirk ceased employment with the Payer on May 31, 2022, when that employment had ceased on February 14, 2022 because he began employment with BV on February 15, 2022. It was his employment with BV that ceased on May 31, 2022.

[10] Mr. Dirk’s testimony and his documentary evidence provided more details about his relationship, including his work, with the Payer, BV and Kaz Holding. The Payer was incorporated in Russia in the spring of 2019 and its registered office is in Moscow. It is an 80% subsidiary of Kaz Holding, whose head office is located in London, England. The two main controlling shareholders of this company are two brothers from Kazakhstan. BV is a sister corporation of the Payer and has its registered office in Amsterdam, the Netherlands.

[11] It is my understanding that the Payer was incorporated for the purpose of operating a mining project situated northeast of Moscow, known as the Peschanka Project (**Project**). BV’s mission is to develop this Project, whose operations of the mine were expected to start in 2025 and are now expected to start in 2027.

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<sup>19</sup> I note that the Minister did not deny the statement of facts found in the last two paragraphs of this third section of the Notice of Appeal. Is it because the Minister does not contest these facts? In any event, almost all of these facts were attested by Mr. Dirk in his testimony as set out in the reasons below and were not contradicted by any witness of the respondent, as none appeared at the hearing.

[12] To carry out this development, BV entered a \$500 million contract with Fluor, a large engineering company based in Vancouver, British Columbia.<sup>20</sup> Pursuant to this contract, Fluor was to provide consulting services for designing the mining process facilities, including procuring parts to build a concentrator and supervising its construction at the Project's site. Originally, Fluor also was to carry out the construction, but this service was removed from the contract.

[13] Fluor had, during the Relevant Period, between 100 and 140 employees involved in the Project. BV had the right<sup>21</sup> to use 14 office spaces (**Vancouver Kaz offices**) on the Vancouver premises of Fluor, including three closed offices, eight cubicles and two meeting rooms. As seen above, Mr. Dirk stated to the Minister on several occasions that BV had 9 to 14 employees working full time in the Vancouver Kaz offices from February 2018 to May 2022 (see paragraph [7] above).

## (2) First Period

[14] Mr. Dirk holds a mining engineering degree from a Canadian university and resided in Calgary, Alberta when he was first hired in 2018 by BV. At this time, he was hired as a Mining Director of the Project at a base salary of \$300K (to be reviewed annually) and was entitled to a country allowance of \$222K while being based in Vancouver. (See the first contract of employment (Exhibit A-3) governed by the laws of England and Wales and the assignment letter of October 2018 (Exhibit A-5). Pursuant to the first paragraph of the assignment letter, Mr. Dirk was to work at "BV's ... Branch in Canada" (emphasis added))

[15] While keeping his residence in Calgary, he started to work in the Vancouver Kaz offices on October 1, 2018, and this work lasted until August 23, 2021 (the **First Period**). He had rented housing facilities for himself while working in Vancouver. He would usually return to his home in Calgary every weekend to be with his family. The assignment letter, dated October 1, 2018, states at article 1 that he was to report

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<sup>20</sup> Page 28 of the hearing transcript.

<sup>21</sup> Mr. Dirk testified as follows at page 93 of the hearing transcript:

A It was a part of the contract that they needed to provide that to us. It was built into the price, so indirectly -- ... It was specifically mentioned in the contract.

Mr. Dirk tried to obtain a copy of this agreement from Fluor, which request was denied on the ground of confidentiality.

to the “Project Director of Peschanka Project”, Mian Khalil, a BV employee,<sup>22</sup> who was an American citizen residing in Texas, but who came regularly to the Vancouver Kaz offices. Mr. Dirk described his boss as the chief executive officer of the Project.

[16] Mr. Dirk’s duties were the “exploration, mining designs, mining permits, and getting all of the equipment procurement and pre-construction of the mine and also ready for operations for all of the facilities on the Peschanka property”.<sup>23</sup> For instance, during the First Period, Mr. Dirk worked on requests for procurement proposals with companies such as Caterpillar and Hitachi. He worked in the Vancouver Kaz offices with some Russian employees:

A ... when I was based in Vancouver, I would travel to Moscow periodically. And employees of mine would travel from Moscow to Vancouver to see me periodically in the office.

JUSTICE: That’s in the period number 1.

A And they were KAZ Minerals Russia employees.<sup>24</sup>

...

JUSTICE: -- you had employees ... of Russia[~~n~~] coming to see you?

A Yes, ... to do work. So when I was in KAZ Mineral’s K.P.B.V. based in Vancouver, we did a request for proposals for mining equipment with Caterpillar, Komatsu, Hitachi. And the team that worked on that were myself and a number of KAZ Mineral’s Russia employees: Mark Fullenwider, an American, but he was based in Moscow and was an employee of KAZ Minerals. ... --

JUSTICE: So that would be Russia, right?

A Yes, KAZ Minerals Russia employee.<sup>25</sup>

[Emphasis added.]

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<sup>22</sup> Given that the Payer was only incorporated in the spring of 2019.

<sup>23</sup> Pages 35 to 36 of the hearing transcript.

<sup>24</sup> Page 68 of the hearing transcript.

<sup>25</sup> Page 85 of hearing transcript.



[17] Two such employees of the Payer spent four weeks in Vancouver:

JUSTICE: ... so in summary, two came for four weeks and two others came for two weeks, right?

A Yeah. At another period too in the summer, different periods --

JUSTICE: So this is all during that first period.

A Yeah, that was in November and December 2019.

JUSTICE: Okay.

A They also came as well in June of 2019 as I onboarded them, but they were KAZ Minerals employees, so they came to work in Vancouver in the offices for a month.

JUSTICE: So they were employees of B.V. or Russia?

A Russia.<sup>26</sup>

...

A There was also an engineering director and my boss would come over. My boss would, as I mentioned before, he would come to the offices of Fluor as a KAZ Minerals Russia employee and work there one week every two months. And less frequent --

JUSTICE: During that first period, correct.

A Correct.

JUSTICE: He was not your boss at that time, correct?

A No, no, he was. He was always my boss. Even though we would work for different entities ---

...

JUSTICE: Okay. But he was technically an employee of Russia, but he was your boss while you were an employee of B.V.

A Correct.

JUSTICE: Correct? ... So he came at least one week every two months during that first period. What about --

A Oh, first period, second period --

JUSTICE: And third?

A -- and even third period.

JUSTICE: Third. So that would be true for the 3 period[s].

A Yes, yes. He continued throughout the project.<sup>27</sup>

[Emphasis added.]

[18] A Human Resources Director came in March 2019. A Russian economist also visited the Vancouver Kaz offices in October 2018. They were also the Payer's employees.<sup>28</sup> The COVID-19 pandemic started in March 2020, so it is not surprising that there were fewer visits of Russian employees of the Payer after that time because of travel restrictions.

[19] In the record of employment (**ROE**) of Mr. Dirk for the First Period, the name of the employer is shown as BV and its branch office is shown as Almaty, Kazakhstan. His total insurable earnings are shown in box 15B as \$462,671.58 (see Exhibit A-6, box 4). Box 5 also provides the CRA payroll account number for BV. (See also Exhibit A-5, article 7, which states that Mr. Dirk was required to participate in the unemployment insurance plan.)

### (3) Second Period

[20] After August 23, 2021, Mr. Dirk continued to work on the Project as its Mining Director, but as an employee of the Payer. This lasted until February 14, 2022 (Second Period).<sup>29</sup> A new contract of employment, the second employment

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<sup>27</sup> Pages 88 to 89 of the hearing transcript.

<sup>28</sup> Pages 89 to 90 of the hearing transcript. There are some inconsistencies here as the Payer was described as having been incorporated in the spring of 2019. Is it possible that the economist came rather in October 2019? Or that the Payer was incorporated in the spring of 2018?

<sup>29</sup> In his Notice of Appeal, Mr. Dirk described the Second Period as being from August 24, 2021, to February 28, 2022, and the Third Period as being from February 28, 2022, to

contract, was signed on September 7, 2021, which is shown as **addendum number 1** to an employment contract dated March 1, 2021. This March 1 contract filed in court is not signed and bears many handwritten modifications and therefore looks like a draft contract. The signed and final version was not filed as an exhibit (both the March 1 document and addendum number 1 were filed as Exhibit A-1). The person who signed the addendum on behalf of the Payer was a Russian human resources person. This contract was governed by the laws and Labour code of the Russian Federation. Mr. Dirk received his remuneration in a Russian bank both in U.S. dollars (\$525K), which was then transferred to his Canadian account, and in Russian rubles.

[21] A second addendum (**addendum number 2**) was entered into on September 17, 2021, in Moscow between the Payer and Mr. Dirk, a citizen of Canada, to increase, it appears, his remuneration. It came into force on September 17, 2021. This addendum was signed by a Russian human resources person.

[22] Pursuant to the draft March 1 employment contract, Mr. Dirk was expected to start to work on March 31, 2021, but not earlier than the date that the employee obtained a work permit to be issued by Russia. In paragraph 1.1 of addendum number 1, it is stated that a work permit was issued on April 14, 2021, valid from April 30, 2021, until April 29, 2024. However, Mr. Dirk stated that he started to work in Russia on August 27, 2021. In paragraph 9 g of the Reply, he admitted that he “left Canada to begin work in Russia on August 23, 2021”.

[23] According to Mr. Dirk’s testimony, he continued to work on the Project as before, with the same duties, that is, to assist with the development of the Project, but mainly in Russia, and he continued to report to the same superior, the American Project Director, who was also an employee of the Payer:

JUSTICE: Okay. And what changed when you signed the contract with Russia.

A Just that instead of being based primarily in Vancouver, I was based primarily in Moscow, Russia.<sup>30</sup>

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May 31, 2022. I prefer to rely on the documentary evidence which, in Exhibit A-2, states at paragraph 1.1 that the employment shall commence on February 15, 2022.

<sup>30</sup> Pages 67 to 68 of the hearing transcript.

...

A Otherwise, no changes.

...

JUSTICE: Okay. So during that whole period, you stated in your Notice of Appeal that you went on one occasion to the Vancouver office, flew out. When was that and for how long were you there?

A Just a day. My ... boss, who was an employee of KAZ Minerals Russia but the American, he would be similar to me. He worked six weeks in Russia and then he would work three weeks from home in Dallas. Sometimes he would change that if his wife would travel to meet him in Russia or not. She didn't really care for it there, so -- and whenever he went back, he would always go to the Fluor offices to do business meetings with them, get an update. I happened to meet him for one day, I believe.

JUSTICE: So your boss ... -- what was his title?

A Mian Khalil, he was the project director.<sup>31</sup>

...

A He would either stop at Canada on his way home or on his back to Russia.<sup>32</sup>

[Emphasis added.]

[24] In his letter dated August 9, 2022, Mr. Dirk described the Project Director, his supervisor, Mr. Mian Khalil, as the General Director of the Payer (see also Exhibit A-2, article 2.1). Mr. Dirk also stated that his General Director would regularly go to the Vancouver Kaz offices not only during the time that he was an employee of the Payer, but also throughout the three periods. He estimated one week every two months. In his communications with the Minister, Mr. Dirk also stated that the Deputy Director of the Payer worked periodically in the Vancouver Kaz offices. The Payer's Human Resource Director also worked in these offices in March 2020. But Mr. Dirk acknowledged that he did not visit the Vancouver Kaz offices during the Second Period. However, as it is stated in paragraph 9 v of the Reply that Mr. Dirk visited the Vancouver Kaz offices on one occasion during the "Period"

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<sup>31</sup> Page 63 of the hearing transcript.

<sup>32</sup> Page 65 of the hearing transcript.

(that is, the Relevant Period). He testified that it happened during the Third Period. According to his testimony, Mr. Dirk would normally work six weeks in Russia and come back to Canada for two weeks. He estimated that he spent two weeks in Canada in December 2021 and January 2022 and 15 weeks in Russia.

[25] He also stated that the Payer's employees continued to visit and work at the Vancouver Kaz offices:

JUSTICE: And basically, you're saying that during period 2 and 3.

A Those [Vancouver Kaz offices] were available to[o] --

JUSTICE: It was the same scenario that existed? For example, your boss --

A Yes.

JUSTICE: -- was an employee of Mineral -- of Russia?

A Of Russia.

JUSTICE: And he was going there over those -- for three periods, as you describe[d] it --

A Yes, and had a meeting in the third meeting, ... as I described it.

JUSTICE: Are you aware if there were other employees of Russia that might have gone during period number 2 and 3?

A Yes, Andrew Batteson. He was an engineering manager and an engineering director. He was promoted. [H]e came over in period 2 and period 3.

JUSTICE: An employee of Russia, right?

A Yes, sir.

JUSTICE: So and he came in period 2 and period 3.

A Oh, sorry, he came in period 2. In period 3, ... actually -- they needed him to go to Kazakhstan and finish the project there, so he was an employee of K.P.B.V., but in Kazakhstan, so he only came in period 2. He came about three or four occasions --<sup>33</sup>

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<sup>33</sup> Pages 94 and 95 of the hearing transcript.

[26] He provided the following details for his work done when he returned from Moscow to his home in Calgary:

JUSTICE: Okay. Period 2.

A There was two times in period 2 where I worked from my residence in Calgary. It would have been in the last two weeks of October and the last week of December, first week of January.<sup>34</sup>

(4) Third Period

[27] After the end of the Second Period, Mr. Dirk continued to work on the Project, but as an employee of BV again. A new contract of employment, his third employment contract, was signed on February 15, 2022,<sup>35</sup> which is nine days before President Putin announced on February 24, 2022, the Russian invasion of Ukraine, described as a “special military operation”.<sup>36</sup> Mr. Khalil, his managing director, signed this contract on behalf of BV. He also signed an addendum to the contract of employment on April 1, 2022. Article 4.1 of the February 15, 2022 contract stipulates that his “contractual work location” was his residence in Calgary. Mr. Dirk recognized that he worked there, but most of the work was carried out in Moscow.<sup>37</sup> He provided the following details:

... And then in period 3, there was two times when I worked from my residence in Calgary, from when I went home on the 24th of February when Russia crossed the border into the Ukraine.

...

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<sup>34</sup> Pages 137 to 138 of the hearing transcript.

<sup>35</sup> See Exhibit A-2.

<sup>36</sup>

[https://en.wikipedia.org/wiki/On\\_conducting\\_a\\_special\\_military\\_operation?wprov=sfti1#](https://en.wikipedia.org/wiki/On_conducting_a_special_military_operation?wprov=sfti1#). (Valid online link on June 25, 2024))

Mr. Dirk stated in his testimony that he was “on a plane when Russia crossed the line to Ukraine, so I stayed home for an extended period. ... My boss, who was an American, went home as well, and we had a meeting in Vancouver.” (Page 61 of the hearing transcript.)

<sup>37</sup> Pages 136 to 137 of the hearing transcript.

A I -- I worked from home for a month, except for one day I travelled to Vancouver to meet with my boss. And then in the last three weeks of May, I worked from home as well.

JUSTICE: How long were you in Vancouver?

A Just one day.<sup>38</sup>

[28] He then described how long he worked in Russia:

JUSTICE: -- ... in period 3. And I'm asking you how many days did you work, or weeks did you work, in Russia --

A ... about seven and a half weeks in total in period 3 I worked in Russia.<sup>39</sup>

[29] From the statements made by Mr. Dirk in his testimony, it appears that the reason for the change of employer was driven by foreign exchange control considerations. Thereafter, his remuneration in U.S. dollars was paid directly from London to his Canadian account while his Russian rubles were paid to his Russian bank account. After the invasion of Ukraine, he stayed home to see how things would develop. When the situation settled down, he went back for one more rotation mid-March. He went on vacation in Italy on April 29, 2022, to clear his head and decided to return on May 9, 2022, to Canada.<sup>40</sup>

[30] This third contract of employment was terminated by Mr. Dirk while in Canada, effective May 31, 2022, after the adoption of the Canadian economic sanctions imposed on Russia following its invasion of Ukraine in February 2022.

[31] Mr. Dirk stated in his testimony that he paid premiums under the Act during the three periods described above.<sup>41</sup> There is evidence that appears to support that BV paid the employer's premium under the Act during the First Period. There are no ROEs for the Second Period and the Third Period. Mr. Dirk admitted the fact outlined in paragraph 9 p of the Reply, which states that the Payer did not withhold EI premiums from Mr. Dirk's pay. Furthermore, the second employment contract

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<sup>38</sup> Page 138 of the hearing transcript.

<sup>39</sup> Page 140 of the hearing transcript.

<sup>40</sup> Page 62 of the hearing transcript.

<sup>41</sup> Pages 107, 128 and 130 of the hearing transcript.

(Exhibit A-1) does not contain a similar provision to paragraph 7 of the assignment letter (Exhibit A-5) with respect to the requirement to contribute premiums to the EI program under the Act. Mr. Dirk suggested that it was because the Payer had employees in different jurisdictions. He also acknowledged that in respect of the First Period, he received a T4 for his remuneration paid by BV and that he did not receive any T4 for his remuneration paid by the Payer or BV with respect to the Second Period and the Third Period.

[32] There was no change of Russian apartment after he became employed by BV in the Third Period.<sup>42</sup> The situation remained the same throughout the three periods for his meetings with subordinates:

A In periods 1, 2, and 3, I had subordinates in Moscow and Pechenga. I had some in -- but throughout Russia.<sup>43</sup>

[33] At one point, after the BV branch office in Kazakhstan was closed, the Payer's human resources group took care of the employees working in the Vancouver Kaz offices:

... they used that HR group to support us, but later on, they used KAZ Minerals Russia to support the employees in Vancouver. Long story ...<sup>44</sup>

[34] During this period, as seen above, he also worked from his residence in Calgary.

#### **IV. Positions of the parties**

##### **A. Mr. Dirk**

[35] Mr. Dirk contends that the Payer had a place of business at the Vancouver Kaz offices during the Second Period and that, during the Third Period, BV was his employer and it also had such a place of business in the same location. Given that neither the Regulations nor the Act provides a definition of a place of business, he is using the CRA Website Definition found on the Government of Canada website, Canada.ca.

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<sup>42</sup> Page 132 of the hearing transcript.

<sup>43</sup> Page 133 of the hearing transcript.

<sup>44</sup> Page 135 of the hearing transcript.



## B. Respondent

[36] Counsel for the respondent stated that the Minister was not bound by the CRA Website Definition, which was only informative, although she did not provide any specific definition of a “place of business” and stated that she had not found one in the case law either. However, she relied on the following two decisions, which in her view supported the Minister’s position that neither the Payer nor BV had a place of business in Canada: *Rizzo v. M.N.R.*, 2015 TCC 103, 2015 CarswellNat 1285 [“Rizzo”], and *Guan v. M.N.R.*, 2009 TCC 561, 2009 CarswellNat 3639 [“Guan”].

## V. Analysis

[37] It is useful to reproduce again the relevant provision of the Regulations that is at issue:

5. Employment outside Canada, other than employment on a ship described in section 4, is included in insurable employment if
- (a) the person so employed ordinarily resides in Canada;
  - (b) that employment is outside Canada or partly outside Canada by an employer who is resident or has a place of business in Canada;
  - (c) the employment would be insurable employment if it were in Canada; and
  - (d) the employment is not insurable employment under the laws of the country in which it takes place.

[Emphasis added.]

[38] As mentioned above, the appeal officer concluded that all of these conditions in section 5 had been satisfied, except paragraph (b). Given that neither the Payer nor BV resided in Canada because there is no evidence that their management and control were exercised in Canada, the remaining issue is whether they had a “place of business” in Canada. I am referring to both BV and the Payer because Mr. Dirk had two different payers during the Relevant Period, a situation that the appeal officer does not seem to have considered. The evidence clearly supports the position of Mr. Dirk that during the three different periods, there were three written employment contracts. During the First Period, which immediately precedes the Relevant Period, he was employed in Canada by BV (see Exhibit A-3). During the Second Period, he was employed by the Payer outside of Canada (see Exhibit A-1). Finally, during the Third Period, he was employed by BV outside of Canada (see Exhibit A-2). The last two periods correspond to the Relevant Period.

## A. Meaning of “place of business”

[39] The expressions “place of business” and “place of business in Canada” are used both in the Act and the Regulations,<sup>45</sup> but are not defined in either one. In this situation, it is customary to determine what the ordinary meaning of an expression is. To do so, dictionaries are very often consulted.

[40] The expression “place of business” is defined in *Black’s Law Dictionary*<sup>46</sup> as “[a] location at which one carries on a business”. A “principal place of business” is defined as “[t]he place of a corporation’s chief executive offices, which is typically viewed as the ‘nerve center.’”

[41] It is defined similarly as follows on the online version of the *Oxford English Dictionary*<sup>47</sup>: “A place where business is conducted, spec. a shop, office, or other commercial establishment.”

[42] It is also useful to review the case law dealing with this expression. For instance, the expression “place of business” (which is not defined in the *Income Tax Act*<sup>48</sup> (ITA) either) is used in paragraph 20(1)(ee) of the ITA, which authorizes a deduction of the connection costs of public utilities at a place of business. In *R. v. Guaranteed Homes Ltd.*,<sup>49</sup> Smith D.J. was called upon to determine the scope of the expression “place of business” for the purposes of this paragraph 20(1)(ee).

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<sup>45</sup> “Place of business in Canada” is used in section 87 of the Act, which deals with the keeping of records and books; in subsection 102(19), which deals with service of information or a complaint to a partnership; and in subsection 126(8) of the Act, which deals with the service of garnishment to a person carrying on business under another name or to a partnership.

In the Regulations, the expression “place of business in Canada” is used only in section 4 (dealing with employment on a ship outside Canada) and in section 5 (dealing with employment outside Canada).

<sup>46</sup> Bryan A. Garner, ed. in chief, *Black’s Law Dictionary*, 11th ed., (St. Paul, MN: Thomson Reuters, 2019) sub verbo “place of business”.

<sup>47</sup> Business, n. meanings, etymology and more | Oxford English Dictionary (oed.com).

<sup>48</sup> R.S.C. 1985, c. 1 (5th Supp.).

<sup>49</sup> 78 D.T.C. 6510, [1978] C.T.C. 636 (Fed. T.D.) [“*Guaranteed Homes*”].

He held that a display house in which there was a field office was a place of business for a construction company. This is how he defined a place of business:

21 I have quoted the opinion of St-Onge QC in the Canadian Utilities case that “**a place of business** is where business is being done”.<sup>50</sup> It has also been described as “a place where business is carried on”. This clearly applies to simple cases such as a single retail store or wholesaling or manufacturing establishment. But a person, firm or corporation may have several, or many places of business, in the sense of places where business is carried on, eg: a supermarket chain store corporation. The words “a place of business” have a wider meaning than “**Head Office**”, though some aspects, at least, of a company’s business are normally carried on at its Head Office. The same is true of a company’s “**Principal Establishment**”. A person, firm or corporation may also have **branch offices** which are places of business in the same sense. Some businesses, eg: engineering and construction businesses, may have what is often called a “**field office**”, which conducts some or all of the firm’s business in the locality in and for which it has been set up, and which is properly described as “a place of business”. Other examples of a company having more than one place of business could easily be cited.

[Emphasis added.]

[43] The Federal Court of Appeal in *Queen v. William A. Dudney*<sup>51</sup> provides an analysis that is enlightening for resolving the issue of this appeal. In that case, the issue was to determine whether the taxpayer had a “fixed base regularly available to him” under the Canada–United States tax treaty. This is how the issue and the method to resolve it are described:

[7] The term “fixed base regularly available to him” is not defined in the Convention or in the *Income Tax Act*. The application of Article XIV must therefore be determined on a case by case basis, giving effect to the intention of the contracting states. A literal or legalistic interpretation that might defeat their intention is to be avoided: *J.N. Gladden Estate v. The Queen*, [1985] 1 C.T.C. 163 (F.C.T.D.) at 166-167, quoted with approval in *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802 at 822.

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<sup>50</sup> I like this particular meaning because the word “business” in this context could have a wider meaning than a business being carried out for a profit. Given that “insurable employment” could apply to employees of non-profit organizations such as charities, the meaning of “place of business” should be wide enough to cover a place where the activities of a non-profit organization are being carried out. However, this is not the case here. We have an employee who is working for an employer who carries on a business for a profit.

<sup>51</sup> 2000 D.T.C. 6169 [“*Dudney*”].

[Emphasis added.]

[44] In order to determine the meaning and scope of “fixed base regularly available to him”, Sharlow J.A. referred to the commentary of 1977 OECD Model Convention, more particularly the commentary to paragraph 1 of Article 5, which includes the following :

2. Paragraph 1 gives a general definition of the term “permanent establishment” which brings out its essential characteristics of a permanent establishment in the sense of the Convention, i.e. a distinct “situs”, a “fixed place of business”. The paragraph defines the term “**permanent establishment**” as a fixed place of business, through which the business of an enterprise is wholly or partly carried on. This definition, therefore, contains the following conditions:

- the existence of a “**place of business**”, i.e. a facility such as premises or, in certain instances, machinery or equipment;
- this place of business must be “**fixed**”, i.e. it must be established at a distinct place with a certain degree of permanence;
- the carrying on of the business of the enterprise through this fixed place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.

...

4. The term “**place of business**” covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. A place of business may also exist where no premises are available or required for carrying on the business and it simply has a certain amount of space at its disposal. It is immaterial whether the premises, facilities or installations **are owed or rented by or are otherwise at the disposal of the enterprise**. A place of business may thus be constituted by a pitch<sup>52</sup> in the market place, or by a certain permanently used area in a Customs depot (e.g. for the storage of dutiable goods). **Again the place of business may be situated in the business facilities of another enterprise**. This may be the case, for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by the other enterprise.

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<sup>52</sup> The Antidote English Dictionary gives this definition for a “pitch”: “uk – a public place where people go to sell things or to perform”.

...

6. Since the place of business must be **fixed**, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, i.e. if it is not of a purely temporary nature. If the place of business was not set up merely for a temporary purpose, it can constitute a permanent establishment even though it existed, in practice, only for a very short period of time because of the special nature of the activity of the enterprise or because, as a consequence of special circumstances (e.g., death of the taxpayer, investment failure), it was prematurely liquidated. Where a place of business which was, at the outset, designed for a short temporary purpose only, is maintained for such a period that it cannot be considered as a temporary one, it becomes a fixed place of business and thus — retrospectively — a permanent establishment.

[Emphasis added.]

[45] This analysis made by the Federal Court of Appeal brings me to the definition proposed by Mr. Dirk, the CRA Website Definition, which is the one appearing on the Government of Canada website, Canada.ca, and which was acknowledged by the Minister's Reply as being the Canada Revenue Agency definition, the agency responsible for the application of section 5 of the Regulations. It is worth repeating here:

Place of business

Means any premises, facility, or installation used to carry on business, whether or not it is used exclusively for that purpose. Premises, facilities, or installations may be considered to be a place of business whether they are owned or rented, or, in some cases, where they are simply available to the business.

[46] When we compare this CRA Website Definition to the definition used in the commentary of the OECD Model Convention, we can see the many similarities between the two definitions. The situs (location) can be a large variety of places: premises, facilities or installations. All three of these terms are used in both definitions. In both definitions, it is immaterial whether the premises, facilities or installations are owned or rented or otherwise at the disposal of the business. Also, in both definitions, it is immaterial whether the place is used exclusively for the carrying on of business. The CRA Website Definition has the benefit of being more concise.

[47] When we compare the definition of "place of business" to the definition of "fixed place of business", it is evident that the addition of the adjective limits the scope of a place of business. As stated in the OECD Model Convention commentary,

to be “fixed”, a business “must be established at a distinct place with a certain degree of permanence”. Another restriction occurs when the expression “principal place of business” is used, as we have seen in the *Guaranteed Homes* decision.

[48] Now let us compare the definition of “place of business” used by the appeal officer to the above CRA Website Definition. Here is the appeal officer’s definition:

In general, an employer’s **place of business** is the location where the employer carries on business. The location in Canada that is determined to be **the head office** of a business would also be considered a place of business of the employer. A place of business may also be any **other location** owned or leased by the employer or for which the employer has obtained a license<sup>53</sup> and where the employer or one or more of its employees work or report to work, or from which one or more of the employees are paid.<sup>54</sup> [Emphasis added.]

[49] First, we see that the meaning of the first sentence is in conformity with the usual meaning of the expression “place of business”, that is, the location where the employer carries on the business. To illustrate this definition, she uses the obvious example of a head office. In the third sentence, she refers to the same concept as in the CRA Website Definition about the kind of occupation rights of the location: it may be owned, leased or occupied by licence, in effect what is “simply available”. However, she adds one more condition for a location to constitute a “place of business”, a condition that is not mentioned in the CRA Website Definition. That is that the place of business be a location where the employer or one or more of its employees work or report to work, or from which one or more of the employees are

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<sup>53</sup> In *DatEx Semiconductor Incorporated v. M.N.R.*, 2007 TCC 189, Hershfield J. dealt with the term “licence” used in the definition of “establishment in Canada” from the CPP Regulations as follows:

[36] However, there is an additional test. Such premises must be owned, leased or licensed by the employer. I have no reason to believe that the Appellant owned the premises, but I have no hesitation in finding that it operated there under a lease or license. The Appellant’s presence and the presence of its officers are not as trespassers. No formal lease or license is required to constitute a lease or license which can be a simple right of occupation and which need not be exclusive.[17] ...

Footnote 17: *Black Law’s [sic] Dictionary*, 8th ed., s.v. “license”.

[Emphasis added.]

So the use of the place can be “simply available to the business”.

<sup>54</sup> See paragraph [2] above, where the definition was also reproduced and its source discussed.

paid. (I will refer to this condition as the “**work or report condition**”.) This work or report condition can also be found in the definition of “establishment in Canada” in subsection 15(1) of the CPP Regulations. That definition reads as follows:

Part III — Employment Included in or Excepted From Pensionable Employment  
by Regulation

Interpretation

15. (1) In this Part

...

“**establishment in Canada**”, with respect to an employer, means any office, warehouse, factory, oil well, gas well, mine, workshop, farm, timber land, pier, wharf, school, college, club, residence, hotel, motel, restaurant, tavern, bar or any other place or premises in Canada that is owned, leased or licensed by the employer and where the employer or one or more of his employees works or reports for work or from or at which one or more of his employees are paid;

[Emphasis added.]

[50] When we compare the definition of “establishment in Canada” under the CPP Regulations with the CRA Website Definition, we can see that it lists many more examples of what could be a location; “premises” is one of the examples in the list and is also used in the CRA Website Definition. The occupation rights of the location are similar in both definitions. As noted above, the work or report condition does not appear in the CRA Website Definition. Finally, there is no reference to the concept of having to carry on a business, although this may be inferred from the fact that one or more employees report to work there. As in the CRA Website Definition, the work or report condition does not appear in the ordinary meaning of “place of business” adopted in the OECD Model Convention.

[51] Although the appeal officer did not state that the source of her definition of a “place of business” was the CPP Regulations definition of “establishment in Canada” and did not use it verbatim in her report, it is fair to conclude that her definition comes at least in part from it. This conclusion is also supported by the fact that counsel for the respondent referred this Court to the *Guan* decision. In that case, the judge dealt with the application of paragraph 5(b) of the Regulations and referred to—but, in my view, did not formally adopt—the definition of “establishment in

Canada” in the CPP Regulations as defining “a place of business”. He stated at paragraph 9 of a 14-paragraph judgment:

The expression “place of business in Canada” is not defined in the *Act* but a similar section in the *Canada Pension Plan Regulations* C.R.C., c. 385 refers to an employer who has an establishment in Canada and the expression “establishment in Canada” is defined as follows in section 15 of the said *Regulations* ...

[Emphasis added.]

[52] This judge ruled that there was not sufficient evidence to support a finding of there being a “place of business” in that case “on a balance of probabilities”. Also, it does not appear that the “work or report condition” was formally considered. Therefore, the *Guan* case does not help the respondent’s case.<sup>55</sup>

[53] I believe that the courts have to be very cautious in deciding to adopt a defined expression in one set of regulations under one Act for the purposes of applying an undefined expression in another set of regulations under another Act, unless the other Act or the regulations under it require the courts to do so.<sup>56</sup> Borrowing a statutory definition from one piece of a legislation to apply other legislation may in effect be adding words to that other legislation. It has been recognized that a court cannot do so because it would be usurping the legislative power of Parliament to enact a statute or of the Government to enact regulations. In *Kruco Inc. v. R.*,<sup>57</sup> Dussault J. cited our former colleague Bowman J. at paragraph 115:

... Judge Bowman recently made a similar comment in *Canadian Occidental U.S. Petroleum Corp. v. R.*, [2001] T.C.J. No. 112 (T.C.C. [General Procedure]), rejecting the argument of the Respondent who asked the Court to adopt an interpretation requiring the addition of words to a provision of the Act. Judge Bowman, relying on the principle stated in *Friesen, supra*, rejected this

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<sup>55</sup> The *Rizzo* case, which she also referred to, is not helpful either to support her position in this appeal because the worker in that appeal did not reside in Canada, and therefore that was sufficient to conclude that the worker did not have insurable employment. The deputy judge did not have to determine the meaning of “place of business” in Canada given that he found that the employer did not have a business presence in Canada. (See paragraphs 18 and 19.)

<sup>56</sup> A good illustration of this is found in subsection 5(5) of the Act, which defines “business” as defined in subsection 248(1) of the ITA.

<sup>57</sup> 2001 CarswellNat 1600, [2001] 4 C.T.C. 2053, 2001 D.T.C. 668.



interpretation. According to Judge Bowman (in paragraph 19), “[t]he judicial filling of perceived legislative lacunae to achieve some unspecified policy objective is an unacceptable usurpation by the court of the legislative function.”

[Emphasis added.]

[54] On the other hand, there is a principle of interpretation that courts may apply an interpretation provision of one enactment to other enactments relating to the same subject matter,<sup>58</sup> unless a contrary intention appears.<sup>59</sup> Professor Pierre-André Côté describes the application of *in pari materia* to related statutes as follows:

The presumption that legislatures preserve a certain uniformity of expression within the same enactment also applies to enactments in the same field. The same word is deemed to have the same meaning in related legislation. ...<sup>60</sup>

[Emphasis added.]

[55] Professor Ruth Sullivan illustrates some of the limits to this approach when she writes that “[i]dential phrases and expressions are presumed to have the same meaning while differences in wording are presumed to reflect differences in the intended meaning or effect”<sup>61</sup> (emphasis added).

[56] Professor Côté adopts a similar approach when he describes the *a contrario* argument as follows: “[where] two laws on the same subject are drafted differently [it] will suggest that different meanings were intended.”<sup>62</sup> The argument flows from the maxim *expressio unius est exclusio alterius*, which means “to express one thing is to exclude another.”<sup>63</sup>

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<sup>58</sup> I do not have to determine here whether the Regulations and the CPP Regulations constitute the “same subject matter” because of my conclusion that the principle of interpretation *in pari materia* does not apply here.

<sup>59</sup> See subsection 15(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21.

<sup>60</sup> Pierre-André Côté in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters, 2011) at page 368.

<sup>61</sup> Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis 2022) at § 13.04 Related Legislation, “[4] Consistent terms”.

<sup>62</sup> Côté, *supra* footnote 60 at pages 369 to 370.

<sup>63</sup> Sullivan, *supra* footnote 61 at § 8.09 Implied Exclusion.

[57] I believe such a situation applies here if one were to import the defined expression of “establishment in Canada” from the CPP Regulations for the purposes of interpreting the undefined expression of “place of business” in paragraph 5(b) of the Regulations. Here we have differences in wording.

[58] The danger of not applying this limit to the *in pari materia* principle can be illustrated by the interpretation adopted by the Supreme Court of Canada in *Sunbeam Corporation (Canada) Ltd. v. Minister of National Revenue*.<sup>64</sup> Martland J. stated at page 1393:

... my opinion is that the word “**establishment**” contemplates a fixed place of business of the corporation, a local habitation of its own. The word “permanent” means that the establishment is a stable one, and not of a temporary or tentative character.

[Emphasis added.]

[59] Here, paragraph 5(b) of the Regulations refers to a “place of business” and not to a “fixed place of business” nor to an “establishment” as we have seen above. To communicate properly and efficiently one’s intent, one must use the right words because different words usually have a different meaning. Even synonyms can convey subtle differences in meaning and scope.

[60] In my view, there is one more reason not to apply the definition used by the appeal officer, which I believe was imported in part from the CPP Regulations. It has to do with the work and report condition. The CPP Regulations definition makes sense for the purposes of the *Canada Pension Plan (CPP)* and the CPP Regulations because that condition fits in the scheme of that legislation. It is useful to reproduce here some of the provisions of the CPP Regulations dealing with the following:

Part III — Employment Included in or Excepted From Pensionable Employment  
by Regulation

### **Interpretation**

15. (1) In this Part,

“**employer operating in Canada**” includes

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<sup>64</sup> 62 D.T.C. 1390 [“*Sunbeam Corporation (Canada) Ltd.*”].

... and

(d) any employer who has an establishment in Canada and who

(i) is subject to income tax under Part I of the *Income Tax Act*, or

(ii) but for section 149 of the *Income Tax Act*, would be subject to income tax under Part I of that Act,

for any taxation year for which he has taxable income;

...

### **Employment Outside Canada**

16. (1) **Pensionable employment** includes employment outside Canada (except employment in international transportation) that would be pensionable employment if it were in Canada, if the employee employed therein

(a) ordinarily reports for work at an establishment in Canada of his employer;

(b) is resident in Canada and is paid at or from an establishment in Canada of his employer;

... or

(g) ...

(2) **Pensionable employment** includes employment in a country other than Canada (except employment described in subsection (1) or employment in international transportation) by an employer operating in Canada if

(a) the employment in that country would be pensionable employment if it were in Canada, and

(b) the employee

(i) was engaged by the employer at the time when the employee was in and was resident in Canada, or

(ii) ...

and the employer has undertaken in prescribed form to make payment of the employee's contributions and the employer's contributions in accordance with

section 8 in respect of all such employees employed by him in such employment in that country.

[Emphasis added.]

[61] When we compare the conditions to qualify for “pensionable employment” under the CPP and those to qualify for “insurable employment” under the Act for employment outside of Canada, we can see that the respective conditions are substantially different and particularly more stringent for pensionable employment. Under subsection 16(1) of the CPP Regulations, to qualify for pensionable employment, the employee must ordinarily report for work at an establishment in Canada or, if resident, be paid at or from an establishment in Canada of his or her employer. Under subsection 16(2) of the CPP Regulations, to qualify if the employer is an “employer operating in Canada”, the employer must have undertaken to make payment of the employee’s contributions and the employer’s contributions. There are no similar conditions for employment to qualify as “insurable employment” under section 5 of the Regulations. The work or report condition is not mentioned in this section.

[62] In conclusion, it is the definition relied on by Mr. Dirk—that is the CRA Website Definition, the Minister’s own definition—and not the definition relied on by the appeal officer and counsel for the respondent that better reflects the ordinary meaning of the expression “place of business”, which is essentially where one carries on a business. The CRA Website Definition just confirms that one can carry on a business almost anywhere, whether there are “premises”, “facilities” or “installations”. It also confirms that it is not limited to a place that the business owns or leases: it can be a place that is “simply available to the business”. This interpretation is consistent with the one adopted around the world as reflected by the OECD Model Convention.

[63] Furthermore, to have a “place of business”, one does not need to have one or more employees who work or report to work at this place of business. The Federal Court of Appeal has recognized in *E. S. G. Holdings Limited v. The Queen*<sup>65</sup> that a

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<sup>65</sup> 76 D.T.C. 6158 [*E.S.G. Holdings*]. Given that these are my very last written reasons for judgment because of my age, I will indulge in telling this anecdote. I was present in the courtroom when Chief Justice Jackett rendered his oral judgment from the bench. I remember it well, probably because it was my first time before that Court. I was an articling clerk of André Gauthier (who pleaded the case for the taxpayer), a former articling clerk of George W. Ainslie, Q.C. (who pleaded for the Crown), who was a former articling clerk of Chief Justice Jackett. The decision in *E. S. G. Holdings* was

corporation can carry on an “active business” without any employees through the services of an agency of an independent contractor corporation. Therefore, the addition of the work or report condition would require a regulatory amendment to section 5 of the Regulations if this is what the EI Commission or the Government wishes to have to apply the Regulations. Until it does, this Court cannot add words or conditions that are not present in a set of regulations.

[64] In my view, this conclusion is also in compliance with the requirement that the ordinary meaning of the expression be in harmony “with the scheme of the Act, the object of the Act, and the intention of Parliament” as stated, for instance, by the Supreme Court of Canada in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*<sup>66</sup> at paragraph 22:

In light of this passage there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. At page 87 of his text *Construction of Statutes* (2nd ed. 1983), Driedger fittingly summarizes the basic principles: “... 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”. ...

[Emphasis added.]

[65] The object and intention of Parliament (with respect to the Act) and of the EI Commission and the Government (with respect to the Regulations) is quite evident: it is to provide financial assistance to eligible employees who reside in Canada, whether employed in Canada or in a foreign country, and who become unemployed:

The Employment Insurance program

The Employment Insurance (EI) program provides temporary income support to partially replace employment income for eligible unemployed contributors to the program while they look for new employment or upgrade their skills, and for those who are absent from work due to specific life circumstances. ...

Canada’s employment insurance system dates back to the 1940 creation of the Unemployment Insurance Commission, the precursor of the current Canada EI

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rendered by him after listening to the arguments of Mr. Ainslie. He told Mr. Gauthier and Mr. Marc Noël (who assisted Mr. Gauthier and who would eventually become himself a Chief Justice of the Federal Court of Appeal) that it would not be necessary to hear their arguments.

<sup>66</sup> [1994] S.C.J. No. 78; [1994] 3 S.C.R. 3 (S.C.C.), at paragraph 22 (Q.L.).

Commission. Collection of premiums to fund the program began in 1941 and the first benefit payments were issued in 1942.<sup>67</sup>

[66] The Canadian Labour Congress describes in more detail the birth of employment insurance in Canada with this factual background:<sup>68</sup>

On August 5, 1940, the federal government passed the Unemployment Insurance Act, establishing a fundamental pillar of Canada's social safety net. Years of political pressure from unions, social groups and the CCF (which became the NDP) forced the Liberal government to take action, even though the constitution had to be amended.

THIS BRIEF HISTORY SHOWS THE RISE AND FALL OF UI/EI IN CANADA.

**1918** Faced with the integration of returning soldiers back into the workforce, the *Employment Officers Co-ordination Act* is introduced in which the federal government subsidized provincial employment offices. The federal government also created the department of Employment Services, mandated to provide employment data and advice.

In **1919**, the Government of Canada signed a draft document which recommended public unemployment insurance at the first International Labour Conference. In the same year, the federal government also appointed a Royal Commission on Industrial Relations. The Commission recommended the implementation of a national scheme of social insurance for workers who lost their jobs through no fault of their own.

**1930s** In response to high rates of unemployment caused by the Great Depression, various levels of government set up a system of "relief". This was often limited to vouchers not cash and tied to providing labour to public works or in work camps.

**March 1935** – Failed first attempt – *Employment and Social Insurance Act* passed third reading in Prime Minister Bennett's Conservative government.

**June – July 1935** – Dire conditions in work camps on the West Coast prompt the *On To Ottawa Trek*, which ends in a police instigated riot in Regina on

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<sup>67</sup> See <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/monitoring2019/intro.html>. "Employment Insurance Monitoring and Assessment Report for the fiscal year beginning April 1, 2018 and ending March 31, 2019: Introduction", Valid online link on June 26, 2024.

<sup>68</sup> See <https://canadianlabour.ca/passage-of-the-unemployment-insurance-act/>. (Valid online link on June 26, 2024.)

July 1<sup>st</sup>. Relief camps are shut down, and the incident highlights the need for a social insurance system in Canada.

**October 1935** With Bennett's government defeated, the *Employment and Social Insurance Act* is never implemented. It is deemed unconstitutional the following year, because employment falls under provincial jurisdiction.

**Between 1935 and 1940** Growing pressure from unions, social groups and the Cooperative Commonwealth Federation (CCF was the forerunner of the NDP) forced the Liberal government of W.L.M. King to take action.

**1940** – The effects of the depression so deeply marked Canadians that the provinces unanimously agreed to change the constitution. Prime Minister King finally gets British approval and unanimous provincial support to allow UI to fall under federal jurisdiction, and the *Unemployment Insurance Act* passes. Only 40% of labour force covered, as seasonal workers, public servants, and others excluded. Workers are required to show they are unemployed, available for suitable work, and have contributed to the program for 180 days over the past two years. Benefits last between 6 to 52 weeks.

**1955** – Under Prime Minister Louis St. Laurent, an extensive overhaul of program extends benefits to approximately 75 percent of the Canadian labour force and changes benefit duration to 15 – 36 weeks.

[Emphasis added.]

[67] The CRA Website Definition also works well within the scheme<sup>69</sup> of the Act and Regulations—for instance, in the context of section 87 of the Act, which deals with the keeping of records and books; of subsection 102(19), which deals with service of information or a complaint to a partnership; and of subsection 126(8) of the Act, which deals with service of garnishment to a person carrying on business under another name or to a partnership. It would achieve the objectives of the administrative measures described in these provisions of the Act. If in certain circumstances it does not, then the EI Commission, with the approval of the Government, can adopt measures similar to the provisions found in the CPP Regulations, such as the one found in subsection 16(2) *in fine*, or replace the expression “place of business” by “fixed place of business”.

[68] Therefore, if the Payer and BV had during the Relevant Period a place of business, as required by section 5 of the Regulations and, as we have seen above,

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<sup>69</sup> See also my analysis concerning the scheme of the Regulations above when I compared it to the scheme of the CPP Regulations.

Mr. Dirk has met all the other conditions of that section, then his employment would be insurable. He certainly believed that he had such insurable employment given that he contributed to the Canadian Employment Insurance program during the whole of the Relevant Period.

## B. Application of the meaning of “place of business” to the facts

[69] Let us briefly review the facts to determine if the Payer and BV had such a “place of business” in Canada during the Relevant Period. As we have seen above, the evidence has disclosed that during this period, Mr. Dirk ceased to work for the Payer on February 14, 2022, and started to be employed by BV again on February 15, 2022, until his resignation on May 31, 2022, which was induced by the economic sanctions adopted by the Government of Canada against Russia.

[70] To better understand the activities of the two employers who hired Mr. Dirk during the Relevant Period, it is important to describe the type of business that he was working in. As is the case for farming,<sup>70</sup> the mining business may take many years before it can realize and show a profit in its operations, at least, of a particular mineral deposit. The following description found under the Wikipedia entry for “mining” illustrates how long this process can be:

The process of mining from discovery of an ore body through extraction of minerals and finally to returning the land to its natural state consists of several distinct steps. The first is discovery of the ore body, which is carried out through **prospecting or exploration** to find and then define the extent, location and value of the ore body. This leads to a mathematical resource estimation to estimate the size and grade of the deposit.

This estimation is used to conduct a **pre-feasibility** study to determine the theoretical economics of the ore deposit. This identifies, early on, whether further investment in estimation and engineering studies is warranted and identifies key risks and areas for further work. The next step is to conduct a **feasibility study** to evaluate the financial viability, the technical and financial risks, and the robustness of the project.

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<sup>70</sup> Another example is the hydroelectricity business. For instance, the construction of the Daniel-Johnson dam, located 214 km north of Baie-Comeau, Quebec, started in 1959 and was completed in 1968. It was preceded by a five-year feasibility study in 1955 and hydrological studies in the summers of 1919 and 1920. (“Daniel-Johnson dam” (May 19, 2024), online: Wikipedia.)



This is when the mining company makes the decision whether to develop the mine or to walk away from the project. This includes mine planning to evaluate the economically recoverable portion of the deposit, the metallurgy and ore recoverability, marketability and payability of the ore concentrates, engineering concerns, milling and infrastructure costs, finance and equity requirements, and an analysis of the proposed mine from the initial excavation all the way through to reclamation. The proportion of a deposit that is economically recoverable is dependent on the enrichment factor of the ore in the area.

To gain access to the mineral deposit within an area it is often necessary to mine through or remove waste material which is not of immediate interest to the miner. The total movement of ore and waste constitutes the **mining process**. Often more waste than ore is mined during the life of a mine, depending on the nature and location of the ore body. Waste removal and placement is a major cost to the mining operator, so a detailed characterization of the waste material forms an essential part of the geological exploration program for a mining operation.

Once the analysis determines a given ore body is worth recovering, **development begins** to create access to the ore body. The mine buildings and processing plants are built, and any necessary equipment is obtained. The **operation** of the mine to recover the ore begins and continues as long as the company operating the mine finds it economical to do so. Once all the ore that the mine can produce profitably is recovered, **reclamation** can begin, to make the land used by the mine suitable for future use.

[Emphasis added.]

[71] To summarize, we can see that there are five major steps in a mining project:

1. The exploration
2. The feasibility study
3. The development
4. The operation
5. The reclamation

[72] Mr. Dirk worked on the Project from October 1, 2018, to May 31, 2022, that is, for close to four years. On the basis of his testimony, I would say that the Project was at steps 2 and 3 during that period. There is a statement that an economist came from Russia to work at the Vancouver Kaz offices, which would be consistent with a feasibility study step. However, I would say that most of the work done by Mr. Dirk would be consistent with the development step. It is clear that the operation step had not started, although his title was “Mining Director”. In his testimony, Mr. Dirk estimated that the operation of the Project’s mine would not start before 2027. The evidence does not reveal when the rights to the mineral deposit were acquired,

when the exploration and the development started or when the Fluor consulting contract was entered into. However, it can be stated confidently that the development step is estimated to last at least nine years and that BV and the Payer (starting in 2019 or whenever the Payer was incorporated) used the Vancouver Kaz offices during this period or were planning to use them during the whole of that period.<sup>71</sup>

[73] During that period, BV had the mandate to manage the feasibility and development steps of the Project. It is BV that entered into a \$500-million contract with Fluor to work on the development of the Project. Fluor had 100 to 140 employees working full time on this contract. As seen above, BV had a branch office established on the premises of Fluor's Vancouver offices to work with its engineering consulting firm and occupied 14 offices, which were used by employees of BV and the Payer.

[74] One of BV's employees working at the Vancouver Kaz offices was Mr. Dirk, who was hired as the Mining Director. He started to work there on October 1, 2018, and had to report to the Project Director of the Project (see Exhibit A-5). He generally reported to work at the Vancouver Kaz offices every week, travelling from his residence in Calgary to Vancouver, where he rented some housing facilities. During the First Period, Mr. Dirk was remunerated by BV, which withheld Canadian taxes and his EI contributions. He received an ROE at the end of the First Period, which lasted almost three full years. During this period, several of his reports (subordinates), including employees of the Payer, came to work at the Vancouver Kaz offices. It is very clear that BV had during that period a place of business in Canada.

[75] Although not necessary, I would even add that these two foreign companies had a "fixed place of business" as defined in *Dudney* (the Federal Court of Appeal decision) and an "establishment" as interpreted by the Supreme Court of Canada in *Sunbeam Corporation (Canada) Ltd.* because we have here the required degree of permanence, given the nature of the work to be performed by these companies during the development step.

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<sup>71</sup> Given the impact that the Canadian economic sanctions resulting from the invasion of Ukraine by Russia had on the contractual relationship of Fluor with BV and the Payer, it is unknown to what extent Fluor is still involved with the Project.

[76] That is the situation in the First Period, but this period is not within the Relevant Period.<sup>72</sup>

[77] However, those facts in the First Period are very relevant for the purposes of determining whether the Payer and BV had a place of business in Vancouver during the Second Period and the Third Period. Although Mr. Dirk became an employee of the Payer during the Second Period, he continued to perform exactly the same duties for the same Project. As he stated in his testimony, the only change was that most of his duties were performed in Moscow.

[78] Employees of the Payer and BV who reported to him when he was working in the Vancouver Kaz offices during the First Period continued to visit and work in the Vancouver Kaz offices during the Second Period and the Third Period. The Vancouver Kaz offices were not closed down after the end of the First Period. It continued to be a place of business of the mining project at least until the end of the Relevant Period. Whether the employees of the mining project had an employment contract with BV or the Payer, they were all involved in the feasibility and/or development steps of the mining project, that is the Project. Although Mr. Dirk said that he only went to the Vancouver Kaz offices on one day during the Third Period to meet his superior and no days<sup>73</sup> during the Second Period, this superior—Mr. Mian Khalil, the Project Director<sup>74</sup> to whom he always reported during the three periods—worked regularly in the Vancouver Kaz offices during these three periods. Mr. Dirk testified that Mr. Khalil was an employee of the Payer during the Second Period, but also during the First and Third Periods. Given that the Payer was incorporated in 2019, according to Mr. Dirk’s testimony, I infer that Mr. Khalil was also most likely an employee of BV, at least during the initial portion of

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<sup>72</sup> Furthermore, Mr. Dirk’s “insurable employment” does not depend on the application of section 5 of the Regulations because he was being employed in Canada and would qualify under paragraph 5(1)(a) of the Act.

<sup>73</sup> Contrary to the rule in subsection 16(1) of the CPP Regulations providing the conditions to have a “pensionable employment”, section 5 of the Regulations does not require an employee to “ordinarily repor[t] for work” to a “place of business” in Canada to have “insurable employment”.

<sup>74</sup> Mr. Khalil is described as the “Project Director” during the First Period (Exhibit A-5, the assignment letter) and as the “General Director” in the second employment contract (March 1, 2021, Exhibit A-1) during the Second Period and in the third employment contract (February 15, 2022, Exhibit A-2, article 2.1) during the Third Period. When Mr. Khalil signed the latter contract and its addendum number 1 on April 1, 2022, he described himself as “Managing Director”.

the First Period, as stated above. I adopt a similar inference regarding the Third Period as Mr. Khalil signed Mr. Dirk's third employment contract and addendum number 1 for and on behalf of BV. Furthermore, it is reasonable to infer that Mr. Khalil, being an American, would want to avoid, as this was the case for Mr. Dirk, the Russian exchange controls applicable when he worked for the Payer in order to have his own U.S. dollar remuneration paid directly from London to his bank account outside of Russia.

[79] Therefore, it is reasonable to conclude that the Vancouver Kaz offices continued to be not only the place of business of BV during the First Period and the Third Period, but also the place of business of the Payer during the Second Period. This is even more reasonable when you consider that Mr. Dirk moved from the payroll of the Payer, the future operator of the mine, back to the payroll of BV, whose main mission was to work on the development of the Project, which step was expected to last until 2027.

[80] In conclusion, Mr. Dirk satisfies all the conditions of section 5 of the Regulations.

[81] For all these reasons, the appeal of Mr. Dirk is allowed and the decision of

the Minister is varied such that Mr. Dirk is considered to have held insurable employment during the Relevant Period while working for both the Payer and BV.

Signed at Vancouver, British Columbia, this 8<sup>th</sup> day of July 2024.

“Pierre Archambault”

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Archambault D.J.

CITATION: 2024 TCC 95  
COURT FILE NO.: 2022-3029(EI)  
STYLE OF CAUSE: ROBERT DIRK v. THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: April 16, 2024

REASONS FOR JUDGMENT BY: The Honourable Justice Pierre Archambault, Deputy Judge

DATE OF JUDGMENT: July 8, 2024

APPEARANCES:

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