Docket: 2007-2808(IT)I

BETWEEN:

WAYNE MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence with the appeals of
*John R. Balkwill* (2007-2809(IT)I), *Michael Martin* (2007-2810(IT)I),
and *Douglas J. Balkwill* (2007-2811(IT)I)
on October 20, 2008, at Windsor, Ontario
Before: The Honourable Justice T. E. Margeson

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | John Mill |
| Counsel for the Respondent: | Andrew Miller |

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years are dismissed.

Signed at New Glasgow, Nova Scotia, this 5th day of January 2009.

"T. E. Margeson"

Margeson J.

Docket: 2007-2809(IT)I

BETWEEN:

JOHN R. BALKWILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence with the appeals of
*Wayne Martin* (2007-2808(IT)I), *Michael Martin* (2007-2810(IT)I),
and *Douglas J. Balkwill* (2007-2811(IT)I)
on October 20, 2008, at Windsor, Ontario
Before: The Honourable Justice T. E. Margeson

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | John Mill |
| Counsel for the Respondent: | Andrew Miller |

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years are dismissed.

Signed at New Glasgow, Nova Scotia, this 5th day of January 2009.

"T. E. Margeson"

Margeson J.

Docket: 2007-2810(IT)I

BETWEEN:

MICHAEL MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence with the appeals of
*John R. Balkwill* (2007-2809(IT)I), *Wayne Martin* (2007-2808(IT)I),
and *Douglas J. Balkwill* (2007-2811(IT)I)
on October 20, 2008, at Windsor, Ontario
Before: The Honourable Justice T. E. Margeson

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | John Mill |
| Counsel for the Respondent: | Andrew Miller |

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years are dismissed.

Signed at New Glasgow, Nova Scotia, this 5th day of January 2009.

"T. E. Margeson"

Margeson J.

Docket: 2007-2811(IT)I

BETWEEN:

DOUGLAS J. BALKWILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on common evidence with the appeals of
*John R. Balkwill* (2007-2809(IT)I), *Michael Martin* (2007-2810(IT)I),
and *Wayne Martin* (2007-2808(IT)I)
on October 20, 2008, at Windsor, Ontario
Before: The Honourable Justice T. E. Margeson

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | John Mill |
| Counsel for the Respondent: | Andrew Miller |

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* for the Appellant's 2003 and 2004 taxation years are dismissed.

Signed at New Glasgow, Nova Scotia, this 5th day of January 2009.

"T. E. Margeson"

Margeson J.

Citation: 2009TCC3
Date: 20090105
Docket: 2007-2808(IT)I

BETWEEN:

WAYNE MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2007-2809(IT)I

AND BETWEEN:

JOHN R. BALKWILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2007-2810(IT)I

AND BETWEEN:

MICHAEL MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2007-2811(IT)I

AND BETWEEN:

DOUGLAS J. BALKWILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Margeson J.

[1] It was agreed at the outset that all of these matters would be heard together on common evidence.

[2] With respect to the Appellant, John R. Balkwill, the Minister assessed the taxpayer standby charges in the amounts of $5,201 and $5,908 for the 2003 and 2004 taxation years, respectively. The Minister further assessed the Appellant operating benefits of $3,400 for each of the 2003 and 2004 taxation years. The Minister further assessed the taxpayer shareholder benefits in the amounts of $8,548 and $8,599 for the taxation years 2003 and 2004, respectively.

[3] With respect to the Appellant, Wayne Martin, the Minister assessed the taxpayer for standby charges in the amount of $5,495 in the 2003 and 2004 taxation years and operating benefits of $3,400 in each of these years. The Minister further assessed the taxpayer shareholder benefits in the amounts of $13,796 and $8,212, for the 2003 and 2004 taxation years, respectively.

[4] With respect to the Appellant, Douglas J. Balkwill, the Minister assessed the taxpayer $7,519.07 as standby charges in both taxation years 2003 and 2004 and $3,200.64 as an operating benefit for each taxation year 2003 and 2004.

[5] With respect to the Appellant, Michael Martin, the Minister assessed the taxpayer standby charges of $8,227.11 in the taxation year 2003 and $6,669.98 in the 2004 taxation year. The Minister further assessed the taxpayer automobile

expenses of $3,200.64 and $2,400.48 in the taxation years 2003 and 2004, respectively.

[6] From these assessments the appeals are taken.

**Evidence**

[7] David H. Cornies was a chartered accountant from Leamington, Ontario and did the accounting work for both Balkwill/Martin Electric Ltd. (the "Company") and the individuals during the years in issue.

[8] He identified Exhibit A-1 with reference to the 2003 Ford Windstar ("Windstar") which indicated that Bonnie Martin was the principal driver of this vehicle during the 2003 and 2004 taxation years and that a reasonable standby charge was calculated for her during these years and included in her 2003 and 2004 T4 statements of remuneration.

[9] The second letter referred to Phyllis Balkwill and her use, as principle driver of the 2002 Chrysler 300M motor vehicle ("300M"). This letter indicated that a reasonable standby charge was calculated for her and included in her statement of remuneration and in her T4 in the taxation year 2003 when she was an employee of the Company. This amount was not included in her T4 and statement of remuneration for the 2004 taxation year as she had no other earnings from the Company. However, when preparing her income tax return for the 2004 taxation year, the sum of $4,160 was added to her income as a reasonable standby charge and added to her income on line 1404 of her return.

[10] He was not familiar with the lease document included in this Exhibit.

[11] This lease was for the 2005 Ford F150 4X4 SC ("F150"). He said this was inadvertently included in this Exhibit.

[12] In cross-examination he said that he had no personal knowledge of Bonnie Martin driving the vehicle but he was told that she did and they filled out the T4 based upon what they were told.

[13] He identified the lease for the Windstar found in Exhibit R-1 and agreed that it was in the name of Michael W. Martin.

[14] With respect to the 300M, he was told that the Company had leased it. John R. Balkwill was the valid lessee for the vehicle but he knew that it was Phyllis Balkwill who used it for business purposes.

[15] In re-direct he said that sometimes he had small business clients who put the leases in the names of persons, other than the business, due to the difficulty of financing by small businesses.

[16] John Robert Balkwill testified that he was a 50% shareholder in the Company and Wayne Martin is the other 50% shareholder. The Company specializes in the installing, maintenance and monitoring of climate controls in greenhouse ranges. He tends to emergency calls several times every day. They provide maintenance on a 24 hour basis, seven days a week. Three to four times a week he may attend to after-hours calls. They must respond within 10 to 15 minutes. They are responsible for 1000 to 1500 acres of greenhouses. They also do other electrical work. The whole structure is computerized. Typically they have 12 to 38 employees.

[17] He described his wife, Phyllis Balkwill as a bookkeeper/manager in 2003 and 2004. During that time she drove the 300M for business purposes. She went to the bank, picked up supplies and went to the lawyer's office. She used the car for personal reasons as well. He did not use that vehicle for personal or business purposes.

[18] In the year 2004 she was not employed by the Company but continued to drive the vehicle.

[19] With respect to the Windstar, the employees drove it but he did not.

[20] With respect to the 2003 Expedition ("Expedition"), he drove it for nine months but only for business purposes. One reason he gave for the purchase of that vehicle was that equipment and supplies had to be stored inside the truck. The Expedition seemed to keep the temperature more constant than did the van.

[21] The vehicle stayed in his driveway which was 35 kilometres from the business.

[22] He was on call at all times. There were break-ins and thefts at his office as there was no security there and no fencing. Often he did not go to the office. He

had an office in his home and could monitor all of the greenhouses from there. They had about 150 regular customers.

[23] He described the Expedition as having a full back seat and doors. He used it sometimes to carry other workers. The 300M was at their house and his wife used it for personal use. Sometimes he went with her in it. They did not keep any logs in 2003 and 2004.

[24] He introduced a log book that he prepared personally for 2006 by using the time sheets. This was introduced into evidence as Exhibit A-2. He could not recall having seen Exhibit R-1, Tab 17, which was a summary of Doug Balkwill's mileage from June 19, 2006 to November 1, 2006.

[25] He described Exhibit R-1, Tab 9 as a photocopy of the backseat of Doug Balkwill's truck which contained Doug Balkwill's personal tools, batteries, drills and battery chargers. There was a bench seat there but there was not much room behind the door.

[26] They inquired about getting this vehicle without the seat but were told it would cost more money. This vehicle was normally used to transport goods and construction workers to and from job sites. It could carry maybe one person but not a large person. Michael Martin drove an identical vehicle.

[27] Exhibit R-1, Tab 9, page 2, was a photocopy of the back seat of Michael's vehicle. It was his position that the log prepared in 2006 was reflective of the usage of the vehicles in 2003 and 2004.

[28] Exhibit A-3 was placed into evidence, subject to weight. It contained a purported log of Douglas Balkwill's jobs for the year 2005. It was prepared after they were asked to prepare it and the information was reconstructed from his daily records.

[29] He drove under 20,000 kilometres per year and that was consistent with Douglas Balkwill's driving as well. John Balkwill lives three kilometres from the office.

[30] Exhibit A-4 was a Live Search Map showing the distance between Douglas Balkwill's house and the office. Exhibit A-3 was reflective of a typical day for himself and Douglas Balkwill for 2005. It was also consistent with his vehicle usage in 2003 and 2004. He did not use his vehicle for personal matters but

had to take it home to store tools and supplies. They could not use a van for those purposes as it would not handle the materials. They required a mixture of vans and other vehicles.

[31] They had been audited before and had no difficulties. He was referred to a letter from the Canada Revenue Agency ("CRA") dated September 23, 2005 in Exhibit R-1, Tab 16, about the audit in question and what documents they were asked to produce. They had no logs for those years.

[32] Exhibit R-1, Tab 18, was identified as a list of all employees that drove company vehicles for business purposes.

[33] The Company has multiple vehicles for Company purposes but some are registered in their names for financing purposes. The difference between his vehicle and the wives' vehicles was that his vehicle was used for transporting materials and the wives' vehicles were not used for that purpose.

[34] In cross-examination he said that he was a shareholder and employee during the years in issue. Wayne Martin was the other shareholder. He, Wayne and Douglas Martin and Abe Friesen responded to all emergencies. He had access to the Expedition and he was the normal user of it. He signed the lease. He denied that the "x" found on the lease near the space for vehicle use, marked personal, was put there by him. He only glanced at the lease. The vehicle was registered in the Company's name.

[35] He had access to the Windstar. It was leased for the Company's use.

[36] Exhibit R-1, Tab 17, was a summary of Doug Balkwill's mileage as prepared by the accountants and showed personal miles but he denied that he used it personally. These figures were given to the CRA by his accountant.

[37] When shown the photos of the Ford F-150's in Exhibit R-1, Tab 9, he said that he thought that they had only one door in the back and not two.

[38] He could not say why the lease indicated that the purpose of the lease was personal because it was for business.

[39] All other employees took the vehicles home on weekends, had access to them and were not prevented from using them for personal business.

[40] Douglas Balkwill may have used the F150 in 1999 but he was not the shop foreman then.

[41] He was aware of the amounts assessed against him and said that they were not included in his return. All vehicles were leased to the Company even the one in his name. The Company paid for the lease and the insurance.

[42] He agreed that the amount assessed for the 300M was for his wife's use of it.

[43] The Respondent called Diana Masters who had been an auditor with CRA for seven years. She had personal knowledge of the files in these cases used for the Company's compliance audit. She has audited over 100 such accounts. The standby and operating benefits were applicable under s. 248 of the *Income Tax Act* ("*Act*"). There were also vehicles in the names of individual shareholders which were assessed under another section of the *Act*.

[44] The vehicles were inspected in the Company's parking lot. She knew that there were back seats in the F150 where one or two people could be seated. Her job was to see that all taxable benefits were reported properly.

[45] She identified the document in Exhibit R-1, Tab 10 and said that it was prepared and given to her by Debbie Ouellette who was the Company's bookkeeper. She could identify the leases for the various vehicles.

[46] Two-thirds of the lease payments are used in determining benefits. She identified the insurance document in Exhibit R-1, Tab 11. The complete insurance documents identified the personal assets of the shareholders.

[47] She referred to the vehicles in question in this case which were listed in Exhibit R-1, Tab 11 and the shareholder loan payments found in Exhibit R-1, Tab 13. She also reviewed the payroll ledger in Exhibit R-1, Tab 14, and said that no benefit amounts were allotted to any taxpayers.

[48] She identified the letter in Exhibit R-1, Tab 16 regarding an appointment between the Company and the CRA dated September 23, 2005. She issued this letter and it requested various documents to be made available for the interview including log books for the vehicles but none were available. She also identified Exhibit R-1, Tab 18 which was a list of employees which was prepared by Debbie Ouellette.

[49] In cross-examination she confirmed that two people could sit in the back seat of the F150's depending on their size. There was nothing in Exhibit R-1, Tab 12 about personal vehicles. With respect to the 300M, she assessed it correctly on the basis that the vehicle was owned by an individual.

[50] In redirect she said that she photocopied the relevant pages of the larger insurance document and identified the 300M as a personal vehicle.

[51] Abe Friesen was an electrician, a controls technician and a service technician for the Company. He worked for the Company in 2003 and 2004 and did some service work, repairs and trouble-shooting on the computers. He is still employed by the Company.

[52] There was a service call every three to five weeks but the customers normally want to talk to the bosses. If they are out of town then he and the other technicians took the calls. With respect to the day calls, he took 80% of the emergencies. Then he said, "I cover most of the service calls".

[53] In cross-examination he said that John and Wayne took the majority of the evening calls. "John takes care of the computer stuff." He said that he responded to more emergency calls now than he did in 2003 and 2004 because he is more trained now and is a licensed electrician.

[54] In response to a subsequent question by counsel for the Appellant, he said that he also took night calls during the years in question.

[55] Michael Wayne Martin was an electrician. He worked with the Company since 1994. The "W" in the Company's name refers to him. He described the business as that of electrical contracting and installing environmental controls in greenhouses. That was 90% of the Company's business. One-third of that was maintenance.

[56] He was the everyday manager while John goes out on the jobs.

[57] He goes to the shop the first thing every morning and at night goes home from the office. He also goes to the post office, out to appraise jobs and bill collecting. He drives an F-150 pickup truck with a standard cab with a bench seat in front and one small bench seat in the back. There is a "suicide door" on each side in the back. The front door must be opened to enable the back door to be opened. There is no outside handle.

[58] He uses the vehicle to store materials and tools and to keep them dry. He has used the back seat to pick up an extra worker but one almost has to sit sideways in the back. He used it personally about six times per year.

[59] He uses it to go to the store once every couple of weeks. Otherwise they use his wife's van.

[60] He also uses it twice per year to go to the lake and back for a total of 4200 kilometres. He identified pictures of his type of vehicle as in Exhibit A-5. Exhibit A-6 showed the distance from home to the workplace which was 11.7 kilometres.

[61] He is on-call when he is at home and has to go out on weekends and night calls. Mr. Friesen does the service calls and computer calls during the day and sometimes at night and on weekends.

[62] He kept his tools in the half cab portion so as to keep them dry and to prevent theft. His truck is safer than a van.

[63] Phyllis Balkwill worked her last day for the Company on January 2, 2004. He drove the F-150 and his wife started driving the Explorer and then the Windstar. The Explorer then stayed at the Company premises. His wife did the cleaning of the offices and picked up supplies.

[64] He admitted that the F-150 was registered in his name but said that the Company owned it. They also used the Windstar occasionally to transport workers to training sessions.

[65] His wife's T4 contained a benefit allocation for the Windstar.

[66] He identified Exhibit A-7 which was a mileage compilation, completed by him, for the F-150 based upon his actual travel in 2008. According to him, this would be very close to his usage of the vehicle in 2003 and 2004. He drove 20,000 to 30,000 kilometres per year, based upon the mileage of the vehicle when he turned it in.

[67] Exhibit A-8 was a compilation of actual miles for his son's vehicle for the year 2006. He was an apprentice and had no other vehicle. This was also an F-150. This witness could not say how much his son used it on weekends. He would guess

that it was about 10% of the actual mileage. In cross-examination he agreed that Exhibit A-7 did not contain the mileage for the cottage trips.

[68] He was a shareholder and employee of the Company. If everyone else was busy, he would do maintenance. Occasionally he is on call.

[69] His vehicle had a split bench seat in the back. They did have theft at their office site and filed police reports.

[70] Phyllis Balkwill did not receive a paycheque in 2004. She was not working there. He admitted that they used the Windstar on the weekends as a family vehicle.

[71] In 2003 and 2004 his son was out on call very often.

[72] He identified the lease for the F-150 super cab that he used and said that J.W. Electric and Controls paid all of the expenses related to it. He did most of the leasing arrangements himself. He did not know why the term “personal” was marked on this lease. He did use the vehicle for personal purposes as did Michael Martin and Douglas Balkwill with respect to their vehicles.

[73] He confirmed that he had signed the lease shown at Tabs 4, 6, and 8. In 2003 the Explorer was at the shop. His wife used it personally to a certain extent in 2003 and 2004. He did not know why the Windstar was registered in his name. The Company issued T4’s in the name of the owners for the benefits, but not for the sons because the majority of their use was for business.

[74] In re-direct, he said that if he were asked he would have signed the vehicle over to the Company without consideration.

Argument on Behalf of the Appellants

[75] Counsel referred to subsection 248(1) of the *Act* and argued that if the vehicles did not meet the definition of “automobile” under that provision, then there could be no benefit assessed against the Appellants. The F-150’s were not designated for the purposes set out in the *Act*.

[76] With the exception of the wives’ vehicles they did not meet the definition of “automobile” under the requisite provision of the *Act*. These vehicles were the 300 M, the Windstar and the Explorer.

[77] With respect to the Explorer, it did not matter that it was in the name of Wayne Martin. This was for the sake of convenience only. It was not reflective of the real situation.

[78] He had legal title but it was on the basis of a “bare trust” and as he said he would have signed it over to the Company for nothing. The intent was for the Company to have the beneficial interest.

[79] Bonnie Martin was an employee and she was already assigned benefits related to the Windstar. The insurance benefit was not assessed to her but the benefit was to her and not to Wayne Martin.

[80] The same analysis applies to Phyllis Balkwill for the year 2003. She was an employee for 2003 only and one day of 2004. It may not be appropriate to assess any benefit for 2004.

[81] With respect to the Explorer the evidence was that somebody other than him was using that vehicle. None of these vehicles were for personal use for Wayne Martin.

[82] With respect to the F-150’s, he referred to the case of *Muller v. R.*, 2004 CarswellNat 2732, 2004 TCC 562 and argued that the type of people who are involved in the cases at bar are not the type that are meant to be caught by this statute.

[83] The evidence was that it would cost more money to get the vehicle without the back seat. The presence of the tools in the photographs shows what the appellants used them to do.

[84] There were no logs for the trucks but there is no requirement under the *Act* for a log to be kept.

[85] One should ask the question, “What happens in the real world, are these the kind of people that the *Act* is meant to catch?” Where the personal use is minimal, the *Act* is not offended.

[86] “Does the personal use tip over the threshold?” Here it does not. All or substantially all was for business use.

[87] The F-150's were not designed primarily for driving passengers.

[88] He referred to *Kowalchuk v. R.*, 2005 CarswellNat 3825 in support of his position that the vehicles did not meet the definition of "automobile" because the only evidence of the use of the seats was to transport workers to job sites.

[89] He referred to the case of *Séguin v. The Queen*, 2003 57 DTC 3952 in support of his position that a log book need not be kept.

[90] With respect to the standby charge, where the use is primarily for business there should be a "limited personal use" charge and the Court should calculate it.

[91] In conclusion, he reiterated that the most important argument was that the F-150's were not automobiles under the definition. The Explorer was a similar vehicle.

[92] Phyllis Balkwill was an employee but only for one day in 2004.

[93] If the vehicle was not owned by a shareholder, it was not a shareholders' benefit.

[94] The appeals should be allowed.

Argument on Behalf of the Respondent

[95] With respect to the "bare trust" in regard to the vehicles used by the wives of the shareholders, counsel argued that this was not raised in the Notice of Appeal or Amended Notice of Appeal and that no evidence was led in that regard.

[96] He relied upon the case of *McGoldrick v. R.*, 2004 FCA 189 [C.A.] for the proposition that the Appellants are bound by the pleadings. Further, there are elements of a "bare trust" that must be established.

[97] With respect to the fact that the wives of the shareholders assessed themselves a benefit with respect to their use of the vehicles, his position was that that does not affect the findings in this case regarding the Minister's assessment of the shareholders. The Minister will have to adjust the wives' returns if these assessments are upheld.

[98] There are two issues in this case:

1. Whether the Minister was correct in assessing a benefit as a result of their use of the vehicles in question while they were employees? and

2. Was the Minister correct in assessing a shareholders' benefit?

[99] The definition of "automobile" is only relevant with respect to the assessments under the provisions of subsections 6(1)(*e*) and 6(1)(*k*). The definition of "shareholders' benefits" under subsection 15(1) has no relation to the definition of "automobile".

[100] If the Respondent does not get past the definition of "automobile" for six out of the eight vehicles in question here, then we do not have to address the issue of standby charges. It makes no difference if the vehicles used by the wives were "automobiles" under the definition or not.

[101] Counsel disagreed that under section 248 the vehicles were not designed primarily for the transportation of passengers. If the Appellants' argument is correct then why is subsection 248(1)(*e*) in the section at all?

[102] In order for the vehicles to be excluded from the definition of "automobile" they must be:

1. a pick-up truck – they are not;
2. must have seating capacity for no more than the driver and two passengers;
3. they must be used primarily for goods and equipment in the taxation years in dispute.

[103] It is the job of the Appellants to show that the vehicles were used all or substantially all of the time for transporting goods, etc. (The Minister's rule in this regard is 90%.)

[104] All of the six vehicles (other than the vehicles used by the wives) met this definition.

[105] Counsel referred to the case of *Gariépy v. R.*, 2008 DTC 3327 in support of this position.

[106] The standby charge is for having the vehicles at their disposal, not for going and coming from work. The Appellants who used the F150's did not have a personal vehicle at their disposal.

[107] The terms "all" or "substantially all" of the use in the course of gaining or producing income was considered by Associate Chief Justice Bowman in *Pronovost v. R.*, 2003 DTC 720. In that case there was a personal vehicle available so that we must consider the facts in the case at bar where there was not. There was no other vehicle that was available for the sons' use.

[108] In *Pronovost, supra,* the Court was satisfied that "the truck was used, for almost nothing else but the Appellants' work". The personal use was minimal. This is not the situation in the case at bar.

[109] In reference to *Muller v. R., supra*, counsel took the position that the case was incorrectly decided because it was a "comfort-based decision" and very subjective. The statute refers to capacity.

[110] There were no log books completed for the years in question and the ones that were completed for the years that were not in issue cannot be given much weight.

[111] The lease documents indicate personal use. No one from the dealership was present to show why that information was incorrect. The Appellants signed the lease and there appears to be nothing incorrect with the remainder of the lease.

[112] Further, the document presented at the objection stage and placed into evidence here, indicates personal use and that the vehicle was used by Doug Balkwill for business for less than 90% of the time.

[113] This is a case where the need for log books is obvious even if one is not required.

[114] Unlike the situation considered by the Court in *Séguin, supra,* there was personal use and they had no personal vehicles.

[115] In this case the exceptions in the definition of "automobile" under subparagraphs 248(1)(*e*)(i) and (ii) have not been met and the vehicles in question were "automobiles" under the definition.

[116] With respect to the standby charges that they should be assessed at a reduced rate, the charge has to be calculated in accordance with the formula set out in the *Act*. In 2003 the number of kilometres to be used was 1000 kilometres/month and in 2004 the correct amount was 1667 kilometres/month. There was no evidence that the calculations were incorrect.

[117] In the case of *Gariépy, supra*, the Court held that in order for the taxpayer to get the reduced amount, "he must provide clear, explicit evidence of the actual use of the automobile in terms of kilometres".

[118] The Court in *Adams v. R.,* 98 DTC 6266 made it clear that in order for an employee to be liable for a standby charge, no actual use is required. All that is required is that the employees have a vehicle available for their use or at their disposal and that they have a right to use it.

[119] In the case at bar the employer made a vehicle available to the employees and it mattered not whether they used it or not. Standby charges should be applied here.

[120] The usage charge is covered by paragraphs 6(l)(*e*) and 6(l)(*k*) of the *Act*. There is no real dispute about the calculation. Here the vehicles were owned or leased by the Company, and therefore, there should be a usage charge.

[121] With respect to the shareholders' benefits, these relate to the lease costs and the insurance costs. The vehicles were in John Baldwill's and Wayne Martin's names. The boxes showed personal use.

[122] Counsel took the position that the Appellants' argument about not owning the vehicle is contrary to the evidence. If they did not own them, how could they transfer them for no consideration as they indicated they would? This shows that the Company did not own the vehicles. It could not be sued. These were not assets of the Company. It was immaterial that their wives drove the vehicles.

[123] If they were Company assets, why were they not in the Company's name like the F150's The shareholders held themselves out as owners, they were shareholders and they received the benefits.

[124] He asks the question, was it only a coincidence that only the shareholders' wives were assigned a benefit by the Company's accountant for the shareholders' vehicles?

[125] It makes no difference that the Company paid for the vehicles, it does not mean that it owned them.

[126] Why would the Company assign a benefit to Phyllis Balkwill in 2004 when she was working there for only one day? That must mean that it was believed that the vehicle was owned by the shareholder.

[127] It did not matter that the vehicle was driven by another employee. It was owned by the shareholder, Mr. Martin.

[128] The Court should draw an unfavourable inference against the Appellants because one of them did not testify nor did the wives of the shareholders.

[129] If paragraph 15(1)(*a*) does not apply then paragraph 6(1)(*a*) should be applied for the insurance and lease costs.

[130] The appeals should be dismissed.

Rebuttal

[131] In rebuttal counsel for the Appellants said that there was a "bare trust" situation here or there may have been a leasing back to the Company by the shareholders. The provision of the use of the vehicles by the shareholders to the wives cannot be a benefit under paragraph 15(1)(*a*). It may be a transfer under section 56.

[132] Mr. Martin said that he would transfer the vehicle to the Company without consideration. The "bare trust" agreement need not be pleaded.

[133] He again referred to *Pronovost, supra* at paragraphs 16 and 21 and, in particular, said that the finding by Associate Chief Justice Bowman that the vehicle was used "substantially for the transportation of goods, equipment or passengers in the course of earning income" applies to the cases at bar.

[134] The Appellants did not live in a rural area as was suggested by counsel for the Respondent.

[135] In respect to *Muller, supra,* he took the position that it was appropriate to consider "comfort" in deciding the issue.

[136] He also reiterated that the purpose of section 248 was related to a personal element and there was none here.

Analysis and Decision

[137] The Court is satisfied that counsel for the parties have correctly identified the issues before the Court.

[138] The Court will deal firstly with the issue of the so-called “bare trust”.

[139] There is no reference in any of the pleadings to this issue and it was raised for the first time in argument by counsel for the Appellants.

[140] Further, there was no direct evidence adduced nor any questions asked during the trial about this issue, other than the evidence adduced and questions asked about why several of the vehicles were not registered in the Company’s name, but rather in the names of two of the shareholders.

[141] In essence, this evidence was that the vehicles were so registered because there might have been a difficulty in obtaining financing for the vehicles if they were registered in the Company’s name.

[142] The Court considers that such an explanation was a mere after-thought on behalf of the Appellants that was contemplated after the pleadings were completed, including amended pleadings, and if there was any merit to this argument it would have been proposed from the beginning.

[143] Further, the indication of the Appellants in their evidence was nothing more than a suggestion as to why the vehicles were registered in their names and in essence amounted to nothing more than a possible explanation but in any event fell far short of establishing or even indicating that any such trust agreement existed, or as to what were its terms.

[144] In order for there to be a “trust” or “bare trust” there must be parties, there must be terms established by way of rights and obligations and in respect of the vehicles in question there would have to be a reference as to what form of ownership the Appellants would be taking by registering the vehicles in their personal names and in all likelihood a recitation for the reasons for establishing the trust. There were none of these “trappings of a trust” here.

[145] The Court is satisfied that no such “trust” existed in this case.

[146] Further, if the Court is wrong in that finding, it is satisfied that the Appellants cannot raise this issue at the trial stage (*McGoldrick v. R.*, (C.A.) 2004 F.C.A. 189) and the Appellants are bound by the pleadings. It is significant that the Company had experienced accountants’ advice who would have been aware of the manner of registration of the vehicles and of the manner in which the vehicles were leased and paid for and they did not see fit to change the registration into the Company’s name.

[147] The Appellant shareholders were the legal owners of the vehicles and that carried with it legal rights and responsibilities. If the Appellants were to be successful in convincing the Court that the beneficial ownership was different from the legal ownership then cogent evidence of this fact would have to be adduced. It was not.

[148] The Appellants’ argument with respect to the “bare trust” is dismissed.

[149] The Court is satisfied that the fact that the wives were assessed a benefit for the use of the vehicles does not detract from the evidence of ownership of the Appellant shareholders and any benefits assigned to them in that regard will have to be revisited by the Minister in the event of an unfavourable decision for the Appellant.

[150] The next question that the Court will consider is whether or not the Minister was correct in assessing a shareholders’ benefit under the provisions of subsection 15(1) against the shareholders Wayne Martin and John R. Balkwill with respect to the vehicles operated by their wives with respect to the lease costs and the insurance costs.

[151] Counsel for the Appellants argued that if there was any benefit conferred it was to Bonnie Martin and Phyllis Balkwill and not to Wayne Martin and John R. Balkwill.

[152] The Court is satisfied that there was a benefit to these two shareholders by having the Company lease the vehicles and pay for the insurance. If the Company did not do it then the two shareholders would have because the Court has already found that the vehicles were owned by the two shareholders.

[153] Surely this is a real benefit conferred on these two shareholders as contemplated by subsection 15(1) of the *Act* as none of the exceptions listed therein apply to this situation. If this provision does not apply then paragraph 6(1)(*a*) applies and the result is the same.

[154] There has been no issue taken as to the calculation of the shareholders' benefit in either case for the automobile insurance costs and the lease costs.

[155] In respect to each of these Appellants, these costs were personal and/or living expenses of the Appellants. These expenses were benefits of each shareholder which they received as a result of being a shareholder and/or employee of the Company.

[156] The last question to be answered is whether the Minister was correct in assessing a benefit as a result of the Appellants' use of a Company vehicle while they were employees of the Company.

[157] The answer to this question falls on whether or not the six out of eight vehicles in question were automobiles under the definition thereof as set out in section 248 of the *Act*.

[158] Counsel for the Appellants argued that these vehicles do not fall within the relevant definition of "automobile" (with the exception of the wives' vehicles).

[159] He argued that the type of people involved here are not the type that are meant to be caught by the *Act*. However, the *Act* does not refer to types of people but types of vehicles. Whoever the people are, they are caught by the *Act* in this case if the vehicles in question were "automobiles" under the facts disclosed in these cases.

[160] He took some considerable comfort from the decision in *Mueller v. R.*, 2004 CarswellNat 2732 where Justice Bell decided that the pick-up truck in question was not an "automobile" by virtue of its seating capacity and the uneasy access to the back of the cab, lack of shoulder belts, limited leg space and lack of head protection. He was also satisfied that the vehicle was purchased by the registered owner for use in the farming operation and no evidence was presented for any other use.

[161] Counsel also argued that evidence was given that it would have cost more money to get the vehicle without the back seat. Further, the presence of tools in the photographs shows what the trucks were used for.

[162] Counsel for the Respondent took the position that this was a “comfort-based decision” and “very subjective” and should not be followed.

[163] Each case must stand on its own. The Court is not particularly swayed by the argument that it would have cost more to get the truck without the back seat and in the case at bar there is enough evidence from the photographs and the other evidence as to the capacity of the vehicles and as to their use.

[164] The Court is not convinced on the evidence as to what the clear purpose was in purchasing the vehicles (the F150s) and their use was obviously much different than the use found by Justice Bell.

[165] It is true that the *Act* does not require that log books be kept, but when the issue arises as to their use during the year, such evidence is very important.

[166] The Court attaches very little weight to the books that were created after the fact for years that were not in issue and they cannot find the basis for concluding as to what use they were put during the year.

[167] The Court is not swayed to any extent by the use of the term “personal” in some of the leases and the end result is that the reason for its presence is at best unknown.

[168] It is interesting to note that no one from the dealerships was present to give evidence regarding the leases and they might have been able to shed some light on the use of that word since no issue was taken as to the remainder of the contents of the leases.

[169] It is significant that the document presented at the objection stage and placed into evidence at the trial was a document created by the Company and shows that the vehicle used by Doug Balkwill was less than 90% for business purposes and that of John Balkwill was for 20% personal use.

[170] Mike Martin’s vehicle was used 19.9% of the time for personal use and 80.1% of the time for business use.

[171] This document certainly shows that the vehicles were used a considerable amount of the time for personal matters.

[172] On the basis of the evidence adduced the Court finds that the Appellants have failed to satisfy the Court, on a balance of probabilities that the vehicles in question fall under the exceptions provided under subparagraphs 248(1)(*e*)(i) and (ii) of the *Act* and they are "automobiles" under the *Act*.

[173] The Court is satisfied that the so-called "standby charges" are appropriate in each case as assessed by the Minister.

[174] Counsel for the Appellants have asked for a reduced rate, but this is not available to them based upon the formula contained in the *Act* and (as argued there was no indication that the Minister's calculations were incorrect) as indicated in *Garié v R.*, 2007 CarswellNat 3945 in order to obtain the reduced amount, the taxpayer must provide "clear, explicit evidence of the actual use of the automobile in terms of kilometres". That has not been done here.

[175] As indicated in *Adams v. R.*, 98 DTC 6266 an employee is liable for standby charges even though no actual use of the automobile is shown.

[176] All that is required is that there be an automobile available for his use or disposal.

[177] In all of the cases at bar, there was ample evidence that this requirement was met.

[178] The Court is satisfied that the Appellants have failed to prove on a balance of probabilities that the vehicles were used "substantially for the transportation of goods, equipment or passengers in the course of earning income" as referred to by Associate Chief Justice Bowman in *Pronovost, supra.*

[179] Several of the Appellants did not testify and the wives of the Appellants did not testify and the Court concludes that their evidence could have been of significance.

[180] The appeals are dismissed and the Minister's assessments are confirmed.

Signed at New Glasgow, Nova Scotia, this 5th day of January 2009.

"T. E. Margeson"

Margeson J.

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COUNSEL OF RECORD:

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