Docket: 2009-2421(IT)G

BETWEEN:

GORDON IRONSIDE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 6 and 7, 2013 at Calgary, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Jonathan D. Warren
Counsel for the Respondent:	Donna Tomljanovic

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2001, 2003, 2004 and 2006 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of October 2013.

"Diane Campbell"

Campbell J.

Citation: 2013 TCC 339
Date: 20131025
Docket: 2009-2421(IT)G

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Appellant,

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REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant, in these appeals, incurred legal and professional fees (the "Fees") to defend himself against allegations of committing improper disclosures after being charged in June of 2001 by the Alberta Securities Commission (the "Commission").

[2] In computing income for the 2003 and 2004 taxation years, the Appellant deducted the amounts of $22,883 and $463,181 in Fees respectively from his professional income pursuant to paragraph 18(1)(*a*) of the *Income Tax Act* (the "*Act*"). As a result of the 2004 deduction of Fees, he determined that he now had a non-capital loss of $241,762 in respect to the 2004 taxation year, which he carried back to 2001 and 2002. In 2006, the Appellant carried forward a non-capital loss claimed in 2005, unrelated to the Fees. The Minister of National Revenue (the "Minister") refused to apply the 2005 non-capital losses to the 2006 taxation year because the 2004 non-capital losses had been denied in a reassessment in April, 2007. This denial resulted in the Minister reversing the 2004 losses of $40,765 to the 2002 taxation year and, instead, using the 2005 non-capital losses to offset the amounts that the Appellant had carried back to 2001 from 2004, thereby reducing the deduction to be applied in the 2006 taxation year to an amount of $2,547.

[3] Consequently, the taxation years before me in these appeals are 2001, 2003, 2004 and 2006.

[4] The parties filed an Agreed Partial Statement of Facts which outlined the Appellant's work history in detail. It also contained schedules specifying the particulars relating to the amount of the Fees, as well as a schedule detailing the various sources and amounts of the Appellant's income, including business, employment and professional sources, between 1988 and 2007. I have attached the most relevant portions of the Agreed Partial Statement of Facts relating to the Appellant's work history as Schedule "A" to my Reasons. However, the following is a summary of the evidence which was before me.

Facts

[5] In September, 1979, the Appellant became a chartered accountant within the Province of Alberta. Between 1979 and 1985, he worked with the accounting firm of Coopers & Lybrand Chartered Accountants. During this period, he became involved in separate business opportunities with a number of companies engaged in the oil and gas industry. In May, 1985, he became the Chief Financial Officer of Blue Range Resources Ltd. and, in August, 1987, he became a director of and was employed by Blue Range Resource Corporation ("BRRC") as its Chief Financial Officer.

[6] Between April 1, 1994 and December 12, 1998, the Appellant held the office of President of BRRC and was remunerated in the form of salary, bonuses, stock options and the purchase of corporate shares by way of private placements. Through the company's associations with others within the industry, the Appellant had opportunities presented to him to invest in other oil and gas related endeavours.

[7] On November 12, 1998, Big Bear Exploration Ltd. ("Big Bear") initiated a hostile takeover bid for all of the issued and outstanding securities of BRRC. It was successfully completed on December 12, 1998 and the Appellant was forced to resign as an officer and director of BRRC.

[8] On March 2, 1999, after ascertaining the financial condition of BRRC, Big Bear sought court protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[9] On March 8, 1999, the Commission ordered an investigation pertaining to the disclosure of material facts and financial information.

[10] On June 26, 2001, the Commission issued a Notice of Hearing to the Appellant and one other individual from BRRC to determine if they acted contrary to the Alberta securities legislation, if it was in the public interest to remove them from the Alberta capital market and if administrative penalties should be applied.

[11] The five main issues that were explored by investigators for the Commission were:

(a) failure to classify certain facilities leases as capital leases for accounting purposes (with the result that long-term debt was materially accumulated);

(b) failure to disclose reporting of raw gas production and reserves;

(c) failure to disclose that BRRC had sold forward more gas than it was producing, pursuant to fixed-price contracts or contracts with imbedded long-term transportation obligations;

(d) failure to disclose that production estimates for the fiscal year 1999, disclosed in the Corporation's annual report to shareholders in July, 1998, had been materially reduced by management; and

(e) failure to disclose liquidity pressures and banking accounts.

(Joint Book of Documents, Exhibit A-1, Tab 29)

[12] The Appellant retained Carscallen Lockwood LLP to defend him in the proceedings before the Commission.

[13] The Appellant's Fees were covered pursuant to a Director and Officer's liability insurance policy with Chubb Insurance. For a variety of reasons, some Fees were not covered by Chubb Insurance, such as consultant and expert witness fees, and the Appellant paid those personally. The insurance policy contained a $5 million limit and, by 2004, this amount had been dispersed for defence fees (Transcript, Examination-in-Chief of the Appellant, page 64). The Appellant testified that, by 2008, professional costs incurred exceeded $6.5 million and that he paid the excess fees. It is these amounts as well as others that the Appellant is seeking to deduct as expenses.

[14] The Commission hearing was conducted in two parts: the merits segment, which focussed on the public disclosures made by the Appellant and, subsequently, the sanctions and costs segment. The merits segment lasted 120 days and, on December 21, 2006, the Commission concluded that the Appellant had contravened the Alberta security laws and acted contrary to the public interest (Exhibit A-1, Tab 30). The sanctions and costs decision was rendered in November, 2007. The Appellant was banned from trading in securities, assuming the role of director or officer of a company, fined an administrative penalty and directed to pay significant costs. The Appellant appealed the Commission's decisions to the Alberta Court of Appeal, which dismissed that appeal on April 9, 2009.

[15] On June 2, 2005, the Appellant received a written legal opinion from his solicitors which reflected legal advice he received in 1999. In all likelihood, this was provided to the Appellant in response to his request a number of years after he initially received the legal advice. The opinion outlined the implications of the Commission hearing and noted that a negative finding by the Commission could result in the Appellant being prohibited from acting as a director or officer of any public company. The legal opinion also advised that an adverse finding could result in a complaint being filed with the Institute of Chartered Accountants of Alberta, which could affect his ability to retain his chartered accountant designation, his future ability to work in that profession and his future ability to earn business and professional income (Exhibit A-1, Tab 19).

[16] On December 22, 2006, the day after the Merits decision was released by the Commission, the Appellant received correspondence from the Institute of Chartered Accountants advising that the findings of the Commission were going to be treated as a complaint under section 67(3) of the *Regulated Accounting Profession Act*, R.S.A. 2000, c. R-12 ("RAPA") (Exhibit A-1, Tab 20). The Appellant replied, on February 12, 2007, requesting particulars of the Institute's complaint against him. This was followed by a similar request from the Appellant's legal counsel in May, 2007 (Exhibit A-1, Tabs 21 and 22).

[17] On June 15, 2007, the Complaints Inquiry Committee of the Institute sent a letter to the Appellant's legal counsel advising that, among other things, the Merits decision of the Commission raised the issue of questionable conduct on the part of the Appellant but, at that time, the Commission had made no allegations against the Appellant of unprofessional conduct (Exhibit A-1, Tab 23).

[18] On November 30, 2009, the Institute of Chartered Accountants advised the Appellant that they were in receipt of the decision of the Alberta Court of Appeal and

that they would be proceeding with an investigation and potential disciplinary action. The Appellant was further advised that, pursuant to Rule 201.2 of the RAPA, the Appellant's conviction before the Commission created a "rebuttable" presumption that he did not maintain the good reputation of the profession and did not serve the public interest (Exhibit A-1, Tab 28). A disciplinary hearing was eventually held several years later and, on January 12, 2012, the Discipline Tribunal of the Alberta Institute of Chartered Accountants cancelled the Appellant's registration as a chartered accountant (Agreed Partial Statement of Facts, paragraph 18).

Issue

[19] The issue in these appeals is whether the legal and professional Fees paid by the Appellant are deductible as business expenses under paragraph 18(1)(*a*) of the *Act*. More specifically, I must determine:

(a) whether the Fees which the Appellant paid in defending allegations before the Commission were incurred to gain or produce income from a business or property within the meaning of paragraph 18(1)(*a*) of the *Act* or whether the Fees were personal expenses within the meaning of paragraph 18(1)(*h*) of the Act; and

(b) if the Fees fall within the meaning of paragraph 18(1)(*a*) of the *Act*, the second issue that must be determined is whether the Fees were capital outlays within the meaning of paragraph 18(1)(*b*) of the *Act*.

The merit of the deductibility in respect to employment expenses under section 8 of the *Act* was not before me in these appeals.

The Appellant's Position

[20] The Appellant wants to deduct the Fees as business expenses from his professional income because he argued that he paid them to maintain his designation and reputation and, therefore, his ability to gain or produce income from that source.

[21] The Appellant also submitted that it was his designation and experience as a chartered accountant that had provided him the opportunity to eventually become President of BRRC and that this position with BRRC also opened the door to income earning possibilities with other corporations. He argued, therefore, that there was a link between the impugned acts while employed at BRRC that led to the Commission hearing and his chartered accounting business. He submitted that, although his

various sources of income, whether employment, business or professional, were all intertwined, he had been presented with those income opportunities initially because of his designation as a chartered accountant. His position is that he would never have encountered the Commission's allegations or incurred the Fees to defend himself but for his designation as a chartered accountant, for without that base of experience and knowledge, he would never have become President of BRRC.

[22] The Appellant further argued that the expenses were necessarily incurred in respect to future business income because an adverse finding by the Commission would trigger the removal of his designation as a chartered accountant which, in turn, would negatively impact his ability to earn business income as well as professional and employment income.

[23] Finally, with respect to paragraph 18(1)(*b*) of the *Act*, the Appellant argued that, if the Fees are deductible, then they were current expenses as opposed to capital outlays because, at the time of the hearing before the Commission, he had not yet lost his designation as a chartered accountant. The Fees, therefore, were not incurred to acquire anything he did not already possess, as he was attempting to "maintain" his right to earn business income rather than seeking to "regain" the right.

The Respondent's Position

[24] The Respondent argued that the Fees were properly denied, as they were not incurred to gain or produce income. Instead, the Appellant had to deal with the Commission's allegations because of his position and work as President and officer of BRRC and not because of his accounting activities. "…[H]is need to defend himself arose from circumstances entirely divorced from any business he was running as a chartered accountant." (Respondent's Oral Submissions, Transcript, page 156). Therefore, the connection is too remote, the Respondent submitted, between the incurred Fees and the professional source of income.

[25] The Respondent also argued that the Fees were not deductible under paragraph 18(1)(*h*) of the *Act*, as they were personal in nature and incurred to defend his personal reputation rather than to gain or produce business income.

[26] Lastly, the Respondent argued that, since the Fees were incurred to protect the Appellant's reputation and marketability, which is an enduring asset, they were not deductible under paragraph 18(1)(*b*) because they were capital outlays.

Analysis

[27] Section 9 of the *Act* outlines the calculation of income from a business in a taxation year as the profit from that business in that year. In earning that profit, a taxpayer can deduct business expenses that are incurred to earn that profit, unless otherwise limited in the *Act*.

[28] Section 18 of the *Act* limits the deductibility of business expenses that are otherwise deductible pursuant to section 9. The general limitation on the deductibility of business expenses is contained at paragraph 18(1)(*a*), which states that an expense is only deductible "… to the extent that it was … incurred by the taxpayer for the purpose of gaining or producing income from the business …" There are further restrictions contained at paragraph 18(1)(*b*), which denies the deduction of capital outlays and also paragraph 18(1)(*h*), which disallows the deduction of personal and living expenses.

[29] The definition of "business" is contained in section 248 of the *Act*. It is defined to include, among other things, a "profession." The same section defines "Professional Corporation" as:

> "*professional corporation*" – "professional corporation" means a corporation that carries on the professional practice of an accountant, dentist, lawyer, medical doctor, veterinarian or chiropractor;

[30] The appeals before me deal with the issue of deductibility of business expenses as those relate to the Appellant's "professional income," which was comprised of his chartered accounting and consulting work from both arm's length and non-arm's length entities (Agreed Partial Statement of Facts, para 23). The question is whether he can deduct those legal and professional expenses against his professional income.

[31] The Supreme Court of Canada in *Symes v The Queen*, 1993 CarswellNat 1178, [1993] 4 S.C.R. 695, after examining several potential legal tests in respect to determining whether an expense would be deductible under paragraph 18(1)(*a*), concluded, at paragraph 73, as follows:

> … no test has been proposed which improves upon or which substantially modifies a test derived directly from the language of s. 18(1)(a). The analytical trail leads back to its source, and I simply ask the following: did the appellant incur child care expenses for the purpose of gaining or producing income from a business?

[32] Whether or not the purpose of an expenditure is to produce income will be a question of fact involving an examination of all of the surrounding circumstances in order to determine the "objective manifestation" of the purpose (*Symes*, at para 74). Although Iacobucci J., in writing for the majority in *Symes*, did not establish an exhaustive list of those factors to examine in such an issue, he did set out a number of relevant factors to consider in deciding if a business expense will be deductible:

(i) "… [I]t may be relevant to consider whether the expense is one normally incurred by others involved in the taxpayer's business. If it is, there may be an increased likelihood that the expense is a business expense." (*Symes*, at para 75).

(ii) "It may be relevant in a particular case to consider whether a deduction is ordinarily allowed as a business expense by accountants." (*Symes*, at para 75).

(iii) "It may also be relevant to consider whether a particular expense would have been incurred if the taxpayer was not engaged in the pursuit of business income. …" (*Symes*, at para 76). In this regard, the Court in *Symes*, at paragraph 79, outlined a "business need" or "but for" test:

> … In particular, it may be helpful to resort to a "but for" test applied not to the expense but to the need which the expense meets. Would the need exist apart from the business? If a need exists even in the absence of business activity, and irrespective of whether the need was or might have been satisfied by an expenditure to a third party or by the opportunity cost of personal labour, then an expense to meet the need would traditionally be viewed as a personal expense. …

[33] The caselaw in this area, while numerous, illustrates the difficulty noted by Iacobucci J. in *Symes* of establishing an exhaustive list of factors upon which deductibility of business expenses can be assessed and determined by a court. The decisions centre around the issue of "connectivity" between the need which the expense meets and the business itself. In this respect, Hogan J. in *Patry v The Queen*, 2013 TCC 107, 2013 DTC 1142, at paragraph 34, summarized several of the leading cases dealing with "connectivity":

> [34] … *Mercille* and *Vango* suggest that legal expenses relating to actions allegedly committed during the course of business activities can be deductible in certain circumstances. However, the Federal Court of Appeal's decision in *Poulin* suggests that such expenses must also be "the unfortunate consequence of a risk

> that the taxpayer had to take and assume in order to carry on his trade or profession". Similarly, in *Leduc*, the Tax Court suggests that for such legal expenses to be deductible they must have arisen in the normal course of the taxpayer's income-earning operations, and must have been "directly related" to those operations. In *Mercille* and *Vango* the taxpayers succeeded in showing that the expenses were related to their income-earning activities because the disciplinary actions against which they defended themselves were directly related to their work.
>
> [35] *Leduc* and *Doiron* both suggest that there must be real evidence establishing the connection between the relevant legal expenses and the business. In *Leduc*, the Court declined to find that the relevant legal expenses were deductible, in part because the taxpayer's legal practice had continued to thrive. In *Doiron*, the Federal Court of Appeal ruled that the taxpayer had not established the connection between his legal expenses and his law practice because, on the evidence before the Court, he could not have hoped to regain his licence.

[34] Lamarre J. in *Leduc v The Queen*, 2005 TCC 96, 2005 DTC 250, where the Appellant in that appeal, a lawyer, sought to deduct legal fees for defending against several counts of sexual exploitation charges, summarized at paragraph 26, the nexus that must exist between the actions that initiated the charges and the business itself:

> [26] … if the activities that led to the charges were carried on in the normal course of the income-earning operations, then an expense incurred to defend those activities is a direct result of the activities themselves, and hence may be deductible under paragraph 18(1)(a) of the *ITA*. Consequently, it is the activity that resulted in the charges and its connection to the business that determine the deductibility of the legal expenses associated with the defence.

[35] The Court concluded that the connection between eventual conviction in the criminal proceedings and the risk of losing his license to practice law was, at that stage, too hypothetical and speculative and, therefore, too remote to justify the deduction of the legal expenses (*Leduc*, at para 23).

[36] In *Cimolai v The Queen*, 2005 TCC 767, 2005 DTC 1800, Rip A.C.J. (as he was then) discussed the important distinction between current income and future income. He found that the legal expenses incurred by a medical professional, who sought damages from other professionals employed at the hospital, were not deductible as employment expenses because they were not paid to establish a right of salary from the hospital. There was no connection between the Appellant's former associates and the hospital, which was not named as a party to the proceedings, despite his argument that prosecuting these professionals would defend his professional reputation and likely preserve his ability to earn income. This decision

compares the cases of *Noble v The Queen*, [1998] 1 CTC 2797, and *Leduc*, at paragraph 31, as follows:

> [31] In *Noble*, legal expenses were incurred by the appellant lawyer in retaining independent counsel to advise him in relation to providing information about a client to the tax authorities. Sobier J. held that the legal expenses were deductible since they were necessary to prevent a conflict of interest position, which would render the appellant incapable of performing his legal services and thus prevent him from earning business income. …

[37] These two decisions were reconciled, at paragraph 36 of *Cimolai*, in the following manner:

> [36] These cases are reconcilable since the legal expenses in *Noble* were clearly linked to the appellant's ability to earn income from his current client, whereas the expenses in *Leduc* were said to preserve a future right to practice law. …

[38] In *Vango v The Queen*, [1995] TCJ No. 659, Bowman J. found that legal fees were deductible because, if the taxpayer had not expended money on these fees to have the wording of charges laid by the Toronto Stock Exchange modified, in respect to his former employment with Richardson Greenshields, then he could have been dismissed as an employee from his present employer, Nesbitt Thomson.

[39] The decisions in *Noble* and *Vango* are comparable because legal fees were incurred in order to earn income from the current client in *Noble* and the current employer in *Vango*. The connection between the expense and the income was both direct and immediate. In contrast, *Leduc* dealt with the taxpayer's ability to earn future income from his legal practice and the criminal offences had little to do with his law practice.

[40] In *The Queen v Doiron*, 2012 FCA 71, 2012 DTC 5103, the Federal Court of Appeal held that legal fees paid by a lawyer, to defend against criminal charges related to obstruction of justice that led to his eventual imprisonment, were not deductible since he was not practicing law during the taxation years in question. Therefore, the expenses were not incurred to produce income. The appellant argued that the expenses were necessary to have future income in that he could have preserved his license to practice law if he had successfully defended the criminal charges. The Court ultimately found that the expenses were capital outlays under paragraph 18(1)(*b*), but even if the expenses had not been on capital account, the Court, at paragraph 48, explained that the appellant did not prove a connection between the fees incurred and his licence to practice law:

> 48 … Mr. Doiron has not shown how he could hope to regain his licence to practice even if he had succeeded in having that evidence excluded so that "the … case would fall apart and [he] would be acquitted of a most serious offence" …

[41] At paragraph 54, Noël J. went on to state:

> 54 … to establish the necessary connection, the respondent had to show that he had a plausible defence and that, should he win his criminal case, he could hope to regain his licence to practice. …

[42] Noël J., in *Doiron*, addressed the same timing consideration that was observed in the reasons in *Cimolai*. *Doiron* appears to suggest that, in those cases dealing with future rather than immediate income, the connectivity analysis is twofold. Not only must taxpayers adduce evidence of a direct relationship between the "need that the expense meets" and the business, but they must also establish a connection between the expense and the ability of the taxpayer to earn future income from that business. This adds another dimension to the thread of the connectivity requirement that runs throughout the caselaw.

[43] In the context of the caselaw, which I have outlined, it is clear that the need which the expense meets and the business itself must be directly related and that the expense must either be incapable of being severed from the income earning operations or be the consequence of a necessary risk to earn income in that regard. Ancillary expenses may be deductible, and may provide the required connection between the expenses and the business, so long as they are essential and necessary to the business activities.

[44] The Appellant cited *BJ Services Co. v The Queen*, 2003 TCC 900, [2003] TCJ No. 706, in its submissions, but while this decision provides a more holistic interpretation of the connectivity requirement, such a broader interpretation does not extend to encompass the facts in the present appeals. Ancillary expenses may be deductible where they are shown to be so integral to the activities of the business that they cannot be divided from the entirety of the operation. However, the facts do not support such a conclusion in these appeals.

[45] Applying the principles from the jurisprudence to the evidence that was before me, I must conclude that the legal and professional fees, that the Appellant paid in defending himself against allegations before the Alberta Securities Commission, were not incurred to gain or produce income from his chartered accounting business. Instead, the expenses were a direct resulting consequence of his position that he held

as an officer and employee of BRRC. The expenses were incurred to protect his reputation within the oil and gas industry where he focussed his business activities. As such, they were personal in nature and were not incurred to protect the income earning potential associated with his professional accounting business.

[46] A review of the factors enunciated by the Supreme Court of Canada in *Symes* supports my conclusion in this regard.

(i) Whether the expense is one normally incurred by others involved in the taxpayer's business?

[47] The parties agreed that this factor was not particularly relevant in these appeals. Chartered accountants are not, as a rule, engaged in defending themselves against charges relating to infringements of provincial securities legislation and, therefore, such fees would not generally be considered a usual and accepted business expense associated with the provision of professional accounting services.

(ii) Whether a particular expense would have been incurred if the taxpayer was not engaged in the pursuit of that business income?

[48] It is clear to me that, based on the facts, the Appellant's necessity to defend himself against the Commission proceedings arose separate and apart from his business activities as a chartered accountant. The charges and the subsequent hearing were the direct result of his conduct and activities as President, CEO and a director of BRRC. This is supported by both the evidence and the Agreed Partial Statement of Facts submitted by the parties. It is further supported by the fact that a portion of the Fees incurred by the Appellant was covered by Chubb Insurance, a policy that BRRC provided for the benefit of its corporate directors and officers. The connection, between the proceedings before the Commission and the Appellant's accounting business, is absent in these appeals and it is that missing element which was crucial to the Appellant's success in these appeals. The connection, if indeed there is one at all, is simply too remote to allow the deduction of those Fees. This case can be distinguished from the *Vango* decision, where the taxpayer was granted the deductions, because the *Vango* expenses were clearly and directly correlated to his income earning activities as an investment advisor and stockbroker and also to his future income. In the appeals before me, the Appellant's Fees arose due to his conduct and actions in the capacity of President and director of BRRC. They were not incurred as a result of his business activities as an accountant.

[49] While I can appreciate the Appellant's argument that his professional accounting designation, reputation and background opened the door to his eventual employment with BRRC, together with its resulting opportunities within the oil and gas industry, there is no direct or apparent relationship, established in the facts of this case, between the acts that created the "need" and the Appellant's accounting business.

[50] It is also worth noting that the Appellant's professional consulting services were broader than activities arising solely from his designation of chartered accountant. In addition, some of the consulting activities were provided to related companies.

[51] By 2002 and as late as 2004, the Appellant's reputation and credibility within the oil and gas industry had been severely affected, but not his chartered accountant designation. In this respect, these appeals are similar to *Leduc*, where it was held that allegations did not arise in the course of the Appellant's law practice. The Court, in *Leduc*, noted that the taxpayer's earning capacity from his activities as a lawyer were not in jeopardy when the expenses were incurred, as there was no certainty of an investigation into his conduct by the Law Society. Whether an eventual conviction in *Leduc* could possibly affect his law practice in the future was hypothetical, speculative and simply too remote. This mirrors the facts before me where, at the time the legal and other fees were incurred, there existed only a "potential" for an investigation and disciplinary action by the Complaints Inquiry Committee of the Institute of Chartered Accountants of Alberta. By email dated November 30, 2009 from the Institute, the Appellant was advised that, as a consequence of the Commission's findings, they were commencing a disciplinary investigation, but reminded him that a conviction pursuant to the securities legislation would create only a "rebuttable" presumption that he failed to maintain the reputation of the profession. As such, there was no certainty, even as late as November, 2009, respecting the eventual outcome of this subsequent investigation.

(iii) Would the need exist apart from the business?

[52] Based on the decision in *Doiron*, the Appellant is required to prove the existence of a nexus between the Fees he incurred and a hope to retain his chartered accountant designation. At paragraph 12 of the Notice of Appeal:

> 12. The likelihood of the Taxpayer's designation as a Chartered Accountant being removed following negative findings being made against the Taxpayer by the ASC is strong and therefore the Taxpayer had no choice than to fully

> defend himself from all the allegations in order to allow himself to maintain and increase his business and professional income.

[53] The evidence established that the Commission's proceedings against the Appellant and the actions taken eventually by the Institute of Chartered Accountants were not entirely divorced from each other. The Commission's Merits decision was the vehicle that propelled the Institute to initiate a disciplinary investigation. The Appellant testified that he received legal advice to this effect before he incurred the Fees and he knew that the Institute could use the Commission's decision as a basis for a complaint if the hearing went unfavourably from his perspective. However, the evidence before me illustrates that the Appellant's chartered accountant designation was not definitively and conclusively at risk when those Fees were incurred. In fact, the Appellant received correspondence dated June 15, 2007 indicating that, despite the fact the Commission's decision was treated as a complaint, a decision by the Institute had not yet been made as to whether the complaint would be investigated or dismissed. Only on November 30, 2009 did the Institute communicate its decision to the Appellant to move forward with its own investigation. Ultimately, the Institute did not cancel the Appellant's designation until January 12, 2012, almost nine years after he incurred the Fees. Again, this scenario is comparable to the facts in *Leduc*, where the taxpayer in that case was informed by the Law Society that a negative finding by the criminal court would result in him being summoned to determine if he breached the *Law Society Act* and whether disciplinary action would result. In that case, Lamarre J. concluded that this connection was not sufficient and would be too remote to justify the deduction.

[54] In both *Leduc* and in the appeals before me, the professional licenses were in no immediate risk at the time the expenses were incurred, despite a possibility that failure to defend the allegations could lead to future disciplinary action that had the potential of removing the professional designations. By contrast, the decisions in both *Noble* and *Vango* allowed deductibility of legal fees because they were found to be incurred in order to earn income from current client/employment situations, making the connection between the expense and the income both direct and immediate. The appeals before me differ from *Noble* and *Vango* in that they deal with the ability to earn future income, but in circumstances where the nexus, between the acts taken to preserve a professional license itself, and the future income from that profession, is simply too remote.

[55] By incurring the Fees, what risk was the Appellant trying to avert? According to the evidence, it was the risk of losing the opportunities to make lucrative private placements within the oil and gas industry. The Fees, therefore, were incurred to

avoid, or at least reduce, the negative impact that the Commission proceedings could have on those profitable income sources, the most lucrative being taxable capital gains, employment income and taxable dividends during the period 1988 to 2007. By comparison, income, from his profession as a chartered accountant in the years preceding 2004, was minimal (Schedule A, attached to the Agreed Partial Statement of Facts). Once the Appellant's eligibility for these lucrative placements was precluded by the Commission's findings, he shifted, quite likely out of necessity, to earning his living through activities as a chartered accountant. This shift in income source is apparent in his tax returns for the taxation years, 2003 to 2006, where there is an increase in earnings in the professional income category (Exhibit A-1, Tabs 35, 36, 37 and 38). The Commission's proceedings not only extinguished the dividend and employment income sources, but actually contributed to the shift of focus and increase to the business and professional income sources. Prior to 2002, most of the revenues resulted from the dividend and employment sources, but it was precisely these two sources that were negatively affected by the proceedings, which effectively reduced those sources to zero or negligible amounts. By comparison, it is interesting to note that, until the point in time when the Commission proceedings commenced, the Appellant's professional source income was comprised of insignificant amounts. This further supports and strengthens the connection, of the Fees incurred, to the Appellant's employment sources from which the Commission's proceedings arose, rather than to the professional income source. All of this leads to the inevitable conclusion that the Fees would have been incurred in any event, even in the absence of the Appellant's professional source income and designation.

[56] The Respondent argued that the Fees were incurred to defend the Appellant's reputation and credibility, but that this was unrelated to his ability to earn income from his professional accounting source or at least too remote from the source. The Appellant, on the other hand, argued that his designation of and reputation as an accountant provided the stepping stone for the placement opportunities that were presented to him and that his designation and reputation were the basis of his ability to produce professional income from this source. At first glance, it would be logical to conclude that the Appellant's status would have required that he defend his designation and reputation as a chartered accountant in order to earn business and professional income. However, the evidence illustrates that, as his reputation declined, his professional gross income increased. Consequently, it is apparent that the Appellant's title and reputation were important, as well as connected, to his ability to produce employment and dividend income, but it was not connected to his professional source income at the time the Fees were incurred. This again supports my conclusion respecting the lack of connection between those Fees and the professional source income related to his chartered accountant activities.

[57] The Appellant also contends that he intended to produce business income from a Dissenting Shareholder's Action Agreement. The Appellant entered into this contingency agreement in April, 2008 in which he agreed to provide a group of shareholders of BRRC with crucial information that he received from his participation in the Commission proceedings. If the action had resulted in a finding that their shares were worth more than $3 per share, then the Appellant would receive 20 percent of the excess value. However, the evidence does not support the Appellant's argument because the Agreement was signed two full years after the Commission's decision. Although the Appellant testified that he had been working with those shareholders prior to signing the Agreement in 2008, no further evidence was adduced in this respect. In any event, I view the potential to earn income from this Agreement as simply an opportunity that presented itself in the course of these events, but it was not the reason or one of the reasons upon which the Appellant defended the Commission's allegations.

[58] In summary, until the Commission commenced its proceedings against the Appellant, his main sources of income were derived from employment and dividend sources within the oil and gas industry. During this same period, his revenues from professional income were negligible. The Commission proceedings garnered adverse publicity which, in turn, severely affected the Appellant's reputation and resulted in the near elimination of both his employment and dividend income sources. The Fees were expended in an attempt by the Appellant to avoid personal financial failure in this respect, regardless of the existence of his professional activities as an accountant. When he was unsuccessful in defending the Commission's allegations against him, he turned to his professional accounting activities for income and, for the first time in many years of the Appellant's work history, those activities became profitable. This bars the Appellant from successfully claiming that the Fees he incurred were to produce such professional income. The Appellant has failed to establish, and the facts do not support, the requisite connection or nexus between those expenses and his ability to keep his designation as an accountant and to produce future income from that designation. Rather, the evidence before me supports the lack of connection between the expenses and the professional source. Therefore, the Fees, which are at issue, are personal in nature and cannot be deducted in the computation of the Appellant's income.

[59] The appeals are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 25th day of October 2013.

"Diane Campbell"

Campbell J

SCHEDULE "A"

AGREED PARTIAL STATEMENT OF FACTS

For the purposes of this appeal, the parties admit the following facts and agree that their admission of facts shall have the same effect as if the facts had been proved formally and accepted by the Court as true. The parties further agree that the documents contained in the Joint Book of Documents are accurate copies of authentic documents.

[…]

Appellant's work history

1. The appellant obtained his designation as a chartered accountant in the Province of Alberta with the Institute of Chartered Accountants of Alberta in September of 1979.

2. From September 1979 to May 1985, the appellant was employed as a chartered accountant by Coopers & Lybrand Chartered Accountants in the position of tax supervisor, elevating to senior tax manager. During this same period the appellant was also involved in a number of separate business opportunities, consisting of Ironside Energy Ltd., Ironside Enterprises Ltd., Blue Range Resources Ltd. and Schuler Royalty Limited Partnership.

3. In May 1985 the appellant became the chief financial officer of Blue Range Resources Ltd., a privately held corporation. He continued to be involved in a number of separate business opportunities, participating directly and indirectly in oil and gas drilling opportunities. The involvement included the structuring, financing and ownership of natural gas processing facilities, oil and gas exploration, development and production companies and oil and gas service companies.

4. In August 1987 the appellant became the chief financial officer and a director of Blue Range Energy Corporation, later Blue Range Resource Corporation, a publicly traded oil and gas company. Blue Range Resource Corporation was a reporting issuer on the Alberta Stock Exchange, having been listed in August 1987 and on the Toronto Stock Exchange since 1991. One of the appellant's

main roles was raising capital from public and private sources and interacting with persons involved in the capital markets.

5. In the period April 1, 1994, to December 12, 1998, the appellant was the President, Chief Executive Officer and a director for Blue Range Resource Corporation.

6. As the President and Chief Executive Officer of Blue Range Resource Corporation, the appellant had responsibility for seventy (70) to eighty (80) employees and contractors that were involved in the Divisions of the corporation's business, including Exploration (15-18 employees), Land (10-12 employees), Engineering and Field Operations (12-14 employees), Corporate (8-10 employees) and Finance and Accounting (20-25 employees).

7. Remuneration for his role with Blue Range Resource Corporation included a salary, bonuses, and stock options and the purchase of company shares by way of private placement. Also, through the company's business associations with third parties, the appellant was able to invest in other oil and gas related opportunities, some involving direct ownership while others involved indirect ownership.

8. On November 12, 1998, Big Bear Exploration Ltd., a public corporation, announced its intention to make a takeover bid for all of Blue Range Resource Corporation's issued and outstanding securities on the basis of an exchange of one Blue Range Resource Corporation share for eleven Big Bear shares. On November 13, 1998, Big Bear issued a take-over bid circular. The transaction was characterized as a hostile bid. The transaction was successfully concluded by December 12, 1998.

9. The appellant ceased to be an officer and director of Blue Range Resource Corporation on December 12, 1998.

10. On March 2, 1999, after Blue Range Resource Corporation's new management ascertained its financial condition, it obtained court protection under the Companies' Creditors Arrangement Act, R.C.S. 1985 c. c-16.

Blue Range Resource Corporation – Alberta Securities Commission ("the Commission") proceedings

11. On March 8, 1999, the Executive Director of the Commission ordered an investigation into all matters "relating to trading in the securities of Big Bear and Blue Range and into the disclosure of material changes, material fact and financial information pertaining to Big Bear and Blue Range by their officers, directors, employees and agents" under section 41 of the *Securities Act*, S.A. 1981, c. S-6.1 (now R.S.A. 200, c. S-4).

12. On June 26, 2001, the Executive Director of the Commission issued a notice of hearing respecting a number of allegations against the appellant and one other (the "respondents"). The purpose of the hearing was for the Commission to consider whether,

    a. the respondents acted in a manner contrary to the Alberta securities legislation and the public interest;

    b. it was in the public interest to make orders that would remove them from the Alberta capital market in a certain manner and require them to pay an administrative penalty; and

    c. it was appropriate to make orders for costs of the investigation and hearing against the respondents.

13. The Commission hearing was held in two parts. The first part considered the merits of the allegations, which focused on the nature and quality of public disclosure made by the respondents in respect of Blue Range Resource Corporation in the period April 1, 1997, to December 12, 1998.

14. The Commission hearing ran for in excess of 120 days in the period between October 31, 2002, and June 25, 2004, with written argument delivered by the parties in February 2005. The merits segment concluded with the Commissions' decision on December 21, 2006, wherein it found that the appellant had contravened Alberta securities laws and acted contrary to the public interest.

15. After the conclusion of the merits segment, the Commission dealt with the second segment of the hearing; this related to sanction and costs. The Commission released its decision in this regard in November 2007. The Commission ordered that,

    a. all of the exemptions contained in the Alberta securities laws do not apply to the appellant permanently, except that this order will not preclude him

from trading in or purchasing securities over an exchange as principal through accounts maintained with a registrant who have first been provided with a copy of the Commission's decision;

b. the appellant is to resign any position he holds as a director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer or both of any issuer;

c. the appellant is to pay an administrative penalty of $180,000; and

d. the appellant is to pay $675,000 toward of the costs of the investigation and hearing of this matter.

16. The appellant's appeal to the Alberta Court of Appeal of the order of the Commission was heard on December 2, 2008. It was dismissed on April 9, 2009.

17. In a letter dated December 22, 2006, the Institute of Chartered Accountants of Alberta informed the appellant that, pursuant to paragraph 101(1) of the *Regulated Professions Act* ("RAPA"), they considered the Alberta Securities Commission Merits Decision to constitute a complaint under RAPA.

18. Subsequent to the decision of the Alberta Court of Appeal in respect of the appellant's appeal of the Commission matter, the Alberta Institute of Chartered Accountants held a disciplinary hearing in respect of the appellant. On January 12, 2012, the Discipline Tribunal of the Institute of Chartered Accountants cancelled the appellant's registration.

19. Pursuant to a policy between Blue Range Resource Corporation and Chubb Insurance, the appellant had coverage with Chubb Insurance under the Executive Protection Policy related to his position with Blue Range Resource Corporation. Pursuant to that policy, Chubb Insurance paid Carscallen Lockwood and other third parties for part of the appellant's defence costs in the Commission proceedings. Notwithstanding the payments made by Chubb Insurance, the appellant retained Carscallen Lockwood and other third parties and was legally responsible for paying the invoices rendered. The appellant was responsible for the amounts not covered by Chubb Insurance, and it is these amounts as well as some other amounts, that the appellant is claiming as expenses.

20. Under the Policy, insured persons were "any person who has been, or now is, or shall become a duly elected or appointed Director or duly elected or appointed officer of the insured organization.

21. Under the Policy, Chubb Insurance agreed to "… pay on behalf of the insured persons all loss for which the insured person is not indemnified by the insured organization and which the insured person becomes legally obligated to pay on account of any claim first made against him, individually or otherwise, during the policy period or, if exercised, during the extended reporting period, for a wrongful act committed, attempted, or allegedly attempted by such insured person before or during the policy period."

Income Tax Returns and Reassessments

22. The appellant filed income tax returns claiming income in the years, amounts and from sources as set out in Schedule A. For clarity,

    a. the column title "Other Income" refers to income from interest and income from oil and gas royalty trusts and other income received from Fair West Energy Corporation;

    b. the column title "Business Income" refers to income from direct investment in oil and gas assets; and

    c. the column title "Professional Income" refers to income from the appellant's consulting business and/or as a chartered accountant.

23. As to the source of the income from the appellant's consulting business, this was from both arm's length entities (Jag Petroleums, Blue Range Development Corporation) and non-arm's length entities (Ironside Energy Ltd. and Ironside Enterprises Ltd.).

24. The expenses at issue were deducted by the appellant from the Professional Income category.

[…]

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