

Docket: 2004-4046(EI)

BETWEEN:

ALIREZA NAGHASH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

UNIVERSITY OF ALBERTA,

Intervenor.

Appeal heard on common evidence with the appeal of *Alireza Naghash*
(2004-4047(CPP)) on May 25, 2005, at Edmonton, Alberta

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Galina Bining

Agent for the Intervenor: Gordon Beck

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 4th day of November 2005.

"D.W. Rowe"

Rowe, D.J.

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Citation: 2005TCC694
Date: 20051104
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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant, Dr. Alireza Naghash (Naghash) appeals from decisions issued by the Minister of National Revenue (the “Minister”) on July 28, 2004 wherein the Minister decided the employment of Naghash with the University of Alberta (U of A/payor) from July 31, 2001 to July 31, 2002 did not constitute either insurable or pensionable employment pursuant to the provisions of the *Employment Insurance Act* (“EIA”) and the *Canada Pension Plan* (the “Plan”) because he was not engaged under a contract of service and – therefore – was not an employee of U of A.

[2] All parties agreed the appeals could be heard together.

[3] At various times in several documents or during the course of testimony, submissions or references to various websites, the term PDF was used to denote both the Postdoctoral – sometimes spelled as Post Doctoral – Fellowship and also the holder of that fellowship. For the purposes of these reasons, I have elected to use

PDF to describe the fellowship itself and Fellow to refer to the recipient of the funding pursuant to said fellowship.

[4] The appellant testified he is employed as a Research Associate at U of A. Referring to paragraph 10 of the Reply to the Notice of Appeal (Reply) filed in appeal 2004-4046(EI), he agreed the following assumptions were correct:

- (a) in March, 2001, the Appellant was invited by the Payor to join the research group in the Department of Chemical and Materials Engineering of the Payor as a Post Doctoral Fellow;
- (b) the purpose of the Post Doctoral Fellowship offered to the Appellant was to conduct a research project in the field of fuel cells;
- (c) the Post Doctoral Fellowship offered to the Appellant was for a period of one year, being from July 31, 2001 to July 31, 2002, and was renewable for another year subject to the satisfactory performance of the Appellant and the availability of research funding;
- (d) the Appellant accepted the fellowship offer of the Payor;

[5] Naghash did not agree with the characterization of “stipend” as applied to the sum of \$28,000 per year paid to him by U of A or that it was applicable only to his living expenses while conducting research for the payor, as stated in subparagraph 10(e) of the Reply. At subparagraph 10(f) of said Reply, the Minister made the following assumption:

- (f) the Payor considers Post Doctoral Fellows as individuals who are engaged in training and learning opportunities, normally within five years from the completion of a doctoral degree and 10 years from the completion of a MD, DDS or equivalent degree;

[6] The appellant did not agree that Fellows are engaged only in training and learning opportunities but accepted that PDFs are normally for a limited period of time (subparagraph 10(g)). The Minister assumed – at subparagraph 10(h) that:

- (h) the primary purpose of the Post Doctoral Fellowship received by the Appellant was to further the education and training of the Appellant with the goal of enhancing his knowledge and experience, rather than to benefit the Payor;

[7] The appellant disagreed with this statement but agreed that funding of PDFs comes from a number of external organizations and is administered by the payor, as

stated in subparagraph 10(i). Naghash did not accept use of the term “stipend” to define the payments he received from the payor and did not agree that the amount of the fellowship received by him was determined by the funding organization, as relied on by the Minister in subparagraphs 10(j) and 10(k), respectively. Naghash agreed his research activities at U of A were overseen by a Faculty Advisor who was a staff member of the payor (subparagraphs 10(l) and 10(m), respectively). Naghash stated he did not accept the conclusions of the Minister – cast in the form of an assumption at subparagraph 10(n) - that “the relationship of the Faculty Advisor with the Appellant was one of educator and student and any control exerted by the Faculty Advisor over the Appellant was as a result of that relationship;” or the assumption – at subparagraph 10(o) - that “the Payor did not have the intent to engage the Appellant under a contract of service.”

[8] Naghash stated that on January 15, 2001, he contacted a member of the U of A academic staff with respect to a PDF and received a reply indicating U of A was awaiting funding and – in the interim – requested him to provide a reference letter. Naghash received an invitation letter – Exhibit A-1 – dated March 14, 2001, signed by K.T. Chuang, Ph.D., Professor, and J.L. Luo, Ph.D., Associate Professor. The contents of the letter are as follows:

After carefully evaluating your academic achievement and relevant research experience, we are pleased to invite you to join our research group at University of Alberta in Edmonton, Canada as a Post Doctoral Fellow to conduct a research project for a period of one, renewable for another one year subject to satisfactory performance in your research and availability of research funding.

We hope that you could start this project in April, 2001 or soon after, depending upon when your visa is approved. Unless you arrive at University of Alberta before June 30, 2001, this invitation is null and void (due to the project deadline). The research topic will be in the field of fuel cells as discussed in our earlier e-mail correspondence. We are also prepared to offer you a stipend of \$28,000 per year (Canadian funds) to cover your living expenses while working at the University of Alberta.

Provided you plan to stay for at least one full year, you should normally be able to obtain Alberta Health Care Insurance. You will be advised by our Pension and Benefit's office of the procedures to follow.

Please notify us in advance of your expected date and time of arrival, airline, etc. We will then inform the Immigration authorities at this end so as to assist in streamlining admission procedures when you arrive.

[9] The appellant described his academic achievements which included a Bachelor of Science in Engineering, (Iran) Master degree in Engineering Materials (Australia) and a Ph.D. in Chemical Engineering (Singapore, supervised by Massachusetts Institute of Technology (MIT)), specializing in the field of lithium batteries. He stated it was necessary to obtain an extension from U of A because a delay in obtaining his visa to enter Canada prevented him from meeting the June 30, 2001 deadline stated in the letter. After arriving in Edmonton and reporting to U of A, he met with Professors Chuang and Luo and was assigned certain tasks which permitted him to become familiar with the equipment. After one month had passed, he began having meetings every two weeks with Professors Chuang and Luo together with three other individuals who were involved in the same research project. Naghash stated he understood there were certain milestones to be attained and goals to be achieved in order to satisfy the terms established by the funding agency and that reports of progress were provided to the funding entity by the professor who had applied for the grant. Dr. Chuang was the Faculty Advisor for the project and during regular meetings with Chuang and Luo, the appellant stated he received instructions as to certain methods to pursue in terms of research techniques and – often – was told to perform a specific task in a particular manner or was instructed to avoid utilizing a procedure. At the meetings which lasted between one and two hours, Naghash stated he presented written material, charts, graphs and made oral presentations concerning certain aspects of his work. He worked alone in an area of the laboratory dedicated to his portion of the research project. For his efforts, he received a monthly cheque in the sum of \$2,333.33 which he understood was based on a 35-hour work week. Naghash stated he had no relationship with the funding agency and at one point - about March, 2002 - understood that Professor Chuang had requested a change in the direction of the research. The fellowship ended on July 31, 2002, and was not renewed. Naghash asked for a letter confirming his position and on July 15, 2002 a letter addressed, To Whom It May Concern – dated July 15, 2002 – was written on U of A letterhead and signed by Fraser Forbes Professor and Chair. The letter - Exhibit A-2 - confirmed the appellant was currently working as a Fellow in the Department of Chemical and Materials Engineering at the U of A. It stated the appellant was working under the supervision of Dr. Chuang and had been granted a two-week leave of absence from July 17 to July 31, 2002 so he could travel to Singapore. The appellant stated he had worked at the University of Singapore as a research engineer and had been paid a monthly salary. Because he was a citizen of Iran, his wife remained in Singapore while he was involved with the research project at U of A. He stated he had not become familiar with the national EI and CPP schemes until he had been at U of A for a few months. Even then, he did not discuss the issue with Dr. Chuang but spoke with other Fellows and ascertained that – like

him - none was subject to any EI or CPP deductions from their remuneration, although U of A contributed 50% of the premium cost for medical plan coverage. The appellant stated he was familiar with two types of PDFs which he divided into an External PDF and a Grant PDF in order to distinguish them in terms of funding. A Fellow working under an External PDF will operate autonomously after having obtained funding through personal efforts. As a result, Fellows in this context are at liberty to do as they choose and report directly to the funding entity, although they still must find a mentor within the appropriate faculty who is willing to be associated with that project. The other category – the Grant PDF – is characterized by work performed under the direct supervision of a faculty member who is entitled to issue orders as to the manner and nature of the tasks undertaken. Naghash stated that, in his view, these workers are employed under a contract of service due to the control exercised by the faculty member as compared with the External PDF where funding is paid every 6 months based on a budget submitted by the applicant during the funding process. However, this PDF is available only to Canadian citizens and/or permanent residents. Naghash stated that a Fellow at one university could obtain sufficient funding for a project and then persuade another university to permit the research project to be carried on at its facility since the cost - to it - would be insignificant.

[10] In cross-examination by counsel for the respondent, the appellant stated he contacted Simon Fraser University in Burnaby, British Columbia as well as the Université of Montréal and St. Francis Xavier University with a view to determining the manner in which they treated Fellows.

[11] (Counsel for the intervenor advised the Court U of A conceded some Canadian Universities treat Grant PDFs as employees - as opposed to those participating in a project funded as an External PDF - but the intervenor did not make that distinction and Fellows in both categories were not considered to be employees.)

[12] Continuing with his testimony, the appellant stated he began searching for PDF opportunities while employed in Singapore. Once at U of A, he started working on a research project in relation to the conversion of butane gas to a substance known as butene in a process involving a structural change. However, the first two or three weeks were devoted to becoming familiar with the laboratory and equipment. Naghash stated he used his own knowledge and experience to carry out his work and would not have accepted that particular PDF if it was merely for training rather than to earn remuneration. Prior to accepting the PDF at U of A, he had applied for other PDFs and also for professorial posts at various educational institutions. In terms of working hours, the appellant stated he worked late, if necessary, at various stages of

the project. Sometimes, he was called to the office of either Dr. Chuang or Dr. Luo where one or other would assign a specific task and reports were submitted to both so the funding entity could be informed of progress.

[13] Counsel for the intervenor cross-examined the appellant who agreed that when he met with Dr. Chuang and/or Dr. Luo to report progress, in the course of ensuing discussions, he was free to disagree with their suggestions and to voice his opinions. Naghash stated that according to his understanding a Grant PDF has no right to the intellectual property inherent in his research which – in his case – was funded by a grant from National Science Engineering Research Council (NSERC) but that an External PDF would own the results of any project that had been carried out pursuant to funding obtained through the individual efforts of that Fellow. He agreed an External PDF would probably permit the Fellow to exercise a higher degree of autonomy than a Grant PDF, although the nature of discussions of the science involved would probably be the same under both regimes. Although the subject of his Ph.D. thesis was lithium-ion batteries, Naghash stated he had some experience in the field of fuel cell research. As for recording hours of work, the appellant stated he had never filled out any time sheet in any of the positions occupied previously during his academic/working career. Naghash stated he had discussed his work situation with Dr. Stephen Bekhor, another Fellow working under similar circumstances at U of A who had also filed an appeal with the Tax Court of Canada seeking a reversal of the Minister's determination that he was not an employee.

[14] Dr. Karl Chuang, Ph.D. was called to the stand by counsel for the intervenor. Chuang stated he is a Professor of Chemical Engineering in the Faculty of Engineering at U of A. His specific area of expertise involves catalytic processes and fuel cells and he is regarded as an expert in that field. He has been at U of A since 1986 and first had a Fellow working pursuant to a PDF in 1987. In his view, Fellows participate in a project not to assist directly as much as to obtain additional training. On average, he supervises 4 or 5 Fellows per year who work on different aspects of the same project. He stated Fellows want to be able to publish their findings because one of the criteria by which they are judged is the number of scientific papers they have produced. On the other hand, Research Associates are often used on projects funded by corporations that do not want them to publish results and/or conclusions drawn from research until some future date to be decided upon in accordance with corporate strategy. Chuang stated he considers a PDF as a vehicle for further training that prepares an individual to obtain employment in his or her discipline. Chuang stated the source of funding varies and includes federal and provincial governments and entities within the private sector. The funding for the appellant's PDF was provided by NSERC which required High Quality Personnel (HQP) to be associated

with the project before it would provide necessary funding. Chuang stated Dr. Naghash worked in the laboratory and communicated with him on a regular basis. He agreed there was no need for the appellant to fill out time sheets or to conform with a daily routine, *per se*. In his opinion, the appellant required additional training in the field of chemical engineering. Because most graduates are employed soon after completing their education, there are few grants offered in the field of engineering and most applicants for PDFs are from overseas. Chuang stated he would not draw a distinction between the so-called External PDFs and the type offered to the appellant.

[15] In cross-examination by the appellant, Chuang agreed the grant from NSERC was to fund “curiosity-driven” research, sometimes referred to as a discovery grant. Chuang stated the purpose was to conduct inquiries during a 3-year period and there was no requirement to report progress to NSERC. However, because new PDFs are offered each year and new Fellows arrive to assume these positions, the term for any Fellow is limited – usually - to one year. In order to qualify for a NSERC grant, U of A had to agree to train students and to utilize all funds for the purpose of funding PDFs rather than spending money to pay a salaried Research Associate as to do so could result in a new application - for 5-year funding - to be looked upon with disfavour. Chuang stated there was never any intention that U of A would pay EI premiums or make CPP contributions in respect of a Fellow because NSERC merely grants a specific sum in accordance with the terms of an application and the cost associated with EI and CPP is not included in the budget. Chuang stated he has not seen any NSERC grants that contain money for work-related benefits nor – in his experience – has the PDF of any Fellow ever been terminated prior to the date set forth in the original acceptance letter.

[16] Jeffrey Goldberg, Ph.D testified he is a Professor and Associate Dean of the Faculty of Graduate Studies and Research at U of A. In his position, he is familiar with PDFs and the funding arrangements related thereto. At any given time, U of A has about 300-400 persons as Fellows and a department within the Faculty administers the PDFs. In his view, a PDF is a training exercise that typically lasts from two to four years generally commencing immediately after an individual has obtained a Ph.D. The purpose of the PDF is to permit an individual to obtain additional experience utilizing advanced research techniques and to publish papers preparatory to firming up a career path, perhaps as a professor. Goldberg produced a document printed from the U of A website on the subject “Policies Governing Postdoctoral Fellows” – Exhibit I-1 - and stated it accurately reflects the policy of U of A that “[s]ince PDFs are in training, they are considered by the University to be trainees rather than employees.” Goldberg stated funds are held either by a funding

agency - such as NSERC – and may include U of A on occasion or the money may flow directly from the funding source. Sometimes funds are held by U of A to assist a professor who is the Principal Investigator according to the terms of funding for a specific research project. Goldberg stated U of A does not distinguish between the so-called External PDF's who may have found their own funding source and the type of grant offered to the appellant. As noted on the highlighted portion of page 2 of the print-out - Exhibit I-1 – all Fellows working at the University under a PDF, both on and off campus, and regardless of the source of funding are registered and administered through the PDF office. The sixth page of the document deals with benefits available to full-time Fellows and includes dental care, supplemental health care and an assistant program for them and members of their family which is separate from Alberta Health Care. Goldberg produced an Academic Appointment/Pay Action Form – Exhibit I-2 - pertaining to the appellant and under the category “Employee Attributes”, boxes had been checked to indicate Naghash was a full-time Postdoctoral Fellow who was paid \$28,000 per annum and that Dr. Luo was the designated Trustholder for the purposes of the funding source. Goldberg stated U of A used this form as a matter of convenience and administrative efficiency as it had no separate form to be used specifically in respect of Fellows receiving funds through PDFs. He agreed the policy in respect of the status assigned Fellows varies among universities in Canada and that many institutions do not regard Fellows who obtained their own funding as employees since the resulting project is considered to be an external PDF. However, there are several universities in Canada – including McGill and University of Toronto – that follow the same policy as U of A in that they regard Fellows as trainees.

[17] In cross-examination by the appellant, Goldberg agreed that a Postdoctoral Fellowship is a name assigned to an award funded by a certain entity and can include money provided by U of A. Goldberg agreed that a portion of the policy document – Exhibit I-1 – on the fifth page thereof under the category of Achievement - referred to a Fellow within the context of a Faculty Member developing a clear understanding of certain matters “at the start of employment”. Goldberg stated Fellows are not apprentices in the ordinary sense that term is used and their conduct is governed by rules promulgated by U of A under the Code of Student Behaviour.

[18] Counsel for the respondent did not call any witnesses and stated the respondent was adopting the position advanced by the intervenor.

[19] The appellant submitted the evidence had established he was employed with U of A under a contract of service and was engaged in both insurable and pensionable employment.

[20] The position of the respondent and the intervenor was that the intention of the parties at the outset was clear and ought to be determinative of their relationship in the absence of compelling reasons permitting the Court to arrive at a contrary conclusion. Both counsel submitted the circumstances under which the appellant participated in the research project were within the context of the clear terms of the PDF and did not constitute a contract of service.

[21] All parties were aware the decision in the case of *Stephen Bekhor v. M.N.R.*, 2005TCC443 - Dockets 2004-3299(EI) and 2004-3301(CPP) - also involving U of A - as intervenor - had been reserved by Justice Lamarre Proulx. Accordingly, it was agreed any written submissions would await the release of said decision and that arguments would refer to said judgment. Depending on the result, each party would have the opportunity to deal with the extent of the divergence – if any – from the specific circumstances in that case to those in the within appeals in order to persuade me to arrive at a different conclusion.

[22] The decision of Justice Lamarre Proulx in *Bekhor, supra*, was released on July 15, 2005. At the close of the hearing in the within appeal, I advised that upon receipt of a copy of said decision – each party had 30 days in which to respond. The appellant requested an extension until September 15 - which was granted - and submitted numerous documents, materials and extracts which I will discuss later in these reasons.

[23] In *Bekhor*, a ruling had been issued by Canada Customs and Revenue Agency – as it then was – stating Bekhor held insurable employment. A similar ruling was issued in the within appeals but – like the Bekhor ruling - an appeal to the Minister resulted in a decision that the employment of the appellant with U of A was neither insurable nor pensionable pursuant to the provisions of the *EIA* and the *Plan*, respectively.

[24] At paragraphs 7 to 16, inclusive of her judgment, Justice Lamarre Proulx recited these facts:

[7] The announcement of a “Postdoctoral/Visiting Scientist Position in Space Physics” was produced as Exhibit A-3. It stated that the Space Physics Group in

the Department of Physics at the University of Alberta was inviting applications for postdoctoral and/or visiting scientist positions in magnetospheric physics.

[8] The letter of offer dated September 13, 2002, was produced as Exhibit A-2. The letter, signed by professors Rankin and Marchand, reads as follows:

I am pleased to offer you a post-doctoral fellowship in our department for a minimum period of two years, subject to a satisfactory review after one year, and the availability of funds. You will work under the guidance of Dr. R. Rankin, and Dr. R. Marchand of the department of physics. With your background and interest in space plasmas, I believe you will find this opportunity for further training to be very beneficial. Your work will include the development of theories and models of magnetospheric processes, and the use of models in the interpretation of data collected under the Canadian Geospace Monitoring program. Please note that this position, should you accept it, involves team work, in which an open exchange with other members of the group will be required.

You will receive a stipend of \$42,000.00 (Can.) per annum plus applicable benefits normally given to postdoctoral fellows. If you plan to accept this offer please advise us in writing by September 23, 2002.

It is my understanding that you are a Canadian Citizen, and therefore exempt from the conditions that relate to foreign nationals.

[9] The contract between the Canadian Space Agency and the University of Alberta was produced as Exhibit A-4. This contract was signed on behalf of the University of Alberta by the principal investigator, Robert Rankin, by the department chairman and by the faculty dean. It is dated November 26, 2001.

[10] The contract states, among other things, that the contractor shall prepare and submit, quarterly, a progress report. This report must contain a description of the progress accomplished on each task, with appropriate sketches, diagrams, photographs, etc. Attached to the contract, there is an annex describing the work to be done. That work was divided into 13 tasks. Another annex specifies the milestones and the delivery schedule from August 1, 2001 to July 31, 2003.

[11] The appellant produced as Exhibit A-8 a document regarding postdoctoral fellows (PDFs) printed from the Queen's University Website. This document states that PDFs are considered to be employees of Queen's University unless

they receive their funding from an external source. The policy document concerning postdoctoral fellows at Simon Fraser University was produced as Exhibit A-9. Regarding the employment status of PDFs, this university follows the same policy as Queen's University. The same policy also appears to be followed at the University of Ottawa (Exhibit A-10).

[12] The policy document governing postdoctoral fellows at the University of Alberta was produced as Exhibit I-1. The term "postdoctoral fellows" is defined therein as follows:

"Postdoctoral Fellows" (PDFs) refers to those individuals who are in training normally within five years from the completion of a doctoral degree (including thesis defense) and 10 years from completion of a MD, DDS or equivalent. Since PDFs are in training, they are considered by the University to be trainees rather than employees.

[13] "Funding Source" is defined as follows:

"Funding Source" refers to the source of funds for the stipend and benefits of the PDF appointed under these Policies. The funds are held by a "Funding Agency" which is either the University or another institution or another agency (such as NSERC, SSHRC, AHFMR, CIHR or Killam Fellowships) and may be in the form of grants, fellowships, scholarships or contracts.

[14] Under the heading "Introduction", the document contains the following:

For PDFs in the sciences, the customary pattern is to seek to broaden research expertise under the guidance of an established researcher. For those in the humanities, the customary pattern is to embark on a new research project with guidance from and in consultation with an experienced faculty member. In all disciplines, an important objective is to strengthen the publication record and *cv*, thereby building a reputation and enhancing the chances of securing a more permanent faculty or research position.

All PDFs working at the University, both on campus and off campus, and regardless of the Funding Source, are registered and administered through the PDF Office.

[15] Regarding termination, it is stated that a PDF appointment may be terminated at any time for just cause on the recommendation of the faculty member responsible for the PDF. The PDF would receive one month's notice for each year of service.

[16] The requisition form to the accounting division for payment of the Appellant's stipend was produced as Exhibit I-2. It is entitled Academic Appointment/Pay Action Form. Dated October 22, 2002, it indicates that this was a new appointment to a position as a postdoctoral fellow. The amount to be paid was of \$42,000 per annum, the Trust Holder's name being Dr. R. Rankin. The document was produced as Exhibit I-2.

[25] It is apparent the circumstances of Bekhor's PDF were substantially the same as those applicable to Naghash in the within appeals. The point was made there – as it was by the appellant before me – that precedents exist at some Canadian universities for the status of employee to be accorded to PDF recipients unless they receive funding from an external source. In *Bekhor*, Dr. Jeffrey Goldberg testified and Justice Lamarre Proulx extracted certain portions from the transcript of his testimony which she referred to in paragraph 20 of her judgment, as follows:

[20] Respecting the policy of some other universities as referred to in paragraph 5 of the notice of appeal, Mr. Goldberg stated that it was true that the treatment of postdoctoral fellows as either trainees or employees is not consistent across the country (pages 26 to 29 of the transcript):

Q. Are the treatment of Postdoctoral Fellows as being either trainees or employees, is that treatment consistent across the country in your knowledge?

A. It's not consistent across the country. What's consistent across the country is what a postdoc does in their position, in their responsibilities and in their endeavour. But how the universities choose to deal with this issue is inconsistent across the country.

Q. So, by inconsistent, you presumably mean that some universities do treat Postdoctoral Fellows as employees and others do not?

A. Some universities choose to treat Postdoctoral Fellows who are funded through their supervisor's research grants as employees. No university treats postdocs who are funded directly by their own funding from a funding organization as employees because those Federal agencies don't allow you to treat them as employees, they want them to be considered trainees. So, only further the category of stipend that come, that flows through the supervisor's research grant. Some universities choose to call that an employee situation.

Q. You know, can you advise the Court what certain of those universities that do treat indirectly funded PDFs as employees, can you advise who some those universities are?

A. The examples that came to mind that are Simon-Fraser and Queen's, I think that's accurate because I've looked at some of their documentation earlier in the weekend.

Q. Are there other universities that like the University of Alberta do not treat any PDFs as employees?

A. Yes, it's my understanding that there are several.

Q. Do you know the names of any?

A. As far as I know, I think Université de Montréal right now is one of them. I think the University of Calgary is one of them but I'm not sure that they've resolved the issue. In fact, I wish I had been advised because we hold in our postdoc Office a table which really distinguishes several that do this model and several that do the other model. So, I don't want to be inaccurate so, I don't want to put forward any names but, or more names, but there are more, there are several in those models.

Q. Doctor Goldberg, to your knowledge, has any kind of Court or similar authority ordered the University of Alberta to treat PDFs as employees?

A. Can you repeat the question, please?

Q. To your knowledge, has any kind of Court or similar authority ordered the University of Alberta to treat PDFs, Postdoctoral Fellows, as employees?

A. No, not to my knowledge.

Q. Doctor Goldberg, which would be the more common type of PDF funding, funding directly to the PDF from the external agency or funding through a research grant that had been awarded to a University Professor?

A. My educated guess would be, it would be a fifty-fifty (50-50) type split. I don't know exactly the answer to that but of the greater than three hundred (300) and close to four hundred (400) postdocs on campus, I think there will be a large number in either those categories.

[26] In the *Bekhor* appeal, Dr. Rankin, a professor in the Department of Physics in the Faculty of Sciences at U of A testified Dr. Bekhor was a Fellow who had been recruited by himself and Dr. Marchand to work on a scientific project under the general terms of a contract awarded to him and Marchand by the Canadian Space Agency. The objective – according to the testimony of Rankin “was to provide a general description of progress against the overall objectives of the contract which

were to investigate space weather processes affecting the near outer space environment surrounding the earth.”

[27] Commencing at paragraph 26 of her reasons, Justice Lamarre Proulx analyzed the facts and the relevant jurisprudence prior to arriving at her conclusion at paragraph 40. Because of the similarity in facts and in the submissions made, I am reproducing this portion of the judgment as follows:

[26] The question at issue is not whether the agreement between the parties is a contract of employment or a contract for services (employee versus independent contractor status), but whether it is a contract of employment or an agreement of financial assistance regarding continuing studies (employee versus student or postgraduate student status).

[27] I will deal first with the policy of other universities regarding postdoctoral fellowships. It would appear from certain exhibits produced by the Appellant - and this was confirmed by Dr. Goldberg in his testimony reproduced at paragraph 19 of these reasons - that some universities may consider a postgraduate trainee in a work situation similar to the Appellant's as being in an employment situation. I do not want by my conclusion in the case at bar to imply that these universities are wrong in law. I consider it to be a legal situation in which the intent of the parties when entering the contract is determinative.

[28] In this regard, I wish to refer to the decision of the Federal Court of Appeal in *Ambulance St-Jean v. Canada (M.N.R.)*, [2004] F.C.J. No. 1680 (Q.L.) at paragraph 3:

3 Although the stated intent of the parties or their mutual understanding are not necessarily determinative of the nature of their relationship, they are, however, entitled to considerable weight in the absence of evidence to the contrary, such as a behaviour which betrays or contradicts the said intent or understanding. Where the parties "have freely elected to come together in separate business arrangements rather than one side arbitrarily and artificially imposing that upon the other, so that in fact it is a sham, parties should be left to their choice and that choice should be respected by the authorities". We agree with this statement of Porter D.T. C.J. in *Krakiwsky v. Canada (Minister of National Revenue - M.N.R.)*, 2003 T.C.J. No. 364.

[29] I must examine not only the terms and conditions of the work activity but also the stated intent of the parties as evidenced by their writings and their conduct.

[30] Dr. Goldberg, the associate dean of graduate studies, testified that the University of Alberta does not consider the positions of postdoctoral fellows as being employment but rather sees them as training and consider the stipends as being not salaries but financial assistance to older students. This statement is corroborated by the announcement advertising the position, the policy document printed from the University's Web site, the letter of offer and the exchange of correspondence between Dr. Rankin, the Appellant and the team members.

[31] In this regard, I will cite an e-mail dated March 13, 2003, from Dr. Rankin to the team members. (This document is part of Exhibit I-5). In my view, this e-mail describes well the context of a university research program kept alive by the determination and work of the professors for the benefit of young postdoctoral scientists. The document also shows the importance of keeping the trust of outside sources interested in promoting research in Canadian universities in their particular fields of endeavour.

CSA [Canadian Space Agency] has just asked me to prepare a progress report on your activities for the period from January 1st, 2003 to March 31st, 2003. This must be submitted around April 1st, 2003. Please keep this date firmly in mind, as I will ask you to send me written material by no later than March 31st.

It is worth summarizing the situation at present. The contract that pays you terminates on July 31st, 2003. At that time, I will have submitted a new proposal for continued funding. You may have heard that CSA did not receive from the federal budget any new (additional) funding beyond current levels. This means that we must fully justify any funding beyond July 31st, 2003. For me to do this, I should ideally have 2 to 3 papers to report from each of you by way of publications or articles submitted (Steven excepted, as he has only been here a few months). These must be in direct relation to the contract milestones, and not based on your prior existence at previous institutions. The reason this is so important, is that the loose milestones set in the contract can only be justified through evidence of publications. For comparison, the average faculty member, with a full teaching load (3 courses) and administration duties, is expected to publish 2-3 papers annually.

There is some latitude here, as for most of you, you are working in a new area in which it takes time (of order 1 year) to gain full experience. I will make that point in the new proposal that I will prepare in the next 2 months or so. However, in the future, you should really aim for a publication rate at the level set for faculty members. This will be important for your future careers as well.

In the new proposal, I will ask for increased salaries, but this is always contingent upon our success in delivering on broad contract milestones.

[32] In this e-mail the term "salaries" is used. It may also have been used in a few other letters just as the term "employer" was used once or twice as well. This cannot, however, be determinative of the nature of the relationship between the researchers and their team leader. I find much more indicative the actual content of the e-mail. It talks about loose milestones or broad contract milestones in relation to which the research has to be conducted. The work involves tasks that are far from being specific and required to be done on a daily basis. A progress report is requested after three months of individual and team research. There is much latitude given the researchers. The e-mail adds that the papers to be submitted must show the results of research done in relation to the contract milestones and not of previous research. This shows that the intent of the University's program is to stimulate research and develop the capabilities of the researchers, thereby fulfilling the University's teaching and training mandate.

[33] I find that the above-quoted e-mail supports the position of the Intervener that postdoctoral fellows at the University of Alberta have the status of trainees and not employees. I would draw the same conclusion from the whole of the evidence adduced, including the evidence given by the Appellant.

[34] The Appellant stated that Dr. Marchand and Dr. Rankin exercised control over him as employers. Dr. Marchand did not testify nor did the Appellant's former colleagues at the University. Dr. Rankin testified at the request of the Intervener. From my reading of the exchange of correspondence between the Appellant and Dr. Rankin and the other documents mentioned in these reasons, I find that their relationship was one not of an employer and employee but of director of a research program and researcher, that is, professor and student.

[35] On a research team, the team leader is in charge. The trainees are subordinates of the team leader. They are subordinates because they need and want guidance. That is why the trainees in this particular instance had accepted their positions. It was stated in the letter of offer (Exhibit A-2) that "[y]ou will work under the guidance of Dr. R. Rankin and Dr. R. Marchand of the department of physics."

[36] The postdoctoral fellows were expected to work on the research project. They received their stipends for that work. However by thus working and receiving guidance, they also learned. The Appellant testified that he saw Dr. Marchand on a regular basis, nearly daily, and that he received guidance from him.

[37] The same letter (Exhibit A-2) stated: "You will receive a stipend of \$42,000.00 (Can.) per annum plus applicable benefits normally given to

postdoctoral fellows." The Appellant had inquired as to the nature of those benefits and was provided with the information requested. He did not at that time ask for the employment insurance benefit. He did not even inquire as to whether he would be covered by the employment insurance plan. The information given on the University's Web site is clear. There is no evidence that the Appellant was looking for insurable employment or that he was misled as to the nature of the agreement.

[38] The Appellant also raised the point of the termination clause mentioned in paragraph 15 of these reasons. It cannot but be found normal that in a matter of an agreement respecting financial assistance there be a possibility of ending the agreement for just cause.

[39] For all these reasons, I conclude that the relationship of the Appellant with the University of Alberta was one of advanced student and professor, not one of employee and employer. The stipend received was in the nature of financial assistance provided to a learning postdoctoral fellow, not remuneration for services rendered by an employee to an employer.

[40] The appeal must be dismissed.

[28] In written argument, counsel for the respondent submitted the evidence was clear the appellant had accepted a PDF pursuant to which he was paid a stipend of \$28,000 per year to cover living expenses and that the posting on the U of A website stated the PDF was a training position and Fellows would not be treated as trainees and not as employees. Counsel referred to 5 decisions, including *Bekhor, supra*, involving facts similar to those in the within appeals and noted that in every instance the courts held the Fellows were not employees. Counsel submitted the reasoning in *Bekhor* - particularly with respect to the clear intention of both parties at the outset – and the earlier jurisprudence supported the view there had not been an employer-employee relationship between the appellant and U of A.

[29] Counsel for the intervenor's written submissions were limited to the sole issue whether the decision in *Bekhor* should be adopted with respect to the within appeals. The intervenor submitted the decision was reached in contemplation of similar arguments raised by the appellant herein in both his pleadings and submissions and that Naghash had been in communication and received advice from the appellant Bekhor. U of A was an Intervenor in the *Bekhor* case and counsel submitted the same arguments had been raised by Dr. Bekhor, namely, that he was an employee of U of A. Counsel submitted the evidence in the within appeals did not differ in any meaningful or significant way from the circumstances of the appellant in *Bekhor* and that this decision should be followed particularly in view of the discussion therein on the issue of the intention of the parties.

[30] Dr. Naghash submitted written arguments in which he devoted a great deal of time to producing a variety of documents and materials for the purpose of establishing that the majority of Canadian universities consider Fellows working under a PDF to be employees. He seemed to be under the impression that documents not introduced at the hearing of the appeals could be entered as exhibits at this stage for the purpose of being relied upon in furtherance of some proposition. I have ignored much of this material except for some information he obtained from university websites which in the context of today's technology and information retrieval falls within the area of judicial notice in that it is readily accessible and – depending on the source and the purpose of the posting – is probably reliable. The appellant pointed out he was required to attend meetings with Dr. Chuang and Dr. Luo in order to report progress and to receive instructions regarding specific tasks or techniques to be utilized in the course of the research. According to the appellant's view of the evidence, the direction of the work was not directed by mutual consensus but was conducted in accord with the research priorities of the two supervising professors. The appellant submitted lengthy arguments concerning the indicia of employment within the context of determining whether a worker was an employee or independent contractor and also seemed to suggest that he was an apprentice within the meaning of the *EIA* and therefore an employee of U of A. He submitted the issue of intent is not determinative of the relationship between the parties and that the presence of a training component does not preclude the existence of an employer-employee relationship between the worker and the payor since nearly all employment contains some degree of education. He conceded he was unaware of the existence of EI and CPP programs at the time of accepting the PDF at U of A but submitted that does not mean he is somehow exempted from the application of that legislation. The appellant submitted U of A was out of step with the majority of Canadian universities who treated Fellows receiving payment from a Grant PDF as employees and that an Interpretation Bulletin (IT-75R4) dealing with the subject of education and training – in section 30 – states, "...if that work is performed by the student assistant under the specific direction of a researcher or co-researcher and it is done primarily for financial gain, an employee-employer relationship is considered to exist."

[31] Paragraph 5(1)(a) of the *EIA* states:

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[32] The definition of “employment” in section 2 of the *Plan* is:

“employment” means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office;

[33] First, I will deal with the suggestion by the appellant that his PDF was somehow equivalent to that of an apprentice within an apprenticeship. In my view, those terms have a specific application to the trades or to technicians and/or technologists. The Canadian Oxford Paperback Dictionary, Oxford University Press, defines “apprentice” as:

1. a person who is learning a trade by being employed in it for an agreed period, usu. (*usually*) at lower wages than is normal for that trade; 2 – beginner, a novice;

[34] The relevant definition of “trade” in said dictionary is:

2. a skilled handicraft esp. (*especially*) requiring an apprenticeship.

In both instances the italics are mine.

[35] The facts in the within appeals are that the appellant applied for and received a PDF to join a research group headed by Drs. Chuang and Luo. He was already a Ph.D and was not pursuing a specific additional designation nor was he embarking on a course of action designed to hone his plumbing or welding skills. Clearly, he did not fall within the definition of apprentice or apprenticeship as contemplated by the relevant legislation. This aspect was canvassed by Teskey T.C.J. in the case of *Ontario Cancer Institute v. Canada (Minister of National Revenue – M.N.R.)*, [1993] T.C.J. No. 430 and - after referring to several dictionary definitions – at paragraph 41 of his reasons stated:

[41] I am not prepared to describe this post-doctoral training as an apprenticeship, to do so would be stretching the definition out of its normal common meaning. The indefinite period of time is not dictated by the amount of training received by the trainee but by the job market. If there are no jobs available, the trainee simply carries on doing post-doctoral research until one is obtained. This is why the period is anywhere from two to five years.

[36] Second, whether the appellant was an independent contractor as opposed to providing his services pursuant to a contract of service is not an issue and an analysis

of the usual indicia to make that determination is not warranted for the purpose of deciding these appeals.

[37] An issue to be decided is whether there is sufficient reason that I should not adopt the decision of Justice Lamarre Proulx in *Bekhor, supra*, particularly in light of other relevant jurisprudence. Earlier in his reasons in *Ontario Cancer Institute* - at paragraph 36 – Judge Teskey stated:

[36] Considering all the facts before me and disregarding the intention of the parties (I find that both Gauci and OCI intended the contract not to be an employment contract of service) I am satisfied that the contract was not an employment contract of service. It was a contract for education and training for an indefinite period of time. She was paid a stipend in order to pay living expenses. All trainees at OCT had at the very least a MD or Ph.D. Without a stipend of some sort, only the very rich could attain the necessary training.

[38] In *Sunnybrook Hospital v. Canada (Minister of National Revenue - M.N.R.)*, [1994] T.C.J. No. 1061, O'Connor T.C.J. decided that a medical doctor performing research at a hospital was not an employee and that the stipend paid was to cover living expenses. In the course of his reasons, Judge O'Connor noted at paragraph 13:

[13] In the current situation, with respect to the job market and requirements for training, few, if any, individuals within the scientific field go directly from acquiring a Ph.D. to an assistant professorship. There is almost always a period of post-doctoral research and training.

[14] When grant money comes in to Sunnybrook, that portion which is for the payment of the stipends to fellows is set aside, and designated by the grant number. There are no deductions for any reason barring an administrative error. The stipends are meant to cover living expenses.

[15] Dr. Yuan and Dr. Johnston dealt with various problems as colleagues. Dr. Johnston discussed the best approach to a given problem and together they formulated experiments and decisions based on their mutual intellectual capabilities. Fellows differ from technicians who do not contribute intellectually to the decisions but rather take instructions daily from the fellows and scientists.

[39] In the case of *Benabdallah v. Canada (Minister of National Revenue - M.N.R.)*, [1997] T.C.J. No. 1180, Tardif T.C.J. held the appellant with a Ph.D in science was not engaged in insurable employment with the Université de Montréal while receiving funds distributed to her from a grant. At paragraph 10 of his reasons, Tardif, T.C.J. stated:

[10] A grant differs from a salary in a number of ways. First of all, it is in theory not negotiable. A grant is generally a sort of incentive to continue one's studies. There is no correlation between the amount of the grant and the significance of the studies for which it is given. A grant generally constitutes minimum financial support, and it is given only if strict conditions are met; there is little or no room for negotiation, unlike in the case of a salary, to which adjustments can be made.

[40] The appellant seems to have equated the requirement to pay income tax on his stipend as conclusive proof of his status of employee. Not so; he paid tax because either paragraph 56(1)(n) or paragraph 56(1)(o) of the *ITA* required him to do so on the basis the remuneration was a fellowship or – less likely - a research grant. Dr. Naghash met with Dr. Chuang and Dr. Luo on a regular basis in relation to the work being done by him in the context of the research project. I am satisfied on the evidence that Naghash was primarily engaged in a learning process. Despite being the holder of a Ph. D, his thesis had been in the field of lithium-ion batteries and he had limited experience in the field of fuel cell research. In the opinion of Dr. Chuang, the appellant needed to gain additional experience in the field of chemical engineering and was afforded the opportunity to do so by participating in the research project involving conversion of butane to butene. The overall project was part of what Dr. Chuang referred to as curiosity-driven research and there was no foreseeable profit or gain to be harvested from that pursuit nor any requirements to report specific ongoing progress. It seems odd to many of us who graduated from university forty years ago that individuals who have obtained a Ph.D after perhaps 7 years of undergraduate study are now compelled – or nearly so – to participate in various forms of postdoctoral programs in order to become eligible for suitable employment that pays a reasonable salary. However, that seems to be a fact of modern academic life and many universities in Canada have adopted the approach that recipients of funding through a PDF – usually a Grant PDF - should be treated as employees rather than merely as students. The appellant's current position at U of A is that of Research Associate and he earns \$40,000 per annum. It may be advantageous for the purpose of achieving consistency to have a Canada-wide policy in respect of PDFs but that is a matter for the educational institutions or - perhaps – the federal government if it decides to amend existing legislation to include Fellows and other recipients of similar funding within the definitions of insurable and pensionable employment. I accept that several well-known Canadian universities distinguish between External PDFs and Grant PDFs whereby the former are regarded as independent contractors and the latter as employees.

[41] The appellant testified he had no knowledge of the EI or CPP programs when he contacted U of A and expressed interest in the PDF. However, in the course of his research from accessing the website he ought to have been aware that U of A

considered Fellows to be in training and – therefore – trainees rather than employees. The appellant pointed out he was referred to as an employee in the Academic Action Form – Exhibit I-2 - and that the letter – Exhibit A-2 – written at his request stated he was “currently working as a Post-Doctoral Fellow at the University of Alberta.” According to Naghash, those references are confirmatory of his status as employee. I disagree. As Dr. Goldberg testified, there is no special form to use for paying Fellows except for the space provided to insert details with respect to the Trustholder of the funds which in the appellant’s case was Dr. Luo. As for the To Whom It May Concern letter – signed by Professor Fraser on U of A letterhead - it merely states the obvious which was that Dr. Naghash was currently working as a Fellow. The letter dated March 14, 2001 – Exhibit A-1 – signed by both Dr. Chuang and Dr. Luo constituted an invitation to Dr. Naghash to “join our research group at University of Alberta in Edmonton, Canada as a Post Doctoral Fellow to conduct a research project for a period of one year, renewable for another year subject to satisfactory performance in your research and availability of funding.” The letter went on to indicate the research topic was in the field of fuel cells as the parties had discussed earlier in their e-mail correspondence. The letter also stated that U of A was “prepared to offer you a stipend of \$28,000 per year (Canadian Funds) to cover your living expenses while working at the University of Alberta.”

[42] The definition of “stipend” in the Canadian Oxford Paperback dictionary includes the following:

- 1 a salary or fixed regular sum paid for the services of a teacher, public official, or clergyman.
2. any fixed regular payment, such as an allowance or scholarship.

[43] Although some Fellows may be called upon to teach and thereby form part of the academic staff, that was not the situation in the within appeals and it was apparent the appellant would be participating - for a limited period - in a research project devoted to discovery rather than to produce a specific result.

[44] As part of the jurisprudence concerning the often difficult task of determining whether a worker is an independent contractor or an employee, Stone J.A. issued this admonition in the case of *Minister of National Revenue v. Emily Standing*, [1992] F.C.J. No. 890 Stone, J.A. when he stated:

...There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the **Wiebe Door** test ...

[45] Adapting that statement for use within the context of the within appeals, one could not permit parties jointly - nor one party unilaterally - to label a relationship educator-trainee if the evidence did not support that characterization particularly if there was bad faith or coercion present in the circumstances and the affixing of that label to the relationship was rooted in an ulterior motive. None of those considerations apply here. A characterization in accord with a declaration of the status of a Fellow receiving funding pursuant to a specific PDF and expressed clearly by U of A - *inter alia*, on its website - is reasonable, particularly when the overall circumstances support that characterization and subsequent conduct of the parties is confirmatory.

[46] Some confusion arises with regard to the nature of decisions issued in respect to cases heard under the Informal Procedure of the Tax Court of Canada and it stems from the wording of section 18.28 of the *Tax Court of Canada Act* which reads:

A judgment on an appeal referred to in section 18 shall not be treated as a precedent for any other case.

[47] However, section 18 only applies in respect of appeals under the *ITA* whereas the within appeals under the *EIA* and the *Plan* are governed by the provisions of section 18.29 of the *Tax Court of Canada Act* which dictates they are to be heard under the Informal Procedure Rules. As a result, the decisions referred to in these reasons do have precedential value. I am not restricted by section 18.28 - a legislative oddity at its inception - that currently qualifies as a full-blown anachronism. I support the view that judges of the Tax Court should strive, to the extent possible, to achieve consistency as expressed in the decision in *Long v. The Queen*, [1998] 1 C.T.C. 2835. Unless there are compelling reasons to the contrary, it is desirable for decisions of a court to follow a consistent path. The evidence adduced in the within appeals does not dissuade me from adopting the reasoning - and the result - of the decision of Justice Lamarre Proulx in *Bekhor, supra*. Apart from the importance of adhering to the principle of *stare decisis*, had I been the first to encounter this issue in the context of the within appeals I would have arrived at the same conclusion.

[48] I have not been persuaded by the appellant that the decisions issued by the Minister were incorrect and they are hereby confirmed. Both appeals are hereby dismissed.

[49] I have been informed by counsel for the respondent and counsel for the intervenor that the *Bekhor* decision has been appealed. However, rather than waiting for the decision of the Federal Court of Appeal, I considered it best to issue these reasons so the appellant could evaluate his position in the context of the appeal by Dr. Bekhor.

Signed at Sidney, British Columbia, this 4th day of November 2005.

D.W. Rowe

Rowe, D.J.

CITATION: 2005TCC694

COURT FILE NO.: 2004-4046(EI) and 2004-4047(CPP)

STYLE OF CAUSE: Alireza Naghash and M.N.R. and
University of Alberta

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REASONS FOR JUDGEMENT BY: The Honourable D.W. Rowe, Deputy Judge

DATE OF JUDGMENT: November 4, 2005

APPEARANCES:

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