Docket: 2013-3484(EI)

BETWEEN:

KASSEM MAZRAANI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

INDUSTRIELLE ALLIANCE, ASSURANCE ET SERVICES FINANCIERS INC.,

Intervenor.

Appeal heard on August 29, 30, 31 and September 1 and 2, 2022, at Montreal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Emmanuel Jilwan
Counsel for the Intervenor:	Yves Turgeon Amélya Garcia

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal made under subsection 103(1) of the *Employment Insurance Act*, is dismissed, without costs, and the decision of the Minister of National Revenue dated August 1, 2013, is upheld.

Signed at Ottawa, Canada, this 4th day of October 2022.

"Guy R. Smith"

Smith J.

Citation: 2022 TCC 109
Date: 20221004
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REASONS FOR JUDGMENT

Smith J.

I. **Overview**

[1] Kassem Mazraani (the "Appellant") worked as an insurance sales agent for Industrielle Alliance, Assurance et Services Financiers inc. ("IA") from April 10, 2012 to November 23, 2012. Following his termination, he sought a determination as to whether he was engaged in insurable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996 c. 23 ("*EIA*").

[2] By letter dated August 1, 2013, the Minister of National Revenue (the "Minister") informed the Appellant that it had been determined that his employment was not insurable as the "requirements of a contract of service had not been met" and "an employer-employee relationship did not exist".

[3] It is from this decision that the Appellant appeals to this Court. IA joined the appeal as an intervenor (the "Intervenor") to support the Minister's position.

[4] The only issue before the Court is whether the Appellant was engaged in insurable employment pursuant to the provisions of the EIA or whether he was an independent contractor engaged in a contract for services.

II. **Minister's Assumptions of Fact**

[5] In concluding that the Appellant did not hold insurable employment, the Respondent relied on the following assumptions of fact:

a) The Payer [IA] is a personal insurance and financial services company whose principal activity is the sale of life, disability and health insurance.

b) [IA]'s head office is located in the city of Québec, and it has several branches throughout the Province of Quebec;

c) In the Province of Quebec, the insurance and financial services industry is regulated by the Autorité des marches financiers (the "AMF");

d) In order to sell insurance and other related financial products in Quebec, individuals and companies must hold a valid license from the AMF;

e) The Appellant was hired by [IA] as a financial advisor in April 2012;

f) Prior to working for [IA], the Appellant had already worked for several years as a financial planner with another major insurance company;

g) At the time of his hiring by [IA], the Appellant's AMF license was inactive;

h) Between April 3, 2012 and June 7, 2012, the Appellant attended a mandatory training course which was offered by [IA], on the basis of two hours a day, three days a week;

i) The completion of this training course was required in order for the Appellant to meet regulatory requirements and to reactivate his AMF license;

j) The Appellant did not receive any remuneration for his attendance and completion of this training course;

k) On May 3, 2012, the Appellant and [IA] entered a written contract with an effective date of April 30, 2012;

l) This contract provided, *inter alia*, that:

i. The Appellant was authorized to solicit and obtain applications and requests for the various contracts and financial services offered either directly or indirectly by [IA];

ii. The Appellant was liable for any amount incurred by or owed to [IA] or a client due to a mistake, negligence, fraud or dishonesty by him or one of his mandataries;

iii. The Appellant was remunerated by way of a "fund" that was set up by [IA];

iv. The Appellant was remunerated on a weekly basis by way of advances on the balance of this fund;

v. The balance of this fund was obtained by calculating the commissions and bonuses paid to the Appellant, less any charges, weekly advances and other fees, expenses and commitments made in the performance of his duties;

vi. The Appellant would remain liable to [IA] after the termination of the contract for any negative balance in this fund;

vii. The Appellant was an independent contractor, and the contract specified that it must not be interpreted as establishing an employer-employee relationship between him and [IA];

viii. The Appellant agreed to pay all expenses incurred in the exercise of his duties, including but not limited to the following:

- obtaining or renewing the licenses necessary to exercise his duties;
- obtaining or renewing professional civil liability insurance;
- membership dues in professional or other associations;
- his business office, including secretarial fees and office supplies;
- information systems, long-distance calls and facsimiles;
- travel, solicitation and publicity;
- training and upgrading;

ix. The Appellant was not authorized to:

- bind [IA] by any promise or agreement;
- incur any liability whatsoever on behalf of [IA];
- accept a risk on behalf of [IA];

- commit [IA] to any relationship whatsoever;
- use brochures, advertisements or printed matter bearing [IA]'s name or logo that had not been preapproved in writing by [IA];

m) In a letter from [IA] dated April 27, 2012, the Appellant was also advised that his agent contract would be terminated if he did not receive any remuneration for five consecutive weeks;

n) The Appellant was affiliated with [IA]'s branch located in Ville LaSalle;

o) The Appellant's tasks were to solicit and obtain applications for [IA]'s insurance products from potential clients;

p) The Appellant would set up appointments over the phone with potential clients, and meet with them in order to present and sell them products offered by [IA] or other affiliated companies;

q) These meetings often took place at the clients' homes;

r) The Appellant had access to a cubicle at [IA]'s Ville LaSalle branch where he could also work from;

s) The Appellant was required to transmit to [IA] all of the applications for insurance that he obtained from potential clients;

t) The Appellant was paid exclusively on commission;

u) The Appellant was entitled to receive advances on these commissions;

v) Upon each successful sale of [IA]'s products, the Appellant would earn a percentage of the total value of the insurance contract;

w) The Appellant was not subject to direct control by [IA];

x) [IA] did not supervise the amount or the quality of the work performed by the Appellant, aside from ensuring that the Appellant complied with legislative and regulatory requirements;

y) [IA] did not dictate the way in which the Appellant had to perform his tasks;

z) [IA] did not assign a particular territory to the Appellant;

aa) [IA] did not provide the Appellant with a list of clients to contact;

bb) The Appellant determined his own work schedule;

cc) [IA] did not control the hours worked by the Appellant or his absences;

dd) The Appellant's attendance at [IA]'s premises was not compulsory nor was it monitored;

ee) The Appellant was not entitled to vacation or sick leave with [IA];

ff) The Appellant was required to pay for his own professional liability insurance;

gg) The Appellant had the option to provide his own computer or to rent one from [IA];

hh) The Appellant rented a laptop computer from [IA] in order to perform his work;

ii) The cost of the computer rental was deducted from the Appellant's compensation fund on a weekly basis;

jj) The Appellant was required to use his own vehicle to travel for his work for [IA];

kk) The Appellant did not receive any compensation or allowance from [IA] for the use of his vehicle;

ll) The Appellant had a chance of profit and a risk of loss in providing his services to [IA];

mm) The Appellant had no guarantee of a steady income while working for [IA];

nn) The Appellant was responsible for any and all expenses incurred in the performance of his work for [IA];

oo) The Appellant did not receive any compensation or allowance from [IA] for his work-related expenses;

pp) In the event that policies for which the Appellant received a commission were cancelled within a certain time after taking effect, the Appellant was liable to reimburse [IA] a pro-rated amount of the commission received upon the successful sale of said policies;

qq) [IA] issued a T4A slip (Statement of other income) in the name of the Appellant for the 2012 taxation year;

rr) [IA] reported that the Appellant earned an amount of $7,084.91 in self-employed commissions;

ss) No deductions at source were made by [IA] from the Appellant's income in respect of income tax, employment insurance to the Quebec Pension Plan;

tt) In his income tax return for taxation year 2012, the Appellant declared gross commission income from self-employment in the amount of $7,084;

uu) The Appellant reported that he incurred $7,098 in expenses to earn his income from the Payer in 2012;

vv) The Appellant declared a net loss of $14 from his commission income earned from the Payer in 2012.

III. **The Background Facts**

[6] The Appellant testified on his own behalf. The Intervenor called a number of witnesses including Bruno Michaud, Yves Charbonneau, Stephanie Woo, Vanessa Charbonneau, Pascale Apold and Éric Leclerc.

[7] The Appellant completed the Canadian Securities Course offered by the Canadian Securities Institute in 2002. He later followed a study program offered by the Autorité des marchés financiers du Québec ("AMF") and obtained the licenses required to sell insurance products and mutual funds in 2008. He joined London life Insurance Company ("London Life") where he worked from the beginning of 2009 until his termination in March 2011.

[8] The Appellant submitted an application for a position with IA on December 21, 2011 and, after an interview process conducted by a third party, was invited to attend the offices of IA on April 2, 2012 where he was greeted by Eric Leclerc, Branch Manager and René Beaulé who would become his sales manager.

[9] A desk was assigned to him with a filing cabinet, keys, a telephone and magnetic access card. On April 3, 2012, he signed a lease agreement for a laptop computer requiring weekly payments of $18.05 deducted from his commission account (Ex. A-19) and was provided with a user name and password to access IA's computer-based "Extranet" reserved for IA sales agents (Ex. A-18).

[10] He received training for the use of the telephone and was given sample messages (Ex. A-53). He was also provided with sample promotional materials that could be personalized with his photo and contact information but were otherwise standardized for IA (Ex. A.54).

[11] He also attended a 10-week training program for "new" sales agents that involved two-hour courses, three days per week (Ex. A-8). It was comprised of a broad range of topics including prospecting, sales techniques, time management, insurance products, retirement planning, compliance issues and the like. IA does not dispute that the Appellant attended most if not all of these courses. However, there is some disagreement as to whether the training program was mandatory.

[12] From mid-August to the end of September, the Appellant attended 13 training courses of one to three hours per week. These courses were intended for "all" sales agents and allowed them to obtain "professional development units" or PDU's ("unité de formation continue" or "UFC") (Ex. A-24). Each unit represented one hour of recognized training that had to be reported to the Chambre de la sécurité financières ("CSF"). All sales agents including the Appellant were required to obtain 30 PDU's over a 24-month period failing which their license was subject to suspension. During his time with IA, the Appellant acquired 16 PDU's including 3 for "compliance" (Ex. A-24).

[13] The Appellant testified that he received frequent emails from Mr. Leclerc's assistant reminding him to enter upcoming events in his calendar (Ex. A-41). The language used in the emails varied but often mentioned that attendance was "important" and at other times that it was "essential" or "imperative". It sometimes stated "please take note" ("veuillez prendre connaissance") of upcoming events that were to be entered in the agent's agenda.

[14] The agenda located in the Intranet was continually up-dated. It listed all upcoming training courses or modules. Also included were attachments with the sales production numbers of all agents in the branch, leaders of the week in various sales categories, ongoing or upcoming sales competitions including the "President's Competition", potential prizes and cumulative performance bonuses. A list of sales agents who had not been present for the last training module was also attached.

[15] On May 29, 2012, the Appellant received an email concerning an upcoming presentation on a new software program known as "Gestion Clients". It indicated that attendance was "mandatory" ("obligatoire") and that agents were expected to be

present “without exception” (“sans exception”) (Ex. A-40). The Appellant attended this event.

The Letter of Offer

[16] When he met Mr. Leclerc on April 2, 2012, the Appellant could not actually sell insurance products because his insurance sales license had lapsed and he was required to renew his “E&O” or liability insurance coverage.

[17] On April 11, 2012 he submitted an “Application for a Representative’s Certificate” with the AMF. Two representatives of IA also signed to confirm that the Appellant would be “attached” to the firm “without being an employee” (Ex. R-4-2). The Appellant was required to make a payment or “contribution” of $237.13 to the CSF and did so but the amount was later reimbursed by IA.

[18] The Appellant’s insurance sale license was reinstated on April 26, 2012. The next day, he received a letter from IA (the “Letter of Offer”) indicating that it was offering him “an agent contract” and told that he could “begin underwriting insurance and annuities contracts (. . .) as a financial security advisor on April 30, 2012” (Ex. A-5). It stated that he would be part of “unit 35 of team 90”, that he would “be in charge of the policies and clientele” that made up part of that “service unit” and that Mr. Beaulé would be his sales director.

[19] The Letter of Offer explained that according to IA’s “Career Establishment Program”, an amount of $2,500 would be credited to his account and he would be entitled to “advances on commissions” equal to $600 per week. It also specified that if he did “not receive any remuneration for five consecutive weeks”, IA would “terminate the program” and the agent contract. The Letter of Offer referenced the “Commissions and Bonuses Schedules and Compensation Rules”. It reminded him that “the Act respecting the distribution of financial products and services stipulates that you must hold a valid license” (Ex. A-20).

The Agent Contract

[20] The Appellant acknowledged receipt of the Letter of Offer on May 3, 2012 in the presence of Mr. Leclerc. At the same time, he signed the agent contract (the “Agent Contract”) (Ex. A-20). It indicated that he would be entitled to remuneration as described in the Letter of Offer and that, in consideration of any insurance contracts obtained, commissions would be credited to his account.

[21] The Agent Contract provided that the Appellant was "an independent contractor", that there was not a "employee-employer relationship" and that he "agreed to pay all expenses incurred in the exercise of his/her duties", including "without limiting the generality of the foregoing"; "obtaining and renewing licenses necessary to exercise his duties"; "professional civil liability insurance"; "membership dues in professional or other associations"; "business office, including secretarial fees and office supplies"; "information systems, long-distance calls and facsimiles"; "travel, solicitation and publicity"; and "training and up-grading." The Appellant was entitled to incorporate his business as long as he controlled the company and that he alone could sell insurance products.

[22] IA reserved the right to "set minimum production and business persistency standards . . . and to amend these standards from time to time".

[23] The Agent had an obligation to "immediately remit" any amount received "on behalf of the Company" from the sale of insurance products. The use of a trust account was subject to strict oversight and IA reserved the right to terminate an agent contract for "inappropriate management" of trust accounts.

[24] The Agent Contract provided that sales agents could not contractually bind IA or incur any liability on its behalf, nor accept any risk.

[25] The use of brochures, advertisements and printed material, including business cards, was subject to oversight by IA and were in a standardized or pre-approved format. Paragraph 13 indicated that all "forms, handbooks, policies, computer software and other Company documents" remained the property of IA.

[26] An agent could be terminated for various reasons including not having "a valid insurance permit" or acting "to the detriment of the interests of a client".

[27] IA reserved the right to transfer clients to another agent if a "request was made to that effect by the client" or the agent's contract was terminated. Paragraph 16 provided that after the cancellation of the Agent Contract, the agent was subject to a non-competition clause and could not solicit clients who were part of the service unit at the time of cancellation for a period of two years.

[28] On May 3, 2012, the Appellant also signed a number of documents that would allow him to receive referral fees from IA agents licensed to sell "automobile and residential insurance contracts" (Ex. A-22 and A-23).

[29] The Appellant testified that the Agent Contract was never discussed or explained to him including his status as an "independent contractor". He had signed but not read the contract. He also maintained that remuneration was not discussed.

[30] The Appellant maintained that all secretarial services, office supplies, training, telephone line and business cards were paid by IA. He was also reimbursed for the fee paid to the CMF. He assumed his travel expenses.

The Appellant's Sales Activities

[31] There was little cogent evidence of the Appellant's actual sales activities though it is not disputed that, with the assistance of Mr. Beaulé, he completed the necessary documentation to obtain a group policy for himself, his spouse and two children. This appears to have been recorded by IA as four insurance policies.

[32] The "Statement for Group Insurance" dated May 30, 2012 (Ex. A-12) described his disability and life insurance as being based on an "annual salary" of $31,200. The Appellant pointed to the use of the words "annual salary".

[33] Similarly, the more detailed summary of the group coverage (Ex. A-12-a) used the expression "date of employment – May 4, 2012" and "annual salary" of $31,200. It was clear that the policy took effect on May 31, 2012.

[34] The Appellant explained that he was listed on a schedule to appear as a sales agent at a kiosque located in a local shopping mall. The cost was $40.00 per block of time or $20 per agent (Ex. A-51). He was expected to hand out product descriptions and forms intended to gather contact information from prospective clients. He used this service on numerous occasions.

[35] In September, the Appellant prepared a sales proposal for a universal life insurance policy but was not allowed to complete the sale because the client was already represented by an IA agent on his team. He indicated that he did not discuss it with the agent in question and had only spoken to his sales manager, Mr. Beaulé.

[36] He prepared a joint proposal for clients located in Gatineau QC. He travelled there to meet them but one spouse was not present. He contacted Mr. Beaulé who instructed him "to close the sale." He did so with the client signing documents that were later amended for a single person. This was the only other policy sold by the Appellant during his tenure with IA.

[37] In October 2012, Mr. Beaulé asked the Appellant to contact an existing client from the group whom he had never met and whose monthly cheque had been returned by the bank for non-sufficient funds. He did so (Ex. A-6 and A-7).

The Appellant's Termination

[38] On November 20, 2011, the Appellant received an email from Eric Leclerc indicating that he had not generated any sales for more than 4 consecutive weeks, that he was overdrawn for amounts that had been advanced to encourage an increase in his level of activity and that the situation had not improved (Ex. A-3).

[39] He then received a letter from Michel Arsenault, Superintendent of Sales, indicating that the Agent Contract was terminated effective November 23. The Appellant was reminded that he remained responsible for charges arising from policies cancelled within 2 years. He was also reminded of the non-competition clause in his contract. On December 13, 2011, he attended the branch office to return the computer, keys, magnetic card and signed a remittal form (Ex. A-15). At that point, his commission account was overdrawn by ($1,392.99).

[40] For the 2012 taxation year, IA issued a T4A for $7,084 that the Appellant reported as gross commission income. He claimed expenses of $7,098 thus reporting net commission income of ($14.00) (Ex. R-1).

[41] In 2012, IA deposited a total of $4,489.69 in the Appellant's bank account. This represented gross commissions less the advance of $2,500 and other charges.

Cross-examination of the Appellant

[42] In cross-examination, the Appellant admitted that he also generated business income from the sale of reading glasses. For the 2012 taxation year, he reported gross business income of $11,126 and a net business loss of ($2,285).

[43] The Appellant admitted that although he had indicated that he worked full-time for IA, it was mostly from Monday to Thursday. He reserved Fridays for personal time but occasionally went to the IA office. On Saturday and Sunday, he attended a flea market at "Marché St. Eustache" where he sold reading glasses.

[44] The Appellant could not remember what his legal status was at London Life but admitted that they did not withhold taxes. He refused to acknowledge that after his termination, the issue was whether he was an independent contactor or an

employee, indicating that London Life had settled with him "because" he was an employee. After his termination by London Life, he did not file a claim for employment insurance but received social assistance of $5,346.

[45] He professed not to really understand the difference between being employed or self-employed from a taxation point of view because he prepared his tax returns by simply imputing the numbers using a program known as "U-File". He admitted having taken a course on basic taxation with the AMF, clarifying that he had actually taken it three times and only passed the last exam.

[46] Apart from the group policy for himself and his family, the Appellant admitted that the only other policy sold by him, was a $50,000 life insurance policy. The application was initially rejected by compliance because monthly payments of $75.87 had been entered as $23,886,000. The Appellant insisted it was unintentional and the result of a computer glitch. It was later corrected.

[47] When questioned about the sales kiosque where he appeared as a sales representative, the Appellant insisted it was mandatory because his name was on the schedule and the email from IA told him to "be on time".

IV. **Witnesses for the Intervenor**

i) **Bruno Michaud**

[48] Mr. Michaud retired from his position as Vice-President of Sales in 2017, after 35 years of service. He held a similar position with IA in 2012.

[49] He recognized the Appellant's Agent Contract (Ex. A-20) and explained that IA had gone through an important transition in the early 1990's when it absorbed another insurance company with about 170 sales agents who were all considered independent contractors. IA redrafted its agent contract so that existing agents would also become independent contractors. It submitted a first draft to the Canada Revenue Agency ("CRA") for discussions purposes in 1993. After a few revisions, CRA accepted the revised draft contract (Ex. 4-3) and agreed to recognize the status of former employees as independent contractors if the working relationship supported the provisions of such a revised contract.

[50] Mr. Michaud reviewed the Appellant's application to the AMF for a representative's certificate (Ex. R-4.2) and confirmed that all agents had to be

"attached" to a "firm" and that in the Appellant's case, he was "attached" to IA but "without being an employee" as indicated in the form.

[51] He explained that sales agents were responsible for establishing their own sales objectives and determining the means by which they would achieve those objectives. They were responsible for their daily schedules and where they worked. They could do so at home or at an external office. They could determine when they took time-off including annual vacations. They had no obligation to report their activities. Branch meetings were not mandatory and there were no disciplinary measures. Agents were responsible for all prospecting expenses including business cards and promotional material although IA provided the first box of 250 business cards on a gratuitous basis.

[52] Mr. Michaud indicated that a sales agent could get some clerical assistance from IA up to a certain point but that the agent was responsible for the cost of a full-time assistant and would determine their schedule, remuneration and holidays.

[53] He explained that sales agents could work with other licensed agents and split fees or commissions with them. They could also incorporate provided the company was "attached" to IA. This gave agents the flexibility to determine their salary and dividends. They could also sell shares in their company, something that was not possible if they transferred their clientele directly to another agent.

[54] In cross-examination, Mr. Michaud reviewed the Letter of Offer (Ex. A-5) and agreed that the Appellant had been assigned to "unit 35 of team 90" but explained that this was for organizational purposes as total sales would be reported for that unit. He acknowledged that IA assigned a sales manager to the team.

[55] Mr. Michaud acknowledged that some branch meeting were "obligatory" such as the meeting to discuss the Gestion Clients software (Ex. A-20). He explained that the branch published sales numbers to create some competition amongst sales agents so that they could surpass themselves and increase sales. He acknowledged that leaders could be entitled to some form of benefit.

[56] Mr. Michaud also acknowledged that the change made in 1993 was mainly for tax purposes and that, in the transition from employee to independent contractors, there was no change since sales agents were already quite independent. They paid all their expenses generally equal to 30% of gross revenues. They were assigned an office at the branch but attended mostly to complete paperwork.

ii) **Yves Charbonneau**

[57] Mr. Charbonneau signed an agent contract with IA in 1993. He was described as an independent contractor (Ex. R-4.6). In 2004, he incorporated his own company and it signed a similar contract with IA (Ex. R-4.8). He filed the necessary notice with the Registraire des entreprises du Québec (Ex. R-4.27) and the AMF to indicate that his company would be attached to IA (Ex. R-4.30 and R-4.31). He had decided to incorporate following discussions with his accountant.

[58] Mr. Charbonneau was not restricted to any particular territory. He could develop his own clientele and determine his own work schedule. He paid his own assistant and established her work schedule. They worked together but he was responsible for the professional aspects. He paid for all prospecting expenses. He reported to his sales manager to keep him apprised of his results. At the beginning of his career, he attended almost all branch meetings and training sessions but later in his career only attended if the topic was of interest to him. After 36 years, he had never been the subject of a reprimand for missing a meeting.

[59] In cross-examination, Mr. Charbonneau acknowledged that he remembered the Appellant as they had been on the same team in 2012. He admitted that IA had gone through a change in 1993 but that he did not notice any real change.

[60] Mr. Charbonneau was questioned on the meaning of the word “imperitive” and “essential” (“impéraif and “promordiale”) that he interpreted as meaning it was important to attend the meeting but not mandatory. However, if an email said the meeting was “obligatory” (“obligatoire”), then he was required to attend.

[61] Mr. Charbonneau recognized an email for “week 42” (Ex. A-72) that included an agenda, a new training session and attachments. When asked why it included a list of agents who were absent, he suggested it meant they had simply not attended the last presentation. He agreed that it also meant IA was recording those who were present and those who were not. He agreed that they received regular emails with updated agenda and ranking of all agents from top producer of the week to the lowest producer but suggested that the latter could simply be a new recruit. He did not agree that this was actually a competition.

[62] Mr. Charbonneau admitted that IA provided him with an office including a telephone and landline. He admitted that all of his training was paid for and provided by IA unless he sought outside training. He admitted that he had never paid for or developed any software since he used the software provided by IA.

[63] In re-examination, Mr. Charbonneau recognized the email sent to all agents (Ex. A-40) indicating that it was "obligatory" to attend a meeting for the presentation of the "Gestion Clients" software. He saw nothing unusual about this email and attended the meeting because it was the software used by all IA agents.

iii) **Stephanie Woo**

[64] Ms. Woo joined IA at about the same time as the Appellant and signed the standard agent contract. She was a new agent and had not previously held a license.

[65] By all accounts, she progressed quickly. In 2014, she purchased another sales agent's clientele for $14,515 (Ex. R-4.14). In 2022, she incorporated a new company for her business and separate company as a holding company. She took the same steps as Mr. Charbonneau and filed a notice with the AMF.

[66] When she started with IA, she was a "trainee" as she did not have her insurance sale license. She was therefore required to attend a training program over 90 days that was mandatory for compliance purposes. She regularly reported to her sales manager and considered her a "coach". She could not recall the meeting involving Gestion Clients but suggested she had probably attended.

[67] As with Mr. Charbonneau, she developed her own clientele, determined her own work schedule and paid for all her prospecting expenses. She also paid for an assistant and determined her working schedule. She attended most weekly training sessions, explaining that they were highly recommended but not mandatory.

[68] Ms. Woo had two "incredible years" grossing $50,000 in 2012 and $100,000 in 2013, followed by four average years when she had two children. She was able to reach an agreement with another sales agent to split her commissions on a 50/50 basis. Her gross commissions had since increased to about $175,000.

[69] In cross-examination, she indicated she did not specifically recognize the schedule of training sessions for 2012 (Ex. A-8) or the actual printed version of the modules (Ex. A-57) she recognized the topics, admitting that she took the training and that it was mostly provided by the sales directors.

[70] Although she was a top producer in 2012, she had no knowledge of the insurance industry or insurance products prior to joining IA in 2012. She benefitted from the training offered by IA as well as external training. She had one-on-one

meetings with her sales director. At the beginning, the administrative staff and her sales director assisted in the completion of documentation.

[71] She indicated that as a sales agent, she could not accept cash or a cheque in her personal name and that all premiums had to be paid to IA.

[72] She did not recall the instructions for the telephone or the draft messages, indicating that she did not use the landline, preferring her cell phone.

[73] In 2012, she only sold IA insurance products.

[74] In re-examination, she explained that she could sell insurance products from other insurance companies such as Manulife or Sunlife if a client requested it and IA had an agreement with those companies.

iv) **Vanessa Charbonneau**

[75] Ms. Charbonneau signed the standard IA agent contract in 2010 (Ex. R-4.24). She eventually incorporated her business in 2022 (Ex. R-4.25 and 4.26) and filed the appropriate registration forms with the AMF (Ex. R-4.28 and 4.29).

[76] She remembered the Appellant because he had questioned her about her position with IA when she was at a sales kiosque in the fall of 2011. She told him that she was an independent contactor paid exclusively by commissions.

[77] According to her attendance at the kiosque was voluntary, there was an organized schedule and she generally shared the costs another sales agent.

[78] She also recalled an incident involving the Appellant when he had approached her about the transfer of an existing client. She had refused offering to share the commission or transfer the client to him for a fee. The Appellant did not agree and therefore she contacted her sales manager who dealt with it.

[79] As with other witnesses, she had no specific territory, she developed her own clientele and paid her own expenses. She hired her own assistant that she found using an advertisement in a local newspaper.

[80] She established her sales objectives with her sales manager but they remained her own objectives. The more clients she met, that more sales she made. She tried to

meet between 10 to 15 every week. The role of the sales manager was to guide her in that process and assist with different insurance products.

[81] She indicated that she would sometimes delegate her work to other agents, especially for more technical issues. This included her father, Yves Charbonneau.

[82] In cross-examination, she recognized a document titled "Keep your clock on time all year long" subtitled "I take responsibility and do what's necessary to succeed" with a list of 10 bullets points (Ex. A-42). One bullet point indicated: "I take part in agency meetings and I consult the information on the extranet". Ms. Charbonneau did not agree that this told her "what to do" but rather that it was a guide to help agents succeed in their business. She applied some of the suggestions.

[83] She admitted that when she joined IA she was assigned to a group and required to serve clients within that group. She was in fact assigned 40 existing clients that she had never met. She indicated that, once assigned, the clients belonged to her but that she could only "sell" them to another IA agent. She acknowledged that if she left IA, she could not take these clients with her.

[84] She acknowledged that IA provided her with an office, desk, telephone and landline as well as sales brochures. She did not pay for any software development. IA provided training for all their insurance products.

[85] She explained that she had no knowledge of any consequences if agents were absent for a meeting and that if a list was prepared, it was to ensure that the listed agents could remember to obtain a copy of the training module.

[86] On re-examination, Ms. Charbonneau explained that she was not certain if she had an obligation to take on clients assigned to her from within the group. She had never questioned this and had simply served them.

v) **Pasquale Apold**

[87] Ms. Apold was a lawyer who worked for IA from 2011 to 2017.

[88] In 2012 she was chief of compliance and her role was to ensure compliance with legislation known as an *Act Respecting the Distribution of Financial Products and Services*, CQLR C D-9.2 ("*DFP&S*") ("*Loi sur la distribution de produits et services financiers, RLRQ C D-9.2.*"). That legislation regulated the sale of insurance products (amongst other products) sold by representatives who were

required to be acting for a firm and authorized to do so by a certificate issued by the AMF. In accordance with article 80 of that legislation, a firm was responsible for "any injury caused to a client by the fault of one of its representatives in the performance of the representative's functions".

[89] The other relevant legislation was an *Act respecting the regulation of the financial sector*, CQLR c E-6.1 ("*Loi sur l'encadrement du secteur financier, RLRQ c E-6.1*") that established the role, functions and powers of the AMF. Ms. Apold acknowledged that she consulted and followed the "Guide on Governance and Compliance" published by the AMF.

[90] To ensure compliance with this legislation, IA was required to put in place a system of surveillance and to prepare appropriate directives, documentation and forms, training of directors and inspectors and engage compliance officers.

[91] One of the forms used by administrative staff was the compliance monitoring grid ("conformité - grille de suivi") (Ex. -56) distributed to all IA branches to ensure that client applications were in compliance with the legislation.

[92] She explained that one of the requirements of the legislation was the preparation of an "illustration" intended to explain the insurance product before it was sold to a prospective client. IA was required to establish strict guidelines ("lignes directrices") for the preparation of such illustrations.

[93] Similarly, the legislation imposed strict guidelines for "all forms of advertising or display" (Ex. A-46). Accordingly, sales agents were provided with sample business cards and pre-approved advertising forms that could be completed by adding a photo and telephone number. All forms of advertising were subject to pre-approval and IA was responsible for advertising used by its sales agents.

[94] Ms. Apold recognized the "Coaching Guide" (Ex. A-42) used for trainees but explained that it likely had not been completed because the Appellant was not a "trainee", having previously held an insurance license.

[95] She recognized the renewal form filed with the AMF (Ex. 4.2) noting that an applicant could represent a firm as an "employee" or "without being an employee" but that the Appellant had indicated the latter.

[96] She explained that an agent who was an "employee" was not required to develop a clientele and would typically serve clients at the branch while agents

described as independent contractors were expected to work outside the branch and develop their own clientele, although it too would become the property of IA.

[97] In cross-examination, Ms. Apold was questioned on the use of the "compliance – aide-memoire" (Ex. A-26). She explained that the administrative employees at each branch were trained to use it for each file.

[98] She acknowledged that there was no difference between the Appellant's business card and those of the branch manager, except for the different names. She acknowledged that his business card did not say he was an independent contractor.

[99] She was not familiar with the list of training sessions or training modules (Ex. A-8 and A-57) indicating that these were internal IA documents.

[100] Questioned on the type of license held by the Appellant, Ms. Apold confirmed that it was tied to IA but that he could also have incorporated. She acknowledged that there was a third form of licence intended for brokers who would represent multiple insurance companies, but it did not apply here.

vi) **Eric Leclerc**

[101] Mr. Leclerc was Regional Vice-President of Sales for IA. However, in 2012 he was manager of the LaSalle branch. He remembered the Appellant.

[102] He reviewed the mechanics of the compensation fund explaining that $2,500 would be credited to an account that could be drawn down by a minimum of $600 per week or more based on anticipated sales. He clarified that agents were responsible for the license fee payable to the AMF and contribution to the CSF but that the latter amount was reimbursed by IA for competitive reasons.

[103] According to Mr. Leclerc, the Appellant had signed the Agent Contract in his office. He had no specific recollection of the meeting but always proceeded in a systematic fashion. His assistant would schedule a meeting with the new agent and he would review certain key clauses emphasizing the importance of i) maintaining the license ii) remitting all premiums collected on behalf of IA iii) not using a trust account and iv) not delegating the sale of products to someone who was not duly licensed. Those were the key considerations.

[104] Ms. Charbonneau had provided him with the Appellant's contact information. The process was long because his license had expired. He described the Appellant

as a self-effacing individual who always came to the meetings but he was worried for him since there was not much activity. Most agents would complete successful sales at a ratio of 33% of client meetings, but the Appellant had only obtained one new client. He met him on several occasions to discuss his progress and sales activities. In the end, he felt it was up to the Appellant to take advantage of the services offered by IA to develop his clientele. When he was finally terminated, there had been no sales for more than five weeks.

[105] Mr. Leclerc was questioned on the list of training sessions (Ex. A-8) explaining that it was intended for "trainees" and he was not sure where the Appellant had obtained it. At the same time, it was to his advantage to learn the products, selling techniques and use of the IA software. He explained that the Appellant was not obliged to attend but that it was to his advantage to do so.

[106] He addressed the issue of the disability insurance policy explaining that the "annual salary" of $31,200 was calculated based on a draw of $600 per week but the amount could be increased at a later date as his earnings increased. He could not explain why the form used the word "salary".

[107] The sales manager, Mr. Beaulé in this instance, was the point of contact with head office and his role was to assist all sales agents. Once agents had established their objectives, he would assist them him in reaching those goals. He explained that sales were a function of the number of meetings and transactions per week.

[108] Meeting with the sales manager were not considered compulsory but they were generally in high demand for advice and a second opinion. This was not the case for "trainees" who were required to attend for compliance reasons.

[109] Mr. Leclerc indicated that IA did not track absences in general, including for medical reasons. There was no directive to that effect. He did not recognize a "medical certificate" allegedly faxed to his attention on September 19, 2012 (Ex. A-21) indicating that if it was received, his staff would have put in the Appellant's file. He had no knowledge or recollection of the certificate in question.

[110] With respect to the Gestion Clients software described in the email to all sales agents (Ex. A-40) indicating that the meeting was "obligatory" and that agents were to attend "without exception", Mr. Leclerc explained that it was an important change for IA. It was a new "CRM" ("customer relationship management") program used to produce financial analysis of a client's situation. It was not possible to work at IA or sell its insurance products without a working knowledge of the software.

[111] He explained that the use of the word "imperative" as opposed to "obligatory" meant that the meeting was not mandatory. These meetings were offered to motivate agents and to provide relevant information and tools to assist in the sales process. Sometimes the training or information sessions were offered a second time since not enough agents had attended. He confirmed that sales gents who did not attend were not reprimanded. Even when it was possible to obtain "PDU's, these meeting were not compulsory but agents, like the Appellant, needed to accumulate a total of 30 PDU's every two years. If an agent attended, then the PDU points obtained were reported to the AMF. This was part of compliance.

[112] With respect to the sales kiosque where the Appellant had met M. Charbonneau, he explained that he had made the arrangements with the shopping centre and that it was intended to provide agents with prospecting opportunities. There was a schedule divided into blocks of time but participation by agents was voluntary. If they chose to do so, they had to assume their share of the rental costs.

[113] Mr. Leclerc reviewed the purchase order for calendars and associated material (Ex. A-54) that were standardized and could be ordered by agents for distribution to clients. Such items were very popular but not mandatory.

[114] He reviewed the index of a course on Taxation Concepts Applicable to Life Insurance ("Notions de fiscalité relatives à l'assurance de personnes") (Ex. R-4.19) consisting of 231 pages. He explained that it was produced by the AMF and was one of five courses required to obtain a license as a sales representative.

[115] In cross-examination, Mr. Leclerc rejected the suggestion that all material benefits accrued to IA, indicating that as a company it certainly sought to make profits but it also formed a partnership with its sales agents.

[116] He reviewed the list of training sessions (Ex. A-8) indicating that it was intended for new trainees who had no knowledge of the insurance industry. He was not sure where the Appellant had obtained it but admitted that he had likely attended most if not all the training sessions in questions.

[117] Questioned about meetings he had with the Appellant, Mr. Leclerc could not specifically recall but indicated that he met sales agents on a regular basis to discuss their progress and level of satisfaction with the services being offered by IA.

[118] When questioned about the Appellant's attendance, Mr. Leclerc repeated that he did not see him very often but that he attended most branch meetings and training

sessions, though they were not mandatory. He explained that it was his role to create interesting programs and ensure all agents were happy.

[119] I find that all the Intervenor witnesses were very credible.

V. **Prior Legal Proceedings**

[120] As summarized above, the Appellant worked as an insurance sales agent for London Life from 2009 until his termination in March 2011. The sales agreement dated December 29, 2008 (Ex. R-3) stipulated that he was an "independent contract", that there was no "employee/employer relationship" and that he would "set the time, place and manner of solicitation in the sales and services".

[121] Following his termination, the Appellant filed a complaint with the Commission des normes du travail du Québec ("CNTQ") for a "dismissal made without good and sufficient cause" and claimed damages of $16,485. The matter was settled by a "Release, Discharge and Transaction" signed on January 23, 2012, (Ex. A-2) made "without any admission of liability" to avoid "any further costs and expenses" and London Life agreed to pay the sum of $15,000. The release stated that in accordance with the "contractual relationship that prevailed between" the parties and based on the Appellant's Notice of Assessment for the 2010 taxation year indicating that he had reported commission income as a self-employed person, no deductions were taken and the Appellant was responsible for any taxes owing.

[122] Similarly, following his termination by IA the Appellant filed a complaint with the CNTQ, seeking damages on the basis that he was an "employee" and that he had been unjustly dismissed. The hearing was scheduled for April 22, 2015.

[123] However, the CNTQ informed the Appellant (Ex. A-10) that it would seek an adjournment given the decision by the Commission des relations de travail du Québec in Blackburn et al v. Industrielle Alliance, assurance et services financiers, 2014 QCCRT 0737 ("Blackburn") released on December 24, 2014.

[124] The CNTQ also informed the Appellant that his file would be closed because it had been decided that, in light of Blackburn, he did not have the status of an "employee" and that "the nature of the positions occupied by the complainants and the identification of the employer" in that instance, were "identical" to his own situation. He was informed that he could continue the proceedings against IA in his own name but there is no evidence that he did so.

[125] The Appellant responded by letter dated March 31, 2015 (Ex. A-11) arguing that the decision to close his file was unfair and requesting that the CNTQ continue to represent him. There is no evidence of a response from the CNTQ.

[126] At the hearing of this appeal, the Appellant suggested that the complaint before the CNTQ was still outstanding and that he wanted to call counsel of the CNTQ to testify but she was not present and had not been subpoenaed. The Intervenor later introduced the index of proceedings (Ex. R-5) indicating that CNTQ had filed a notice of discontinuance ("désistement") on September 9, 2015, thus terminating the entire proceeding before the CNTQ.

VI. **The Applicable Law**

[127] The issue at the heart of this appeal is whether the Appellant was self-employed and governed by a contract for services or whether there was an employee/employer relationship governed by a contract of employment also described as a "contract of service" that is subject to the provisions of the *EIA*.

[128] Because the workplace is in Quebec, it is necessary to consider section 8.1 of the *Interpretation Act*, R.S.C., 1985, c. I 21 (the "*Interpretation Act*") as it recognizes that "both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada".

[129] The notion of the complementarity between these two sources of law was discussed in *Grimard v. Canada*, 2009 FCA 47 where the Federal Court of Appeal ("FCA") stated that "it would be wrong to believe that there is antinomy between the principles of Quebec civil law on this point and what has been referred to as common law criteria, that is to say, control, ownership of the tools, chance of profit, risk of loss, and integration of the worker into the business" (para. 27).

[130] As noted in *Talbot v. M.N.R.*, 2009 TCC 460, the *EIA* "does not define what a contract of service is" and thus it must "be analyzed in light of Quebec civil law when the applicable provincial law is that of Quebec" (para. 5).

[131] Paragraph 5(1)(a) of the *EIA* provides as follows:

> Subject to subsection (2), insurable employment is
>
> (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 and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[My emphasis]

[132] To determine whether the Appellant was involved in "insurable employment" pursuant to "any express or implied contract of service", the Court must take into consideration the relevant provisions of the *Civil Code of Québec*, CQLR c CCQ-1991 c.64 ("CcQ") and in particular the following provisions:

> **1425**. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **1426**. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account . . .
>
> . . .
>
> **2085.** A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.
>
> **2086.** A contract of employment is for a fixed term or an indeterminate term.
>
> **. . .**
>
> **2098.** A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.
>
> **2099.** The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client.

[133] In order to find that there was an "express or implied contract of service" within the meaning of paragraph 5(1)(a) of the *EIA*, as claimed by the Appellant, the Court must be satisfied that there was a "contract of employment" pursuant to which he "undertook . . . to do work under the direction or control of another person", as described in article 2085.

[134] Conversely, in order to find that there was "a contract of enterprise or for services", as claimed by the Minister and IA, the Court must be satisfied that the Appellant "was free to choose the means of performing the contract" and in regards to the performance of those services, there was "no relationship of subordination", as provided in article 2099.

[135] Stated otherwise, if the Court finds that the Appellant was required to accomplish his work "under the direction or control of another person" and was not "free to choose the means of performing the contract", it would have to conclude that there was "a relationship of subordination" and thus a "contract of service" as described in *EIA* or a "contract of employment" as described in article 2085.

[136] Article 1425 of the CcQ provides that "in interpreting a contract", the Court must consider "[t]he common intention of the parties." This is consistent with the decision of *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85 ("*Connor Homes*") where the FCA stated that the Court must conduct a two-stage analysis. It must first consider the subjective intention of the parties and then perform an analysis to determine whether the actual working relationship is objectively consistent with that intention.

[137] Having reviewed a number of decisions dealing with the importance of the common intention of the parties, notably *Wolf v. the Queen*, 2002 DTC 6053 (F.C.A.) and *Royal Winnipeg Ballet c. Canada (Minister of National Revenue)*, 2006 FCA 87 ("Royal"), Mainville JA indicated:

> . . . **The relationship of parties who enter into a contract is generally governed by that contract**. . . . **However**, the legal effect that results from that relationship, i.e. **the legal effect of the contract, as creating an employer-employee or an independent contactor relationship, is not a matter which the parties can simply stipulate in the contract**. In other words, **it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so**.
>
> [37] . . . the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole

> subjective discretion of the parties. Consequently, **the legal status of independent contractor or of employee is not determined solely on the basis of the parties declaration as to their intent. That determination must also be grounded in a verifiable objective reality**.
>
> [My Emphasis]

[138] The comments made by Mainville JA are consistent with the notion that the *EIA* is remedial legislation because it seeks to extend state-sponsored benefits to individuals who are no longer employed. From that perspective, paragraph 5(1)(a) should be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its object": section 12, *Interpretation Act*.

[139] Once the court has addressed the subjective intention of the parties, it must then review the "verifiable objective reality" of the relationship. This is so because, as stated by Mainville JA, it is not sufficient "to simply state in a contract that the services are provided as an independent contract" (*Royal*, para. 37). For that reason, as explained in Connor Homes, the court must then determine whether the actual working relationship is objectively consistent with that intention.

[140] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 ("*Sagaz*") Major J of the Supreme Court of Canada explained that the factors with the greatest impact are those established by the FCA in *Wiebe Door Services Ltd., v. Minister of National Revenue*, [1986] 3 FC 553 ("*Wiebe Door*").

[141] Those factors include the following:

1. the degree or absence of control exercised by the alleged employer;
2. the ownership of the working tools;
3. the chance of profit and the risk of loss and liability;
4. the integration of the alleged employee's work into the alleged employers' business.

[142] As further noted by Major J, these «factors constitute a non-exhaustive list, and there is no set formula to their application," adding that the "relative weight of each will depend on the particular facts and circumstances of the case" (para. 48).

[143] What follows is a review of leading decisions involving workers in the financial services industry and, in particular, the sale of insurance products.

[144] *Combined Insurance Company of America v. Canada (Minister of National Revenue)*, 2007 FCA 60 ("*Combined FCA*"), involved an appeal by an insurance company from a finding by the TCC that the worker held insurable employment during the six-month period prior to her termination.

[145] In a unanimous judgment, the FCA found that the trial judge had "based his conclusions solely on the [worker's] testimony" and had not considered the testimony of the insurance company's four witnesses nor "the tests developed . . . in *Wiebe Door*" (para. 38). The court concluded that this was an error and proceeded to "examine anew the evidence in light of the applicable tests" (para. 39).

[146] The FCA conducted an exhaustive review of the evidence in light of *Wiebe Door* and several additional factors, finding that the classification of the worker as an independent contractor reflected the actual state of affairs. It found that the worker owned all the tools required to pursue her sales activities, that from the perspective of profit and risk of loss, this was dependent on her efforts and the number of hours worked. The Court clarified that "control of the quality of work, like that of results, does not necessarily create a relationship of subordination . . . and should not be confused with control of the performance of work" (para. 70). It found that the insurance company "exercised only a limited amount of control over the results . . . and this was "primarily to ensure compliance with statutory and regulatory requirements" (para. 72). It observed that the insurance company naturally had a financial interest in having its workers sell as many insurance policies as possible and that the district manager did everything he could "to motivate his representatives and make them more efficient" and sometimes in so doing "exerted considerable pressure" (para. 73). Meetings organized for new sales representatives were intended to increase productivity but were not mandatory and there was no evidence of the imposition of penalties. The court concluded that the worker was self-employed and did not hold insurable employment during the six-month period in question.

[147] Similarly, in *Giroux v. M.N.R.*, 2008 TCC 653 ("*Giroux*"), the appellant worked as an insurance agent with London Life and, following her termination, the Minister determined that she was self-employed. The worker appealed and London Life intervened to support the Minister's position.

[148] The worker had initially been hired as a trainee and paid $500 per week during a seven-week program. She then signed a sales agreement describing her status as self-employed. From that point on, she only received sales commissions. According to her contract, she had to achieve a minimum number of sales. She was responsible for all expenses incurred in her promotional activities as well as the cost of her

insurance license. She could work from home but could also rent an office and computer from London Life. After a period of sick leave, she was terminated because her insurance license was no longer current.

[149] At the hearing of the appeal, the worker called two witnesses, both sale agents with London Life. The first witness (Mr. Thiffault) testified that "he had to take continuing training for the first 24 months of service" and that London Life organized "weekly meetings". He indicated that "his team manager followed up on his solicitation activities and that he had to report on the number of telephone calls or meetings he had with potential clients" and "submit a quarterly evaluation and explain any decrease in sales that might have occurred" (paras. 9-11).

[150] The second witness (Mr. Bourgeois) was "executive director of training and development" and "managed the appellant's training". He helped new advisors prepare a business plan was responsible for their training, including insurance products and software used by London Life as well as sales techniques. Agents used a software known as "Spectra" to gather data and produce reports for clients indicating all relevant insurance products. He organized weekly meeting that "were mandatory" for agents who had less than 24 months of service (paras. 17-18).

[151] After a lengthy review of the appellant's sale agreement, Hogan J. concluded that the facts were very similar to those considered in *Combined* FCA but that the appellant "had greater freedom in some respects" since she "could define her own sales territory and target clientele. She was "also free to participate or not in trade shows and professional events". Hogan J. found that the appellant "clearly understood the difference between an employee and a self employed worker" and that "she chose to report that she was a self employed worker because the nature of her work was appropriate to that legal relationship". He added that London Life "exercised control for the sole purpose of complying with regulatory obligations" and that the appellant "had control over her hours of work and the effort she devoted to increasing her net income". Hogan J. concluded that she was "a self-employed worker" and that "her work was not insurable employment within the meaning of the *Employment Insurance Act*" (paras. 53-59).

[152] In the later decision of *Combined Insurance Company of America v. M.N.R.*, 2011 TCC 85 ("*Combined TCC*"), the Minister of National Revenue had determined that the workers in question held insurable employment within the meaning of paragraph 5(1)(a) of the *EIA*. The insurance company appealed.

[153] Favreau J. noted that the sales agreement signed by the workers was "a typical Quebec contract that all sales representatives had to sign to be able to sell insurance", noting that none of its clauses were negotiable and no changes could be made and that when "a sales representative became a sales manager, he or she had to sign an addendum to that agreement, which remained in effect" (para. 16). According to the agreement, the workers declared that they were independent contractors, that they were not employees and that they were not entitled to benefits available to employees of the insurance company.

[154] Favreau J. found that the conduct of the workers reflected the description in the contract at issue, noting that he knew very few employees who would assume the costs incurred by the workers in the accomplishment of their duties. He relied on *Combined FCA* and concluded that he could not find "that a relationship of subordination existed" since the workers "could choose how they performed their work. They could recruit and train any number of representatives that they wanted to have on their teams, accompany them in the field and motivate them and solicit the clients that they wanted except in sectors attributed to other representatives" (paras. 72-73).

[155] Favreau J. referred to the *Wiebe Door* factors, noting that the workers "owned certain tools needed for their activities . . . but most of the tools belonged to" the insurance company. He found that the workers "could make substantial profits by dedicating time and energy to their activities but were also exposed to a risk of loss" and that the control exercised by the insurance company was intended to help the workers "attain their objectives in terms of sales and revenue and to ensure compliance with statutory and regulator requirements" (para. 74).

[156] Favreau J. also reviewed a number of factors raised by the workers including weekly training given to managers, the composition of teams, sanctions that could be imposed if they did not attain their sales objectives, the required use of a script referred to as "word for word", a dress code and "precise and explicit training" for managers" who "were part of the structure" and could be demoted. (para. 40). He noted that "the evidence of subordination referred to" by the workers did not convince him that "a relationship of subordination existed" (para. 75) and concluded that the workers were independent contractors.

[157] More recently, in *Lamontagne v. M.N.R.*, 2018 TCC 153 ("*Lamontagne*"), the appellant had worked as an insurance agent with Sunlife Financial Distributors (Canada) Inc. ("*Sunlife*"). The Minister had determined that the worker was not

engaged in insurable employment within the meaning of the EIA. The worker appealed and *Sunlife* intervened to support the Minister's position.

[158] After a three-month internship, the worker had obtained her license and signed a contract to sell Sunlife's insurance products and products of affiliated companies. The contract provided that the worker was responsible for "soliciting and obtaining policy applications . . . presenting the offerings of the Company . . . assuming responsibility for servicing personal policies . . . acting as the Company's agent concerning all aspects of the marketing and distribution of policies among the public". It also specified that the worker was an independent contractor and that the contract in no way created "any form of employer-employee or master-servant relationship between the parties" (para. 9).

[159] After her termination, the worker filed a complaint with the Commission des relations du travail du Québec and initiated proceedings against Sunlife before the Superior Court of Quebec for termination in bad faith and abusive termination of her contract of employment seeking damages in the amount of $3.7 million. Both proceedings were dismissed and the worker was found to be self-employed.

[160] D'Auray J. indicated that she could have dismissed the appeal based on "the principle of judicial comity" relying on *Congriu v. Canada*, 2014 FCA 73. She nonetheless reviewed the applicable provisions of the CcQ and addressed the issue of intention finding that the contract left no doubt that the parties intended that the worker was "an independent contractor". The worker had also filed her income tax return reporting business income and claiming expenses incurred in connection with those activities. As a result, D'Auray J. found that the worker was not credible when she stated that she had not read or understood the contract in question. Having reviewed the details of the working relationship in light of the various *Wiebe Door* factors, D'Auray J. concluded that the worker was self-employed.

[161] The Intervenor in this instance has referred to a number of other decisions.

[162] *Paquin v. Services financiers Groupe Investors*, 2012 QCCA 37, involved an appeal from a decision of the Superior Court of Québec that had confirmed a finding of the CNTQ that the worker was not a salaried employee. It did so by applying the *Wiebe Door* factors but adding other factors including control over the worker's presence, performance reviews, possibility of disciplinary measures and the personal execution of the work.

[163] The Quebec Court of Appeal found that the analysis of the *Wiebe Door* factors favoured a finding that the worker was an independent contractor, noting in particular that there was no evidence of disciplinary measures and also that it was perfectly normal that the insurance company sought to ensure that the worker established sales objectives and met those objectives. The appeal was dismissed.

[164] *Fédération des caisses Desjardins du Québec v. Canada (National Revenue)*, 2020 FCA 182 ("Fédération"), involved an appeal from a decision of the TCC that concluded that the worker was an employee. The FCA noted that the TCC should have considered the "cumulative application" of the *EIA* and the *CcQ* to determine whether "there was a legal relationship of subordination", adding that this involved "a global perspective with no particular factor playing a dominant role" (para. 3).

[165] The FCA found that even if the sales agreement could not be negotiated by the worker and there was an apparent inequality of bargaining power, this was not relevant "in determining whether there is a relationship of subornation". It added that even if "work quality and quantity assessment reports were issued periodically" that was not to be confused with "the applicable concepts because monitoring results is not the same as controlling work performance, which is specific to the contract of service" (paras. 4-5). The FCA found that it was necessary to conduct "a comprehensive analysis of the case and consider all the evidence in light of the applicable test" as established in *Combined FCA* (para. 6). The TCC decision was set aside and sent back for reconsideration by another judge.

VII. **Analysis**

Intention of the Parties

[166] As reviewed above, the Agent Contract provided that the Appellant was an independent contractor and that there was no employer-employee relationship.

[167] The Appellant indicated that he had "not read' the Agent Contract before signing it on May 3, 2012, suggesting he was not aware or had not understood that he was to be an independent contractor engaged in a contract for services.

[168] I find that the Appellant's assertion was contradicted in several instances including the fact that he signed an application to reinstate his insurance license indicating that he was "attached" to IA "without being an employee".

[169] It was also contradicted by the evidence of Mr. Leclerc who testified that, although he could not specifically recall the subject meeting, he had met over 300 sales agents over the course of his career and had an established methodology to go over every important clause of the Agent Contract.

[170] The Appellant's position was further contradicted by Ms. Charbonneau who testified that she met him in the fall of 2011. In response to his enquiries, she explained that all agents were independent contractors paid by commission. The Appellant then submitted an application to IA on December 21, 2011.

[171] In general, the Appellant's position was also contradicted by the testimony of Mr. Charbonneau, Ms. Woo and Ms. Charbonneau, who had all met the Appellant. Ms. Woo in particular, joined IA shortly before the Appellant. All of them understood that "they" were independent contractors.

[172] The Appellant's position is further undermined by the fact that the agreement with London Life described him as an independent contractor. He received a T4A for each of the 2009, 2010 and 2011 taxation years and reported net commission income accordingly. There were no deductions.

[173] In 2012, he received a T4A from IA and again reported net commission income as well as net business income from another source. I find that the losses claimed in those years indicate that the Appellant had a clear understanding of his ability to claim expenses as someone who was self-employed.

[174] I attach little weight to the settlement reached and lump sum payment of $15,000 paid to him by London Life since it was made on a without prejudice basis and without any admission of liability. Contrary to the position taken by the Appellant, it does not suggest that London Life "agreed" that he was an employee. It was a typical out-of-court settlement entered into by the parties as a compromise.

[175] As admitted by the Appellant, he studied a training module on basic taxation as part of his early training with the AMF. Having done so, I find that it is not credible for him to suggest that he was only vaguely aware of the distinction between an individual receiving employment income with deductions and self-employed income with no deductions whatsoever. The Appellant's suggestion that he completed his tax returns by entering the numbers and relying entirely on the U-File tax filing software is simply not credible.

[176] In light of the clear terms of the Agent Contract, the Court finds that the common intention of the parties was that the Appellant was an independent contractor governed by a contract for services.

[177] What remains to be determined is whether the objective reality of the working relationship was consistent with that common intention.

The Degree or Absence of Control by IA

[178] The insurance industry is highly regulated. Therefore it is not surprising that IA exercised some form of control over the Appellant's work.

[179] To ensure proper compliance, illustrations had to be prepared prior to the submission of a proposal to a client and a copy had to be retained in the file. All documentation was reviewed by local administrative staff using a compliance monitoring grid and files were subject to review by the compliance department.

[180] The Appellant was required to sell insurance products that had been developed and approved by IA, with some flexibility for the sale of outside products. Given the regulated nature of the industry, this was not a business where the Appellant could sell products that had not been approved by IA, nor was it permissible to accept cash or personal cheques from the sale of such products.

[181] To access the full suite of insurance products, IA again exercised a degree of control since it was not possible to access the Intranet and Gestion Clients platform without a computer using an access code and password.

[182] IA also exercised some form of control over the use of business cards and promotional material but that was to ensure statutory and regulatory compliance.

[183] The Appellant reported his sales activities to his sales manager. This was confirmed by the other witnesses who did the same thing, including Mr. Charbonneau who had considerable seniority. But these witnesses also explained that they had established their own sales objectives and that the purpose of such meetings was to keep the sales manager apprised of their progress and sales numbers. It also gave them an opportunity to ask questions and get feedback.

[184] The Appellant indicated that over a span of eight months, he had recorded approximately eight meetings with either his sales manager or Mr. Leclerc.

[185] I find that this is a rather low level of control and that a typical employee would be subject to a much greater level of oversight and supervision. As stated by the FCA in Fédération, supra, "monitoring results is not the same as controlling work performance which is specific to a contract of service" (paras. 4-5).

[186] Beyond those meetings, there was no evidence that the Appellant was subject to any restrictions or guidelines as to how he would perform or conduct his prospecting activities, nor any limits as to when or where this would be done.

[187] Even the training sessions that offered instruction on selling techniques such as how to approach clients or deal with objections, were all intended to provide tools and tricks of the trade to enhance productivity. They were not mandatory.

[188] The Agent Contract indicated that IA reserved the right "to set minimum production and business persistency standards for the Agent" but there was no evidence as to what that might be. The only evidence before the Court was that the Appellant had sold five policies and that, when he was terminated, he had not recorded any sales for four weeks or more, as indicated by Mr. Leclerc.

[189] As reviewed above, there was no evidence of mandatory or even recommended daily or weekly production numbers. The Appellant was encouraged to engage in prospecting activities and given wide latitude as to how this would be performed or accomplished. As explained by Mr. Leclerc, the success of agents was directly related to the number of meetings arranged per week.

[190] I find that the level of control exercised by IA over the activities of the Appellant was primarily for monitoring and quality control purposes and to ensure regulatory compliance. The Appellant was otherwise provided with a wide latitude in the performance of his contract. This is consistent with the intention of the parties and terms of the Agent Contract, that he was an independent contractor.

Ownership of the Working Tools

[191] The Appellant argued that IA was a billion dollar company with vast financial resources. It owned and operated the business, developed products and supporting software, all of which, in the mind of the Appellant, suggested that IA owned the bulk of the business assets and that it was "their" business and not "his" business. He thus concluded that he was an employee.

[192] The Appellant challenged the various witnesses and sought admissions that they had been assigned an office and related accessories and that they had access to IA's computer software that had not been developed or paid by them. This was intended to demonstrate that IA owned the bulk of the business assets.

[193] The Appellant failed to acknowledge that he rented a computer on a weekly basis, though he could have purchased one on his own. He also paid rental fees for a sales kiosque, as confirmed by Mr. Leclerc and Ms. Charbonneau. He was also required to assume the cost of business cards and promotional items.

[194] The fact that IA owned the bulk of the business assets might be interpreted as favouring a finding that the Appellant was engaged in insurable employment.

[195] However, the Court must reject this argument as it conflates business assets with the working tools required by a sales agent. It ignores the fact that the actual business of a sales agent was to sell insurance products as an "agent" of IA. That business required that the Appellant engage in active prospecting activities. The essential working tools of a sales agent was the computer, owned by agents or rented from IA, to access the IA Intranet and Gestion Clients computer platform.

[196] I find that the Appellant owned (or rented), the essential work tools for his agent business or was required to provide them including a computer, vehicle, business cards and promotional items. This is consistent with the intention of the parties and terms of the Agent Contract, that he was an independent contractor.

Chance of Profit and Risk of Loss and Liability

[197] As described above, the Appellant was only entitled to commission income generated from the sale of insurance products. He was not entitled to a base salary.

[198] The Appellant was required to assume the cost of all prospecting and promotional activities. As a result, he could very easily incur more expenses then commissions as was the case in 2012 and prior to that with London Life. If he had no sales for five weeks, his contract could be terminated on seven days' notice. If an insurance policy was cancelled by a client, the sales commission might have to be reimbursed by the agent. There was therefore a risk of loss.

[199] Moreover, the Appellant was provided with a $2,500 credit facility described in the Letter of Offer as a "career establishment fund." He was entitled to weekly advances of $600 or more based on anticipated sales if approved by the branch

manager. However, unless the advances reflected actual sales, they were in the nature of a loan and not income. The Appellant remained liable for amounts advanced less commissions generated by him. When the Appellant was terminated, there was a balance owing to IA, thus demonstrating a very real risk of loss.

[200] Conversely, as explained by Mr. Leclerc, a sales agent's success was a direct function of the number of client meetings per week organized or arranged by that agent. It was a function of the effort and number of hours dedicated to the activity. If agents engaged in successful promotional and prospecting activities, they could be entitled to significant profits. Mr. Leclerc testified that sales agents could retain up to 70% of gross commission income with the remainder going to expenses.

[201] The Appellant expressed scepticism about the possibility of earning a reasonable income with IA and presented data from the AMF on the number of agents who joined IA and London Life in one year and the number who left the next year, over a span of five years (Ex. A-71).

[202] The Court accepts that the attrition rate in the financial services industry is quite high but that is likely due to the competitive nature of the sales activity and entrepreneurial profile required to succeed. That said, I find that the data presented by the Appellant was inconclusive or subject to interpretation. For example, it failed to account for departures due to retirement.

[203] I also find that the Appellant's position was contradicted by the testimony of the Intervenor witnesses, notably Ms. Woo, who had no prior experience in the insurance industry when she joined IA in March 2012.

[204] Even though the fruits of a sales agent's activity would accrue to the benefit of IA's bottom line, as argued by the Appellant, it could also generate considerable commission income. As confirmed by Mr. Charbonneau, Ms. Woo, Ms. Charbonneau and Mr. Leclerc, it was possible to earn significant profits and at some point, to incorporate to gain certain tax benefits, an advantage that was not typically available to employees. At the end of a sales agent's career, the clients or book of business could be sold to another sales agent, all financed internally by IA. The chance of profit was therefore significant.

[205] I find that the chance of profit and risk of loss or liability in this instance is consistent with the intention of the parties and terms of the Agent Contract that the Appellant was an independent contractor and not an employee.

Integration of the Appellant in the Business of IA

[206] This issue is to be addressed from the perspective of the worker (*Sagaz*, para. 43). On April 12, 2012, the Appellant entered the premises of IA and met Mr. Leclerc as well as Mr. Beaulé who would become his sales manager.

[207] As previously noted, he was provided with a desk and related accessories. He was given a brief training on the operation of the telephone and provided with sample messages to indicate to callers that he was out of the office. He printed the Nortel telephone instructions (Ex. A-34). He was eventually provided with a box of preprinted business cards similar to those of other agents as well as Mr. Leclerc.

[208] Having signed the lease agreement, he was given a laptop computer with an access code and password to access the Intranet where he could view the full suite of IA products and rolling agenda of upcoming events and training sessions.

[209] The Appellant as well as other sales agents received regular emails requesting that they take note of an updated agenda with an indication that certain matters were of some were importance. All agents were asked to add this information to their personal agenda.

[210] According to the Agent Contract, the Appellant was expected to sell IA insurance products but could sell other competing products if approved by IA.

[211] If an agent was terminated, any clients initially assigned to that agent or new clients, became the clients of IA. Agents were subject to a non-solicitation and non-competition clause for a duration of two years after his departure.

[212] As much as these elements might suggest that the Appellant was actually integrated into the business of IA, as emphasized by the Appellant, I find that there other important considerations that point in the opposite direction.

[213] The Appellant testified that he worked for IA from Monday to Thursday, reserving Fridays for personal activities and weekends for an unrelated business. He thus established his work schedule without any input from IA. There was no evidence of a regular work schedule and nothing to suggest that the Appellant was in any way required to report to the branch office for a minimum number of hours per day or week.

[214] Mr. Leclerc and Ms. Woo testified that the Appellant was not often present at the branch office, except for meetings or training sessions.

[215] The Appellant tendered evidence of a medical note, faxed to the attention of Mr. Leclerc, to justify his absence for a few days in September 2012. I accept the evidence of Mr. Leclerc that absences were not tracked. Sales agents were not required to justify their absences or need permission for time-off or vacations.

[216] As noted in the summary above, the Appellant testified that he diligently attended all training sessions offered three times per week from April to June and that these sessions were mandatory. His attendance at these sessions was not challenged and in fact, was confirmed on several occasions.

[217] However, the list of training sessions (Ex. A-8) was titled: [Translation] "Initial Training 2012 - New Agents - Duration 10 weeks - Schedule 9:30 to 11:30". The Appellant's assertion that they were mandatory was contradicted by Mr. Leclerc who indicated they were only mandatory for "trainees". This was confirmed by Ms. Woo who was in fact a new unlicensed sales agent.

[218] Mr. Leclerc indicated that there was nothing to prevent the Appellant from attending and that it was in fact encouraged if he felt it would be beneficial or advantageous to him but it was at his discretion. Mr. Leclerc was not sure how the Appellant had obtained the list but it would seem plausible that it was provided to him by his sales manager Mr. Beaulé (who was no longer with IA) who was anxious to provide the Appellant with all the tools possible to ensure his success.

[219] The second list of training sessions was titled [Translation] "Training Grid for All Agents". The Appellant insisted that these too were mandatory. This was again contradicted by Mr. Leclerc and all the Intervenor witnesses who would attend only if the topic was of interest to them or if they wished to accumulate PDU's for compliance purposes. Despite the Appellant's assertion that these training sessions were mandatory, I find that they were not.

[220] Despite the numerous inter-office emails produced by the Appellant urging all agents to review the up-dated agenda, with the use of words such as "important", "essential" or imperative", I find that the overall evidence indicates these meeting were at best "important" and that agents were at liberty to attend if they were interested and available. The only exception were trainees who were required to attend as part of a mandatory 90 days training for compliance purposes.

[221] The same cannot be said for the meeting involving Gestion Clients where agents were told that attendance was “obligatory” and they should attend “without exception”. Although it is not clear what consequences, if any, would flow from a failure to attend, I find that the tone of this email underscored the importance of the new IA computer platform that was essential for all agents.

[222] The Appellant indicated that the inter-office emails regularly included a list of sales agents who had not attended the last training session. However, he could not point to any related consequences or penalties. Ms. Charbonneau explained that the list was intended to remind those agents that they should access the module or course material provided. None of the other Intervenor witnesses felt that the list was of any importance or consequence. I accept that evidence.

[223] In the end, there was no evidence of any consequences or penalties for not attending branch meetings or training sessions, at least none for the Appellant.

[224] I also accept the evidence of Mr. Michaud that the preparation and distribution of a list of top producers was intended to create some internal competition and to motivate sales agents. It was not evidence that IA exercised any form of control over the performance of the work of sales agents.

[225] Despite the provision of a desk and related accessories, I find that the dominant consideration for the Court was the absence of a work schedule and the Appellant’s ability to control his own routine and promotional activities. I find that he was not obligated to attend training sessions and that he did so voluntarily to increase his chances of success. There were no penalties for non-attendance.

[226] In the end, I find that the Appellant’s level of integration is consistent with the intention of the parties and terms of the Agent Contract, that the Appellant was an independent contractor and not an employee.

VIII. **Conclusion**

[227] I find that the facts in this instance are difficult to distinguish from those in *Combined* FCA, Giroux, *Combined* TCC and the more recent decision of *Lamontagne*. That said, this does not mean that the facts are identical.

[228] As noted by Favreau J. in *Combined* TCC, the contract signed by the Appellant was a typical Quebec contract that sales representatives were required to sign. It clearly provided that the Appellant was an independent contractor, that there

was no employer-employee relationship and that he was required to assume all promotional expenses incurred in connection with that activity.

[229] I find that the level of control exercised by IA was primarily for monitoring purposes and quality control in the sale of its products. It was also exercised to ensure appropriate statutory and regulatory compliance in a highly regulated industry. But IA did not seek to control the performance of the Appellant's work.

[230] While the bulk of the business assets were owned by IA, the Appellant owned or rented all the work tools required to operate the business of a sales agent. He also paid his license fee to the AMF and liability insurance.

[231] An agent's successful sales activities would necessarily accrue to IA's bottom line but at the same time sales agents could earn significant income that was a function of their time and effort and ability to meet prospective clients.

[232] I find that the Appellant was responsible for the performance of his work, that he controlled his work schedule and was not required to report to the sales manager or office for a fixed number of hours or days per week. His attendance at training sessions and most branch meetings was optional. If he attended all such meetings, it is because he chose to do so to ensure his own success.

[233] After an objective analysis of the various *Wiebe Door factors*, the Court concludes that the realities of the workplace were consistent with the intention of the parties, as expressed in the Agent Contract, that the Appellant was an independent contractor who was not engaged in an employer-employee relationship. This would be consistent with articles 1425 and 1426 of the CcQ.

[234] Having reviewed the objective reality of the workplace, I am unable to conclude that there was "a contract for employment" in accordance with Article 2085 of the CcQ since the Appellant had not agreed "to do work under the direction or control of another person", namely IA.

[235] On the contrary, I conclude that the Appellant was engaged in a "contract for enterprise" in accordance with Article 2099 of the CcQ, since he "was free to choose the means of performing the contract" and, in connection with such performance, there was "no relationship of subordination".

[236] The Court concludes that the Appellant was not engaged in insurable employment for the purpose of the EIA during the period in question.

[237] For all the foregoing reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 4th day of October 2022.

"Guy R. Smith"

Smith J.

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