Docket: 2004-4421(EI)

BETWEEN:

COMBINED INSURANCE COMPANY OF AMERICA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MÉLANIE DRAPEAU,

Intervenor.

Appeal heard on May 6, 2005, at Montréal, Quebec

Before: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Mélanie Beaulieu and Yves St-Cyr
Counsel for the Respondent:	Natalie Goulard
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue on the appeal made to him under section 92 of the *Act* is confirmed.

Signed at Ottawa, Canada, this 6th day of September, 2005.

"C.H. McArthur"

McArthur J.

Citation: 2005TCC478
Date: 20050906
Docket: 2004-4421(EI)

BETWEEN:

COMBINED INSURANCE COMPANY OF AMERICA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MÉLANIE DRAPEAU,

Intervenor.

REASONS FOR JUDGMENT

McArthur J.

[1] This is an appeal from the decision of the Minister of National Revenue (the Minister), dated September 20, 2004, that the Intervenor, Mélanie Drapeau was employed in insurable employment with the Appellant within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* ("the Act") from August 18, 2003, to January 16, 2004. The Appellant submits that the Intervenor was not an employee engaged in insurable employment during this period, but was an independent contractor and was self-employed.

A. THE FACTS

[2] In determining that the Intervenor held insurable employment, the Respondent relied on the following facts:

(a) the Appellant is an insurance company engaged in selling various insurance policies;
(b) the Appellant is in business in Canada since 1956 and has an office in Boucherville, Quebec;

(c) the Worker was engaged by the Appellant as a sales representative;

(d) the Appellant and the Worker signed a sales representative agreement;

(e) the Worker was obliged to sign this agreement in order to perform her duties for the Appellant;

(f) the Worker was required to use only the selling methods and techniques developed by the Appellant;

(g) the Worker was assigned to specific tasks by the Appellant to be performed at specific times;

(h) the Worker was obliged to sell only the insurance products the Appellant;

(i) the client base developed by the Worker became the property of the Appellant;

(j) the Worker was required to perform her duties personally;

(k) the Worker began to work at 8:00 a.m. and finished at 9:00 p.m. and she followed the Appellant's supervised and regimented schedule every day;

(l) the Worker was obliged to attend sales representatives meeting daily;

(m) the Worker was not permitted to change her work schedule on her own;

(n) the Worker's routes were assigned to her each day by the sales manager;

(o) the Worker was required to directly contact and advise the sales manager in the case of any absence due to sickness or for any other reason;

(p) the Worker was required to provide the Appellant with precise reports, both written and verbal, on a regular basis;

(q) the Worker's remuneration was on a commission basis;

(r) the Appellant unilaterally set and changed the commission rate;

(s) the Worker had to meet performance standards;

(t) the Appellant had the right to terminate the Worker at his discretion;

(u) the Worker used her own car and assumed its operating costs;

(v) the Appellant provided an office, its furnishings, equipment and materials to the Worker;

(w) the risk of loss to the Worker was reduced by the Appellant providing the Worker, on an ongoing basis, lists of current clients whose policies were subject to renewal;

(x) the Worker's tasks were integrated in the Appellant's business.

At the hearing, most of these assumptions were revealed to be correct.

[3] I believe that the Appellant's business structure is pyramidal: A "divisional administrator" supervises roughly 40 "district managers." These "district managers" supervise "sales managers" who, in turn, supervise a number of representatives that do business within their territory. The Intervenor's "district manager" was Jean-Guy Saint-Laurent.

[4] Mr. Saint-Laurent hired the Intervenor. Employees of the Appellant who are responsible for training new representatives prepared her for the exam administered by the *Autorité des marchés financiers*; no one may work as an insurance representative in Quebec without having passed this exam. Once the Intervenor passed the exam, Mr. Saint-Laurent was her supervisor during the compulsory training period prescribed by the *Act, respecting the distribution of financial products and services*, R.S.Q., c. D-9.2.

[5] On July 14, 2003, and January 1, 2004, the Intervenor signed two documents entitled "*Entente standard d'agence de Combined*" (Combined's Standard Agency Agreement] with the Appellant (Exhibit A-1). Pursuant to these agreements, the Intervenor affiliated herself with the Appellant as a representative who "shall work on a self-employed basis as an independent contractor." At least on paper, these agreements expressly create a relationship based on a contract of enterprise as opposed to an employer-employee relationship under an employment contract.

[6] In practice, once the training period was over, the Intervenor dealt mainly with her "sales manager" Sylvain Poulin and her "district manager" Mr. St-Laurent. At the hearing, Michel Rivest, the Appellant's "divisional administrator", testified that the "district managers" were responsible for managing the representatives.

B. APPLICABLE LAW

[7] In common law provinces, the question whether an employer-employee relationship exists is answered by applying tests developed by the decision of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. Minister of National Revenue,* [1986] 3 F.C. 553, confirmed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. Given the complexity of economic and contractual relationships, the Courts have rejected an analysis based strictly on a relationship of subordination, or the exercise of a power of control, in favour of an examination of the overall relationship between the parties. In *Sagaz*, Major J. wrote as follows at paragraphs 47-48:

> . . . The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[8] The advantage of this multidimensional approach is that it is more flexible and permits determinations that take account of the entire dynamic of the relationship. The disadvantage of the approach is that it is more problematic to predict the determination that a Court will make, given the multiplicity of factors on which its analysis will be based.

[9] In Quebec, a province governed by civil law principles, the employment contract is defined in article 2085 of the *Civil Code of Québec*, S.Q. 1991, c. 64, which states that "[a] contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer."

[10] An employment contract differs from a contract of enterprise or for services (Article 2098) "… by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay." Article 2099 provides that "[t]he contractor or provider of services is free to choose the means of performing the contract and *no relationship of subordination*

exists between the contractor or the provider of services and the client in respect of such performance."

[11] Thus, subordination, or the exercise of a power of control, is a more important, if not determinative, factor in Quebec law. The *Employment Insurance Act*, which applies to the present dispute, is a Federal statute. As of June 1, 2001, if concepts of private law are involved, section 8.1 of the *Interpretation Act,* R.S.C. 1985, c. I-21, has required the application of the private law of the province in which the dispute arose:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

[12] In light of these enactments, there is no sense debating whether the common law, multiple-factor approach propounded in *Wiebe Door* and *Sagaz* is a preferable one. The Quebec legislature has expressly stated that the existence of a relationship of subordination between the parties is what distinguishes an employment contract from a contract of enterprise or for services.

[13] Thus, I agree with the comments of Dussault J., who stated as follows in *Lévesque v. Canada (M.N.R.),* [2005] T.C.J. No. 183:

> [TRANSLATION]
>
> 23 In *Sauvageau Pontiac Buick GMC Ltée v. Canada*, T.C.C., No. 95-1642(UI), October 25, 1996, [1996] T.C.J. No. 1383 (QL), Archambault T.C.J., citing the Supreme Court of Canada's decision in *Quebec Asbestos Corp. v. Couture*, [1929] S.C.R. 166, considered these definitions and held that the determinative element was whether or not a relationship of subordination existed. He also accepted Pratte J.A.'s definition of this term in *Gallant, supra*. At paragraph 12 of his decision, Judge Archambault stated:
>
> > 12 It is clear from these provisions of the C.C.Q. that the relationship of subordination is the primary distinction between a contract of enterprise (or of services) and a contract of employment. As to this concept of a relationship of subordination, I feel that the comments of Pratte J.A. in *Gallant* are still applicable:

> The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties.

24 Furthermore, in *D & J Driveway Inc. v. Canada*, F.C.A., No. A-512-02, November 27, 2003, 322 N.R. 381, [2003] F.C.J. No. 1784 (QL), Létourneau J.A. of the Federal Court of Appeal stated that an employer-employee relationship does not necessarily exist simply because a person who gives out work can control its result. He put the matter as follows at paragraph 9 of the judgment:

> A contract of employment requires the existence of a relationship of subordination between the payer and the employees. The concept of control is the key test used in measuring the extent of the relationship. However, as our brother Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, [1996] F.C.J. No. 1337, [1996] 207 N.R. 299, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, control of the result and control of the worker should not be confused. At paragraph 10 of the decision, he wrote:
>
> > It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker.

25 . . . Several indicia can be taken into account in ascertaining whether or not a relationship of subordination exists. In *Seitz v. Entraide populaire de Lanaudière inc.*, Court of Québec (Civil Division), No. 705-22-002935-003, November 16, 2001, [2001] Q.J. No. 7635 (QL), Judge Monique Fradette provided a series of indicia that can help determine whether or not subordination exists. She discussed this as follows at paragraphs 60-62 of the judgment:

> [TRANSLATION]
>
> 60 In order for there to be an employment contract, the jurisprudence requires the existence of a right of supervision and immediate direction. The mere fact that a person provides general instructions about the way in which the work is performed, or reserves the right to supervise or inspect the work, is not sufficient to convert the agreement into an employment contract.
>
> 61 A series of indicia developed by the jurisprudence enables courts to determine whether there is a relationship of subordination between the parties.
>
> 62 The indicia of control include:
>
> - mandatory presence at a workplace

- compliance with work schedule
- control over employee's vacations
- submission of activity reports
- control over the quantity and quality of work
- imposition of the means of performing the work
- power of sanction with respect to the employee's performance
- source deductions
- fringe benefits
- employee status on income tax returns
- exclusivity of services for employer

> 26 However, in my opinion, the fact that some indicia point to a relationship of subordination does not end the analysis. The process consists of determining the overall relationship between the parties based on the distinction drawn in the C.C.Q. Thus, the extent to which the indicia of subordination predominate in relation to the others must be established.

C. ANALYSIS

[14] These indicia are the basis on which I will examine the overall relationship between the Appellant and the Intervenor in order to determine whether a relationship of subordination is present or not.

[15] **Mandatory presence at a workplace:** The representatives who worked for the Appellant worked in the field, since the role of a representative is to sell insurance policies from door to door, and obtain renewals of existing policies by visiting customers at their homes. Thus, the Intervenor was not required to go to the same workplace every day. However, Mr. Saint-Laurent assigned the neighbourhoods in which the Intervenor was required to work. At the hearing, the Intervenor testified that she was not free to choose these neighbourhoods, and that she had to work on the streets that Mr. Saint-Laurent assigned to her. Mr. Saint-Laurent's testimony confirmed that he assigned her streets where she had to attempt to sell the Appellant's insurance policies, but he said that she would have been free to choose her streets if she had wished. In any event, the Intervenor does not seem to have been encouraged to choose the areas in which she would work.

[16] **Compliance with work schedule:** The Intervenor's work days always began with a morning meeting with her "sales manager", the other representatives, and Mr. Saint-Laurent. The Intervenor testified that her work days were organized according to a strict schedule. The schedule began with mandatory meetings in the morning to set the day's objectives and motivate the representatives. There would be another meeting at about noon to go over what was done in the morning and prepare

for the afternoon's work. Since the Intervenor's "district manager" expected her to attend these meetings, she had no choice but to follow the work schedule chosen by Mr. Saint-Laurent.

[17] **Control over employee's absences:** The Intervenor would occasionally miss morning meetings. In addition, she was absent because of her pregnancy. At the hearing, it was revealed that the Intervenor justified her absences to Mr. Saint-Laurent by giving him medical certificates. Although Mr. Saint-Laurent did not expressly demand medical certificates, he agreed to look at them when the Intervenor offered to submit them to him. It is unlikely that the Intervenor would have asked her physician for such certificates if she did not believe she was required to justify her absences to Mr. Saint-Laurent. And Mr. St-Laurent appears never to have chosen to tell her that since she was self-employed, she did not need to justify her absences in this manner.

[18] **Submission of activity reports:** The Intervenor gave Mr. Saint-Laurent activity reports so that he could calculate her total sales and pay her the resulting commissions. These reports were essential for accounting purposes and for the Appellant's records, and are not necessarily indicative of an employer-employee relationship.

[19] **Control over quantity and quality of work:** The Intervenor set sales targets with Mr. Saint-Laurent. If she did not reach them, Mr. Saint-Laurent exhorted her to adhere more closely to the sales techniques set out in the training manuals that the Appellant prepared for the representatives. With regard to the quality of the Intervenor's work, at least during her mandatory training period, Mr. Saint-Laurent, as the supervisor, was to ensure that she made no false representations to any clients, and that the clients gave valid consent. In my opinion, the fact that this obligation is imposed by the *Act respecting the distribution of financial products and services* is of little importance: it is the degree of control exercised over the quality of the work that counts.

[20] **Imposition of the means of performing the work**: This is one of the most fundamental distinctions between a contract of enterprise, under which a contractor generally has only an obligation of result, and an employment contract, under which the employer imposes an obligation of means on the employee so that the employee will achieve the result using the employer's preferred method. The evidence in this case disclosed that the Appellant's training manuals, and Mr. Saint-Laurent, insisted on the use of ready-made scripts which even anticipated answers to clients' objections and refusals. The following is an example of such a script (Exhibit I-3):

[TRANSLATION]

Client: I'm not interested.

Agent: Mr./Ms. _____, if you had a money-making machine, and it gave you thousands of dollars a year, surely you would want to insure this machine for only $ _____ a week, wouldn't you?

Client: Yes.

Agent: The good news is …

You are such a machine. You are potentially worth thousands of dollars of future income. I think you'll agree that such a precious machine should be insured … especially when the premium is so low. Isn't this true? [*or*] Do you agree?

Client: Yes.

Agent: May I write it for you, then?

Client: Yes.

Agent: You want the full unit, $_____ per month _____ like the others, is that correct?

In my opinion, these sales scripts, and the importance they were given during the training and at the meetings the Intervenor was required to attend, suggest that the Appellant imposed means of performing the work.

[21] **Power of sanction with respect to the employee's performance**: In addition to selling insurance policies to new customers, the representatives were responsible for renewing existing policies. It was easier to obtain a renewal than to sell a new policy, and the Appellant's commissions for new business were higher than its renewal commissions. However, renewals constituted a source of income for the Intervenor, and Mr. Saint-Laurent gave representatives the names and addresses of customers whose policies were due for renewal. If he decided not to give renewals to a representative owing to poor performance, the decision had the effect of an economic sanction on the representative. I agree with counsel for the Appellant that a purely economic sanction should be distinguished from a disciplinary sanction, but

the fact remains that the Appellant had a power of sanction over the Intervenor, if only in economic terms.

[22] **Source deductions and fringe benefits:** The Appellant did not make source deductions from the amounts it paid the Intervenor, and the Intervenor had no benefits that point to the existence of an employment contract.

[23] E**mployee status on income tax returns:** The Intervenor declared business income and, on Mr. Saint-Laurent's advice, she kept the receipts for the expenses that she incurred in the performance of her duties so that she could deduct them from her taxable income. At first glance, this appears difficult to reconcile with the existence of a typical employment contract, but the fact that the Intervenor took steps to obtain employment insurance benefits at the end of her contract with the Appellant suggests that her understanding of her situation, and of the tax and employment insurance systems, was rather limited.

[24] **Exclusivity of services for employer:** The Intervenor testified that she could sell only the Appellant's insurance products and could not hold other employment. However, it appears that no one expressly told her that she could not do any other work. I have no doubt that the Intervenor believed she could not work for anyone else, and it appears that neither the Appellant nor Mr. Saint-Laurent made any particular effort to disabuse her of this belief. Nonetheless, this is still just an impression in the Intervenor's mind, and it cannot have the same probative value as an express prohibition issued by the Appellant.

D. CONCLUSION

[25] In light of the indicia listed above, I find that by virtue of the degree of control involved in the relationship between the Appellant and the Intervenor, that relationship was sufficiently subordinate to constitute an employment contract rather than a contract for enterprise.

[26] However, the Appellant's business model is not on trial in this appeal. It is quite possible that most of the Appellant's representatives are independent contractors. It is even possible that Mr. Saint-Laurent, who had considerable discretion regarding the way in which he managed representatives, did not exercise the same degree of control over the work of other representatives under his supervision.

[27] Nonetheless, it is clear to me that the Intervenor, having been subject to the control that the Appellant exercised over her during her period of service, experienced all the drawbacks of employee status without access to its benefits, including eligibility for employment insurance benefits.

[28] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 6th day of September, 2005.

"C.H. McArthur"

McArthur J.

CITATION:	2005TCC478
COURT FILE NO.:	2004-4421(EI)
STYLE OF CAUSE:	Combined Insurance Company of America v. The Minister of National Revenue and Mélanie Drapeau
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 6, 2005
REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
DATE OF JUDGMENT:	September 6, 2005

APPEARANCES:

Counsel for the Appellant	Mélanie Beaulieu and Yves St-Cyr
Counsel for the Respondent	Natalie Goulard
For the Intervenor:	The Intervenor herself

SOLICITORS OF RECORD:

Counsel for the Appellant:

Name:	Mélanie Beaulieu and Yves St-Cyr
Firm:	Ogilvy, Renault

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada