Docket: 2008-224(EI)

BETWEEN:

FINANCIÈRE BANQUE NATIONALE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CARLO MASSICOLLI,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 17 and August 1, 2008, at Montréal, Quebec

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Wilfrid Lefebvre Vincent Dionne
Counsel for the Respondent:	Mounes Ayadi
Counsel for the Intervener	Serge Racine Stéphane Larochelle

JUDGMENT

The appeal from the determination made by the Minister of National Revenue under the *Employment Insurance Act* is allowed and the determination is reversed. Carlo Massicolli was employed by National Bank Financial in insurable employment from January 1, 2003, to October 1, 2004.

Signed at Ottawa, Canada, this 16th day of January 2009.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of March 2009.

Brian McCordick, Translator

Citation: 2008 TCC 624
Date: 20090116
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REASONS FOR JUDGMENT

Archambault J.

[1] On December 1, 2006, a Canada Revenue Agency eligibility officer determined that Carlo Massicolli was employed in insurable employment by the Appellant, National Bank Financial (NBF), within the meaning of section 5 of the *Employment Insurance Act* (the Act), from January 1, 2003, to December 31, 2004 (the relevant period). [1] The appeals officer set aside that determination and determined that Mr. Massicolli did not hold insurable employment during that period. NBF filed an appeal from the appeals officer's determination in this Court, and Mr. Massicolli filed a Notice of Intervention on March 10, 2008. On June 26, 2008, counsel for the Respondent notified the other parties to the dispute that he now supported NBF's position, that he would not be adducing any evidence, and that he would make no oral submissions at the hearing scheduled for July 17, 2008. By reason of this change of position by the Respondent, I decided not to take the Respondent's assumptions of fact into account; consequently, each of the

[1] Since Mr. Massicolli stopped working for NBF on October 1, 2004 (Exhibit A-2, tab 9), it would be more accurate to define the relevant period as January 1, 2003, to October 1, 2004.

other two parties had the burden of proving the facts in support of the findings that they sought from this Court.

Agreed facts

[2] The three parties filed a Partial Agreed Statement of Facts, which frames the issue in the instant case as follows: Was Mr. Massicolli an independent contractor or an employee of NBF during the relevant period? Contrary to the position usually taken by payors and workers before this Court, NBF submits that Mr. Massicolli was an employee, and Mr. Massicolli submits that he was an independent contractor. I shall reproduce paragraphs 1-29 of the Partial Agreed Statement of Facts:

> [TRANSLATION]
>
> 1. The Appellant, a company incorporated in Canada, provides securities brokerage and other services.
>
> 2. The Appellant's securities brokerage services consist, among other things, in offering counselling and brokerage services to individuals through investment advisors, and in offering institutional brokerage and corporate finance services.
>
> 3. The counselling and brokerage services that the Appellant offers to individuals are rendered by investment advisors who are assigned to various branches throughout Canada, including the branch located in Pointe-Claire, Quebec ("the Branch").
>
> 4. On August 27, 1993, the Intervener joined the Appellant's team of investment advisors. His job consisted, among other things, in providing investment advice to clients based on their investor profiles and investment objectives ("Clients"). From January 1, 2003, to October 1, 2004 ("the Period"), the Intervener was an investment advisor and broker at the Branch.
>
> **Regulation**
>
> 5. During the Period, the Appellant and the Intervener were subject to legislative rules, including the *Securities Act* (Quebec), and rules established by self-regulatory bodies governing securities trading, including the Investment Dealers Association of Canada (IDA).
>
> 6. The IDA is a self-regulatory body which is responsible for, among other things, the supervision, administration and registration of brokers, and which supervises the conduct of business by brokers and their representatives and ensures that brokers are sufficiently capitalized to carry out their functions appropriately with a view to protecting Clients. During the Period, the Appellant was a member of the IDA as a securities dealer.

7. Since 1982, the Commission des valeurs mobilières du Québec (now the Autorité des marchés financiers) entrusted the IDA with the administration and regulation of the activities of securities brokers like the Appellant and representatives like the Intervener.

8. In 2008, the IDA and Market Regulation Services Inc. (MRS) merged to become the Investment Industry Regulatory Association of Canada (IIROC). IIROC now fulfils the IDA's role in the province of Quebec.

9. In order to comply with IDA requirements during the Period, the Appellant implemented mechanisms for the supervision and control of transactions and operations involving Clients' affairs.

10. The Intervener was one of the representatives registered by the Appellant with the Commissions des valeurs mobilières du Québec in accordance with section 149 of the *Securities Act* (Quebec).[2]

11. During the years in issue, the Intervener held licences to practice his profession in British Columbia, Quebec and Ontario.

Remuneration and benefits

12. During the Period, the Intervener was remunerated solely by commission, and the Appellant had no obligation to pay the Intervener any minimum income.

13. During the Period, the commissions paid to the Intervener represented roughly 50% of the commission fees charged to Clients.

14. The Appellant was responsible for, among other things, billing and Client account receivables, and gave the Intervener the share of the commissions to which he was entitled.

15. During the Period, the Intervener was entitled to fringe benefits, including various group insurance policies such as life insurance and health insurance.

Office and equipment

16. The Intervener had an office at the Branch.

17. The Intervener sometimes had to work away from the Branch premises in order to meet with Clients.

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[2] During his testimony, Mr. Massicolli stated that he was a representative registered with the IDA. All the footnotes related to the Partial Agreed Statement of Facts are mine.

18. Client files had to be stored at the Branch, and operations and transactions on Client accounts had to be effected or initiated from the office located at the Branch.

19. During the Period, the Intervener had to incur work-related expenses, including travel expenses and motor vehicle expenses. The Appellant did not reimburse these expenses.

20. The Appellant made the following available to the Intervener at the Branch:

a. meeting rooms;

b. financial analysis, reception, marketing, accounting and payroll services, and

c. Intranet resources.

Administration and marketing

21. During the Period, the Intervener offered investment advice and brokerage services to Clients under the Appellant's banner. In his dealings with the Clients during the period, the Intervener used business cards and letterhead bearing the Appellant's logo and business name.

23. As of April 2003, the Intervener formed an undeclared partnership with Mark W. Auger, an investment advisor who worked at the Branch.[3] The business name of the partnership was "Auger-Massicolli." [4] Around June 2003, the Auger-Massicolli business name also appeared on the Intervener's business cards and letterhead.[5]

22. Beginning around June 2003, the business cards and letterhead used by the Intervener in his dealings with Clients also bore one of the following trademarks:

a. "Bâtir de la résistance aux conséquences du hazard" (TMA622252);

b. "Building resistance to randomness" (TMA621930); and

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3 Branch Manager Martin Leclerc testified that he was unaware of the existence of an undeclared partnership formed by the Auger-Massicolli team. Consequently, he neither consented nor agreed to this type of association. When two advisors decide to form a team, an authorization request form must be filled out and signed not only by them, but by the branch manager and the senior vice-president as well. (Exhibit INT-1, tab 10.)

4 Mr. Massicolli confirmed that, unlike a partnership, which must be registered, this undeclared partnership was never registered.

5 In order to make the agreed facts easier to understand, I have reversed the order of paragraphs 22 and 23.

c. Dolmen Design (TMA642799).

24. The trademarks referred to in paragraph 22 were the property of Les Placements Sydwood Inc., an entity unrelated to the Appellant or to any of the Appellant's subsidiaries.[6]

Staff and assistants

25. The Intervener had the help of assistants in carrying out his work.

26. Part of the cost of these assistants was borne by the Intervener through deductions from his remuneration, and part of the cost was borne by the Appellant. The Appellant made source deductions at all times from the assistants' salaries in accordance with Quebec and federal tax legislation.

27. The Appellant covered the cost of office furniture and supplies associated with the assistants' activities.

Contributions to government bodies

28. The Intervener was responsible for the fees and contributions payable for his licences from the government bodies in the provinces in which he was registered.

Administration

29. The Appellant could charge the Intervener for transaction losses.

Factual background

[3] The testimony of the witnesses, and the numerous documents adduced at the hearing, proved numerous additional facts. Some of those facts shall be set out directly below, while others will be addressed under the heading "Analysis".

[4] After obtaining a Bachelor's of Business Administration (Finance) degree from the Université du Québec à Montréal in 1986, Mr. Massicolli worked for The Co-operators Financial as a financial advisor. After that company was acquired by the Laurentian Bank of Canada, he held managerial positions at that bank, including the position of branch audit and security manager and the position of credit manager.

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[6] The shareholders of Les Placements Sydwood Inc. were Mr. Auger, Mr. Massicolli and/or members of their families. The fact that a royalty was payable for the use of these trademarks shows that the two investment advisors had turned their minds to tax and estate planning. In other words, this was an entirely commonplace income-splitting mechanism.

- Agreement with NBF

[5] Before being hired by the brokerage firm of Lévesque Beaubien Geoffrion Inc. (LBG), now NBF, Mr. Massicolli filled out an employment application form on which the [TRANSLATION] "position applied for" was advisor (see Exhibit A-2, tab 1). On the form, signed on August 26, 1993, Mr. Massicolli stated: [TRANSLATION] "I wish to work for your Company and . . . agree to comply with the regulations and practices in force at the Company." (Emphasis added.) In a letter dated August 27, 1993, Maurice Dupont, vice-president and Laval branch manager, confirmed the offer to hire Mr. Massicolli. The letter was amended by a letter dated September 1, 1993, which states: [TRANSLATION] "This is to confirm the main points of the agreement that finalize [*sic*] your employment with our firm . . ." (Emphasis added.)

[6] The letter states that he was hired effective September 1, 1993, at which time his [TRANSLATION] "training" would begin. According to the conditions of his hiring, he was to receive a hiring bonus: a total of $15,000 in [TRANSLATION] "salary" that would be paid for the first nine months, plus commissions [TRANSLATION] "in accordance with the commission and bonus system established by LBG." The letter adds: [TRANSLATION] "The above bonus is not reimbursable, but your progress will be monitored and reviewed regularly . . ." (Emphasis added) It specifies that if Mr. Massicolli engaged in conduct detrimental to LBG's reputation, LBG would have the option to [TRANSLATION] "terminate your association with our firm." Mr. Dupont concludes the letter by stating that it is his pleasure to welcome Mr. Massicolli to [TRANSLATION] "our team" (see Exhibit A-2, tab 4).

[7] On the employment application form, under the heading [TRANSLATION] "Terms and Conditions of Hiring", it is stated that Mr. Massicolli's employment was to begin at the Laval branch, and that his [TRANSLATION] "employee number" would be 11368. In addition to his annual salary in the form of commissions, he was to receive basic life insurance coverage as a benefit.

[8] NBF's *Investment Advisor's Guide* provides more details about the calculation of investment advisors' remuneration.[7] The document sets forth the following basic principle:

> [TRANSLATION]
>
> I. Basic principle
>
> ▪ The remuneration of an investment advisor is established in three stages:
>
> 1st stage: Establish the gross commission that NBF receives for all operations and transactions carried out by the investment advisor.
>
> 2nd stage: Establish the commission of the NBF advisor. This commission is a percentage of the gross commission, and can range from 0% to 55% of the gross commission, depending on the type of activity or the value of the transaction.
>
> 3rd stage: Adjust the investment advisor's commission by increasing or decreasing the commission amount through adjustments related to his production and by subtracting certain amounts representing additional costs incurred by NBF with respect to the services provided which are over and above certain established parameters.

[9] To illustrate all the components of the establishment of investment advisors' commissions, it is helpful to reproduce the "Monthly Summary of Income — Example" from the guide.[8]

> **Monthly Summary of Income – Example**
>
> \+ Net commissions on transactions
> \+ Portfolio management fees
> \+ Finder's Fees

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[7] Exhibit A-2, volume 4, tab 13, P100 03, page 1 of 7, effective August 1, 2005. [Translated using a very similar 2008 English version as reference.] Although the 2005 document pertains to a period subsequent to the relevant period, I believe that it provides a good description of the situation during the relevant period. This comment applies generally to all similar documents quoted in these Reasons for Judgment.

[8] Exhibit A-2, volume 4, tab 13, P100 03, page 7 of 7, effective August 1, 2005, Appendix 1.

+	Net commissions on Trailer Fees, PAC with mutual fund and group RSP with mutual fund
+	Net commissions on life insurance contracts
+	Net commissions on term contracts
+	Adjustments on transaction commissions
A	**Total income subject to adjustment**
B	**Adjustment: 33⅓% of A**
C	**Income after adjustment (A – B)**
+	Net commissions on administration fees (SSP, RSP Portfolio, RIF Portfolio, Full Access Plan)
-	Losses on transactions
-	Amount exceeding budgeted Entrepreneur Account
D	**Income after adjustments and commissions on administrative fees**
-	Portion (%) of net income paid to the assistant
-	Monthly fixed payment to the assistant
-	Contribution towards guaranteed income of investment advisor
-	Contribution towards computer services
-	Regulatory and [self-regulatory association] registration fees
-	Contribution towards assistant's salary
-	Legal fees
-	Relay Program reimbursement
-	Other reimbursements of fees assumed by the advisor
E	**Net income after fees assumed by the advisor (line D less total fees)**
+	Quarterly performance bonus
-	Portion (%) of performance bonus paid to the assistant
F	**Monthly net income (i.e. gross income for tax purposes) (line E plus quarterly net performance bonus)**

[10] Although there are no precise quotas for investment advisors, NBF's remuneration policy in force on April 1, 2003 discloses that the remuneration of advisors who have generated gross commissions lower than $55,000 per three-month period is reduced by 33% for the subsequent month.[9] According to Mr. Massicolli, NBF did not set any targets for him, because his production exceeded its expectations.

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[9] This is the adjustment referred to in letter B of the Monthly Summary of Income. See also Exhibit INT-1, tab 8, page 21.

[11] Part IV of the *Employee Guide* (English version of Exhibit A-2, tab 23) prepared by NBF's Human Resources Department deals specifically with various terms and conditions of employees' work. Two provisions deserve special attention:

> *4.3 Bonuses*
>
> • Permanent employees who are eligible for discretionary bonuses based on the profitability of the firm and/or the division, and also on the employee's individual performance, must have worked during the reference period and be employed by the firm at the time the bonus is paid in order to be eligible. In addition, any applicable vacation pay that is payable in accordance with provincial labour law provisions is included in the bonuses paid.
>
> . . .
>
> *4.4 Commission*
>
> • Employees eligible to receive commissions must have worked during the reference period in order to be eligible. In addition, any applicable vacation pay[10] that is payable in accordance with provincial labour law provisions is included in the commissions paid.
>
> [Emphasis added.]

[12] The *Employee Guide* also describes the various forms of group insurance coverage offered to permanent full-time or permanent part-time employees (administrative or producer) who work a minimum of 20 hours per week. Coverage includes basic life insurance, basic accidental death and dismemberment insurance, medical insurance, dental insurance and short-term disability insurance. According to the *Employee Guide*, an employee is eligible for the group insurance program from his or her hiring date. (Exhibit A-2, tab 23, page 16). Paragraph 6.4 specifies that basic life insurance premiums are paid 100% by the employer. This applies as well to basic life insurance for dependants and to basic accidental death or dismemberment insurance. As for medical insurance, the employer pays the premiums for personal coverage, but the employee pays a premium for family dental and medical coverage.

---

[10] Part V of the *Employee Guide*, concerning absences, expressly states that it does not apply to employees remunerated solely by commission.

[13] The short-term disability insurance policy covers the first 90 calendar days of absence due to illness. An employee with at least two years of service receives 100% of his or her remuneration for the first 20 consecutive working days of absence. The benefit payment for the remaining 70 days is 85%. If the employee has no base salary, compensation is based on the commissions and bonuses earned during the 12 full months worked prior to becoming disabled, to a maximum of $240,000 (gross) per year (section 6.1.4 of the English version of the *Employee Guide*). However, investment advisors like Mr. Massicolli were not entitled to join the defined-benefit pension plan, because they were considered "producer" employees with no base salary (see page 22 of the French version of the *Employee Guide*).

[14] The *Employee Guide* describes several other benefits, including reduced costs for financial programs offered by the National Bank of Canada (NBC) and NBF (see Part VIII of the document). The *Investment Advisor's Guide* also contains a section concerning the "employee account", an account, in Canadian or U.S. funds, opened in the name of a permanent or retired NBF employee (policy P140-10 in the *Employee Guide*). The account features attractive interest rates on any credit balances in current accounts, as well as reduced brokerage fees, and a waiver of administrative fees for registered plan accounts. Although Mr. Massicolli says that he did not avail himself of this benefit, he was entitled to do so.

[15] The part of *the Investment Advisor's Guide* that deals with travel expenses states: "Except the events listed below, commission employees (retail sector) must assume meal, travel and accommodation expenses themselves: the President's Club; the President's Convention; the President's Council; training for recruits, investment and administrative assistants . . . ."

[16] The *Employee Guide* deals with NBF's training and development policy. All permanent full-time workers who have completed their probationary period are eligible to be reimbursed for the costs they incur for training courses, or the fees that they pay to attend a development seminar (Exhibit A-2, volume 5, tab 23, page 9). Mr. Massicolli was reimbursed for the cost of certain training courses that he enrolled in, including courses given by CSI Global Education, but he covered his registration fee for a conference on estate freezes held by the Association de planification fiscale et financière (see Exhibit INT-2, tab 44).

[17] At the time he was hired, Mr. Massicolli lived in St-Constant, on the South Shore across from Montréal, but had to work at the Laval branch. Since Mr. Massicolli noticed that LBG had no branch on the West Island, he decided to build his clientele in that geographical area of Montréal.

[18] Mr. Leclerc acknowledged that NBF did not provide actual client lists to its investment advisors, but that the advisors could get some of their clientele from among the customers of NBC, which owned 20-30% of LBG at that time. There was thus a synergy between NBC's clientele and NBF's clientele. Mr. Massicolli acknowledged contacting the managers of NBC's various branches. He spoke to potential clients about investments. Mr. Leclerc estimated that 20-25% of the clients served by Mr. Massicolli were NBC customers.

[19] Tired of having to cross two bridges to get to work, Mr. Massicolli moved to Baie d'Urfé on the West Island. By 1996, Mr. Massicolli had built up enough of a client base on the West Island for LBG to open a point of sale, which was a sub-branch of the Laval branch. The location opened on May 10, 1996. Since there were other investment advisors who lived on the West Island, two new advisors joined the West Island team, which justified the opening of an actual branch in the fall of 1996. Mr. Massicolli and a colleague, Christian Lamarre, became co-managers. This situation did not please Mr. Massicolli. In a sense, he was competing with the branch's other investment advisors. He found it difficult to motivate them. Since he was a co-manager, he also had to act as compliance officer with regard to the activities of the West Island branch. In any event, a new manager, Martin Leclerc, was appointed in 2000. This appointment enabled Mr. Massicolli and Mr. Lamarre to concentrate on the activities that were apparently of more interest to them: developing and serving a brokerage clientele.

[20] Mr. Massicolli focused more on providing investment advice than on selling products developed by NBF. In adopting this approach, Mr. Massicolli was prioritizing fees for counselling services over commissions on the purchase and sale of securities. In furtherance of this approach, Mr. Massicolli formed a team with Mark W. Auger in May 2003 so that they could concentrate their efforts on entrepreneurs and wealthy families. One of the reasons for this association was the principle of complementarity: each investment advisor would be able to develop expertise in different aspects of securities brokerage. Mark Auger was responsible for managing the portfolios of the Auger-Massicolli team's clients, while Mr. Massicolli was responsible for business development.

[21] In many respects, Mr. Auger and Mr. Massicolli behaved as entrepreneurs. For example, in order to develop its new niche, the Auger-Massicolli team decided to pursue a high-end marketing strategy. It called on the services of a graphic designer to create the stationery. The prototype prepared by the graphic designer described Auger-Massicolli as a limited liability partnership, designated by the French abbreviation "SENC" (*société en nom collectif*). The proposed letterhead and business cards contain the business name ending in SENC, NBF's name, and each entity's logo. However, as stated in the *Investment Advisor's Guide*, any advertising by an NBF representative requires NBF's approval.[11] The "Goals Worksheets" show that the question of a proposed limited liability partnership was discussed in July 2003. The Auger-Massicolli team never obtained NBF's approval for the use of the French designation SENC. That is probably why Mr. Massicolli and Mr. Auger say that they formed an undeclared partnership, which is not required to "make declarations in the manner prescribed by the legislation concerning the legal publication of partnerships" (article 2189 of the *Civil Code of Québec* (the Civil Code)).

[22] In order better to focus on their target clientele consisting of entrepreneurs and wealthy families, Mr. Auger and Mr. Massicolli decided to reduce the number of clients that they served from 760 to 460.[12] A part of this "purging" was done by transferring clients to another NBF investment advisor. Transferring at least $10 million in investments entitled the Auger-Massicolli team to a consideration of $25,000, which was used to help pay an assistant's salary for two years. It appears that some portion of the $25,000 also helped defray the team's marketing expenses.

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[11] See paragraph 75 of these Reasons for Judgment, which deals with this rule in the *Investment Advisor's Guide*.

[12] In a letter to one of his clients, dated May 14, 2004, Mr. Massicolli noted that it would be preferable to terminate their business relationship because the Auger-Massicolli business model did not meet the client's financial needs. He ended the letter by stating: [TRANSLATION] "In closing, I would like to thank you for the trust that you have placed in National Bank Financial throughout these years." (Exhibit A-2, volume 5, tab 20).

[23] Mr. Auger and Mr. Massicolli used a "Goals Worksheet" to define their objectives: the commission target, the income to be earned during the month, and the amount of assets to have under management. The team tried to persuade Luc Paiement, the president and person responsible for individual investor services at NBF, to form a group that they called "Private Client Wealth Management". Negotiations between the Auger-Massicolli team and NBF's management lasted several months. In the end, NBF allowed the team to personalize NBF's concept of "Advisor Baskets" and to use the designation "MWA Basket" instead (Mr. Auger's initials are MWA). A letter signed by Mr. Paiement on December 15, 2003, informs NBF's clients about this "MWA Basket".

[24] On the other hand, the proposals made by the Auger-Massicolli team in relation to (a) a limited liability partnership; (b) a separate incorporated division; (c) merger/integration into FBN Gestion Privée; (d) separate branding / joint branding, appear not to have been approved by Mr. Paiement. In fact, in a letter to Mr. Paiement dated January 24, 2004,[13] Mr. Auger expressed his frustration in the following terms:

> Auger-Massicolli is genuinely concerned that our experiences and know how [*sic*] are being undermined by NBF's inaction. We are behind schedule. Our most direct competitors, National Bank of Canada and Desjardins, are not wasting anytime [*sic*] in aggressively recruiting, training, and coordinating the required people and technological resources. Auger-Massicolli will not stand still.

[25] The Auger-Massicolli team moved from talk to action. It left NBF on October 1, 2004, some eight months later, to join Desjardins Securities. Upon the team's departure in October 2004, NBF filled out a Record of Employment (ROE) in compliance with the provisions of the Act.

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[13] Around the same time – on January 27, 2004 – Mr. Massicolli asked to be appointed vice-president at NBF, and a confirmation of his appointment to that position was sent to him on January 29, 2004 (Exhibit A-2, volume 5, tab 32).

[26] In addition to that Record of Employment, NBF prepared T4 information slips for 2004 as it had done for the preceding years. On these slips, the commissions paid by NBF to Mr. Massicolli are entered in box 14 as "employment income". NBF also prepared copies of Form T2200, Declaration of Conditions of Employment, for Mr. Massicolli for the years 2003 and 2004 (see Exhibit A-2, volume 5, tabs 27 and 29). These forms describe Mr. Massicolli as an "employee" holding the position of investment advisor. For the year 2003, the form states that he is authorized to work from home[14] and that he is paying an assistant's salary at his discretion. Mr. Leclerc, Mr. Massicolli's branch manager, said that the latter did not object to being issued T4 slips and T2200 forms for the years 2003 and 2004. In fact, Mr. Massicolli included his commissions from NBF in his employment income as entered on line 101 of his income tax return (see Exhibit INT-1, tabs 39 and 40). He also deducted "employment expenses" on line 229.[15]. It should be noted that he reported $400 in business income on his 2004 income tax return. This amount is related to financial planning advice and is the only business income reported on the return.

The regulatory context

[27] Before setting out each party's position, it is important to describe the regulatory context in which a securities brokerage business operates in Quebec. As with certain other professions and occupations, there are rules governing the conduct of such business.[16] In order better to protect the public and the brokerage industry, there are stringent standards. These standards apply to the businesses themselves, but they also apply to their employees and agents. As I understand it, brokerage firms that came together under the IDA umbrella imposed standards on themselves in order to better protect their industry and their clients. The Commission des valeurs mobilières du Québec, created by Quebec legislation, entrusted the IDA with the responsibility to regulate brokerage activities from 1982 onward.

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[14] Mr. Massicolli's branch manager acknowledged that it is not commonplace for an investment advisor to work from home.

[15] Mr. Massicolli's 2003 employment income was $457,943, from which he deducted $187,469 in employment expenses. The four most significant expense items are "other" expenses in the amount of $134,697 (which Mr. Massicolli described as expenses to obtain investment information); automobile expenses in the amount of $13,298; meal and entertainment expenses of $19,658 (of which 50% are eligible); and a salary of $9,522 paid to an assistant or replacement (Exhibit INT-1, tab 39, pages 136, 160 and 161).

[16] Unless the context indicates otherwise, any reference to brokerage in these Reasons for Judgment is a reference to securities brokerage.

[28] The By-laws, Regulations and Policies of the IDA are set out in its *Rule Book* (July 1997). The IDA's Constitution articulates the aims of the Association, and section 2(b) in particular refers to "encourag[ing] through self-discipline and self-regulation a high standard of business conduct among Members[17] and their partners, directors, officers and employees and to adopt, and enforce compliance with, such practices and requirements as may be necessary and desirable to guard against conduct contrary to the interests of Members, their clients or the public". (Emphasis added.) (English version of the IDA Constitution, the French version being Exhibit A-2, volume 2, tab 12.)

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[17] IDA By-law No. 2 is about membership. By-law 2.2 thereof states:

> Any individual, firm or corporation shall be eligible to apply for Membership if
>
> (a) in the case of an individual, the applicant is a resident of Canada; in the case of a firm, it is formed under the laws of one of the provinces or territories of Canada, and, in the case of a corporation, it is incorporated under the laws of Canada or one of its provinces;
> . . .
> (c) the applicant and its directors, officers, partners, investors and employees, and its holding companies, affiliates and related companies (if any), [agree to] comply with the By-laws . . .

Based on this list, I find that a partnership could become a member of the IDA and that the word "partner" ("*associé*" in the French version) means a member of such a partnership.

- General obligations

[29] By-law No. 29 pertains to "Business Conduct" and section 1 (cited by the IDA as By-law 29.1) states, *inter alia*, as follows:[18]

BUSINESS CONDUCT

> 1. Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.
>
> For the purposes of disciplinary proceedings pursuant to the By-laws, each Member shall be responsible for all acts and omissions of each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Member; and each of the foregoing individuals shall comply with all By-laws, Regulations and Policies required to be complied with by the Member.
>
> [Emphasis added.]

Duty of supervision

[30] Among the rules of conduct governing IDA members are the rules related to the duty of supervision, particularly By-law 29.27(a):

> 27.(a) Each Member shall establish and maintain a system to supervise the activities of each partner, director, officer, registered representative, employee and agent of the Dealer Member that is reasonably designed to achieve compliance with the Rules of the Association and all other laws, regulations and policies applicable to the Member's securities and commodity futures business. Such a supervisory system shall provide, at a minimum, the following:

[18] English version of Exhibit A-2, volume 2, tab 12.

(i) The establishment, maintenance and enforcement of written policies and procedures acceptable to the Association regarding the conduct of the types of business in which it engages and the supervision of each partner, director, officer, registered representative, employee and agent of the Member that are reasonably designed to achieve compliance with the applicable laws, rules, regulations and policies;

(ii) Procedures reasonably designed to ensure that each partner, director, officer, registered representative, employee and agent of the Member understands his or her responsibilities under the written policies and procedures in (i);

(iii) Procedures to ensure that the written policies and procedures of the Member are amended as appropriate within a reasonable time after changes in applicable laws, regulations, rules and policies and that such changes are communicated to all relevant personnel;

(iv) Sufficient personnel and other resources to fully and properly enforce the written policies and procedures in (i);

(v) The designation of supervisory personnel with the qualifications and authority to carry out the supervisory responsibilities assigned to them. Each Member shall maintain an internal record of the names of all persons who are designated as having supervisory responsibility and the dates for which such designation is or was in effect. Such record shall be preserved by the Member for seven years, and on-site for the first year;

(vi) Procedures for follow-up and review to ensure that supervisory personnel are properly executing their supervisory functions. Where the supervision is conducted and supervisory records are maintained at a branch office, the follow-up and review procedures shall include periodic on-site reviews of branch office supervision and record-keeping as necessary depending on the types of business and supervision conducted at the branch office;

(vii) The maintenance of adequate records of supervisory activity, including on-site reviews of branch offices as described in (vi), compliance issues identified and the resolution of those issues.

[Emphasis added.]

[31] IDA By-law No. 39 deals with agents. The most relevant portions are as follows:[19]

PRINCIPAL AND AGENT

39.1 All By-laws, Regulations, Policies and Forms of the Association that refer to the term employee shall be deemed to refer as well to the term agent and all references to the term employment shall be deemed to refer as well to the term agency relationship, where applicable.

39.2 For the purposes of this By-law "securities related business" means any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities or exchange contracts (including commodity futures contracts and commodity futures options) for the purposes of applicable securities legislation and exchange contracts legislation in any jurisdiction in Canada, including for greater certainty, sales pursuant to exemptions under that legislation.

39.3 The relationship between the Member and any person conducting securities related business on behalf of the Member may be that of

(a) an employee, or
(b) an agent who is not an employee,

but may not be that of an incorporated salesperson.[20]

39.4 Where a Member structures its business relationship with a person conducting securities related business on behalf of the Member using the principal / agent relationship contemplated in paragraph 39.3(b), the Member shall ensure that:

. . .

(c) the Member shall be responsible for, and shall supervise the conduct of the agent in respect of the business including compliance with applicable legislation and the By-laws, Regulations, Policies and Forms of the Association, including the by-laws, rulings, policies, rules, regulations, orders and directions of any self-regulatory organization or similar authority to which the Member is subject;

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19 See Exhibit A-2, volume 2, tab 12: IDA *Rule Book*, Part XXXIX.

20 My understanding of this statement is that a "representative" cannot be incorporated, but a member can be incorporated.

> (d) the Member shall be liable to clients (and other third parties) for the acts and omissions of the agent relating to the Member's business as if the agent were an employee of the Member;
>
> . . .
>
> (n) the Member and the agent shall enter into an agreement in writing which shall be provided to the Association prior to engaging in the principal/agent relationship and shall contain terms which include the provisions of paragraph (a) to (m), inclusive, and which do not include provisions which are inconsistent with paragraph (a) to (m), and shall provide the Association with a certificate by an officer or director of such Member and upon request by the Association shall provide an opinion of counsel confirming the agreement is in compliance with such provisions.[21]
>
> [Emphasis added.]

[32] IDA Regulation 1300, which pertains to "Supervision of Accounts" (English version of Exhibit A-2, volume 3, tab 12), defines a "managed account" as "any account solicited by a Member or . . . registered representative of a Member, in which the investment decisions are made on a continuing basis by the Member or by a third party hired by the Member," A "discretionary account" is defined as an "account of a customer other than a managed account in respect of which a Member or any person acting on behalf of the Member exercises any discretionary authority in trading by or for such account . . ." (Regulation 1300.3). Regulation 1300.7 states:

> No Member or any person acting on its behalf, shall exercise any discretionary authority with respect to a managed account unless: (a) the individual who is responsible for the management of such account is: (i) a partner, director, officer, employee or agent of the Member who has been approved by the Association as a portfolio manager or associate portfolio manager; or (ii) a sub-adviser with which the Member has entered into a written sub-adviser agreement . . ." [22]
> [Emphasis added.]

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21 My understandanding is that By-law No. 39 seeks to impose an obligation of supervision in relation to persons who operate a "securities related business" as defined in By-law 39.2, if the individual does so as an employee or agent "on behalf of the member".

22 IDA Regulation 1300.9 states:

> Application for approval as a portfolio manager shall be made to the Association and may be granted where the applicant:
>
> (a) has satisfied the applicable proficiency requirements outlined in Part I of Policy No. 6;

[33] In addition to Regulation 1300, there is Policy No. 2, which establishes "Minimal Standards for Retail Account Supervision",[23] particularly for managed accounts. Part VII, which pertains to the supervision of such accounts, states that the member must be approved by the IDA to open such accounts, and must comply with all the requirements specifically detailed in the By-laws, Regulations and Policies of the IDA. Only qualified portfolio managers may handle managed accounts. (Division E: Managed Accounts).

[34] As Mr. Massicolli acknowledged in his testimony, since neither he nor Mr. Auger was a partner, director, officer or agent of NBF, neither of them could be a portfolio manager unless he was an employee of NBF. It has been established that Mr. Auger was an assistant portfolio manager, and the evidence does not disclose the existence of a "written sub-advisor agreement". Neither Mr. Auger nor Mr. Massicolli was an IDA member. They were merely registered representatives. They had to be NBF employees in order to open portfolio management accounts and exercise discretionary authority over such accounts. They could open such accounts only on behalf of NBF, which had to exercise tight control over the activities of employees acting as portfolio managers or assistant portfolio managers.

(b) has within the past three years held registration under Canadian securities legislation as a portfolio manager, investment counsel or any equivalent registration category;
(c) is a partner, director, officer, employee or agent of a Member; and
(d) makes an application for approval in such form as the Board of Directors may from time to time prescribe. [Emphasis added.]

[23] It should be mentioned that Policy No. 2 establishes minimum industry standards for the supervision of retail accounts. It also expressly states that they do not preclude members from establishing a higher standard of supervision (English version of Exhibit A-2, volume 3, tab 12, page 2, Introduction).

[35] More generally, it is important to note that the rules contained in the By-laws, Regulations and Policies apply only to managers and their personnel. A member's personnel includes its directors (if it is a corporation), partners (if it is a partnership), officers, sales directors, branch managers or co-managers, investment representatives and any other employees of the member. It also includes agents acting on behalf of a member, provided there is a written agreement approved by the IDA. Thus, the duty of supervision applies only to those persons. The rules impose no obligations, including supervisory obligations, regarding any other person operating a brokerage business or carrying on brokerage activities. NBF therefore has no obligation to supervise a sub-contractor who is not one of the persons included in this long list.

The parties' positions

- NBF's position

[36] Counsel for NBF went over the relevant rules that should assist the Court in determining whether Mr. Massicolli was an employee or whether he was self-employed. First of all, the question should be decided in accordance with the Civil Code, since the Act does not define "employment . . . under [a] . . . contract of service" for the purposes of the definition of "insurable employment" in subsection 5(1) of the Act. In support of his position, he cited *Tambeau, sub nom. 9041-6868 Québec Inc. v. Minister of National Revenue*, 2005 FCA 334. In particular, he cited the remarks of Décary J.A.:[24]

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[24] It must be noted that Pelletier and Létourneau JJ.A. expressed their concurrence in the decision of Décary J.A. However, in a more recent decision, *Combined Insurance Company of America v. M.N.R. and Mélanie Drapeau*, 2007 FCA 60, which was written by Nadon J.A. and was also concurred in by Pelletier and Létourneau JJ.A., *Wiebe Door* is referred to once again. However, the decision in *Combined Insurance* does not refer to the decision in *9041-6868 Québec Inc.*, nor does it state state that the interpretation of Décary J.A. is no longer the law in Quebec.

The application for leave to appeal to the Supreme Court of Canada from the decision in *Combined Insurance* was dismissed without reasons on October 25, 2007, [2007] S.C.C.A. No. 156 (QL)). The position taken by counsel for Combined Insurance in the written response on the application for leave was that the decision of the Federal Court of Appeal in *Combined Insurance* [TRANSLATION] "does not in any way contradict the decision in *9041-6868 Québec Inc.*, rendered by this same Court in 2005" (paragraph 25 of the response). He adds:

> [TRANSLATION] "The Federal Court of Appeal . . . was forced to conclude that there was no relationship of subordination in relation to the performance of Ms. Drapeau's work for the respondent. . . . Thus, the Federal Court of

[3] When the *Civil Code of Québec* came into force in 1994, followed by the enactment of the *Federal Law - Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 by the Parliament of Canada and the addition of section 8.1 to the *Interpretation Act*, R.S.C., c. I-21 by that Act, it restored the civil law of Quebec to its rightful place in federal law, a place that the courts had sometimes had a tendency to ignore. On this point, we need only read the decision of this Court in *St-Hilaire v. Canada*, [2004] 4 FC 289 (FCA) and the article by Mr. Justice Pierre Archambault of the Tax Court of Canada entitled "Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It", recently published in the Second Collection of Studies in Tax Law (2005) in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, to see that the concept of "contract of service" in paragraph 5(1)(*a*) of the *Employment Insurance Act* must be analyzed from the perspective of the civil law of Quebec when the applicable provincial law is the law of Quebec.

. . .

[7] In other words, it is the *Civil Code of Québec* that determines what rules apply to a contract entered into in Quebec. Those rules are found in, *inter alia*, the provisions of the Code dealing with contracts in general (arts. 1377 C.C.Q. *et seq.*) and the provisions dealing with the "contract of employment" (arts. 2085 to 2097 C.C.Q.) and the "contract of enterprise or for services" (arts. 2098 to 2129 C.C.Q.). Articles 1378, 1425, 1426, 2085, 2098 and 2099 C.C.Q. are of most relevance for the purposes of this case:

1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.	1378. Le contrat est un accord de volonté par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation.

Appeal did indeed apply the relevant provisions of the *Civil Code of Québec* in this case (paragraph 13 of the response).

. . . The Federal Court of Appeal did not revive the common law criteria for determining the existence of an employment contract in Quebec. Rather, and unlike the judge at first instance, the Court correctly went over all the evidence in the record and determined that there was no relationship of subordination between Ms. Drapeau and the respondent. It did so by applying several indicia of supervision, such as ownership of work instruments; chance of profit and risk of loss; integration; degree of control; mandatory presence at the workplace and compliance with work schedule; control over absences for vacations; power to impose sanction; imposition of means of performing the work; submission of activity reports; and control over quality and quantity of work. . . . " (paragraph 15 of the response).

. . .

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

…

1425. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.

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.

1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

. . .

…

1440. A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

1440. Le contrat n'a d'effet qu'entre les parties contractantes; il n'en a point quant aux tiers, excepté dans les cas prévus par la loi.

. . .

…

2085. 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.

2085. Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.

. . .

…

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 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.

2098. Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.

2099. The contractor and the provider of services is free to choose the means of performing the contract and no relationship of subordination exists

2099. L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de

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

subordination quant à son exécution.

. . .

[9] The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les Obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in 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. The circumstances in which the contract was formed include the legitimate stated intention of the parties, an important factor that has been cited by this Court in numerous decisions (see *Wolf v. Canada* (C.A.), [2002] 4 FC 396, paras. 119 and 122; *A.G. Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54; *Le Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, 2003 FCA 50; *Tremblay v. Canada (M.N.R.)*, 2004 FCA 175).

. . .

[11] There are three characteristic constituent elements of a "contract of employment" in Quebec law: the performance of work, remuneration and a relationship of subordination. That last element is the source of the most litigation. For a comprehensive definition of it, I would refer to what was said by Robert P. Gagnon in *Le droit du travail du Québec*, Éditions Yvon Blais, 2003, 5th edition, at pages 66 and 67:

> [TRANSLATION]
>
> 90 - *A distinguishing factor* - The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 *et seq*. C.C.Q. Thus, while article 2099 C.C.Q. provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the

> client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> 91 - *Factual assessment* - Subordination is ascertained from the facts. In this respect, the courts have always refused to accept the characterization of the contract by the parties. . . .
>
> 92 - *Concept* - Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way. (Emphasis added.)

[37] He also cited my decision in *Rhéaume v. The Minister of National Revenue and Julie Faucher*, 2007 TCC 591, and, in particular, the following paragraphs:

> [24] Upon analysing these provisions of the *Civil Code*, it is clear that three essential conditions must be met in order for a contract of employment to exist: (i) prestation of work by the employee; (ii) remuneration paid by the employer for this prestation; and (iii) a relationship of subordination. The factor that clearly distinguishes a contract for services from a contract of employment is the existence

of a relationship of subordination, that is to say, the employer's power of direction or control over the worker.

. . .

[29] In my opinion, the rules governing the contract of employment in Quebec law are not identical to the common law rules, and thus, it is not appropriate to apply common law decisions such as *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553 (F.C.A) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59.[7] At common law, "there is no universal test to determine whether a person is an employee or an independent contractor . . . 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."[8] As Major J. [h]eld in *Sagaz*:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan, J.A. that a persuasive approach to the issue is that taken by Cooke, J. in *Market Investigations, supra*. 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.
>
> 48 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. (Emphasis added.)
>
> . . .

[31] In Quebec, unlike the common law situation, the central question is whether there is a relationship of subordination, that is to say, a power of control or direction. Courts have no choice but to determine whether or not there is a relationship of subordination in order to determine whether a contract constitutes a contract of employment or a contract for services. That is the approach that Létourneau J.A. of the Federal Court of Appeal adopted in *D & J Driveway*,[9] where he determined that there was no contract of employment based on the provisions of the *Civil Code*, and, in particular, his finding that there was no relationship of subordination, which he described as "*the essential feature of the contract of employment*."[10]

. . .

[33] Lastly, before finishing this statement of the rules that govern the determination of whether Ms. Rhéaume held insurable employment, we should recall the remarks made by Picard J. of the Quebec Superior Court in *9002-8515 Québec Inc*.,[12] which I reproduced at paragraph 121, page 2:82 of my paper:

> 15 In order for there to be a contract of enterprise, there must be no relationship of subordination and the Agreement contains several elements showing a relationship of subordination. A sufficient number of indicia exists in this case of a relationship of authority.

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7 See my paper, *supra*, for a more detailed analysis.

8 Major J. in *Sagaz*, at paragraphs 46-47.

9 *D & J Driveway Inc. v. Canada (M.N.R.)*, [2003] F.C.J. No. 1784 (QL), 2003 FCA 453. See also *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (QL) (F.C.A.); *Sauvé v. Canada*, [1995] F.C.J. No. 1378 (QL) (F.C.A.); *Lagacé v. Canada* (*M.N.R.*), [1994] F.C.J. No. 885 (QL) (F.C.A.), confirming [1991] T.C.J. No. 945 (QL). It should, however, be stated that, in *D & J Driveway* and *Charbonneau*, the Federal Court of Appeal did not expressly reject *Wiebe Door*, but it determined that a service contract existed because there was no relationship of subordination, thereby following the rules set out in the *Civil Code*.

10 Paragraph 16 of the decision.

12 *Commission des normes du travail v. 9002-8515 Québec Inc.*, REJB 2000-18725. See also the comments by the Minister of Justice, reproduced at paragraph 42 of my article, to the effect that the provider of services must "enjoy virtually total independence concerning the manner in which the contract is performed."

[38] Counsel for NBF also cited the following remarks by Bédard J. in *Caron, sub nom. 9020-8653 Québec Inc. v. Minister of National Revenue*:[25]

> [17] . . . However, I feel that contrary to the common law approach, once a judge finds the absence of a relationship of subordination, that is the end of the analysis to determine whether there is a contract for service. It is not necessary to consider the relevance of ownership of tools and the risk of loss or possibility of profit, since under the *Civil Code*, the absence of a relationship of subordination is the only essential element of a contract for service that distinguishes it from a contract of employment. Elements such as ownership of tools and the risks of loss or possibility of profit are not elements essential to a contract for service. However, the absence of

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25 2007 TCC 604.

> a relationship of subordination is a determining factor. With regard to the two types of contract, it must be determined whether there is a relationship of subordination. Obviously, the fact that the Worker acted as a contractor could be an indication that there was no relationship of subordination.
>
> . . .
>
> [19] I must note that the Appellant must show the absence of a relationship of subordination on a balance of probabilities to establish that there was no contract of employment. I must also note that if the evidence shows elements of both autonomy and subordination, the conclusion must be that there was a contract of employment because the contract for service must be carried out with no relationship of subordination. This is what Picard J. decided in *Commission des normes du travail v. 9002-8515 Québec inc,* No. 505-05-020995-963, April 6, 2000 (Superior Court of Québec):
>
> > 15. In order for there to be a contract of enterprise, there must be no relationship of subordination. . . . A sufficient number of indicia exists in this case of a relationship of authority.
> >
> > [Emphasis added.]

[39] Counsel for NBF submits that ample evidence clearly shows that NBF exercised direction and control over Mr. Massicolli's work. He submits that the fact that this obligation of control and direction over a worker is partly attributable to regulatory standards means that the worker in question is an employee. He reiterated that the need for such control is not attributable solely to the IDA regulatory standards; it also stems from NBF's business requirements. Among other things, NBF's reputation and its ability to make profits depend on such control. These considerations are also why NBF exercised its control and its right of direction over Mr. Massicolli's work. Counsel noted paragraphs 2 and 3 of the Partial Agreed Statement of Facts, which are worded as follows:

> [TRANSLATION]
>
> 2. The Appellant's securities brokerage services consist, among other things, in offering counselling and brokerage services to individuals through investment advisors, and in offering institutional brokerage and corporate finance services.
>
> 3. The counselling and brokerage services that the Appellant offers to individuals are rendered by investment advisors who are assigned to various branches throughout Canada, including the branch located in Pointe-Claire, Quebec ("the Branch").

[Emphasis added.]

[40] Counsel also referred to the following paragraphs:

> 9. In order to comply with IDA requirements during the Period, the Appellant implemented mechanisms for the supervision and control of transactions and operations involving Clients' affairs.
>
> 14. The Appellant was responsible for, among other things, billing and Client account receivables, and gave the Intervener the share of the commissions to which he was entitled.
>
> 18. Client files had to be stored at the Branch, and operations and transactions on Client accounts had to be effected or initiated from the office located at the Branch.

[41] As further evidence of the exercise of control and direction by NBF, counsel once again referred to the provisions of the *Code of Ethics* and the *Employee Guide*.

[42] He acknowledged that Mr. Massicolli was a model employee for NBF because he was very productive and his behaviour complied with NBF's rules of conduct. Consequently, the fact that NBF did not exercise as much control over Mr. Massicolli on a day-to-day basis as far as his schedule was concerned does not mean that it did not have a right of control over his activities.

• Mr. Massicolli's position

[43] Counsel for Mr. Massicolli did not dispute NBF's counsel's description of the rules that apply in determining whether Mr. Massicolli was an independent contractor or an employee – that is to say, the rules set out in the Civil Code. In addition, when, as an important ground of his argument that Mr. Massicolli was an independent contractor, he cited the fact that Mr. Massicolli alone bore all losses resulting from any investments poorly executed by him or by one of his assistants, I pointed out to him that risk of loss is not a relevant element in the Civil Code. His reply to my remark was that this factor was cited to establish the absence of a relationship of subordination. He thereby acknowledged – and was, in my opinion, correct in law in this regard – that the civil law approach should be adopted in determining Mr. Massicolli's status.

[44] First of all, counsel for Mr. Massicolli noted that the IDA's rules can apply to an agent who is not an employee, as shown by By-law No. 39. He also cited certain portions of the decision of the Federal Court of Appeal in *Combined Insurance Co. of*

America v. Canada (Minister of National Revenue), [2007] F.C.J. No. 124 (QL), 2007 FCA 60, and in particular the following:

> **70** The judge also referred to the control of the respondent's work quality in support of his finding that the appellant exercised control over the respondent. At paragraph 19 of his decision, he wrote "it is the degree of control exercised over the quality of work that counts". This was an error of law, as this Court's case law is consistent on this point: control of the quality of work, like that of results, does not necessarily create a relationship of subordination. They also should not be confused with control of the performance of work: see *Desbiens v. Attorney General of Canada*, [2005] F.C.J. No. 2103, 2005 FCA 439, at paragraph 6.
>
> . . .
>
> **72** . . . Finally, the evidence was that the appellant exercised only a limited amount of control over the results of the respondent's work, primarily to ensure compliance with statutory and regulatory requirements.
>
> [Emphasis added.]

[45] Thus, Mr. Massicolli submits that, in determining Mr. Massicolli's status, the application of IDA rules should not be taken into account. When asked to characterize the legal relationship between the Auger-Massicolli team and NBF, counsel for Mr. Massicolli stated that he considered it a contract for services and for the provision of premises and personnel, under which NBF provided the services or property in question, initially to Mr. Massicolli, and, as of May 2003, to the Auger-Massicolli team. He submits that Mr. Massicolli's assistants, and the Auger-Massicolli team's assistants, were his assistants or the team's assistants, not NBF's assistants. If NBF paid bonuses to its assistants, it was due to the service agreement between Mr. Massicolli and the Auger-Massicolli team on the one hand and NBF on the other. Thus, it was the Auger-Massicolli team, an undeclared partnership, which operated a securities brokerage business. It was this team that provided investment advice and financial planning services to clients under a contract for services between the team and the client.

[46] In Mr. Massicolli's submission, NBF bought and sold securities for Auger-Massicolli clients under a mandate conferred on NBF by the client. As for the keeping of portfolios belonging to clients served by the Auger-Massicolli team, counsel for the Appellant submits that this was under a type of contract of deposit, probably between the client and NBF.

[47] In order to justify the existence of the IDA's rules, counsel for Mr. Massicolli stressed article 2100 of the Civil Code, which states:

2100. The contractor and the provider of services are bound to act in the best interests of their client, with prudence and diligence. Depending on the nature of the work to be carried out or the service to be provided, they are also bound to act in accordance with usual practice and the rules of art, and, where applicable, to ensure that the work done or service provided is in conformity with the contract	**2100.** L'entrepreneur et le prestataire de services sont tenus d'agir au mieux des intérêts de leur client, avec prudence et diligence. Ils sont aussi tenus, suivant la nature de l'ouvrage à réaliser ou du service à fournir, d'agir conformément aux usages et règles de leur art, et de s'assurer, le cas échéant, que l'ouvrage réalisé ou le service fourni est conforme au contrat.
Where they are bound to produce results, they may not be relieved from liability except by proving superior force.	Lorsqu'ils sont tenus du résultat, ils ne peuvent se dégager de leur responsabilité qu'en prouvant la force majeure.

[Emphasis added.]

[48] In order to show that Mr. Massicolli was self-employed, his counsel cited the absence of a schedule, the fact that he had to develop his own clientele, the fact that most clients followed Mr. Massicolli and Mr. Auger to Desjardins Securities, the fact that they had to bear 100% of losses resulting from an investment, and the fact that they behaved as businesspeople when they incurred expenses, such as assistants' salaries, to earn their income. He also cited article 1308 of the Civil Code, which pertains to the administration of the property of others.[26]

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[26] That article reads:

[49] Counsel for Mr. Massicolli submits that NBF's role is like that of an intermediate broker. He also cited paragraph 105 of my article (cited in *Tambeau*, *supra*), notably at page 2:67:

> [105] Another direct proof of the exercise of the power of direction of an employer could be proof establishing that the payor trains the worker, unless the training relates only to knowledge of the products to be sold.[120] The imposition of rules of conduct or behaviour also constitutes direct proof, unless the rules correspond to standards that are applicable regardless of the worker's status, i.e. statutory standards.[121]

[120] *Sarrazin v. Canada (M.N.R.)*, [1997] T.C.J. No. 320 (QL), at paras. 10, 13 (chicken catchers in producers' poultry buildings: providers of services); *Service Barbara-Rourke*, *supra* (note 115), at para. 44; *Yunes v. Garland Canada Inc*., [2004] J.Q. n^{o} 8434 (QL) (S.C. Qué.), at para. 17 (door-to-door salesperson: provider of services); *Services de santé Marleen Tassé*, *supra* (note 31), at paras. 30, 74, 87; *Desrochers*, *supra* (note 116), at paras. 24-26.

[121] *Charbonneau*, *supra* (note 4), at paras. 7, 11; *Dr Denis Paquette*, *supra* (note 99), at para. 33 (n^{o} 8); *Services de santé Marleen Tassé*, *supra* (note 31), at paras. 16, 25, 63; *Neblina Spa Enr.*, *supra* (note 95), at paras. 5, 14, 16; *Ménard*, *supra* (note 98), at para. 8.

- Response

[50] In response, counsel for NBF submitted that the decision in *Combined Insurance* is not applicable to the instant case because of significant differences regarding the facts. Among other things, he noted the facts set out in paragraph 7 of the decision, particularly the fact that the worker in *Combined Insurance* worked for the payor on a non-exclusive basis, the fact that she

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1308. The administrator of the property of others shall, in carrying out his duties, comply with the obligations imposed on him by law or by the constituting act. He shall act within the powers conferred on him.	1308. L'administrateur du bien d'autrui doit, dans l'exercice de ses fonctions, respecter les obligations que la loi et l'acte constitutif lui imposent; il doit agir dans les limites des pouvoirs qui lui sont conférés.
He is not liable for loss of the property resulting from a superior force or from its age, its perishable nature or its normal and authorized use.	Il ne répond pas de la perte du bien qui résulte d'une force majeure, de la vétusté du bien, de son dépérissement ou de l'usage normal et autorisé du bien.

had complete freedom with regard to the people to whom she could make insurance proposals, and the fact that she needed to take out an appropriate insurance policy, at her expense, to cover her personal civil liability.

[51] He also noted that Mr. Massicolli's counsel's characterization of the legal relationship was complex while in reality the situation was much simpler. Mr. Massicolli's clients, and, subsequently, those of the Auger-Massicolli team, were NBF's clients. The contract for services was between those clients and NBF. The contractual relationship between Mr. Massicolli and NBF was a relationship stemming from an employment contract. It is because Mr. Massicolli was its employee that NBF had the right to exercise tight control over the performance of his duties as investment advisor and registered representative.

[52] Counsel for NBF made the following comments about the factors based on which his colleague submits that the Appellant is self-employed. As far as the schedule is concerned, he noted that Mr. Massicolli was someone who arrived at work very early and left very late. He exceeded NBF's standards. This is why little control was exercised over his schedule. As far as client recruitment is concerned, he noted that every account opening required NBF's approval. He also noted that all transactions on client accounts were controlled daily or monthly by NBF. In his submission, NBF's standards were a set of rules governing how work was to be done. The fact that the representatives had some flexibility in building their clientele and determining their niche did not cause NBF to lose its right to control its investment advisors' work in relation to that clientele. As for the status of agent contemplated in By-law No. 39, he noted that, according to By-law No. 2, IDA members and their employees had to agree to abide by the by-laws, regulations, rulings and policies, and that when a person engaged in securities related business as an agent, the member was responsible for the agent's conduct and had to supervise his actions. Lastly, the contract of agency (mandate) had to be approved in writing by the IDA under section 39.4(n) of By-law No. 39, and this approval was not obtained in the instant case.

Analysis

[53] I am in agreement with the summary given by counsel for NBF. However, I would like to add the following comments.

- Intention

[54] Since the starting point for determining whether Mr. Massicolli was employed in insurable employment is to establish whether he was bound by a contract of employment or a contract for services under the provisions of the Civil Code, it is important to consider how the parties themselves characterized the nature of their contractual dealings. In the case at bar, the evidence as to the parties' intention is clear: the parties wished to enter into an employment contract, not a contract for services. Indeed, Mr. Massicolli signed an employment application on August 26, 1993, with a view to becoming an investment advisor at LBG (now NBF). From LBG's point of view, it is clear that Mr. Massicolli was hired as a salaried employee because he was assigned Employee No. 11368 on the employment application form. The form makes reference to the position applied for and to the consideration of candidates' applications.

[55] As for Mr. Massicolli, he stated on the form that he wished to begin working for LBG, and that, if hired, he agreed to comply with the rules and practices in effect at LBG. In so doing, he clearly expressed his intent to subordinate his work to LBG's direction and control. The terms and conditions of hiring do not refer to fees, but rather to an "annual salary" in the form of commissions. In his letter confirming that Mr. Massicolli was being hired, Maurice Dupont, vice-president and branch manager, discussed the various terms and conditions on which Mr. Massicolli was being hired and expressed pleasure in welcoming Mr. Massicolli to his team.[27]

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[27] It should be pointed out that one part of the letter might seem confusing. Mr. Dupont states that LBG can terminate [TRANSLATION] "your association with our firm" (*association* in the original French) rather than referring to a contract of employment. Obviously, the French word "*association*" can have several meanings. It could mean that the two parties have formed a legal partnership. With respect to this question, Mr. Massicolli specified in his testimony that neither he nor Mr. Auger were partners ("*associés*") of NBF. The French word "*association*" can also mean simply "association". In my opinion, that is how the word should be understood in this instance.

[56] Another indicia that LBG hired Mr. Massicolli as an employee is the fact that it offered him numerous benefits, including, *inter alia*, various group insurance policies, such as life insurance, disability insurance, health insurance and dental insurance, the costs of which were generally borne by LBG/NBF. One of the few fringe benefits described in the *Employee Guide* that Mr. Massicolli was not entitled to was NBF's defined benefit pension plan. He was also entitled to several discounts on various services offered by NBF and NBC to their clients, though Mr. Massicolli asserts that he never availed himself of these privileges. I do not know of clients that offer such benefits to their suppliers (service providers). The only one that Mr. Massicolli named was Cascades. When I asked him to specify whether they were offered to suppliers, he acknowledged that they were limited to Cascades employees.

[57] In addition to intending to hire Mr. Massicolli as an employee, LBG/NBF continued to consider him an employee throughout the relevant period, since NBF prepared T4 information slips, in respect of the 2003 and 2004 taxation years, setting out the employment income that Mr. Massicolli received from NBF. Moreover, when he left the company on October 1, 2004, NBF prepared a Record of Employment in compliance with its obligations under the Act. Mr. Massicolli never challenged NBF's approach in this regard, except perhaps when he signed his commitment to comply with the *Code of Ethics*, since he struck out the words [TRANSLATION] "as a condition of my employment." [28]

[58] Not only did Mr. Massicolli sign an application for employment with NBF (then LBG) on August 26, 1993, he also acted consistently with the existence of an employment contract by reporting the income that he received from NBF as employment income. (See *inter alia* the income tax returns for the 2003 and 2004 taxation years, produced at tabs 39 and 40 of Exhibit INT-1.) In addition, on line 229 of his income tax returns, he deducted expenses incurred to earn that employment income. In this regard, he set out the details of these expenses on a Form T777. He did not fill out a statement of business income, which anyone who operates a business must file. The only business income that he reported was the sum of $400, from an activity other than brokerage.

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[28] See *infra*, at paragraph 78.

- The parties' conduct

[59] Naturally, it is possible that the two parties to the contract, namely NBF and Mr. Massicolli, were mistaken as to the true nature of their contractual relationship. It is the function of this Court to ensure that the conduct of parties in the performance of the contract was consistent with the intent that they expressed when they agreed to form the contract.[29] Among other things, the Court must ensure that all conditions essential to the existence of an employment contract were fulfilled. In the case at bar, the condition that might pose a problem is the existence of a relationship of subordination. As counsel for NBF noted in his oral argument, citing the Civil Code, cases and scholarly writing in support, in Quebec the criterion that distinguishes between a contract of employment and a contract of enterprise or for services is the existence of a relationship of subordination.

— Relationship of subordination

[60] This Court is rarely provided with such direct and abundant evidence of a right of direction and control over a worker's work. Generally, one has to turn to indirect evidence, based on a series of indicia of supervision, to determine whether a relationship of subordination exists. Here, the direct evidence of a right of direction and control, and of the exercise of that right, is found largely in the documentation, namely the *Employee Guide*, the *Investment Advisor's Guide*, the *Code of Ethics* and the *Compliance Manual.*

(i) *Employee Guide*

[61] Section 2.2 of the *Employee Guide* is the directive on attendance, and section 2.7 is the directive regarding the performance evaluation process (Exhibit A-2, volume 5, tab 23, section 2.2 (translation of the French version) and section 2.7 (English version):

> *2.2 Attendance*
>
> [TRANSLATION] It is our responsibility as employees to be present at work. Absenteeism affects the employee's entire department. When an employee does not work his or her hours as scheduled, or is absent without a valid reason, the employee's work must be done by colleagues, increasing their workload and affecting the quality of service to clients. An employee's daily contribution is essential to the smooth operation of the firm.

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[29] For a discussion of this process, see my article, at pages 2:63 *et seq.*

2.7 Performance Evaluation Process

The firm believes that employees should receive regular feedback on the quality of their work. Performance evaluation is thus the process whereby the manager evaluates the employee's current performance by identifying strengths and areas that require improvement. The process also allows for developing an action plan that encourages both professional development and acquisition of the skills required for the position.

The specific objectives of the performance evaluation process are to:

- Define clear, quantifiable performance criteria for employees.
- Discuss the following freely and openly with employees:
  - their current level of performance;
  - progress to be made in order to reach specific objectives;
  - current or potential problems.
- Provide employees and managers with a regular opportunity to communicate.

Evaluations at NBF are carried out between October 1 and November 15, whereas at NBCN they take place throughout the year on the anniversary of the employee's hire date.

Employees who have not received a performance evaluation may request that their supervisor/manager provide them with one.

[Emphasis added.]

[62] An investment advisor who is absent must ensure that he finds someone to replace him during those absences. This goes without saying, because clients must be able to contact an investment advisor at all times during regular business hours. Mr. Leclerc confirmed that an investment advisor cannot work for two brokerage firms at once. The *Investment Advisor's Guide* specifies NBF's policy in the event that an investment advisor is absent. Here are the first two points of the relevant directive (English version of Exhibit A-2, volume 4, tab 13, P100-11).[30]

- When an investment advisor is absent, unsolicited orders and *orders solicited in advance* must be executed first by a member of the investment advisor's team, either an associated advisor or an investment assistant, who is registered in the client's province of residence.

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30 This Policy is dated March 28, 2007. The evidence does not disclose whether it existed during the relevant period, but even if it did not, it illustrates NBF's right of control and direction over its investment advisors.

- If no team member is available/registered in the client's province of residence or if the absent investment advisor is not associated with another investment advisor and/or does not have an investment assistant who holds the appropriate licence, any such orders must be executed by the branch manager or his designated substitute who must hold the appropriate licences.

. . .

[Emphasis added.]

[63] As for Mr. Massicolli's schedule, Mr. Leclerc, the branch manager, acknowledged that investment advisors did not have to punch any time cards. Mr. Massicolli, in particular, had a great deal of flexibility with regard to his hours of work. On the other hand, like all investment advisors, he had to comply with certain minimum performance standards. Upon being hired, he was notified in writing that [TRANSLATION] "your progress will be monitored and reviewed regularly." If Mr. Massicolli had not worked enough hours during the regular business hours of NBF's Pointe-Claire branch, the first penalty would have been a commission reduction.[31] If the problem had continued for any length of time, NBF would have exercised control by demanding that Mr. Massicolli be at the office more frequently. If he had not complied with this instruction to be at the office longer in order to generate more business for NBF, disciplinary measures, up to and including Mr. Massicolli's dismissal, could have been taken. Since Mr. Massicolli was an excellent producer who generated high commissions during the relevant period — $457,943 in 2003[32] — it was obviously unnecessary for NBF to exercise control over his attendance at the Pointe-Claire branch.

[64] The *Employee Guide* prescribes the following dress code:

2.4 Dress Code

Each employee represents the firm in dealings with clients and colleagues, which is why professionalism is called for in regards to the choice of clothing.

[Emphasis added.]

[65] Mr. Leclerc confirmed that it was not necessary to intervene with respect to Mr. Massicolli's dress because it was exemplary.

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31 Advisors registered in the industry for five years, and with NBF for three years, who generated less than $55,000 in gross commissions during three consecutive months, would have their net commissions reduced by 33% for the following month (Exhibit INT-1, tab 8).

32 This amount was his share after the deduction of costs by NBF. Consequently, one can assume that the gross commissions, before the splitting, were in the range of $1 million.

(ii) *Investment Advisor's Guide*

[66] NBF has prepared an Investment Advisor's Guide, which discusses various corporate policies and procedures that investment advisors must follow. Since it would be too time-consuming to discuss all of them, I will only refer to a few. However, in order to illustrate the breadth of the guide, its table of contents has been reproduced in Appendix 1 to these Reasons for Judgment.

[67] Under the heading "Operations", there is a description of the steps to follow upon "Opening an Account – Retail".[33] Mr. Leclerc specifically stated that no account can be opened at NBF without NBF's consent. In order for an account to be opened for a client and for the account to be authorized by the branch manager, a "Client File" must be filled out by the advisor himself, not his assistant. The investment advisor must know his client well, and the "Client File" must contain all the requisite information. The advisor must obtain a copy of acceptable, non-expired IDs for any new client. The guide specifies which IDs and documents are acceptable. For individuals, these include a passport, driver's licence, health insurance card, etc. (Exhibit A-2, volume 4, tab 13, G500-01, page 5). According to the guide, the advisor must ensure that all requisite documentation is received and submitted to operations staff at the branch for verification (Exhibit A-2, volume 4, tab 13, pages 3 and 13).

[68] The branch manager exercises control over the conduct of his or her investment advisors through constant supervision. If the Client File is incomplete, the manager must refuse to open the account. If the client profile changes, notably with regard to the risk level that the client accepts, the file must be revised. In other words, if the investment objectives change, they must be noted in the Client File. Once the account is open, the branch manager continues to monitor all transactions on the account. The verification is done daily, monthly and annually. Mr. Leclerc acknowledged that the measures adopted by NBF might be stricter than IDA standards. One example that he gave is the rules for trading on margin. NBF's interest stems from the fact that, if it accepts high risk levels, it must have the capitalization level required by industry standards.

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[33] Appendix 2 to these Reasons for Judgment is the table of contents for the section of the document called "Opening an Account – Retail" (Exhibit A-2, volume 4, tab 13, G500-01).

[69] According to Mr. Massicolli, the Auger-Massicolli team adopted file-opening standards that were stricter than NBF and IDA minimum standards. For example, the client's signature was required in order to complete the Client File. Moreover, an assistant with his team looked after the compliance work, that is, ensuring that the investment decisions made by the team were executed properly by NBF's personnel; this consisted, among other things, in verifying the quantities and prices for purchase and sale transactions that were to be carried out. This may all be true, but it does not change the fact that NBF issued directives regarding these activities and exercised strict control over them.

[70] Page 4 of the section of the *Investment Advisor's Guide* pertaining to the credit policy (P100-01) discusses the settlement methods for cash accounts, and the Credit Department's intervention criteria.[34] For example, on the tenth business day following the settlement date, "[i]f by 2 p.m. the credit officer has not received confirmation from the investment advisor that the transaction has been completed, he may, if deemed necessary, liquidate or conclude the transaction that has not been settled. In the case of an involuntary liquidation or conclusion, no commission is credited to the investment advisor."(Emphasis in the original.) (English version of Exhibit A-2, volume 4, tab 13, P100-01, page 4).[35]

[71] The same section of the guide discusses the policy for recovering unsecured debit balances greater than $500 and less than $5,000. It states that, on the 26th day, if the situation is not settled, the credit officer turns the case over to a collection agency. The collection agency's fee, which amounts to 25% of the amount recovered, is assumed by the investment advisor. The guide states that the advisor has the option of using the Small Claims Court for amounts under $1,000.

[72] For balances greater than $5,000, NBF's legal department intervenes, and, generally, the collection fees may be shared equally between NBF and the investment advisor (English version of Exhibit A-2, volume 4, tab 13, P100-01, page 24).

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34 Appendix 3 to these Reasons for Judgment is the table of contents concerning this subject (English version of Exhibit A-2, tab 13, P100-01 of the *Investment Advisor's Guide*).

35 Under the heading "Unsecured Debit Balances", it is stated that a credit loss is always the investment advisor's responsibility. However, where the loss results from an administrative error, "the investment advisor's responsibility is limited to the steps that he undertook which contributed to the error."

[73] In the part entitled "Legal Fees, Settlements and Judgements Involving the Responsibility of Investment Advisors", it is stated that, where the complaint is considered serious and complex, legal fees will be charged equally to the investment advisor named in the lawsuit or involved in the alleged violation and to the branch where the advisor reported at the time the events in question occurred. However, all settlements must be paid by the investment advisor involved, and, should the advisor cease to be an employee of NBF, the advisor will remain responsible for their payment (English version of Exhibit A-2, volume 4, tab 13, P160-01, pages 2 and 3, effective August 30, 2004).

[74] In the part of the *Investment Advisor's Guide* concerning commissions payable by clients, there is a reference to the gross commission discount offered to clients. At page 2, it is stated that discounts cannot cause gross commissions to fall below the minimum commission without a penalty to the investment advisor, unless the branch manager approves such a discount. (English version of Exhibit A-2, volume 4, tab 13, policy P100-02). The branch manager is responsible for correcting any conduct that is not in keeping with NBF's interests or with the spirit of the policy set out in that guide.

[75] Another section of the *Investment Advisor's Guide* (policy P100-09) pertains to advertising. Its introduction notes that industry rules require advertising by NBF or one of its investment advisors to be approved first by a designated officer-administrator. The guide states that the branch manager has been mandated to assume this role. It also states that, in addition to receiving the branch manager's approval, certain types of advertising must be approved by NBF's Compliance Department. "Typical areas to watch for in advertising are omissions of relevant facts and qualifications, and any exaggerated, unwarranted or misleading statements or claims. Any particular rate or yield will require the relevant disclaimers. We must also ensure that specific securities are not on the Firm's restricted list." (English version of Exhibit A-2, volume 4, tab 13, policy P100-09, page 1 of 2.)

[76] The guide also contains a policy on communication with non-resident clients who live in tax havens. The policy has been in force since March 31, 2006. Although dated after the relevant period, it discloses that NBF has the right to exercise control over its brokers or investment advisors. Among other things, it states that "an investment advisor is not allowed to effect transactions via another securities broker or financial institution. All transactions must be transmitted to the authorized individual in the trading desk." (English version of Exhibit A-2, volume 4, tab 13, policy P120-10 of the *Investment Advisor's Guide*, at page 1). It states that the general objective of the policy is to promote a "proactive" approach aimed at protecting NBF's integrity and reputation and maintaining high ethical standards in dealings with non-resident clients. The goal is to ensure compliance with regulations in accordance with the "Know Your Client" rule, IDA Regulation 1300 (Identification of Beneficial Owners), the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and Internal Revenue Service regulations. One of the control measures adopted by NBF with respect to electronic mail is the following: "The content of messages and documents transmitted and received will be swept by special software in order to identify communication written to and from jurisdictions identified as tax havens." (English version of Exhibit A-2, volume 4, tab 13, section P120-10, page 5).

(iii) The *Code of Ethics*

[77] In April 2003, the president and CEO of NBF presented a new *Code of Ethics* to his employees. Mr. Leclerc said that it was adopted following a market downturn; the bad publicity created by the Enron and Nortel affairs comes to mind.

[78] In the *Code of Ethics*, NBF's president states that it is important that all employees read and fully understand the Code so that its principles become their *modus vivendi*, guiding them in the advice they give and the actions they take with regard to NBF's clients and other stakeholders as well as to their fellow employees. The president states that "[t]he laws and regulations set forth by securities regulators and self-regulatory organizations provide detailed rules on how we must conduct our operations; the Code of Ethics represents the spirit in which all of us must work in order to ensure the integrity and good reputation of our organization." (Introduction to the English version of the *Code of Ethics*, dated February 2004, the French version being Exhibit A-2, volume 5, tab 17, page 1). Section 2 of the Code specifies that "employees are required to annually acknowledge in writing compliance with the Code of Ethics (and any amendments) as a condition of their employment" and that any breach the Code "could result in sanctions, including dismissal for cause". (Exhibit A-2, volume 5, tab 17, page 3.) On September 12, 2003, Mr. Massicolli signed the "Acknowledgment and Undertaking" form, committing him to abide by the rules of the *Code of Ethics* and the Computer Security Policy. However, he struck out the words [TRANSLATION] "as a condition of my employment" (see Exhibit A-2, volume 5, tab 22).

[79] The *Code of Ethics* contains numerous rules that must be followed, including rules pertaining to the confidentiality of information. For example, it specifies, in section 3.7 of the English version: "A client's affairs will be held in the strictest confidence. An employee may not personally benefit from any knowledge of a client's confidential information or affairs, or by disclosing such confidential information to another party to allow such other party to benefit from such knowledge."

[80] One of the measures concerning conflicts of interest states: "Gifts and entertainment should not place the employee in a compromising position and should not influence the decisions that we make in the performance of the duties performed for the Firm." (Section 3.8 of the English version, the French version being Exhibit A-2, volume 5, tab 17, page 6). The same section states that all employees functioning as directors of private or public companies must secure the necessary approvals required by NBF prior to agreeing to function in that capacity with a company other than NBF.

[81] NBF has established policies relating to advantageous transactions, that is to say, transactions that show "a strong probability of gain and a degree of exclusiveness in the right to participate." Section 3.8 states that "[w]henever developments occur which present a conflict of interest between the employee and his clients or the Firm, the employee must inform his supervisor so that actions can be taken to resolve the conflict."

(iv) *Compliance Manual for Branch Managers*

[82] In carrying out their duties, branch managers must follow the instructions contained in the *Compliance Manual for Branch Managers*.[36] The document is meant to complement the *Compliance Manual* and its purpose is to detail the legislation that branch managers must follow and to guide them in their day-to-day tasks. IDA Policy No. 2 establishes minimum standards for the supervision of retail accounts. The policy does not preclude members like NBF from adopting higher standards of supervision. For example, NBF can issue instructions to its investment advisors restricting trading in certain securities. The list of restricted securities may be drawn up and issued by NBF's legal services department or finance department.

[83] One of the supervision measures pertains to the opening of accounts for non-residents (other than U.S. residents). The measure expressly states that investment advisors must obtain the Compliance Department's approval to open such accounts.[37] The *Compliance Manual for Branch Managers* sets out the daily and monthly monitoring that branch managers must do and the points to verify, including excessive concentration of securities, transactions not suited to the client, excessive number of transactions, conflicts of interest between investment advisor and client trading activity, inappropriate/high-risk trading strategies, deterioration of the quality of client portfolios, and outstanding margin calls.

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[36] Appendix 4 to these Reasons for Judgment contains part of the manual's table of contents (not including the description of its appendices).
See Exhibit A-2, volume 5, tab 14, page 18 (French version of the *Compliance Manual for Branch Managers*).

[84] Monthly account statements of clients who have generated at least $1,500 in commissions,[38] monthly account statements of employees, discretionary account statements and statements for accounts in which mail has been waived must be reviewed on a monthly basis for compliance. The *Compliance Manual for Branch Managers* specifies what points to check and what measures to take. For example, if the branch manager notices excessive volume, i.e. the ratio of gross commissions generated by the advisor exceeds 1.5% of the assets under management, and inappropriate conduct is noticed, disciplinary measures can be considered (see Exhibit A-2, volume 5, tab 14, pages 31 and 36 of the *Compliance Manual for Branch Managers*, and pages 32 and 36 of the English version).

[85] Mr. Massicolli submits that there was little supervision of his work because he and Mr. Auger did the compliance work themselves, through one of their assistants, whose very duty was to do such work. Nonetheless, in an advertising letter boasting the merits of the Auger-Massicolli team and describing the "MWA Basket Portfolio", Luc Paiement, NBF's president of individual investor services, took care to specify that the fund was managed by Mr. Auger and supervised by NBF's portfolio management department, a special committee that meets every three months to confirm that the investments that have been made are coherent at all times, and [TRANSLATION] "fully in line" with the financial objectives of the "MWA Basket Portfolio" (see Exhibit INT-1, tab 32, page 108).

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38 Mr. Massicolli said that all his clients generated more than $1,500 per month.

[86] The *Compliance Manual for Branch Managers* also deals with the IDA rules that require registered personnel to participate in a continuing education program in order to keep their registration in force.[39] In this regard, branch managers are required to follow the professional development of the investment advisors and registered personnel at their branch. Thus, they must follow and even guide them in their progress. They must also make sure that personnel respect the deadlines for passing continuing education courses (page 76, paragraph 3.6 of the manual, the French version being Exhibit A-2, volume 5, tab 14, page 85).

[87] Lastly, paragraph 3.9, which deals with trading practices, contains specific directives regarding the manner in which things are to be done; among other things, it is forbidden to solicit client orders on the basis of rumours: "NBF prohibits its employees from spreading rumours of a sensational nature likely to affect the market conditions." (English version of Exhibit A-2, volume 5, tab 14, page 91.)

[88] The conclusion of the *Compliance Manual for Branch Managers* sets out the objectives of efficient branch-level supervision. It states that "efficient supervision is good business practice that translates into acquiring and upholding the branch's good reputation in the eyes of both clients and employees" (page 83 of the manual, which is the English version of Exhibit A-2, volume 5, tab 14, page 93).

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[39] In Policy No. 2, the Introduction to Part I, "Establishing and Maintaining Procedures, Delegation and Education", states:

> **Introduction**
>
> Effective self-regulation begins with the Member establishing and maintaining a supervisory environment which both fosters the business objectives of the Member and maintains the self-regulatory process. To that end a Member must establish and maintain procedures which are supervised by qualified individuals. A major aspect of self-regulation is the ongoing education of staff in all areas of sales compliance.
>
> [Emphasis added.]

Under the next heading, "Establishing Procedures", it is specified, at paragraph 4, that "[a]ll policies established or amended should have senior management approval."

[89] Mr. Leclerc stated that if an investment advisor failed to comply with the directives given by NBF, or contravened those directives, NBF's response could range from a notice in writing to a disciplinary measure, and even a dismissal. Mr. Leclerc reiterated that it is in NBF's interest to ensure that its clients have a high level of trust, because its reputation depends on it.

(v) The existence of a regulatory framework

[90] The fact that IDA rules required NBF to supervise its employees very closely does not mean that those employees cannot be considered employees and that those rules are to be excluded in determining the true nature of the contractual relationship between NBF and its personnel. Given the importance of soundly managed financial markets in Quebec and throughout Canada, and given that the adoption of abusive or fraudulent practices by certain brokerage firms would have serious repercussions on all brokerage firms (including reduced investor confidence in the brokerage industry) it should come as no surprise that the various brokerage firms joined together to form the IDA and adopt strict regulations, and that the Commission des valeurs mobilières saw fit, in 1982, to entrust the administration and regulation of securities brokers' activities to the IDA.

[91] An analysis of the IDA rules discloses no obligation on the part of a member to supervise and control businesses operated by other brokers, except if an unincorporated agent (unincorporated salesperson) is involved. NBF must exercise control over its own business, and in particular its own personnel, including its investment advisors, through which it operates its securities brokerage and counselling services business. A reading of these rules shows that they apply to "members and their partners, directors, officers, and employees".[40] Some of the IDA's rules add members' agents to this list.[41] When such agents are involved, "the Member shall be responsible for, and shall supervise the conduct of the agent in respect of the business" (By-law 39.4(c)) and "shall be liable to clients . . . for the acts and omissions of the agent relating to the Member's business as if the agent were an employee . . ." (By-law 39.4(d)). It should be recalled that an agent conducts business on behalf of the principal. It goes without saying that a member is required to exercise control over his agent.[42]

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40 See, for example, the "objects" of the IDA, set out in its Constitution, paragraph 2(b) of which is reproduced in part at paragraph 28 of these Reasons for Judgment.

41 See, *inter alia*, the rule concerning "managed accounts" (Regulation 1300, section 7).

42 In my opinion, IDA By-law No. 39, its last, was added in order to include the case of a person who might not be considered an employee in Canada's common law provinces. Since those provinces, unlike Quebec, have no codification of laws, it is the courts that have

[92] It should also be borne in mind that Mr. Massicolli asserted that he was not acting as an agent of NBF. Rather, in his submission, NBF was acting as his agent when it issued invoices to his clients, collected on unpaid accounts and paid his assistants' remuneration.

— NBF's business, not Mr. Massicolli's

[93] The evidence as a whole amply shows that the brokerage business, including the provision of investment counselling services, was NBF's business. It should also be recalled that the parties agreed that the business carried on by NBF was a brokerage services business which consisted, among other things, in offering investment advice to individuals through investment advisors.

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developed the criteria to distinguish between an independent contractor and an employee. Control is only one of the many criteria that the courts use in this task. It has often been considered unreliable (see, *inter alia, Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at page 736). In fact, courts sometimes consider it "neutral" and ascribe more importance to other criteria such as risk of loss, ownership of tools and chance of profit. It was in all likelihood to deal with the possibility that a representative could be considered self-employed under such circumstances that the IDA deemed it best to deal with cases in which the representative is a member's agent. In Quebec, it would be hard to imagine that an agent (mandatary) who is subject to such a high degree of direction and control on the part of a member would not be considered the member's employee, because the province's National Assembly has chosen to make a relationship of subordination, that is to say, the fact that the work is done under the payor's direction and control, the decisive criterion in distinguishing between an employee and a self-employed worker. In adopting By-law No. 39, the IDA ensured that its regulatory norms would be applied uniformly throughout Canada. Even if this was not the IDA's intent, it is the result.

[94] Even though in correspondence and other communication, casual reference might be made to "Mr. Massicolli's clients" or "your clients", I have no doubt that the clients in question were NBF's, and this includes the clients who were directly solicited by Mr. Massicolli as well as those who were transferred to another NBF investment advisor in consideration of $25,000.[43] Being an employee of NBF, and therefore acting in NBF's name and on its behalf, Mr. Massicolli solicited potential clients for NBF's benefit. When the clients agreed to "do business" with Mr. Massicolli, he opened an account with NBF and subjected himself to NBF's strict standards regarding the opening of new accounts. These clients legally became clients of NBF. In fact, when Mr. Massicolli terminated a service contract with one of "his" clients in May 2004, he thanked the client for [TRANSLATION] "the trust that you have shown in [NBF] for all these years."

[95] Mr. Auger and Mr. Massicolli acknowledged that, upon leaving NBF in October 2004 and joining Desjardins Securities, they were not able to bring "their" clients' files with them. They thereby recognized, at least implicitly, that these clients belonged to NBF. The clients themselves had to ask NBF to transfer a copy of their file and their entire portfolio (which they were entitled to do) so that the Auger-Massicolli team could continue to provide them with services at their new employer's place of business.[44]

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[43] In *Bouchard v. Canada*, [2008] T.C.J. No. 356 (QL), my colleague Favreau J. recently held that the consideration received for a similar transfer by NBF investment advisors constituted income from employment, not a retiring allowance or proceeds from the disposition of goodwill.

[44] Exhibit INT-2, tabs 41, 42 and 43. Mr. Leclerc, the West Island branch manager, estimated that, after Mr. Auger and Mr. Massicolli left, NBF retained 50% of the clients served by the Auger-Massicolli team, measured on an assets-under-management basis. According to Mr. Massicolli, most of the clients whom he advised, and whose portfolios he managed, followed him to Desjardins Securities.

[96] While Mr. Massicolli did enjoy some degree of flexibility in terms of the way in which to perform his work, and this was reflected in, among other things, the choice to associate with Mr. Auger and adopt a business model focussing on the discretionary management of portfolios held by Quebec entrepreneurs, numerous authorizations did have to be secured from NBF management. The fact that Mr. Auger had the necessary experience and qualifications to manage portfolios meant that Mr. Massicolli was able to pursue his approach, which did not prioritize commissions, but rather investment advice in exchange for fees. However, when it came time to organize a marketing campaign or do a mass mailing of advertising letters, NBF's authorization was needed. It was entirely normal that NBF should have its say regarding these matters, not only because its clients were involved and because of IDA rules, but also because the firm's reputation was on the line. It was entirely justified for it to exercise control over the manner in which its business was operated.

[97] In order to show that he and Mr. Auger carried on business as self-employed workers, Mr. Massicolli called Mr. Auger as a witness. He stated that he developed a business plan without requiring NBF's approval. As an example, he cited his fee schedule for management services offered in the "MWA Basket". Upon being questioned by the Court, he acknowledged that the schedule was essentially similar to NBF's, except that NBF offered far more services for the same fees. Indeed, the Auger-Massicolli advertising brochure says that their management fees cover portfolio management, financial advice, account management, and accompanying clients to their meetings with business partners such as accountants, tax experts, lawyers, bankers, insurers and other professionals (Exhibit INT-1, tab 32, at page 106).

[98] It is true that, under the contractual agreement between Mr. Massicolli and NBF, Mr. Massicolli was liable for any loss incurred by NBF if fees could not be recovered or if a client's investment resulted in any other loss. It is also true that Mr. Massicolli had to incur several expenses to earn his commission income; these expenses included, but were not limited to, the salary of certain additional administrative assistants that Mr. Massicolli or the Auger-Massicolli team felt it useful to have; the cost of purchasing certain equipment, including electronic equipment; and the cost of financial data services, such as the Bloomberg service. The existence of such an agreement or of such terms and conditions is not inconsistent with the existence of a contract of employment. Other examples of this that readily come to mind are cashiers at supermarket chains or other retail sales businesses, who are often held responsible for discrepancies in the till; commissioned

sales agents who pay their own transportation costs; and construction workers who supply their own small tools.

[99] One must bear in mind that NBF had adopted a business model in which its investment advisors received roughly 50% of the gross commissions collected by NBF in consideration of their brokerage and investment counselling services. NBF could just as well have borne all the expenses, and remunerated its investment advisors by paying them a fixed salary with a bonus, or a much lower percentage than the 50% of gross commissions that was paid. In view of the context, it is entirely understandable that NBF determined that certain expenses should be wholly borne by the investment advisors if they were to be entitled to a 50% commission.

[100] In my opinion, the letter of January 24, 2004, expressing the Auger-Massicolli team's frustration, reflects the fact that Mr. Auger and Mr. Massicolli no longer wanted to behave like the (commissioned) employees that they were, but rather as persons acting independently from NBF, which was not permitted under IDA rules unless they themselves became members of the IDA.

[101] Certain arguments put forth by counsel for Mr. Massicolli are worth commenting on. In his oral submissions, counsel acknowledged that the contract entered into when his client was hired might be an employment contract. However, he said that the contract was later transformed into a contract for services. When I asked him when this transformation occurred, he initially said: [TRANSLATION] "At the end of the nine-month period in which NBF paid a base salary of $15,000 for the first nine months." When asked to confirm whether it was indeed at the end of this nine-month period that the service contract came into being, counsel for Mr. Massicolli did so. But when I asked him to specify what had changed in the conduct of Mr. Massicolli's activities that would justify such a conclusion, his counsel was unable to do so. As I have stated, only the terms and conditions of remuneration had changed. Subsequently, counsel said that the change occurred later, when the business model adopted by Mr. Auger and Mr. Massicolli changed and they adopted the portfolio management model.

[102] According to Mr. Massicolli's conception of things, his business was to offer investment counselling services, and this business was regulated by the IDA. On cross-examination by counsel for NBF concerning the minimum capital requirements set out in IDA By-law No. 17, Mr. Massicolli replied that it was NBF, his supplier of services, which needed to have this minimum capital (see Exhibit A-2, tab 17, By-law No. 17). By-law 17.1 states that all members "shall have and maintain at all times risk adjusted capital greater than zero calculated in accordance with

Form 1 and with such requirements as the Board of Directors may from time to time prescribe."

[103] The interpretation of the facts proposed by counsel for Mr. Massicolli cannot be reconciled with the parties' conduct, since the Payor, NBF, continued to prepare T4 information slips and T2200 forms, a fact that clearly shows that NBF considered Mr. Massicolli its employee. In fact, in the income tax returns that he prepared, Mr. Massicolli even entered his commission income paid by NBF, and his fees, as income from employment.

[104] The fact that Mr. Massicolli and Mr. Auger formed an undeclared partnership is not inconsistent with the existence of a contract of employment. There can be a contact of partnership even if the parties to the contract do not carry on a business. Indeed, article 2186 of the Civil Code defines a contract of partnership as "contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits." (Emphasis added.) Consequently, it is possible to have a partnership made up of people who seek to make and share pecuniary profits even though the activity in which they engage is not the operation of a business. Thus, in my view, the activity could consist in providing services as an employee, or leasing property.

[105] In summary, the evidence amply demonstrates that there was a relationship of subordination between Mr. Massicolli and NBF during the relevant period. The contract between Mr. Massicolli and NBF was a contract of employment, not a contract for services.

[106] For all these reasons, NBF's appeal is allowed and the Minister's determination is reversed. Carlo Massicolli was employed by NBF in insurable employment during the period from January 1, 2003, to October 1, 2004.

Signed at Ottawa, Canada, this 16th day of January 2009.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of March 2009.

Brian McCordick, Translator

Appendix 1

FINANCIÈRE BANQUE NATIONALE

GUIDE DU CONSEILLER EN PLACEMENT — G000-03

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Appendix 2

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Appendix 3

FINANCIÈRE BANQUE NATIONALE

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CITATION:	2008 TCC 624
COURT FILE NO.:	2008-224(EI)
STYLE OF CAUSE:	FINANCIÈRE BANQUE NATIONALE INC. v. MINISTER OF NATIONAL REVENUE AND CARLO MASSICOLLI
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	July 17 and August 1, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	January 16, 2009

APPEARANCES:

Counsel for the Appellant:	Wilfrid Lefebvre Vincent Dionne
Counsel for the Respondent:	Mounes Ayadi
Counsel for the Intervener:	Serge Racine Stéphane Larochelle

COUNSEL OF RECORD:

For the Appellant:	
Name:	Wilfrid Lefebvre Vincent Dionne
Firm:	Ogilvy Renault, LLP Montréal, Quebec
For the Intervener:	
Name:	Stéphane Larochelle
Firm:	Séguin Racine, Avocats Ltée Laval, Quebec
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada