

2001-3601(EI)
2001-4483(EI)

BETWEEN:

AMERICAN INCOME LIFE INSURANCE COMPANY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *American Income Life Insurance Company* (2001-3602(CPP) and 2001-4485(CPP)) on April 10, 2002 at Vancouver, British Columbia, by

the Honourable Deputy Judge D.W. Rowe

Appearances

Counsel for the Appellant:

Cheryl M. Teron

Counsel for the Respondent:

Nadine Taylor

JUDGMENT

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

Signed at Sidney, British Columbia, this 18th day of July 2002.

"D.W. Rowe"

D.J.T.C.C.

2001-3602(CPP)
2001-4485(CPP)

BETWEEN:

AMERICAN INCOME LIFE INSURANCE COMPANY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *American Income Life Insurance Company* (2001-3601(EI) and 2001-4483(EI)) on April 10, 2002 at Vancouver, British Columbia, by

the Honourable Deputy Judge D.W. Rowe

Appearances

Counsel for the Appellant:

Cheryl M. Teron

Counsel for the Respondent:

Nadine Taylor

JUDGMENT

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

Signed at Sidney, British Columbia, this 18th day of July 2002.

"D.W. Rowe"

D.J.T.C.C.

Date: 20020718
Dockets: 2001-3601(EI)
2001-3602(CPP)
2001-4483(EI)
2001-4485(CPP)

BETWEEN:

AMERICAN INCOME LIFE INSURANCE COMPANY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.T.C.C.

[1] The appellant appeals from a decision dated July 4, 2001 wherein the Minister of National Revenue (the "Minister") decided that the employment of Camille Burbank with American Income Life Insurance Company (American) during the period from April 23 to August 23, 2000 constituted both insurable and pensionable employment pursuant to the relevant provisions of the *Employment Insurance Act* (the "Act") and the *Canada Pension Plan*, (the "Plan") respectively, because he was employed under a contract of service. A separate appeal - 2001-3602(CPP) - was filed and parties agreed it would be heard together with the other appeals as noted below.

[2] The appellant also appeals – 2001-4483(EI) - from a decision dated September 19, 2001 wherein the Minister decided that the employment of Jerry Jahraus - with American - during the period from October 16, 2000 to January 26, 2001 was both insurable and pensionable employment pursuant to the *Act* and the *Plan*, respectively, because he was employed under a contract of service. A separate appeal – 2001-4485(CPP) - was filed and the parties agreed it would be heard together with the other appeals earlier mentioned.

[3] Leave to amend the Notice of Appeal filed in 2001-3601(EI) was granted with respect to paragraph 1 thereof, to substitute "contract for services" in place of "contract of services" in line 1; in addition, an amendment to paragraph 35 replaced the date "August 23, 2001" with "August 23, 2000."

[4] Debbie Gamble testified she was a Senior Vice-President of the appellant and - in February 2000 - worked in the Agency Department which deals with coordinating interaction between field agents and the Home Office. Prior to assuming that responsibility, Gamble had worked for the appellant for 22 years as a vendor of life and health insurance policies. The appellant has three offices, one in Waco, Texas, another in Indiana and another in Washington, D.C. There are 250 employees in the Waco office who are not directly involved in selling insurance policies. Gamble stated the appellant enters into contracts with individuals or entities as agents within an assigned area and these persons or entities are afforded the opportunity to build a larger agency. There are various levels of agents, included a Managing General Agent (MGA), State General Agent (SGA) and agents at three other levels who earn different commissions based on placement within the organizational structure referred to as "the hierarchy." The appellant began operating in Canada in July, 1998 and currently has contracts with 185 agents. Over the past 13 years, American has probably contracted with between 240 and 300 agents per year because the drop-out rate is high. Gamble stated there had been an earlier decision issued by the Minister wherein 7-10 persons had been ruled to be employees but since the amounts assessed were small, the appellant elected to pay it rather than appeal the resulting assessment. Gamble referred to a contract – Exhibit A-1 – entered into between American and Camille Burbank and another – Exhibit A-2 – between American and Jerry Jahraus. On page 2, Gamble referred to a clause stating "The Agent is not an employee of the Company." According to the SG designation, Burbank was entitled to receive a commission of 40% on the sale of policies. Jahraus was able to receive the same rate but was listed under two other persons who would be entitled to earn commissions based on his sales. Contracts with potential agents were sent to Tania Donaldson, Assistant Vice-President in Agency, in Waco, Texas for signature on behalf of the appellant. Gamble explained that agents are recruited as a result of placing advertisements in newspapers but these are not paid by American. Instead, they are inserted by existing senior agents seeking to add to their scope of operations. Each policy sold produces a specific amount of premium but there are varying commission rates because different types of insurance – such as accident and disability - have lower profit margins and the remuneration to agents in respect of this coverage is approximately 50% of that earned for selling a life insurance policy. Gamble stated American provided no instructions concerning the manner in which sales should be made nor were agents required to provide any reports. American did

not establish any routes or territories and there were no deadlines or priorities established in order to motivate agents to make sales. There is no requirement by American that an agent has to undertake any certain number of presentations within a specified time. The appellant did not require agents to attend any meetings and they were able to hire their own workers to assist in various ways with the proviso that only a licensed agent could submit an application for insurance coverage to the appellant. Both Burbank and Jahraus were licensed by the Province of Alberta and could sell insurance policies anywhere in the province. Gamble referred to a T4A – Exhibit A-3 – issued to Burbank – which stated he had earned the sum of \$5,391.56 by way of self-employed commissions during the 2000 taxation year. A T4A – Exhibit A-4 – issued to Jahraus - indicated his self-employed commissions – in 2000 – were in the sum of \$1,227.54. A letter – Exhibit A-5 – dated September 25, 2000 - sent by the Agency Department of American to Burbank - informed him that he owed the sum of \$1,218.00 and that this amount – if not re-paid – would be included in the T4A. A similar letter – Exhibit A-6 – was sent to Jahraus indicating he owed American the sum of \$1,952.00. Gamble explained that agents could receive advances against anticipated commissions arising from first-year renewals of policies and the system utilized a formula for determining the amount of an advance even though the premium had not been received by the appellant. Usually, commissions were paid to agents on a monthly – or other regular - basis only after the appellant had received payment from a policyholder. The ledger sheets respecting commission earnings and payments to both Burbank and Jahraus were filed as Exhibits A-7 and A-8, respectively. Gamble stated the purpose of the ledger statements is to record the monetary position of an agent in relation to the appellant. The record keeping is important because the contracts between American and the agents with the SGA or MGA designations required these individuals to assume any debts arising from advances - by American – to agents under them in the hierarchy. When an agent submitted a completed application to American, a blank cheque accompanied the form and if the policy was issued by the appellant then the said cheque was used to establish a mechanism with the designated financial institution for automatic withdrawal each month. The decision whether or not to issue the policy - based on acceptable levels of risk - rested solely with the appellant. Since Burbank and Jahraus held only a Level-1 license in Alberta, they were not permitted to sell policies for companies other than American but other levels of license did permit an agent to undertake sales of product offered by other insurers. American had no offices within Canada and the services provided by agents usually took place within the homes of prospective policyholders. In order to function, an agent required a vehicle, cell phone and an in-home office. Gamble stated American provided standardized sales forms that had been earlier approved by a regulatory agency in some jurisdiction or other as appropriate for solicitation of business. Agents had to bear their own

expenses and were not reimbursed by the appellant nor were any source deductions made since it was always the intention of the appellant that agents would be operating their own business as independent contractors. The office in Waco received notice – Exhibit A-9 – from Ms. Lyse in Calgary that Burbank's relationship - as an agent – with American was terminated, effective September 15, 2000. A termination notice – Exhibit A-10 – with respect to Jahraus was effective January 26, 2001.

[5] In cross-examination, Debbie Gamble stated the Head Office of American was in Waco, Texas. She was referred to a document – Exhibit R-1 – indicating a Calgary, Alberta address and Gamble stated there was an entity – known as Altig – that functioned as a State General Agent pursuant to a contract with American. Altig advertised in Calgary newspapers seeking persons interesting in selling life insurance and was able to pay commissions at varying levels to agents working under it. Each level of agent is paid a different commission rate and both Burbank and Jahraus were at a 40% commission for the first 60 days of their contract. American handled the tracking of commission amounts due to agents and these were paid monthly but advances could be made on a weekly basis. Altig – an agency business owned by Richard Altig and operated as a proprietorship – carried on business in 17 States in the United States and in the Western Provinces. Any agents holding Level 1 licenses issued by the Province of Alberta had American named as the company for which policies could be solicited from the public. Gamble stated American provided certain forms to agents such as those required to change beneficiaries or methods of payment but it did not provide any referrals directly.

[6] In re-examination, Gamble stated she had not seen the document - Exhibit A-1 – until it was handed to her in Court and added that American had not authorized Altig to use that particular letterhead. As for contracting with Altig as an individual operating an agency as a proprietorship, Gamble stated it was a standard business practice of American to avoid dealing with corporations since it wished to reserve the right to pursue any indebtedness against a person rather than a corporate entity.

[7] Melinda-Rae Lyse testified she resides in Calgary, Alberta and is a Regional General Agent selling insurance policies pursuant to a contractual arrangement with American. She began as an agent in 1994 and stated that Altig has several offices in Canada and in the United States. Lyse operates an office from her home and also sells policies in Edmonton, Alberta and London, Ontario and uses the premises of Altig in those cities. In Calgary, she also works out of the Altig office but does not pay any rent as it is not a private space and is available for other agents to use. Lyse explained she has two employees both of whom are subject to source deductions. They work out of the Altig office in Calgary or from her own home office. She is

responsible for payment of their salaries and is not reimbursed by either Altig or American. Lyse described the hierarchy as commencing – at the top – with the State General Agent or SGA, a designation held by Altig. Next, is the Regional General Agent – RGA – and then Master General Agent – MGA – followed by General Agent – GA – and a Supervising Agent or SA. Lyse stated that – as an RGA – she would receive a portion of any commissions earned by persons below her in the hierarchy. As the direct selling agent, her commission rate was set at 75% of the premium collected in respect of any policy sold through her own efforts. The agent's contract – Exhibit A-1 – was also signed by Lyse in her capacity as the MGA. The contract – Exhibit A-2 – with Jahraus was signed by Steve Lee as MGA and Lyse as RGA. Lyse stated Altig placed advertisements seeking persons - who would be suitable to work as agents - by inviting responses from individuals searching for a career but there was no specific mention of the product to be sold. Once persons were accepted as agents – and properly licensed – there was no requirement for them to report to the Altig office and applications for insurance were delivered to the MGA and/or RGA for forwarding to the American office in Waco. There were no working hours set but a model was provided that an agent could follow in order to be successful in the insurance business. As an RGA, it was in her best interest to have agents under her that could produce sales since she would receive a share of all commissions generated. A presentation of printed material – approved by the Alberta Insurance Council – was available for use by agents. Each Friday, agents usually reported to the persons above them in the hierarchy and provided details of the number of appointments made, presentations completed and sales achieved. However, attendance was not mandatory and Burbank and/or Jahraus did not always attend. The highest rate of attendance by agents – about 75% - was at sales meetings when matters relevant to increasing production were discussed but failure to attend did not carry any consequences if an agent elected not to participate. Agents were encouraged to report on which leads had been followed up so as to avoid a duplicate visit by another agent. There was no ability to issue any disciplinary action to any agent who did not follow up on leads but – as RGA – Lyse would not issue further cards with names of potential purchasers. While a licensed agent is the only one authorized to sell the insurance policy, other persons may be hired to set up appointments and to carry out administrative aspects pertaining to the business. Even if agents had been engaged previously in selling for another insurance company, they still had to be trained – for between one and three days – because the American product was different. Study materials and a sample examination were provided for potential agents to use in preparing to write the licensing tests. Lyse stated that American wanted agents to generate the sum of \$12,000 in annualized life insurance premiums in each quarter but if that goal was not attained then a three-month extension was granted. Agents could obtain an advance from American calculated on

the basis of 65% of probable commission earnings. Statistics concerning the number of sales calls required to be made in order to generate a certain level of income were provided by American and were well known with the overall insurance industry. Sales calls were made at homes of the prospects and common space - within the Altig premises - was available on Fridays so the necessary paperwork could be completed. The agents could use the copier and fax machines but there were no special phone lines available for their specific use. Potential agents had to be sponsored by an insurance company and had to purchase books – at a cost of \$75 – and pay a fee of \$50 to write the two examinations as well as a licensing fee of \$85, if they obtained passing grades. The overall cost of cell phones, office supplies, vehicles expenses or entertainment and promotion incurred by an agent was not reimbursed by anyone. Lyse stated that Burbank had signed a contract with American on the basis he would be operating as an independent contractor. In her experience, individuals were given an ample amount of time to read, reflect and consider implications of the contract prior to signing and submitting it to American for signature by a designated representative in Waco.

[8] In cross-examination, Melinda-Rae Lyse stated American does not have an office in Calgary even though the letterhead – Exhibit R-1 – would indicate otherwise. All materials and documents pertaining to the sale of an insurance policy refer to American. Agents were provided with a 12-page script which they were expected to memorize and the presentations based thereon were practiced in a classroom setting. Later, new agents "shadowed" an experienced agent in order to learn sales techniques and to become familiar with details of the product being offered. An agent occupying the role of MGA would contact an agent below him or her from time to time to discover how matters were progressing in terms of selling policies. The MGA's and RGA's were concerned about any breaches of ethics or provision of incorrect information during sales presentations by agents below them in the hierarchy. Agents at various levels checked over the paperwork of other agents prior to submission to Head Office. The senior agents would provide contacts and advice in order to assist newer agents in generating a reasonable level of income. Between 50 and 75 leads – in the form of cards – were provided to agents each week by Altig and were supposed to be returned together with a report whether contact had been made and the result, if any. American wanted a report on any action taken with respect to each lead provided and leads were made available only at the Friday morning meetings. Some agents operated on the basis that 20 visits to prospects would result in six sales and certain of them would see four people a day for five days while others might use another working model chosen from among three or four available for implementation. The commission range was established by American and started at 40% for the first \$10,000 in premiums or 60 days – whichever came

first – and was then increased to 50%. American paid commissions directly into the accounts of agents and Exhibit R-1 – a sample report – set forth therein sums paid to various agents. American undertook the necessary calculations and also sent a cheque to Altig – or to Lyse – for their appropriate share of a specific agent's commissions generated during a certain period. During the period relevant to the within appeals, the law governing insurance agents in Alberta required the selling of policies to be a full-time occupation. Approved presentation materials - contained in a binder – were provided by American to agents. Agents had to pay for their own business cards but the American logo was displayed on the card. American was the underwriter for the policies and established the premiums to be paid by a policyholder. Once American accepted the application for insurance, all collections of ongoing premiums were handled by the Head Office. If an application was rejected, the cheque submitted with the form was returned. All promotions to a higher level within the hierarchy had to be approved by the American Head Office. In Lyse's opinion, voluntary withdrawal by agents - due to unsatisfactory sales levels - usually resolved the matter of poor productivity by certain individuals within the sales force.

[9] In re-examination, Lyse stated that – as an RGA- she believed in leading by example. She was able to earn more revenue if agents below her in the hierarchy were effective sales people because she received an override on their commissions. The leads provided to agents came from a public relations agency contracted to American rather than directly from the appellant's own office.

[10] Camille Burbank testified he worked as a salesperson during the relevant period and had responded to an advertisement by taking his resumé to the address stated therein. Later, he received a call to attend a meeting. The advertisement had not mentioned life insurance and it was only at the meeting that he discovered the nature of the product and the identity of American. However, it was not until approximately 10 months later that he decided to pursue the matter and took another resumé to the Altig office and was interviewed by someone. At that time, he was offered the chance to sell insurance products made available by American. He discovered he had to study for – and pass – examinations in order to obtain a license to sell insurance. He was provided with study material and sample tests. He participated in training sessions in a classroom setting over a period of four or five days and memorized a lengthy script to be used during sales presentations. Before Melinda-Rae Lyse would permit him to go out on a sales call, he had to demonstrate his proficiency in delivering the presentation and she worked with him in role-playing scenarios. Burbank stated that advice was provided to him and other new agents to the effect that it was unwise to depart from the prepared script but there was no method by which adherence to the recommended presentation could be

monitored. He was informed of the amount of sales calls that would probably have to be made in order to produce the revenue required to maintain a particular life style. He signed a contract – Exhibit A-1 – but never received a copy with the signature of Tania Richardson, the American representative. Burbank stated he understood the hierarchy permitted an agent to progress through the different levels. At the beginning of his sales career, Burbank stated he reported back to Steve Lee – a Supervising Agent – concerning progress in terms of sales activity and went on calls with Lee and other agents as that course of action had been strongly recommended as a learning tool. He reported daily - or every other day to Lee - but did so mainly because he sought answers to questions that had arisen in the interim. At the Friday meetings, discussions were held and paperwork was completed. After two weeks, Burbank stated he was out on his own but other individuals at the Altig office continued to assist in completing the necessary paperwork prior to submission to the American Head Office. He was aware that other agents had been contacted by Lee and/or Lyse if their sales volume was inadequate. He also knew some agents had hired secretarial assistants but - at his own commission level - the income produced was insufficient to bear that cost. Leads were provided to agents as a result of letters having been sent to unions and other groups inviting members to participate in supplementary health coverage. Burbank stated he received between 40 and 50 leads each week and more could be obtained provided action had been taken – and reports made – with respect to the earlier batch he had been given. Some leads were handed out - in accordance with Calgary Postal Codes - but agents were free to develop their own leads and were not restricted to that – or any other – area within the province. As time went by, Burbank stated he did not have any questions to ask of Lee and – instead – began instructing and providing advice to new agents. Since leads were handed out following the Friday meeting, Burbank considered attendance to be mandatory. He made appointments to see prospects during evenings and on weekends and – rarely – visited people during the day. The payment of 40% commission was fixed by American - without negotiation - but it was increased to 50% once an agent had produced \$10,000 in premium revenue and there was a three-month period in which that goal could be reached but extensions were usually granted. In Burbank's view, there was no probationary period in effect as during the training process individuals – of their own volition – simply dropped out. Once agents began making their own sales calls, there was no form of supervision in effect. He was paid in accordance with a commission report regularly provided to him. Burbank stated he was aware he could operate his own expanded agency - as a business - in the same manner as Melinda-Rae Lyse. Burbank used his own car, cell phone and met with prospects in their homes. He prepared his own presentation binder using materials made available at the Altig office and kits were provided to him to collect – on occasion - saliva samples depending on the type of policy sought

by an applicant. Burbank stated he always considered policyholders to be the clients of American and - once an application had been approved - all subsequent administration relating to the policy was undertaken by the appellant. Some applications were rejected and if he had received an advance in anticipation of a policy being approved, then that amount would be charged back to him and deducted from a future payment which would be deposited – electronically – into his account. Burbank stated he regarded himself as a self-employed individual selling products owned by American.

[11] In cross-examination, Camille Burbank stated that when he applied for employment insurance benefits he advised the official that he had been a self-employed salesman and had been free to choose the hours of work and the manner in which it was done. He never represented to said official that he was an employee or officer of American. He was aware of Altig but did not understand the nature of the relationship between that business and American and when he used the 12-page script he did not recall the name – if any – to identify authorship or ownership of that training material. As for supervision, Burbank stated it was a two-way street and he usually initiated calls to Lee or Lyse for assistance with regard to some aspect of the business. Sometimes, it was merely a question that had arisen in connection with the paperwork. Burbank stated he probably missed one or two Friday meetings and thinks he would have communicated a reason for his absence. The sales meetings were attended by 7 to 18 people depending on the particular Friday within the relevant period and there was a steady turnover of agents. He described the meetings as a "team atmosphere in which people would help each other." Burbank stated he would accept most suggestions from senior agents in an effort to improve sales and friendships developed as a result of that interaction. The cards containing information on prospects – or leads - had a return address of Waco, Texas. Burbank stated there was no requirement to attend at the Altig office and the training had occurred within a classroom setting. He had to pass the examinations in order to obtain his certificate which specified American as the company providing the product he was permitted to sell. At the Altig premises, he had no designated telephone or office space but had access to the fax machine and the photocopier. Burbank stated he decided to terminate his relationship with American because he found he no longer believed in the product. Prior to becoming an insurance agent, he had worked as a salesman at a flooring company and currently sells business uniforms. Towards the end of his career as an insurance salesman, he had difficulty motivating himself to make calls but no disciplinary action was ever taken as a result of his diminished sales activity. During the relevant period, he was never asked to perform any other duties for American and understood he was expected to fulfill the requirement of making sales in accordance with his written contract.

[12] Counsel for the appellant submitted the worker – Burbank - had a reasonable basis to believe that he was a self-employed person, carrying on business for himself using sales skills he had previously acquired. In counsel's view of the evidence, there was a clear demonstration of the lack of control or supervision over the activities of the agents and any restrictions imposed were often the result of having to conform with licensing rules and regulatory policy administered by the appropriate department of the provincial government. Taking all the evidence into account, counsel submitted the best approach is to regard the agents – Burbank and Jahraus – as individuals who were carrying on the business of soliciting sales of insurance policies and – in that capacity – being subject to the chance of profit and risk of loss arising from the performance of the contracted task.

[13] Counsel for the respondent conceded the life insurance industry is somewhat unusual and accepted that some agents may develop their sales volume to the point where they become entrepreneurs carrying on business on their own account. However, with regard to Burbank and Jahraus and other agents who were novices in that particular branch of sales, the evidence points toward them being employees of American and the degree of control and supervision exercised was more substantial than it might seem at first glance. Counsel submitted that the business in question was clearly that of American and Burbank and Jahraus had not gained sufficient independence during the short periods of employment - in each case - in order to break free from that mold.

[14] The Supreme Court of Canada - in a recent decision - *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.C. 59; 274 N.R. 366 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.* [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 45 to 48, inclusive, of his judgment stated:

Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" (1987), 37 U.T.L.J. 25, at p. 29) sets out the

"enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in *La Forest J.*'s dissent on cross-appeal in *London Drugs* where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents".

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, ...* ([1952] 1 *The Times L.R.* 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416) Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, ...(*Vicarious Liability in the Law of Torts*. London: Butterworths, 1967) at p. 38, that what must always occur is a search for the total relationship of the parties:

[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

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.

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.

[15] An analysis of the decision of the Supreme Court of Canada was undertaken by Joel Nitikman, a partner with Fraser Milner Casgrain LLP, Vancouver, British Columbia. In an article entitled *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.: Employee vs. Independent Contractor* published in *Canadian Current Tax* December 2001, Volume 12, No. 3 at p. 30 Nitikman discussed the development of the jurisprudence in this field including *Wiebe, supra*, which followed the decision of the Privy Council in *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (PC) at 169-70; aff'g [1945] 4 D.L.R. 225 (S.C.C.). Following a review of the reasons of Major, J., Nitikman – at p. 32 - concluded as follows:

Thus, it is now clear that in determining the employee vs. contractor issue, the usual factors cited are not tests in and of themselves, but merely pieces of evidence that may be given more or less weight in a particular situation to determine whether the worker is simply part of the payor's business or really in business on his or her own account.

[16] I will examine the facts in relation to the indicia set forth in the judgment of Major J. in *Sagaz*.

Level of control:

[17] The evidence discloses the worker Burbank and the other agents to have had the opportunity to conduct their sales calls and presentations in accordance with their own schedule once they had obtained the appropriate licensing and had proceeded to master the script provided to them - as a template - to follow during visits to prospects. Burbank's testimony indicated his contact with the supervising agent – Steven Lee – was a two-way street and that he sought advice from Lee and other more experienced agents for the first couple of weeks. After that, he sought advice - from time to time – but usually in relation to completing paperwork prior to

submission to the appellant's Head Office. Burbank did not feel as though he were subject to any control or discipline and, when he started to become disillusioned, he merely began to reduce his sales activity until it reached the point where he quit. The leads provided were utilized by him as a marketing tool but he was always aware of the right to sell insurance policies to any person located within the province of Alberta. He considered attendance at the Friday sales meetings to have been mandatory but was not present for at least two of them although he provided an excuse on each occasion for his absence. He established his own schedule for making sales calls and discovered he had to work at nights and on weekends when the prospective policyholders would be at home. The atmosphere at the Altig office appeared to be one characterized by experienced agents assisting others who were new to that highly specialized sales field. Certainly, some of the senior agents were receiving a commission override on the sales of agents beneath them in the hierarchy and would be motivated to act as mentors in order that production be improved within the sales force. The control exercised by American was practically nil as it related to the carrying out of the sales activities by the agents. The actions taken – by senior agents - to modify behaviour of other agents was not done within the realm of agency on behalf of American; instead, it was to further their own interests because they were receiving a slice of the commission on sales by agents below them on the ladder. There were certain requirements that had to be met in order to comply with the licensing and regulatory standards set by the provincial government or the industry council and some of those were set forth in the Agent Contract – Exhibits A-1 and A-2 – under the heading, Obligations of Agent. Burbank did not regard himself as ever being subject to any sort of probation and noted that it was the training process – itself – that had the effect of weeding out those who were not suited to selling life insurance.

Provision of Equipment and/or helpers:

[18] The evidence revealed that Melinda-Rae Lyse – a senior agent – hired two assistants to help her with the administration associated with the conduct of her business which was devoted to selling insurance policies. Although only the licensed agent could make the sale, other work was done by the helpers who were paid for by Lyse without any reimbursement from Altig or American. During the relevant period, Burbank was aware that his current commission structure and level of sales would not generate sufficient premium income to permit him to hire assistants but he also understood that – with time – he might become like Lyse in that overall sales volumes from his own efforts - and of agents below him in the hierarchy - might grow to the point where he could obtain the services of workers to handle administrative aspects of the business. He used his own vehicle and bore all the costs.

He provided his own cell phone and paid the expenses associated with it. He was responsible for disbursements associated with obtaining his sales license and paid all other expenses arising from his sales activity. He prepared his own binder - for use during sales presentations - by gathering material from a variety of sources, including Altig. At the Altig office, he was able to use the fax and photocopier – without cost – but there was no designated office space or telephone lines dedicated for use solely by the agents.

Degree of financial risk and responsibility for investment and management

[19] Burbank's understanding of his relationship with American was that he was a self-employed individual selling products owned by American. He was aware that his current level of licensing issued by the provincial government permitted him to sell only products offered by American. He appreciated that his role in the overall scheme was to solicit applications for insurance coverage which were then submitted to American for approval or rejection. It was American - holding authority as an insurer pursuant to federal and provincial legislation - that could offer insurance policies to the public. Once a policy was approved, the mechanics of collecting premiums was taken over by the appellant utilizing its own infrastructure. The evidence presented by the appellant established that agents had to make a certain number of efficient sales calls in order to close a corresponding amount of sales which generated an ascertainable amount of income as a result of being entitled to receive a certain commission rate depending on the position of the agent within the overall vertically-structured business organization. There were no guarantees of income and any advances against projected sales were deducted from actual, earned, future commission income. Burbank, Jahraus and other agents were required to assume the financial risk of obtaining the license and the tools of the trade, including an in-home office – in order to undertake the work required to produce income. A responsible approach to the sales activity would be expected to lead to sales of increased - or supplemental - insurance coverage and there was the ability to continue to earn commissions for renewal of coverage on an ongoing basis for some period following the initial sale. Sound management, such as by maintaining contact with the policyholders, could limit the extent of policy lapses, that dreaded scourge within the insurance industry. The prompt submission – to the appellant's office in Waco - of properly completed application forms and other related documents would ensure that commission income could be calculated and remitted to the account of the particular agent on a timely basis.

Opportunity for profit in the performance of tasks

[20] The chance for profit rested entirely in the hands of Burbank and Jahraus. There was no training wage or probationary stipend or minimum-wage guarantee. These individuals were totally on their own and if sales revenue did not match expenses, there would be no profit despite significant efforts to that end. There was a high turnover rate among agents and one can understand the reasons for many persons deciding not to stay in that field of endeavour. The life insurance business is typified by the solitary activity of the lone-wolf sales agent whose dedication to the task either yields happy, profitable results or cruel disappointment depending on individual effort, talent, aptitude and a variety of intangibles including the aura of good fortune. In the event Burbank or Jahraus could become senior agents within the hierarchy and could recruit others to work beneath them, then the opportunity for profit would increase since they would – like Melinda-Rae Lyse – be able to earn money from the efforts of others.

[21] In the case of *Combined Insurance Co. of America v. Canada (Minister of National Revenue - M.N.R.)* [1999] T.C.J. No. 113, MacLatchy D.J.T.C. held that an insurance sales representative was an independent contractor in that she was responsible for managing her own activities and had to bear expenses associated with sales calls. Judge MacLatchy found the workers operated their own business and – at paragraph 16 of his judgment - stated:

... They ran their own businesses including the creating of their own client base, the hiring of any support staff, the maintaining of required licenses, filings, liability and fidelity insurance without any interference or approval from the Appellant.

[22] In the above-noted case, there was an eight-week guarantee in the sum of \$3,200 but that arrangement had been made between the worker and the Sales and District Sales Manager and not by the appellant insurance company.

[23] In *Mutual Life Assurance Co. of Canada v. Canada (Minister of National Revenue – M.N.R.)* [1996] T.C.J. No. 668, Hamlyn T.C.J. decided that the worker – a life insurance sales representative - was an independent contractor. Judge Hamlyn found the sales agent was free to choose his office location and method of marketing and that he supplied nearly all of the basic tools required, including vehicle, office and supplies. The remuneration was based totally on commissions from sales but if expenses exceeded revenue, the losses were borne by the worker.

[24] In the within appeals, it is apparent there are two different businesses operating at the same time. One of them – from the perspective of Burbank – arises from his

activity as a self-employed person carrying on the business of soliciting insurance coverage from members of the public. He undertook the necessary steps to become licensed and trained in order to put himself in a position where he could earn commission revenue from policy sales. Once he had completed the application form and provided the necessary information – including a method for premium payment – his task was concluded. Whether or not a policy was issued depended on American, the insurer having the authority to underwrite the policy. Up to that point, he had to depend on his ability to use the leads wisely, and to utilize his administrative and organizational skills to set up appointments in an efficient and cost-effective manner and to maximize his presentation skills in order to close a higher proportion of sales in relation to sales calls. Again, it must be emphasized that the jurisprudence demands that the Court approach the analysis from the standpoint of the persons alleged to have been employees.

[25] In the case of *The Minister of National Revenue v. Emily Standing*, 147 N.R. 238, F.C.A., Stone, J.A. at pp.239-240 stated:

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

[26] In the within appeals, the workers acted in a manner consistent with the written agreement which – arguably – is a bit peculiar in the sense that senior agents – Lee and/or Lyse – were also signatories but are not really parties to the contract between American and Burbank or American and Jahraus. On the sheet - attached to both Exhibits A-1 and A-2 - Burbank and Jahraus, respectively, are referred to – by marking an "X" in the appropriate box as SG, apparently another form of designation to be applied to an agent. No explanation was ever provided for the significance of those initials except that it obviously applies to rookies just coming into the sales force.

[27] Having regard to all the evidence, I am satisfied the appellant has demonstrated that the decisions issued by the Minister are incorrect because the answer to the central question is that Burbank and Jahraus were each performing the services as persons in business on their own account. The appeals are allowed and the relevant decisions of the Minister are hereby varied to find, as follows:

that Camille Burbank was not employed in either insurable or pensionable employment with American Income Life Assurance Company during the period from April 23 to August 23, 2000 because he was an independent contractor.

that Jerry Jahraus was not employed in either insurable or pensionable employment with American Income Life Assurance Company during the period from October 16, 2000 to January 26, 2001 because he was an independent contractor.

Signed at Sidney, British Columbia, this 18th day of July 2002.

"D.W. Rowe"

D.J.T.C.C.

COURT FILE NO.: 2001-3601(EI) and 2001-4483(EI)

STYLE OF CAUSE: American Income Life Insurance Company
and M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 10, 2002

REASONS FOR JUDGMENT BY: the Honourable Deputy Judge D.W. Rowe

DATE OF JUDGMENT: July 18, 2002

APPEARANCES:

Counsel for the Appellant: Cheryl M. Teron

Counsel for the Respondent: Nadine Taylor

COUNSEL OF RECORD:

For the Appellant:

Name: Cheryl M. Teron

Firm: Owen, Bird
Vancouver, British Columbia

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada

COURT FILE NO.: 2001-3602(CPP) and 2001-4484(CPP)

STYLE OF CAUSE: American Income Life Insurance Company
and M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 10, 2002

REASONS FOR JUDGMENT BY: the Honourable Deputy Judge D.W. Rowe

DATE OF JUDGMENT: July 18, 2002

APPEARANCES:

Counsel for the Appellant: Cheryl M. Teron

Counsel for the Respondent: Nadine Taylor

COUNSEL OF RECORD:

For the Appellant:

Name: Cheryl M. Teron

Firm: Owen, Bird
Vancouver, British Columbia

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada