Mazraani v. M.N.R.

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File numbers:	2013-3484(EI)
Judges and Taxing Officers:	Pierre Archambault
Subjects:	Employment Insurance Act

Docket: 2013-3484(EI)

BETWEEN:

KASSEM MAZRAANI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

INDUSTRIELLE ALLIANCE, ASSURANCE ET SERVICES FINANCIERS INC.,

Intervenor.

Appeal heard on May 11 and 12 and June 1, 2, 15 and 16, 2015 at Montreal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

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

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act"*) is allowed and the decision of the Minister of National Revenue, dated August 1, 2013, is varied on the basis that the appellant was engaged in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Act* for the period from April 10, 2012 to November 23, 2012, while working for the Intervenor.

Costs are payable by the Intervenor to the Appellant in the amount of $2,000.

Signed this 12th day of April 2016.

"Pierre Archambault"

Archambault J.

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KASSEM MAZRAANI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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INDUSTRIELLE ALLIANCE, ASSURANCE ET SERVICES FINANCIERS INC.,

Intervenor.

REASONS FOR JUDGMENT

Archambault J.

> Founded in 1892, Industrial Alliance Insurance and Financial Services Inc. [**Industrial Alliance, IA,** or **the Company**] is a life and health insurance company whose primary mission is to provide financial protection to its insureds and their beneficiaries in the event of death, disability, or illness, and to help clients achieve financial independence at retirement or accomplish special projects.
>
> To carry out this mission, Industrial Alliance offers a wide range of life and health insurance products, savings and retirement plans, RRSPs, mutual and segregated funds, securities, auto and

> home insurance, mortgage loans, and other financial products and services. It is known for the personalized service provided by its professional agents, who are attentive to the ever-changing needs of their clients.
>
> The fourth largest life and health insurance company in Canada, Industrial Alliance is at the head of a large financial group with operations in all regions of Canada, as well as in the United States.
>
> Industrial Alliance . . . employs more than 3,700 people, and manages and administers over $70 billion in assets.[1]

[Emphasis added.]

I. ISSUE

[1] The issue in this appeal is whether one of its former professional agents, Mr. Mazraani, was an employee of the Company during the period from April 10, 2012 to November 23, 2012 (**relevant period**).[2] Mr. Mazraani is appealing[3] a decision of the Minister of National Revenue (**Minister**) regarding the insurability of his employment under the *Employment Insurance Act* (**Act**).[4] Because the contract was concluded in the province of Quebec, the solution to this issue depends on whether Mr. Mazraani was working under a contract of employment pursuant to article 2085 of the *Civil Code of Québec* (**Civil Code** or **Q.C.C.)**[5] or as an independent contractor under a contract of enterprise or for services pursuant to article 2098 Q.C.C.[6]

II. ASSUMPTIONS OF THE MINISTER AND ADMISSIONS

[2] The Minister decided that Mr. Mazraani did not hold insurable employment**.** In doing so, she relied on the following assumptions of fact set out in paragraph 5 of the Reply to the Notice of Appeal:

a) The Payer is a personal insurance and financial services company whose principal activity is the sale of life, disability and health insurance; (admitted)

b) The Payer's head office is located in the city of Québec, and it has several branches throughout the Province of Quebec; (admitted)

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

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

e) The Appellant was hired by the Payer as a financial advisor in April 2012; (admitted)

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

g) At the time of his hiring by the Payer, the Appellant's AMF license was inactive; (admitted)

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

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

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

k) On May 3, 2012, the Appellant and the Payer entered into a written contract with an effective date of April 30, 2012; (admitted)

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

i. The Appellant was authorized to solicit and obtain applications and requests for the various contracts and financial services offered either directly or indirectly by the Payer; (admitted)

ii. The Appellant was liable for any amount incurred by or owed to the Payer or a client due to a mistake, negligence, fraud or dishonesty by him or one of his mandataries; (admitted)

iii. The Appellant was remunerated by way of a "fund" that was set up by the Payer; (denied)

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

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

vi. The Appellant would remain liable to the Payer after the termination of the contract for any negative balance in this fund; (denied)

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

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

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

- training and upgrading; (denied)

ix. The Appellant was not authorized to:

- bind the Payer by any promise or agreement; (admitted)
- incur any liability whatsoever on behalf of the Payer; (admitted)
- accept a risk on behalf of the Payer; (admitted)
- commit the Payer to any relationship whatsoever; (admitted)
- use brochures, advertisements or printed matter bearing the Payer's name or logo that had not been preapproved in writing by the Payer; (admitted)

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

n) The Appellant was affiliated with the Payer's branch located in Ville LaSalle; (admitted)

o) The Appellant's tasks were to solicit and obtain applications for the Payer's insurance products from potential clients; (admitted)

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

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

r) The Appellant had access to a cubicle at the Payer's Ville LaSalle branch where he could also work from; (admitted)

s) The Appellant was required to transmit to the Payer all of the applications for insurance that he obtained from potential clients; (admitted)

t) The Appellant was paid exclusively on commission; (denied)

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

v) Upon each successful sale of the Payer's products, the Appellant would earn a percentage of the total value of the insurance contract; (admitted)

w) The Appellant was not subject to direct control by the Payer; (denied)

x) The payer did not supervise the amount or the quality of the work performed by the Appellant, aside from ensuring that the Appellant complied with legislative and regulatory requirements; (denied)

y) The Payer did not dictate the way in which the Appellant had to perform his tasks; (denied)

z) The Payer did not assign a particular territory to the Appellant; (admitted)

aa) The Payer did not provide the Appellant with a list of clients to contact; (admitted)

bb) The Appellant determined his own work schedule; (denied)

cc) The Payer did not control the hours worked by the Appellant or his absences; (denied)

dd) The Appellant's attendance at the Payer's premises was not compulsory, nor was it monitored; (denied)

ee) The Appellant was not entitled to vacation or sick leave with the Payer; (denied)

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

gg) The Appellant had the option to provide his own computer or to rent one from the Payer; (denied)

hh) The Appellant rented a laptop computer from the Payer in order to perform his work; (admitted)

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

jj) The Appellant was required to use his own vehicle to travel for his work for the Payer; (admitted)

kk) The Appellant did not receive any compensation or allowance from the Payer for the use of his vehicle; (admitted)

ll) The Appellant had a chance of profit and a risk of loss in providing his services to the Payer; (denied)

mm) The Appellant had no guarantee of a steady income while working for the Payer; (denied)

nn) The Appellant was responsible for any and all expenses incurred in the performance of his work for the Payer; (denied)

oo) The Appellant did not receive any compensation or allowance from the Payer for his work-related expenses; (denied)

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

qq) The payer issued a T4A slip (Statement of other income) in the name of the Appellant for the 2012 taxation year; (admitted)

rr) The payer reported that the appellant earned an amount of $7,084.91 in self-employed commissions; (admitted)

ss) No deductions at source were made by the Payer from the Appellant's income in respect of income tax, employment insurance or the Quebec Pension Plan; (admitted)

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

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

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

[Emphasis added.]

III. MINISTER'S DECISION

[3] The appeals officer who confirmed the decision of the rulings officer indicated that she had been an appeals officer for about 19 years, dealing with employment insurance matters. She confirmed the independent contractor status in part because she thought that Mr. Mazraani looked more like a self-employed or independent contractor as he was required to supply or pay for his own tools. This is what she actually stated in referring to Mr. Mazraani's pay slip showing the charges deducted from the amount he was paid by IA:[7]

> MR. JILWAN: All right. So this element, what this element brought to your analysis?
>
> MS. LAMBERT: Well this looks more like a self-employed non-insurable, because he has to supply his own tool or to pay to supply his tool.

[Emphasis added.]

[4] She also consulted the data regarding Mr. Mazraani's income as filed with the Canada Revenue Agency (**CRA**), and she noted that he had claimed a $14 loss in respect of his activities for Industrial Alliance. She wrote in the English summary of her report[8] that the worker "had a possibility for loss" and that this element was "indicative of a contract for services". Furthermore, she testified that employees are not allowed the "expenses"[9] that Mr. Mazraani claimed.

[5] In the summary referred to above, the appeals officer wrote under the heading "Provision of labour" that the "worker did not have a set schedule, or a minimum number of hours to be worked." She believed the version of the payer given to the rulings officer by Mr. Eric Leclerc, the LaSalle Branch manager, who said that the Company did not supervise the worker's work and did not tell the worker how to carry out his work. The appeals officer did not get any direct information from the Company because it never returned her phone calls and did not reply to her letter.[10] The only documents from the Company or from Mr. Mazraani are the Agent Contract, submitted by the former, and the "rapport de paie", submitted by the latter and showing the expenses for which he was being charged by the Company![11]

IV. FACTUAL DESCRIPTION

A. IA Organization Structure: from employees to independent contractors

[6] Mr. Bruno Michaud, Senior Vice-president, Sales and Administration, explained that Industrial Alliance works through 52 branches (which are also described as firms or agencies) in

the province of Quebec and the Ottawa region in order to sell its products.[12] Both in Quebec[13] and outside that province, the Company also sell its products through general independent agencies or insurance brokers.

[7] In paragraph 7 of the decision (**CRT** reasons**)** of the Commission des relations du travail du Québec (**CRT**) in *Blackburn and Kaliszczak* c. *Industrielle Alliance, assurance et services financiers inc*, 2014 QCCRT 0737,[14] it is stated that Industrial Alliance operates close to 50 agencies in Quebec, which are constituted of teams of four or five representatives, each team being "associée à un directeur des ventes". These sales managers all "relèvent d'un directeur d'agence", who is the person in charge of the branch. These branch managers report to one of the superintendents "qui sont tous sous la responsabilité du vice-président du "réseau carrière". In his testimony before this Court, Mr. Michaud said that this vice-president would report to him, the Senior Vice-president, Sales and Administration.[15] He also added that there were "five superintendents who are responsible for on average 10 branches each" and "[t]hey would act as a coach for the branch manager."[16] This description shows a highly hierarchical organization which carries out the Company's mission, and it shows as well that the superintendents act toward the branch managers (who are all IA employees) as the sales managers do toward the agents (who are not considered by the Company as employees), that is, as coaches![17]

[8] During his testimony−and as described in the CRT reasons−Mr. Michaud stated that Industrial Alliance used to treat all its agents as employees before 1993, while many, if not most, of its competitors were treating theirs as independent contractors. So there were incentives for Industrial Alliance to do likewise. One of the reasons indicated by Mr. Michaud was that its employees asked for the change. However, Mr. Michaud also acknowledged, in response to one of my questions, that there were benefits to the Company as well, such as being freed from contributions to the Régime de rentes du Québec (Quebec Pension Plan).[18]

[9] Here is the description by the CRT of the business organization plan change made by Industrial Alliance:[19]

> [8] Bruno Michaud est l'un des dirigeants d'Industrielle Alliance. Il y travaille depuis près de 32 ans. Actuellement, il occupe le poste de vice-président principal, vente et administration en assurance et rente individuelle. Il affirme que le modèle d'affaire « réseau carrière » actuel existe depuis le 1er janvier 1993.
>
> [9] Auparavant, explique-t-il, tous les représentants d'Industrielle Alliance étaient des salariés payés à commission. À ce moment, l'entreprise était pratiquement la seule à utiliser ce modèle d'affaire. En fait, la majorité de l'industrie utilisait des travailleurs autonomes comme représentants et cette formule a fait peu à peu son chemin, car de plus en plus de représentants y voyaient plusieurs avantages, surtout d'un point de vue fiscal. Aussi, lorsque l'occasion se présenta de procéder à l'intégration au sein d'Industrielle Alliance d'un important contingent de représentants, plus de 100, en provenance d'une autre compagnie d'assurance qui possédaient déjà ce statut, la décision fût [*sic*] prise de revoir le modèle d'affaire d'Industrielle Alliance afin que ses représentants soient dorénavant considérés comme des « *travailleurs autonomes* ».

> [10] Outre un changement à son modèle d'affaire, cette nouvelle orientation impliquait pour Industrielle Alliance de revoir sa relation contractuelle avec ses représentants, donc de revoir la rédaction de son contrat de représentant. Pour ce faire, il fallait, dit-il, éviter des ennuis avec les autorités fiscales en lien avec le changement de statut de leurs représentants. C'est pourquoi Industrielle Alliance a jugé opportun de soumettre son nouveau contrat de représentant à Revenu Canada pour examen et acceptation.
>
> . . .
>
> [11] S'il est vrai que le contrat de représentant a subi plusieurs modifications entre 1993 et 2011, Bruno Michaud tient toutefois à préciser que le contrat est en substance le même. Aussi, indépendamment des modifications, toutes les parties reconnaissent que les représentants déclarent depuis ce temps aux autorités fiscales la rémunération qu'ils reçoivent d'Industrielle Alliance à titre de revenu d'entreprise.
>
> [Emphasis added.]

[10] According to Mr. Michaud's testimony before this Court, Industrial Alliance acquired another company in January 1992 and all the agents of that particular company were treated as independent contractors. Therefore, the Company made the business decision to treat all its agents as independent contractors, except for the sales managers.

[11] It is evident from the Agent Contract (**Agent Contract**) reproduced below and signed by Mr. Mazraani that great care was taken in implementing IA's intent to treat its agents as independent contractors. First, the contract is entitled "Agent Contract" and not "Employment Contract". Furthermore, section 4 explicitly states that the agent is an independent contractor and that the contract does not establish an employer-employee relationship. In addition, there is the fact that Industrial Alliance requires that its agents be responsible for many expenses, such as those which are described in section 4 of the contract, which would include paying rent for the use of the computer and software.[20]

[12] In addition to having, I am sure, the benefit of professional help in drafting this contract, Industrial Alliance approached the CRA (then Revenue Canada) employment insurance division to look over the contract and get their input on how to ensure that its agents would in fact be treated as independent contractors. Not only did the CRA representative indicate that the status of agents as independent contractors would be confirmed, but he made specific suggestions as to how to improve the contract, such as removing section 5 and modifying others. For instance, the CRA representative suggested replacing, in section 8 of the French version, the words "RÈGLEMENTS ET INSTRUCTIONS" by "POLITIQUES".[21] The letter of November 3, 1993 in which these suggestions are made concludes with the statement that, on receipt of the modified copy of the contract, they would confirm the independent worker status of the agents effective January 1, 1993.[22] This occurred on December 23, 1993.[23] Both letters are addressed to the attention of Mr. Bruno Michaud, "Assistant vice-president Marketing, Assurance et rentes individuelles".

[13] When asked by Mr. Mazraani to distinguish between the way in which the Company handled its agents before 1993, when they were treated as employees, and the manner in which

it did so afterwards, when they were treated as independent contractors, Mr. Michaud gave the following answers:[24]

> MR. MICHAUD: The main change, as I said this morning, was that advisors could incorporate themselves, could hire employees and that was the main -- the main purpose of the ---
>
> JUSTICE ARCHAMBAULT: So before 1993, people could not hire their own assistant?
>
> MR. MICHAUD: No.
>
> JUSTICE ARCHAMBAULT: No, okay. So they could hire assistants ---
>
> MR. MICHAUD: I would say they could but the expense ---
>
> JUSTICE ARCHAMBAULT: They could?
>
> MR. MICHAUD: --- the expense was not deductible. So from a tax point of view, since ---
>
> JUSTICE ARCHAMBAULT: I thought it was? [*sic*]
>
> MR. MICHAUD: No, no. I'm sorry, it was not because they were employees. They were commissioned employees.
>
> . . .
>
> JUSTICE ARCHAMBAULT: Yeah, okay.
>
> Do you see any other differences?
>
> MR. MICHAUD: That's the main difference.
>
> [Emphasis added.]

[14] I asked again and was more specific:[25]

> JUSTICE ARCHAMBAULT: So was there any difference in the handling of the representatives before '93 and after? . . .
>
> . . .
>
> JUSTICE ARCHAMBAULT: Is there any -- like for example, the way you would train them, coach them, motivate them, these are examples of ---
>
> JUSTICE ARCHAMBAULT: Would there be any change between before and after?
>
> MR. MICHAUD: These three examples I don't think there was so many change.
>
> . . .
>
> JUSTICE ARCHAMBAULT: Yeah, okay. So there was not much change in the terms of the training of your representative, in the coaching of them, in the motivation.

MR. MICHAUD: Yeah.

. . .

MR. MICHAUD: The other big change was they were able to sell their -- sell their clientele.

JUSTICE ARCHAMBAULT: That didn't happen before '93?

MR. MICHAUD: Before, no, no.

[Emphasis added.]

[15] Mr. Michaud acknowledged that some things remained the same, such as:[26]

MR. MICHAUD: Yes, but I would say going back there, you have to keep in mind that for the insurance business, most of the advisors were insurance agents. There was also and there's still the relationship of principle [*sic*] and agent between the insurance carrier and the advisor. And if the advisor would do something wrong, then the life insurance company would be held responsible. It was as simple as this.

JUSTICE ARCHAMBAULT: Before?

MR. MICHAUD: And still.

JUSTICE ARCHAMBAULT: And still the case?

MR. MICHAUD: Still, yeah.

[Emphasis added.]

B. LaSalle Branch

[16] The manager of the LaSalle Branch, Mr. Leclerc, was the last of the IA witnesses to testify, and this occurred on the fifth day of the hearing.[27] He stated that his branch had an average of 45 financial advisors (**agents**), of which around 15 had less than two years of experience.[28] Around 13 or 14 new agents are hired every year.[29] He insisted that the people who are called sales managers are really only coaches, that their role is only to assist and help the agents, and that they do no supervision of the work of the agents. When I mentioned that the Company had produced a lot of training materials for its agents, he replied that they were documents found on its internal Internet and that the agents were free to use them. He added that the Company never follows up to ensure that they perform their work in the manner suggested in these training documents.

[17] However, later on, after further questioning, he acknowledged that these training materials were also used in the numerous training sessions given by IA personnel (usually the sales managers) and that the sales managers were also spending more than 50% of their time on the road accompanying the agents and helping them to improve their sales techniques and assisting them in any way that was required.

[18] I counted 53 agents on the intercom phone number list for the personnel of the branch as of May 2012 and six sales managers in addition to the branch manager, Mr. Leclerc.[30] So, that gives an average ratio of one sales manager for eight agents. Mr. Michaud testified that the sales managers are not appointed by the branch manager but by the superintendents. Both the branch manager and the sales managers are treated as employees.[31]

C. Mr. Mazraani hired as agent under an Agent Contract

(1) The application and the informal hiring

[19] Mr. Mazraani received in 1986 a Bachelor of Science in business computing from the Lebanese American University in Beirut, Lebanon. In 1991 and 1992, he also studied at Concordia University in Montreal in computer sciences but did not obtain a degree. In 2002, he attended a Canadian securities course in Montreal. He worked for London Life Insurance from 2008 to March 2011 as an agent. He was involved in selling financial products such as life, disability, critical illness and liquidity insurance.[32]

[20] On December 21, 2011, Mr. Mazraani submitted an application to work for Industrial Alliance.[33] According to Mr. Mazraani's testimony, he was hired on April 3, 2012, when he met Mr. Leclerc, who introduced him to his new sales manager, Mr. Beaulé. The latter trained and supervised him even though the formal contract was only signed on May 3.[34] He was not informed at that first meeting that he was being hired as an independent contractor:

> MR. MAZRAANI: That -- in the meeting, especially the first meeting, we never discussed -- either was Mr. Leclerc or Mr. Beaulé that I am building my own business. It was I have just to do whatever ---
>
> JUSTICE ARCHAMBAULT: You're saying they never specifically stated that you were going to build your own business?
>
> MR. MAZRAANI: No.[35]

[Emphasis added.]

[21] He started work on April 4, by attending the theoretical training. He was advised by letter on April 12, 2012 that he was allowed to use the Intranet and was given an access code and a password for that purpose.[36] In this letter, it is stated that "[l]'extranet est réservé exclusivement à la force de vente. Son développement est également progressif et les divers secteurs de la compagnie seront appelés à y ajouter diverses fonctionnalités." The weekly rent for the laptop was $18.05 before taxes.[37]

(2) The April 27 letter

[22] On April 27, 2012, Mr. Mazraani was formally informed by Mr. Arsenault, an IA sales superintendent, that the Company was offering him an agent contract and that he could begin underwriting insurance and annuities contracts for the Company as a financial security advisor

on April 30, 2012.[38] In this letter (**April 27 letter**), Mr. Mazraani is reminded that the *Act Respecting the Distribution of Financial Products and Services* (**Distribution Act**) required that he "hold a valid licence in order to operate in the disciplines or categories of discipline [he was] authorised to operate in." He apparently got his licence back on April 30, after studying for and passing an exam. He had been unemployed from the time of the termination of his relationship with London Life in March 2011[39] up to the time he started working for Industrial Alliance.

[23] In the April 27 letter, it is stated: "[You] will be part of service unit 35 of team 90 and you will also be in charge of the policies and clientele that currently make up part of this service unit. Your sales director will be Mr. René Beaulé". [Emphasis added.] This service unit was located at the Ville LaSalle Branch which was also known as the Mercier Agency. The letter adds: "You will be compensated according to our career establishment program. The initial amount of your advances on commissions will be $600 per week and an amount of $2,500 will be deposited in your career establishment fund." He was advised as follows: "if during the period in which you are regulated by the career establishment program, you do not receive any remuneration for five consecutive weeks, we will terminate the program. We will also terminate your career agent's contract".

[24] At paragraph 47 of the CRT reasons, it is indicated that the advances on commission paid during the training ("*stage*") period or at the beginning of the parties' relationship were not reimbursable:

> . . . les parties reconnaissent que les avances de commission non-remboursables sont versées uniquement pendant le stage ou au début de l'embauche. Par la suite, il est entendu que toutes les avances de commissions sont remboursables.

[25] It appears from Mr. Mazraani's bank statements that he started receiving his advances on commissions on May 3, 2012, and there were similar payments made each week thereafter in May, for a total of $2,555.[40] All these payments were equal payments, except for the last one, which was lower−$304 instead of $562.

(3) Licensed to act as a financial security advisor on April 30, 2012

[26] In order to be allowed to sell financial products, Mr. Mazraani was required, under the Distribution Act, to hold a licence issued by the AMF. According to Mr. Michaud, Mr. Mazraani was not allowed to start acting as a financial advisor before April 30 because he only got this licence at that time. The application for the licence was made to the AMF by Mr. Mazraani on February 6, 2012. In that application, he asked for reinstatement of his certificate.[41] In the section headed "Choice of Ways to Carry on Business", there is a statement by Industrial Alliance, made on April 11, 2012, confirming that Mr. Mazraani will be "attached to our firm . . . without being an employee . . . to pursue activities in the following sector . . . insurance of persons". [Emphasis added.] Under the fourth heading, "Statement", Mr. Mazraani confirms that he will not be carrying on activities (paid or not) in a field other than that which is connected with his practice as a representative. If he had indicated otherwise, he would have been required to send in the "Dual Employment form". [Emphasis added.] Under heading number 6, "Fees

payable to the AMF – Contribution to the Chambre de la sécurité financière", there is an item, "Contribution to the *Chambre de la sécurité financière"*, for which a sum of $237 appears. This is in addition to the mandatory fee for each sector or sector class and for "study of application". [42]

(4) The Agent Contract dated May 3, 2012

[27] In addition to the April 27 letter, Mr. Mazraani received the Agent Contract together with the "Commission and Bonus Schedule and Remuneration Rules" (**Remuneration Rules**). Here are some of the relevant portions of the contract, signed on May 3, 2012, but effective April 30, 2012:

AGENT CONTRACT

. . .

2- AGENT'S RIGHTS AND POWERS

a) The Company authorizes the Agent to solicit and obtain applications and requests for the various contracts and financial services offered either directly by the Company or through another company with which the Company has signed a distribution agreement (hereinafter called the "authorized entity"). The Agent agrees to offer quality service.

b) The Agent agrees to make all reasonable efforts to maintain in force all contracts issued by the Company and for which he/she is responsible as an Agent.

c) The Agent agrees to deliver immediately to the applicant each contract for insurance or other financial products, in accordance with legislation and **instructions** from the Company.

d) The Agent agrees to submit to the Company, or the authorized entity, all applications for insurance, annuities or financial products that he/she has obtained.

However, after advising the Company, the Agent could give an application or request to other insurers if:

i) the Company refuses to issue a contract; or

ii) the Company doesn't offer the type of product requested.

e) The Agent is liable for any amount incurred by or owed to the Company or a client due to a mistake, negligence, error, omission, fraud or dishonesty by him/her or one of his/her mandataries.

3- REMUNERATION

During the term of the contract, the Agent requests that weekly advances be paid to him/her and he/she agrees to reimburse them. Hence, the Company has created a "fund" on behalf of the Agent in which all weekly advances are posted.

In consideration of the contracts established subsequent to applications or requests submitted by the Agent, the Company pays to his/her fund all remuneration related to

these contracts as established according to the Company's Commissions and Bonuses Schedules and Remuneration Rules, adjusted from time to time, which form an integral part of this contract.

The Agent acknowledges that the remuneration paid into the fund following the sale of a contract shall only become vested when the insurance contract has been in force for a certain period, as provided for in the Commissions and Bonuses Schedules and Remuneration Rules, subject to any adjustments to be made.

In the event of termination of a contract before the related remuneration is vested by the Agent, the Company debits a negative charge in the Agent's fund. This charge is a percentage of the commission and bonus, as established by the Commissions and Bonuses Schedules and Remuneration Rules.

The balance of the Agent's fund is obtained by calculating the commissions and bonuses paid, and deducting the charges, weekly advances and other fees, expenses and commitments make [*sic*] in the performance of his/her duties. The Agent remains liable to the Company, even after the termination of the contract, for any negative balance in the establishment fund. Hence, in the event where the advanced remuneration would not be reimbursed from the vested commissions, the Agent will accumulate a debt towards the Company which he/she will have to repay.

Individual Life Insurance, Individual Disability Insurance and Group Insurance

The commissions and bonuses payable to the Agent for premiums under these contracts are determined in accordance with the schedules in effect on the date on which the insurance becomes effective.

Individual Annuities and Group Pensions

The commissions and bonuses payable to the Agent for premiums under these contracts are determined in accordance with the schedule in effect when a premium is received, when a premium or interest credit is reinvested or when the premiums received and the credited interest are applied to the payment of an annuity.

Other Products and Financial Services

The commissions and bonuses payable to the Agent for other types of contracts and financial services are determined in accordance with the schedules in effect when the Company is remunerated by the supplier of such products or services.

4- STATUS AND FEES

The Agent is an independent contractor and this contract must not be interpreted as establishing an employer-employee relationship between the Company and the Agent. As such, the Agent agrees to pay all expenses incurred in the exercise of his/her duties.

Without limiting the generality of the foregoing, the Agent agrees to pay the following fees and expenses:

- obtaining or renewing the licenses necessary to exercise his/her duties;

- obtaining or renewing professional civil liability insurance;

- membership dues in professional or other associations;
- his/her business office, including secretarial fees and office supplies;
- information systems, long-distance calls and facsimiles;
- travel, solicitation and publicity;
- training and upgrading.

If the Agent operates his/her own company, he/she must provide the Company with all information that this latter deems necessary to evaluate it, such as the names of shareholders and the number of shares held by each one and the names of directors. The Agent must also annually provide the Company with a copy of his/her company's insurance certificate. The Agent must be the only person authorized to sell insurance products in the name of his/her company. As a director and shareholder, the Agent remains responsible for the company.

The Company reserves the right to terminate the Agent contract when a change occurs in the management or control of the Agent's company.

5- MINIMUM PRODUCTION

The Company reserves the right to set minimum production and business persistency standards for the Agent and to amend these standards from time to time.

. . .

7- RULES AND POLICIES

The Agent agrees **to comply with** all laws, **rules and codes** of ethics applicable to the performance of his/her duties. The Agent also agrees to comply with **all Company policies**, which include the Market Conduct Standards and the Policy for Using Electronic Communications. The **goal of these policies is to standardize administrative procedures**, reduce **the time taken to process a request** and ensure that everyone respects the regulations of the life and health insurance industry.

8- MODIFICATIONS

Subject to a written notice of seven (7) days that must be sent to the Agent, the Company may modify the Commissions and Bonus Schedules and Remuneration Rules, the Market Conduct Standards, the Policy for Using Electronic Communications, as well as any other provision of this contract. The modifications take effect when the seven (7) days notice expires.

9- PERMITS AND INSURANCE

The Agent agrees to obtain the licenses required by legislation of the province in which he exercises his/her duties and maintain professional liability insurance in force. The Agent agrees to provide proof of the validity of his/her license(s) and professional liability insurance at the Company's request.

10- RECEPTION OF AMOUNTS

The Agent must **immediately** remit to the Company any amount that he/she receives on behalf of the Company.

The Agent must inform the Company in writing of the opening (and of all subsequent changes) of a trust account for the performance of his/her duties. The Agent agrees to provide the Company with all information that this latter deems necessary to evaluate the sound management of the trust account. The Agent authorizes the Company to verify the transactions in the trust account(s) with the financial institution. The Company shall send the Agent a written notice seven (7) days before checking with the financial institution concerned.

The Agent who pays into a trust account any amount of money that he/she receives on behalf of the Company, shall remit the entire amount to the Company within the required timeframe. The Company reserves the right to terminate the Agent contract due to inappropriate management of the trust account.

The Agent must **not grant a premium rebate** to clients by paying the amount requested by the Company or authorized entity in full or in part.

11- ASSIGNMENT

a) Assignment

The Agent acknowledges that the Company has right of preference on all amounts payable to the Agent or to any person making a claim for him/her or on his/her behalf under the present contract, as security for any amount that might be owing by the Agent to the Company. The signing of the present contract by the Agent shall in fact constitute an assignment of these amounts. The Agent agrees to refrain from assigning, transferring, pledging or in any other way disposing of any amounts owing to him/her or that might be payable to him/her under the present contract.

b) Assignment of Right of Representation

The Agent may sell or otherwise dispose of his/her right to represent Company clients with respect to individual life insurance, guaranteed investment or segregated fund contracts, **subject to** the Company's standards and conditions in effect on the date of the transaction. The standards and conditions are described in the Company's Commissions and Bonuses Schedules and Remuneration Rules.

12- LIMITATIONS OF THE AGENT'S RIGHTS AND POWERS

The Agent is not authorized to:

- bind the Company by any promise or agreement;
- incur any liability whatsoever on behalf of the Company;
- accept a risk on behalf of the Company;
- commit the Company to any relationship whatsoever;
- use brochures, advertisements or printed matter bearing the Company's name or logo that have not been previously approved in writing by the Company.

13- PROPERTY OF DOCUMENTS AND MATERIAL

Forms, handbooks, policies, computer software and other Company documents at the Agent's disposal remain the property of the Company and must be surrendered on request or on cancellation of this contract. **Client files remain the property of the Company**.

The Company is committed to respecting the confidential nature of any information received from the Agent in conjunction with an insurance application. Unless required by law, the Company agrees to not provide this information to any other agent to allow this agent to compete with the initial Agent. Notwithstanding the preceding, **the Company reserves the right to appoint another Company agent to provide service under a policy** in place of the initial Agent, whether this contract is in force or terminated, if one of the following events occurs:

i) the Agent does not have a valid insurance permit;

ii) a request to this effect was made by the client;

iii) the service provided by the Agent is **not satisfactory** for the client or **the Company**;

iv) the Agent acts to **the detriment of the interests of the** client or the **Company**;

v) the Agent contract is suspended or terminated.

14- SUSPENSION OF THE CONTRACT

The Company may suspend this contract under any reasonable grounds, whether or not related to duties of the Agent, by giving the Agent notice. The effective date of the suspension corresponds to the date the notice is sent.

No remuneration is payable during the suspension and the Agent loses the right to all commissions payable during this period.

Without limiting the generality of the preceding, when this contract is suspended, the Agent is not authorized to solicit, obtain applications or perform transactions related to Company clients. During a suspension, the Agent must abstain from contacting Company clientele as an Agent.

The restrictions and obligations resulting from the suspension apply to all business of the Company and that of its authorized entities.

15- CANCELLATION OF CONTRACT

With or without cause, the Company may **terminate** this contract by giving seven (7) days written notice to the Agent at his/her last known address.

With or without cause, the Agent may terminate this contract by giving written notice to the Company. The cancellation date is the date of receipt by the Company of the written notice.

This contract is automatically terminated in case of death, fraud, dishonesty, serious error or bankruptcy on the part of the Agent.

No remuneration is payable as of the date this contract is cancelled and, if there is a debt owed by the Agent to the Company, such debt is immediately payable to the Company by the Agent. The Agent remains responsible for any commission or bonus charges on insurance contracts terminated after the cancellation of this contract. The commission and bonus charges are those described in the Commissions and Bonuses Schedules and Remuneration Rules. These charges constitute a debt owed by the Agent to the Company and are payable to the Company upon request.

When this contract is cancelled because the Agent ceases to act as an Agent, **the Company becomes the assignee of the client records**.

16- NON-COMPETITION

For a period of two (2) years beginning on the date of the cancellation of this contract, the Agent must not act as an Agent or broker on behalf of clients of the Company who are part of the service unit served by the Agent at the time of the cancellation of the contract, by selling or soliciting, directly or indirectly, on the Agent's own behalf, or on behalf of any other individual, company or corporation, life insurance contracts, annuities or disability contracts, or any other type of contract or financial service offered either directly by the Company or through another company with which the Company has signed a distribution agreement. The Agent agrees that each infraction of this commitment shall result in a charge equivalent to the total of the annual premiums of the cancelled or annulled contracts, in the case of life insurance and disability insurance contracts, and to the commissions paid, in the case of annuity contracts and other types of cancelled or annulled contracts, as special damages, without prejudice with respect to any other recourse by the Company, notably the right to request an injunction to halt such a violation.

17- LEGAL PROCEEDINGS

. . .

19- SCHEDULES, CODE AND POLICIES

The Agent acknowledges that he/she has read and received all the necessary explanations regarding the following documents:

- Commissions and Bonuses Schedules and Remuneration Rules;
- **Market Conduct Standards**;
- **Policy for using electronic communications**.

. . .

[Emphasis added.]

[28] Mr. Michaud testified that no agent was entitled to approve the issuance of an insurance policy; this could only be done by an underwriter in the Quebec City office. Not even the sales manager, the branch manager or the five superintendents were allowed to do so.

(5) Expenses and benefits

[29] Mr. Michaud, in his testimony, confirmed that the costs for the use of a car, a home office, a computer and a cellular telephone, for long distance calls and for liability coverage were all items which all the agents were responsible for paying. He also confirmed that no taxes were being withheld at source from the agents' remuneration, i.e., the commissions paid to the agents.

[30] Industrial Alliance provided some benefits, such as health insurance coverage for Mr. Mazraani and his family, but the cost of those benefits was charged to him and deducted from his commissions.[43] Mr. Mazraani obtained liability insurance coverage (from Lombard General Insurance Company of Canada), as required by his Agent Contract, and the cost of that insurance coverage was deducted from his commissions.[44] However, Mr. Michaud admitted in his testimony that an employee agent would also need this kind of insurance because everyone holding a licence as a financial advisor needs such coverage.[45] Also, IA would not need to check whether an agent has this coverage because "we know for most of them because we have a plan that most of our advisors are using because it's more convenient."[46] [Emphasis added.]

[31] There are several exceptions to the rule that costs were charged to Mr. Mazraani. For example, the contribution of $237 to the Chambre de la sécurité financière was an expense that was reimbursed to him by Industrial Alliance. During his testimony, Mr. Michaud explained that it used to be considered the insurance company's expense as opposed to the individual agent's. At the beginning, that expense used to be charged directly to the insurance companies or the firms. However, given that a particular agent could be working for more than one such company or firm, it was decided to bill the individual agents directly in order to avoid double or triple payment of that contribution. In his testimony, Mr. Michaud was adamant that Mr. Mazraani paid the cost of obtaining the licence to work as a financial advisor. For him, a contribution to the Chambre de la sécurité financière was a separate item and it was the only one that was paid by Industrial Alliance.

[32] However, there are other expenses that were incurred by Industrial Alliance and not charged to Mr. Mazraani, such as the cost of the business cards given to the agents. Similarly, the costs for the office where Mr. Mazraani performed his services 80% of his time were borne by Industrial Alliance; these costs included the cost of the premises, the cost of the phone system and the monthly payment for the local and toll-free telephone service. Only the costs for cellular telephone service and long-distance calls were paid by the agents. The Company also paid the cost of developing the software provided to the agents and the cost of the Intranet and Internet services used by them.

[33] Mr. Michaud also acknowledged that no fees were charged for the ongoing training offered by Industrial Alliance. If such training was offered by somebody else, its cost would be borne by the individual agents.[47] However there is no evidence that this type of activity took place. Mr. Michaud acknowledged one exception to this rule: If a particular agent decided to take courses to become a financial planner, Industrial Alliance would reimburse to the agent the fees incurred upon his successfully completing the program.[48]

D. Training

(1) Training for new agents

[34] Starting April 4, 2012 and until April 30, 2012, the effective date of the contract, Mr. Mazraani was given training by Industrial Alliance. The document entitled "Coaching Guide Professional Development Program for Financial Advisors" (**Coaching Guide**), addressed to the branch manager, describes its purpose as follows:[49]

> This *coaching guide* was created to help you follow, in close collaboration with the sales manager, the professional development of your new financial advisor. It will enable you to support your sales manager in his role as **coach**, training **supervisor** and **sales manager** for his new recruit.

[Emphasis added.]

[35] It also states: "Obviously, each sequence of the guide highlights the essential elements of compliance to be considered by the training **supervisor** and his trainee". [Emphasis added.] The Coaching Guide further says: "We suggest that you have regular meetings with your new advisor, alone or with your sales manager present. We suggest five to six meetings during the thirteen weeks of the internship." It concludes as follows: "In closing, we hope that this tool meets your needs and helps you to be more efficient in the important support role that you fill with your colleagues for your agency's growth and development. Your **SUPER VISION** (supervision) and your **ENTHUSIASM** make all the difference!"[50] [Underlining **only** added.]

[36] The new trainees receive instruction on different topics, including the trainee's **duties**, the **rules** on maintaining client files and the Market Conduct Standards Code (**Conduct Standards**).[51] The coaching guide also describes 20 steps, from prospecting to handling objections to closing techniques to delivery to service to follow-up. The performance of the trainee is **appraised** on a scale of 1 to 5. In addition the form asks the branch manager to indicate whether **the training supervisor has verified the client files** for the current week. This request appears every time certain steps have been completed.

[37] Mr. Mazraani filed a list of training sessions setting out the training topics for new agents.[52] It shows 28 training presentations given over a period of ten weeks, generally two hours per day, three days per week. This training started on April 3 and ended on June 7, 2012. Among the topics, there were "Approche" (April 4), "Techniques conclusion" (April 18), "Gestion du temps" (April 24), and "Transition - Stratégies de vente" (June 7).

[38] In her e-mail of May 1, 2012, dealing with "Formation nouveaux Conseillers − nouvelle grille", the "secrétaire administrative" informs the new agents that "Il est très important de lire toute l'information disponible sur Extranet avant chaque formation . . . Vous pouvez consulter votre directeur des ventes pour connaître la matière à lire." In an e-mail dated May 14, 2012, to Mr. Mazraani, among other persons, she writes: "Veuillez noter que vous aurez une formation . .

. sur les références d'assurance auto et habitation." [Emphasis added.] That training was to be given on May 31. She does not invite him; she tells him that he will receive this training! A reminder regarding that training session was sent to Mr. Mazraani on May 28 by the same administrative secretary, and this time a copy was sent to his sales manager and the branch manager.[53]

[39] The following is a description of the material that was provided as Exhibits A-47 and A-57. They are described as training "modules", are for the most part dated September 2002 and are intended for agent training. The modules include Module 2, "The Art of Selling" (21 pages); Module 3, "Planification, Organisation, Contrôle" (21 pages); Module 5, "Approach" (57 pages) plus an annex entitled "How to handle the Objections on the Telephone" (10 pages); Module 7, "Conclusion" (33 pages) and "How to handle objections" (9 pages) plus an annex entitled "The face to face objections" (10 pages);[54] Module 8, "Delivery" (31 pages); and Module 9, "Service and Follow-Up" (25 pages). In addition to these modules, there is another document, entitled "Closing", which has 11 pages.[55]

[40] Here are some samples of the instructions that can be found in this training material. In "The Art of Selling",[56] on page 7, it is stated: "The agent should use his appearance to project an image of a successful person . . . Therefore, be impeccable, with a businesslike appearance and not provocative (washed hands, clean nails, clean haircut, shined shoes, dry-cleaned suit, fresh breath, etc.) . . . Your pen should also be a sign of your success. One does not sign an important contract with a cheap pen. Use a compartmentalized briefcase. Arrange your documents neatly, use labelled folders which will allow you to find the forms you want rapidly." [Emphasis added.]

[41] At page 8 and following, there is a description of the different buyer personality types. The document tells how to behave with each. With the expressive buyer, the agent is told to "[a]void details . . . being abrupt, cold or sticking too close to the agenda."[57] With the personality type described as amiable and characterized by gentleness, the following conduct is advised: Present your case calmly, without being intimidating." Avoid saying to these persons "[h]ere's how I see things" and "manipulating or forcing them to agree . . . being condescending or humiliating them by using subtleties or insults."[58]

[42] On page 13, the cycle of selling is described as consisting of the following: prospecting, approach, interview, conclusion, delivery, service and follow-up. The module on the art of selling also briefly describes each of these steps, but they are discussed in more detail in the modules discussed below.

[43] On page 5 of Module 3, "Planification, Organisation, Contrôle", there is this enlightening statement :

> Débuter votre carrière de représentant c'est comme ouvrir votre propre entreprise. Vous êtes particulièrement avantagé puisque cette forme d'entreprise n'engage pas l'investissement de vos économies personnelles, la recherche d'un local, l'achat de matériel et la tenue d'un inventaire. Elle nécessite cependant l'investissement de votre temps et de votre talent.[59]

[Emphasis added.]

[44] This passage is very instructive because it does not say that one is opening one's own business, but that it is like starting up one's own business, thus implying that the agents are not carrying on a business. Furthermore, such a description is often used to differentiate, from an economic point of view, between a business and an employment. Carrying on a business normally requires capital and labour while employment normally only requires labour. This puts in its proper context the minor importance of some of the expenses that are to be incurred by the agents pursuant to the Agent Contract, that is, expenses such as the cost of their licence, payment for the use of a computer ($18 dollars per week), travel costs and the costs for the use of their car, while the Company covers major items such as the rent for the office and the cost of training, of the office equipment, of developing or buying software specific to the insurance industry, of telephone service, of supervision, etc.

[45] On page 6 of Module 3, where the planning of their activities is dealt with, the agents are reminded of the importance of attending the branch office meetings:

> Vous devez équilibrer vos activités. Le travail de représentant consiste à vendre de l'assurance mais aussi à prospecter, préparer des dossiers, servir ses clients, voyager sur la route, régler *la « paperasse »* au bureau, **assister aux rencontres d'agence**, étudier etc.

[Emphasis added.]

[46] On the same page, the module indicates that agents should plan their work by doing the following things:

> 1. Préparer vos journées de manière à fournir **au moins 8 heures de travail** véritable. . .
>
> 2. Fixer l'heure de votre départ sur la route. Flâner au bureau ou à la maison n'est pas très payant.
>
> 3. Penser à vos rendez-vous avant de vous y rendre. Imaginer des objections que le client éventuel pourrait vous exprimer et préparez vos réponses. . . .
>
> 4. Dîner avec un Centre d'influence – pensez toujours « Prospection . . .
>
> 5. Prévoyez **deux rendez-vous par jour au minimum**.
>
> . . .
>
> 7. Planifiez une partie de la journée pour préparer vos dossiers et **tenez vos rapports sur vos activités quotidiennes prévues ou imprévues**.
>
> 8. Réservez-vous du temps pour lire.
>
> 9. **Ne vous occupez pas de vos affaires personnelles** pendant vos heures de travail et vice versa.
>
> 10. Rappelez-vous que le temps est pour vous du capital. À vous de bien planifier chaque heure, chaque minute.

[Emphasis added.]

Page 7 is headed "Vos objectifs et les **attentes de la compagnie**". [Emphasis added.] Under that heading, on page 8, agents are told: "Avec l'aide du directeur des ventes, déterminez vos objectifs en effectuant les exercices suivants . . ." [Emphasis added.]

[47] At page 9, there are self-serving statements that are more consistent with an intention on the part of the Company to treat its agents as independent contractors. For example, we find the following under the heading "Définition de l'organisation":

> C'est un horaire de travail organisé efficacement, de manière à réaliser les activités qui vous permettent d'atteindre vos objectifs. Le représentant travaille pour lui-même; il contrôle et est entièrement responsable des résultats de son travail. Il est définitivement un propriétaire unique. . . .

[Emphasis added.]

[48] The index for Module 5, dealing with the approach, gives a good indication of the module's content:

> When must the potential client be contacted?
>
> . . .
>
> How to prepare telephone approaches?
>
> . . .
>
> Methods of approach
>
> . . .
>
> Sales dialog
>
> . . .
>
> Scheduling a meeting
>
> . . .

[Emphasis added.]

[49] Here are some examples that are given of sales dialogue to use according to the "source and prospecting tool", and depending, for example, on whether the agent is dealing with an existing client, relatives, friends or acquaintances, or whether he is doing direct solicitation. Of great interest, for example, is how the agents are told to introduce themselves when they call a prospective client: "My name is . . . **of Industrial Alliance** Insurance and Financial Services. Can you spare a few minutes to speak with me?" [Emphasis added.] (Page 20). Later on in this

dialogue, the agent is told to say: "**Since my company**[60] **is asking me** to obtain as many [surveys from prospects] as I can, I asked [name of the person who gave the referral] to tell me if they knew of anyone else who would be interested in helping me with this task. . . ." [Emphasis added.] Another example of an approach on the phone is the following:

> Good morning . . . Mr... My name is… I'm calling from Industrial Alliance Insurance and Financial Services. I am your new agent, and I am the one handling your file. I have been asked by my Company to meet you and make your acquaintance.

[Emphasis added.]

[50] Another suggested approach is: "Mr… my name is… **from Industrial Alliance Insurance** and Financial Services. You are insured with us, so **the Company has asked me** to meet you." [Emphasis added.]

[51] Module 7, entitled "Conclusion", instructs the salesperson on the following subjects: "Why close? When to close the sale? How to close the sale?" [Emphasis added.] For instance, it states:[61]

> . . . More than 98% of all people sign a policy for emotional reasons, and only 2% do it for rational reasons. Thus, **you must** concentrate your efforts on arousing their interest in acquiring insurance, increasing the desire to sign and bringing the potential client to action.

[Emphasis added.]

[52] This module provides "some words and practices that the agent can use to persuade his potential clients to act. We advise you to memorize them and learn their exact definitions from a good dictionary." [Emphasis added.] For instance, at pages 12 and 13:

> People will not sign anything without closely reading the document first. The word "**sign**" means "bond" or "commitment" and creates resistance. If you ask the client to sign something, he will surely answer "*I'll think about it.*" **Use** words like "**authorize**" or "**give your approval**".
>
> . . .
>
> . . . closing the sale begins as early as the first minutes of the sales interview. With the help of your director, carefully analyze the following diagram and understand the process.

[Emphasis added.]

[53] At page 28 of Module 7, the agent is instructed by the Company to record his sales: "In order to follow through on your contracts, from sale to delivery, **record all relevant** information in the 'Personal Sales Record' (F20-123A) or on the Extranet – Agency Management". [Emphasis added.] Also, on page 29, after the agent has been successful in getting his potential client to sign an application, the Module urges:

> The day you file your proposal, write to him and congratulate him for his decision and thank him for his trust in you.

> For example, you could send him a thank-you card that is available at the agency (F900-02A). On the other hand, if you prefer to write him a letter, you could use the following example, which is available in Interface.

[Emphasis added.]

[54] The "How to handle objections"[62] part of Module 7 provides a lot of different scenarios and guidelines regarding how to deal with objections. These are some examples from that document. On pages 4 and 5, we find the following:

> **Handy tricks to help face the objections.**
>
> . . .
>
> **b) If an objection surfaces:**
>
> - **Never argue**. The representative should never respond to an objection by arguing with the potential client. Instead of jumping at the occasion of winning the debate, use the objection as an opportunity to learn more.
> - **Never attack**. . . . Try to feel what he is feeling. . .
> - **Listen carefully.** Let him always express his objection without interrupting him. . . .
> - **Use "and", instead of "but"**. When you have an objection, try to use "and" instead of "but". A potential client who hears "but" could feel confronted or rejected. . . .
>
> . . .
>
> - **Answer positively**. Answer in a way that makes the potential client feel that you are taking care of him.

[Emphasis added.]

[55] There are more examples in "The 'face to face' objections" Annex, including this one on page 4 relating to the "I don't need to buy life insurance" objection:

> **Agent** "You insure your office, your chair, the curtains and the inventory, but you haven't insured the thing most precious in life: yourself. . . .

[Emphasis added.]

[56] On page 5, the "I have to think about it" objection is dealt with:

> **Agent** "I'm relieved to hear that you want to think about it a bit because it will take about 2 or 3 weeks after the medical exam before the company can decide if it wants to assume the risk." . . .

[Emphasis added.]

[57] On page 6, the following is suggested should the prospect say " I'd like to speak to my wife about it":

> **Agent** "I agree with you perfectly. But what would she object to? More money if you die? More money when you retire? More money if you should be disabled?

[Emphasis added.]

[58] On page 7, the "I can't afford it" objection is covered:

> . . .
>
> **Agent** "What would you do if, one day you received a notice telling you that your taxes have gone up $120 a month?"
>
> Wait for his response. Invariably, he'll answer that he will find the money, never mind how. Tell him the following:
>
> **Agent** "It's the same thing for insurance: You'll find the money to pay for the premium. There is a difference however, between paying taxes and paying a premium. When you pay taxes, your money disappears but when you pay premiums, they assure you are protected."

[Emphasis added.]

[59] In Module 8, "Delivery", the index discloses the following topics "Why to deliver the policy? When to deliver the policy? How to deliver the policy? The delivery interview".[63] [Emphasis added.] More specifically, it is stated at page 5 that the "purpose of this module is to teach you how to prepare for the delivery of the policy and to insure you that your new prospect will remain your client for many years to come." [Emphasis added.] Under the item "when to deliver the policy", it is stated:

> . . . It is **strongly** recommended that the policies be delivered **14 days at the very latest** after the Company has issued them. . . . Because, don't forget that the more time that goes by between the signing of the application and the confirmation of its acceptance, the more your client will be inclined to change his mind.

[Underlining only added.]

[60] Further instructions are given at page 6:

> In short, when the agent delivers the insurance policy to the client and he notices that changes have taken place in the insurability of the person since the application had been signed, he **must** notify the insurer immediately, and while awaits the instructions from the insurer, he should not deliver the policy.

[Emphasis added.]

[61] Under the subject heading "How?" it is stated at page 6:

> To ensure that your potential client will become and remain a long-term client, you should prepare yourself carefully **before the interview**. **There are 9 steps to follow to prepare for it well.**
>
> . . .
>
> 2. Enter transaction in "My Sales Register" (F20-123A)
>
> . . .

[Emphasis added.]

[62] At page 13, eight steps to be followed in order to deliver a policy well are set out. The following guideline is given at page 14 in connection with the first step: "If such an interview takes place in your office, you should, of course, take all the necessary precautions to ensure that neither your client nor yourself be disturbed and that you can direct all of your attention to your client." At page 22, it says: "As soon as you return to the agency, do not forget, above all, to send the 'Endless Chain' thank you letter (Interview module)" [Emphasis added.] This is what Module 8 says an agent should do if he delivers a policy with an additional premium, i.e., greater than the premium discussed at the preliminary stage (at page 25):

> . . . you should let the applicant see that he has a weak point. According to them, it is good to make him understand that it may be his last chance to obtain insurance, by emphasizing, for example, the fact that he was lucky that his proposal had not been refused. Never excuse yourself to an applicant for the Company having issued a policy at a special rate. Mention only the advantageous points; don't mention the disadvantages.[64] Show a positive attitude and be proud that the applicant can transfer this additional risk to your company.

[Emphasis added.]

[63] Module 9, "Service and Follow-Up", following a similar pattern to the other modules, deals with the why, when and how of providing service and follow-up; it also speaks about how one should approach an insured?[65] At page 5, the document explains in the following terms why service is so important:

> Once a policy has gone past the expiration date at the beginning of the second year, without renewal and without any apparent reason, this means a loss for the insured, a loss for the agent and a **loss for the company**.
>
> The insured has paid a premium, which he has thrown out of the window. The agent is deprived of the renewal commissions and of the conservation bonus. **The company pays the administrative costs, which exceed the income achieved.**

[Emphasis added.]

[64] The above excerpt clearly illustrates that the Company's interests are always at issue, contrary to the impression given by certain self-serving statements noted above and below which focus only on the agent.

[65] At page 6 of the module it is stated:

> . . . After the registration of the policy, to reinforce your sale, you send the "Thank you" card (Conclusion module). You then deliver the contract and take the time to give your client all pertinent information (Delivery module) - this is part of your service toward your client.

[Emphasis added.]

[66] At page 7 of the module there is a description of how one provides service and does follow-up: ". . . it is very important to organize your computer, which generates your activities automatically. With a mini-file, you have monthly indexes useful for inserting your client's cards in order to communicate with him at a good opportunity." [Emphasis added.] Among the points covered on page 8, there is this one relating to birthday cards: "14 days before the birthday of a client or a potential client, you are notified to prepare his birthday card. . . . **Your director will show which way** you can get them back weekly, or you can have recourse to "*Help*" from the tool bar". [Emphasis added.] On page 15, the following instructions are given regarding an approaching contract anniversary "You send the letter which follows as well as the "Updating Your File" brochure (F13-248A) the week before this date, followed by a telephone call." This is part of the suggested dialogue for that activity:

> Hello, it's… **from Industrial Alliance**. I just received your updating document from your file.

[Emphasis added.]

[67] In addition to the morning sessions referred to in the list of training sessions,[66] Mr. Mazraani stated that he had three weeks of technical training from 1:30 to 3:30 in the afternoon on Tuesdays and Thursdays. The lecturers were employees of Industrial Alliance, usually sales managers. This training included use of the computer and the software.[67]

[68] The software, which was designed by or for Industrial Alliance and which describes its financial products for its potential clients, constitutes a key tool for the distribution of its financial products. As an example of the documentation that would be generated by this software, Mr. Mazraani filed a document dated September 6, 2012 describing a Genesis universal life insurance policy that he submitted to one of his clients.[68] The nine-page document contains sections with such headings as "A Financial Solution for All of Your Needs" and "Plan Details". Information is given on the coverage, the average return for the first year and the projected values over a 57-year period based on certain investment assumptions. There is also a "Highlights" section containing the definitions of words used in the document and there is an "interest rate sensitivity test". None of that, in my view, could have been generated without a computer, at least not as quickly and accurately as it was done with such a tool.[69]

[69] In addition, Mr. Mazraani was trained for one hour by a secretary on the use of the telephone system provided to him by Industrial Alliance. Not only did he receive training on how to use the telephone system, but he was given several examples of messages to be used.[70]

(2) Training for all agents and branch meetings

[70] Even after the initial training, Mr. Mazraani continued to receive training and supervision by Industrial Alliance. This training was offered to all agents. In Mr. Mazraani's words, the training sessions were to inform him (and the other agents) about the financial products offered by Industrial Alliance and to show him how to do his work, including how to use the Intranet and software applications, how to follow the compliance rules, how to request blood samples from potential clients, and how to approach clients for solicitation purposes.

[71] There is a document listing thirteen training sessions for all agents for the period from August 13 to September 24, 2012. These sessions usually ran from 9:30 a.m. to 10:30 a.m. or 11 a.m.[71] The topics included "La prospection" (August 13), "Tout sur l'agenda" (August 23), "Tout sur la messagerie" (August 30), "Tout sur la gestion des contacts" (September 6), and "[C]omment générer une liste d'envoi" (September 20). Some of these topics suggest training on how to do things. Some of the other sessions were for the purpose of informing the agents about financial products or services; such was the case with the one on September 12: "Présentation Inter-Action – Formation nouveau système hypothécaire". Service Inter-Action was a new IA subsidiary carrying on a mortgage brokerage business, which wanted to get referrals from the branch's agents.[72]

[72] In an e-mail of May 4, 2012 concerning Solicour, it is stated: "L'objectif de ces rencontres est de faire connaître les services de Solicour mais surtout de former les représentants à développer des affaires d'assurance collective". This e-mail is directed at people with no experience in the collective insurance sector. The subject of the presentation referred to in the e-mail is "Pourquoi et comment faire de l'assurance collective!".[73] There is another e-mail, on which appears the notation "Important à noter à votre agenda", that is addressed to all the members of the LaSalle Branch and whose subject is "Rencontre préparatoire **Concours du président**".[74] The topics listed are "Idées de prospection", "Suggestions de structure de travail" and "**Objectifs de l'agence**".[75] [Emphasis added.]

[73] There is another list showing eleven meetings and other activities including two training sessions[76] qualifying for professional development units (PDU or, in French, UFC, unités de formation continue[77]), scheduled from October 25 to December 13, 2012.[78] For instance, the list indicates a meeting to take place on October 25, a Thursday, between 9:30 a.m. and 10:30 a.m., and a branch meeting ("Réunion d'agence") for 2 p. m. on November 22.

[74] Danielle Harrison, "adjointe à la direction – formation" de l'Agence Mercier, sent the following e-mail dated September 18, 2012, whose subject line reads "Important − Atelier publipostage Gestion clients". This was a workshop for the "création et la fusion de lettres pour envoi postal".[79] In an e-mail of October 1, 2012, IA's "secrétaire administrative" informs the personnel of changes to the training schedule, in particular with regard to the presentation "Comment préparer un dossier hypothécaire".[80]

[75] The following description by the CRT of what went on in the Laval Branch discloses a similar pattern:[81]

> [75] Il y a d'abord deux réunions hebdomadaires entre le directeur des ventes et ses représentants. La première est une réunion d'équipe. Plusieurs sujets sont abordés, tels que les **objectifs de vente pour l'équipe**, les **règles** et les **procédures corporatives**, les pratiques commerciales, des conseils de vente, etc. La seconde est une **réunion de supervision** où le directeur des ventes rencontre chaque représentant de son équipe, à l'exception de certains « *senior* ». La discussion a notamment pour objet **leur rapport d'activité** et le traitement de certains dossiers. Les réunions hebdomadaires sont d'une durée approximative de une heure trente.
>
> [76] Ensuite, il y **a les réunions de suivi** trimestriel entre le directeur des ventes et ses représentants, en expliquant que l'objectif poursuivi vise à faire un suivi quant à la réalisation du plan d'affaire et des objectifs de vente des représentants.
>
> [77] Monsieur Blackburn mentionne deux autres réunions, soit les réunions d'agence mensuelles qui se tiennent généralement l'avant-midi, lesquelles visent le directeur d'agence, les directeurs des ventes et tous les représentants, soit les réunions de formation trimestrielle dispensée par Industrielle Alliance.
>
> [78] Enfin, il précise qu'à chacune de ces réunions, **les présences sont prises**, soit par le directeur de l'agence ou les directeurs des ventes et que le représentant qui ne peut y participer **a l'obligation d'en informer son directeur des ventes** et de lui exposer les raisons de son absence.
>
> [79] Messieurs Blackburn et Kaliszczak affirment que la majorité des représentants (95%) sont présents aux réunions.
>
> [80] Le directeur de l'agence de Laval, André Pavan reconnaît qu'il tient un registre de présence, mais il ajoute qu'il l'utilise uniquement lorsque la réunion concerne une formation reconnue par l'AMF. Il mentionne qu'une de ses responsabilités consiste à s'assurer que les représentants de son agence ont rempli leurs engagements de formation continue (30 unités réparties sur 2 ans, en assurance de personne, en assurance générale et en conformité), tout en rappelant que la majorité de la formation est obtenue à l'interne. Quant à son registre, il note un taux de présence de 73% pour la dernière année et il estime que pour les années antérieures, les taux de présence sont sensiblement les mêmes. Ceci dit, il nie tenir un registre similaire ou prendre en compte la présence des représentants à d'autres types de réunion.
>
> [81] Tous les témoins reconnaissent qu'aucun représentant n'a subi de sanction, de réprimande ou de conséquence pour ne pas avoir assisté à l'une ou l'autre des réunions de l'agence de Laval, ni pour avoir omis, refusé ou négligé de produire un rapport sur ses activités.

[Emphasis added.]

[76] So, it is not surprising that Mr. Mazraani and some of the witnesses referred to in the CRT reasons felt compelled to attend the meetings.

[77] In addition to specific presentations describing particular insurance products,[82] which were made to the agents, there were numerous documents available on the Intranet describing how to act as a salesperson and how to perform sales work.

E. Work of Mr. Mazraani as financial advisor (agent)

[78] Mr. Mazraani performed most of his duties at the offices of the LaSalle Branch, in a cubicle not far from his sales manager, Mr. Beaulé. The cubicle was for Mr. Mazraani's exclusive use and had his name on it. His telephone extension number was 422. Although he was working from Monday to Thursday, he considered himself a full-time employee of Industrial Alliance, putting in at least 35 hours per week, as he was regularly reminded to do by Mr. Beaulé or Mr. Leclerc. He reserved Fridays for personal matters. He said that he was selling reading glasses at the flea market in Saint-Eustache on weekends in order to supplement his family income. He had three children and a wife to support.

[79] Mr. Mazraani was generally responsible for soliciting his own potential customers to purchase Industrial Alliance's financial products. He testified that, although the Company claims that he was free to offer financial products from other financial institutions under the Agent Contract, he did not do so. It would have been difficult to do so given the minimum production targets that he had to reach to remain in the employment of Industrial Alliance. In addition, given the complexities of the financial products[83] he had to master, it was illusory to think that he could represent other financial institutions. In addition, there were several restrictions, such as dealing with an "authorized entity", as stipulated in section 2 of the Agent Contract. For instance, an IA subsidiary, Solicour, made available to him the products of other financial services companies. This subsidiary earned a commission on these products. Another restriction mentioned in the Agent Contract was that he could submit applications or requests to other insurers only if the financial product was not available within the Industrial Alliance group or it refused to issue a policy.

[80] That was likewise the case for the two agents, Blackburn and Kaliszczak, in the Laval Branch. At paragraph 51 of the CRT reasons, it is stated:[84]

> . . . Ils vendent essentiellement les produits d'assurance et les produits financiers d'Industrielle Alliance en raison de la structure de la rémunération qui ne favorisent pas la vente d'autres produits. Pour eux, il s'agit d'une activité marginale qui n'est pas encouragée, en ajoutant que ce type de transaction doit être systématiquement approuvé par le directeur de l'agence. . . .

[Emphasis added.]

(1) Other instructions

[81] In addition to all the training and the module materials described above that Mr. Mazraani received both before he officially started working and after, Industrial Alliance gave numerous instructions to its agents not only on what to do, but also on how to do their work.

[82] For instance, Mr. Mazraani was asked, in accordance with the power to assign clients mentioned in the April 27 letter,[85] to look after a particular client of the LaSalle Branch who was not one of his. This occurred at least once, when his sales manager asked him to deal with a problem of a returned cheque for a premium paid by a policyholder who had not been solicited

by Mr. Mazraani. In support of his testimony in this regard, Mr. Mazraani filed Exhibits A-6 and A-7, which provide the name of this particular client of the branch. The returned cheque was in fact a pre-authorized bank withdrawal that was returned to Industrial Alliance marked "insufficient funds".

[83] Section 7 of the Agent Contract stipulates that the agent agrees to comply with all Company policies, whose purpose is described as being: "to standardize administrative procedures, reduce the time taken to process a request and ensure that everyone respects the regulations of the life and health insurance industry." [Emphasis added.] These policies include the Conduct Standards[86] and the Policy for Using Electronic Communications (**Communications Policy**). The Conduct Standards are set out on two pages. It consist of 13 articles appearing on page 1 (**Conduct Standards on page 1**); on page 2 are the "Industry Monitoring Standards" (**Industry Standards**),[87] of which there are one or more for each of 18 different items and for which there are descriptions of the controls to be put in place by the Company and of the sanctions to be applied for failure to comply. Section 19 of the Agent Contract refers to these documents, under the heading "schedules, code and policies", as documents that an agent must acknowledge having read.

[84] The "primary objective" of the Conduct Standards is to establish guidelines for all the Company's operations. The Conduct Standards on page 1 read as follows:

> **Introduction**
>
> The primary objective of this market conduct standards code is to establish **guidelines** for all of the Company's operations and to make sure the interests of our clients always take priority in our daily operations.[88]
>
> This part of the code primarily covers the market conduct standards of sales personnel.
>
> A number of controls have been or will be introduced to make sure that the articles of the code are respected. Above all, we believe that training employees and sales personnel is still the best way to avoid any mistakes that could prejudice to our clients,[89] whether it be intentional or not.
>
> **Articles**
>
> 1) The intermediary agrees to properly inform and advise the client and follow the rules of his/her code of ethics.
>
> 2) Any advertising or offer of a product or service made by the Company or a member of the sales force must be clear and true. Such advertising or offer must not falsely represent the product and must not contain any incomplete statements, demonstrations or comparisons designed to mislead the client.
>
> 3) Any document, notice, statement or contract destined for the client must be clear and understandable and must provide the client with all necessary information. Moreover, any documents issued by the Company may not be modified by any member of the sales force.

4) Any solicitation of current or future clients must be carried out in such a way as to not mislead the client about the real purpose of the solicitation.

5) Before recommending a product or a service to a client, the intermediary must fully determine the client's needs, objectives and financial situation. To do this, he/she will carry out a needs analysis, establish objectives and determine the client's investor profile.

6) The intermediary must encourage the client to keep his/her existing contracts in force. However, **if, in the interest of the client**, we have to modify or replace his/her contracts, the client must be informed of the advantages and **consequences**[90] of the change, and the change must be made in accordance with the rules prescribed by law or the regulations in effect.

7) The intermediary shall faithfully and completely forward all information obtained from the client and required by the Company, for the analysis and evaluation of any insurance application. The agent must also inform the Company of any situation that could change the Company's decision.

8) All information obtained from the client will be treated confidentially and will only be used for the purposes authorized by the client.

9) All individual insurance or annuity applications must be **immediately** sent to the Company. The same applies to any request for change made by the client.

10) All amounts remitted by a client to an intermediary **must be immediately** forwarded to the Company.

11) All amounts owed to a client by the Company must be **immediately** forwarded to the client.

12) Any insurance contract or other document issued by the Company must be delivered to the client within 21 days of its being issued. If additional information must be obtained when the contract is delivered, this information must be **immediately** forwarded to the Company. Also, when delivering the contract, the intermediary must explain the contents of the contract to the client and inform the client of any change, extra premium or amendment made by the Company. Finally, the intermediary must inform the Company and return the contract if there is any change in the insurability of any of the insureds.

13) Application of Controls and Sanctions

- In all cases, failure to comply with these standards may be reported by Company personnel.

- When more than one sanction is indicated, they will apply gradually in the event of subsequent offences.

- The agent's contract will be terminated if the intermediary fails to comply with the standards following three (3) written notices in a continuous period of 24 months.

- Any failure to comply with the standards that leads to termination of the contract will be considered a serious offence. Contract termination will be reported to the provincial regulatory body.

- Notwithstanding the foregoing, the indicated sanctions may vary and may be combined with any other measure deemed appropriate by the chief compliance officer or his/her replacement.

- In all cases, the costs incurred by the Company due to the agent's failure to comply will be charged to the agent. This includes any fines imposed on the Company due to the agent's wrongful acts.

[Emphasis added.]

[85] With respect to the Communications Policy,[91] the IA in-house counsel stressed that this document was intended to fulfil IA's obligation under *An Act respecting the Protection of Personal Information in the Private Sector*[92] (**Information Protection Act**), and principally under section 10, which provides as follows:

> 10. A person carrying on an enterprise must take the security measures necessary to ensure the protection of the personal information collected, used, communicated, kept or destroyed and that are reasonable given the sensitivity of the information, the purposes for which it is to be used, the quantity and distribution of the information and the medium on which it is stored.

[Emphasis added.]

[86] However a reading of the document shows a different reality. First, the document starts with the following paragraphs:

> This document summarizes the main points of the Company's general policy on the use of electronic communications i.e., the Internet and email. All Company agents **must agree** to respect this policy. Given the nature of their work, it is important that the rules below be followed so as **not to result in data loss** on their computer or interruption of their connection to the head office.
>
> 1. Access to electronic communications is given with the **sole purpose of assisting agents in work-related activities**. Use of this access for any other purpose, particularly illegal activities, personal commercial activities, unethical or offensive practices, conversations or access to sites considered to be offensive or that may adversely affect the interests of the Company and any other related activities **is strictly prohibited**.
>
> 2. To ensure optimal service to all agents and for billing purposes, the Company regularly gathers statistics on the frequency and duration of Internet accesses and the number and the size of email messages sent and received. In case of reasonable doubt, the Company reserves the right to monitor the use and content of such communications more closely.
>
> . . .
>
> 4. Agents cannot provide privileged information (trade secrets, client lists etc.) or personal information concerning salaries, management personnel, suppliers, clients or other Company representatives to third parties without the required authorization.
>
> 5. Any use that does **not comply with the Company's security policy may lead to sanctions** that can range from the relocation of access rights to termination of the agent's contract.

[Emphasis added.]

[87] The policy also provides additional rules respecting Internet use. It describes several precautions that must be taken, including:

> 1) *Agents **must** assume that information* found on the Internet (Web) is not reliable and should consult other sources to verify information.
>
> 2. Agents should be careful when downloading files from the Internet and take note of the following:
>
> > (a) Agents who lease a computer from the Company must not download any files meant to enhance the performance of their computer. . . .
> >
> > (b) Almost all information found on the Internet is protected by exclusive rights. Agents should not download any applications or software unless they have the required license.
> >
> > (c) In a number of cases, viruses contracted from the Internet have gone on to infect other computers at several companies. Therefore, each time files are downloaded, agents should scan the files in question for viruses using antivirus software.
>
> 3. Agents offering opinions in discussions forums on the Internet should include the following statement after their comment:
>
> > "This message is an expression of the author's personal opinions. The Company will not be held liable in any way for the opinions expressed herein."

[Emphasis added.]

[88] These extracts from the policy clearly show that the Company is telling its agents how the use the Intranet and the Internet, to which they are given access. There are specific instructions on how to use it, constraints as to the length of time for which it can be used, a prohibition against using applications unless the proper licence is obtained, and a prohibition against giving out information about salaries and management personnel. These are concerns expressed in relation to matters that are of interest to the Company and that are not within the scope of the Information Protection Act as described by the in-house counsel in her testimony.

[89] Another example of guidelines and instructions benefiting the Company is the statement that opinions expressed by the agents should not be considered the opinion of the Company.

[90] This is equally true for the Industry Standards, which appear on page 2 of the Conduct Standards.[93] For example, with respect to the media, it is stated that agents must not encourage a client to use the media to resolve a problem. Failure to comply with this requirement results in termination of the agent's contract, as would also be the case for violations with respect to money laundering. No other sanction is mentioned in these two cases! Another Industry Standard, which is similar to article 3 of the Conduct Standards on page 1, is the prohibition against modifying any document issued by the Company.[94] Also, it is stated

that any advertising of products and services has to be approved by the Company's communications department. Another standard is that a policy being replaced should never be terminated before the new one is issued. One of the sanctions described for failure to comply with these last three standards is termination of the agent's contract.

[91] In section 10 of the Agent Contract, there is one specific direction which requires that an agent not grant a premium rebate to clients. In the same section, the agent is instructed to "inform the Company in writing of the opening (and of all subsequent changes) of a trust account for the performance of his/her duties." The Company will thus be in a position to exercise its power to control. Finally, the agent must immediately remit to the Company any amount that he or she receives on behalf of the Company.

[92] Other examples of instructions are found in the memo sheet entitled "Keep Your Clock on Time All Year Long", where it is stated:[95]

> 1 When I arrive at the office, the first thing I do is to enter my activities and results from yesterday into the agency's management system.
>
> 2 I take my messages, read my email and consult my agenda for the day.
>
> 3 I devote 60% of my time to prospection by making a sufficient number of calls in order to obtain 10 appointments a week.
>
> 4 I remember, every time that I see or speak to a client or a prospect, to ask for referrals in life insurance and renewal dates for mortgage loans and home and automobile insurance.
>
> 5 I take the time to call my clients on their birthdays.
>
> 6 I take the time to do the medical follow-up of my files and to deliver my contracts as soon as I receive them.
>
> 7 **I take part in agency meetings** and I consult the information on the extranet.
>
> 8 I do what's necessary so that my work week is full before leaving for the weekend.
>
> 9 I contribute to the development of the agency by referring candidates to my manager.
>
> 10 I contribute to the success of my team, my agency and « L'équipe solidaire » by **doing my part** during company sales promotions.
>
> [Emphasis added.]

[93] In an e-mail sent by Nicole Duclos, "**superviseure** administrative", [Emphasis added] an assistant to the branch manager, of which the subject line reads "IMPORTANT CONFORMITÉ « Précisions et ajustements »",[96] we find the following instructions:

> Pour que vos dossiers soient conformes, veuillez vous assurer de sauvegarder l'illustration et le profil de l'investisseur électronique que vous avez préparés pour le client avant la vente où [*sic*] le jour de la signature de la proposition F1E. À noter que lorsque vous ne sauvegardez pas, la date

de préparation de l'illustration est différente de la date de signature de la proposition ce qui n'est pas conforme.

Je vous rappelle que la déclaration du proposant F13-743 doit être imprimée (recto-verso) afin qu'elle soit signée par le client. Ne pas oublier de cocher la case à l'effet que le client déclare avoir pris connaissance de la déclaration du représentant qui figure au verso.

Vous trouverez ci-joint un aide-mémoire à jour afin que vous puissiez nous remettre vos dossiers dans l'ordre indiqué. Veuillez ne pas brocher les différents documents remis pour expédition au Siège Social car ils doivent débrocher à la réception pour mettre à l'imagerie votre dossier.

[Emphasis added.]

[94] Mr. Mazraani filed the aide-mémoire for compliance ("conformité").[97] This document indicated to him the order in which each document had to be filed, specified that all originals of documents were to be grouped together, as were all the copies thereof which were to stay in the file and indicated where the originals and copies had to be filed. For example, this aide-mémoire required that the original of a document be sent to the head office and that a copy be retained in the file. During her testimony, the in-house counsel acknowledged that this document was not a compliance measure taken pursuant to the Distribution Act, but was an administrative compliance measure taken for the greater efficiency of IA's operations.[98]

[95] There is another compliance checklist entitled "Conformité, Éléments à corriger − Grille de suivi" (**Compliance Checklist**), which indicates the sources of the various requirements. Some of these requirements refer to regulations, some to industry standards or to internal rules.[99] That checklist reads in part as follows:

AJOUTER AU DOSSIER

1. Notes dans la section "Communications" du dossier client AMF REGL. 2 ART. 6.

2. CTC (Renseignements personnels – objectifs et planifications) + détaillé AMF REGL. 2 Art. 6

3. ABF (Bilan financier) + détaillé AMF REGL. 2 ART. 6

4. Description des polices en vigueur dans le Temps d'arrêt incomplète AMF REGL. 2 ART. 6

. . .

6. Déclaration du proposant (F-13-743) **ACCAP**[100]

. . .

À CORRIGER

17. Actif et passif incomplet. AMF REGL. 2 ART.6

18. Bilan financier erroné, ne tenant pas compte des contrats existants ou remplacés AMF REGL. 2 ART.6

19. Temps d'arrêt papier n'est pas signé par le proposant AMF REGL. 2 ART.6

. . .

21. Refus d'assurance au conjoint, non initialisé par le proposant AMF REGL. 2 ART.6

. . .

24. Les initiales du proposant sont absentes sur la F-13-743 AMF REGL. 2 ART.6

. . .

32. Divergence − Initiales du directeur n'apparaissent pas sur le formulaire « Profil de l'investisseur » **Règle interne de la compagnie**

[Emphasis added.]

[96] In July 2012, Industrial Alliance wrote a memorandum describing what its agents were to do as a result of changes being made to premium rates for particular insurance products. It reads in part as follows:

. . .

Que faire?

1. Détruire les quantités que vous avez en stock à votre agence.

2. Utiliser le fichier électronique de la F32 joint à ce courriel. Imprimez-le et remplissez-le au besoin. La version électronique en format PDF de cette proposition est également disponible sur l'extranet et dans le centre de documentation.

3. De nouveaux exemplaires papier seront disponibles le 25 juillet 2012 à votre centre d'approvisionnement habituel. Lorsque vous en commanderez, veuillez prendre en considération que nous préparerons éventuellement une version en format PDF dynamique (qui peut être remplie à l'écran).

[Emphasis added.]

This represents a higher level of micromanagement than one would expect from most employers with regard to their employees!

[97] The following is another example. On June 28, 2012, the Company sent out a memorandum entitled "Kiosque Square Décarie, Règles et procédures". Under the heading "RÈGLES INTERNES", we find the following instruction: "SVP être à l'heure selon l'horaire établi."[101]

[98] Industrial Alliance prepares advertising material to be used by its agents, such as agendas and office calendars. This marketing material is personalized and can include a photo of the agent. The direction given by the Company regarding such photos is "TENUE

VESTIMENTAIRE: Homme: VESTON, CRAVATE Femme: TENUE PROFESSIONNELLE". [102] Although it is the agents who pay for the marketing material, it is Industrial Alliance that tells them how to dress.

[99] Mr. Mazraani also received a leaflet from the Company explaining how to access the "Gestion Clients" tool starting June 18.[103]

(2) Supervision and control

[100] Industrial Alliance does compliance verification. Although new legislation has in recent years raised the standards, compliance control was something that the Company had done long before these new standards came into force in 1998, as was acknowledged by Mr. Charbonneau, a veteran of about 29 years as an IA agent. When asked about these new standards and the consequential need for training, he offered the following statements:[104]

> MR. CHARBONNEAU: So you don't need to get training to read that we have to put "renseignements personnels" or whatever, those are things that we would do. It's just that now it's better done, so we see all the papers is done.
>
> . . .
>
> JUSTICE ARCHAMBAULT: So are you saying that you never attended any session to explain to you when the new conformity rules came in?
>
> MR. CHARBONNEAU: No, the new conformity rule came in, but I mean ---
>
> JUSTICE ARCHAMBAULT: Did you receive a training for that?
>
> MR. CHARBONNEAU: Well we got the training at the office ---
>
> . . .
>
> MR. CHARBONNEAU: --- at the branch.
>
> . . .
>
> MR. CHARBONNEAU: But we -- all of that was something that we would be doing over the years, it's just now it's more ---
>
> . . .
>
> MR. CHARBONNEAU: --- refined.
>
> . . .
>
> JUSTICE ARCHAMBAULT: At the beginning you need some training to be made aware of it.
>
> MR. CHARBONNEAU: Exactly.
>
> JUSTICE ARCHAMBAULT: But once you get going you don't need to be told every time?

MR. CHARBONNEAU: Exactly, but also what I meant is that all those things that they ask, it's something that we've been doing over the years ---

. . .

MR. CHARBONNEAU: --- so it wasn't ---

. . . .

MR. CHARBONNEAU: --- nothing new.

[Emphasis added.]

[101] He provided the following description of how compliance is ensured by the Company: [105]

JUSTICE ARCHAMBAULT: I have a note here about activity report. Do you file activity report? You don't file them. So how would your sales manager or branch manager know about the new clients you bring in, how is he being informed about that?

. . . .

JUSTICE ARCHAMBAULT: Because you said they do sometime review it, so ---

MR. CHARBONNEAU: Yes, exactly.

JUSTICE ARCHAMBAULT: --- so I'm assuming that they don't review it because you ask him to do it?

M. CHARBONNEAU: Non.

JUSTICE ARCHAMBAULT: They do it out of their own; right?

MR. CHARBONNEAU: Exactly.

JUSTICE ARCHAMBAULT: So how do they know? The file cabinet is in your office; correct?

M. CHARBONNEAU: Oui.

JUSTICE ARCHAMBAULT: So they have the right to go into your ---

MR. CHARBONNEAU: Yes.

JUSTICE ARCHAMBAULT: --- and they look at it ---

MR. CHARBONNEAU: Yes.

JUSTICE ARCHAMBAULT: --- and that's how it's done?

MR. CHARBONNEAU: Yeah, they could do it "au hasard".

JUSTICE ARCHAMBAULT: Some kind of a spot check?

M. CHARBONNEAU: Oui.

JUSTICE ARCHAMBAULT: . . . So they just -- they just do it?

MR. CHARBONNEAU: Exactly.

[Emphasis added.]

[102] The in-house counsel, Ms. Beaudet, corroborated Mr. Charbonneau's testimony that the compliance department only checked, on a random basis, 5% to 10% of the transactions.[106] She testified that the level of compliance was not specified in the legislation and that it was the Company's decision to do it at that level. This was considered reasonable in the Company's circumstances. In this context, compliance means checking whether the agent has fulfilled his or her obligations under the Distribution Act, such as inquiring about the client's situation or needs.[107]

[103] The staff at the branch office did go over the documentation prepared by Mr. Mazraani, as evidenced by a note in the file of one of Mr. Mazraani's clients in which, by mistake, the amount shown as the first premium was $23,886,001. This number should have been $75.87.[108] An assistant of Mr. Leclerc,[109] Ms. Laporte, acting on his behalf, informed the head office of the error. She then reported the error to Mr. Mazraani's hierarchical superior, Mr. Beaulé, not to Mr. Mazraani.[110] It was Mr. Beaulé who informed him.

[104] When it was suggested to him by counsel for IA that agents could employ a sales assistant, Mr. Michaud said they could, and I asked for the following clarifications:

JUSTICE ARCHAMBAULT: . . . So there is no contractual relationship between that assistant and the company?

MR. MICHAUD: No. . . .

. . .

MR. MICHAUD: The only thing that we require these employees of the advisors to do is to sign kind of a confidentiality agreement that they don't disclose the information about the clients because ---

. . .

JUSTICE ARCHAMBAULT: . . . But is that an undertaking they take directly towards you or towards the -- towards the advisor?

MR. MICHAUD: I don't have the details. I don't know.[111]

. . .

JUSTICE ARCHAMBAULT: . . . if I'm not mistaken, I thought in the judgment I read that they need to have this employee assistant approved by you. Am I mistaken?

MR. MICHAUD: They don't need to approve but we just want to make sure that they don't hire let's say somebody that would not be suitable but the decision ---

. . .

JUSTICE ARCHAMBAULT: If you were not happy with an assistant that they hired, what would you do?

MR. MICHAUD: I don't have any control. I don't control the quality of the work that they do. So I don't know ---

JUSTICE ARCHAMBAULT: No, let's say they have a bad reputation.

MR. MICHAUD: Oh, I would say to the advisor maybe you should find somebody else.

JUSTICE ARCHAMBAULT: Maybe or would you insist?

MR. MICHAUD: I would say -- I would say it never happened. So ---

JUSTICE ARCHAMBAULT: So you don't know. But you don't know what you would do?

. . .

MR. MICHAUD: I would say we would strongly recommend ---

JUSTICE ARCHAMBAULT: If someone had connection with the mafia?

MR. MICHAUD: Yeah, I would -- I would certainly strongly recommend that he looks after somebody else.[112]

[105] At the Laval Branch, it would seem that the Company plays a greater role than Mr. Michaud was prepared to recognize in this appeal:[113]

> [34] Monsieur Blackburn n'est pas totalement en accord avec l'affirmation voulant qu'Industrielle Alliance ne joue aucun rôle à l'égard des adjointes des représentants dans la mesure où la liste des tâches est approuvée au préalable par le directeur de l'agence
>
> [Emphasis added.]

[106] Mr. Mazraani stated that there were regular meetings with his sales manager Mr. Beaulé to discuss his performance, to motivate him to become a better salesperson. He testified on several occasions that they "push you all the time". These meetings would often happen after a training session. As corroboration of his statements, Mr. Mazraani filed a copy of pages from his own agenda.[114] For September 5, 2012, he wrote: "Met with Eric [Leclerc] **Wants to see Activities**. Explained it is very hard despite all activities left office unhappily." [Emphasis added.]

[107] You find examples of similar meetings which are described in the CRT reasons. In the following excerpt from those reasons, the setting of sales objectives, the development of a business plan and the requirement for attendance at meetings are discussed:[115]

[67] La clause 5 du contrat de représentant prévoit la possibilité pour Industrielle Alliance de fixer une norme minimale de production, et selon les dires de monsieur Blackburn, elle est peu élevée (+/-30 000 $ par an).

[68] Selon messieurs Blackburn et Kaliszczak, tous les représentants confectionnent un plan d'affaire, lequel a été négocié et discuté avec le directeur des ventes. Outre le fait que celui-ci est remis, il est revu et validé annuellement en fonction du niveau de réalisation des objectifs fixés. Le plan d'affaire est à ce point sérieux qu'un suivi trimestriel est effectué par le directeur des ventes. De plus, les objectifs de vente sont inscrits dans le système informatique de gestion de l'agence afin de contrôler les activités des représentants.

[69] Bruno Michaud, André Pavan et Isabelle St-Jean estiment que le plan d'affaire, les objectifs de vente et le choix de développer une clientèle parmi une autre, relèvent exclusivement du choix du représentant.

[70] Pour illustrer le caractère facultatif de la démarche, André Pavant mentionne que le tiers des représentants ne dévoile pas leur plan d'affaire ou leurs objectifs de vente. Isabelle St-Jean est de ce nombre. Pour eux, il n'y a rien d'anormal là-dedans puisque dans le modèle d'affaire d'Industrielle Alliance, le rôle d'un directeur des ventes est de faire du « *coaching* » et de la formation, en insistant sur le fait que les représentants ne sont pas tous rendus au même niveau. Plus précisément, il mentionne qu'à l'heure actuelle, il compte 21 représentants à l'agence de Laval qui ont moins de 12 mois d'expérience sur un total de 51 et entre 2 et 3 qui ont moins de 24 mois d'expérience. Or, ce sont eux et eux seuls, dit-il, qui font rapport de leurs activités à leurs directeurs des ventes et même encore là, il réitère que cette démarche s'effectue dans une perspective de « *coaching* ». Quant aux autres, c'est-à-dire ceux qui ont plus de 24 mois d'expérience, ils ne font aucun rapport au sujet de leurs activités. Ils ont fait leurs preuves et ils savent surtout quoi faire pour réussir.

[71] Le témoignage de Bruno Michaud va dans le même sens. Lorsqu'un représentant est nouveau dans l'industrie, il est évident que le directeur des ventes va l'aider ou l'assister pour établir son plan d'affaire ou ses objectifs de vente. Toutefois, ce type d'intervention est toujours réalisé dans une perspective d'aide ou de conseil et jamais avec l'idée de contrôler ou d'imposer quoi que ce soit. Bien souvent, dit-il, les nouveaux représentants ne sont pas en mesure de faire une bonne évaluation de leur situation ni des implications reliées à la réalisation d'un objectif. Ils ont besoin de « *coaching* » et de prendre conscience qu'un chiffre d'affaires de X implique un niveau de prospection de Y ou un nombre Z de clientèle : c'est mathématique. C'est bien beau se fixer des objectifs, mais encore faut-il savoir quoi faire pour les réaliser. Enfin, il mentionne que les représentants exercent des activités dans une industrie qui est très règlementée [*sic*] et que les directeurs des ventes agissent également comme maîtres de stage. Dans cette perspective, il est normal qu'en début de carrière, le contrôle et la surveillance exercés soient plus grands, à tout le moins pendant la période de stage.

[72] Au sujet du rôle du directeur d'agence, André Pavan et Bruno Michaud l'associent davantage à une responsabilité qui consiste à s'assurer de la conformité de toutes les transactions effectuées et de maintenir un niveau de formation qui respecte les exigences de l'AMF.

La présence aux réunions

[73] Selon messieurs Blackburn et Kaliszczak, les représentants ont l'obligation d'assister à plusieurs réunions et ils doivent faire rapport de leurs activités.[116]

[Emphasis added.]

[108] To show how important the involvement of the sales manager was in the execution and supervision of the work of the agents and how integrated the agents are into the organization of the Company, Mr. Mazraani testified that his sales manager informed him on June 22, 2012 that he would be away for a week and that if Mr. Mazraani needed any assistance he could ask any manager at the agency.[117] There is at least one other such e-mail sent by Mr. Beaulé; it is dated October 2, 2012. In it, he indicates to the members of his team that he will be away on vacation and tells them to see the other managers or Nicole, who was the "superviseure administrative" [Emphasis added.], should they have any questions or need help.[118]

[109] Mr. Mazraani also felt compelled to justify his absence from the office to Industrial Alliance by providing a medical certificate, which he sent to the attention of Mr. Eric Leclerc. [119] This certificate indicated that he would not be able to report for work from September 19 to September 21, 2012 inclusive. Mr. Mazraani felt that it was a normal thing for an employee to advise his employer of his absence. Mr. Blackburn said substantially the same in his appeal. If he was not present at the Laval office, he would inform his sales manager, as indicated in the following excerpt from the CRT reasons:

> [41] Monsieur Blackburn affirme toutefois que le représentant qui n'est pas présent à l'agence de Laval, pour une raison ou pour une autre, se doit, à tout le moins, d'en informer son directeur des ventes.

[110] Other interesting facts also emerge from the CRT reasons,[120] for instance, with regard to the freedom that agents were supposed to have in choosing when to take their vacation:

> [25] Cependant, monsieur Blackburn déclare que dans les faits, la direction de l'agence de Laval encourage fortement les représentants à prendre leurs vacances d'été durant les deux premières semaines de juillet. Pour ce qui est des mois d'août et de septembre qui correspondent à la période du concours du président, il affirme qu'il n'est pas question de prendre des vacances. Ceci dit, il reconnaît qu'il n'a pas été personnellement témoin d'une situation où un représentant aurait subi une mesure disciplinaire ou une terminaison de contrat pour ce motif. Enfin, son témoignage est silencieux sur le nombre de jours de vacances autorisé, s'il en est, ni n'aborde la question des jours fériés.
>
> [26] Monsieur Kaliszczak abonde dans le même sens, notamment sur l'affirmation voulant qu'il n'est pas question de prendre des vacances pendant la période du concours du président. Il explique qu'il a déjà tenté, **sans succès**, d'en faire la demande à son directeur des ventes de l'époque (monsieur Blackburn) en 2009 ou en 2010.
>
> [Emphasis added.]

[111] As an illustration of the steps taken by the Company to stimulate sales, reference may be made to Industrial Alliance instituting the "Concours du président", the aim of which is to recognize the best performers. During the competition, statistics of sales are distributed to the agents. For example, the data for the week of August 6, 2012, show the ranking of 263 agents across Quebec. We see the same with respect to the branch managers and the sales managers. [121]

[112] The Company can exercise its control through various mechanisms under the Agent Contract. For example, under section 14 dealing with the suspension of the contract, "[t]he Company may suspend [the] contract under any reasonable grounds, whether or not related to duties of the Agent, by giving the Agent notice. . . ." No remuneration is payable during the suspension and the agent loses the right to all commissions payable during that period.

[113] Similarly, under section 15 dealing with the cancellation of the contract, the Company may terminate the contract, with or without cause, by giving seven day's written notice. In that case, no remuneration is payable as of the date the contract is cancelled and, if any debt is owed by the agent to the Company, such debt is immediately payable to the Company by the agent. [122]

F. Yves Charbonneau

[114] The intervenor in this appeal, Industrial Alliance, asked two of its successful agents to testify to describe the type of relationship that they have with the Company. The first was Mr. Charbonneau, who was also "attached" to the LaSalle Branch. He has been an agent with the Company since 1987. He did not remember if he had been hired as an employee or an independent contractor. However, it should be remembered that Mr. Michaud testified that IA's agents were treated as employees prior to 1993. His Agent Contract,[123] which is dated October 25, 1993, specifies that it was in force on October 18, 1993. This date is consistent with the testimony given by Mr. Michaud that the status of its agents changed in 1993. When asked whether there was anything different prior to 1993 or after 1992, Mr. Charbonneau stated that there was nothing different in the way that he carried on his activities.

[115] The status of Mr. Charbonneau also changed in August 2004 after he incorporated himself. The agent corporation contract also entitled "Agence de carrière" is between Industrial Alliance and Conseils financiers Yvanjay Inc., the company of Mr. Charbonneau, who is described as the authorized representative of that entity. It is worthy of note that he contacted the Company before he incorporated his own company to replace himself.

[116] Mr. Charbonneau transferred his right to represent his clientele to Conseils financiers Yvanjay Inc.[124] In section 5 of this contract, it is stipulated that it is of the essence of the contract that Mr. Charbonneau "conduise lui-même toutes les affaires de l'agent étant plus particulièrement entendu que le représentant autorisé doit être la seule personne autorisée à transiger de l'assurance ou des produits financiers pour le compte de l'agent." Moreover, the authorized representative "se porte caution conjointe et solidaire des dettes et obligations de l'agent." So it is not a surprise that Mr. Charbonneau thought that his old contract as an agent for the Company still remained in force after the agent corporation contract came into effect. As far as he is concerned, it looks as if nothing changed after this incorporation. However, section 20 of the agent corporation contract states : "Le présent contrat remplace tout contrat antérieur entre l'agent ou son représentant autorisé et la Compagnie."[125]

[117] During his testimony, Mr. Charbonneau, like Ms. Stephanie Woo, the other successful agent who testified at the request of Industrial Alliance, stated that he believed he was not required to attend the training sessions and other regular meetings, although he acknowledged that he usually did attend. He did not remember−and this is the most generous interpretation−that the Company could, in certain instances, exercise its right to make it "mandatory" for its agents to attend certain meetings.

[118] Mr. Charbonneau testified that he had employed for many years an assistant to help him with the clerical work, that he fixed and paid the assistant's salary, determined the assistant's work schedule, etc. He also confirmed that he could work on a team with other agents at the branch and that they could share their commissions.

G. Stephanie Woo

[119] The second agent who testified for Industrial Alliance was Ms. Stephanie Woo. She was hired in March 2012, about the same time as Mr. Mazraani and signed a contract similar to his, which described her status as being that of an independent contractor. However when asked by IA's counsel about her remuneration for her first year, she gave the following revealing answer: [126]

> MS. WOO: [] thousand ([],000) starting from March to December.
>
> JUSTICE ARCHAMBAULT: These are your commissions ---
>
> MS. WOO: **My salary** ---

[Emphasis added.]

[120] To be as successful as she has been, she followed the instructions received from the Company, which she described as follows :

> MS. WOO: Okay, first of all when I started, the company gave us a recipe saying that if you met or called x amount of people, it's a game of numbers and sales; right? And so they told us if you met up with this amount of people, you should get this amount of appointments and you should make this amount of sales. And they told me there's no secret to this recipe, if you follow it you'll get it.
>
> . . .
>
> MS. WOO: --- that's what I did. And so I did follow the recipe of booking 12 appointments a week, asking for referrals. And every single week on the Friday, if I didn't get 12 to 14 appointments for the next week, I would not go home until I got my appointments.[127]

[Emphasis added.]

[121] She testified that in order to get your licence from the AMF, you have to pass an exam and that you normally prepare for that exam by buying books on the examination subjects, reading

them on your own and understanding them, thus putting yourself in a position to pass the exam. [128] Once you get your licence, you start a three-month internship ("*stage*") working at the insurance company that you are attached to. The Company did not provide her any particular training to help her pass the AMF exam and obtain the licence to act as a financial advisor. But if she had any questions, she could ask the branch manager. This testimony makes it clearer that all the training that the agents get from the Company is for the purpose of showing them how to perform their work for IA!

[122] Ms. Woo also confirmed that she had purchased the right to represent other customers from someone who had left the Company and that she had herself sold the right to represent some of her clients. During her testimony, she gave similar answers to those of Mr. Charbonneau with respect to her freedom in setting her schedule, soliciting clients, taking holidays and determining when she would take them and for how long.

[123] Ms. Woo acknowledged that she kept her sales manager informed of her activities, which included informing him about the hours she spent outside the office, the clients which she was seeing and the sales which she made, although she felt that she was not required to do so:[129]

> JUSTICE ARCHAMBAULT: Then why did you do?
>
> MS. WOO: Because I'm personally the type of person that wants to be checked up on, ask, encouraged.

[Emphasis added.]

[124] She described the role of her sales manager as being to help her improve her sales techniques and show her how to approach clients and how to deal with particular problems, such as obtaining a void cheque from a client. This assistance (her sales manager would "[g]uide, support" her) would take place both in the office and on the road when she met her clients.[130] Her sales manager would accompany her to visit a client whenever she needed such assistance. [131] During her three-month training, she would attend training sessions three times a week for two or three hours per day.[132] She thought that attendance at these training sessions was not a requirement, but she attended all of them because she wanted to be a successful agent. She also got technical training, on the telephone system, for example:[133]

> JUSTICE ARCHAMBAULT: Did someone tell you how the telephone system work at the office?
>
> MS. WOO: **Our secretary**[134] -- a secretary the first day came ---
>
> . . .
>
> JUSTICE ARCHAMBAULT: --- would have told you how to do it?
>
> MS. WOO: Exactly.

[Emphasis added.]

[125] She also attended the weekly Monday meetings to learn about different subjects, such as sales techniques, to be informed about new products or about office rules, to receive pep talks, to hear about the birthdays of team members or to discuss performance as reflected in data distributed weekly. She acknowledged that there were incentives offered by the Company and that she herself received gifts such as a bottle of wine, a watch, pens, glasses and a wine cellar. Like Mr. Mazraani, she indicated that she would meet with her sales manager after the meetings. She also confirmed that payment of insurance premiums by clients was not made to her but to the Company. She also testified that she set her own targets for increasing her sales on an annual basis.

[126] In 2012, when she was hired, she would spend approximately 10 hours a day doing her prospecting at the branch office. From 2013 to 2015, she said, she spent approximately three hours per day at the branch and the rest of her time was spent meeting her clients outside the office.

H. The Clients

[127] The Agent Contract stipulates in section 13 that the client files remain the property of the Company.[135] Pursuant to the same section, the Company has the right to appoint another agent if the Company is not satisfied with the service provided by "the initial agent". Section 15 of the Agent Contract provides: "When this contract is cancelled because the Agent ceases to act as an Agent, the Company becomes the assignee of the client records."

[128] In addition, the agent must comply with the non-competition clause in section 16 of the Agent Contract for a period of two years, beginning on the date of cancellation of the contract. The agent must not act as an agent or broker selling to or soliciting clients of the Company who are part of the service unit served by the agent at the time of the cancellation of the contract.

[129] Mr. Michaud described what would happen, on the retirement of a particular agent from the firm, to that agent's clients. Normally, the departed agent would get a commission on a yearly basis for the first ten years in respect of the premium paid by the client for his or her insurance coverage. So, if an agent left three years after having made the sale, and provided that the client continued to pay the premium, the agent would continue to get his share of the commission. However, he also indicated that the departing agent could sell the right to represent these clients to other IA agents and that the Company would intervene to consent to such transfer. It would not allow such transfer to be made to someone working for another company. [136] This is in accordance with section 11 of the Agency Contract and section H.10 of the Remuneration Rules,[137] which provides:

> . . .
>
> The company reserves the right to approve any future assignment beforehand. The company cannot refuse its approval without valid reasons.
>
> The assignee must be under contract with the company at the time of the transaction.

[Emphasis added.]

[130] When I asked how much would be paid for the right to represent other clients, Mr. Michaud indicated that he had seen a transaction for as high as $750,000. Surprised, I asked for clarification as to why that right was worth so much. From Mr. Michaud's explanation, I understood that what the other agents would be paying for is the right to receive the commissions that would be paid for the balance of the period during which commissions could be collected on the contracts. In other words, what the departing agent is doing is selling the future flow of his commissions. Obviously, the acquiring agent would have the opportunity to sell other financial products to the clients who used to deal with the departing agent. When I asked if there was any benefit in only selling the names of the clients without the flow of the commissions, Mr. Michaud acknowledged that this would be worth little, if anything.

[131] Furthermore, the Remuneration Rules set out additional conditions for the assignment of life insurance contracts. These conditions further restrict the power of an agent to assign such rights. The rules vary according to the status of the selling agent and the type of product involved and whether the agent is one with experience or without experience. For instance, for an agent without experience, the conditions are the following for life insurance:[138]

> i) The agent must have kept his/her contract with the Company in force for at least seven (7) consecutive years; or
>
> ii) The agent must have $150,000 in in-force premiums with the Company at the time of assignment. Orphaned clients are excluded from the in-force premiums calculation.

[132] So it is clear that the clientele belongs to Industrial Alliance and not to the agent. So contrary to what Mr. Michaud asserted in answering Mr. Mazraani on cross-examination by him, Mr. Mazraani did not own any clientele.[139] He could not even sell his future flow of commissions because he did not meet the minimum requirements. Mr. Mazraani was right in believing that he owned only his AMF licence.[140] Since this licence only allows him to sell insurance if "attached" to an insurance company, it is worth nothing if he cannot be hired by another insurance company! When Mr. Mazraani's contract was terminated, Industrial Alliance removed all of his client files and kept them. Mr. Mazraani has not been able to work as an agent since his contract was terminated in November 2012.

V. ANALYSIS

[133] To decide if Mr. Mazraani held insurable employment during the relevant period, the Court must determine whether he worked pursuant to a contract of service (contract of employment).[141]

A. The relevant source of the law

[134] When the CRA issued to Industrial Alliance on December 23, 1993 its opinion that IA's agents were independent contractors and not employees for the purpose of the Act, the most

prevalent approach applied by the CRA (acting on behalf of the Minister), this Court and the Federal Court of Appeal to cases originating from the province of Quebec was the common law approach described in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (FCA) and the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, [2001] S.C.J. No. 61 (QL), 2001 SCC 59. The *Civil Code of Lower Canada* and the Quebec jurisprudence was rarely considered for the purpose of distinguishing between an employee and an independent contractor in determining if a contract of employment existed.[142] Under the common law, the key question to be asked was, and still is, "Whose business is it?" In *Sagaz*, Major J. enunciated what might be described as the "total relationship" test:

> 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.]

[135] Given this approach followed in 1993, and given that the behaviour of employees on commission resembles to a great degree that of people carrying on a business, it is not surprising that the CRA expressed the opinion that, for the purposes of the Act, IA's agents were independent contractors under the Agent Contract submitted to the CRA.

[136] However, as I explained in an article that I wrote about 10 years ago, in 2005,[143] the courts must now take into account, in applying the Act, the changes in the relevant legislation, starting with the addition in 2001 of section 8.1 to the *Interpretation Act*.[144] Pursuant to this new section, one has to apply the law of Quebec when defining an employment relationship governed by Quebec law in cases where the relevant civil law concept is not defined in a federal statute such as the Act. So, to determine if Mr. Mazraani held insurable employment under the Act, this Court must look at the Quebec legislation because the Agent Contract was concluded in Quebec.

B. The contract of employment and the contract for services under the Civil Code

[137] What is the Quebec law which defines an employment relationship? The answer is to be found in the new *Civil Code of Québec*, which was introduced in 1994 and which defines expressly a contract of employment. Therefore, as of 1994, there is no doubt as to what a

contract of employment is (before that, it was a jurisprudential concept) and the only essential element that has to be considered under the Code is whether there is a relationship of subordination between the payer and the payee.[145] When one compares the provisions of the Civil Code relating to the contract of employment with the provisions dealing with the contract of enterprise or for services, it is clear that the contracts are the same, except for the fact that there is no relationship of subordination in the case of a contract of enterprise.

[138] It is useful to reproduce in side-by-side format the relevant Civil Code provisions:

Contract of employment	**Contract of enterprise or for services**
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.	2098 A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work, or to supply a service, for a price which the client binds himself to pay to him.
2086 A contract of employment is for a fixed term or an indeterminate term.	2099 The contractor or the provider of services **is free to choose the means** of performing the contract and, with respect to such performance, **no relationship of subordination exists between** the contractor or the provider of services and the **client**.
2087 The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee.	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 supplied, they are also bound to act in accordance with usage and good practice, and, where applicable, to ensure that the work carried out or service supplied is in conformity with the contract.
2090 A contract of employment is tacitly renewed for an indeterminate term where the employee continues to carry on his work for five days after the expiry of the term, without objection from the employer.	2101 Unless a contract has been entered into specifically in view of his personal qualities or unless the very nature of the contract prevents it, the contractor or **the provider of services may employ a third person** to perform the contract, but its performance remains under his supervision and responsibility.
2091 Either party to a contract for an indeterminate term may terminate it by giving notice of termination to the other party. The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the specific circumstances in which it is carried on and the duration of the period of work.	2103 The contractor or the provider of services supplies the property necessary for the performance of the contract,

2093 A contract of employment terminates upon the death of the employee.

2094 One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.

unless the parties have stipulated that only his work is required.

He shall supply only property of good quality; he is bound by the same warranties with respect to the property as a seller.

A contract is a contract of sale, and not a contract of enterprise or for services, where the work or service is merely accessory in relation to the value of the property supplied.

2104 Where the property is supplied by the client, the contractor or the provider of services is bound to use it with care and to account for its use; where the property is manifestly unfit for its intended use or where it has an apparent or latent defect of which the contractor or the provider of services should be aware, he is bound to inform the client immediately, failing which he is liable for any injury which may result from the use of the property.

[Emphasis added.]

[139] Before describing how legal scholars and the case law have interpreted the relationship of subordination concept, it is useful to start with the comments of the Quebec Minister of Justice on article 2085 Q.C.C. that accompanied the Civil Code bill:

> [TRANSLATION]
>
> This article restates the rule enacted by article 1665(a) C.C.L.C. The definition contained in the new article establishes more clearly the difference between a contract of employment and a contract for services or contract of enterprise. The sometimes fine line between the two kinds of contracts has caused difficulties both in the scholarly literature and in the case law.
>
> The definition indicates the essentially temporary nature of a contract of employment, thus enshrining the first paragraph of article 1667 C.C.L.C., and highlights the chief attribute of such a contract: the **relationship of subordination characterized** by the **employer's power of control**, other than economic control, over the employee with respect to both the purpose and the means employed. **It does not matter whether such control is in fact exercised** by the person holding the **power**;[146] it also is unimportant whether the work is material or intellectual in nature.
>
> [Emphasis added.]

[140] The following comments by the Quebec Minister of Justice on article 2099 are also useful:

[TRANSLATION]

Through this new article, the Code affirms **the independence** of the contractor or **provider of services** in a contract of enterprise or for services. It has historically been agreed that the nature of the work furnished by the contractor or the provider of services presupposes that these persons enjoy **virtually total independence**, in relation to the client, **concerning the manner** in which the contract is performed.

The tests stated are those identified by the case law in this area, which clearly recognized that the **contractor assumes the direction of the work and defines the means of execution**, even though the client determines the result to be achieved under the contract and retains the right to ensure that the work is in conformity with the contract.

[Emphasis added.]

[141] The relationship of subordination concept is well described by Professor Robert P. Gagnon:[147]

[TRANSLATION][148]

(c) Subordination

90 — *Distinguishing factor* — **The most significant feature** characterizing a contract of employment is the **subordination** of the employee to the person for whom he works. **It is by this feature that a contract of employment can be distinguished from other onerous contracts** which also involve the performance of work for the benefit of another person for a price, such as a contract of enterprise or a contract for services under articles 2098 ff C.C.Q. Thus, while the contractor or the provider of services "is free", under article 2099 C.C.Q., "to choose the means of performing the contract" and while between the contractor or the provider of services and the client "no relationship of subordination exists . . . in respect of such performance," it is a characteristic of a contract of employment, subject to its terms and conditions, that the employee personally performs the work agreed upon under the employer's direction and within the framework established by the employer.

. . .

92 — *Concept* — Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the **concept of legal subordination in a broad sense.** The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with **the power** given a person, accordingly recognized as the employer**, of determining the work to be done, overseeing its performance and controlling it**. From the opposite perspective, an employee is a person who **agrees to be integrated into the operating environment of a business** so that it may receive the benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over

> the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.
>
> . . .
>
> **94** — *Result* — In borderline cases, article 2085 C.C.Q. does not exclude resort to an examination of the situation and the parties' economic relationship in order to determine the nature of their legal relationship. However, it does not authorize a characterization as a contract of employment on the basis of economic subordination. The subordination that it contemplates is essentially legal in nature. However, even in its most relaxed and attenuated forms, **the situation of legal subordination should suffice to place the worker in the employee category**. The exclusion of any relationship of subordination between a client and a contractor or provider of services now legitimizes this conclusion (art. 2099 C.C.Q.). Lastly, it will be noted incidentally that **employee status can coexist**, in the same person and in connection with the same economic or professional activity, with another status such as shareholder or director of the company,[149] independent contractor[150] or **even employer.**[151]
>
> [Emphasis added.]

C. The true contractual relationship

(1) The contract and the intention of the parties

[142] Industrial Alliance intended to conclude a contract for services with Mr. Mazraani. It signed an Agent Contract which explicitly stipulates that it does not create an employer-employee relationship. Industrial Alliance even got help from the CRA in drafting its Agent Contract and got a written opinion from the CRA that the agents were independent contractors for the purposes of the Act. That opinion comforts the Company in its position.

[143] However, that status was not discussed with Mr. Mazraani when he was verbally hired on April 3, 2012. He only learned about it when he was presented with the written contract around the 27 of April. He acknowledged that section 4 of his Agent Contract, which describes his status as an independent contractor, was discussed with him at that time. In any event, he had no power of negotiation given that he had been unemployed since March 2011, when his contract with London Life was terminated. Mr. Mazraani also acknowledged that he filed his income tax return on the basis of the T4A that had been issued by Industrial Alliance and said he did so because he had no other choice.[152] T4As are issued for business income (earned by self-employed persons) and not employment income. However, Mr. Mazraani truly believes that he was an employee of Industrial Alliance and that he behaved like one. He stated in his written submissions: "With all that, my blood, my soil, my skin, my bones, and all my active cells feel and sense that I was hired as full employment". He worked most of the time at the IA branch office in a cubicle near the office of his sales manager. When he was sick, he provided a medical certificate from his doctor to justify his absence. He understood that it was mandatory to attend to IA meetings and training sessions.

[144] Mr. Mazraani is not the only one to believe himself to have been an employee of IA. There are at least two other such agents, namely those who went before the CRT asking for the benefit of the Standards Act's protection for employees. In addition to these agents, there are IA

management people who also believe that Mr. Mazraani was hired under a contract of employment. In an e-mail to Mr. Mazraani on November 20, 2012 at 8:56 p.m. concerning the "Terminaison de contrat de travail", the manager of the Mercier Agency, Mr. Eric Leclerc, states in the first paragraph: "Votre contrat de travail prévoit que vous ne pouvez pas être plus de 4 semaines consécutives sans rémunération sinon il y aura bris de contrat."[153] It is interesting to note that, in the "Member's statement for Group Insurance" provided by Industrial Alliance with regard to the benefits of Mr. Mazraani, the Company uses the expressions "annual salary" and "Basic AD&D Employee" in relation to the income of Mr. Mazraani.[154] This is very close to admitting that Mr. Mazraani was hired as an employee. Even Ms. Woo described her commissions as "salary" and referred to the branch secretaries as "our secretaries" during her testimony, as seen above.

[145] As is recognized in the jurisprudence, the fact that the parties agree to characterize their contract as a contract for services is not necessarily determinative of the nature of the contract.[155] If there is evidence to show that the contract does not fairly and adequately reflect the true nature of the relationship, the courts are permitted to ignore the description given in a particular contractual document and determine the true relationship between the parties. In France, they apply a similar approach and the recharacterization of a contract results from the application of the reality principle.[156]

[146] Therefore, although a particular contract may have been properly drafted to reflect a contract for services, if the parties do not behave in accordance with the piece of paper that governs their relationship and the factual situation is such that the payer has the power to exercise direction and control with regard to how particular work is to be performed and the worker is not "free to choose the means of performing the contract"[157] or does not "assume . . . the direction of the work and define . . . the means of execution",[158] then the relationship would be an employment relationship and the worker would not be an independent contractor.

[147] In this particular case, in my view, there are plenty of facts to support the position that the intent expressed in the contract does not properly reflect the conduct of the parties. First, the contract is a contract of adhesion. Mr. Mazraani did not have any opportunity to discuss whether he wanted to be an independent contractor or an employee. It was the policy of Industrial Alliance at that time to have only independent contractors and that had been its policy since 1993. Therefore, he had to accept this contract as is and, as can be seen from a reading of it, it is a contract that basically protects the interests of the Company and not the interests of Mr. Mazraani. A good illustration of this is section 15 of the contract, which stipulates: "No remuneration is payable as of the date this contract is cancelled and, if there is a debt owed by the Agent to the Company, such debt is immediately payable to the Company by the Agent." Furthermore, at that time, Mr. Mazraani was in a vulnerable position given that he had been unemployed for several months when he was hired by Industrial Alliance.

(2) The circumstantial evidence

[148] Then there is strong direct and circumstantial evidence which shows that Industrial Alliance had the power to direct and control the work of Mr. Mazraani and to instruct him in the performance of it.[159] Let us deal first with some of the circumstantial evidence, which is the usual situation in which the Court finds itself.

[149] First, there is the business card,[160] which shows that Mr. Mazraani was a "Financial Security Advisor" working for Industrial Alliance, because the logo and the name of the Company appear on it. There is no indication on that business card that Mr. Mazraani was an independent contractor or agent, nor does it show him as representing several insurance companies as an insurance broker or an independent representative would do.[161] Any ordinary person looking at Mr. Mazraani's business card would assume that Mr. Mazraani was an employee of the Company in the same way that this person would look at Mr. Michaud's business card and believe that he is an employee of the Company. In the case of Mr. Michaud, he is clearly considered an employee by Industrial Alliance. And our ordinary person would be even more comforted in his belief when, as we have seen, IA agents introduce themselves to potential clients in this sort of fashion: "Good morning . . . My name is . . . from Industrial Alliance" and I have been asked by "my company to meet you"! [Emphasis added.]

[150] Second, Mr. Mazraani did not represent several insurance companies as a normal insurance broker or any other independent contractor would do, although the Company claims that he was free to do so. This is a red herring. The reality was such that Mr. Mazraani−like the two agents described in the CRT reasons−did not represent other companies. It might very well have been a different story had he represented ten insurance companies. The fact that Mr. Mazraani worked only for Industrial Alliance constitutes a strong indication that he was working under the instructions, direction and control of the Company.

[151] Third, Industrial Alliance provided him with an office where he performed his services most of the time. His cubicle was close by the office of the sales manager, which put him in the position of being supervised directly by this sales manager. Not only did he have his own cubicle, but he also had his own telephone line in this office. To use again the words of Professor Gagnon, we can see that Mr. Mazraani "[agreed] to be integrated into the operating environment of a business so that it [might] receive the benefit of his work".[162] The Company described him as being so integrated in the April 27 letter: "[You] will be part of service unit 35 of Team 90 and you will also be in charge of the policies and clientele that currently make up part of this service unit. Your sales director will be Mr. René Beaulé."[163] [Emphasis added.] Mr. Mazraani is at the bottom of the hierarchical chain of command going from the senior vice-president to the vice-president to the superintendent to the branch manager to the sales manager (often referred to in the present case as a sales director), who was Mr. Mazraani's immediate superior. What do managers (or directors), such as branch managers and sales directors, do? They direct. When one performs work "under the direction" of another, one is considered an employee pursuant to article 2085 Q.C.C.

(3) The direct evidence

[152] This case is the exception to the general rule that it is usual to decide the issue of the existence a relationship of subordination mostly on circumstantial evidence because direct evidence of the exercise of the power to instruct, direct and control is not always available, or is difficult to produce due, for instance, to the "diversification and specialization of occupations and work techniques [which] often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work." [Emphasis added.][164] But in this appeal plenty of direct evidence was produced of this power having been exercised by Industrial Alliance during the relevant period. This direct evidence corroborates the circumstantial evidence and supports the ultimate conclusion that the Company here had the **power** to instruct the agents and to direct and control their work, and more particularly the work of Mr. Mazraani.

[153] This direct evidence comes from the Agent Contract, the Conduct Standards (including the Industry Standards), the Communications Policy, the voluminous training material, the numerous e-mails, the intra-office notices, the leaflets, and the testimony of Mr. Mazraani, all of which have been described above in detail in the "Factual Description" part of these reasons, which includes, but is not limited to, the sections dealing with "training", both the training provided during the initial period, for new trainees, and the ongoing training provided for all agents, with the "other instructions" on what to do and how to do it, and with the "supervision and control" of Mr. Mazraani. I will not repeat all those facts, but shall give a general overview highlighting some of that evidence and comment on the most important and relevant items. I will also deal with the testimony given by some of the IA witnesses and the work of the appeals officer.

[154] One very revealing document is the memo sheet entitled "Keep Your Clock on Time All Year Long", which describes 10 tasks to be performed by the agents. These tasks range from entering activities in the agency's management system to an agent's devoting 60% of his time to prospecting so as to obtain at least 10 appointments a week to attending branch meetings.[165] Another one is Module 3, which lists 10 items dealing with the planning of the agents' work. These run from doing at least eight hours of real work to obtain a minimum of two meetings with potential clients every day to not dealing with personal matters during working hours.[166]

[155] The Agent Contract refers to the Conduct Standards and the Communications Policy, which Mr. Michaud, the vice-president of the Company, did not seem to be aware of, if we are to believe him. The Conduct Standards on page 1 consist of 12 articles describing how the work of the agent is to be performed and a thirteenth that deals with the sanctions for failure to comply with the other 12. The Industry Standards are dealt with in 72 boxes which contain not only the standards but also the means of control and the sanctions that could result from failure to adhere to the standards. In addition to these standards, there is the Communications Policy, which sets out clear instructions from Industrial Alliance to its agents on how and how not to use the Internet services provided to them. Actually, these rules are not limited to its Intranet service but also apply to the Internet in general. The Company tells the agents how they should be behaving

on the Internet. Not only does it lay down the rules that the agents must follow, but it also sets forth the sanctions applicable in case of failure to comply with them:[167]

> 5. Any use that does **not comply with the Company's security policy may lead to sanctions** that can range from the revocation of access rights to termination of the agent's contract.

[Emphasis added.]

[156] The Conduct Standards (including the Industry Standards), the Communications Policy and the voluminous training material, like the other direct evidence, constitute clear indications that Industrial Alliance not only has the power to issue instructions and directions to its personnel but in fact does so. It should be stated that this only makes sense, given the type of work to be performed and the size of the organization. Because it is Industrial Alliance's name which appears on the business card or is mentioned when an agent meets a potential client, it is in Industrial Alliance's own interest to ensure that its agents are being monitored and controlled and that they are being given instructions on how to better serve the commercial interests of the Company. It is its public image, its reputation and its liability which are at stake. As Mr. Michaud himself said, it is the Company that has the "deep pocket".[168]

[157] In the "Training" section under the "Factual Description" heading in these reasons, we saw that the training given by Industrial Alliance to its agents was not limited to explaining its products as financial institutions or promoters would do to promote their products. One can think, for instance, of stock brokerage firms that do so-called "road shows" to explain products such as tax shelters to members of a brokers' syndicate which will distribute those products to their individual clients. One can even contemplate a company like Industrial Alliance making these kinds of presentations to members of independent insurance brokerages or financial services firms (cabinets de services financiers) such as Financière S_entiel, the one referred to in note 161 above, which represents 18 different insurance companies.

[158] Here Industrial Alliance, in its dealings with its own branches and its own agents, goes a lot further. Not only does it explain its financial products and those of its group, it trains its agents in the art of selling, how to organize one's work, how to plan, how to approach and solicit clients, what to say when introducing oneself over the phone, how to talk to people of different personality types, how to dress to meet potential clients or when having their picture taken for the Company's calendars, what kind of pen to use for signing policy applications, how to deal with objections face to face and on the phone, how to conclude a sale, how to close, how to develop a relationship over the years, when to send birthday cards and what to say on such occasions. It even has models to be followed which can be found on its Intranet.

[159] This training does not stop after the three months of initial training for the new agents who keep arriving every year. It is offered to all the agents on a continuing basis because there is always something new to communicate to them. Most of them benefit from the stimulation, the motivation, and the competition among themselves (Concours du président). The training could, for instance, take the form of an explicitly mandatory presentation to show them new features of the Intranet (Gestion Clients).[169] It could be training to show them how to do a

"publipostage" (direct-mail solicitation). It could be training to promote products offered by the group. It could be training to show the agents how to produce a client file and in what order the documents are to be filed so as to facilitate things for the Company, for instance, the work of the underwriters−the only ones who can decide to issue a policy−and the work of the compliance personal in examining clients' files.

[160] The Company told the agents how to use its telephone system and the Internet. There were instructions on how to use the Intranet that was put in place by the Company. There were restrictions as to the length of time during which its agents could use its Intranet and Internet services and as to the purposes for which they could use them. The Company told them not to use these services for personal commercial work, or to use them in a way that could adversely affect the interests of the Company, or to divulge any information of a confidential nature, such as the salaries of its personnel. It also provided them with a disclaimer to use when expressing an opinion and told them what they could download and what they could not. The Company stated that it would monitor the use of those services. Here again, it was in the Company's interest to exercise supervision and control over its agents to ensure its efficient operation.

[161] The Company exercises control over every aspect of its agents' work, as illustrated by section 12 of the Agent Contract, which prohibits the "use [of] brochures, advertisements or printed matter bearing the Company's name or logo that have not been previously approved in writing by the Company." Industrial Alliance tells the agents that they cannot modify any IA publicity material without the approval of the Company. The agents are required to remit the money they collect from their clients to the Company immediately. They cannot grant any rebate to their clients[170] or go to the media to deal with particular problems. In Mr. Mazraani's case, the Company told him what to do and what not to do. He was told to look after a client of the branch that was not one of his. This was specifically mentioned in the April 27 letter: "*you will also be in charge of the policies and clientele that currently make up part of this service unit.*"[171] So the Company was "determining the work to be done" to use the words of Professor Gagnon.[172] Mr. Mazraani was told not to look after another client because another agent of the Company was responsible for that particular client.[173] Under section 13 of the Agent Contract, the Company could have given its approval for that client's file being handled by Mr. Mazraani because the client had so requested, but the Company turned Mr. Mazraani down and thereby exercised its control over him. So the agents are not free to run their alleged business as they wish.

[162] In addition, the agents were expected to attend meetings, although the official version of the Company was that attendance was not compulsory. Agents with a lot of experience and who were good producers−like Mr. Charbonneau−may not have been expected to attend all meetings, which seem to have been numerous. However, when an important meeting took place, the Company exercised its power to direct all its agents to attend, as illustrated by at least two e-mails that were introduced in evidence by Mr. Mazraani.[174]

[163] The Company supervised the agents' work and corrected mistakes when any were found, as happened in the case of an application submitted by Mr. Mazraani for one of his clients. The

correction was made by one of the branch manager's assistants, who then informed Mr. Mazraani's superior, that is, his sales manager who thereafter advised Mr. Mazraani. Mr. Mazraani, like some agents at the Laval Branch, felt compelled to produce a medical certificate to explain his absence from the office. There is no evidence that the Company informed him that this was not necessary. It should be mentioned that the sales managers kept their agents informed of their absence for holidays and vacation and told them from whom they could get help during their absence.

[164] During his testimony, Mr. Mazraani indicated that he met with his sales manager regularly and that they had discussions on how he could make more sales and on the level of sales expected of him by the Company. This is corroborated by the training material, in which the agents are told what objectives the Company expects of them. On page 7 of Module 3, "Planification, Organisation, Contrôle", there is this heading: "Vos objectifs et les attentes de la compagnie". [Emphasis added.] It is stated under that heading (on page 8): "Avec l'aide du directeur des ventes, déterminez vos objectifs en effectuant les exercices suivants. . . ." [Emphasis added.]

[165] Further evidence of the power to control that the Company had over the work of its agents is found in section 13 of the Agent Contract, where it is stipulated that the Company reserves the right to appoint another Company agent to provide service under a policy in the initial agent's place, whether the contract is in force or has been terminated, in the event that the service provided by the agent is not satisfactory for the client or for the Company or if the agent acts to the detriment of the interests of the Company.

[166] There is also the power described in section 14 of the Agent Contract, where it is stated that the Company may "suspend the contract under any reasonable grounds", whether or not related to the duties of the agent, that no remuneration is payable during the suspension and that the agent loses the right to all commissions payable during that period. During the suspension, the agent is not authorized to solicit or obtain applications or do transactions relating to any of the Company's clients.

[167] Under section 15, the Company can cancel the contract with or without cause by giving seven days' notice, and it is provided that no remuneration is payable as of the date the contract is cancelled (but if the agent is still indebted or owes any amount to the Company, such debt is immediately payable to the Company). Lastly, when a contract is cancelled, the Company becomes the assignee of the agent's client records.

[168] Section 16 states that, for a period of two years beginning on the date of the cancellation of the contract, the agent must not act as an agent or broker on behalf of the clients of the Company who were part of the service unit served by the agent at the time of the cancellation of the contract.

[169] Here, Mr. Mazraani was working on the premises of Industrial Alliance; his office was located near his sales manager, Mr. Beaulé. He attended on a weekly basis meetings which he

felt were mandatory; he received substantial training from Industrial Alliance when he began working for them and he continued to receive training throughout the duration of his work for IA, which lasted seven months. The Company provided him with all the most important tools, i.e., the data on the Intranet and the materials necessary for soliciting applications for insurance policies by Mr. Mazraani's potential clients. Being present on the premises of the Company, he was able to contribute to its success and, as we saw above, this is something the Company expects from its agents, as evidence by the following from the memo sheet entitled "Keep Your Clock on Time All Year Long" states: "I contribute to the success of my team, my agency and "L'équipe solidaire" by doing my part during company sales promotions."[175]

[170] Mr. Mazraani was not in a position to choose the means of execution. Had he been, it would show that he was an "independent" contractor. He could not actually make a sale; this was the prerogative of the underwriters. He could only solicit and propose clients' applications. He could not negotiate the premium. He could not even grant a rebate. He could not receive a payment in his name. He had to remit any money or cheques to the Company "immediately". Generally, he only sold products of the Company and if ever a product that his client needed was unavailable from the Company, he could obtain it through a subsidiary of the Company, which also shared in the commissions. He was told by the Company that he could not represent a particular client because that client had used another IA agent in the past. When a mistake occurred in entering information about an application on the Intranet, Mr. Mazraani did not even have the authority to correct it. This is what Mr. Leclerc stated:[176]

> JUSTICE ARCHAMBAULT: And my question to you is who has the authority to go and make the change?
>
> MR. LECLERC: My staff.
>
> JUSTICE ARCHAMBAULT: Your staff?
>
> MR. LECLERC: Yes.
>
> JUSTICE ARCHAMBAULT: Under your management?
>
> MR. LECLERC: Yes.
>
> JUSTICE ARCHAMBAULT: Not the financial advisor?
>
> MR. LECLERC: No.
>
> JUSTICE ARCHAMBAULT: That was my question.
>
> . . .
>
> MR. LECLERC: Because if everybody start to call at the head office it will be like a zoo.[177]

[171] This shows that the Company was exercising control over the work of Mr. Mazraani. It was the Company that decided who did what. So it is not surprising to see Mr. Mazraani arguing that he did not have a business: "Simply I was a porter for their policies to be delivered and for

their money to be picked up. I do not decide I do not control and I do not get paid by the client. Industrial Alliance is everything and everything is theirs."[178]

[172] In this case, we can see that Mr. Mazraani, like the other agents, was "integrated into the operating environment of a business so that it [might] receive the benefit of his work", to use the words of Professor Gagnon, cited above.[179] Professor Bich, now a Quebec Court of Appeal judge, described the concept of relationship of subordination this way:[180]

> [TRANSLATION][181]
>
> . . . Although the employee sometimes in practice enjoys substantial leeway in carrying out the work, he is still, however, subject to the employer's control: because the employee's activity is integrated into the context established by the employer and is performed for the employer's benefit, it is only normal that there would be control on the one hand and subordination on the other.
>
> [Emphasis added.]

[173] What percentage of employers give such detailed instructions to their employees on how to do their work as those given here? It is ironic that a number of decisions have been rendered in which courts and administrative tribunals have concluded that life insurance agents are independent contractors despite having received a great deal of training on how to do their work and that courts have held to be employees part-time professors, called *chargés de cours* in Quebec, who received no training and no instructions on how to teach!

D. Specific comments

(1) Mandatory training and meetings

[174] As described above, the training was substantial. The initial training went from April to June and there was ongoing training thereafter. Mr. Mazraani considered this training to be mandatory and this view is shared by the Minister, who made it one of her assumptions with respect to the initial training in the Reply to the Notice of Appeal.[182] The training was organized by the Company, presented at the Company branch office and all paid for by the Company, even that training which qualified for PDUs! The sales managers were there to help and assist the agents. They were also in a position to supervise the agent's work and tell them how to improve it. The Coaching Guide required them to verify the "client files for the current week".[183] The goal of an insurance company is to make sales of financial products. So it was not surprising to hear Mr. Leclerc state that the sales managers spend more than half of their time on the road with their agents, although the official version of the Company is that they do not supervise them! If one of its agents, in whom the Company has invested a lot of time for training, does not produce adequately, the Company loses money.[184] The Company wants its salespersons to succeed and, therefore, as indicated by Ms. Woo, they gave them hints and a

recipe for how to proceed. This is clearly an instance of the Company indicating to the agents how to do their work.

[175] The nature of the work performed by Mr. Mazraani was such that it required not only knowledge but long-term training, coaching on how to do that work and continuous supervision by the sales manager in the performance of his duties. This is due in part to the intricacies and complexities of the financial products being offered by the Company, which required that the Company provide the tools for explaining those financial products to potential clients of the Company. The numerous training components in Exhibit A-48 illustrate this point. The Genesis universal life insurance policy is a financial product that affords both life insurance protection and a wide range of investment options designed for the accumulation of large amounts of money in a tax shelter. The document filed as Exhibit A-48 could not have been generated efficiently without software designed by or for Industrial Alliance, and a sale of the Genesis product could not have been made as efficiently without this document. That is why the use of the computer with the software provided by the Company was essential for the purpose of generating the proposals made to individual clients and supplying the information required in order for the client to make an informed decision and in this connection training was required. The fact that Mr. Mazraani paid weekly rent of $18 for the use of the computer is nothing but a red herring.

[176] On several occasions, Mr. Michaud and Mr. Leclerc were asked whether the agents were required to attend meetings and they indicated that they were not. This is what Mr. Michaud stated:[185]

> MR. MAZRAANI: Do you believe that the training, especially the first training, was mandatory?
>
> . . .
>
> MR. MICHAUD: Yeah. It's not -- it's not mandatory but again, it shows you interest in developing your business if you're not attending. We're trying to help the people build their business and we provide training to these people. So usually they don't even ask the question is it mandatory or not. They are attending and they're part of the meeting, especially the first one.

[Emphasis added.]

[177] In other words, it was not necessary to mention that attending meetings was a requirement; the context made it such that people would attend them, as would normally be the case in any firm which suggests to its employees that they attend meetings and as was in fact the case for Mr. Mazraani, Mr. Charbonneau and Ms. Woo. Naturally, agents with a lot of experience and who were good performers were not expected to attend all the meetings if the Company did not make them mandatory. That is the most plausible version of the reality of the requirement to attend these branch meetings. This is common sense: the circumstantial evidence favours the version of Mr. Mazraani over the misleading evidence of the Company.

[178] Furthermore, the training material introduced as direct evidence by Mr. Mazraani shows a different picture than the one presented by the IA witnesses. It describes the work of agents as

follows: "*Le travail de représentant consiste à vendre de l'assurance mais aussi à . . . assister aux rencontres d'agence*".[186] [Emphasis added.] There is also the memo sheet entitled "Keep Your Clock on Time All Year Long", where it says:[187] "7. I take part in agency meetings . . . ."

[179] In addition, Mr. Mazraani was able to find, in the course of the six-day hearing of this appeal, spread over five weeks, direct evidence to contradict the evidence of several IA witnesses, including the testimony of Mr. Michaud and that of Mr. Leclerc. He was able to retrieve at least two e-mails that made it mandatory to attend branch meetings which were not PDU trainings sessions. The first is an e-mail dated May 29, 2012 indicating on its subject line: "IMPORTANT − FORMATION NOUVEAU LOGICIEL GESTION CLIENTS".[188] In it, the "secrétaire administrative", Nathalie Gagnon, writes the following instruction to all members of the LaSalle Branch, also known as the Agence Mercier:

> IMPORTANT – À TOUS LES MEMBRES DE L'AGENCE MERCIER
>
> . . .
>
> Ce changement affectera vos méthodes de travail au quotidien.
>
> Il est **obligatoire** que vous soyez présents à cette réunion **sans** exception.

[Emphasis is **not** mine.]

[180] The meeting was scheduled for Monday, June 18 in the conference room. This additional information is provided:

> L'objectif est d'expliquer les raisons et les bénéfices de cette nouvelle solution par une présentation Power Point live et une démo de l'application.
>
> Par la suite, vous aurez accès à des capsules de formation (vidéo e-learning) qui vous seront expliquées à la réunion du 18 juin.

[181] This is a very good example of the exercise by an employer of its right to exercise control and direction over the work of its workers. Not only is it mandatory to attend the meeting, but the e-mail explains that the change will have a daily impact on the way that they do their work.

[182] There is also a notice and another e-mail sent to the agents about a "RÉUNION D'AGENCE" to be held on June 4, at 10 a.m. and stating, in the notice, "VOTRE PRÉSENCE EST IMPÉRATIVE" and in the e-mail, "VOTRE PRÉSENCE EST PRIMORDIALE". The topic is "Annonce des nouveautés à venir".[189]

[183] In addition, according to several of the IA witnesses, more particularly, Mr. Michaud and Mr. Leclerc, there was no taking of the attendance of agents at branch meetings, except for the training sessions qualifying as PDU's, that is, the continuing education units required by the regulatory bodies.[190] Again, Mr. Mazraani was able to find a list of those not in attendance at the "présentation I.A Inter-Action"[191] on September 12, 2012, which was not a PDU training

session. The purpose of the presentation was to promote a subsidiary's mortgage service so that the agents could refer clients who needed this new service.[192] Because of the large number of absentees, another presentation was scheduled for November 1, 2012.[193]

[184] It should be repeated that most employees working in larger organizations are not told that attending meetings is mandatory. However, everyone in the organization knows that non-attendance will not be well regarded. The situation is the same here, as recognized by Mr. Michaud in the extract reproduced above. In the end, as I have stated before, the issue here is whether the Company had the power to control and to direct the work performed by its workers and the evidence clearly shows that it did. Not only did it have the power, but it exercised that power. The e-mail concerning a particular meeting at which a new client management system was to be put in place indicated that attendance was **mandatory** for all, **without exception**.

(2) Regulatory requirements

[185] Evidence was introduced and argument put forward to show that Industrial Alliance supervised and controlled the quality of the work performed by its agents only because of its obligations under the Distribution Act. The in-house counsel testified that the above-described Compliance Checklist[194] was created for the purpose of fulfilling legislative and regulatory requirements. Section 85 of the Distribution Act provides as follows: "A firm and its executive officers shall oversee the conduct of the firm's representatives. They shall ensure that the representatives comply with this Act and the regulations."

[186] I recognize that part of the Compliance Checklist deals with issues resulting from those requirements, such as knowing your clients and their needs.[195] However, contrary to the statements made by the in-house counsel, the checklist does not wholly result from such requirements. In his testimony, Mr. Michaud acknowledged that requirements such as knowing your client and ensuring that he is well informed when a financial product is being offered to him come not only from the regulations but also from industry standards established by the CLHIA (ACCAP), which seemed more important to him than the regulations.[196] For instance, item 24 of the checklist deals with missing initials of the subscriber-applicant on Form F-13-743, which document is referred to in item 6 on the checklist, where it is shown as being required by the CLHIA (ACCAP). The checklist shows as the legal source for item 24, section 6 of Regulation 2[197] which provides: "Where a firm, an independent representative or an independent partnership uses statistics in its advertising or written representations, the source of the statistics must be clearly identified." Even counsel representing the Company before this Court did not deal with this specific issue or, more generally, with why the compliance required by the Distribution Act and its regulations should not be taken into account for the purpose of determining whether a relationship of subordination existed between the Company and its agents, and more particularly, Mr. Mazraani. He cited in his written argument before the Court and his additional written submissions sent to the Court on July 3, 2015, numerous Quebec court and tribunal decisions which state as a kind of mantra:

> 35 Ce contrôle administratif et déontologique implique une certaine subordination mais pas nécessairement ou "indéniablement" la subordination juridique au sens où on l'entend dans le cadre d'une relation employeur-employé.[198] [Emphasis added and note omitted.]

[187] This statement was made by the Superior Court judge because the member of the CRT had concluded:

> [200] L'encadrement obligatoire des parties par la *Loi* qui subordonne l'agent au courtier suffit à conclure à un lien de subordination. Il n'est pas conciliable avec la relation d'affaires usuelle entre deux entrepreneurs.
>
> [Emphasis added.]

[188] I have no quarrel with the above conclusion of the Superior Court. Indeed, it would be inappropriate to rely on a statute such as the *Real Estate Brokerage Act,* R.S.Q., c. C-73.1 and on the *Règles de déontologie de l'Association des courtiers et agents immobiliers du Québec* to decide whether a person is bound by a contract of employment or a contract for services under the Civil Code. However, the fact that a brokerage firm is subject to particular legislation, such as the *Real Estate Brokerage Act*, which recognizes explicitly that agents can be "employed by or authorized to act on behalf of a broker",[199] should not be relied on to exclude the possibility that the agents could be employees. Industrial Alliance and other payers should not be allowed to use the conclusion stated in paragraph 35 of the *La Capitale* decision as a licence to dress up a contract of employment as a contract for services.

[189] Both in its evidence and in its argument, Industrial Alliance has declared that it only supervised the work of the agents in order to comply with its obligations under the Distribution Act[200] and the Information Protection Act.[201] It did not identify which of its supervisory activities were required by those statutes and would not have been consistent with the existence of a contract of employment. It should be pointed out that neither Mr. Michaud nor Mr. Charbonneau saw any differences between the treatment of agents when they were considered as employees before 1993 and their treatment when they were considered as independent contractors after 1992!! So, after 1992, we basically have the same relationship as existed before 1992, except that we have a contract that states that it does not create an employer-employee relationship.

[190] I would rephrase as follows the statement in paragraph 35 of *La Capitale*, quoted above: The administrative control required by legislation such as the *Real Estate Brokerage Act* and the Distribution Act imply a certain control or supervision, but not necessarily such as will lead to a conclusion that there exist a relationship of subordination as described or referred to in articles 2085 and 2099 Q.C.C and not necessarily incompatible with such an employer-employee relationship.[202] In other words, the analysis of the facts has to be done by applying the relevant provisions of the Civil Code (and not such specific legislation) and answering, as I have suggested above, the key question: Does the payer have the power to instruct, direct and control? For a worker to be considered an employee under the Civil Code, there must be a contract between the payer and the worker, and the contract is the legal source for the existence

of an employer-employee relationship. So it is the contract that must be looked at along with the conduct of the parties to see if that conduct is consistent with the terms of the contract. Here, there is plenty of evidence establishing the existence of IA's power to give instructions to, and to direct and control the work of, its agents, and this is without even taking into account the supervisory function fulfilled by IA to comply with its obligations under the Distribution Act and the regulations thereunder.

[191] It should be stressed that the Civil Code and the other legislation do not have the same objective. The *Real Estate Brokerage Act*, the Distribution Act and other similar legislation are intended to protect the public from (past) abuses. When such abuses become wide spread in an industry, political pressure builds in the public to have the legislators intervene to do something about them. Before the legislators decide to intervene, the industry often proposes that it take measures to curtail these abuses and promises to self-regulate without the establishment of public bodies, such as the AMF and the professional orders governed by the *Professional Code*. The industry (for example, the life insurance industry) would form an association (such as the CLHIA/ACCAP) which would adopt industry standards and require that its members abide by them.[203] When this solution does not achieve its goal, partly because such an association cannot impose its standards on a company unless that company accepts to be bound by them, legislators may have to respond to public pressure and adopt measures to protect the public, such as requiring that an agent hold a valid licence and that he pass an examination to qualify for that licence and imposing certain obligations and standards on the various players in the industry.

[192] The purpose of such legislation is to protect the public and not to decide who is an employee or who is an independent contractor. When a particular financial services company is required under this kind of legislation to ensure that its agents comply with that legislation, the legislative intent is that it will apply whether the agent is an employee of the company or not. Given the well-known problem of distinguishing between an employee and an independent contractor,[204] the legislature would not want a particular financial services company to evade its obligations by taking the position that an agent attached to the company is not one of its employees. So it is that the scope of the legislation is broadened in this fashion. Also, when an industry wants to protect its business model of doing business though independent contractors, the legislature can reply to that industry that the wording of its legislation does not prevent this business model from being used.[205]

[193] The purpose of the Civil Code is described in its preliminary provision as follows:

> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.
>
> [Emphasis added.]

[194] To illustrate this, let us look at section 85 of the Distribution Act, which I reproduce once more: "A firm and its executive officers shall oversee the conduct of the firm's representatives.

[206] They shall ensure that the representatives comply with this Act and the regulations." [Emphasis added.] A representative can be an employee or an independent contractor. So section 85 cannot be used to argue that an agent cannot be an employee because it is the Act that requires a firm to "oversee the conduct" of the agent. This would constitute an absurd result and defeat the purpose of the legislation since section 85 is to apply to representatives who are either employees or independent contractors. The proper analysis, in my view, is that a firm which has entered into a contract of employment with its agent has the power to oversee the conduct of this agent pursuant to the contract, but it also has the obligation to do so pursuant to the Distribution Act, which sets out the statutory requirements to be met. In this way, the purpose of both the legislation and the contract is achieved.

[195] Coming back to the question of the Compliance Checklist, additional comments are in order. First, I cannot see, for many items on the checklist, a close relationship between the section of the regulation cited as a source and the item appearing on the checklist. For example, as with item 24 mentioned above, for item 2, "CTC (Renseignements personnels − objectifs et planifications) + détaillé", the checklist cites the Distribution Act, Regulation 2, article 6. Out of the 36 items appearing on this checklist, almost half (15) refer to this article!

[196] There are some exceptions. For instance, items 14 to 16 deal with documents that are to be destroyed, such as medical questionnaires, copies of cheques after delivery, and copies of driver's permits and health cards. The legal source of this requirement is the Information Protection Act.[207]

[197] Second, some of the items in the Compliance Checklist are not, contrary to what IA's in-house counsel stated, limited to legislative and regulatory compliance. An example is item 32, "Divergence – Initiales du directeur n'apparaissent pas sur le formulaire « *Profil de l'investisseur* ». The source of this compliance requirement is shown as "Règle interne de la compagnie". Another example, mentioned above, is item 6 "Déclaration du proposant". The CLHIA (ACAP), not the regulation, is indicated as the source of this compliance requirement.

[198] Third, even if there were legislative and regulatory obligations to supervise for compliance the work done by an agent, Industrial Alliance would have done or should have done with regard to compliance virtually the same supervision and control of this work as it had done before the legislative and regulatory measures were adopted in 1998, as confirmed by Mr. Charbonneau. Such supervision and control would have consisted, for instance, in making sure that the client was well informed and that the product offered corresponded to the financial needs of the client. A company would want its agents to have on file updated financial statements, such as a balance sheet. This would be so because not only would the Company's liability be at stake (as acknowledged during his testimony by IA's vice-president), but its reputation would be at serious risk of being destroyed or adversely affected. Therefore, it is very important for such a company to be in a position to control the quality of agent's work and to tell him what to do and what not to do.

[199] For instance, if a client found out that he had bought something which did not correspond to his needs or to his means, he would in all likelihood be upset on realizing this and would let it be known, at least to his family and friends, if not to the public through television shows specializing in the stories of abused consumers, with the risk which that would entail of giving not only the Company but also the life insurance industry in general a bad reputation. This is why Industrial Alliance imposes on its agents not only its Conduct Standards on page 1 and its Communications Policy, but also the Industry Standards, which prohibit, for instance, an agent from encouraging a client to go to the media to disclose a problem with an insurance company. [208] As we saw above, as a member of the CLHIA (ACCAP), Industrial Alliance was required to adhere to that association's code of ethics.

[200] Outside of the Compliance Checklist, not all compliance supervision exercised by the Company was done to fulfil industry or legislative obligations. Much of it was for the more efficient operation of the Company's business, as seen, for instance, in this e-mail from the "superviseure administrative" with the subject line "IMPORTANT CONFORMITÉ" « Précisions et ajustements »:[209]

> Vous trouverez ci-joint un aide-mémoire à jour afin que vous puissiez nous remettre vos dossiers dans l'ordre indiqué. Veuillez ne pas brocher les différents documents remis pour expédition au Siège Social car ils doivent débrocher à la réception pour mettre à l'imagerie votre dossier.

[Emphasis added.]

(3) No fixed schedule or fixed hours and activity reports

[201] In his testimony, Mr. Charbonneau said that he was free to determine his daily schedule, free to serve clients anywhere, free to decide when to take his vacation and how long it would last, and that there were no restrictions on his territory. This statement must be contrasted with the letter of April 27 which states that if no income is received for five consecutive weeks the contract will be terminated.[210] In addition, section 5 of the Agent Contract the Company reserves the right to modify its minimum production standards.

[202] There is also the memo sheet entitled "Keep Your Clock on Time All Year Long", which contains the following:[211]

> 3. I devote 60% of my time to prospection by making a sufficient number of calls in order to obtain 10 appointments a week.
>
> . . .
>
> 8. I do what's necessary so that my work week is full before leaving for the weekend

[Emphasis added.]

[203] There is Module 3, which instructs the agents as follows: "1. Préparez vos journées de manière à fournir **au moins 8 heures de travail** véritable" and "5. Prévoyez **deux** **rendez-vous**

par jour au minimum."[212] [Emphasis added.] There is also the memo referred to above saying: "SVP être à l'heure selon l'horaire établi."[213] Finally, there is the statement in the CRT reasons "qu'il n'est pas question de prendre des vacances pendant la période du concours du président. Il [one of the complainants] explique qu'il a déjà tenté, sans succès, d'en faire la demande à son directeur des ventes . . . ."[214]

[204] Even if Mr. Charbonneau's statements were all true—which is not the case—that would not necessarily be conclusive evidence that there was not a relationship of subordination between the agents and Industrial Alliance. The existence of restrictions with regard to such things as work schedule, territory, and when to take vacation and for how long could be an indication of the existence of such a relationship of subordination. Their absence, however, does not conclusively prove that the Company has no power to direct and control the workers. The important question is whether the Company had any power to control and direct the work of its workers or agents, and it is the duty of this Court to determine whether such power did in fact reside in the Company. It is worth repeating here the comments made by the now Chief Justice of the Federal Court of Appeal in *Groupe Desmarais Pinsonneault & Avard Inc.* (*supra*):

> 5 The question the trial judge should have asked was **whether the company had the power to control the way the workers did their work**, not whether the company actually exercised such control. **The fact that the company did not exercise the control or that the workers did not feel subject to it** in doing their work did not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.

[Emphasis added.]

[205] In its training materials, the Company states: "Le représentant travaille pour lui-même; il contrôle et est entièrement responsable des résultats de son travail. Il est définitivement un propriétaire unique".[215] In my view, this is an embellishment of the reality and a self-serving statement. Although it is clear that the Company wants its agents to act with a lot of autonomy—i.e., to organize their time so as to be productive—the agents are working as part of the business of the Company, and it is also for the benefit of the Company that they are producing sales. The Company is more candid in Module 9, "Service and Follow-Up,[216] at page 5, when it recognizes that what an agent does has a financial impact on the Company itself:

> Once a policy has gone past the expiration date at the beginning of the second year, without renewal and without any apparent reason, this means a loss for the insured, a loss for the agent and **a loss for the company**.
>
> The insured has paid a premium, which he has thrown out the window. The agent is deprived of the renewal commissions and of the conservation bonus. **The company pays the administrative costs, which exceed the income achieved.**

[Emphasis added.]

[206] In my view, the fact that the agents are given a large degree of autonomy in performing their duties is only normal given that the Company cannot supervise the agents all the time. The compensation structure ensures that the agent will perform; otherwise, he will earn no

commission. If an agent does not produce commission income for five weeks, that agent can be terminated and, indeed, Mr. Mazraani was terminated for that reason. This is the normal situation for any employee salesperson working on commission only.

[207] Much was said about the fact that the agents did not have to make any activity reports to the Company. The testimony of the various IA witnesses, including Mr. Leclerc, on this point was again contradicted by the Company's internal documents. On the memo sheet entitled "Keep Your Clock on Time All Year Long", we find this instruction: "When I arrive at the office, the first thing I do is to enter my activities and results from yesterday into the agency's management system." In his testimony at the end of the hearing, Mr. Leclerc tried to lessen the impact of these internal documents, which were hurting IA's case. He stated that the "Registre de mes ventes, F20-123" no longer existed in 2012.[217] When I inquired if it had been replaced by another system, he replied that there was something "that do the same job". When asked by counsel for IA if that system existed in 2012, he replied: "Yes, but I think nobody used it." Mr. Leclerc also testified that the "copie de vos activités de la semaine" mentioned in Module 3 was an idea conceived in the head office, but that nobody used it. This is what he stated:[218]

> M. LECLERC: Non, mais ce que je veux vous dire là-dessus c'est que des fois t'as des gens biens [*sic*] pensant dans un siège social qui disent « **Ils devraient faire ça comme ça**. »
>
> . . .
>
> M. LECLERC: Et ils vont mettre ça dans un guide.
>
> . . .
>
> M. LECLERC: Ça correspond pas à la réalité.
>
> . . .
>
> M. LECLERC: Ça fait que quand on reçoit ça, on dit « Bien, non, on n'utilise pas ça. »
>
> [Emphasis added.]

[208] Mr. Leclerc is a branch manager, but he is almost at the bottom of the chain of command. The important decisions regarding the way to run IA's operations are taken, I would think, at the head office, which has more authority than he. If Mr. Leclerc decides not to comply with head office decisions, that is his business. However, my perception that Industrial Alliance has the power to tell it agents how to do their work is confirmed again.

[209] In addition, there seems to be a bit of a misconception as to what constitutes an activity report. In this particular case, it is evident that any time an agent brings to Industrial Alliance an application to have an insurance policy issued the Company knows if a particular contract is entered into. It must know because it is its underwriters who make the decision to issue a policy, and the entire remuneration of its agents is computed by reference to the premium that the Company will receive from its life insurance policies issued to its clients.

[210] There is in Module 3 a section entitled "**Contrôle**" where it is stated, under the heading "Relevé hebdomadaire du représentant (F15-125)": "Ce rapport est automatiquement compilé pour vos crédits de vente dans Extranet − Gestion d'agence. (Voir votre directeur des ventes pour une formation à ce sujet.). Par la suite, celui-ci sert au rapport S.I.R.A." This document may be a good tool to help the agents be informed about their own performance, but, equally, it provides to the Company relevant data enabling it to see how its agents are performing! This was established by Mr. Leclerc when he was cross-examined by Mr. Mazraani about the reasons for his termination. The main reason was that he had not produced commission income for five consecutive weeks. At one point it was not clear whether he was terminated at the end of the fourth or the fifth week. So Mr. Leclerc gave this revealing answer (June 15 transcript, pages 209-210):

> LE JUGE ARCHAMBAULT: O.k. Vous l'informiez que ça va se terminer?
>
> M. LECLERC: Ça va se terminer.
>
> LE JUGE ARCHAMBAULT: Mais vous le faites au moment où il n'a pas encore atteint ses cinq semaines. Vous êtes d'accord avec ça?
>
> . . .
>
> M. LECLERC: C'était atteint pour nous parce que **le rapport de rémunération, FASAT** -- il s'appelle FASAT au lieu de SIRA -- le lundi matin, **on le reçoit** et puis ça nous indique, pour la semaine cinq, le montant de rémunération **qu'il va recevoir**, puis c'est écrit 0, parce que les chèques de commission, ils les reçoivent le jeudi. Puis moi, **le lundi, je sais déjà, par le système comptable**, qu'il va recevoir 0 pour une cinquième fois consécutive.

[Emphasis added.]

[211] The statistics on the agents' performance are also distributed to the agents for the "Concours du président"; this creates emulation among them and increases sales. It also shows that the Company is in a position to evaluate the performance of its agents without any additional formal activity report being provided by those agents! I am sure that if someone like Mr. Mazraani only produced five sales during the course of seven months, his supervisor, the sales manager, would discuss that agent's performance and suggest ways to improve it. Mr. Mazraani testified that this is in fact what happened. He filed as evidence a copy of his own agenda.[219] For September 5, 2012, he wrote: "Met with Eric [Leclerc] **Wants to see Activities** Explained it is very hard despite all activities left office unhappily." [Emphasis added.]

[212] Ms. Woo testified that she kept her sales manager informed not only of the hours she spent outside the office, but also as to when she met her clients and when a sale was concluded. Therefore, it is very plausible that there were at least informal activity reports made by Mr. Mazraani to Mr. Beaulé and/or Mr. Leclerc.

[213] For a business operating a manufacturing plant with assembly lines, such as a snowmobile manufacturer, control over the schedule of the assembly line workers is of the utmost

importance because all of the employees on the line are interdependent. Given the nature of the IA agents' work and the remuneration structure adopted to pay them, their situation is completely different. As long as an agent produces sufficient premium income, the Company does not need to know how many hours per week the agent is working, whether the work is performed in the morning or in the evening, or whether it is done on the premises of the branch or at the client's home or office. Industrial Alliance does not need to exercise any control over these aspects of the agents' work. In other words, what count is the number of sales, not the number of hours. Unlike the situation on an assembly line, the Company cannot be beside its agents all the time to check whether they are doing their work, even if the sales managers are on the road with IA's agents for more than 50% of their time!

[214] However, the Company can exercise its power to instruct and direct when operational needs so require. There are several examples of this which are described in these reasons. Among these are the schedules fixing the day and the hour of all the training sessions, which, according to Mr. Mazraani were mandatory. The training ran from April 3 to December 13, 2012. There is also the memo dealing with a promotional activity to begin on June 28, 2012. In that memo, entitled "Kiosque Square Décarie, Règles et procédures", we find the following instruction: "SVP être à l'heure selon l'horaire établi."[220] Other examples include the modifications of meetings at which attendance was mandatory or "primordiale", as we have seen above.

[215] Finally, it is interesting to note that Mr. Leclerc, the manager of the LaSalle Branch, stated that he did not know what exactly his sales managers were doing with regard to the training of the agents, although the Coaching Guide clearly establishes that it was part of his duties to be aware of this. He explained that the sales managers were professionals and knew what to do. So the Company does give its employees a large degree of autonomy in the performance of their functions. This is no different than the way the Company treats its agents in giving them considerable autonomy.[221]

(4) No significant change in the mode of operation

[216] When Mr. Michaud and Mr. Charbonneau were asked whether there were any differences in the handling of the agents when they were considered as employees before 1993 and when they were considered as independent contractors after 1992, neither one indicated that in the latter case there were fewer constraints with respect to their freedom in performing their work, i.e., with regard to the scheduling of their activities, the limitation of their territory or the requirement to attend meetings. Nor did they testify that, after 1992, the agents were "free to choose the means of performing the contract" to use the words of article 2099 Q.C.C. or that they "enjoy[ed] virtually total independence, in relation to the client, concerning the manner in which the contract [was] performed" to use the words of the Quebec Minister of Justice.

[217] Instead, Mr. Michaud gave a list of irrelevant and baseless points of law,[222] including the assertion that an employee could not, before the change, deduct the salary of an assistant, could not incorporate himself and could not sell his right to represent clients. These answers are

consistent with the fact that nothing of substance change in the way that the Company exercised its power to direct and control the work of its agents.

(5) Expenses

[218] Much emphasis was placed by Industrial Alliance on the fact that Mr. Mazraani had to pay his computer costs, for his long-distance calling expenses, the cost of his cellular phone expenses, the cost of his licence, the costs of secretarial help, etc. However, the Company supplies to its representatives significant assets and services which are of great importance in the agent's activities. First, it provides free of charge the use of office space (a cubicle), a desk, a filing cabinet and a telephone. In addition, the Company provides, and remains the owner of, all forms and books, policies, computer software and other Company documents that it places at its agents' disposal.[223] Furthermore, the Company pays for all the training which it provides to its agents, whether at the beginning stages or thereafter, including the training which qualifies as PDU's.[224]

[219] But, in the end, the incurring of expenses is not a factor that needs to be considered here as it is in the common law provinces, although it is not an irrelevant fact to consider in the analysis of the circumstantial evidence of the existence of the "power" to direct, instruct and control. For instance, if a worker provided heavy machinery such as a bulldozer and a power shovel costing tens of thousands of dollars to carry out his work, this would make it less likely that the worker would have allowed the payer to exercise direction and control over the way to perform the work and use his machinery! Such circumstantial evidence is not conclusive, but is an element to consider in determining whether that power existed.

(6) Ownership of clientele

[220] Great emphasis was also put, in the evidence and in the arguments of Industrial Alliance, on the fact that it does not provide a list of clients to its agents. However, the most important issue is whose clients they are once they are found by the agents and, in this particular case, it is clear from the evidence described above that any client that an agent is soliciting belongs to the Company, contrary to the argument made by the Company's lawyer. If the agents were true independent contractors, you would expect that they would able to keep their clients when they leave the Company, whether voluntarily or not, and be able sell them to anyone they wished, if that is what they wanted to do. Here the agents cannot sell their clientele to whomever they wish. That is because the clients belong to the Company and only in certain circumstances, as we have seen above, does the Company allows its agents to sell the future flow of commissions, which is the only thing belonging to the agents, and even that they can only sell to another IA agent!

[221] In connection with the relevant factors to be considered in deciding whether we have a contract of employment, I would adopt the same comments as those made above regarding expenses. Ownership of the clientele is not a factor recognized under the Civil Code, contrary to the situation in common law. However, it could constitute an item of circumstantial evidence

that could help the Court draw an inference that the Company had the power to direct and control the work of its agents. The fact that the Company owned the clientele makes it more likely that it had this power because it gave it an incentive to protect its asset. But, as stated above in relation to expenses, this is not conclusive.

E. Credibility of the IA witnesses

[222] When witnesses are affirmed or sworn, they affirm or swear that they will tell the truth, the whole truth and nothing but the truth. Experience teaches that not all witnesses fulfil this commitment. Some lie; some mislead; some are mistaken; some believe that they are telling the truth when the reality is actually quite different; some embellish the facts. However, when executives of well-known and reputed corporations, members of the legal profession, and people in authority, such as a police officer, are testifying, the expectation is that they will have higher standards in honouring their oath.

[223] In this particular appeal, there were a senior vice-president of the fourth largest life insurance company in Canada, an in-house counsel, and a branch manager who testified. Their testimony was, to say the least, troubling. Some of their statements embellished reality, others were misleading and still others bordered on perjury.

(1) Mr. Michaud and Mr. Leclerc

[224] During his testimony and before the training materials described above were filed, Mr. Michaud testified that he was not aware of any written guidelines on the way in which the work of the agents was to be performed:

> JUSTICE ARCHAMBAULT: Okay. So . . . is there a binder or something like that that you give to your agents what they have to do to ---
>
> MR. MICHAUD: I don't know if there's a binder to be honest with you.
>
> . . .
>
> JUSTICE ARCHAMBAULT: --- I say binder but I'm saying guidelines . . . or whatever?
>
> MR. MICHAUD: Yeah, I know there's some guidelines that are being given to the advisors when they start with the company. . . .
>
> . . .
>
> JUSTICE ARCHAMBAULT: In writing or verbally?
>
> MR. MICHAUD: I don't know.
>
> JUSTICE ARCHAMBAULT: You don't know.
>
> MR. MICHAUD: I don't know.

JUSTICE ARCHAMBAULT: So are you not aware of any written guidelines that -- is that the only thing that you're telling them to do?

MR. MICHAUD: No. There's probably something but I haven't seen it to confirm.[225]

[Emphasis added.]

[225] How could Mr. Michaud not have remembered whether there were written guidelines and voluminous training materials showing the agents what to do and how and when to do it? How could he have forgotten that sections 7 and 19 of the Agent Contract referred to schedules, codes and policies? One such document was the Conduct Standards (which included the Industry Standards), and another, the Communications Policy, which, according to the in-house counsel, were always attached to the agents' contracts.[226] Mr. Michaud never mentioned these written guidelines. There is no possibility of confusion stemming from the use of the word "guidelines" because the Conduct Standards use this term in their introduction. This is all rather surprising on the part of a person who obtained a favourable opinion from the CRA with respect to the Agent Contract and who was, and still is, Senior Vice-president, Sales and Administration.[227]

[226] Furthermore, Mr. Michaud appeared to be evading my question when I asked him whether there was "a binder or something like that that you give to your agents what they have to do". He replied: "I don't know if there's a binder to be honest with you". When people say "to be honest with you", alarm bells start ringing! In view of the existence of such detailed standards issued by both the Company and the industry and of such voluminous training materials (at least 228 pages), as described above, one wonders whether Mr. Michaud was not intentionally misleading the Court when he gave these answers. It was fortunate that I was able to read, before the closing of the evidence, the Agent Contract, which referred to the Conduct Standards, (which included the Industry Standards) and the Communications Policy, and that I asked for these documents.[228]

[227] Mr. Michaud and Mr. Leclerc were misleading the Court when they said that the role of the sales manager was only to coach and motivate IA's agents.[229] The Coaching Guide used by the Company to train its agents contradicts their testimony**.** As we saw above, the Coaching Guide states that its purpose is to "enable you [the branch manager] to support your sales manager in his role as coach, training **supervisor** and **sales manager** for his new recruit." Obviously the Company believes that the role of its sales managers is not limited to that of a coach. The sales manager has also an actual sales manager's role, which includes managing sales. The Guide asks the branch manager to confirm, at various steps of the Professional Development Program, whether **the training supervisor verified the client files** for the current week. It concludes as follows: "Your **SUPER VISION** (supervision) . . . make[s] all the difference!"[230] [Underlining **only** added.]

[228] Furthermore, as we saw above, the sales managers, together with the branch staff are indeed not only telling the agents what to do, how to do it and even sometimes when to do it, but also supervising the work of the agents both on the Company's premises and on the road. The evidence described above also makes it clear that they are monitoring the performance of the

agents, reviewing their work and even correcting it. Either Ms. Laporte or Mr. Beaulé picked up the error in an application submitted by Mr. Mazraani and took measures to correct it before Mr. Beaulé told Mr. Mazraani. Moreover, I have no hesitation in concluding that Mr. Michaud was none too candid and was being misleading when he suggested that Mr. Mazraani's work was controlled by his bank account.[231] He was omitting the fact that the Company loses as well when an agent is not performing, as we saw earlier in discussing Module 9.

[229] Mr. Michaud also downplayed the importance of the president's contest by portraying it as being just a gala celebration to acknowledge the top producer.[232] This is also contradicted by internal documents of the Company. For instance, there is the e-mail with the notation "Important à noter à votre agenda" which is addressed to all the members of the LaSalle Branch and whose subject is "Rencontre préparatoire **Concours du président**".[233] The topics listed are "− Idées de prospection − Suggestions de structure de travail − **Objectifs de l'agence**".[234] [Emphasis added.]

[230] Mr. Leclerc was present in the courtroom during the five days of testimony.[235] Nobody had asked for the exclusion of witnesses. Except for Mr. Mazraani, he was the last witness to testify. He tried to deal with some of the most damaging evidence against IA's case to fix things up. By way of explanation of the evidence already referred to above,[236] Mr. Leclerc stated that the Coaching Guide was not used to evaluate Mr. Mazraani because, in Mr. Leclerc's view, he was not a trainee. He had been hired as a person with some years of experience, including his experience as an agent at London Life. Mr. Leclerc's testimony is an embellishment of reality and is not credible because, first of all, Mr. Mazraani followed the initial 10-week training program for new agents, as did the other trainees. In addition, there are e-mails in which Mr. Mazraani is treated as a trainee. An example is the e-mail sent to him by Nathalie Gagnon, with a carbon copy to Mr. Leclerc and Mr. Beaulé, advising him to enter in his agenda "two training supervision" scheduled for two different dates, in June and July, with Mr. Leclerc. [Emphasis added.] The subject of the e-mail, which is dated May 28, 2012, is "Training supervision K. Mazraani".[237] [Emphasis added.]

[231] Mr. Leclerc claimed that this e-mail was sent to Mr. Mazraani by mistake because he did not consider him a trainee. However, his testimony again is not credible. For one thing, a copy of that e-mail had been sent to him. So he was aware of it at that point and, if it was a mistake, he should have done something about it. But there is no evidence that Mr. Leclerc did any such thing! When cross-examined by Mr. Mazraani, he stated that he did not remember their having met on the dates specified in that e-mail.[238]

[232] Moreover, Mr. Leclerc gave a completely different description of Mr. Mazraani's level of knowledge when Mr. Mazraani asked Mr. Leclerc to explain why his assistant had corrected an error he had made in entering data on the Intranet with respect to a life insurance policy application and did not bring the error directly to his attention but instead went to his superior, his sales manager.[239] This is what Mr. Leclerc stated :

> JUSTICE ARCHAMBAULT: Mr. Mazraani is saying that the documentation that we see doesn't advise him that there was a mistake. It was picked up by Mrs. [Laporte]. So why was he not the -

- pourquoi c'est pas lui qui était le destinataire de l'information?

. . .

MR. LECLERC: For sure. Because he's a **rookie**, **he doesn't know nothing how to work** -- how to repair, how to correct the situation[240]

. . .

MR. MAZRAANI: The question why Mr. Beaulé will come to me and bring me the documents, not come directly to me?

JUSTICE ARCHAMBAULT: Do you have an answer for that?

MR. LECLERC: He is a **rookie. He just starts**.

JUSTICE ARCHAMBAULT: That's your explanation?

MR. LECLERC: For sure. **He cannot correct by himself**. [241]

[233] In any event, even if, contrary to all appearances, the Coaching Guide was not used to train and evaluate Mr. Mazraani during his initial training, it shows that the Company had such a guide, which it used with its new agents, and that it had the power to train them, evaluate them, supervise them−for example, by "verifying their client files for the current week−"[242] and instruct them as to how to perform their work. It also recognizes that the role of the sales managers is not limited to that of a coach and that the branch manager has a supervisory role. This document is more credible than the testimony of Mr. Leclerc.

[234] In his testimony, Mr. Leclerc also stated that the sales managers do not tell the agents how to do their work, that they do not check whether they are following the instructions appearing in the different modules and the different documents described above. They only make suggestions when they meet their agents, and they do this even when the agents are on the road. Indeed, he acknowledged, to my surprise−and perhaps to the surprise of IA's counsel−that more than 50% of the sales managers' time was spent on the road accompanying the agents:[243]

MR. LECLERC: My coaches are more than 50 percent of the time in the field with the advisors.

JUSTICE ARCHAMBAULT: M'hm.

MR. LECLERC: So they help them. They check and say "Hey, I have a suggestion. If you want, next time maybe change this, change this, try this if you want."

MR. TURGEON:[244] **But this would apply to the trainee, to the new ---**

MR. LECLERC: No, the new one. Only the new one.

MR. MAZRAANI: Objection, My Lord.

JUSTICE ARCHAMBAULT: Yes. Go ahead. What is your objection?

MR. MAZRAANI: Let him talk. He tried to talk and he stop him by interfering and interrupting. Let him complete his ---

. . .

Me TURGEON: Mais ma question était de lui demander à qui ça s'appliquait.

. . .

MR. LECLERC: Only the new advisors.

[Emphasis added.]

[235] I believe that, here again, Mr. Leclerc, with the help of counsel for IA, is misleading the Court when he says that the "coaches" are only making suggestions or that they only accompany those agents who are trainees. With respect to both of these statements, Mr. Leclerc subsequently changed his testimony. He admitted that sales managers could accompany agents even after the initial training period and that the sales managers were giving "direction" to the agents:[245]

MR. LECLERC: Yes, to -- it's to help them to practice to become good advisors.

Because we have theoretical classes in the morning with the material and these things ---

. . .

MR. LECLERC: --- but the rest of the day we are -- we do field training for the **new** advisors.

JUSTICE ARCHAMBAULT: And is there a limitation when the sales manager will stop attending?

If someone who has two years of experience he would like to have the presence of the sales manager could he ask for ---

MR. LECLERC: Yes.

JUSTICE ARCHAMBAULT: And they will go?

MR. LECLERC: Yes.

JUSTICE ARCHAMBAULT: So you're there to help them to ---

MR. LECLERC: We are there to support them, **also to give them direction**.

[Emphasis added.]

[236] The last statement seems to have been made in a momentary lowering of his guard by Mr. Leclerc, but this answer is more plausible than his earlier statement! It does not make sense that a company would not have the power to give direction to and exercise control over, people working on its premises in circumstances such as those in this case, where there is such a large

number (13 or 14) of new agents arriving every year. To have space occupied by non-producing or poorly producing agents would not be the most efficient way to run its operations. As is recognized by the Company in Module 9, when an agent is not doing his or her job properly, it ". . . means . . . a loss for the company. . . . The company pays the administrative costs, which exceed the income achieved."[246] The Company terminated Mr. Mazraani because he was a poorly producing agent. In addition, it was in the Company's interest to show its agents how to do their work and to supervise that work to lessen the risk of having its reputation tarnished and of being exposed to liability.[247] So I have no hesitation in believing over the testimony of Mr. Leclerc the testimony of Mr. Mazraani that he was working under the direction and control of the Company. The whole of the evidence makes it more plausible that a sales manager of the Company, which has such great power under the Agent Contract to suspend or terminate that contract, would be perceived as giving direction and not merely suggestions.

[237] According to the appeals officer's report, Mr. Leclerc informed the rulings officer that the "payeur vérifiait le travail afin de s'assurer que les règles dictées par la loi étaient respectées, mais il ne supervisait pas le travailleur et ne lui indiquait pas comment effectuer le travail."[248] The same kinds of statements were repeated by several IA witnesses in their testimony before this Court. In the evidence described above, it is shown that the Company was in fact overseeing the work of its agents in order to make its operations more efficient and not necessarily with regard to matters related to statutory requirements under the Distribution Act. Furthermore, much of what was covered by these requirements were things that the Company would have done anyway because they represented good business practices. So this information provided by Mr. Leclerc to the rulings officer was misleading, to put it in the best possible light.

[238] To show that Industrial Alliance did not exercise direction and control with respect to the work of its agents, including Mr. Mazraani, Mr. Michaud and Mr. Leclerc stated that the office meetings and training sessions were not mandatory and that no attendance check was done. The only exceptions, they maintained, were the PDU training sessions.[249] The same claim was made by an IA witness in the CRT case: the attendance was required to be taken so that this information could be given to the Chambre de la sécurité financière as part of a normal continuing education process to ensure that the agents were properly qualified to deal with the public.

[239] At first blush, in my view, this appears rather surprising given that any employee who starts a new job feels compelled to attend training sessions and an employer expects its personnel to attend, and two of the training documents say as much.[250] But the two e-mails introduced by Mr. Mazraani concerning mandatory meetings[251] as well as the list of absentees,[252] which had nothing to do with PDU training sessions, not only demonstrate that this perception is well founded but they raise considerable doubt about the truthfulness of the testimony of several IA witnesses, but more particularly the testimony of both Mr. Michaud and Mr. Leclerc. To say the least, they were less than candid and were misleading in saying that the training and the office meetings were not mandatory and that the attendance was only taken for PDU training sessions.[253]

[240] In his testimony, Mr. Michaud had a problem with using the words “control” or “supervise”. Sometimes he would deny that the Company controls or supervises the work of the agents:[254]

> MR. MAZRAANI: My next question, who controls the agent then?
>
> MR. MICHAUD: Who controls what? The agent?
>
> MR. MAZRAANI: The agent regarding performance, regarding training, regarding application software, conformity, name it.
>
> MR. MICHAUD: Regarding -- I will start with compliance. We don’t control compliance. We monitor ---
>
> JUSTICE ARCHAMBAULT: I beg your pardon?
>
> MR. MICHAUD: We don’t control compliance. We monitor the transactions that are being done by the advisors.[255]
>
> . . .
>
> JUSTICE ARCHAMBAULT: Okay. With respect to the other items he mentioned?
>
> . . .
>
> JUSTICE ARCHAMBAULT: He said performance, training ---
>
> . . .
>
> MR. MICHAUD: The performance usually the sales manager would work with the agent if the agent has some difficulty to help him reduce because at the end of the day, the person who controls the advisor’s performance is the advisor himself because he makes -- we are paying our guys on commission. So if he doesn’t work, if he doesn’t sell, he doesn’t get anything. So the bank account controls the advisor.

[Emphasis added.]

[241] Sometimes, he would use such a term and then retract it, as if it were improper to acknowledge its applicability, as is illustrated in the following passage in which Mr. Michaud is answering questions about the agents’ right to deal with other insurance companies:

> JUSTICE ARCHAMBAULT: So in -- so would you say that it’s very rare or occasional or -- that they would represent some other company other than through Solicour obviously?
>
> MR. MICHAUD: Yeah, it would be rare because at the end of the day, we’re also -- **we have to super -- not supervise but we -- if something wrong happens ---**
>
> JUSTICE ARCHAMBAULT: M’hm, you’re responsible.
>
> MR. MICHAUD: --- we could be held responsible because he’s attached to Industrial Alliance.
>
> JUSTICE ARCHAMBAULT: M’hm.

MR. MICHAUD: Say that -- and we know there are some advisors that are doing business with a brokers firm and -- but at the same time**, if they do something wrong, we know where they would go at. They would go at the deep pocket**. So we have -- we want **to make sure** that the advisors are doing business with any other companies through our group of companies.[256]

[Emphasis added.]

[242] Sometimes, as we have just seen, he would say not that the Company was supervising but that it was making sure something had been done. At other times, he would admit that the Company did supervise, but only during the training. At other times, he would temper the impact of the supervision by declaring that it was exercised in order to comply with the law, for instance, the Distribution Act, as is illustrated in the following:

MR. MICHAUD: Yeah, and **make sure** that we have all the documentation in file to make sure that the advisor did the right thing for the clients or completed what he had to complete. It's like we don't supervise the work of the advisor but we have to make sure that we get all the information needed to issue a policy if we should -- well, plus the application for the policy.[257]

. . .

MR. MICHAUD: Yeah, but at the same time we **supervise**[258] the transaction. We have to make sure it's there.

JUSTICE ARCHAMBAULT: You have to make sure that he follows the process and that is part of the process. Is that a fair ---

MR. MICHAUD: Yeah.

JUSTICE ARCHAMBAULT: --- comment?

MR. MICHAUD: And it's the law.

. . .

MR. TURGEON: Because we have to understand and we will show it with the proper legal background and regulation that the firm has the; [*sic*] obligation to be sure that this is complied. That's a compliance issue.[259]

[Emphasis added.]

[243] We can see another illustration of Mr. Michaud's problem with semantics, in this case with the words "approve" and "authorize" in the contexts of agents incorporating themselves or hiring an assistant:

JUSTICE ARCHAMBAULT: Do they need the authorization?

MR. MICHAUD: No. We give them guidelines but they don't need the authorization.[260]

JUSTICE ARCHAMBAULT: . . . if I'm not mistaken, I thought in the judgment I read that they need to have this employee assistant approved by you. Am I mistaken?

MR. MICHAUD: They don't need to approve but we just want to **make sure** that they don't hire let's say somebody that would not be suitable but the decision --.[261]

[Emphasis added.]

[244] Later on I asked what the Company would do if the person was not suitable:[262]

MR. MICHAUD: Oh, I would say to the advisor maybe you should find somebody else.

JUSTICE ARCHAMBAULT: Maybe or would you insist?

MR. MICHAUD: I would say -- I would say it never happened. So ---

. . .

JUSTICE ARCHAMBAULT: If someone had connection with the mafia?

MR. MICHAUD: Yeah, I would -- I would certainly **strongly recommend** that he looks after somebody else.

[Emphasis added.]

[245] I do not believe that this statement is a candid description of the factual reality at the Company. I have no doubt that if Industrial Alliance were unhappy with the behaviour of a particular agent, or if that particular agent hired an assistant who would give the firm a bad reputation, or if the agent's assistant misbehaved on IA's premises, Industrial Alliance would not only "strongly recommend" but would tell the agent to bring about a change in the behaviour of the assistant or to get rid of the assistant, especially if that assistant had a bad reputation. After all, it is the Company's own reputation that is on the line and it is in the Company's own interest to have the power to exercise control and supervision over the work of its agents and their assistants. Furthermore, section 14 of the Agent Contract specifically gives the Company the power to suspend that contract on any reasonable grounds, whether or not related to the duties of the Agent and, pursuant to section 15, the Company may terminate the contract with or without cause.

[246] The same comment can be made regarding the answer given by Mr. Michaud on cross-examination by Mr. Mazraani. Mr. Michaud had stated that all of his agents were happy about becoming independent contractors in 1993. When Mr. Mazraani asked him whether that change would have been appealing to those who were average performers, Mr. Michaud answered that all his agents were happy. I asked how many advisors there were and was told 800. When questioned whether he had asked each of those 800 advisors, he replied that none had resigned and therefore he assumed that they were happy with the situation.[263]

[247] Another example of misrepresentation of the facts by Mr. Michaud is his answer that the IA subsidiary, Solicour (which acts as a kind of broker between IA's agents and competitors of IA in the insurance field that may offer financial products not offered by IA), does not get remunerated for its services, which answer he changed after further questioning:[264]

JUSTICE ARCHAMBAULT: But your company gets a commission out of this thing presumably. So ---

MR. MICHAUD: No, no. We're paying the advisor the commission that we get. He's paid exactly the same way he would be paid ---

JUSTICE ARCHAMBAULT: So you're not making -- Solicour is not making any profit in this?

MR. MICHAUD: Well, I would say we keep -- there's a small margin that we keep, yes.

JUSTICE ARCHAMBAULT: Yeah. So there is a little margin?

MR. MICHAUD: Yeah.

JUSTICE ARCHAMBAULT: Yeah. That's what I assumed.

MR. MICHAUD: Yeah, we're not ---

--- (LAUGHTER)

MR. MICHAUD: We are trying to make some profit somewhere.

JUSTICE ARCHAMBAULT: Usually nothing ---

MR. TURGEON: Not surprising, My Lord.

JUSTICE ARCHAMBAULT: Usually nothing is done for free.

MR. MICHAUD: No, no, no, no.

JUSTICE ARCHAMBAULT: In the business world.

MR. MICHAUD: There's no free lunch.

[Emphasis added.]

[248] There are other examples of Mr. Michaud not being forthcoming in his answers:[265]

MR. MAZRAANI: Okay. Would you please explain who pays for local **telephone** services, business cards, all materials used by agents?

MR. MICHAUD: Well, the telephone, the local telephone it's available at the agency. The other one was what?

JUSTICE ARCHAMBAULT: The question is who pays.

MR. MICHAUD: The company.

JUSTICE ARCHAMBAULT: The company. So it's not available.

. . .

JUSTICE ARCHAMBAULT: Okay, okay. So the **business card**, okay, is regulated. It is approved by the company and paid by the company; right?

MR. MICHAUD: Well, the first -- the first ones. I don't know if we pay some others in the future but the first, when a new agent comes in, we provide him with I don't know 100, 200.

JUSTICE ARCHAMBAULT: At no cost or at cost?

MR. MICHAUD: Ah, yeah it's peanut.

JUSTICE ARCHAMBAULT: At no cost?

MR. MICHAUD: At no cost.

JUSTICE ARCHAMBAULT: At no cost. So it is at your cost.

MR. MICHAUD: Yeah, yeah.

MR. MAZRAANI: Not 500?

MR. MICHAUD: I don't know. It's maybe 500.

MR. MAZRAANI: Okay. Or 250 or 500.

MR. MICHAUD: I don't know. And then the only other material we're paying for are all the forms that we're providing.

[Emphasis added.]

[249] So when we dig a little deeper, we get a different picture from these IA executives. The sales managers are not just coaches who simply make suggestions; they are there to supervise, assist and give direction. The Company's witnesses, especially the executives, did not refer in their testimony to the Company's expectations, and yet, as we have seen in the Company's documentation, there are expectations, as one would expect from any for-profit organization which uses the services of salespersons. It is public knowledge that pressure is put on these persons to produce, to achieve targets. If an agent does not produce, he will not be kept in the organization. Mr. Mazraani said so; in his words, they push you all the time. The Company pays a lot of overhead: rent, equipment, Intranet, sales managers, etc. I believe that the portion of Mr. Leclerc's testimony in which he states that the Company gives direction and that his reference, in an e-mail to Mr. Mazraani, to Mr. Mazraani's "contrat de travail"[266] are more plausible and believable than the portions of his testimony in which he says that the Company only makes suggestions and does not provide instruction or exercise control with regard to the work of the agents. Indeed, this is more consistent with the broad discretion that the Company has to suspend or terminate the Agent Contract under the many circumstances described in that contract.

(2) Mr. Charbonneau

[250] Mr. Michaud and Mr. Leclerc were not the only witnesses to have a problem with semantics. When Mr. Charbonneau was asked to describe the role of the sales manager, he said it was to guide, to help, to provide guidelines; then he realized he was not supposed to be using words like guidelines and said “not guideline”:

> MR. TURGEON: If I -- can you briefly explain what is the role of the sales director?
>
> MR. CHARBONNEAU: Well I believe their role is to guide, to give information like formation to the agent to help us, you know, if we need like to find information or provide us with any guideline I guess, not guideline but I would say like if I need some information regarding a certain aspect of anything, they would help me.

[Page 131 of the June 1 transcript; emphasis added.]

[251] There were also contradictions in his testimony, as when he was asked whether he needed permission to open an account and whether approval was required for sales:[267]

> MR. TURGEON: When -- do you need any permission from Industrial Alliance to open a new account?
>
> MR. CHARBONNEAU: To open a new account like a new client?
>
> MR. TURGEON: Yeah.
>
> M. CHARBONNEAU: Non, never.
>
> MR. TURGEON: Or to sell any product?
>
> M. CHARBONNEAU: Non.
>
> MR. TURGEON: **Your sale have to be approved?**
>
> MR. CHARBONNEAU: **Non,** when everything is done properly, there’s no -- **there’s no reason it should be done.**
>
> MR. TURGEON: Okay.
>
> JUSTICE ARCHAMBAULT: It’s not the decision of the underwriter whether to take the risk or not?
>
> MR. CHARBONNEAU: Well like me I see a client ---
>
> JUSTICE ARCHAMBAULT: M’hm.
>
> MR. CHARBONNEAU: --- and if I want to work with the client, you know, as a mutual partner, I send the -- everything to **the Head Office of course, they decide at the end**, you know, whether or not they’re going to insure the person or not.

[Emphasis added.]

(3) The in-house counsel

[252] Other troubling testimony was that of the in-house counsel. When she filed the missing schedules to the Agent Contract, she stated that the Conduct Standards were basically a repetition of what was to be found in the Regulatory Code of Ethics and that any differences were stylistic in nature. This is what she said:

> JUSTICE ARCHAMBAULT: So if the legislation applies -- the legislation applied to any representative, why do you attach it to the contract?
>
> MS. BEAUDET: It is a reminder.
>
> . . .
>
> MS. BEAUDET: So it summarizes the representative's obligation under the code. And it is only a reminder.
>
> JUSTICE ARCHAMBAULT: Okay. And are each articles, are they found in the code de déontologie or are they different?
>
> MS. BEAUDET: The numbers are not the same **but the content is the same**.
>
> . . .
>
> JUSTICE ARCHAMBAULT: **You know, if I did a comparison of each of them?**
>
> MS. BEAUDET**: They are all ---**
>
> JUSTICE ARCHAMBAULT**:** It would be **exactly the same?**
>
> MS. BEAUDET: **Yeah**.
>
> JUSTICE ARCHAMBAULT**: Except the order?**
>
> MS. BEAUDET: **Yes. And maybe the wording is a little bit more practical.**
>
> JUSTICE ARCHAMBAULT**: Oh, I see. You may have changed the wording?**
>
> MS. BEAUDET**: Yeah.**
>
> JUSTICE ARCHAMBAULT: **So it's not an exact replica of the code.**
>
> MS. BEAUDET**: Almost.**
>
> . . .
>
> MS. BEAUDET: If you take for example, ---
>
> JUSTICE ARCHAMBAULT: Yes?
>
> MS. BEAUDET: --- Article 2:
>
> > "Any advertising or offer of a product or service made by a company or a member of the sale force must be clear and true."

So you'll find this principle in the code.[268]

JUSTICE ARCHAMBAULT: Yes. **And how would it have been changed**? Just the way it's ---

MS. BEAUDET: Yeah, we put the name company.

JUSTICE ARCHAMBAULT: I see.

MS. BEAUDET: And maybe we put a dot after the -- just to make it more ---

JUSTICE ARCHAMBAULT: So small stylish ---

MS. BEAUDET: **Stylish, yes.**

JUSTICE ARCHAMBAULT: --- stylish difference.

MS. BEAUDET: Difference.[269]

[Emphasis added.]

[253] However, this is not an accurate statement, contrary to what one would have expected from someone testifying under oath and more particularly from a person who is a member of the legal profession. The analysis above, notably under the headings "Other instructions" in section IV E.(1) and "Regulatory requirements " in section V D.(2), makes it clear that the Conduct Standards, which include on the back a much longer list of Industry Standards, are not merely a partial repetition[270] of the regulations under the Distribution Act or other similar legislation. They establish numerous standards and guidelines not to be found in the Regulatory Code of Ethics and which are mainly, if not solely, for the benefit of the Company, or which correspond to industry standards. Indeed, this is in conformity with section 7 of the Agent Contract, which expressly stipulates that the "**goal of these policies** [the Conduct Standards and the Communications Policy] **is to standardize administrative procedures**, reduce **the time taken to process a request** . . ." The Conduct Standards themselves describe their primary objective as including the establishment of "**guidelines** for all of the Company's operations".

[254] For instance, I do not believe that the following provision in article 3 of the Conduct Standards (page 1:) "[*m*]*oreover, any documents issued by the Company may not be modified by any member of the sales force*", can be found in the Regulatory Code of Ethics. That provision even goes further than the Industry Standards, which only require that client notices, statements and life insurance illustrations attached to contracts not be modified by sales personnel.[271] Similarly, I could not find in the Regulatory Code of Ethics the standard set out in article 6 of the Conduct Standards on page 1, namely: "The intermediary must encourage the client to keep his/her existing contracts in force." However article 6 is very similar to what is found in the Industry Standards with respect to replacements.[272]

[255] The statement in article 10 of the Conduct Standards on page 1 that: "[a]ll amounts remitted by a client to an intermediary must be immediately forwarded to the company" appears to be more specific that what the Regulatory Code of Ethics provides.[273] [Emphasis added.]

The same comment is applicable to article 9 dealing with the transmission of insurance applications and requests for changes and article 12 dealing with the delivery of any insurance contract or other document issued by the Company, which must be "delivered to the client within 21 days of its being issued." This delivery requirement corresponds to what is stated in the Industry Standards with regard to contract delivery.[274]

[256] In the article of the Conduct Standards dealing with the application of controls and sanctions, we find the following statements, which do not appear in the Regulatory Code of Ethics:

> When more than one sanction is indicated, they will apply gradually in the event of subsequent offences. The agent's contract will be terminated if the intermediary fails to comply with the standards following three (3) written notice in a continuous period of 24 months.
>
> [Emphasis added.]

[257] Among the numerous Industry Standards that an agent must adhere to, there is a requirement not to encourage a client to use the media to resolve a problem and a prohibition against an agent going to the media to resolve a conflict. The control in this regard is to be exercised through a complaint being reported by a compliance officer, and the only sanction stated for such behaviour is termination of the agent's contract. The source for this standard is clearly neither legislative nor regulatory, contrary to the testimony of IA's in-house counsel. It is an industry standard developed to protect the interests of insurance companies. It is not in their interest to have the complaints of a particular client publicized in the media.

[258] Even where the Conduct Standards on page 1 are trying to repeat a rule found in the Regulatory Code of Ethics, there is at least one instance in which a word used in the Conduct Standards diminishes the clarity of what is found in the Regulatory Code of Ethics: the word "disadvantages" in the Code being replaced by the word "consequences" in the rule in the Conduct Standards dealing with the obligation of agents to properly inform their clients about financial products, as seen above.

[259] Similar comments made by IA's in-house counsel regarding the Communications Policy are also misleading.[275] This is what she stated at pages 15 and 16 of the June 2 transcript:

> MS. BEAUDET: Regarding electronic communications. And the reason of this policy is to make sure that I.A.'s trademark is respected and also to protect personal information of our clients.
>
> JUSTICE ARCHAMBAULT: So it is for the trademark and what else?
>
> MS. BEAUDET: And to make sure that the personal information of our clients is protected. As you know, we are also binded by the loi sur les renseignements -- la protection des renseignements personnels.
>
> MR. TURGEON: The *Quebec Privacy Act*.
>
> MS. BEAUDET: *Quebec Privacy Act*.

. . .

MS. BEAUDET: So there is -- there's some rules under this law and other rules under the several legislations that we already provided you that were taken and put into this policy to make sure that our agent -- every agent is ---

. . .

MS. BEAUDET: --- is following the standard of practice in this field.

[Emphasis added.]

[260] During her testimony, I asked her to comment on paragraph 2 of the Communications Policy.[276] Under my questioning, she had to change her testimony:

JUSTICE ARCHAMBAULT: You know, I just happened to look at section 2:

> "To ensure optimal service to all agents and for billing purposes, the company regularly gathers statistics on the frequency and duration and can access…"
>
> "…and the company reserves the right to monitor the use and content of such communication more closely."

Is that something that would be more in the interest of your company?

MS. BEAUDET: Interest of **our clients, for sure.**

JUSTICE ARCHAMBAULT: The "frequency and duration" of the access? How does it benefit your clients?

MS. BEAUDET: In the number and size of email messages sent and received.

> "In case of reasonable doubt, the company reserves the right to monitor the use and content of such communication more closely."

So it is, in fact, in Industrial Alliance's interest and clients' interest.

JUSTICE ARCHAMBAULT: Would you say that it is also in its business interest to monitor the duration of the internet access?

MS. BEAUDET: Actually, we would have to ask the ---

. . .

MS. BEAUDET: The one who wrote the policy

. . .

(SHORT PAUSE/COURTE PAUSE)

MS. BEAUDET: Yes, but I'm reading it again and the first -- at the first sentence it says: "To answer [ensure] optimal service to all agents and for billing purposes, so I think that you have your answer there."

[Emphasis added.]

[261] One more rule issued by the Company in the Communications Policy that I fail to see as being for the protection of the personal information of IA's clients is the rule that an agent cannot provide personal information concerning salaries or management personnel to third parties without the required authorization.

[262] Another example of misleading information coming from the in-house counsel is her statements respecting the Compliance Checklist. As mentioned above, she was not able to help the Court understand the relation between a regulation under the Distribution Act and this checklist; but she did add the following (June 15, transcript, page 7):

> MS. BEAUDET: At least what I can tell **you is that everything that it is asked has a reference in the legislation**.
>
> JUSTICE ARCHAMBAULT: Yeah, **except**, for example, 32 where it says "Règle interne de la compagnie".
>
> And when it says ACAP, there's no reference to any legislation so I assume this is the -- what we would generally call, what, industry standards?
>
> MS. BEAUDET: **Yeah.**
>
> . . .
>
> MS. BEAUDET: And there's a reference to a form, F13 ---
>
> JUSTICE ARCHAMBAULT: Are you familiar with that form?
>
> MS. BEAUDET: No.

[Emphasis added.]

[263] Another example of an inaccurate description of facts is found in a discussion that took place after an objection by Mr. Mazraani, who said that he had not seen the Conduct Standards and the Communications Policy before. The in-house counsel stated that the Conduct Standards were taken from Mr. Mazraani's Agent Contract. She changed her version, however, after I repeated my question. This is the exchange that took place (June 2 transcript, page 5):

> JUSTICE ARCHAMBAULT: . . . −did you check your file? Do you know if that particular -- this particular document was in the file of Mr. Mazraani as being attached to the firm's copy of the contract?
>
> MS. BEAUDET: **Yeah,** every -- these documents are attached to every contract.
>
> JUSTICE ARCHAMBAULT: Yes, okay. Since that's your understanding, what I'm asking you specifically is did you check that particular file?
>
> MS. BEAUDET: I didn't check the file.

JUSTICE ARCHAMBAULT: Okay. You assumed that this is the practice file --

MS. BEAUDET: Yes.

[Emphasis added.]

[264] This in-house counsel was not acting as counsel arguing IA's intervention in this appeal. She was a witness testifying under oath regarding the facts of the case. Her testimony was surprisingly inaccurate and misleading on key elements of her evidence.

(4) Overall assessment of the IA witnesses

[265] After listening to the evidence given by the vice-president and the branch manager together with that of Mr. Charbonneau, one of the two IA agents who testified, I have a distinct feeling that these individuals in their testimony were imbued with the same salesmanship culture that the Company instills in its agents. For example, the agents were taught in their training to use the words "to authorize" or "give your approval" instead of "to sign", the word "investment" instead of "cost". However the reality is that potential clients were being asked to sign a life insurance policy application and to pay for such financial products. These three witnesses would use the words "recommend", "suggest", "check", "coach" instead of "instruct", "direct", "supervise", "supervisor" and "boss" so that this Court would not have the right perception of what was going on at the Company's LaSalle Branch. I believe that a lot of play on words took place during their testimony. They used many circumlocutions and periphrases to avoid words like supervision, control and instructions. When things became too problematic, they fell back on the evasive "I don't remember" or "I don't know".

[266] It is obvious from the testimony of the various IA witnesses that they knew that they were not supposed to say that the agents were being supervised, that meetings were mandatory and that agents were not free to do whatever they wished. The reality is that the agents have offices on the premises of the Company. They are being supervised by their employer. Instead of acknowledging that they are, these witnesses said that the role of the sales manager is to coach (help, guide, support and assist). In my view, this is the role of any superior of any employee. And it is in the interest of the Company that its employees be successful in doing their job.

[267] One can draw from the testimony of the IA executives and Mr. Charbonneau that they were at the very least embellishing the facts in order to obtain a favourable decision from this Court. I believe that this serves as a good reminder for the courts that it is dangerous to accept, without documentary corroboration, verbal testimony as an expression of the truth.

(5) Absence of Mr. Beaulé

[268] The first witness to testify to describe the relationship between the Company and the agents was the Senior Vice-president, Sales and Administration, Mr. Michaud, who is based in Quebec City. He stated that the Company did not supervise the work of Mr. Mazraani, who worked at the LaSalle Branch (in Montreal). The best person to testify to describe his role in

connection with Mr. Mazraani would have been his immediate superior, Mr. Beaulé, who was his sales manager. Yet, neither Mr. Beaulé nor any other sales manager testified. Mr. Michaud was not present when this sales manager was meeting with and supervising the agents on his team. Even the branch manager could not properly describe in detail the work of his sales managers because he relied on their professionalism in the performance of their duties. Mr. Leclerc acknowledged this in his testimony on cross-examination by Mr. Mazraani regarding the one-on-one training given by Mr. Beaulé to Mr. Mazraani (June 15 transcript, pages 213 and 214):

> MR. LECLERC: I don't know that.
>
> . . .
>
> MR. LECLERC: If Mr. Beaulé decide to give more information ---
>
> . . .
>
> MR. LECLERC: Mr. Beaulé can take initiative to help the advisor more than the others. It's his choice.

[Emphasis added.]

[269] Mr. Beaulé never testified. Although IA's lawyer informed the Court that Mr. Beaulé was no longer with the Company, IA could still have asked him to testify. I draw a negative inference from his absence, as the jurisprudence and the doctrine recognize can be done. In *Enns v. M.N.R.,* 87 DTC 208, at 210, my former colleague Judge Sarchuk stated:

> In The *Law of Evidence in Civil Cases*, by Sopinka and Lederman, the authors comment on the effect of failure to call a witness and I quote:
>
> > In *Blatch v. Archer*, (1774), 1 Cowp. 63, at p. 65, Lord Mansfield stated:
> >
> > > "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."
>
> The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.
>
> *In the case of a plaintiff who has the evidentiary burden of establishing an issue, the effect of such an inference may be that the evidence led will be insufficient to discharge the burden.* (*Levesque et al. v. Comeau et al*. [1970] S.C.R. 1010, (1971), 16 D.L.R. (3d) 425.) (emphasis added)
>
> These comments apply to the case at bar.

F. The impact of hiring an assistant

[270] As appears from the CRT reasons, the CRT member decided that a particular agent could not have been an IA employee because he or she was able to hire an assistant; the member based his decision on the Quebec Court of Appeal decision in *Dicom Express* (*supra*).[277] Several comments are called for here. First, Mr. Mazraani did not hire an assistant, so this issue does not arise for him. However, even if he had hired one, I do not believe that it would be an impediment in this case. A strict reading of the provisions of articles 2085 and 2099 Q.C.C. makes it very clear that the key question to be answered for the purpose of determining if we have a contract of employment is whether there exists a relationship of subordination between the payer and the worker, that is, whether the Company had the power to give instructions and direction to, and to control, the worker. If such power existed, then a court must conclude that the contract is a contract of employment.

[271] The doctrine, which plays an important role in civil law jurisdictions, recognizes "that **employee status can coexist**, in the same person and in connection with the same economic or professional activity, with another status such as shareholder or director of the company, independent contractor or **even employer**." [Emphasis added.][278] Professor Gagnon added at paragraph 108:

> a) L'exécution personnelle
>
> **108** – Principe et limites – Il s'infère de la nature même du contrat de travail, tel que déjà signalé, que le salarié exécute personnellement le travail convenu, « son travail » comme le mentionne d'ailleurs l'article 2088 C.c.Q. Cette obligation habituelle du salarié n'empêche toutefois pas les parties de prévoir qu'il puisse ou qu'il doive prendre certaines mesures pour assurer son remplacement en cas d'absence, ces mesures pouvant aller jusqu'à choisir lui-même son substitut. Elle n'exclut pas non plus, sous réserve des termes du contrat ou d'une directive contraire de l'employeur, la possibilité que le salarié se fasse aider, compte tenu de la tâche à accomplir, en embauchant lui-même des aides et en cumulant alors le statut d'employé, d'une part, et celui d'employeur, d'autre part.
>
> [Emphasis added.]

[272] Here, the evidence shows that the Company had the power of direction and control over its agents who hire an assistant. It took measures to protect itself by asking the assistant to sign a confidentiality agreement. It is not clear to whom this undertaking of confidentiality was given because the agreement was not filed in evidence and Mr. Michaud could not say. However, I am convinced that the Company took the appropriate measures to protect its interests. In addition, the Company would have taken steps to get rid of an assistant who had a bad reputation or connections with criminal organizations. Mr. Michaud said he would "strongly recommend" to the agent that he get rid of such an assistant. Given all the powers conferred in the Agent Contract with respect to suspending the contract, reassigning clients (who belong to the Company and not the agent) to other agents and terminating the contract (with all the consequences that these measures could have on the payment of commissions and bonuses), such a "recommendation" would not be a mere suggestion or the expression of a wish, it would be an order.

[273] So the hiring of an assistant would not have the result of negating the power of the Company to give instructions regarding, and to direct and control, the work of the agent! It is not conceivable that the Company would not exercise this power if the assistant of an agent got into a conflict with the branch manager, a sales manager or another agent over an issue such as access to the filing cabinet of the first agent for the compliance purposes or if problems arose in the assistant's work relationship with employees of the LaSalle Branch. One can easily envisage what would happen if a LaSalle Branch employee suffered sexual harassment by such an assistant on the Company's premises.

[274] Industrial Alliance also cited in its argument before this Court the *Dicom Express* decision at paragraph 29, where it is stated that someone's employee cannot be at the same time the employer of somebody else with respect to the performance of the same work. First, this appears to be an *obiter dictum* because there was no contract between the plaintiff, Mr. Paiement, and Dicom, the defendant, but only a contract between Mr. Paiement's company and Dicom. How can there be a contract of employment without a contract? The Superior Court Judge had lifted the corporate veil, but, at paragraph 30, the Quebec Court of Appeal reversed that judge's decision on this point. Second, let us review the actual statement made by the Court of Appeal judge:

> 29 En effet, il y a, à mon avis, antinomie entre le statut de salarié et celui d'employeur. L'on ne peut pas être à la fois le salarié de quelqu'un et l'employeur d'un autre dans l'exécution d'une même tâche, car le type de contrôle que comporte la subordination juridique d'un employeur vis-à-vis son salarié ne peut se satisfaire d'un tel partage.
>
> [Emphasis added.]

[275] There is no legislative or jurisprudential support given by the judge for his statement, and I do not know of any. Nor did he discuss the merit of the opinion expressed by scholars such as Professor Gagnon, mentioned above, who have been writing on the contract of employment for a long time. Article 2101 Q.C.C. states that a provider of services may use the services of a third party. There is in the provisions of the Civil Code dealing with the contract of employment no statement that an employee cannot use the services of a third party. The Civil Code is silent on this point. Article 2099 Q.C.C. provides as a condition for the existence of a contract for services that, with respect to the performance of the contract, "no relationship of subordination [exist] between the contractor or the provider of services and the client". So if the evidence, both direct and circumstantial, discloses that a payer not only had the power to give instructions regarding, and to direct and control, the work of its worker, but in fact exercised that power, I do not see how a court could conclude that there existed a contract for services just because this employee happens to have hired an assistant to do clerical work. It can only be a contract of employment.

[276] However, the statement of the Court of Appeal judge is not without merit, but it has to be nuanced and assessed in the context of the relevant facts of that case, because it is in that context that the statement at paragraph 29 was made. The most important such facts are those described in the immediately preceding paragraphs (27 and 28):

> 27 En effet, 2633-5380 Québec inc. eut, pour sa part, cinq salariés différents, tous recrutés, engagés et payés par Claude Paiement à titre de président. . . . Plus encore, la société a recruté un chauffeur pour remplacer Claude Paiement après que son permis de conduire lui fut retiré pour un an. Durant cette période, l'intimé accompagnait son salarié, car il continuait de faire la cueillette et la livraison des colis.
>
> 28 Tous ces faits sont révélés par Claude Paiement à l'occasion d'un interrogatoire avant défense et sont, à mon sens, d'une importance capitale dans la définition du statut de Claude Paiement et de sa société.

[Emphasis added.]

[277] If a worker involved in the delivery of letters and parcels also hires 5 or 10 employees to make the deliveries and uses his own trucks for those deliveries, these are facts that raise considerable doubt as to the existence of a power in a payer (such as Dicom Express) to instruct, direct and control that worker. This fact should be considered as circumstantial evidence of the same nature and relevancy as the situation in which a worker is hired with his bulldozer and power shovel, worth tens of thousands of dollars, to perform his work. If little or no direct evidence exists of the exercise of the power to direct, instruct and control, then the likelihood of the existence of the power could be nil or almost nil. In other words, the presence of a number of employees should be a relevant fact to consider, but it is going too far to say that whenever an employee hires an assistant that employee cannot ever be under the direction and control of somebody else. The facts in this case show that such power not only can exist but was actually exercised, even when an agent hired an assistant. To create such an irrebuttable presumption of fact would require, in my view, an amendment to the Civil Code. It would be all too easy for many company executives to escape the obligation to make contributions under the Act by asking that their secretaries be employed by them and not the company! More to the point, there is nothing in the Civil Code that expressly precludes an employee from being the employer of an assistant or that provides that someone who would otherwise be an employee could not be one because he happened to have hired an assistant.

[278] One last comment is in order for the purpose of justifying a prudent and more nuanced approach on this subject. The National Assembly has enacted the *Taxation Act* which, like the *Federal Income Tax Act*, provides that an employee can deduct in computing the income from his employment the salary of his assistant and his contribution in respect of this assistant to such programs as the federal employment insurance program and the Quebec Pension Plan (régime de rentes du Québec).[279] So it would be odd that the legislature would recognize such a situation in the *Taxation Act* and prohibit it in the Civil Code, since both pieces of legislation emanate from the National Assembly. If two interpretations are available and one of them yields such an odd result, then the one that harmonizes the two pieces of legislation should be favoured.

[279] It is also surprising to read in the CRT reasons the CRT's conclusion that the agents were not required to personally perform their duties. First, there is such a requirement in the Agent Contract in cases where the Company authorizes its agent to incorporate. Not only does the Agent Contract specifically require that the work be performed personally by its former agent,

but the "agent corporation" Contract does so as well.[280] Why would it be different if an agent does not act through a corporate entity? So I believe that there was an implicit condition in the Agent Contract that the services be performed personally in all circumstances. It should be remembered that the agents need a licence from the AMF to distribute life insurance and other financial products. The Company would not allow the clerical assistant of any agent to act as a life insurance representative without the proper licence.

G. Jurisprudential Precedents

[280] The list of cases dealing with the issues raised by this appeal is long. In particular, the facts and issues in this appeal are very similar to those described in the decision that I rendered in *Financière Banque Nationale* (*supra*) confirming that the advisor was an employee of the stock brokerage firm**.** Contrary to the facts in this appeal, the advisor in that case was arguing that he was an independent contractor while the company took the opposite view. But the stock brokerage business, like the insurance business, is a highly regulated industry. The brokerage firm was subject to the same kind of legislation requiring compliance measures and imposing other supervisory obligations. As here, there were guidelines to be complied with. The brokerage's advisors needed a permit from the AMF. The advisor in *Financière Banque Nationale*, like some of the agents here, for instance Mr. Charbonneau, had an assistant working for him. This assistant had been hired and was paid by the advisor. Similarly, the advisor could share his commissions with other advisors or sell his right to represent his clients,[281] who belonged to the firm, as is the case here. The advisor spent a lot of his time away from the office provided by his firm. He had a lot of discretion in determining his schedule and his vacation. He was paid strictly by commission and was responsible for many expenses, as is the situation with the agents here.

[281] I am also aware that the present case might resemble that in ***Combined Insurance Company of America v***. *M. N.R.*, 2007 CAF 60. However, it should be remembered at the outset that each case turns on its own facts and in many instances important facts are never introduced in evidence, often because the worker cannot afford a good lawyer and does not know or understand how important some of these facts are. The absence of important facts may result in a court getting a picture that differs significantly from reality, as is evident in the instant case. When one compares the facts as presented by Mr. Leclerc to the CRA rulings officer and the facts that were introduced before this Court over a six-day hearing, the decision cannot be the same. Here, Mr. Mazraani may not have had the right profile to be a good insurance salesperson, but he surely had a flair for minute details that greatly helped his case.

[282] Also, I note that some observers have seen certain ambivalence in the decision of the Federal Court of Appeal, wherein it reversed the decision of this Court and opined that the decision in *Wiebe Door* should have been considered.[282] It did not refer to its own decision in ***9041 (Tambeau*)**, *supra*, in which it stated that the Tax Court judge had come to the right decision but had relied on the wrong source of the law.[283] That judge had relied on common law decisions such as *Wiebe Door*, when he should have applied the Civil Code.

[283] Since then, I believe, it has been clearly established in the jurisprudence that, in Quebec, the Civil Code, which defines clearly what constitutes a contract of employment, is the law to be applied, and that the approach in *Wiebe Door* and *Combined Insurance* is to be followed only in common law provinces where no statutory definition of a contract of employment exists. In the provisions of the Civil Code, there are no particular requirements with respect to the ownership of tools or with respect to the opportunity for profit or the risk of loss. The only legal criterion laid down by the National Assembly when it adopted the Civil Code, which was applicable as of January 1994, was whether there was a relationship of subordination between the parties. The courts are not at liberty, in applying a Quebec contract, to state that a relationship of subordination is only one of the many factors to be considered and that "[t]he relative weight of each [factor] will depend on the particular facts and circumstances of the case", as was stated in by the Supreme Court of Canada in *Sagaz* (*supra* at paragraph 48), a case originating outside of Quebec.

[284] With respect to the CRT reasons, I would like to point out that the analysis adopted by the CRT is based to a large extent on the common law approach. For instance, it referred to indicia such as "les chances de profit et les risques de perte" and "la propriété des outils". Furthermore, that decision focuses on the degree of control in the execution of the work; it does not ask whether the Company had the power to exercise such control.

H. Tax Misconceptions

[285] It was stated or implied by several IA witnesses that an employee salesman paid by commission, such as an insurance agent, would not be able to deduct the cost of an assistant's salary. Mr. Michaud offered that opinion to explain why the agents became independent contractors. This is a mistaken opinion. Pursuant to subparagraph 8(1)(*i*) (ii) and paragraph 8(1)(*l*.1) of the *Income Tax Act*,[284] an employee can not only deduct the salary of an assistant or a substitute, he can also deduct his employer's contribution for employment insurance and the Quebec Pension Plan! An example of this is to be found in the case of *Longtin v. The Queen,* 2006 DTC 3254, where an employee salesman was allowed to deduct the salary he paid to his wife, who was acting as his assistant.

[286] Some IA agents think that it is more advantageous to them to be independent contractors because they believe, wrongly in my opinion, that they will be able to deduct more expenses if they are independent contractors. The reality is that a salesperson earning commission income can deduct all his expenses incurred to earn his employment income up to the amount of his commissions.[285] It is not surprising, however, to see these misinformed IA agents being very adamant in testifying before this Court that they were independent contractors and, to support that view, in testifying that they did not feel compelled to attend office meetings, although some of them were explicitly stated to be mandatory, and that they felt free to take their holidays whenever they wanted to, although some of them felt compelled to advise the Company when they would take them and, as seen in the CRT reasons, there were restrictions respecting the time the agents could choose for their holidays.

[287] It was stated also by Mr. Michaud that an employee could not incorporate himself for the performance of his duties as an employee. However, it is public knowledge, as reflected in the jurisprudence, that employers prior to 1993 allowed some of their employees to incorporate themselves. So agent employees could have incorporated themselves before 1993. In fact, the *Income Tax Act* had to be amended in 1984 to reduce the tax advantages for employees adopting such a tax-planning strategy.[286]

I. Appeals Officer's Decision

[288] A review of the summary of the appeals officer's report shows that she was misguided in applying the law on the issue of insurable employment. Although she stated that the proper source of the law was the Civil Code, she applied−as was done in *Combined Insurance*−the common law approach as described in *Wiebe Door* and *Sagaz*. She put greater emphasis on the overall behaviour of Mr. Mazraani, which made him look more like a businessperson than an employee. She appears to lay more emphasis on the fact that he provided (or paid for) his own tools, that he claimed a loss of $14, that there were no deductions at source and that Mr. Mazraani declared his commissions as business income. The appeals officer stated:

> Based on copies of payment reports, the workers received only commission and had to pay expenses for the rental of his computer, insurance for the computer, liability insurance, the use of information services, and telephone costs. He had a possibility for loss.

[289] Her statement that Mr. Mazraani received only commissions seems to imply that commission income is not to be treated as remuneration for services provided pursuant to a contract of employment under article 2085 of the Civil Code. In the Larousse on-line dictionary, "rémunération" is defined as "Prix d'un travail fourni, d'un service rendu : C'est la rémunération de son travail." The *Oxford Advanced Learner's Dictionary*, on-line, offers a similar definition of remuneration: "an amount of money that is paid to somebody for the work they have done. Generous **remuneration packages** are often attached to overseas postings." Since the commissions were paid for work performed by Mr. Mazraani, his situation fits these definitions. Finally, section 5 of the Act itself makes this even clearer by its use of the words "whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise". [Emphasis added.]

[290] In my view, the appeals officer's list of indicia shows the influence of the common law, which adopts the four-in-one test described in the leading case of *Wiebe Door*. This test attempts to determine "Whose business is it?" It considers the following factors: control, ownership of tools, possibility of profit and the risk of loss. None of these four factors is conclusive in the common law, rather one must consider the overall situation. This does not take into account the provisions of the Civil Code, which distinguishes a contract of employment from a contract for services on the sole basis of the existence of a relationship of subordination. The fact that an employee could incur losses is not a factor recognized under the Civil Code. In addition, there are no restrictions in the Civil Code that say that an employee cannot be responsible for any expenses. The reality is that salespersons are very often responsible for many of their expenses.

[291] In the English summary of her report, the appeals officer does not even include a "relationship of subordination" heading, which, in my view, shows how little attention she paid to that crucial element. In the French summary of her report, there is such a heading: "Lien de subordination", under which she states:[287]

> Le travailleur effectuait des téléphones pour obtenir des rendez-vous auprès de clients éventuels. Il n'était pas supervisé. Il rencontrait les clients et leur vendait des polices d'assurance. Ses entrées et sorties et ses heures travaillées n'étaient pas contrôlées par le payeur. Le travailleur avait une carte magnétique qui lui permettait d'entrer et sortir des locaux du payeur à sa guise. Le payeur ne planifiait ni ne supervisait son travail. Le payeur n'indiquait pas au travailleur de quelle façon d'exécuter [*sic*] le travail.
>
> Ces éléments sont indicatifs d'un contrat de services.

[Emphasis added.]

[292] It is evident from the report that the decision of the appeals officer was solely based on her perception that supervision was not exercised. The key question, which she did not ask herself and which she did not answer, was whether the Company had the power to exercise control over, and to give instructions to, its workers and, in particular, Mr. Mazraani. This issue is not limited to determining whether such power was exercised. As is acknowledged in the jurisprudence and the doctrine, and by the Quebec Minister of Justice at the time the Civil Code was adopted by the National Assembly, it is the power to give directions that is the key element.

[293] Furthermore, the appeals officer never had the opportunity to meet representatives of the Company. She relied only on the notes of the rulings officer, to whom Mr. Leclerc had given the following Company version:[288]

> Le payeur vérifiait le travail afin de s'assurer que les règles dictées par la loi étaient respectées, mais il ne supervisait pas le travailleur ni ne lui indiquait pas [*sic*] comment effectuer le travail.

[294] It is surprising and unfortunate that the Minister's representative preferred the Company's version, given that the Company's officials had not returned her phone calls. With respect to her statement that the worker, Mr. Mazraani, was not being supervised, this is a somewhat surprising display of faith in the Company's version when one considers that Mr. Mazraani had an office (cubicle) on the premises of IA's LaSalle Branch. This cubicle was located near the office of his sales manager, with whom Mr. Mazraani had regular contact. So it is difficult to understand how the appeals officer could have concluded that Mr. Mazraani was not being supervised. In my view, this situation should have made it more probable that the worker's version was the correct one.

[295] Had she had the chance to pursue her investigation, the appeals officer could have discovered herself all the direct evidence that was introduced before this Court by Mr. Mazraani showing that the Company did exercise its right to give instructions to and to control the work of, its agents and thus that their work was done under the direction of the Company.

[296] When he was absent for medical reasons, Mr. Mazraani felt compelled to let his sales manager know and submitted to him his medical certificate. Ms. Woo testified that she kept her sales manager informed of all the steps she was taking in order to be a successful insurance sales person, although she did not feel that she was required to do so. Most employees do not have to be told that it is mandatory that they report to their supervisors in order to be considered employees. Most employees acknowledge the power of their supervisors to oversee their activities, and this power was being exercised in this particular case with respect to Mr. Mazraani.

[297] Lawyers working as salaried employees for private law firms and for the civil service are given broad discretionary powers with regard to how they carry out their duties. However, they are all recognized as employees until such time as, for instance, in the private sector, they are admitted into the partnership. Professors working at the university and Cegep levels are given wide discretion as to how to teach their students. This does not prevent them from being recognized as employees of the universities and Cegeps, even if they are only working on part-time basis as lecturers. There are numerous decisions confirming that lecturers are employees of a university although they may be working as independent professionals, and only a few hours per week, teaching university students.

VI. CONCLUSION

[298] In conclusion, the ultimate issue is whether Industrial Alliance had the power to issue instructions to, and to direct and control the work of, Mr. Mazraani. In this particular case, in light of the evidence as a whole, both circumstantial and direct, I have no hesitation in concluding that the Company not only had such power, but in fact exercised it on a regular and continuous basis during the relevant period.

[299] It is evident that the Company tried its best to convert the status of its agents from that of employees to that of independent contractors in 1993. As stated in the CRT reasons and in the testimony of Mr. Michaud before this Court, most if not all of its competitors were using that business model. In my view, there are obvious benefits for a company in doing so. For instance, it does not have to contribute to the federal employment insurance program or to the Quebec Pension Plan.

[300] Industrial Alliance tried, in effect, to convert a square into a circle by creating an octagon in the hope that it would look as much like a circle as possible, but in the end, the figure still has angles, and that prevents it from ever becoming a circle. However how long one looks at the octagon to find a circle, it will never be found. It should be remembered that, in order for there to be a contract for services, there must be no relationship of subordination involved. If there is such a relationship, then the contract is a contract of employment. Professor Robert P. Gagnon stated in paragraph 94 of his above-cited work (5th ed.):[289]

. . .

> However, even in its most relaxed and attenuated forms, the situation of legal subordination should suffice to place the worker in the employee category. The exclusion of any relationship of subordination between the client and a contractor or provider of services now legitimizes this conclusion (article 2099 of C.C.Q.). . . .

[Emphasis added.]

[301] Mr. Mazraani was, during the relevant period, an employee of Industrial Alliance because he was performing his services "according to the instructions and under the direction or control of" the Company, the employer, in accordance with section 2085 of the Quebec Civil Code. His Agent Contract was a contract of employment. Therefore he held insurable employment during the relevant period while working for Industrial Alliance.

[302] Before stating my final conclusion, I would like to add that, although my decision is based solely on the legal principles of the Quebec civil law and does not take into account the general objective of the Act of providing relief to unemployed employees,[290] its result is, in my view, totally in harmony with the Act. Life insurance companies hire a very large number of agents, who will not all succeed in that difficult endeavour. The evidence in this particular appeal revealed that of the 45 agents at the LaSalle Branch around 15 had less than two years of experience.[291] Thirteen or fourteen new agents are hired every year.[292] To make one sale, an agent may be required to make hundreds of calls. The Company does not have any obligation to remunerate its agents for all this work unless a life insurance policy is issued and premiums are collected by it, because under its business model the only remuneration which is payable is the commission calculated by reference to the premium collected. As the high personnel turnover indicates, many do not make it in that business. The Company, in Mr. Mazraani's view, is benefiting from a lot of unpaid work: for instance, the canvassing, the soliciting and the preparation and presentation of a financial plan with no positive result in the end. He even went as far as to use the word "slavery" to describe the situation of many agents. Mr. Mazraani is a man who is very upset, and with good reason. Industrial Alliance claimed that an agent builds his own business, but the clients belong to the Company, and when the agent leaves, a non-soliciting and non-competition clause applies. Even Mr. Mazraani's licence is of no value because he is not attached to an insurance company, and he claims that he cannot use the licence without being so attached. Therefore, it is the decent thing that those who do not succeed should be entitled to employment insurance benefits. Persons who work in a similar environment to the one in which Mr. Mazraani found himself at Industrial Alliance deserve the protection of the law, as afforded notably by the Act and the Standards Act.

[303] For all these reasons, Mr. Mazraani's appeal is allowed and the Minister's decision is varied such that Mr. Mazraani is considered to have held insurable employment during the relevant period.

[304] Industrial Alliance is ordered to pay Mr. Mazraani the sum of $2,000 as costs. This hearing lasted longer than necessary because Industrial Alliance was not forthcoming in

providing an accurate factual description of what took place. Additional hearing days were required, which allowed Mr. Mazraani to provide evidence to contradict the misleading evidence introduced by Industrial Alliance's key executives who testified, and enabled the Court to get a clear picture of the true facts. The Court relies on its inherent jurisdiction to prevent and control any abuse of its process, recognized by the Federal Court of Appeal in *Fournier v. Her Majesty the Queen*, 2005 FCA 131, 2006 GTC 1181, paragraph 11:

> [11] The judge stated that he had no jurisdiction to impose costs on an appellant who unnecessarily delayed an appeal process initiated within an informal proceeding. I should point out that the Tax Court of Canada has the inherent jurisdiction to prevent and control an abuse of its process: see *Yacyshyn v. Canada*, [1999] F.C.A. No. 196 (F.C.A.).
>
> [12] The awarding of costs is one mechanism for preventing or remedying abusive delays or procedures: see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at paragraphs 179 and 183. In *Sherman v. Canada (Minister of National Revenue — M.N.R.)*, [2003] 4 F.C. 865, at paragraph 46, this Court addressed the issue in the following terms:
>
> > It is now generally accepted that an award of costs may perform more than one function. Costs under modern rules may serve to regulate, indemnify and deter. They regulate by promoting early settlements and restraint. They deter impetuous, frivolous and abusive behaviour and litigation. They seek to compensate, at least in part, the successful party who has incurred, sometimes, large expenses to vindicate its rights.
> >
> > [Emphasis added by Létourneau J.A.]

Signed this 12th day of April 2016.

"Pierre Archambault"

Archambault J.

Appendix A

APPLICATION OF INDUSTRY MONITORING STANDARDS

Item	Standard	Control	Sanction/Consequence
ADVERTISING a) Business cards, paper and promotional items bearing the Company's name or logo	• The agent must use titles and degrees actually obtained • Must obtain approval from the Company	• The Company verifies each request and makes any necessary corrections • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract • Destruction of non-compliant materials • Reprinting at agent's expense
b) Products and services - newspapers - client pamphlets - Internet - radio, television	• The advertising must be clear, true and not be misleading or criticize the competition • It must be approved by the Company when the Company's name, logo, or name of a Company product appears	• The Communications department checks and approves every ad • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract • If necessary, notice sent to the client(s) or publication of a correction
c) Client notices, statements and life insurance illustrations attached to the contracts	• They must be clear, true and not be misleading or criticize the competition • They cannot be modified by sales personnel	• Training • Department concerned verifies all requests • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract • If necessary, meet with the client
d) Prospecting - Letters - Telemarketing - Telecommunications	• The agent must not mislead the client for the purpose of setting up a meeting • Must use documents approved by the Company • The agent must comply with the rules and procedures regarding the national Do Not Call List (DNCL)	• Communication reviewed by the branch manager • Agency personnel • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract • If necessary, meet with the client
REPLACEMENTS Internal/External (Individual Insurance and Annuities)	• Must be in the client's best interest • Encourage clients to keep existing policies in force • Follow the guidelines and procedures prescribed by the CLHIA if the replacement is warranted • Do not systematically do replacements • Never terminate the policy being replaced before the new one is issued	• Conservation team • Replacement reports • Review duly completed comparison statement attached to the application • Complaint / Compliance officer • Non-disclosure • Incomplete statement, delay • Transactions with charges of $500 or over (Individual Annuities) are checked with the branch manager	• Warning • Commitment to proper conduct • Termination of contract • Communicate non-disclosure statement to the branch manager • Warning to agents with abnormally high replacement rates • Refuse to process the request • Presentation of disclosure form to client, even after the transaction
DECLARATIONS OF INSURABILITY	• All declarations must be complete and true • The questions must be asked as they are written • Client statements must be transcribed accurately and completely	• Telephone inquiries • Paramedical exams • Declarations after issue • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract
LIFE INSURANCE ILLUSTRATIONS a) Sensitivity Rate b) Signature	• Respect CLHIA and Company rules and guidelines • Do not modify the programs or printed life insurance illustrations • Use realistic assumptions (e.g. interest rates) • The life insurance illustration must be signed by the client and forwarded to the Company	• Marketing • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract
CONTRACT DELIVERY	• Policies must be delivered within 21 days after their issue date with a signed delivery receipt returned to the Company after delivery • The client's insurability must be verified and the contract must be explained, along with any modifications made by the Company	• Reports • Agency personnel and management • Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract • Recovery of commission bonuses and any other credits associated with the policy after 45 days, if not delivered
SIGNATURE	• The agent or employee must never sign a document on the client's behalf or imitate the client's signature • Must not change the application under any circumstances once it has been signed by the client	• Verification with the departments • Complaint reported / Compliance officer	• Commitment to proper conduct • Termination of contract • Transaction declined and commission reversed
DILIGENCE	• Inform the client of any transaction that may put his or her coverage in danger • Immediate forwarding of requests by the client to the Company	• Complaint reported / Compliance officer • Sampling	• Warning • Commitment to proper conduct • Termination of contract
KNOW YOUR CLIENT	• The agent must open and maintain a client file, analyze the client's needs and/or prepare an investor profile	• Agency management • Verification of the presence of the needs analysis and/or investor profile in a new file	• Warning • Commitment to proper conduct • Termination of contract • Refuse to process the request • Transaction declined
TRUSTEE a) Collection b) For agents using a Trust account	• Must not use the amounts entrusted to him or her for personal purposes • All cheques must be made payable to the Company • Must use a different bank account than the one used for regular transactions • Must keep a record of deposits and withdrawals. This record should contain at least the following details: client's name, transaction date, contract number and short description of the reason for the transaction • Must reconcile the transactions on a regular basis	• Complaint reported / Compliance officer • Verification by the Company	a) Termination of contract b) Warning Commitment to proper conduct Termination of contract
LICENCE AND ERRORS & OMISSIONS (E&O) INSURANCE	• Must ensure that his or her licence and E&O insurance are up to date • Must advise the Company of any change in status	• Issuing of a contract • Renewal letters	• Suspension of the agent's compensation until proof of current licence or E&O insurance is received • Termination of contract if requirements not met
CONFIDENTIALITY	• Take the necessary steps to maintain the confidentiality of the information to which he or she has been entrusted • Must not use the information for any other purpose than the one permitted for the transaction • Provide information concerning a contract to authorized persons only	• Complaint reported / Compliance officer	• Warning • Commitment to proper conduct • Termination of contract
CONFLICT OF INTEREST	• The interests of the client must always be placed before the interests of the agent at all times during the sale and service process • The agent must not carry out any transaction in which he or she has the only interest	• Different departments • Complaint reported / Compliance officer	• Termination of contract • Cancellation of transaction
MEDIA	• The agent must never use the media to resolve a conflict • Must not encourage a client to use the media to resolve a problem	• Complaint reported / Compliance officer	• Termination of contract
MONEY LAUNDERING	• Comply with the applicable laws and regulations, as well as the Company's policies and procedures	• Frequency and amount of cash transactions • Complaint reported / Compliance officer	• Termination of contract
FEES CHARGED TO CLIENTS	• It is not recommended that agents charge a fee to clients for work done by the agent in their name • The agent is accountable and the client must be given a full explanation if fees are charged to the client • The agent must respect regulatory legislation in this situation	• Complaint reported / Compliance officer	• Refund of fees to the client at the agent's expense • Termination of contract

F12-195A(13-09)

Appendix B

Appendix B	

CITATION:	2016 TCC 65
COURT FILE NO.:	2013-3484(EI)
STYLE OF CAUSE:	Kassem Mazraani v. M.N.R. and Industrielle Alliance Assurance et Services Financiers Inc.
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	May 11 and 12, 2015, June 1, 2, 15 and 16, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	April 12, 2016

APPEARANCES:

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

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada

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[1] Exhibit A-42, in the leaflet entitled “Life in Brief” (2010). In a table called “Snapshot”, IA says it has over 3,700 employees, 1700 representatives and over 18,000 brokers.

[2] Given the length of these reasons, I have added as Appendix B a table of contents.

[3] Only one day had been scheduled for this appeal; the hearing lasted, however, 6 days over a 5-week period.

[4] Subs. 5(1) of the Act defines insurable employment in the following terms:
5(1) Subject to subsection (2), insurable employment is

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

[Emphasis added.]

[5] 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.

[Emphasis added.]

[6] 2098 A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.

2099 The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[Emphasis added.]

[7] Page 60 of the June 1 transcript.

[8] Exhibit R-1.

[9] Page 62 of the June 1 transcript.

[10] Page 4 of 8 of her report.

[11] Page 5 of 8 of her report.

[12] Page 135 of the May 12 transcript. Mr. Leclerc also testified that there were about 14 branches in the Montreal area. (See p.117 of the June 15 transcript.)

[13] As the in-house counsel explained in her testimony.

[14] Dated December 22, 2014. Exhibit A-10. Although this document was produced by Mr. Mazraani as part of his explanation why his claim to have the Commission des normes du travail (**CNT**) represent him before the courts was at first accepted, but then turned down. It was filed as an exhibit at the request of counsel for IA. See p. 162 of the May 11 transcript. The change of heart of the Commission apparently occurred because of this CRT decision with respect to two other IA agents, Mr. Alexandre Blackburn and Mr. Jakub Kaliszczak, holding that they were not employees of IA within the meaning of the *Loi sur les normes du travail* (**Standards Act**). As a consequence of this decision, the CNT lawyers (direction des affaires juridiques) informed Mr. Mazraani that they would no longer represent him in his claim before the Court of Québec, scheduled to be heard on April 22 and 23, 2015. Mr. Mazraani testified that at the time of the hearing before this Court [the Tax Court], he was still trying to convince the CNT to continue to represent him (Exhibit A-11).

Since the CRT reasons had been filed as an exhibit at IA's request, I asked Mr. Michaud if he could confirm that the statement of facts therein was a fair description of the situation at Industrial Alliance. I suggested to the IA's counsel that the hearing be suspended to allow Mr. Michaud to take the time to read those reasons again. Mr. Michaud did not think that it was necessary and his lawyer agreed to proceed on that basis. Mr. Michaud had also been a witness before that administrative tribunal. See p. 8 and ff. of the May 12 transcript. I believe that the facts in the CRT reasons can help give us a better understanding of the situation at the Company.

[15] Pages 140-141 of the May 12 transcript.

[16] Pages 139-140 of the May 12 transcript.

[17] One gets the impression that the word "coach" in the mouth of Mr. Michaud can be synonymous with "boss" or "hierarchical superior".

[18] See page 160 of May 12 transcript.

[19] Exhibit A-10.

[20] Exhibit A-20.

[21] However, calling an orange an apple does not change the reality that it is an orange.

[22] See Exhibit I-3.

[23] See Exhibit I-4. I am surprised that there is in that letter of opinion no caveat (as is found in other communications made by the agency) to the effect that the law may change or that the courts may take a

different view. Indeed, a few days later, on January 1, 1994, the *Civil Code of Québec* came into force.

[24] Pages 147-148 and 149 of the May 12 transcript.

[25] Pages 153, 154 and 155 of the May 12 transcript.

[26] Page 151 of the May 12 transcript.

[27] Except for a brief testimony by Mr. Mazraani, the sixth day was reserved for arguments.

[28] See p. 118 of the June 15 transcript. Ms. Woo stated that there were between 50 and 60 people working at the LaSalle Branch, of which 45 to 50 were agents. So out of the 60 working at the branch, only about 10 were employees (16.6%)!

[29] See p. 119 of the June 15 transcript. At the Laval Branch, there were 21 agents out of a total of 51 who had less than 12 months' experience. Paragraph 70 of the CRT reasons, Exhibit A-10.

[30] Exhibit A-37.

[31] Pages 138 and 141 of the May 12 transcript.

[32] Exhibit A-4.

[33] Exhibit A-4.

[34] See p. 156 of the June 2 transcript.

[35] Pages 156-157 of the June 2 transcript.

[36] Exhibit A-18. I am using and will be using in these reasons the expression "Intranet" -as the IA counsel has usually done in his examination of witnesses at the hearing- instead of the expression "Extranet" because I believe it is the more accurate one. In Termium Plus, The Government of Canada's terminology and linguistic data bank, "intranet" is defined as "the collection of networks that connect computers within corporations","Réseau qui fonctionne comme Internet, mais qui n'est accessible au public que par mot de passe" while "extranet" is defined as "an intranet that has been extended to include access to or from selected external organizations such as customers or suppliers, but not to the general public." Here, the network is for the exclusive use of the IA "force de vente" which expression is defined in Antidote 9 as "personnel commercial d'une entreprise affecté au service de la clientèle".

[37] Exhibit A-19.

[38] Exhibit A-5.

[39] Mr. Mazraani filed a complaint with the CNT on March 14, 2011 on, among other grounds, dismissal without good and sufficient cause. See Exhibit A-9. He made this complaint in order to have the CNT institute, if necessary, legal proceedings to defend his rights. On January 27, 2012, London Life agreed to pay a certain sum of money in full and final settlement of any rights and recourses and claims. The parties stated that their intention was to avoid the costs and risks of a trial and that they wished to settle all litigation and claims without any admission of liability and for the sole purpose of buying peace and avoiding further costs and expenses. See Exhibit A-2.

[40] Exhibit A-27.

[41] Exhibit I-2.

[42] See Exhibit I-2.

[43] This is a practice also followed by certain public and private employers with respect to employees.

[44] Exhibit I-1.

[45] See pages 121-122 of the May 12 transcript.

[46] Ibid., p. 122.

[47] See also s. 4 of the Agent Contract, Exhibit A-20.

[48] As many employers would do.

[49] Exhibit A-42, p. 1, first paragraph.

[50] Exhibit A-42, p. 1, fourth, fifth, seventh and eighth paragraphs.

[51] Exhibit A-42, p. 3.

[52] Exhibit A-8.

[53] The notice says that the training will start at 9:30 a.m. and end at 10:30 a.m. Exhibit A-41.

[54] All the documents are in "Exhibit A-57, except this one, which is Exhibit A-47.

[55] These modules represent 228 pages of training material.

[56] This is Module 2, Exhibit A-57.

[57] Ibid., p. 9.

[58] Ibid., p. 11.

[59] To be fair, it is important to add the following paragraph:

> De plus, en tant que propriétaire de votre propre commerce, il est essentiel pour votre réussite: de définir vos objectifs . . . Vous serez maître de votre temps plutôt que d'être à son service.

[60] In this context, "my company" is, in my view, a synonym of "my employer". It shows that the agent is doing what he is being told to do! Indeed, an employer would ask an employee to get the names of prospects who might eventually become the company's clients. Why would an independent contractor make such a statement?

[61] Exhibit A-57, Conclusion, page 7.

[62] Exhibit A-47.

[63] Exhibit A-57.

[64] It is doubtful that this instruction is in conformity with IA's own Conduct Standards (art. 3) reproduced below and the Code of ethics of the *Chambre de la sécurité financière* (**Regulatory Code of Ethics**), CQLR c. D-9.2, r. 3. See for example ss. 12 and 13 of the Regulatory Code of Ethics:

> 12. A representative must act towards his client or any potential client with integrity and as a conscientious adviser, giving him all the information that may be necessary or useful. He must take reasonable steps so as to advise his client properly.
>
> 13. A representative must fully and objectively explain to his client or any potential client the type, advantages and **disadvantages of the product** or service that he is proposing to him and must refrain from giving information that may be inaccurate or incomplete.
>
> [Emphasis added.]

[65] Exhibit A-57.

[66] Exhibit A-8.

[67] See Exhibit A-19.

[68] Exhibit A-28.

[69] In his testimony, Mr. Leclerc stated that, before computers were used, it would take him 4 to 5 hours to do retirement planning for a client. With a computer, it would only take 20 minutes. See p. 163 of the June 15 transcript.

[70] Exhibit A-53.

[71] See Exhibit A-8, page 2.

[72] According to his referral contract, Mr. Mazraani would be getting a referral fee for bringing potential clients to other IA divisions offering other types of financial products for which he himself was not qualified to offer to his clients.

[73] Exhibit A-63.

[74] The weekly sales report for the week of July 20, 2012 shows the performance of the agents for the purpose of the "Concours du président". Mr. Mazraani had no eligible policy. The report for the 42nd week in the fourth quarter included 4 policies out of a total of five he was able to sell during his time with Industrial Alliance. (Exhibit A-31) Exhibit A-38 shows the sales leaders of the week in two categories together with the birthday of one agent and the service anniversary of two others. See Exhibit A-45 for the list of "Top Life Insurance Agents" for the province of Quebec. See also Exhibit A-67 entitled "Concours du président 2012".

[75] Exhibit A-64.

[76] The 2 PDU training sessions were on the subjects of "Excellence" and "Option avancée et fiscalité des assurances". One of the regular branch meetings was about "L'approche client en investissement. Traitement des objections". Other activities included the "Souper pour les gagnants du Concours" and a "Soirée Gala". See Exhibit A-30.

[77] Mr. Michaud thought that an agent needed 30 PDUs over a two-year period in order to retain his licence to offer financial products.

[78] Exhibit A-30.

[79] Exhibit A-68.

[80] This e-mail is from Exhibit A-41, which contains numerous other e-mails on similar subjects.

[81] Exhibit A-10.

[82] The topic discussed at the meeting held on Wednesday, May 9, 2012 at 9:30 a.m. was "Anciens produits – Ajouts possibles". See Exhibits A-55 and A-8.

[83] To see how complicated an insurance product can be, see "Guide du produit Genesis", a 47-page document for the exclusive use of financial advisors. This product is described as "un outil de planification financière indispensable pour ceux qui recherchent une protection assortie d'avantages financiers incomparables". See Exhibit A-57, last page.

[84] Exhibit A-10.

[85] ". . . and you will also be in charge of the policies and clientele that currently make up part of this service unit." [Emphasis added.] Exhibit A-5.

[86] See Exhibit I-16.

[87] A copy of these standards is attached to these reasons as Appendix A.

[88] Although the Conduct Standards on page 1 do not say so explicitly, I assume that the Company does not want to suffer any prejudice either. If clients suffered a prejudice, they would most likely hold the Company responsible, as acknowledged by Mr. Michaud in his testimony. In any event, it is its public image that would suffer.

[89] See preceding footnote.

[90] Section 13 of the Regulatory Code of Ethics, cited above, uses the words "advantages and disadvantages", which seem clearer to me than those "advantages and consequences", used in the Conduct Standards.

[91] See Exhibit I-17.

[92] CQLR, c. P-39.1.

[93] Exhibit I-16, reproduced in Appendix A of these reasons.

[94] Which appears under "Advertising", par. c), p. 2 of Exhibit I-16.

[95] Exhibit A-42.

[96] Exhibit A-62.

[97] Exhibit A-26. See p. 35 and ff. of the June 2 transcript.

[98] See pp. 42-43 of the June 2 transcript.

[99] Exhibit A-56.

[100] Association canadienne des compagnies d'assurances de personnes inc., that is the Canadian Life and Health Insurance Association Inc. (CLHIA). Its Web site provides the following description:

> Established in 1894, CLHIA is a voluntary non-profit association with member companies accounting for 99 per cent of Canada's life and health insurance business.
>
> The mission of the CLHIA is to serve its members in areas of common interest, need or concern. In carrying out this mission, the Association shall ensure that the views and interests of its diverse membership and of the public are equitably addressed.
>
> [Emphasis added.]

The Web site also provides the following Code of ethics :

> As a condition of membership, all CLHIA members are committed to conducting their business in accordance with the following principles:
>
> 1. To engage in keen, fair competition so that the public can obtain the products and services it needs at reasonable prices.
> 2. To advertise products and services clearly and straightforwardly, and to avoid practices that might mislead or deceive.
> 3. To ensure that illustrations of prices, values and benefits are clear and fair, and contain appropriate disclosure of amounts that are not guaranteed.
> 4. To write all contracts in clear, direct language without unreasonable restrictions.
> 5. To use underwriting techniques that are sound and fair.
> 6. To pay all valid claims fairly and promptly and without unreasonable requirements.
> 7. To ensure competent and courteous sales and service.
> 8. To respect the privacy of individuals by using personal information only for the purposes authorized and not revealing it to any unauthorized person.
>
> [Emphasis added.]

[101] Exhibit A-51.
[102] Exhibit A-54.
[103] Exhibit A-50.
[104] Page 201 and ff. of the June 1, 2015 transcript.
[105] Page 206 and ff. of the June 1, 2015 transcript.
[106] Page 23 of the June 2 transcript.
[107] Section 27 of the Distribution Act sets out the following requirement :

> 27. Insurance representatives must personally gather the information that is necessary to assess a client's needs, in order to propose the insurance product that best meets those needs.

[108] Exhibit A-61.
[109] Mr. Leclerc described Ms. Laporte as follows in his testimony at p. 132 of the June 15 transcript:

> **. . . Loraine Laporte is in** charge to transmit the sales to the head office. So she's the interface between the advisors and the head office.

[110] According to Mr. Leclerc's testimony, it was Mr. Beaulé who spotted the mistake and informed Ms. Laporte. See note 239 below.
[111] Page 116 of the May 12 transcript.
[112] Pages 116-118 of the May 12 transcript.
[113] Par. 34 of the CRT reasons, Exhibit A-10.
[114] Exhibit A-69.
[115] Exhibit A-10.
[116] Par. 75 to 81 are reproduced in par. 75 above.
[117] Exhibit A-17.
[118] Exhibit A-66.
[119] Exhibit A-21.
[120] Exhibit A-10.
[121] Exhibit A-67. See also Exhibit A-45.
[122] Exhibit A-20.
[123] Exhibit I-6.
[124] Exhibit I-8.
[125] Exhibit I-8.
[126] Page 228 of the June 1 transcript.
[127] This is consistent with the training and instructions she received. In particular, Exhibit A-42: "Keep Your Clock on Time All Year Long", provides instruction in the following terms:

> 3 I devote 60% of my time to prospection by making a sufficient number of calls in order to obtain 10 appointments a week.
>
> 8 I do what's necessary so that my work week is full before leaving for the weekend.
>
> [Emphasis added.]

[128] Pages 327-330 of the June 1 transcript.
[129] Pages 238, 251 and 272 of the June 1 transcript.
[130] Pages 265-266 of the June 1 transcript.
[131] Pages 302-304 of the June 1 transcript.
[132] Pages 259-260 of the June 1 transcript.
[133] Pages 263-264 of the June 1 transcript.
[134] This answer is enlightening. Although one may wonder whether Ms. Woo is using a term which she was not supposed to use during the hearing, it illustrates the fact that she considered herself to be integrated into her branch office.
[135] There is a similar provision with respect to forms, handbooks, policies, computer software and other company documents.
[136] When Ms. Woo on one occasion acquired and on another transferred clientele, Industrial Alliance intervened to consent to these assignments. See Exhibit I-14 and Exhibit I-15.
[137] Exhibit A-20.
[138] Exhibit A-20, s. H.10 a) of the Remuneration Rules.
[139] In addition to the Agent Contract, there is a second contract entitled "Damage Insurance Referral Contract" between Mr. Mazraani and Industrial Alliance. As stipulated in s. 7 of this contract, the agent

cannot sell or otherwise dispose of his right to refer clients to the Company with respect to damage insurance contracts. See Exhibit A-22.

[140] See pp. 186-188 of the May 12 transcript.

[141] See note 4 above for the provision of the Act defining what insurable employment is.

[142] Nicholas Kasirer (then an articling student and now a Quebec Court of Appeal judge) and I dealt in 1987 with the sources of law issue in Pierre ARCHAMBAULT and Nicholas KASIRER, "Employé et travailleur autonome : Distinction juridique et le problème des sources du droit*"* [1987] 9 R.P.F.S. 287.

[143] "Contract of Employment: *Why Wiebe Door Services Ltd*. Does Not Apply in Quebec and What Should Replace It", 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*, Department of Justice Canada, 2005 (**my article**).

[144] Section 8.1 provides as follows:

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

[145] Assuming there is a contract pursuant to which services are rendered for remuneration by one person (the employee) to another (the employer).

[146] This statement of the Minister is consistent with many court decisions, including *Gallant v. Canada*, [1986] F.C.J. No. 330 (QL), in which Pratte J.A. of the Federal Court of Appeal stated:

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

In addition, in *Groupe Desmarais Pinsonneault & Avard Inc. v. Canada (M.N.R.)*, 2002 FCA 144, [2002] F.C.J. No. 572 (QL), (2002), 291 N.R. 389, Noël J.A.(as he then was) wrote:

> 5 The question the trial judge should have asked was whether the company had the power to control the way the workers did their work, not whether the company actually exercised such control. The fact that the company did not exercise the control or that the workers did not feel subject to it in doing their work did not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.
>
> [Emphasis added.]

[147] Robert P. GAGNON, *Le droit du travail du Québec*, 5th ed. (Cowansville, Qc: Les Éditions Yvon Blais Inc., 2003) at 73, par. 100. This author and this book were cited by the Quebec Court of Appeal in *Transport Jean Gauthier inc*. c. *Tribunal du travail*, [2005] J.Q. no 3606 (QL), 2005 QCCA 363, par. 24. (**Transport Gauthier inc.**)

[148] This English text is taken from my article, *supra*, at par. 44, which article is also cited by Justice Décary at par. 11 of *9041-6868 Québec Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [2005] F.C.J. No. 1720 (QL), 2005 FCA 334, 350 N.R. 201, 149 A.C.W.S. (3d) 255 (**9041** or **Tambeau**).

[149] For illustrations of this statement, see *Acier Inoxydable Fafard Inc. v. Canada (M.N.R.)*, 2002 FCA 214, [2002] F.C.J. No. 794 (QL), at par. 6; *Roxboro Excavation Inc. v. Canada (M.N.R.*), [2000] F.C.J. No. 799 (QL) (F.C.A.), at par. 3; *Groupe Desmarais*, *supra* (note 146), at par. 4. Furthermore, according to judge Garon (as he then was) in *Fournier v. Canada (M.N.R.)*, [1996] T.C.J. No. 526 (QL), at par. 21, the "fact that a person is both the guiding spirit of a corporation and an employee of that same corporation does not nullify the subordinate relationship that exists between the employer company and the employee." I completely agree with that opinion. *Contra*: *Therrien v. Canada (M.N.R.*), [1995] F.C.J. No. 1206 (QL) (F.C.A.), aff'g. [1994] T.C.J. No. 859 (QL); *Lalande c. Provigo Distribution Inc.*, [1998] A.Q. No. 3073 (C.A. Que.) (QL), at par. 26. This note and the two that follow it are mine and not Professor Gagnon's.

[150] For an illustration of this statement, see *Sauvé v. Canada (M.N.R.),* [1995] F.C.J. No. 1378 (QL), where an exotic dancer was both an employee of the nightclub when she danced on stage and a provider of services when she danced at a patron's table.

[151] For an illustration of this statement, see my decision in *Financière Banque Nationale Inc. v. Minister of National Revenue*, 2008 TCC 624, 2009 T.C.J. No. 13 (QL) where I confirmed the status of a stockbroker as an employee even though he had hired assistants and was sharing his commissions with another broker in a so-called partnership. See par. 2(25) of that decision. *Contra*: A contrary view was taken by the Quebec Court of Appeal in *Dicom Express inc.* c. *Paiement*, 2009 QCCA 611, at par. 29 where it is stated that someone's employee cannot be at the same time the employer of somebody else with respect to the performance of the same work.

[152] He did the same when he reported his income from London Life.

[153] Exhibit A-3.

[154] Exhibit A-12.

[155] See for instance the comments of Létourneau J.A. of the Federal Court of Appeal in *D & J Driveway Inc. v. Canada* (*M.N.R.*), 2003 FCA 453, [2003] F.C.J. No. 1784 (QL):

> 2 It should be noted at the outset that the parties' stipulation as to the nature of their contractual relations is not necessarily conclusive and the Court which has to consider this matter may arrive at a contrary conclusion based on the evidence presented to it: *Dynamex Canada Inc. v. Canada*, [2003] 305 N.R. 295 (F.C.A.).
>
> [Emphasis added.]

For a more in-depth analysis, see my article, at par. 97 to 102.

[156] Jean-Maurice VERDIER, Alain COEURET, Marie-Armelle SOURIAC, *Droit du travail*, 12th ed. (Paris: Dalloz, 2002), at 315, cited at par. 99 of my article.

[157] To use the words of art. 2099 Q.C.C.

[158] To use the words of the Quebec Minister of Justice cited at par. 140 above.

[159] For a more in-depth discussion of the different kinds of evidence that may be adduced to establish the power to direct, instruct and control, see my article at par. 97 ff.

[160] Exhibit A-32.

[161] See Exhibit A-58, Appendix B to the Advisor Agreement with Financière S_entiel, a financial services firm, which shows the logos of 18 different financial services companies (including IA and a sister corporation) from which bonus and commissions could be earned.

[162] Par. 92 of *Le droit du travail du Québec*, cited above.

[163] Exhibit A-5. It does not say "your coach", but your "sales director"!

[164] To use again the words of Professor Gagnon, *supra*, note 147 at par. 92.

[165] See par. 92 above for the complete list of the 10 tasks. It should be added that the Company tried to prevent the introduction as an exhibit of a copy of this memo sheet because the name of the Company did not appear on it. But Mr. Mazraani was able to find the original and establish to my satisfaction that this document was a genuine IA memo. Exhibit A-42.

[166] See par. 46 above.

[167] Exhibit I-17.

[168] See par. 241 below.

[169] See below in D. (1), "Mandatory training and meetings", in particular par. 179-181.

[170] Section 10 of the Agent Contract. The Regulatory Code of Ethics does not prohibit this. It only provides:

> 36. A representative must not, directly or indirectly, without the knowledge of the insurer, give a discount on a premium stipulated in an insurance contract or agree to a premium payment method different from the one provided for in the contract.
>
> [Emphasis added.]

[171] Exhibit A-5.

[172] Par. 92 of his work cited in note 147 above.

[173] Exhibit A-35.

[174] See par. 179-182 below dealing with mandatory training and meetings.

[175] Exhibit A-42.

[176] Page 194 of the June 15 transcript.

[177] Even if Mr. Mazraani had called the head office about the problem, they would have asked him to talk to the branch staff first. See pp. 196-197 of the June 15 transcript.

[178] Page 17 of his July 16, 2015 written submissions.

[179] See Gagnon, par. 92 reproduced above at par 141.

[180] Marie France BICH, "Le contrat de travail", in *La Réforme du Code civil*, Vol. 2 (Sainte Foy, Qc: Les Presses de l'Université Laval, 1993) at 752, par. 23.

[181] Taken from paragraph 43 of my article.

[182] See par. h) of the Reply, reproduced above.

[183] Exhibit A-42.

[184] See par. 205 below, which cites a Company training document which makes a similar point in similar fashion.

[185] Page 202 of the May 12 transcript.

[186] Page 6 of Module 3 entitled "Planification, organisation, contrôle", Exhibit A-57.

[187] Exhibit A-42.

[188] Exhibit A-40. To these two emails, which are explicit, we can add an e-mail of May 14, 2012, from the "secrétaire administrative" telling Mr. Mazraani that he will have a training (not that he is invited to take training, if he wishes) on house and car insurance referrals. (Exhibit A-41).

[189] Exhibit A-39.

[190] This is what Mr. Michaud stated at p. 201 of the May 12 transcript:

> JUSTICE ARCHAMBAULT: I read in the judgment that they would take the presence of the people. Are you -- you're not disputing that?
>
> MR. MICHAUD: No. But I would say I would be surprised. The only reason -- the only reason ---
>
> **MR. TURGEON: It was only for PDU purposes.**
>
> MR. MICHAUD: Your Honour, the only reason why you would take the presence ---
>
> MR. MAZRAANI: Objection.
>
> MR. MICHAUD: --- is because of PDU because PDU, the advisor has to sign that he was attending.

One might note here the help that Mr. Michaud got from I.A.'s counsel who appears to be testifying.

[191] Exhibit A-59.

[192] Similar presentations were done for other IA subsidiaries, such as Solicour, which carries on a group insurance business. The Solicour presentations were called "réunions de formation" and entitled "Pourquoi et comment faire de l'assurance collective!". See Exhibit A-63.

[193] Exhibit A-30.

[194] Exhibit A-56.

[195] Section 27 of the Distribution Act, reproduced above at note 107.

[196] See pp. 49-51 of the May 12 transcript. This is his testimony stated at pp. 50-51 which seems to indicate that the main concern is the Industry Standards and that compliance with the regulation is an afterthought:

> MR. MICHAUD: So when you sell a product like this, you make interest rate assumption. You make the presentation to the client and at the last page of the illustration, we have -- I would say during the pages, it would explain the product and you have some sensitivity testing that has to be shown to the client to see if interest rates go up by two or minus two. **This is all regulated and part of the guidelines that we use at the CHLIA.** [*sic*]
>
> JUSTICE ARCHAMBAULT: It is regulated by that ---
>
> MR. MICHAUD: I would say it's regulated. **It's not the regulation. It's highly recommended by the CLHIA** and we all comply with this.
>
> JUSTICE ARCHAMBAULT: Okay.
>
> MR. MICHAUD: It's a **voluntary** compliance thing.

JUSTICE ARCHAMBAULT: Compliance to make sure that the money will be there presumably at the time.

MR. MICHAUD: And also for the -- and for the Quebec regulation, I would say all the province regulation, we have to make sure that the client understands what he's buying.

[Emphasis added.]

[197] I assume this is the *Regulation respecting firms, independent representatives and independent partnerships,* D-9.2, r. 2 although no IA witness talked about it with authority and the issue was not addressed in written argument. In particular, I asked the in-house counsel during her testimony for explanations regarding the Compliance Checklist, but she was not able to assist the Court. She indicated that Mr. Leclerc might be able to do so. See pp. 2-5 of the June 15 transcript. However, when he testified shortly after her, Mr. Leclerc was not questioned on this subject.

[198] 9095-3532 Québec inc. (*La Capitale Saguenay -- Lac-St-Jean) c. Daigle*, [2010] J.Q. no 13326, 2010 QCCS 6066 (***La Capitale***), involving a judicial review of a CRT decision by the Quebec Superior Court. IA also cited *Transport Gauthier inc*. (*supra*, note 147) where similar dicta were adopted. However, the facts of this appeal are very different from those in *Transport Gauthier inc.*, a decision of the Quebec Court of Appeal which quashed a CRT decision and which was also cited by the Company in its argument before this Court. The member of the CRT had concluded that an individual was an employee under the *Labour Code* by relying on the existence of obligations which the Court of Appeal considered were created by transport legislation applicable to any driver or owner of transport a vehicle. See par. 48 of the Court of Appeal's reasons. It should be noted that this portion of the Court's decision can likewise be considered as *obiter dictum* because the Court also concluded, as was concluded in *Dicom Express* (cited above in note 151), that there was no contract between the individual and the client because the contract was between the individual's company and the client.

[199] Section 19 of the *Real Estate Brokerage Act*. It should be added that this wording covering both employees and persons authorized to act on behalf of the brokerage firm was added in 1985, several years before the new Civil Code was enacted with its new definition of a contract of employment. Under the old *Civil Code of Lower Canada*, there was no nominate contract for employment. For an historical analysis of the amendments to the *Real Estate Brokerage Act*, see the *La Capitale* decision, at par. 22 ff.

[200] Mainly s. 85, which, as we have seen above, provides as follows:

> 85. A firm and its executive officers shall oversee the conduct of the firm's representatives. They shall ensure that the representatives comply with this Act and the regulations.

[201] Mainly s. 10, which provides as follows:

> 10. A person carrying on an enterprise must take the security measures necessary to ensure the protection of the personal information collected, used, communicated, kept or destroyed and that are reasonable given the sensitivity of the information, the purposes for which it is to be used, the quantity and distribution of the information and the medium on which it is stored

[202] I adopted a similar conclusion in *Financière Banque Nationale, supra*, note 151:

> 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.

[203] For an example of this in the securities industry, see *Financière Banque Nationale*, note 151 above, at par. 27 and ff.

[204] This problem was more acute before the introduction of the new Civil Code in 1994 because these terms were not defined in the previous code and different approaches were followed by the courts. On this point, see my article.

[205] For an illustration of this situation, see *La Capitale,* note 198 above, at par. 27.

[206] Section 1 of this Act defines a "representative" as "either an insurance representative, a claims adjuster or a financial planner".

[207] The specific section of this Act is not mentioned in the Compliance Checklist, but I assume the intent is to comply with the section cited by IA's lawyer in his letter dated June 3, 2015 and addressed to the Court, that is, s. 10 of the Information Protection Act, reproduced above.

[208] See Appendix A to these reasons to see the numerous standards applicable to agents, together with a description of the means of control put in place by the Company and of the corresponding sanctions to be applied in case of failure to abide by these standards. So, contrary to what IA's counsel wrote in his written submissions of July 3, 2015, at par. 16 and 17, there are numerous standards, rules and duties that IA has added to the legislative and regulatory standards, and several of those come from a "regroupement volontaire" for self-regulation.

[209] Exhibit A-62.

[210] In his testimony, Mr. Leclerc confirmed that Mr. Mazraani's contract was terminated because of his failure to generate income for five weeks. See pp. 206 and 207 of the June 15 transcript.

[211] Exhibit A-42.

[212] Exhibit A-57, p. 6.

[213] Exhibit A-51.

[214] Exhibit A-10, par. 26.

[215] At page 9 of Module 3, "Planification, Organisation, Contrôle", Exhibit A-57.

[216] Exhibit A-57.

[217] Page 165-166 of the June 15 transcript.

[218] Pp. 161-162 of the June 15 transcript.

[219] Exhibit A-69.

[220] Exhibit A-51.

[221] This is what he stated at p. 214 of the June 15 transcript:

> MR. MAZRAANI: I understand.
>
> But, Mr. Leclerc, how -- you said that before it's 50 percent of Mr. Beaulé is on the ground with the agents, right?
>
> MR. LECLERC: M'hm.
>
> MR. MAZRAANI: Okay. How -- he didn't talk to you what the agents' [*sic*] doing and what he is doing to the agents?
>
> JUSTICE ARCHAMBAULT: Does he keep you informed of his activities?
>
> MR. LECLERC: **No, I don't need that every day to know à quelle heure il va manger, avec qui il est, qu'est-ce qu'il fait**.
>
> JUSTICE ARCHAMBAULT: No, he didn't say that. He's asking you generally do you -- does Mr. Beaulé inform you of his activities to you?
>
> MR. LECLERC: No, not day-to-day.
>
> . . .
>
> JUSTICE ARCHAMBAULT: You don't know that detail?
>
> MR. LECLERC: **No, I don't need these detail because these guys are professional, they have experience and they know how to coach people**.

[222] I will deal with these issues below under the heading "Tax misconceptions".

[223] See s. 13 of the Agent Contract.

[224] Pages 167-168 of the May 12 transcript.

[225] Pages 54-55 of the May 12, 2012 transcript.

[226] This in-house counsel also stated that these Conduct Standards and the Communications Policy were attached as well to the contracts of the independent brokers with which the Company dealt. However, the introduction of the Conduct Standards refers to employees and sales personnel. In the section dealing with controls and sanctions, the Conduct Standards refer to the agent's contract and the agent's failure to

comply. The Communications Policy refers to “company agents”. So it is doubtful these documents are also referring to independent brokers. For this reason and for the reasons given below regarding the credibility of this in-house counsel, I do not consider this fact to have been established to my satisfaction. A copy of an independent broker's contract and the attached documents should have been filed as evidence to corroborate her statement. With respect to the Communications Policy, she testified that her statement was based on a verification she had made with her office, which represents hearsay and is not reliable in the circumstances. (See p. 14 of the June 2 transcript.)

[227] Pages 7 and 25 of the May 12 transcript.

[228] It should be noted that, even if the discovery that documents which should apparently have been attached to the contract were missing had been made after the closing of both parties evidence, there is jurisprudential support for the proposition that a judge is entitled to ask for the reopening of the evidence if he or she finds that the evidence is incomplete or deficient. See *Poulin* c. *Laliberté,* [1953] B.R. 8, a Quebec appellate court decision written by Mr. Justice Rinfret, which is cited and discussed in *La preuve civile*, Jean-Claude Royer, 2e édition, Les Éditions Yvon Blais inc., Cowansville, 1995, at p. 116 and ff.

[229] This is what Mr. Leclerc said at pp. 80-81 of the June 15 transcript:

> MR. LECLERC: . . . Because for the day-to-day if there is something usually he has to see his coach -- personal coach that’s available for himself, but sometimes if I need more precision ---
>
> JUSTICE ARCHAMBAULT: Who was his personal coach?
>
> MR. LECLERC: Mr. René Beaulé.
>
> . . .
>
> MR. LECLERC: But they called the name of this guy sales manager but in the real -- in reality this guy is a coach because ---
>
> MR. TURGEON: Why is that?
>
> MR. LECLERC: Because his job is not the job usually what they do a sales manager because he doesn’t have to organize nothing, **he just has to help people to be sure that they have the tools** that they need to succeed. If they need help he goes to do field **training** if they need. He makes sure that the people have all **the access to the computers and everything to be sure** that these people be really autonome la [*sic*].
>
> [Emphasis added.]

I can picture Mr. Leclerc in a clothing factory saying that the foreperson is only there to help the seamstresses by making sure that they have the tools and the material to be able to sew, and is not supervising, directing and controlling the seamstresses! After all, these seamstresses are independent contractors since they are only doing piece work.

[230] Exhibit A-42, p. 1, eighth paragraph.

[231] Page 176 of the May 12 transcript. This is one of his answers concerning the role of the sales managers:

> MR. MICHAUD: Well, he could call you but I would say when we call the advisor, it's for his best. It's not for us because at the end of the day, as I said, the bank account controls the bank -- controls the advisors.
>
> [Emphasis added.]

[232] Pages 174-176 of the May 12 transcript.

[233] The weekly sales report for the week of July 20, 2012, shows the performance of the agents for the purposes of the “Concours du président”. Mr. Mazraani had no eligible policy. The report for the 42nd week in the fourth quarter, showed four policies out of a total of five he was able to sell during his time at Industrial Alliance (Exhibit A-31). Exhibit A-38 shows the leaders of the week together with the birthday of one agent and the service anniversary date for two others. See Exhibit A-45 for the list of “Top Life Insurance Agents” for the province of Quebec. See also Exhibit A-67 entitled “Concours du président 2012”.

[234] Exhibit A-64.

[235] See p. 164 of the June 15 transcript.

[236] For instance in Secion V D. (1) “Mandatory training and meetings”.
[237] Exhibit A-60.
[238] See pp. 168-169 of the June 15 transcript.
[239] Mr. Leclerc gave the following answer at pp. 190-191 of the June 15 transcript:

> MR. LECLERC: What I see there it’s **the sales manager saw the mistake and asked to Loraine to correct it.**
>
> . . .
>
> MR. LECLERC: So I don’t see nothing -- it’s normal that the director **help** his financial advisors to bring correction.
>
> [Emphasis added.]

This shows that the sales manager was doing more than coaching. He was controlling the work of Mr. Mazraani and took measures to have the error corrected! It shows equally that the word “help” in Mr. Leclerc’s mouth is a synonym of “supervise” and “control”.

[240] Pp. 189-190 of the June 15 transcript.
[241] Pp. 192-193 of the June 15 transcript.
[242] Exhibit A-42.
[243] Pp. 150-151 of the June 15 transcript.
[244] The lawyer representing the Company before this Court.
[245] Pp. 152 and 153 of the June 15 transcript.
[246] Exhibit A-57, Module 9, “Service and Follow-Up”, at page 5.
[247] In addition to any liability that may arise under the Civil Code, s. 80 of the Distribution Act renders the Company liable for any prejudice suffered by a client due to the fault of one of its representatives in the course of the performance of the representative’s duties.
[248] Exhibit R-1, p. 4 of 8.
[249] See, for instance, p. 83 of the June 15 transcript, testimony of Mr. Leclerc.
[250] “Le travail de représentant consiste à . . . assister aux rencontres d'agence” (p. 6 of Module 3. “Planification, Organisation, Contrôle”, Exhibit A-57). “I take part in agency meetings” (Exhibit A-42).
[251] Exhibits A-40 and A-39.
[252] Exhibit A-59.
[253] See Exhibit A-30, which lists the “Réunions et Formations UFC” from October 25 to December 13, 2012.
[254] Pages 172-173 of the May 12, 2012 transcript.
[255] It should be recalled that both Mr. Charbonneau and the in-house counsel stated that they only check between 5% and 10% of the transactions.
[256] Pages 99-100 of the May 12 transcript. As I have mentioned many times above, IA had business reasons to supervise the work of its agents, because its liability is always a concern.
[257] Page 53 of the May 12, 2012 transcript.
[258] In one of the excerpts quoted above, he stated that the Company does not supervise a transaction, but monitors it! Also noteworthy is the fact that the word “supervise” can apparently be a synonymous with “make sure”!
[259] Pages 53-54 of the May 12, 2012 transcript.
[260] In respect of incorporation. See pp. 114-115 of the May 12 transcript.
[261] In respect of the hiring of an assistant. See pp. 116-117 of the May 12 transcript.
[262] Pages 117-118 of the May 12 transcript.
[263] Page 162 of the May 12 transcript.
[264] Pages 96-97 of the May 12 transcript.
[265] Pages 178-180 of the May 12 transcript.
[266] See Exhibit A-3
[267] See p. 136 of the June 1 transcript.
[268] She never identified the specific section of the Regulatory Code of Ethics in her testimony and the Company’s lawyer did not deal with this specific issue in his arguments. I looked for it myself and these are the two sections that I was able to identify. In my view, s. 5 of the *Regulation respecting firms,*

independent representatives and independent partnerships, c. D-9.2, r. 2 bears a greater resemblance to "article 2" than does s. 16 of the Regulatory Code of Ethics:

> 5. No firm, independent representative or independent partnership may, by any means whatsoever, make false, misleading or deceptive representations or engage in false, misleading or deceptive advertising.
>
> [Emphasis added.]
>
> 16. No representative may, by whatever means, make statements that are incomplete, false, deceptive or liable to mislead.
>
> [Emphasis added.]

[269] Pages 10 to 12 of the June 2 transcript.

[270] The Conduct Standards on page 1 contain 12 standards to abide by while the Regulatory Code of Ethics contains 43 sections describing the duties and obligations of agents. The Industry Standards consist of 44 standards.

[271] See the Industry Standards, reproduced in Appendix A, under the heading "Advertising".

[272] See Appendix A.

[273] This is what the Regulatory Code provides :

> 33. A representative must not fail to pay an insurer, upon request or within the prescribed time, the sums of money that he has collected on its behalf.
>
> [Emphasis added.]

[274] See the Industry Standards, reproduced in Appendix A to those reasons.

[275] See also par. 85-89 above under the heading "Other instructions" in part E of the Factual Description section (Section IV) of these reasons for a more complete list of rules which are not consistent with the testimony of the in-house counsel.

[276] At pages 16 to 18 of the June 2 transcript.

[277] See paragraph 119 of the CRT reasons, Exhibit A-10.

[278] Robert P. Gagnon, *supra*, note 147 par. 94.

[279] See art. 75 and 78 of the Quebec *Taxation Act* and the discussion below under the heading "Tax misconceptions".

[280] Exhibit A-20, s. 4, and Exhibit I-8, s. 5.

[281] Contrary to the view expressed by Mr. Michaud in explaining the differences between the pre-1993 and post-1992 treatment of IA's agents, this shows that employees could sell their right to represent clients. It was not limited to independent contractors.

[282] In LA VALSE-HÉSITATION DE LA COUR D'APPEL FÉDÉRALE DANS L'APPLICATION DES LOIS FÉDÉRALES AU QUÉBEC, Marie-Pierre **ALLARD** and Chantal **JACQUIER**, Collection APFF, February 2011, CCH 2011, the authors make the following comments about the reasons of the judge of the Federal Court of Appeal in *Combined Insurance*:

> En première instance, le juge McArthur de la Cour canadienne de l'impôt avait appliqué l'article 8.1 de la *Loi d'interprétation* ainsi que les dispositions pertinentes du *Code civil du Québec* plutôt que les critères de common law de l'arrêt *Wiebe Door Services*. Il avait examiné s'il existait ou non un lien de subordination, tel qu'il est prévu au *Code civil du Québec*. La décision de la Cour canadienne de l'impôt, rendue le 6 mai 2005, précédait celle de la Cour d'appel fédérale dans l'affaire *9041*, rendue le 17 octobre 2005.
>
> Dans une volte-face spectaculaire et inexpliquée, la Cour d'appel fédérale, sous la plume du juge Nadon, infirme la décision de la Cour canadienne de l'impôt et renverse complètement la position qu'elle avait prise sans équivoque dans l'arrêt *9041*. Elle ne mentionne même pas cet arrêt. Elle écarte implicitement le principe de complémentarité du droit civil québécois avec la loi fédérale et revient à une application uniforme du concept d'employé, basée sur les principes de common law.
>
> La Cour d'appel fédérale dans l'affaire *Combined Insurance* se fonde essentiellement sur les critères de common law énoncés dans les affaires *Wiebe Door Services* et *Sagaz Industries*, ainsi

que sur d'autres décisions portant sur l'application de la loi dans des provinces de common law, notamment l'arrêt *Royal Winnipeg Ballet* c. *MRN.*

La Cour mentionne certes, dans l'affaire *Combined Insurance*, les articles pertinents du *Code civil du Québec*, mais elle applique les critères de common law indépendamment du critère du lien de subordination du droit civil. La Cour s'appuie sur des arrêts, dans des affaires émanant du Québec, qu'elle a rendus avant 2005, c'est-à-dire avant l'arrêt *9041*, dans lequel elle affirmait pourtant vouloir mettre un terme au flottement jurisprudentiel sur la source de droit applicable au Québec.

[Emphasis added and notes omitted.]

[283] This what justice Décary stated at par. 2:

With respect to the nature of the contract, the judge's answer was correct, but, in my humble opinion, he arrived at it incorrectly. He did not say anything about the provisions of the *Civil Code of Québec*, and merely referred, at the end of his analysis of the evidence, to the common law rules stated in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 FC 533 (FCA) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983. I would hasten to point out that this mistake is nothing new and can be explained by the vacillations in the case law, to which it is now time to pus an end.

[Emphasis added.]

[284] These provisions read as follows:

Deductions allowed

8(1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

(*i*) **Dues and other expenses of performing duties −**

an amount paid by the taxpayer in the year, or on behalf of the taxpayer in the year if the amount paid on behalf of the taxpayer is required to be included in the taxpayer's income for the year, as

. . .

(ii) office rent, or salary to an assistant or substitute, the payment of which by the officer or employee was required by the contract of employment,

(*l*.1) **C.P.P. contributions and U.I.A. [E.I.] premiums −**

any amount payable by the taxpayer in the year

(i) as an employer's premium under the *Employment Insurance Act*, or

(ii) as an employer's contribution under the *Canada Pension Plan* or under a provincial pension plan as defined in section 3 of the *Canada Pension Plan*, in respect of salary, wages or other remuneration, including gratuities, paid to an individual employed by the taxpayer as an assistant or substitute to perform the duties of the taxpayer's office or employment if an amount is deductible by the taxpayer for the year under subparagraph (*i*)(ii) in respect of that individual.

Sections 78 and 75 of the Quebec *Taxation Act* enacted by the National Assembly contain similar provisions.

[285] Here, the commissions were the only remuneration.

Pararagraph 8(1)(*f*) of the *Income Tax Act* provides as follows:

8(1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

. . .

(*f*) **Sales expenses −**

where the taxpayer was employed in the year in connection with the selling of property or negotiating of contracts for the taxpayer's employer, and

(i) under the contract of employment was required to pay the taxpayer's own expenses,

(ii) was ordinarily required to carry on the duties of the employment away from the employer's place of business,

(iii) was remunerated in whole or part by commissions or other similar amounts fixed by reference to the volume of the sales made or the contracts negotiated, and

(iv) was not in receipt of an allowance for travel expenses in respect of the taxation year that was, by virtue of subparagraph 6(1)(*b*)(v), not included in computing the taxpayer's income,

amounts expended by the taxpayer in the year for the purpose of earning the income from the employment (not exceeding the commissions or other similar amounts referred to in subparagraph (iii) and received by the taxpayer in the year) to the extent that those amounts were not

(v) outlays, losses or replacements of capital or payments on account of capital, except as described in paragraph (*j*),

(vi) outlays or expenses that would, by virtue of paragraph 18(1)(*l*), not be deductible in computing the taxpayer's income for the year if the employment were a business carried on by the taxpayer, or

(vii) amounts the payment of which reduced the amount that would otherwise be included in computing the taxpayer's income for the year because of paragraph 6(1)(*e*);

[Emphasis added.]

[286] See section 125 of that Act, in particular the concept of "personal services business" in subs. 125(7), which concept was added by 1984, c. 45, subs. 40(1), applicable to the 1985 and subsequent taxation years, which was almost ten years before IA's change of business model:

"personal services business" carried on by a corporation in a taxation year means a business of providing services where

(*a*) an individual who performs services on behalf of the corporation (in this definition and paragraph 18(1)(*p*) referred to as an "incorporated employee"), or

(*b*) any person related to the incorporated employee

is a specified shareholder of the corporation and the incorporated employee would reasonably be regarded as an officer or employee of the person or partnership to whom or to which the services were provided but for the existence of the corporation, unless

(*c*) the corporation employs in the business throughout the year more than five full-time employees, or

(*d*) the amount paid or payable to the corporation in the year for the services is received or receivable by it from a corporation with which it was associated in the year;

[Emphasis added.]

[287] Exhibit R-1 on page 1 and on page 8 of 8.

[288] Exhibit R-1, par. 31.

[289] The English translation of this text is from paragraph 44 of my article.

[290] It would have been appropriate to do so if the Act itself defined what a contract of employment is for the purposes of the Act.

[291] See p. 118 of the June 15 transcript. Ms. Woo stated that there were 50 to 60 people working at the LaSalle Branch, of whom 45 to 50 were agents. So out of the 60 working at the branch, only about 10 would have been employees (16.6%)!

[292] See p. 119 of the June 15 transcript. At the Laval Branch, there were 21 agents out of a total of 51 who had less than 12 months' experience: par. 70 of the CRT reasons, Exhibit A-10.