

Docket: 2011-3070(EI)

BETWEEN:

KAJLA ZOLTAN-MAPLE ELECT.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together with the appeal of
Kajla Zoltan – Maple Electric (2011-3072(CPP))
on May 3, 2012, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant: Zoltan Kajla
Counsel for the Respondent: Jasmeen Mann

JUDGMENT

The appeal under the *Employment Insurance Act* with respect to the decision of the Minister of National Revenue dated December 13, 2010, is allowed, without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 8th day of August 2012.

“Robert J. Hogan”

Hogan J.

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KAJLA ZOLTAN-MAPLE ELECT.,

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Appeal heard together with the appeal of
Kajla Zoltan – Maple Elect. (2011-3070(EI))
on May 3, 2012, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant: Zoltan Kajla
Counsel for the Respondent: Jasmeen Mann

JUDGMENT

The appeal under the *Canada Pension Plan* with respect to the decision of the Minister of National Revenue dated December 13, 2010, is allowed, without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 8th day of August 2012.

“Robert J. Hogan”

Hogan J.

Citation: 2012 TCC 286
Date: 20120808
Dockets: 2011-3070(EI)
2011-3072(CPP)

BETWEEN:

KAJLA ZOLTAN - MAPLE ELECT.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

A. Introduction

[1] By letter dated December 13, 2010, the Appellant was notified by the Minister of National Revenue (the “Minister”) that Yury Velichko (the “Worker”) was employed in insurable employment for the purposes of the *Employment Insurance Act* (the “EIA”) and in pensionable employment for the purposes of the *Canada Pension Plan* (the “CPP”) while working for the Appellant during the period from March 8, 2010 to September 29, 2010 (the “Period”).

[2] The Appellant requested a review of those determinations, which were confirmed. The Appellant alleges that the Worker was an independent contractor providing subcontracting services to the Appellant as a licensed electrician in the course of a business carried on by the Worker for his own benefit.

B. Factual Background

[3] The Minister alleges that in determining that the Worker was employed in insurable and pensionable employment, he relied on the following assumptions of fact:

The Appellant

- (a) the Appellant operated an electrical installation and electrical maintenance business (the “Business”);
- (b) the Business operated under the trade name “Maple Electric”;
- (c) Kajla Zoltan controlled the day-to-day operations and made the major decisions for the Business;
- (d) the Appellant’s normal business hours were, 7:00 am to 4:00 pm, Monday to Friday;
- (e) the Appellant advertised for the Worker’s position in a local Russian newspaper;
- (f) the Worker was part of a crew of workers that was assigned to specific jobs that were contracted by the Appellant;

The Worker

- (g) the Worker was hired as an Electrician, for an indefinite period of time, pursuant to a verbal agreement;
- (h) the Worker’s duties included the following:
 - (i) installed electrical switches, outlets and light fixtures;
 - (ii) fastened metal boxes to walls and ceilings; and
 - (iii) ran pipes and tubing inside walls or other concealed areas and ran run wires or cables through them;
- (i) the Worker was certified as an Electrician – in construction and maintenance;
- (j) the Worker had experience in performing electrical installation work;
- (k) the Worker did not hold an Electrical Contractor License issued by the Electrical Safety Authority, which is required to operate an electrical contracting business in Ontario;
- (l) the Worker performed his duties at various job locations in Windsor, Waterloo and Toronto;
- (m) the Worker provided his services exclusively to the Appellant;

Control

- (n) the Worker normally worked the following schedule:
 - (i) Monday, 8:00 am to 6:00 pm;
 - (ii) Tuesday to Thursday, 6:00 am to 6:00 pm; and
 - (iii) Friday, 6:00 am to 1:30 pm;
- (o) the Appellant determined the Worker’s hours of work;

- (p) for out of town jobs, the Worker would leave with the Appellant's crew on a Monday morning and return home on a Friday afternoon;
- (q) the Appellant determined the Worker's deadlines and priorities;
- (r) the Worker's hours of work were recorded on timesheets by the Appellant's Foreman;
- (s) the Worker was supervised by the construction site Supervisor and the Appellant's Foreman;
- (t) the Worker was required to report to the Appellant;
- (u) the Appellant's Foreman provided the Worker with written or oral directions, such as:
 - (i) the work that was to be completed each day and in what priority;
 - (ii) where he was to install boxes, pipes, etc.;
 - (iii) what materials to use; and
 - (iv) for more complicated jobs, what tools to use to get the job done;
- (v) the Worker was required to obtain the Appellant's approval prior to taking certain actions, such as requesting time off, medical appointment leave, changing his hours of work or changing the order in which work was to be completed;
- (w) the Appellant terminated the Worker's services;

Ownership of Tools and Equipment

- (x) the Appellant provided the Worker with a hammer drill and masonry bits, heavy hummer [*sic*] drill and bits, conduit pipe benders, sawzall, chop saw, hacksaw blades, hydraulic and manual knockout punch set and ladder (worth approximately \$3,160), necessary for the Worker to perform his duties, at no cost to the Worker;
- (y) the Appellant provided the Worker with the materials required to complete the work, such as wires and receptacle switches;
- (z) the Worker provided his own hand tools, such as an extension cord, screwdrivers, cordless drill and bits, pliers, hammer, hacksaw, tape measure, snips and utility knife (worth approximately \$479);
- (aa) the Appellant and Worker were responsible for the maintenance and repairs of their own tools and equipment;

Subcontracting Work and Hiring Assistants

- (bb) the Worker provided his services personally;
- (cc) the Worker did not hire helpers or replacements;
- (dd) the Appellant was responsible for hiring and paying replacements or helpers;

Chance of Profit and Risk of Loss

- (ee) the Worker was initially paid \$14.00 per hour, which increased to \$14.50 after a couple of months;
- (ff) the Appellant determined the rate of pay;

- (gg) the Appellant determined the bi-weekly timing of payments to the Worker;
- (hh) the Appellant determined the method of payment to the Worker which was payment by cheque;
- (ii) the Worker was paid in his personal name;
- (jj) the Worker did not receive bonuses, benefits, vacation pay or paid leave;
- (kk) the Worker was paid his hourly rate for travel time to and from out of town work locations;
- (ll) the Worker was paid a \$20.00 per diem allowance when working out of town;
- (mm) the Worker was reimbursed for fuel, meals and accommodation expenses;
- (nn) the Worker invoiced the Appellant;
- (oo) the Worker was covered under the Appellant's Worker's Safety and Insurance Board plan;
- (pp) the Appellant was ultimately responsible for resolving customer complaints which resulted from the Worker's performance;
- (qq) the construction site Supervisor and/or the Appellant's Foreman determined if work needed to be redone;
- (rr) the Appellant provided the guarantee on work performed by the Worker;

Intention

- (ss) the Worker did not manage his own staff;
- (tt) the Worker did not advertise his services;
- (uu) the Worker did not have a business bank account;
- (vv) the Worker registered for a GST number with the Canada Revenue Agency after he started working for the Appellant; and

Other Relevant Information

- (ww) the Worker reported his income as "Other Employment Income" and did not claim any expenses on his personal income tax return for the 2010 taxation year.

[4] The assumptions set out in paragraphs (r), (s), (t), (u), (x), (y) and (qq) are inaccurate.

[5] The evidence shows that the Appellant was awarded a subcontract to install electrical fittings and cables in a new wing of the Windsor Hospital that was under construction during the relevant period. This subcontract was awarded by the general electrical contractor for the project, J.M.R. Electric ("JMR").

[6] The Appellant hired the Worker to work on that project. In all, the Appellant hired four subcontractors for the project. The Appellant did not work on the project

site himself as he preferred to work in the general Toronto metropolitan area so that he could return home at night. The Respondent does not dispute this fact.

[7] Below is the Worker's résumé provided in response to the Appellant's advertisement for an electrician:

...

Dear Sir

I am writing in response to your advertisement for construction electrician. I was talking with you about this vacancy over phone on Monday February 22, 2010 at 11.50 AM, and am sending my resume for your review.

...

Objective

To obtain a position as a Construction Electrician.

Summary of Qualifications

- a. A Licensed Electrician (309A Red Seal) with more than two years of Canadian commercial and residential experience. Adept in performing electrical installations, maintenance and repairs in plant facilities, knowledgeable in all areas of the national electrical code and excel in analyzing and solving problems with various electrical controls and systems
- b. G Driver Licence with clean abstract and own vehicle
- c. Own tools and safety equipment

Professional Skills

- d. Electrical Service Panels
- e. Switches & Circuit Breakers
- f. Lighting fixtures, electrical control and distribution equipment
- g. Generator & Transformers
- h. Wire fishing
- i. Knob and Tube removing
- j. Trouble-shooting
- k. Blueprints & Schematics
- l. Wiring Diagrams
- m. Testing Instruments
- n. Electrical Code
- o. Safety & QA

Work Experience

Construction Electrician
contractor ANDREI PARFENOV, Canada, Toronto (2008-2010)
IOB Electric Ltd, Canada, Toronto (2008)

Performed electrical-related wiring and installation for commercial and residential construction projects, including new construction, retrofits, remodels and plant expansions. *Key Results:*

- Served as an electrician on more than 30 construction projects.
- Earned a reputation for expertise in complex troubleshooting and problem resolution
- Gained extensive experience in analyzing and following manuals, schematic diagrams, blueprints and other specifications
- Mastered the use of measuring/testing instruments such as ammeters, ohmmeters, voltmeters and testing lamps
- Consistently commended for team-player mind-set, “doing it right the first time” and working with minimal supervision under tight deadlines

Education

- Ability Learning Network – EP for Trades Workers & Apprentices (2010)
- Construction & Maintenance Electrician’s License – 309A Red Seal (2008)
- High School Diploma (1991)

I am confident that my education coupled with my extensive experience can be an asset to your company. Please feel free to contact me, either by email: . . . or by leaving a message [*sic*] on . . . I look forward to speaking to you soon.

. . .

[8] The Appellant testified that the Worker and the other three subcontractors assigned to the Windsor project received their instructions from two foremen employed by JMR. The Worker was not subject to his direction and control. The Worker and the three other subcontractors were skilled licensed electricians requiring little supervision. However, they did have to get instructions from the JMR foremen as to which tasks they should complete first. This was done for scheduling reasons in order to avoid unnecessary delays. For example, the metal conduits and wiring and electrical boxes must be installed prior to the drywall installation. Fixtures are installed afterwards. According to the Appellant, this occurs on every worksite. In the case of residential construction, the general contractor often controls the work flow for all of the tradespeople working on the site. On larger commercial projects, the general electrical contractor often controls the work flow for the electrical subcontractors.

[9] The Appellant also explained that all electrical work in the province of Ontario is subject to certification by the Electrical Safety Authority (the “ESA”). The ESA had inspectors present on a full-time basis at the Windsor project. If the electrical work did not meet the ESA’s certification standards, it had to be redone.

[10] The Worker testified that for the Windsor project he used his own tools and heavy equipment supplied by JMR. He acknowledged that the Appellant did not provide him with tools or equipment to work on that project.

[11] The Worker was hired by the Appellant on March 8, 2010 and worked on the Windsor project until August 4, 2010. While the Appellant was in Europe visiting his family for the first time in 10 years, the Worker quit without giving the Appellant any notice of his intention to do so. According to the Worker, he left because his family resided in the Greater Toronto Area (GTA) and he was unhappy being away from them all week. Shortly afterwards, the Worker contacted the CRA to enquire about his tax filing and remittance obligations and the possibility of receiving employment insurance benefits.

[12] When the Appellant returned to Canada from his European family vacation, he contacted the Worker to settle the amounts owed to him. The Worker was required to submit substantiated invoices for the amount owed to him and invoices for the period from May 9, 2010 to August 4, 2010. The Worker had been paid for that period on the basis of the time records kept by JMR.

[13] Shortly after the Worker received payment of the sum owed to him by the Appellant, he agreed to recommence working for the Appellant. According to the Appellant, the Worker was interested in working on job sites in the GTA. The Appellant had a subcontract for electrical work on a hotel project in Markham and the Worker agreed to work on that project. The Appellant himself did not work on the Markham project and there is no evidence to show that he employed a foreman to supervise the work there.

[14] According to the testimony of the Appellant and the Worker, the Worker worked on the Markham project alongside other electricians hired by the Appellant. The Worker worked on that project from around August 21, 2010 until September 29, 2010, the date he was fired. The Worker claims he was fired because the Appellant discovered he had contacted the CRA to ask questions concerning his status as an employee as opposed to an independent contractor.

[15] The Appellant claims he fired the Worker because he was involved in personal conflicts with other workers on the worksite and because he smeared the Appellant's reputation by making comments which he viewed as disparaging, such as "slave driver" and "capitalist".

C. Analysis

(1) Intention

[16] The Appellant submits that he has presented evidence that shows that the Worker agreed to work on the Appellant's project as an independent contractor. According to the Appellant, the evidence presented by the Respondent is insufficient to justify ignoring the parties' agreement to enter into a subcontracting arrangement.

[17] I agree with the Appellant's submission that the worker agreed to enter into an independent contractor relationship. The Worker applied for a GST/HST number shortly after he began working with the Appellant. His major business activity was described as:

...

a self-employed electrician who do[es] electrical work for electrical company¹

...

[18] The registration was effective March 8, 2010, the first day of the Worker's presence on the Windsor hospital project. The Worker's curriculum vitae,² which the Appellant relied on when he hired the Worker, emphasizes that the worker was:

...

- consistently commended for team-player mind set, doing it right the first time; and working with minimal supervision under tight deadlines.

...

[19] The Appellant's interview notes³ indicate that the Worker agreed to work as a subcontractor. The form shows that the Worker was to supply his own hand tools and that he owned a vehicle, which could also be used to transport equipment to the worksite. The testimonial evidence of both parties confirms these facts.

¹ Exhibit A-2.

² Exhibit A-4.

³ Exhibit A-1.

[20] Although he may have agreed to be treated as an independent contractor, the Worker insists that he did not understand the ramifications of his agreement with Appellant. His letter to the CRA justifying his claim for employment insurance makes reference to inconsistencies with his designation as an independent contractor, as follows:

Dear Sir or Madam

Cover Letter to Questionnaire for a Worker – 110690707002

1. Please pay attention to attached copies of pay checks and invoices (copies are in calendar order). Bringing here all these details, I would like to show that Zoltan Kajla did not use my invoices as information source to determine the compensation he should have paid for my work.
 - a) a word “accommodation” was used in invoices instead of a word “allowance” (I did not pay for hotel. Zoltan Kajla did)
 - b) the pay check March 8-13 2010 does not include GST, because I did not have the GST number at that time
 - c) Total paid money amount in the pay checks March 15 – May 8 2010 and total money amount in the invoices do not much. Also, a quantity of work hours in the pay check March 28-Apr 10 does not much with the invoice for the same time period.
 - d) after May 9 I understood that Zoltan Kajla did not pay attention to my invoices and I ceased to write out them. Zoltan Kajla continued to send me pay checks without any invoices from me
 - e) the invoices May 10 – Aug 7 2010 were backdated on Aug 24 2010 because Zoltan Kajla refused to pay me money for the last two work weeks until I send him invoices for the past few months. As you can see in the corrected invoices (June 21-Aug 7) which he sent me back it is clearly visible that I was not aware how much money an hour he actually paid me
2. My work hours were recorded by the supervisor of the construction site and were sent directly to Zoltan Kajla.
3. I have attached the certificated translation of the advertising announcement of employment which Zoltan Kajla places in newspaper. There is no any word in this announcement that he is looking for independent contractors. On the contrary, the announcement says about hiring construction electrician or beginner electrician. When they get a job in the Maple Electric Ltd they mysteriously turn into “independent contractors”. I used exactly the same advertising to find the job in Maple Electric Ltd.
4. “As of January 1, 2007 no person shall operate an Electrical Contracting Business in Ontario without first obtaining an Electrical Contractor Licence

issues by ECRA/ESA.” - this information I took from official Internet site of Electrical Safety Authority. I insist that I worked for Maple Electric Ltd as an employee electrician with license 309 A which did not allow me to work as an independent contractor and was supervised by the foreman of the construction site who controlled my work and checked whether all my work was done properly. Zoltan Kajla insists that electricians who worked and are working now in his company are subcontractors. As I guess, it is very serious offence to subcontract electricians to perform the work as independent contractors without necessary qualification (master electrician license), liability insurance (there will not any responsibility for their work) and electrical contractor license. Such a situation threatens the people that already resident units where electrical system was made by so-called contractors or are going to do this.

5. Also, please pay attention that Zoltan Kajla paid for me to Workplace Safety an[d] Insurance Board. He might have been afraid of judicial claims in case of injury of the workers and therefore big charges, and tried to decline all his responsibility paying to Workplace Safety an[d] Insurance Board as for the usual employees. But for the Revenue Agency he presented the same workers as independent contractors, thus it was not necessary for him to pay for them to CPP/EI. Of course, all these conclusions are based only on my guesses. I believe that in the Canada Revenue Agency work professionals who can find out the truth.

[21] Although the Worker had recently immigrated to Canada, I do not accept his claim that he did not understand the difference between independent contractor status and employee status. Rather, I believe that the Worker asked the CRA for clarification of his status after he stopped working for the Appellant on August 4, 2010. He did so because he was without work and in need of employment insurance benefits. The evidence suggests that he did not pursue this initial enquiry because he was rehired by the Appellant three weeks later and received full payment of the amounts owed to him. Not surprisingly, when the Appellant terminated his relationship with the Worker on September 29, 2010, the Worker reactivated his file with the CRA. This culminated in the Worker receiving employment insurance benefits following the Minister’s determination that he had held insurable employment.

[22] The facts alleged in the Worker’s letter are nonetheless relevant for the second step of the analysis, namely, whether the application of the factors outlined in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (FCA), shows that the facts are consistent with the parties’ characterization of their relationship. In *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, Sharlow J.A. stated the following:

9. In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue – M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.

[Emphasis added.]

(2) Application of the *Wiebe Door* Factors

[23] The *Wiebe Door* factors must be applied to determine whether the parties' agreement on the nature of their relationship conforms to the true nature of their relationship in light of the evidentiary findings of the Court. Applying these tests, does the evidence show that the Worker performed his services in the course of a business conducted for his own benefit?

(3) Control

[24] The Minister assumed in his reply to the Notice of Appeal that the Appellant employed a foreman who supervised the Worker in the execution of his duties. As noted above, this factual assumption is wrong. The foremen on the Windsor Hospital project were employed by JMR. Can their actions be imputed to the Appellant? In my opinion, the answer is yes, in much the same way that the control exercised by clients is imputed to a personnel agency that supplied them with temporary workers.

[25] The case law establishes that there is an important distinction to be made between control over the worker and control over the end product. For example, a consumer can hire a general contractor to build a family home. That consumer would be well advised to inspect the work to point out deficiencies so that they can be corrected before delivery of the house. This does not make the contractor the consumer's employee. In addition, the general contractor will hire tradespeople as subcontractors. For example, the general contractor can hire a self-employed electrician to complete the electrical work. In that case, the general contractor will control the work schedule in order to coordinate the work of the various tradespeople working on the site.

[26] The parties presented contradictory evidence on the level of control exercised by JMR. The Appellant claims that the general contractor's foremen were responsible for controlling work flow and ensuring that the work of all the electrical

subcontractors complied with the standards of the ESA. Certification of the work was performed by inspectors who were present on the worksite on a daily basis.

[27] The Respondent alleges that the JMR foremen provided direct control over, and supervision of, the manner in which the Worker performed his tasks.

[28] On balance, I find the Appellant's evidence to be more credible. The JMR foremen did not supervise and control the Worker's activities for or on behalf of the Appellant.

[29] With respect to the Markham worksite, there is no evidence to suggest that the Worker was subject to the Appellant's direction and control. The Appellant was not present at the worksite and he did not employ a foreman or team leader. The control criterion points to an independent contractor relationship.

(4) Ownership of Tools

[30] The evidence shows that the Worker owned his own hand tools and a vehicle used to travel to and from the worksite. The evidence also shows that the Appellant did not provide the Worker with equipment or material on the Windsor worksite. JMR did, but not the Appellant. The Appellant admitted that on the Markham worksite he provided the Worker with some equipment. There is no evidence as to the relative value of that equipment. At best, this factor is neutral in the characterization of the parties' relationship.

(5) Chance of Profit/Risk of Loss

[31] The evidence shows that the Worker was paid an hourly wage for his services, was reimbursed his gasoline and hotel accommodation costs and received a \$20 per diem meal allowance while working on the Windsor project. He was initially paid \$14 per hour and his wage was increased to \$18 per hour over the relevant period. Apparently, no per diem and gasoline allowance was paid to the Worker when he worked on the Markham Hotel project. The Appellant also paid a premium to the Workplace Safety and Insurance Board to cover the Worker under that organization's plan. The Appellant acknowledged that he would also pay one-half of normal work hours for statutory holidays.

[32] The form of remuneration, at first blush, points to an employer-employee relationship. That being said, it is not totally inconsistent with the manner in which self-employed electricians bill their clients for services. Many electricians bill at an

hourly rate for their services and are reimbursed the cost of materials. Not all contracts are based on a fixed price.

[33] The Worker did not negotiate with JMR directly. He worked for the electrical contractor. On balance, this factor points to an employer-employee relationship.

D. Conclusion

[34] The parties agreed to an independent contractor relationship at the outset of their relationship. Their intention should be respected unless the application of the *Wiebe Door* factors shows that the facts are inconsistent with that intention. The control factor points to an independent contractor relationship. The chance of profit/risk of loss criterion is more indicative of an employee-employer relationship. I place greater weight on intention and on the control factor. Apparently, the Worker did not succeed in establishing himself in business. He tried and failed. This, however, is not a sufficient reason for the Court to ignore the parties' intention when the *Wiebe Door* factors support the parties' characterization of their relationship.

[35] For the reasons outlined earlier, I conclude that the Worker was not employed in insurable and pensionable employment within the meaning of the *EIA* and the *CPP* at any time during the period from March 8, 2010 to September 29, 2010.

Signed at Ottawa, Canada, this 8th day of August 2012.

“Robert J. Hogan”

Hogan J.

CITATION: 2012 TCC 286

COURT FILE NOS.: 2011-3070(EI), 2011-3072(CPP)

STYLE OF CAUSE: KAJLA ZOLTAN-MAPLE ELECT. v. THE
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 3, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: August 8th, 2012

APPEARANCES:

For the Appellant:	Zoltan Kajla
Counsel for the Respondent:	Jasmeen Mann

COUNSEL OF RECORD:

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Name:

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