Docket: 2010-372(EI) and 2010-373(CPP)

BETWEEN:

POWERTREND ELECTRIC LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JAMES D. EBERLE,

Intervenor.

Appeals heard on July 11, 2011, at Kelowna, British Columbia
By: The Honourable Justice Brent Paris

Appearances:

Agent for the Appellant:	David Zobatar
Counsel for the Respondent:	Holly Popenia
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed and the ruling of the Minister of National Revenue on the appeal made to him under section 91 of the *Act* and the determination of the Minister on the application made to him under section 27.1 of the *Plan* are confirmed on the basis that the James D. Eberle was employed in insurable and pensionable employment by the Appellant during the period May 1, 2007 to April 19, 2009.

Signed at Vancouver, British Columbia, this 22nd day of July, 2011.

"Brent Paris"

Paris J.

Citation: 2011 TCC 361
Date: 20110722
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BETWEEN:

POWERTREND ELECTRIC LTD.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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JAMES D. EBERLE,

Intervenor.

REASONS FOR JUDGMENT

Paris J.

[1] The issue in these appeals is whether the work performed by James Eberle for the Appellant between May 1, 2007 and April 19, 2009 was performed as an employee under a contract of service or as an independent contractor under a contract for services. The Minister of National Revenue found that Mr. Eberle was an employee of the Appellant and therefore in insurable employment under the *Employment Insurance Act*[1] and in pensionable employment pursuant to the *Canada Pension Plan*.[2]

[2] The Appellant is an electrical contractor in Penticton, BC, operated by its sole shareholder, David Zobatar. Mr. Zobatar represented the Appellant at the hearing and testified on its behalf.

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1 R.S. 1996, c.23, as amended.

2 R.S. 1985, c. C-8, as amended.

[3] In early 2006, the Appellant entered into a contract with the Lang Ventures Inc. ("LVI") to repair computer lottery equipment in various retail establishments in the South Okanagan region of the province on a call-out basis, and to install and remove lottery equipment from such locations. The equipment belonged to the British Columbia Lottery Corporation ("BCLC"). LVI was apparently responsible for the operation and maintenance of BCLC equipment throughout the province.

[4] Under its contract with LVI, the Appellant was required to have anyone who worked on the lottery machines take a two-day training course in Kamloops, B.C. The contract also stipulated that the Appellant be available to provide the repair service every day of the year between 7:00 a.m. and 9:00 p.m., except Christmas Day. Repair jobs within the immediate Penticton area were required to be completed within one hour from the time the call out was made by the LVI dispatcher, and jobs outside Pentiction were required to be completed within one and one-half hours.

[5] In order to carry out this contract, the Appellant hired Mr. Eberle in March 2006. The Appellant hired Mr. Eberle initially as an employee, and made the required deductions from his pay for income tax, employment insurance premiums and Canada Pension Plan contributions. The Appellant paid Mr. Eberle a fixed salary of $2,000 per month for the repair work. For installations and removals he was paid $12 per hour plus $.30 per kilometre for travel to and from the work sites. Mr. Eberle was not paid for travel related to the repair work. Mr. Eberle took the LVI training course along with Mr. Zobatar. Neither could recall if the Appellant paid Mr. Eberle for the training.

[6] The Appellant required Mr. Eberle to be on call every day of the year from 7:00 a.m. to 9:00 p.m. except Christmas, and to take repair calls directly from the LVI dispatcher and complete the calls within the applicable timeframes. Upon completion of the calls, Mr. Eberle would report by phone to both LVI and the BCLC to indicate what work had been performed. He was not required to report on the calls to the Appellant and Mr. Zobatar said that often he and Mr. Eberle would not be in touch for two or three weeks at a time.

[7] It seems that the repair work consisted largely of replacing parts of the computer lottery terminals, or the cables for the terminals, and reprogramming the terminals. If any electrical work was required, Mr. Eberle would notify LVI and LVI would arrange with the Appellant to send out an electrician.

[8] Mr. Eberle required few tools to perform the repair work. He provided a few small hand tools, and the Appellant provided a cordless drill, an electric cable tester and a drill bit. The cable tester and drill bit were specialized equipment designed for use with the lottery equipment, and were provided to the Appellant by LVI. Mr. Eberle was required to use his own car to travel to the work locations. The Appellant provided Mr. Eberle with a cell phone.

[9] Spare parts for the repair work were stored in Mr. Zobatar's basement in 2006 and 2007, and subsequently in a storage shed owned by the Appellant. Mr. Eberle maintained the inventory of spare parts, and contacted LVI if more were required. LVI also monitored the inventory of spare parts through the phone reports made by Mr. Eberle upon the completion of each call out, in which he indicated what parts he had used to perform repairs.

[10] When LVI required the Appellant to install or remove lottery equipment, it would contact Mr. Zobatar, and he would get in touch with Mr. Eberle. In most instances, they worked together since most of these jobs also required an electrician. Apparently, this work made up a relatively smaller share of the overall work Mr. Eberle did for the Appellant. Mr. Zobatar said that they did between 10 and 16 installations per year, and about an equal number of removals. Mr. Eberle described this work as "intermittent". The installations and removals were a lower priority than the repair calls, and there was some flexibility in when the work could be done. Largely though, it was done according to the schedule set by LVI. Mr. Eberle would report by phone to LVI on the work he did on these occasions.

[11] After the first year Mr. Eberle worked for the Appellant, Mr. Zobatar reviewed the amount of work Mr. Eberle was doing, which averaged one call per day for LVI, and Mr. Zobatar decided that Mr. Eberle should provide his services to the Appellant as an independent contractor rather than as an employee. Mr. Zobatar said he also took into account the fact that he did not supervise or control Mr. Eberle's work when he decided to change Mr. Eberle's status. Mr. Zobatar informed Mr. Eberle of the change and told him that he would be required to invoice the Appellant bi-monthly for his services. No other changes were made to Mr. Eberle's work relationship with the Appellant. Mr. Eberle said he accepted the change in order to keep working.

[12] Mr. Zobatar also said that Mr. Eberle could hire someone to replace him to do the work, as long as that worker had received the required training from LVI and had no criminal record. However, Mr. Zobatar was the only person to replace Mr. Eberle. He did so on two occasions when Mr. Eberle was acting in a play. Mr.

Eberle said that he never considered the possibility of hiring someone to replace him.

[13] Mr. Eberle was never registered to collect GST because his earnings from the Appellant were below the $30,000 per year small supplier threshold.

[14] The Appellant maintains that it correctly classified Mr. Eberle as an independent contractor because his work was controlled by LVI and not by the Appellant. It says that Mr. Eberle could also hire a replacement worker, and was required to provide more equipment for the work than the Appellant was, since he has to supply his own vehicle. The Appellant said, as well, that it was likely that Mr. Eberle's status with the Appellant from the outset was that of an independent contractor and that the Appellant had mistakenly believed that he was an employee for the first year.

Analysis

[15] According to the Supreme Court of Canada, in *671122 Ontario Ltd. v. Sagaz Industries Inc.*,[3] the central question to be decided in a case of this kind is "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". The Court went on to say:

> 47 … 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.

[16] I will start first by reviewing the level of control the Appellant had over Mr. Eberle's activities. While Mr. Zobatar suggested that the Appellant exercised little control over Mr. Eberle, I disagree with this characterization of their relationship. I find that Mr. Eberle was directly controlled by LVI in the performance of his duties and that this control arose out of Mr. Eberle's contract with the Appellant. In effect, the Appellant delegated its right of control to LVI, and LVI exercised that control continuously. It was a requirement of Mr. Eberle's contract with the

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[3] 2001 S.C.J. No. 61.

Appellant that he be available on call for LVI and that he report back to LVI on each call. In requiring Mr. Eberle to be available 14 hours a day, 364 days a year for repair calls, and to complete the calls within a specified time frame and to provide detailed reports of his work, the Appellant exercised close control over his work. It is also apparent that the Appellant had first call on Mr. Eberle's time. Once a service call came in from LVI, Mr. Eberle was required to drop whatever he was doing and attend to the call. He was permitted to work elsewhere but had to fit such work around his work for the Appellant. The critical factor, in my view, is that Mr. Eberle was not permitted to refuse any of the repair calls from the LVI dispatcher. This is also a form of control over the Appellant, and one that is inconsistent with the existence of an independent contractor relationship. It is true that Mr. Eberle could have refused the installation/removal work, because Mr. Zobatar could have done it himself, if necessary, but these jobs only made up a small portion of the work done by Mr. Eberle for the Appellant. Overall, the control test weights heavily in favour of a finding that Mr. Eberle was an employee of the Appellant during the period in issue.

[17] With respect to the tools and equipment used by Mr. Eberle in his work, the major items appear to be Mr. Eberle's vehicle and a cell phone provided to him by the Appellant. This factor points towards the work being performed under a contract for services.

[18] There was no evidence that Mr. Eberle was exposed to any financial risk or that he had any real opportunity for profit in his relationship with the Appellant. His rate of pay was fixed. He received a flat monthly rate for repair calls and an hourly rate for installations and removals. I do not accept the Appellant's suggestion that by carrying out the repair work more effectively, Mr. Eberle could reduce future repair calls for that equipment and thereby increase his "profit". There was no evidence that Mr. Eberle had any control over how frequently the equipment would require attention or that he could in any way minimize the number of service calls from LVI. This test supports the view that Mr. Eberle was an employee of the Appellant.

[19] While Mr. Zobatar maintained that Mr. Eberle could have hired someone to help him perform the work, this would have required that person to be trained by LVI. Mr. Eberle did not consider hiring anyone to assist him because he himself wanted that work. While Mr. Zobatar replaced Mr. Eberle on two occasions over a three-year period, the evidence did not show whether Mr. Eberle's pay was reduced proportionately. This factor, in my view, is inconclusive as to whether Mr. Eberle was an employee or an independent contractor.

[20] The final factor that should be considered is the intention of the parties concerning the nature of the work relationship. Despite Mr. Zobatar's assertion that Mr. Eberle agreed to be classified as an independent contractor after the first year, I am satisfied that he only did so in order to keep his job These circumstances are not reflective of a true mutual intention concerning Mr. Eberle's status, and for this reason, this factor does not assist in establishing whether Mr. Eberle was an employee or an independent contractor.

[21] Overall, given the control the Appellant exercised over Mr. Eberle, and his lack of any opportunity for profit or risk of loss in his work, I conclude that for the period in issue Mr. Eberle was not performing the services as a person in business on his own account but as an employee of the Appellant. The only contravening factor, the requirement that Mr. Eberle provide his own vehicle, is not alone sufficient to show that he was in business on his own account, especially in light of the fact that the Appellant supplied him with a cell phone and some minor tools necessary to perform his duties.

[22] For these reasons, the appeals are dismissed.

Signed at Vancouver, British Columbia, this 22nd day of July, 2011.

"Brent Paris"

Paris J.

CITATION:	2011 TCC 361
COURT FILE NO.:	2010-372(EI) and 2010-373(CPP)
STYLE OF CAUSE:	POWERTREND ELECTRIC LTD. and MINISTER OF NATIONAL REVENUE and JAMES D. EBERLE
PLACE OF HEARING:	Kelowna, British Columbia
DATE OF HEARING:	July 11, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Brent Paris
DATE OF JUDGMENT:	July 22, 2011

APPEARANCES:

Agent for the Appellant	David Zobatar
Counsel for the Appellant:	Holly Popenia
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

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Firm:	N/A
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