

Docket: 2003-1122(EI)

BETWEEN:

MARATHON ELECTRIC LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of *Marathon Electric Ltd.*  
(2003-1123(CPP)) on July 28, 2003 at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant: Craig McTavish

Counsel for the Respondent: Nadine Taylor Pickering

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JUDGMENT

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

Signed at Sidney, British Columbia, this 9th day of October 2003.

"D.W. Rowe"

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Rowe, D.J.

Citation: 2003TCC714  
Date: 20031009  
Dockets: 2003-1122(EI)  
2003-1123(CPP)

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### **REASONS FOR JUDGMENT**

#### **Rowe, D.J.**

[1] The appellant - Marathon Electric Ltd. - (Marathon or payor) appeals from two decisions – both dated December 19, 2002 - issued by the Minister of National Revenue (the "Minister") wherein the Minister – in each instance – confirmed earlier assessments issued to Marathon in respect of premiums owing pursuant to the *Employment Insurance Act* (the "Act") and contributions due under the *Canada Pension Plan* (the "Plan") in the 2000 and 2001 taxation years on the basis certain named workers were employed in both insurable and pensionable employment pursuant to the relevant provisions of the *Act* and the *Plan*. Counsel for the parties agreed both appeals could be heard together.

[2] The workers named in both decisions were:  
Rob Hoy  
Christos Belos – 2000 only  
Nikolai Pinkovski  
Peter Reinhardt  
Marty Donaldson

[3] Rob Hoy testified he is a qualified electrician residing in Port Coquitlam, British Columbia. He holds a Contractor's License - issued by the Province of British

Columbia - in 1979 - which entitles him to work on jobs involving up to 750 watts and unlimited amperage. The significance of the license is that it covers nearly all applications and installations within the industry - except for work in relation to substations - and he can apply for permits in his own name and obtain inspections directly from the relevant supervising authority whether municipal or provincial. A qualified electrical contractor is responsible for ensuring electrical installations conform with applicable codes and regulations. An annual fee must be paid in order to maintain the license if the holder wishes to obtain permits. In 2000 and 2001, Hoy provided his services - as a supervising electrician - to Marathon in respect of certain electrical work undertaken by that company. Hoy stated that the named workers except for Marty Donaldson - since deceased - were qualified journeymen electricians able to perform electrical work even without having the extra ability to "draw" permits in their own names directly from an issuing authority. Hoy stated he obtained jobs from Perry Tsakalos - President of Marathon - and carried out the duties of a site foreman, communicating with Tsakalos only as circumstances required from time to time. Tsakalos contacted Hoy concerning a certain job and, if Hoy was interested in the work, they would meet and discuss the appropriate rate to be paid for Hoy's services as an electrician/supervisor. Hoy stated he was content to work for Marathon and did not provide his services to any other person or business entity during the relevant period, although he had submitted some bids on some residential work which were not accepted probably because his prices - based on his qualifications as a commercial electrician - were too high. Hoy identified a file folder - Exhibit A-1 - containing several documents each entitled Independent Contractor (Non-Employee) Agreement which he had entered into - at different times - with Marathon. The agreement - dated December 1, 2001 - on an attached page - provided for an applicable rate of \$20 per hour and referred to an anticipated completion date - April 1, 2002 - in respect of the particular project. Hoy stated the variation in rates - from \$17 to \$20 per hour - used in different contracts over the course of the relevant period was due to representations - by Tsakalos - that on certain jobs Marathon's bid was too low and the company had to save money. Hoy stated he would identify himself as a representative of Marathon whenever he was acting as a supervisor on a job site and would coordinate a work schedule with the Site Supervisor/General Foreman representing the General Contractor. Marathon delivered materials to the site, as needed. Even though Hoy declined work from other sources during 2000 and 2001, he regarded himself as an independent contractor in the course of providing his services - exclusively - to Marathon. He preferred to work on commercial and industrial installations as opposed to undertaking residential wiring which he categorized as being more suited to younger workers due to the physical demands of that work. On any particular job, Hoy did not report to the Marathon office except if required in order to carry out some aspect of that project.

He owned his own personal tools – both hand and power – but the larger tools and equipment were provided by Marathon, as required. Hoy explained that commercial projects such as a major renovation of a large warehouse are often complex and, even though the job may occupy six months or more, his attendance at the site may not be required on a daily basis and, when on-site, he may not have to remain there more than a few hours, depending on the circumstances. Hoy considered the ability of Marathon to bid on jobs was superior to his own due to the corporation's greater financial resources and its ability to purchase large quantities of material and supplies - on account - from suppliers at a commercial rate and its ability to obtain larger equipment, if needed. Hoy stated he delivered invoices to Marathon and received payment by cheque. A bundle of invoices was filed as Exhibit A-2. During the relevant period, Hoy was having financial problems and Tsakalos – on request – agreed to provide advances on future pay. Payment of a subsequent invoice to Marathon – based on a certain number of billable hours - would reflect the advance but none of the usual deductions were taken from his pay nor was any Goods and Services Tax (GST) added because Hoy was not registered and did not have a GST number. He did not receive any holiday pay nor participate in any benefits that may have been available to Marathon employees. Hoy stated "because I did not have the money to carry a payroll due to my poor financial situation", that if he required assistance on a particular job, an apprentice/helper was provided by Marathon. He was required to correct deficiencies in his own work but they were rare - and minor - and never required more than one day to correct. The only circumstance under which he would invoice Marathon for time spent was if he was correcting defects that were not his own or otherwise performing certain work that had been categorized as an "extra" to the original contract. Hoy owned his own truck on which the following invitation was printed: Need an Electrician? Call Rob. Hoy stated that although he worked a 40-hour week, he had some flexibility in working hours and days which enabled him to care for his special-needs child, an opportunity that would not have been available had he chosen to pursue regular full-time employment. In addition to providing his services to Marathon and caring for his child, he was working on a novel. Hoy was referred to an invoice – within Exhibit A-2 – dated November 30/01 – in the sum of \$5,820. He agreed that sum represented a considerable number of hours and stated it was probably due to having worked additional hours – at his discretion – on either Saturday or Sunday during that month.

[4] In cross-examination, Rob Hoy agreed that electricians can undertake minor work without having to obtain a permit. Marathon had electricians working on a job site and Hoy stated he could issue instructions by telephone during his absence so there was no need for Marathon to retain the services of any substitute supervisor. On occasion, Marathon had two jobs running at the same time and Hoy would travel

between them and billed his time - at a rate sufficient to absorb the cost of operating his vehicle - in lieu of charging any specific amount attributable to travel. Hoy stated the supervising representative named by the General Contractor does not inspect the work performed by electricians supplied by Marathon as that function is carried out by electrical inspectors employed by either the Province of British Columbia or the relevant municipality. Hoy stated he had been an electrician for 25 years, did not require any supervision, and sometimes did not see Tsakalos for a week or more. At the outset, Hoy would obtain a set of blueprints for the job in order to become familiar with the mechanical layout and the general nature of the intended construction. The usual working hours for most sites were between 7:00 a.m. and 3:30 p.m. and had to conform with the by-laws of the municipality. Hoy stated he might work 16 hours over the course of a weekend and then not work for two or three days. No overtime rate had ever been discussed with Tsakalos and Hoy maintained his own timesheet. If needed, he would obtain an advance against a future invoice and received a "draw" twice per month. Hoy was referred to a bundle of photocopied cheques – Exhibit R-1 – and agreed that in some months – such as March, 2001 - he received several cheques – in small amounts – on a frequent basis. When counsel for the respondent suggested to Hoy there did not seem to be a correlation between the amount of the various payments and an invoice purportedly covering the same period, Hoy stated he was satisfied he had been paid in full for his work within the context of a working relationship with Tsakalos/Marathon in which his billable hours were submitted and accepted on the basis of trust. Hoy described his tools as consisting of the usual hand tools together with battery-powered drills and saws. Special saws and hydraulic lifts - costing up to \$5,000 – were supplied by Marathon. Hourly rates charged by Hoy on any job located in a non-metropolitan municipality, always reflected the need to travel and billable time started to run as soon as he left his residence. Any amount of premiums to the Workers' Compensation Board (WCB) - paid by Marathon – for Hoy's protection on a job were deducted from a subsequent invoice payment. In the event a client complained about some aspect of the work on a job site, Hoy stated he would handle the situation if the subject matter was within his field of expertise. He stated that when on job sites he had always informed other workers and/or contractors that he was a sub-contractor of Marathon.

[5] In response to questions from the Bench, Hoy stated that on some jobs Marathon provided its own employees – perhaps, several people - depending on the circumstances. As a matter of course, electricians are the first trades on the job and the last ones out because matters of electrical installation have to be resolved prior to preparing the ground for construction. Hoy stated that if a municipality did not have its own electrical inspection branch, then the required inspection would be undertaken by an employee of the province.

[6] Perry Tsakalos testified he is the President of Marathon and is a journeyman electrician holding a B license. In 1981, he started operating Marathon as a commercial, industrial and residential electrical contractor, although Marathon has since opted out of residential work in order to concentrate on commercial buildings such as warehouses or institutions like schools and hospitals. His son and daughter are employed by Marathon and estimates used for bidding on jobs are either done by him or by freelance estimators retained by Marathon. Tsakalos deals with suppliers, obtains permits for projects and supervises and coordinates work done on a project. Marathon bids on certain jobs and - if successful - Tsakalos obtains a work schedule from the General Contractor in order to arrange for workers and also the necessary materials. Marathon had its own employees but also relied on certain independent contractors who were contacted in order to determine whether they were interested in working on a project. If those persons were willing to consider working on the project, Tsakalos provided them with the relevant drawings. When Marathon's bid was accepted by a General Contractor, Tsakalos would contact Rob Hoy in order to advise him the job was expected to be of a certain duration - usually between two and six months - and would invite him to bid on a certain aspect of the project on either an hourly basis or a fixed sum. Tsakalos recalled that Belos had only provided services to Marathon during 2000 and had been paid a relatively small amount in relation to a small, one-person, electrical installation in a warehouse. Tsakalos followed the same method when contacting Donaldson, Pinkovski and Reinhardt in order to invite them to participate in a job Marathon had obtained. Tsakalos considered all his sub-contractors - except Donaldson - to have been qualified electricians capable of supervising others on the job site, if necessary. Donaldson had experience in the electrical trade but was not a qualified electrician. He was an experienced worker within the labourer category and assisted others who - like Hoy - were fully qualified. None of the workers had any expectation of receiving future contracts from Marathon as the availability of work depended on Marathon being able to bid successfully on certain projects. Tsakalos was referred to a file folder - Exhibit A-3 - containing a series of agreements entered into between Marathon and Donaldson. The rate of remuneration - depending on the individual contract - ranged between \$10 and \$12.50 per hour. The folder containing contracts applicable to Peter Reinhardt was filed as Exhibit A-4. During 2000 and 2001, the remuneration for Reinhardt - set out in various agreements - ranged between \$22 and \$24 per hour. Although not available, Tsakalos stated similar agreements were entered into by Belos during 2000 since Marathon used a standard agreement wherein the blank spaces were completed by inserting details pertaining to a specific project. In the event one of the named workers was already working on a job, Tsakalos stated he would proceed to contact others on his list in order to determine whether they were

willing to accept work from Marathon. Tsakalos agreed that Marathon paid workers on the basis of time sheets submitted but also paid some advances upon request, particularly in the case of Rob Hoy who was an honest, hard-working man who had to purchase medicine for his son. Hoy was able to obtain payments in advance and repay them later by providing his services at a specified rate. Marathon made deductions to recover the advances and, even though it might extend to work done by Hoy on a future project, it eventually worked out so that the total of Marathon payments ultimately matched the number of billable hours performed by Hoy. Tsakalos stated there were never any cash payments to Hoy and no discrepancies - between work done by Hoy and payments made by Marathon - were ever carried forward into another business year. Advances to other workers - although made - were not as common. Tsakalos stated he understood Hoy had been an independent contractor throughout his long career. In the course of carrying out business, Marathon preferred to enter into written contracts with service providers - possessing specialized skills - in relation to a particular project. As an example, Tsakalos referred to an instance where Marathon had needed to retain the services of an expert to install a complicated sound system in a school. Typically, in the course of completing a project, Tsakalos met with the owner of the property and/or the General Contractor as well as engineers, architects and other professionals or tradesmen on a regular basis in accordance with a schedule. During the summer, work began between 7:00 a.m. and 7:30 a.m. and the representative of the General Contractor wanted to have electricians on site at that time. Tsakalos stated he understood each of the workers named in the assessments issued to Marathon for 2000 and 2001, had - at some point - attempted to operate as an electrical contractor but encountered difficulties when attempting to purchase materials necessary to complete a project in accordance with bid specifications. Usually, projects undertaken by Marathon involved an expenditure representing between 65% and 68% of the total bid while labour is only approximately 30% of the overall contract. Currently, Marathon operates with \$100,000 in working capital but in the late 1980's, the company had undertaken projects requiring the purchase of materials and supplies in excess of \$400,000. Tsakalos stated the workers did not attend at the Marathon office on any regular basis and - otherwise - there was no requirement for them to report. The larger pieces of equipment - costing as much as \$300 per week - when required on a job, were rented by Marathon and it obtained all necessary permits pertaining to the electrical work. A worker could request that an electrical inspector attend the site at a particular stage of the installation. Tsakalos identified two bundles of invoices - Exhibit A-5 - submitted to Marathon, one by Donaldson and the other by Reinhardt. During the course of a construction project, Marathon would obtain progress payments from the General Contractor based on invoices for work done to a certain date. In terms of providing instructions - on site - to the Marathon electricians,

Tsakalos stated that if the matter involved something relatively minor, the workers would carry out the instructions issued by the representative of the General Contractor without the matter ever coming to his attention. Any deficiencies - for which a worker was responsible - had to be corrected by that individual. On one occasion, Hoy had telephoned the Marathon office to advise he needed more electricians on the job and Marathon provided the extra help. Tsakalos stated that, as far as he was concerned, the workers were free to hire their own qualified help to assist them but none of them had ever chosen to do so and had relied on Marathon to send extra electricians to a site. None of the named workers charged GST on their invoices to Marathon and no deductions were taken from their pay. The WCB premiums attributable to all workers – except Hoy – were paid by Marathon. In the case of Hoy, Marathon paid the premiums to WCB and deducted 2% from future invoiced amounts in order to recover that cost. During the relevant period, Marathon had regular employees on the payroll and made the usual deductions. The other workers – considered to be independent contractors were issued Summary of Contract Payments forms (T5018s), filed as Exhibit A-6.

[7] In cross-examination, Perry Tsakalos stated discussions had been held with the named workers during which they had been advised of their right to hire other workers. During the relevant period, Marathon had two or three electricians on the payroll as employees. The qualifications of these employees were the same as the named workers – except Donaldson – but the named workers were hired only on a per project basis. The employee electricians were paid by the hour and submitted time sheets – rather than invoices - to Marathon. They owned their own hand tools and usually worked a 35-40 hour week. Even if deficiencies had to be repaired by one of the named workers – considered by Marathon to have been independent contractors – the material required was provided by Marathon in the same manner as if the correction was done by a Marathon employee/electrician. Tsakalos stated it is usual for a Site Supervisor – also known as General Superintendent - to be on site as the representative of the General Contractor/owner. The individual exercising that supervisory function is experienced in nearly all aspects of construction and is – usually - the first person on site each day. Tsakalos agreed Donaldson had to work with qualified electricians and could only assist them rather than perform tasks requiring appropriate trade certification. In the event Hoy was required to attend on site, the Site Supervisor would usually telephone Hoy directly and Marathon would be contacted only if that method was unsuccessful. Tsakalos stated he satisfied himself that the hours billed by workers were justified by examining the progress of work done on the site. An electrical permit – posted on the site – listed the telephone numbers of electrical inspectors so the electricians could make direct contact and arrange for inspections. Prior to the period relevant to the within appeals, Hoy had



provided his services to Marathon and Pinkovski had done work for Marathon in 1999, prior to becoming qualified as an electrician on December 13, 2000. Tsakalos agreed Marathon had the ultimate responsibility for ensuring compliance with the applicable electrical code. Certain workers on a project would be provided with keys – by the Site Supervisor or his agent – in order to access the premises apart from normal working hours. A particular clause - #4 - within the standard contract utilized by Marathon recognized the need of Marathon to coordinate working hours on a project in order to integrate with the needs of the client or other sub-contractors on site. Tsakalos identified a bundle of invoices together with copies of cancelled cheques – Exhibit R-2 – pertaining to invoices submitted by Reinhardt and payment – by Marathon - for services performed. Counsel referred Tsakalos to three cheques dated January 14, 2000, January 14, 2000 and January 28, 2000, in the respective sums of \$1,066, \$100, and \$1,825, totalling \$2,991, the same amount as the invoice issued by Reinhardt on January 31, 2000. Reinhardt received a cheque – in the sum of \$1,804 – on February 25, 2000, but the invoice – dated February 28, 2000 - is in the sum of \$3,375. In March, 2000, Reinhardt was issued 3 cheques prior to submitting an invoice. Tsakalos stated he was able to determine the probable amount of a worker's earning at the end of the month and would issue advances on that basis. He also expressed surprise that Reinhardt had received so many advances as his earlier recollection was that multiple advances had been give only to Hoy for special reasons. Employees were paid every two weeks - with a holdback of one week - while the named workers were paid for all work already performed. The payroll was handled by Tsakalos' daughter and the time sheets submitted by workers were also used for purposes of cost analysis. Tsakalos stated the hourly rate paid to Donaldson rose from \$10 in January, 2000, to \$12.50 by May, 2001, in order to account for increased costs of living. Over the course of two years, the hourly rate paid to Reinhardt increased from \$22 to \$24. None of the workers relevant to the within appeals had any authority to sign cheques or issue documents on behalf of Marathon and their services could be terminated in accordance with the terms of the written contract they had signed. Most work sites were within 30 kilometers of the workers' homes. The workers had authority to telephone a Marathon supplier - directly - to order supplies to be delivered to a job site. In the event they were required to purchase some items, they would be reimbursed upon production of receipts. In relation to the client, Marathon guaranteed the quality of the work and Tsakalos stated the workers would always be paid even if the client defaulted in a payment due to Marathon. Generally, work-related complaints were rare and could be resolved by the workers on site. Tsakalos stated the Site Supervisor on each job would be aware that certain workers were sub-contractors of Marathon. Throughout the relevant period, Tsakalos stated he understood the named workers performed small jobs for other people.

[8] In re-examination, Perry Tsakalos stated the electricians on the regular employee payroll were hired - as needed - for periods of one month or less and then laid off when the work was completed. These individuals were added to the regular payroll in response to their expressed wish to be accorded the status of employee whereby the usual deductions were taken from their cheques. As for Hoy, if he was not needed at a specific job site – or at another Marathon project – he was free to use his time as he chose. Tsakalos stated he saw no real distinction between the working conditions of those electricians he had placed on the payroll as Marathon employees and the workers named in the assessments relevant to the within appeals. During the course of many years in the construction industry, Tsakalos stated it is normal – on job sites - to find some workers who are employees and others who are independent contractors even though they are carrying out the same work.

[9] Christos Belos testified he is the person described – incorrectly - as Chris Bilos in the Replies to the Notices of Appeal - and attached schedules - relevant to the within appeals. He provided his services to Marathon in 1999 and during 2000. He stated that when he was offered work by Tsakalos, it was always on the basis he would be an independent contractor. While working for Marathon, he did some small jobs for other people and submitted invoices – Exhibit A-7 - based on the cost of materials and an amount representing his labour. He received a T5018 form – included in Exhibit A-6 – indicating he had received – from Marathon - the sum of \$3,765 - in 2000, in return for providing his services for a period of approximately 6 weeks. In 2000, Belos worked for Alpha Neon as an employee because he wanted to learn about the installation of neon signs. He is a qualified electrician in Greece but had not performed work in respect of that form of illuminated signage. Belos stated that when Tsalakos would telephone to inquire whether he was interested in doing some work, Tsakalos would describe the job and they would meet at the site in order to discuss the nature of the project and the working schedule as Belos did not accept jobs involving night-time work. Belos stated there are some jobs that can be performed by one electrician and explained it is normal for work to be interrupted while other trades provide their services to the job. As a result, an electrician might work to a certain point and then not return for any requisite future phase of the electrical work. Belos stated his contract with Marathon was based on an hourly rate of \$18 over a certain period of time, as estimated by Tsakalos. Marathon provided all materials and heavy tools and equipment. Belos stated he had intended to provide his services to Marathon on the basis he was an independent contractor. He stated he did not earn sufficient annual income to require registration for purposes of GST. Belos stated he would telephone Tsakalos to request that an electrical inspector attend a job site to examine the quality of the work done up to a particular stage.

[10] In cross-examination, Christos Belos stated he had signed a contract with Marathon in relation to services provided in 1999 but there had been no similar written contracts entered into during 2000. He had considered the 1999 contract would continue to govern their working relationship even though the specific project named therein had been completed. In his view, Marathon did not care whether he hired others to assist him but the situation never arose. Prior to accepting any work from Marathon, Belos stated he would check out the nature of the job and its location. On a job site, while the representative of the General Contractor is responsible for the overall project, the electrical engineers responsible for preparation of the electrical plans verify that the installation had been done properly. Belos stated he deferred to Tsakalos when on-site problems - usually arising from revisions to construction plans - had to be resolved with the representative of the General Contractor. Belos stated he began his apprenticeship as an electrician in Greece when he was only 13. Although familiar with the nature of an electrician's work in British Columbia, because of some difficulty in reading English, he would - on occasion - telephone Tsakalos to obtain an explanation about some matter. Belos stated he preferred a flexible work schedule because his wife was ill and, while he was aware he had to adhere to the hours applicable to the job site, was able to obtain permission from the Site Supervisor to work on a weekend. He did not bill Marathon for time spent during a lunch break and only issued an invoice after receiving cheques in payment for his services rendered during the preceding period. He stated he required money every two weeks and was paid on that basis in accordance with submitted time sheets and a corresponding invoice. On one job, Belos accepted the sum of \$17 per hour as it seemed to be a fair wage for the nature of the work required to be done. Although all materials were supplied by Marathon, Belos stated he did not expect to be paid to repair deficiencies arising from his own work. Other than purchasing his own hand tools, Belos had no work-related expenses and there was no advertising or other signage on his van to indicate he was seeking customers for any business carried on by him. Belos stated he does not hold an electrician's license in British Columbia and at one time used the name Belos Services although he did not operate a business account. On a job site - if requested - he would identify himself as a person working for Marathon.

[11] Counsel for the appellant advised the Court the accuracy of the amounts set forth in Schedule A - attached to the Reply to the Notice of Appeal (Reply) in appeal 2003-1122(EI) - was not in issue. Counsel conceded the case regarding the worker - Donaldson - was weaker than the others in terms of being at one end of the spectrum but submitted the lack of a license is not determinative of one's ability to provide services on his own account. At the other end of the scale, counsel pointed to the

worker – Hoy – as an individual who was amply qualified to carry on his own business in that he held the sort of license that enabled him to take out his own permits for electrical work. Counsel referred to the various written contracts entered into between the named workers and Marathon and to the ability of the workers to accept or refuse work as they chose. Further, even while providing services to Marathon on a project, they could work elsewhere during periods when their presence was not required on a site. Counsel submitted there was very little control or supervision – by Marathon - over the workers and Tsakalos would attend the job site, as needed, to verify progress for various purposes including his own need to submit invoices to the General Contractor for progress payments. Marathon had electricians and other workers on its regular payroll but the named workers and Marathon wanted their services to be provided in accordance with the status of independent contractor. Counsel submitted that even though the workers had chosen to work exclusively – or nearly so – for Marathon does not transform them into employees since they had the right to choose to remain in a working relationship with a company that paid a reasonable rate - on a timely basis - and permitted flexibility in hours of work in order to accommodate any special needs arising from personal circumstances.

[12] Counsel for the respondent conceded that Hoy was the most experienced worker and held the highest qualifications in his trade and had more independence than other workers. Notwithstanding, counsel submitted Marathon still had the right to exercise control and had directed Hoy to attend at other Marathon projects, if required. In addition, Hoy was encountering financial difficulties and was in no position to function as an electrical contractor on his own account. He required funds on a regular basis and obtained advances when certain expenditures had to be made on behalf of his son. Counsel submitted that even Hoy – although highly qualified – could only earn an amount based on the total of hours worked at a certain rate and could not increase revenue through an efficient management of time. Further, counsel submitted neither Hoy nor any of the other named workers could gain a profit from the provision of their services nor did they run any risk of loss because – as stated by Tsakalos in his testimony – they would be paid even if the client defaulted in its payment to Marathon. In counsel’s view of the evidence, there was no true negotiation in terms of arriving at the hourly rate to be paid and the cheques issued by Marathon did not seem to match the invoices issued in some instances, as in the case of Reinhardt. Counsel submitted one must bear in mind that only Marathon had the financial capability and the business infrastructure to submit bids in order to obtain work and the appropriate number of electricians were hired only if a bid had been accepted.

[13] The Supreme Court of Canada - in a recent decision - *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 45 to 48, inclusive, of his judgment stated:

Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" (1987), 37 U.T.L.J. 25, at p. 29) sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in *London Drugs* where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents".

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

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

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

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

Level of control:

[15] There was not a great deal of direct control exercised over any of the workers, particularly in the case of Hoy who was a highly qualified electrician with more than 20 years experience. Indeed, it was Hoy who discharged a supervisory function on behalf of Marathon in addition to providing his own expertise while working on complex electrical installations. That supervisory aspect of his services was

considered by him when negotiating an hourly wage – ranging from \$17 to \$20 per hour – applicable to each contract. Hoy described his duties on a Marathon project as those normally discharged by a site foreman although he did not use that title. Belos appears to have worked on only one or two smaller projects during 2000 and, in the course of his testimony, stated he would contact Marathon in order to arrange for required inspections to be carried out by an inspector. Marty Donaldson was not a qualified electrician but was a skilled labourer in the context of that trade. He was not able to perform work on his own and was relegated to the role of assistant to other qualified electricians. There was no direct evidence pertaining to work done by Pinkovski or Reinhardt but it appears they worked on a site subject to the supervision of Hoy from time to time and their work was examined by Tsakalos when he attended the job on a frequent – albeit unscheduled – basis. Until December 13, 2000, Pinkovski was not qualified as an electrician according to British Columbia standards and would have required supervision in the sense some qualified electrician would be required to certify that the work he had done conformed to standards applicable to that job .

#### Provision of equipment and/or helpers

[16] The evidence established that all the workers had their own hand and/or small power tools. That is normal within the trade. Any heavy equipment or specialized tools were provided by Marathon either by renting them from a supplier or from their own inventory. Although Tsakalos and Hoy and Belos testified they all considered it was possible for a worker to hire a helper, that event never occurred. Rather, when help was needed on a particular site, Hoy would contact Tsakalos to provide extra workers for a job and Marathon would send electricians who were on the Marathon payroll as employees. Hoy stated he did not have the financial means to carry a payroll and chose to structure his working relationship with Marathon accordingly so he would not have to bear the cost of providing expensive equipment and bear the burden of administering a payroll account merely to obtain additional qualified help when required from time to time. None of the other workers ever exercised their purported right to hire their own helpers and relied on Marathon to provide extra electricians when required. Donaldson was a labourer and would not be expected to hire an assistant in order to perform his tasks.

#### Degree of financial risk and responsibility for investment and management

[17] None of the workers incurred any real financial risk. In the remote event some deficiencies had to be corrected, they were required to do so on their own time without billing Marathon at the applicable hourly rate. However, all materials were still provided by Marathon and Tsakalos stated in his testimony that the labour component usually comprises approximately 30% of the total job cost. The workers owned their own tools. When workers purchased certain supplies, they presented a receipt to Marathon and were reimbursed. Any material required for the site could be ordered - directly from the Marathon suppliers – by Hoy or the other electricians on a site and the supplier and/or Marathon would deliver the order. Tsakalos stated all workers would have been paid in full by Marathon even if the particular General Contractor had defaulted in any of its payments. Marathon was able to provide the investment in equipment and infrastructure required to obtain various jobs from the general contractors/owners of certain projects and the management of the work was undertaken by Tsakalos on behalf of Marathon or as delegated to Hoy as part of his agreement to provide services to Marathon not only as a qualified electrician but as someone capable of supervising others. Hoy was compensated at his usual hourly rate if he was required to travel from one Marathon job to another site. In his view, that rate – as applied to actual travelling time - compensated for the expense of operating his own vehicle. Hoy reimbursed Marathon for his own WCB premiums even though they were paid directly by Marathon together with amounts attributable to other workers. The basis for this practice was not fully explained except it is reasonable to infer that Hoy continued to maintain his own WCB account that he had opened at some point during his long career as an electrician.

Opportunity for profit in the performance of tasks

[18] Each worker was entitled to receive payment for the proper number of hours worked at the applicable rate set forth in the relevant contract in relation to a specific project. There was no ability to profit otherwise from an efficient management of time. Had each worker bid on a portion of a Marathon project at a fixed sum, there may have been an opportunity to earn a profit in the normal business sense. However, the working relationship between Marathon and all the qualified electricians – including Pinkovski after December 13, 2000 – was based on payment of an hourly rate in accordance with submitted time sheets and invoices. The ability to negotiate an hourly rate seemed to be rather limited and the modest increases between 2000 and 2001 were provided by Marathon to take into account an increased cost of living.

[19] In the case of *Minister of National Revenue v. Emily Standing*, [1992] F.C.J. No. 890 Stone, J.A. stated:



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

[20] There is no doubt that Marathon and the workers wanted their services to be provided within a working relationship in which they would be independent contractors. Recently, there has been some movement in the jurisprudence whereby the agreements between the parties have been regarded in a manner more consistent with the demands of the modern marketplace.

[21] In the case of *West Direct Express Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] T.C.J. No. 373, Porter D.J.T.C.C. decided a case involving an individual providing courier services to the corporate market in Calgary. At paragraph 14 of his reasons, Judge Porter commented:

I am further mindful that as a result of the recent decisions of the Federal Court of Appeal in *Wolf v. Canada*, [2002] F.C.J. No. 375, and *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 771, a considerable degree of latitude seems now to have been allowed to creep into the jurisprudence enabling consultants to be engaged in a manner in which they are not deemed to be employees as they might formerly have been...

[22] In the within appeals, it is interesting to note that the electricians who were treated as employees and added to the Marathon payroll usually worked for shorter periods than any of the named workers. The employee electricians also owned their own hand tools and worked the same number of hours per week, although they may have had less flexibility in terms of attending at a job site apart from normal working hours. When asked what the distinction was between these employee electricians and the others who were regarded as independent contractors, Tsakalos responded by stating that if certain people wished to be employees he accommodated them by accepting that characterization. Clearly, this points to a circumstance where the parties are choosing to assign themselves a status without regard to the factual underpinnings of the working relationship. In my view, this is significant in terms of understanding the approach taken by Tsakalos – on behalf of Marathon – in purporting to determine the appropriate status with respect to a service provider.

[23] In a recent decision of the Federal Court of Appeal - *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 771 - the Court held that the ownership of tools owned by the gutter installers was an important

factor to be taken into account even though the most expensive tool, a specialized gutter-forming machine mounted on a truck was owned by the payor company. In *Precision, supra*, each installer used his own judgment to decide when to work and whether to accept a specific job. The installers were free to work for other installers and – on occasion – could negotiate with the company in order to obtain a higher rate of pay. The gutter installers could choose to work alone or employ others to help them and Sexton J.A. – writing for the Court – considered that more work done by the installers would produce additional revenue. As well, Sexton J.A. took into account there was no guarantee of work from day-to-day, no minimum pay rate applicable, no fringe benefits and that the installers were responsible to repair – at their own expense – any defects in workmanship. In *Precision*, the company negotiated contracts with the customer and then hired installers to perform the work. In arriving at the conclusion that the gutter installers were independent contractors – and not employees – Sexton J.A. found there were two businesses operating, one on the part of Precision Gutters and the other on the part of the installers. One business concerned the manufacture of the gutters and the other arose from the physical installation. Sexton J.A. did not deal with the elaborate operational infrastructure of Precision Gutters since that was considered to have been a separate business whose breadth and level of responsibility and financial connection with the end user was distinct from the business aspect of the installation process - in the narrow sense - as it applied to the installers.

[24] I return to the central question - as referred to by Major J. in *Sagaz, supra* - which is to determine whether any worker provided his services to Marathon on the basis he was in business on his own account. The fact Hoy had the ability to take out permits in his own name indicates a capacity to be in business for himself particularly since he did have an advertisement on the side of his own vehicle which invited customers to contact him. However, the evidence is clear that during the relevant period, Hoy only bid on a couple of residential jobs and was unsuccessful due to his prices being based on higher rates applicable to the commercial/industrial work which he preferred. He did not have the ability to purchase supplies and materials for a job and depended on Marathon to offer him work once that company had secured a project. Hoy did not want to be an employer of other workers since he had his own financial problems and required cash advances against future earnings in order to buy medicine for his son. He also needed to be paid at least twice per month in order to be assured of a regular cash flow. These indicia are not consistent with entrepreneurship and are nearly indistinguishable from the workings of the usual employer-employee relationship except that Hoy – due to his experience and qualifications – was afforded some leeway in terms of choosing whether to work on certain days or to perform some tasks during the weekend.

[25] Donaldson had no business pursuant to which he could offer his services. He was a skilled labourer/assistant with considerable experience in the electrical trade but was not in any position to perform work on his own. He was paid an hourly wage on a regular basis.

[26] Christos Belos was not qualified as an electrician in British Columbia although he had been certified in Greece and was well able to carry out the necessary work. He did some small jobs for others in February and May, 2000 and invoiced them on his own account. He considered himself to be an independent contractor and had provided his services to Marathon in 1999 and 2000 on that basis. He attended at each job site prior to accepting to work and inquired about the project schedule because he refused all offers of night work. Tsakalos provided an estimate of the duration of the work and they agreed on an applicable hourly rate during that period.

[27] Peter Reinhardt performed a considerable amount of work for Marathon in 2000, as indicated by the sum of \$49,731 set out in the T5018. He also signed various contracts at different times throughout 2000 and 2001 in which he agreed to provide his services at rates ranging from \$22 to \$24 per hour. He was a qualified electrician and chose to receive payment twice per month – as well as advances – and submitted invoices and time sheets after the work had been performed. The invoices and the payments made to him do not match.

[28] Pinkovski was the worker involved in a previous appeal - by Marathon – concerning his working status in 1999. In that case, reported as *Pinkovski v. Canada (Minister of National Revenue- M.N.R.)*, [2002] T.C.J. No. 180, I concluded the worker was an employee of Marathon. The facts therein were substantially the same as those in the within appeals including the existence of various signed contracts between the worker and Marathon at a particular hourly rate, the ownership of tools, provision of equipment and the level of control exercised by Marathon, except there was no evidence of any supervision being carried out by someone – like Hoy – as was the case in the within appeals. At paragraph 16, I commented:

The appellant was not a qualified electrician until December 13, 2000. That fact alone does not preclude him from having been in business for himself even though he may have faced some disciplinary action under the trades apprenticeship program or even prosecution under provincial legislation for performing certain work without the proper Certificate of Qualification. Realistically, it is difficult to see how Pinkovski could have obtained work on his own from the various persons or entities cast in the role of general

contractors when he was not qualified to obtain the work since one would expect the owners or project managers would require some proof the subcontractor was properly licensed and insured. He was not able to purchase materials necessary to complete a job nor did he own the proper equipment. He could earn money – at a fixed hourly rate – if Marathon had been able to obtain work through a subcontract and needed his services as an apprentice electrician to complete the job. Counsel for the appellant submitted that, as between Pinkovski and Marathon, he could be carrying on business on his own account without having to be in the same league as Marathon in terms of being able to bid directly on projects. However, it is apparent that – apart from the characterization of status stated in the various agreements - Marathon treated the appellant like an employee; he was paid every two weeks in accordance with a fixed hourly rate and his work was supervised and inspected prior to the official visit to the site by the electrical inspector because it was Marathon that would have to bear the brunt of any deficiencies. There was nothing of consequence surrounding the provision of services to Marathon that would lead one to conclude the work was being done within the context of an entrepreneur carrying on his own business. The contract between the appellant and Marathon - dated July 1, 1999 – wherein Pinkovski agreed to provide his services to Marathon until December 31, 1999 - without naming any specific construction projects or clients - seems to have had no purpose because further contracts were signed by both parties later on and the identity of the Marathon client and the anticipated start and completion dates of the jobs were stated in the accompanying letter. Agreeing to work at \$15 per hour in connection with any future contracts Marathon might obtain, does not seem to be consistent with what one would expect from an entrepreneur operating his own electrical contracting business.

[29] In the within appeals, I cannot find there were two businesses operating, one on the part of a worker and the other on the part of Marathon. Although Donaldson is obviously an employee/labourer, it is not so easy to characterize Hoy who occupies a position closer to the other end of the spectrum. However, a job status is not dependent merely on how one talks or wishes to be seen, it involves an examination of the actual conduct of the parties during the course of the working relationship. Hoy carried out his work in a manner nearly completely consistent with one who has the status of employee. The work done by Hoy and by other workers was substantially more steady in nature than that offered – each morning – to the gutter installers in the *Precision, supra*, case. The jobs in the within appeals usually lasted between two and six months and the work performed by the qualified electricians was clearly not divisible from the substantial contract Marathon had obtained in each instance from

the relevant General Contractor. The electrical installation business - within the context of commercial/institutional construction - was always that of Marathon. Even though there was some flexibility accorded the tradesmen as to working hours and an absence of ongoing, direct control – by Marathon - over their daily work, Hoy acted as Marathon’s supervising electrician and ensured there was on-site liaison with the representative of the General Contractor. Apart from an expressed desire to have the status of independent contractor, none of the workers named in the assessments otherwise acted as though he had been engaged to provide his services as a person in business on his own account. During 2000 and 2001, Marathon paid Reinhardt the sums of \$49,371 and \$49,527.20, respectively, according to the T5018s. (Exhibit A-6) Hoy earned \$30,166 in 2000 and \$33,159.04 in 2001 as a result of providing his services to Marathon. In 2000, a year in which he was not qualified as an electrician until December 13, Pinkovski earned \$31,570 and – in 2001 – received payments totalling \$16,748.50. Belos was paid the sum of \$3,765 in 2000 and did not provide any services to Marathon in 2001. None of these workers charged GST on their invoices because they were not registrants in accordance with the GST regime even though their revenue – in some instances – exceeded the \$30,000 per year threshold applicable to suppliers as defined by the applicable GST legislation. None of the workers purported to operate in a manner consistent with a business including operating a business bank account and they appeared – for the most part – to be content to wait for a telephone call from Tsakalos inviting them to provide their services – at an hourly rate – on a particular project. It seems to me that if an individual wishes to be seen as providing services as a person in business on his own account, there should be some conspicuous trappings of entrepreneurship sufficient to indicate the existence of an enterprise in an ordinary commercial sense. In the within appeals, an examination of the overall facts leads to the conclusion that none of the workers provided services to Marathon during the applicable relevant period as a person in business on his own account.

[30] The Minister was correct in issuing both decisions and they are confirmed. Both appeals are hereby dismissed.

Signed at Sidney, British Columbia, this 9th day of October 2003.

"D.W. Rowe"

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Rowe, D.J.

CITATION: 2003TCC714

COURT FILE NO.: 2003-1122(EI) and 2003-1123(CPP)

STYLE OF CAUSE: Marathon Electric Ltd. and M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

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

DATE OF JUDGMENT: October 9, 2003

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