

An appeal

- by -

4493028 Canada Inc. carrying on business as Sooke Electric 2010
(“Sooke Electric 2010”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2012A/72

DATE OF DECISION: August 23, 2012

DECISION

SUBMISSIONS

John S. Heaney	counsel for 4493028 Canada Inc. carrying on business as Sooke Electric 2010
Alan W. Zielonka	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards

INTRODUCTION

1. This case is a classic example of businesspersons getting themselves into a terrible muddle because they failed to properly document the critical components of their business relationship as well as the day-to-day commercial activities of their business.
2. I have before me an appeal filed by 4493028 Canada Inc. carrying on business as Sooke Electric 2010 (“Sooke Electric 2010”). This appeal was filed under section 112(1) of the *Employment Standards Act* (the “*Act*”) and it concerns a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on May 17, 2012.
3. On January 11, 2011, Alan W. Zielonka (“Zielonka”) filed an unpaid wage complaint seeking approximately \$22,600 in unpaid wages from Sooke Electric 2010. Mr. Zielonka claimed he had been employed as an electrician, earning \$35 per hour, from December 16, 2009, until September 1, 2010, when his employment ended due to a workplace injury. The delegate presided at a complaint hearing on December 12, 2011, and subsequently issued a Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”) ordering Sooke Electric 2010 to pay Mr. Zielonka the total sum of \$26,305.82 representing unpaid wages and section 88 interest. I should note that the Determination contains a typographical error in that the wages payable are stated to be \$37,273.60 plus \$1,899.43 interest for a total amount due of \$26,305.82. However, this latter figure is set out a page R8 of the delegate’s reasons and I have confirmed with the Employment Standards Branch that the latter figure is the correct amount. In addition, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties against Sooke Electric 2010 for having contravened sections 17 (providing wage statements) and 27 (keeping payroll records). Thus, the total amount payable under the Determination is \$27,305.82.
4. I am adjudicating this appeal based on the parties’ written submissions. I have reviewed the submissions from legal counsel for Sooke Electric 2010, Mr. Zielonka, and the delegate. I have also reviewed the section 112(5) record that was before the delegate and the delegate’s reasons.

BACKGROUND FACTS

5. The following recitation is drawn from the delegate’s reasons and my review of the section 112(5) record. Mr. Zielonka was a principal, apparently with another individual, in a B.C. business corporation, Sooke Electric Ltd. A BC Corporate Registry search conducted on May 11, 2012, indicated that this firm was incorporated on January 3, 2006, that Mr. Zielonka was its sole director and that it was in the process of being dissolved. This corporation ran afoul of the Canada Revenue Agency and on November 17, 2008, the Federal Court issued a certificate under the *Income Tax Act* against it and a Writ of Seizure and Sale was

subsequently issued directing the B.C. Sheriff “to seize and sell the real property or immoveables and the personal property or moveables...of Sooke Electric Ltd.”

6. As I understand the situation, Mr. Zielonka then began searching for someone through whom his ongoing electrical contracting business could continue. Sooke Electric 2010 was incorporated as a numbered company under the *Canada Business Corporations Act* on September 12, 2008, and its current directors are Catherine Cloutier and Benoit Perrault. On December 15, 2009, Mr. Zielonka in his capacity as “director and owner” [*sic*] of Sooke Electric Ltd. agreed to transfer a number of assets to Sooke Electric 2010 including vehicles, tools and inventory for the sum of \$25,000. On December 18, 2009, this agreement was concluded by way of a Bill of Sale. Ms. Cloutier executed these latter two documents on behalf of Sooke Electric 2010. It is not clear to me how these assets could have been lawfully transferred in light of the prior Writ of Seizure and Sale in favour of the Canada Revenue Agency, but that issue is not germane to this appeal.
7. On February 3, 2010, Mr. Zielonka executed a written consent form authorizing Sooke Electric 2010 to carry on business under this latter trade name. This consent was in response to a BC Corporate Registry “name approval” application filed by Ms. Cloutier so that the numbered company could carry on business as “Sooke Electric 2010”. In his consent form, Mr. Zielonka indicated that “Sooke Electric Ltd. is going out of business and I will be working for Sooke Electric 2010”.
8. Mr. Zielonka’s position before the delegate was that he was an employee who had not been paid his full wages. Sooke Electric 2010, on the other hand, argued that there was some sort of ill-defined partnership between it and Mr. Zielonka. The delegate determined that the parties were in an employment relationship and that Mr. Zielonka’s hourly wage rate was \$35. As noted at the outset of these reasons, the delegate ultimately determined that Mr. Zielonka was owed \$26,305.82 in unpaid wages (including 4% vacation pay) and section 88 interest. This sum was the net amount due after crediting Sooke Electric 2010 with \$12,867.21 in previously paid wages. Sooke Electric 2010 argued, contrary to its own payroll records, that this latter sum represented “loans”, or advances against future profit sharing, rather than wages but the delegate rejected this argument.

ISSUES

9. Sooke Electric appeals the Determination based on all three statutory grounds, namely, that the delegate erred in law (subsection 112(1)(a)), failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)) and that it now has evidence that was not available when the Determination was being made (subsection 112(1)(c)).
10. I shall now address each ground of appeal in turn.

ALLEGED ERROR OF LAW

11. Sooke Electric 2010 says that the delegate erred in finding that there was an employment relationship between the parties. Sooke Electric 2010 says that the parties were “joint venturers” – Mr. Zielonka would seek out business that would be transacted through Sooke Electric 2010 and that this latter firm would also employ some former Sooke Electric Ltd. employees. Sooke Electric 2010 says that the monies paid by it to Mr. Zielonka were simply “advances” to cover his work-related expenditures relating to the electrical contract work he secured.
12. The fundamental problem with Sooke Electric 2010’s position is that it is wholly controverted by its own documents. Sooke Electric 2010 issued Mr. Zielonka a T-4 “Statement of Remuneration” for 2009. He was

recorded in internal payroll records as an “employee” and paid statutory holiday pay; deductions were taken from his pay for income tax, employment insurance and the Canada Pension Plan. Mr. Zielonka carried out the sort of duties that would be typically performed by an employee in a managerial capacity. There is nothing in the material before me formally documenting any sort of partnership or “joint venture” arrangement between the parties.

13. In a 2-page memorandum appended to the Appeal Form, legal counsel for Sooke Electric 2010 says that the latter firm agreed to hire three former Sooke Electric Ltd. employees and agreed to “share any net profits of providing electrical services (through these three individuals) with Mr. Zielonka in return for his role as a joint venturer – who sought out business opportunities and, on occasion, made purchases of materials necessary to provide services” (para. 2). However, in his reply submission dated August 9, 2012, counsel appears to have reversed course submitting that Sooke Electric 2010 “does not say that Mr. Zielonka was in a ‘joint venture’ with [Sooke Electric 2010], rather that he agreed that: a) his Sooke Electric Ltd. employees would become employees of [Sooke Electric 2010]; and b) he would solicit electrical work for [Sooke Electric 2010] on a profit-sharing basis using his contacts, contact information and goodwill in the local market.” This latter assertion suggests that the parties entered into some sort of partnership (see *Partnership Act*, section 2). However, in order to find a partnership relationship there must be clear evidence of an intent to enter into a partnership *contract* (see *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2009 BCCA 34, leave to appeal to the Supreme Court of Canada refused: 2009 CanLII 38635) and, in my view, the evidence in this case falls well short of that mark.
14. I am satisfied that there was ample evidence before the delegate supporting his determination that the parties were in an employment relationship governed by the provisions of the *Act*.

ALLEGED BREACH OF NATURAL JUSTICE

15. Counsel says that Sooke Electric 2010’s “most important principal” is Stephane Joyal. Mr. Joyal appeared as a witness at the complaint hearing and the delegate noted Mr. Joyal’s first language is French and that “when giving evidence he required some translation assistance from Mr. Berreault” (delegate’s reasons, page R5). Counsel now asserts – and without any evidence from Mr. Joyal himself – that Mr. Joyal “neither understands or speaks more than a minimal amount of English”. Counsel says that Sooke Electric 2010 applied for an adjournment “for the purpose of finding bilingual counsel to assist Mr. Joyal” and that when this adjournment was refused, Mr. Joyal was “forced to attend a unilingual hearing without bilingual counsel or a proficient translator” and thus Sooke Electric 2010 “was denied the opportunity to be fully heard in the proceeding below”.
16. I have several reservations regarding this ground of appeal. First, there is nothing set out in the delegate’s reasons concerning any adjournment application and Mr. Zielonka, in his submission, says that he does not recall that an adjournment application was ever made. The delegate, in his submission, does not say one way or the other whether an adjournment application was made. This assertion has been advanced by counsel, not by Mr. Joyal directly, and so the allegation before me stands as hearsay evidence. I am puzzled why this allegation is not supported by a sworn statement from Mr. Joyal. On balance, I am not persuaded that a formal application for an adjournment was made at the hearing.
17. Second, even if I were satisfied that an adjournment application was made (and refused) at the complaint hearing, it does not follow that the refusal to adjourn the complaint hearing amounts to a breach of the principles of natural justice. Sooke Electric 2010’s principal, Mr. Berreault, testified at the hearing and I understand that his English is quite proficient. Mr. Joyal, for his part, has not filed any material relating to his own deficiencies in the English language. I am mystified as to how Mr. Joyal can be, in the words of counsel,

Sooke Electric 2010's "most important principal" and yet not adequately function in the English language since, quite obviously, all (or virtually all) of Sooke Electric 2010's business dealings in the Sooke area (near Victoria) would be conducted in English.

18. Third, the date of the complaint hearing is provided to the parties well in advance of the hearing. Mr. Joyal should have had ample time to find legal counsel had he wished to do so. The Employment Standards Branch's practice is to provide to parties, along with the hearing notice, a "factsheet" concerning "Adjudication Hearings" (this document is also posted on the Branch's website). This document specifically advises parties that if they wish to seek an adjournment, they should deliver a written request to the Employment Standards Branch, with supporting reasons, at least 7 days prior to the hearing. There is no evidence before me of any such written application ever being filed. Further, the same factsheet advises parties that if they require translation services, they should make their own arrangements and that the translator must not be someone who is personally involved in the proceedings.
19. Finally, my reading of the delegate's reasons indicates that Sooke Electric 2010, though its three witnesses, was fully able to put its position forward and I have not been apprised as to how Mr. Joyal's supposed lack of English language fluency adversely affected Sooke Electric 2010's ability to present its case or respond to the case advanced by Mr. Zielonka.
20. In sum, I find that this ground of appeal has not been made out.

NEW EVIDENCE

21. The Determination was issued on May 17, 2012, following a complaint hearing conducted on December 12, 2011. On November 29, 2011, Sooke Electric 2010 filed a Notice of Claim in the Provincial Court of British Columbia (Small Claims Court) seeking over \$22,000 against Mr. Zielonka. The basis of the claim was that this latter sum represented "advances" to be applied to completed electrical contract work that, in fact, was never completed. Although this claim is not mentioned in the delegate's reasons, I presume the delegate was aware of it since the Notice of Claim is included in the section 112(5) record.
22. On June 6, 2012, Sooke Electric 2010 obtained a default judgment against Mr. Zielonka for \$21,936.91 plus \$216 in costs for a total judgment of \$22,152.91. Sooke Electric 2010 now submits that this information relating to the default judgment is "new evidence" since "clearly the amounts in dispute cannot be both unpaid wages and unreturned advances".
23. I am not persuaded that this information amounts to admissible "new evidence" within subsection 112(1)(c) of the *Act*. First, the Provincial Court did not adjudicate the issue – judgment was taken in default – and so there is no *res judicata* or issue estoppel argument to be advanced. In other words, the Provincial Court did not judicially determine that the monies in dispute were "advances" or "loans" as opposed to wage payments. Second, this default judgment has now been set aside and I understand that the Small Claims action is the subject of a settlement conference currently scheduled for November 8, 2012. In light of this situation, I fail to see how this factual information is relevant to Mr. Zielonka's claim for unpaid wages under the *Act*. It may be that the Provincial Court will have to determine if Sooke Electric 2010's claim is barred due to the principles of *res judicata* or issue estoppel but that is not a matter for the Tribunal to consider.
24. To summarize, in my view, none of the appeal grounds has been made out. Accordingly, this appeal should be dismissed. Counsel for Sooke Electric 2010, in his initial appeal documents, indicated that the appellant was prepared, on a without prejudice basis, to enter into settlement discussions regarding this entire dispute perhaps under the Tribunal's auspices. The delegate, for his part, indicated in his submission that he "would

be in favour of such discussions taking place”. Mr. Zielonka does not appear to have any interest in participating in such a mediation process.

25. I have considered whether, in this case, it might be appropriate to exercise my discretion under section 114(2) of the *Act* to recommend that the parties attempt to settle the matter. However, given my findings regarding the three grounds of appeal, I do not propose to do anything more than simply confirm the Determination. Of course, my decision does not foreclose the parties from attempting to resolve their differences and if the Director of Employment of Standards wishes to offer her assistance in that process, I cannot think of any reason why she should not do so. It may also be the case, that these discussions can take place during the November 8, 2012, settlement conference scheduled in the Provincial Court.

ORDER

26. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$27,305.82 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal