

Docket: 2006-3458(EI)

BETWEEN:

EDWIN F. PINFOLD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LANDMARK AUTO SALES LTD.,

Intervenor.

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Appeal heard together on common evidence with the Appeal of  
*Edwin F. Pinfold* (2006-3459(CPP)) on May 11, 2007  
at Victoria, British Columbia

Before: The Honourable Justice D.W. Beaubier

Appearances:

Counsel for the Appellant:	Heather Wellman
Counsel for the Respondent:	Christa Akey
For the Intervenor:	Lee G. Henderson

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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 Ottawa, Canada this 23<sup>rd</sup> day of May, 2007.

"D.W. Beaubier"

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Beaubier, J.

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"D.W. Beaubier"

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Beaubier, J.

Citation: 2007TCC304  
Date: 20070523  
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2006-3459(CPP)

BETWEEN:

EDWIN F. PINFOLD,

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### **REASONS FOR JUDGMENT**

Beaubier, J.

[1] These appeals were heard together on common evidence at Victoria, British Columbia on May 11, 2007. The Appellant testified. The Intervenor called two witnesses, Lee Henderson, the owner of Landmark Auto Sales Ltd. (“Landmark”) and his wife, Catherine Henderson, who is the bookkeeper and accountant for Landmark.

[2] The particulars in dispute are set out in paragraphs 2 to 9 of file 2006-3459(CPP) which are virtually identical to those in file 2006-3458(EI). They read:

2. By letter dated June 21, 2005 the Rulings division of the Canada Revenue Agency (“CRA”) determined that the Appellant was employed by Landmark Auto Sales Ltd. (“Landmark”) in pensionable employment commencing on January 1, 2003.

3. By letter dated July 21, 2005 Landmark appealed the CRA Rulings decision to the Minister of National Revenue (the “Minister”) pursuant to section 27 of the *Canada Pension Plan* (the “*Plan*”).
4. By letter dated September 8, 2006, the Minister decided that the Appellant was not employed by Landmark under a contract of service from January 1, 2003 to June 20, 2005 (the “Period”) within the meaning of paragraph 6(1)(a) of the *Plan*.
5. In making his decision the Minister relied on the assumptions of fact as follows:
  - a) during the Period Landmark operated a used automobile sales and services business in Victoria, British Columbia;
  - b) during the Period the Appellant sold automobiles for Landmark from Landmark’s business location;
  - c) by contract signed on or about January 2, 2003 the Appellant agreed to perform services for Landmark as an independent contractor;
  - d) the Appellant did not have scheduled hours of work and was free to set his own schedule;
  - e) Landmark did not direct or provide instructions to the Appellant during the Period;
  - f) the Appellant was not required by Landmark to provide his personal services during the Period;
  - g) the Appellant could subcontract his work without Landmark’s approval;
  - h) Landmark provided the business location, the inventory of automobiles for sale, the equipment and supplies used by the Appellant to sell automobiles;
  - i) the business licence required to sell used automobiles was in Landmark’s name; and

- j) the Appellant was paid by Landmark on a set commission basis for every automobile sale he completed.

**B. THE ISSUE TO BE DECIDED**

- 7. The issue is whether the Appellant was employed by Landmark in pensionable employment during the Period.

**C. THE STATUTORY PROVISIONS UPON WHICH THE RESPONDENT RELIES**

- 8. He relies upon subsections 2(1) and 6(1) and on section 27 of the *Plan*.

**D. THE REASONS WHICH HE INTENDS TO SUBMIT**

- 9. He submits that the Appellant was not employed by Landmark in pensionable employment during the Period within the meaning of paragraph 6(1)(a) of the *Plan* as the Appellant was providing services to Landmark under a contract for service.

[3] At the opening of the hearing, Appellant's counsel admitted assumptions 5(a), (b), (h) and (i).

[4] Respecting the remaining assumptions:

5(c) – Is correct except that the contract was dated January 2, 2003, but it may not have been signed that day. However, Mr. Pinfold's activities for Landmark did not change after the contract was signed, and the contract describes those activities fairly accurately.

5(d) – Mr. Pinfold was first under contract with Landmark in August, 2000, as a salesman of used cars on Landmark's Bay Street lot. Landmark is a low-priced used car dealer in Victoria and it had two lots in 2001 and during the Period. Mr. Pinfold had owned two car dealerships, a Subaru dealership and a Chrysler dealership in Nanaimo. In 2001 and during the Period, Mr. Pinfold was constantly avoiding collection proceedings and attachments of assets by Revenue Canada and he was also involved in matrimonial litigation and proceedings. He was always instructing Landmark that he did not want salary and he was clearing his Landmark cheques as he got them. As a result, Mr. Pinfold wanted to work as an independent contractor, and not as an employee and Landmark agreed to this; that was the

mutual intent. Commencing in October 2001, Mr. Pinfold contracted with Landmark to become the manager of Landmark's Esquimalt Street used car lot. The Esquimalt lot contained about 25 used cars and reconditioned, cleaned and detailed all the used cars that Landmark purchased. From October 1, 2001 until the end of the Period, Mr. Pinfold and Landmark agreed on the following:

1. Mr. Pinfold would open the Esquimalt lot at 9:00 a.m. Monday through Saturday and leave work at 5:00 p.m. Landmark wanted the lot open throughout all day light hours and at times, perhaps at the end of the Period and later, hired a salesman for the evening hours, since Mr. Pinfold would not work after 5:00 p.m.

2. Mr. Pinfold was paid a commission of 35% of the gross profit to Landmark on each car he sold. The deductions from the sale price were the cost of the car and the cost of its reconditioning, detailing and cleaning. However, Mr. Pinfold explained to Landmark, based on his experience, that a loss on a car sale might cause a Revenue Canada investigation; so if a sale price was too low, and would book a loss, Mr. Pinfold and Landmark would allocate a portion of that cost to another car in the lot. The result of this practice was that no cars were sold at a loss. Mr. Pinfold had to be at the lot at 9:00 a.m. to be sure that the mechanic was there and working on Landmark's car purchases; Mr. Pinfold was in complete charge of the reconditioning, detailing and cleaning of all of Landmark's purchased cars, including the extent of that and the cost of all purchases and labour associated with that. He also recorded all of those costs in Landmark's car records. He was completely experienced in this, needed no training and had full discretion respecting this. Mr. Henderson purchased the cars and decided that cost and Mr. Pinfold decided on the second part of the cost to process the cars for sale. Because Mr. Pinfold wanted it, and because he was more than a salesman, Landmark and Mr. Pinfold agreed that Mr. Pinfold had a guaranteed base draw of \$2,000 per month which was offset against his commissions on sales. Mr. Pinfold also hired and fired mechanics and car washers and any other staff on the Esquimalt Street lot.

5(e) – Landmark did not instruct Mr. Pinfold respecting any aspect of the reconditioning, detailing and cleaning of the cars or on the operation of the Esquimalt lot. Mr. Henderson tried to get Mr. Pinfold to wash cars on the lot and clean the lot, where he was the only salesman, but Mr. Pinfold said that this was not a part of his duties and did not do this, although he says that he cleaned out a corner of the lot once.

5(f) – Mr. Pinfold was required to provide his personal services during the Period. In the Court’s view, the contract between Landmark and Mr. Pinfold was similar to a partnership or a joint venture contract with a base guaranteed draw. Each put in a clearly separate contribution. Mr. Pinfold’s input was services – his skill and knowledge as a manager of a car lot, of reconditioning, detailing and cleaning used cars for resale, of pricing cars to sell without a book loss to attract Revenue Canada and of selling cars. Landmark’s contribution was the rest, including, particularly, capital and the cost and choice of cars purchased. Mr. Pinfold’s contract was to provide his professional services for specified remuneration, much as a doctor or a lawyer might provide contract services to an existing professional practice for specified remuneration and for specified, limited, services.

5(g) – Mr. Pinfold could not subcontract his work.

5(j) – Is correct within the bounds already described and subject to the \$2,000 per month draw. Because sales on the Esquimalt Street lot fell from six or seven per month to about one per month while Mr. Pinfold was there, the guaranteed draw was reduced to \$1,500 per month. It appears that this reduction did not occur within the Period. The parties concluded their relationship on August 30, 2006, when Mr. Pinfold went elsewhere.

[5] The written contract dated January 2, 2003 was signed by the parties after an investigation of Landmark by CRA. Mr. Pinfold urged Landmark to do this so as to frustrate any attachment to his Landmark income by CRA. He also suggested that Landmark hold back 10% of his net commission income pending a possible “employment” finding by CRA which might require contributions for withholdings, and this was also done.

[6] The result, based on the criteria proposed in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 F.C. 553 (F.C.A.) is:

1. Contract – Landmark and Mr. Pinfold each controlled their own contributions to their operation of the Esquimalt Street lot during the Period.

2. Ownership of Tools – Landmark supplied the capital input. Mr. Pinfold supplied his services and even his expenditures of Landmark’s money on reconditioning cars was not scrutinized or controlled by Landmark.

3. Chance of Profit or Risk of Loss – Mr. Pinfeld could not lose because he contracted for a base draw and their mutual agreed accounting practice on each car sold was that cars could not be sold at a loss.

4. Integration – Each party operated independently of the other and throughout the Period they preserved that independence.

[7] Mr. Pinfeld was in business for himself. That was what the parties intended from the outset and they conducted themselves that way throughout the Period. Mr. Pinfeld had an independent contract to provide his specialized services and expertise to Landmark.

[8] The appeal is dismissed.

Signed at Ottawa, Canada this 23<sup>rd</sup> day of May, 2007.

"D.W. Beaubier"

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Beaubier, J.



CITATION: 2007TCC304  
COURT FILE NO.: 2006-3458(EI) and 2006-3459(CPP)  
STYLE OF CAUSE: Edwin F. Pinfold v. M.N.R.  
PLACE OF HEARING: Victoria, British Columbia  
DATE OF HEARING: May 11, 2007  
REASONS FOR JUDGMENT BY: The Honourable Justice D.W. Beaubier  
DATE OF JUDGMENT: May 23, 2007

APPEARANCES:

Counsel for the Appellant: Heather Wellman  
Counsel for the Respondent: Christa Akey  
For the Intervenor: Lee G. Henderson

COUNSEL OF RECORD:

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Name:

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