

**Citation: 2007TCC442  
Court File Nos. 2005-4126 (EI)  
2005-4127(CPP)**

**TAX COURT OF CANADA**

**IN RE: the Income Tax Act**

**BETWEEN:**

**1268273 ONTARIO LIMITED  
o/a AUTOPARK SUPERSTORE**

**Appellant**

**- and -**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**HEARD BEFORE JUSTICE WEISMAN  
in the Courts Administration Service, Courtroom Number 1,  
180 Queen Street West, 6<sup>th</sup> Floor  
Toronto, Ontario  
on Thursday, February 1, 2007 at 3:45 p.m.**

**ORAL REASONS**

**APPEARANCES:**

Mr. Irvin A. Schein for the Appellant

Ms. N. Kaneira for the Respondent

**Also Present:**

Mr. C.F. Nethercut Court Registrar

**A.S.A.P. Reporting Services Inc. 8 2007**

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1 Toronto, Ontario  
2 --- Upon commencing the oral reasons for judgment  
3 on Thursday, February 1, 2007 at 3:45 p.m.

4 JUSTICE WEISMAN: I have heard two  
5 appeals by 1268273 Ontario Limited operating as  
6 AutoPark Superstore against determinations by the  
7 Respondent, Minister of National Revenue, under the  
8 *Canada Pension Plan* and the *Employment Insurance*  
9 *Act* for Canada Pension Plan contributions and  
10 Employment Insurance premiums for 17 workers for  
11 the two years 2001 and 2002.

12 The 17 workers involved  
13 13 consultants or sales agents whose names are  
14 listed in the Minister's reply to the notice of  
15 appeal and four other persons namely, Carol Speirs,  
16 who cleaned the Appellants' cars; Jerry Woytkiw,  
17 who worked on a part-time basis at night for  
18 security purposes and snow removal; and Dean Clarke  
19 and Dianne Wilding who both sold warranties,  
20 undercoating, financing and insurance.

21 In order to resolve the issue  
22 before the Court, the total relationship between  
23 the parties and the combined force of the whole  
24 scheme of operations must be considered in order to  
25 resolve the central or fundamental question as to

1 whether the workers were performing their services  
2 for the Appellant as people in business on their  
3 own account or were performing them in the capacity  
4 of employees. To this end, the evidence in this  
5 matter must be subjected to the four-and-one test  
6 laid down as guidelines by the Federal Court of  
7 Appeal in *Wiebe Door Services Ltd. v. M.N.R.* 87 DTC  
8 5025; as confirmed in *671122 Ontario Ltd. v. Sagaz*  
9 *Industries Canada Inc.*, [2001] S.C.J. No. 61; and  
10 *Precision Gutters Ltd. v. Canada (Minister of*  
11 *National Revenue)*, [2002] F.C.J. 771; and as  
12 further amplified by *Légaré v. Canada*,  
13 [1999] F.C.J. No. 878 in the Federal Court of  
14 Appeal and *Pérusse v. Canada*, [2000] F.C.J. No. 310  
15 also in the Federal Court of Appeal.

16 With reference first to the  
17 13 consultants, I note that they all signed the  
18 independent sales staff agreements that are found  
19 at Tab 2 in Exhibit A-1, clearly establishing the  
20 mutual intent of the parties that the  
21 13 consultants be independent contractors without  
22 benefits or source deductions.

23 Adverting to the four-fold test  
24 with reference to these 13 consultants and starting  
25 with control, I found enough evidence of control to

1 satisfy me that the control factor indicates that  
2 these 13 were employees. In the first place, the  
3 sales that they made needed managerial approval.  
4 They were not completely free to deal. In this  
5 respect, the prices of the vehicles being sold were  
6 closely controlled by the Appellant as were the  
7 commissions paid to the consultants. The evidence  
8 of that is to be found in Tab 2 of Exhibit R-1  
9 being schedule "A" setting out commissions as  
10 established by the Appellant.

11                   There was also evidence that there  
12 was a requirement that their shifts be either  
13 personally attended to or covered, again not free  
14 to come and go as they pleased. Their services  
15 were required personally, which is an aspect of  
16 control. The Saturday morning sales meetings were  
17 required to be attended unless they were occupied  
18 otherwise selling vehicles, and all in all I was  
19 satisfied that there is a relationship of  
20 subordination between the 13 consultants and the  
21 Appellant as opposed to one of independence that  
22 one would normally expect to see in an independent  
23 contractor/payor relationship.

24                   So far as tools are concerned, I  
25 found this factor equivocal. The Appellant, there

1 is evidence, provided desks, provided the premises,  
2 the offices from which they worked and the lot upon  
3 which the vehicles were situated unless there was a  
4 situation which was unusual and not the usual case  
5 where the car was to be taken of the premises to  
6 the potential purchaser.

7 I am satisfied that all these  
8 consultants had a computer on the desk and all the  
9 various forms that had to be signed were provided  
10 by the Appellant. I do not agree with the Minister  
11 that the cars which were the item that were being  
12 sold can be considered a tool. On the other hand  
13 the consultants according to the reply,  
14 paragraph 12(aa), which is substantiated by the  
15 evidence, supply their own business cards, cellular  
16 phones, office supplies, sales licenses, personal  
17 logs, invoices and their own vehicles.

18 The consultant's vehicle is a  
19 complication because normally that would be a large  
20 tool supplied by the consultant, but in this case  
21 because of the sales incentive of \$400 per month  
22 should the consultant exceed ten sales in that  
23 month, and the concomitant cost of the vehicle  
24 assessed against the consultant should they fail  
25 to meet the quota of ten per month, I found that

1 the vehicle factor was more relevant to the issue  
2 of profit and loss than I did to ownership of  
3 tools. So I will pass onto chance of profit.

4                   It is true that the Appellant  
5 advertised and there was a rotation system whereby  
6 the potential clients, as a result of advertising,  
7 entered the premises then there would be turns  
8 taken among those consultants present on the  
9 premises to service those customers, but the  
10 evidence satisfied me that the bulk of the business  
11 came from the consultants' own prior clients - that  
12 is the sort of salesman that the Appellant was  
13 looking for when they entered into the independent  
14 contractor agreement with them and they encouraged  
15 their consultants to have their own clientele.

16                   It is clear that the remuneration  
17 was strictly by way of commission, that there was a  
18 clear chance of profit by the exercise of talent in  
19 sales, by ingenuity, by initiative, and one of the  
20 pleadings mentioned, resort to the internet. This  
21 displays the use of enterprise and sound  
22 management.

23                   There was also the chance of an  
24 additional \$400 per month as I have already alluded  
25 to if more than ten vehicle were sold. So the

1 chance of profit factor indicates that these 13  
2 were independent contractors.

3                   So far as risk of losses is  
4 concerned, I take it as a risk of loss when one is  
5 working solely on commission, the opportunity cost  
6 which is a common economic term, in other words,  
7 the income that could have otherwise been earned on  
8 an hourly or other basis during the time that they  
9 expended trying to sell cars, and I am sure that  
10 they had to show a car to numerous clients before  
11 they succeeded in selling one, that is a loss of  
12 time which means money.

13                   Again, there is the possibility of  
14 loss should they fail to meet the quota of ten cars  
15 per month and have to pay for their own vehicle,  
16 and there was the list of expenses for items that I  
17 have already enumerated in paragraph 12(aa) of the  
18 Minister's reply to the notice of appeal.

19                   Clearly when someone is working on  
20 commission if there are no sales, there is no  
21 income. Just for interest's sake, there is a  
22 series of decisions by Justice Bowman, or Chief  
23 Justice Bowman as he now is, holding that  
24 commission salesmen are independent contractors.  
25 The risk factor also accordingly indicates that the

1 13 consultants were independent contractors.

2                                Passing on to -- well, before I do  
3 that, let's just summarize. The control test with  
4 reference to the 13 consultants indicates that they  
5 are employees. The tools factor is equivocal, both  
6 chance of profit and risk of loss factors indicate  
7 that they are independent contractors. The cases  
8 have held that these four factors do not merit  
9 equal weight in all cases.

10                              They are fact driven and in this  
11 case I would think that more weight should be given  
12 to the chance of profit and risk of loss factors  
13 which, as I have said, indicates that these 13 were  
14 independent contractors; but even if the result had  
15 been closer, I would have invoked the test in *Wolf*  
16 *v. M.N.R.*, 2002 DTC 6853 and in *Royal Winnipeg*  
17 *Ballet v. M.N.R.*, 2006 DTC 6323, because of the  
18 clear intent of the parties as evidenced by Tab 2  
19 in Exhibit 1 and I have no problem concluding that  
20 the 13 were independent contractors looked at from  
21 both the four-and-one point of view and from the  
22 intention of the parties point of view.

23                              So far as Carol Speirs is  
24 concerned, I was careful to point out to counsel  
25 for the Appellant that the burden was on the



1 Appellant to establish the fact that the Minister's  
2 determination was not objectively reasonable on the  
3 four heads or guidelines set out in *Wiebe Door* and  
4 that was not done in the case of Carol Speirs.

5                   The evidence with reference to her  
6 was that she was paid on an hourly basis but we do  
7 not know how much per hour. Her hours were not  
8 recorded or checked but were trusted, and the  
9 \$1,087.50 that she claimed on her one invoice plus  
10 GST on Tab 35 was just accepted because she was  
11 trusted.

12                   Mr. Mill, on behalf of the  
13 Appellant, candidly admitted that he did not know  
14 who owned the tools that she used other than the  
15 water, so I have no evidence as to what degree of  
16 control was exercised over her, who owned the  
17 tools, whether she had a chance of profit, whether  
18 she had a risk of loss, and whether she did the  
19 work personally or whether she was free to have the  
20 work done by other hands, helpers or employees.

21                   So, the Appellant having failed to  
22 discharge the burden of proof, I have no choice but  
23 to find that the decision of the Minister has to  
24 stand. It is objectively reasonable and  
25 Carol Speirs was an employee under a contract of

1 service during the period under review.

2 Jerry Woytkiw. This gentleman  
3 worked part time evenings when needed, when there  
4 was vandalism and security was deemed warranted,  
5 and he also did snow plowing when required, paid on  
6 an hourly basis. I have sufficient evidence to  
7 make a decision in reference to Mr. Woytkiw because  
8 he had a truck expense which is a large tool, and  
9 while I had no evidence as to control, it was very  
10 clear that one who shows up on a part-time basis  
11 for security and snow clearing purposes and who has  
12 his own truck certainly has a risk of loss if the  
13 truck expenses are not defrayed by income that he  
14 is earning from the Appellant or otherwise, and  
15 concomitantly I would have thought that there is a  
16 chance of profit by the use of initiative and  
17 ingenuity and sound management and I therefore  
18 concluded that he was an independent contractor.

19 This finally brings me to  
20 Dean Clarke and Dianne Wilding. I have seen or I  
21 have heard that the facts in either case are the  
22 same. They had the same function for the Appellant.  
23 They sold warranties, rustproofing, financing and  
24 insurance. It is my understanding from the  
25 evidence that there was some special expertise for

1 these two. It took shopping around both for  
2 insurance rates and for financing in order to be  
3 able to offer the customer the best possible  
4 contracts in those regards. It is fairly clear  
5 that by the exercise of their skill in that regard  
6 and their initiative and their imagination, they  
7 could offer competitive rates, and they could  
8 attract more sales.

9 I find that they had a chance of  
10 profit, and also when they are working strictly on  
11 commission as I have already said with reference to  
12 the 13, if they are not selling, they are not  
13 making money which is a loss of time and  
14 opportunity cost. There was one factor with  
15 reference to these two and that is the tools which  
16 would indicate that they are employees because they  
17 were given offices and phones and computers and all  
18 the forms. The only thing they supplied themselves  
19 was their business cards and invoices that they  
20 submitted to the Appellant. Again, they both  
21 signed the independent contractor agreement, Tab 2,  
22 Exhibit A-1. They worked on a commission basis. I  
23 would give more weight to the profit and loss  
24 factor and I find them independent contractors as  
25 well.

1                   There was a suggestion that if a  
2 consultant made false promises or extravagant  
3 compromises to a potential customer that was not  
4 approved by the sales manager then they would have  
5 to pay for that cd player or whatever and that was  
6 a risk of loss. I agree with the counsel for the  
7 Minister that that is not a risk of loss.

8                   Throughout the proceedings, I  
9 considered drawing an adverse inference against the  
10 Appellant by virtue of the failure to call any of  
11 these 17 workers and I understand the Supreme Court  
12 of Canada decision in *Levesque v. Comeau*, [1970]  
13 S.C.R. 1010, in brief it says: The failure of a  
14 pivotal key witness to testify without explanation  
15 enables the Court to draw an adverse inference that  
16 the testimony would nothave been helpful to the  
17 Appellant's case.

18                   I have always understood that that  
19 explanation has to come from the Appellant. I did  
20 not agree with counsel for the Appellant that  
21 somehow it was up to the Minister to explain the  
22 absence of these witnesses.

23                   Having said that, I spent the  
24 trial considering drawing that adverse inference  
25 and I decided in the end that I have heard

1 sufficient evidence, including that of Mr. Charlton  
2 to satisfy me that I should not exercise my  
3 discretion and draw an inference because I heard  
4 sufficient evidence to enable me to decide the  
5 various issues involved in this matter.

6                                   In the result, the burden is on  
7 the Appellant to demolish the assumptions contained  
8 in the Minister's reply to the notice of appeal.  
9 The Appellant failed to satisfy me on a balance of  
10 probabilities with reference to Carol Speirs that  
11 the decision of the Minister was not objectively  
12 reasonable pursuant to *Légaré* and *Pérusse*, and,  
13 therefore, the two appeals with reference to her  
14 will be dismissed and the decision of the Minister  
15 confirmed.

16                                   With reference to the  
17 13 consultants and Jerry Woytkiw, Dean Clarke and  
18 Dianne Wilding, sufficient of the Minister's  
19 assumptions have been demolished to establish that  
20 the decision of the Minister was not objectively  
21 reasonable. The Appellant has discharged the  
22 burden of proof upon him in this regard and  
23 those 16 -- actually 32 appeals, 16 under the  
24 *Canada Pension Plan* and 16 under the *Employment*  
25 *Insurance Act* will be allowed and the decisions of

1 the Minister vacated.

2                                   Have I neglected anything? I  
3 appreciate your assistance, thank you.

4                                   THE REGISTRAR: This matter is  
5 concluded.

6 --- Whereupon concluding the oral reasons for  
7 judgment.

I HEREBY CERTIFY THAT I have, to the best  
of my skill and ability, accurately recorded  
by Shorthand and transcribed therefrom, the  
foregoing proceeding.



Judy Halyk, Computer-Aided Transcription

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CITATION: 2007TCC442

COURT FILES NO.: 2005-4126(EI) and  
2005-4127(CPP)

STYLE OF CAUSE: 126873 Ontario Limited o/a  
Autopark Superstore and  
The Minister of National Revenue

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 1, 2007

ORAL REASONS FOR  
JUDGMENT BY: The Honourable N. Weisman,  
Deputy Judge

DATE OF ORAL JUDGMENT: February 1, 2007

APPEARANCES:

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