Docket: 2017-1301(EI)

BETWEEN:

BOIFOR EQUIPMENT INC.

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 20, 2018, at Montréal, Quebec

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant: Guillaume Richard

Counsel for the Respondent: Julien Dubé-Senécal

JUDGMENT

In accordance with the attached reasons for judgment, the appeal under subsection 103(1) of the *Employment Insurance Act* (the "Act") is allowed and the decision that the Minister of National Revenue made on January 5, 2017 (the "Decision"), is amended as follows:

1. David Marion and Marc Lepage did not hold insurable employment within the meaning of the Act when they worked for the appellant for the period of April 16, 2014 to December 31, 2015; and

2. Since the appellant is not appealing the period from January 1, 2014 to April 15, 2014, the Decision remains unchanged and, more specifically, it was noted that David Marion and Marc Lepage held insurable

employment within the meaning of the Act when they worked for the appellant during that period.

Signed at Ottawa, Canada, this 14th day of March 2018.

"Dominique Lafleur"

Lafleur J.

Citation: 2018 TCC 53
Date: 20180314
Docket: 2017-1301(EI)

BETWEEN:

BOIFOR EQUIPMENT INC.

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Lafleur J.

I. BACKGROUND

[1] The Court is dealing with an appeal by Boifor Equipment Inc. ("Boifor") under subsection 103(1) of the *Employment Insurance Act* (SC 1996, c. 23, as amended) (the "Act") from two decisions made by the Minister of National Revenue (the "Minister") affirming that the jobs of Marc Lepage and David Marion were insurable jobs under the Act. Those decisions were both dated January 5, 2017.

[2] At the start of the hearing, counsel for Boifor informed the Court that this appeal would only deal with the period from April 16, 2014 to December 31, 2015 (the "Period"); he admits that, for the period from January 1, 2014 to April 15, 2014, the jobs of Mr. Lepage and Mr. Marion were insurable under the Act.

[3] All citations of statutory provisions were taken from the Act, unless otherwise stated.

[4] For the Period, the appellant admits that Mr. Lepage and Mr. Marion are both bound by a contract of service under paragraph 5(1)(a); the respondent does not challenge this admission.

[5] Therefore, this is a matter of seeking whether the exceptions set forth in paragraphs 5(2)(b) and 5(2)(i) apply. They read as follows:

5(2) Excluded employment — Insurable employment does not include	**5(2) Restriction** — N'est pas un emploi assurable :
(*a*) . . .	*a*) […]
(*b*) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;	*b*) l'emploi d'une personne au service d'une personne morale si cette personne contrôle plus de quarante pour cent des actions avec droit de vote de cette personne morale;
. . .	[…]
(*i*) employment if the employer and employee are not dealing with each other at arm's length.	*i*) l'emploi dans le cadre duquel l'employeur et l'employé ont entre eux un lien de dépendance.

[6] Paragraph 5(3)(a) specifies that it is the *Income Tax Act* (RSC (1985), c. 1, (5th Supp.), as amended) (the "ITA") that determines the meaning of the words "dealing at arm's length":

5(3) Arm's length dealing — For the purposes of paragraph (2)(*i*),	**5(3) Personnes liées** — Pour l'application de l'alinéa (2)*i*) :
(*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and	*a*) la question de savoir si des personnes ont entre elles un lien de dépendance est déterminée conformément à la *Loi de l'impôt sur le revenu*;
. . .	[ ]

[7] As part of this appeal, since Mr. Lepage and Mr. Marion are "dealing at arm's length" between one another and are "dealing at arm's length" with Boifor within the meaning of the ITA, only paragraph 251(1)(c) of the ITA is relevant:

251(1) Arm's length — For the purpose of this Act,	**251(1) Lien de dépendance** — Pour l'application de la présente loi :
. . .	[…]
(*c*) in any other case, it is a question of fact whether persons not related	*c*) dans les autres cas, la question de savoir si des personnes non liées

to each other are, at a particular time, dealing with each other at arm's length.	entre elles n'ont aucun lien de dépendance à un moment donné est une question de fait.

II. THE FACTS

[8] Mr. Lepage and Mr. Marion testified at the hearing. They were credible, and the Court is of the view that the facts conveyed by them reflect reality. In that regard, the Court also notes that Nicole Guy, Appeals Officer, acknowledged that the facts conveyed during the hearing matched what had been reported to her during her file review of Boifor.

1. Corporate structure

[9] Boifor is held by three people: Mr. Lepage holds 26 class D non-participating preferred shares with 25.7% of the votes, Mr. Marion holds 25 class D non-participating preferred shares with 24.8% of the votes, and Gestion Boifor Inc. ("Gestion") holds 25 class B shares and 25 class C shares, with those shares being the only participating shares issued and which have 49.5% of the votes, and 300,000 class E shares (non-voting and non-participating). The only two administrators and directors of Boifor are Mr. Lepage and Mr. Marion; Mr. Lepage is also President and Mr. Marion is Vice President and Secretary.

[10] Gestion is held in equal portions by Mr. Lepage and Mr. Marion: Mr. Lepage holds 50 class A shares, 10 class C shares, 325,000 class F representing 50% of votes and participation; Mr. Marion holds 50 class A shares, 10 class B shares, and 325,000 class F shares representing 50% of votes and participation. The only two administrators and directors of Gestion are Mr. Lepage and Mr. Marion; Mr. Marion is also President and Mr. Lepage is Vice President and Secretary.

[11] A shareholder agreement was signed by all parties in that group; that agreement is not a unanimous shareholder agreement.

[12] Gestion was created for tax and business purposes, and more specifically for the purpose of asset protection; Gestion was created during the redemption of shares held by Jacques Marion, the father of David Marion. Gestion rents offices to Boifor at which the business carries out its activities, along with the computer equipment and furniture.

2. The company

[13] Boifor acts as an agent for certain corporations located in western Canada and United States, and it manufactures items of forestry equipment through sub-contractors. Boifor has around one hundred clients.

[14] Mr. Lepage's role consists of the sale of items, supervising manufacturing, and research and development. Mr. Marion is instead involved with the technical side, installation/training, accounting, purchasing items/equipment, and supervising 2 part-time employees.

3. The role of the parties and decision-making

[15] Decisions in Boifor and in Gestion, whether regarding operations or management, are always made together by Mr. Lepage and Mr. Marion: they always get along well, they always reach consensus, both are efficient and there is harmony between them. Mr. Lepage and Mr. Marion are two business partners who are committed to the best interests of their company, with each having their own qualities that benefit them. Given the complementary tasks that are done by each of them, what stood out from the evidence is that if one of them wanted to leave the company, the other could not continue to operate the company on his own and would have to liquidate it.

[16] Mr. Lepage testified that, with respect to the schedule for annual leave (around 3 to 4 weeks per year), he notified Mr. Marion beforehand so as to avoid any overlap. He added that it is not possible for him to dismiss Mr. Marion and vice versa. The only solution would consist of liquidating Boifor or redeeming Mr. Marion's shares. The official work timetable is from 8:00 a.m. to 4:00 p.m., but Mr. Lepage and Mr. Marion testified that they work every day—they sometimes start at 5:30 a.m. and finish at around 11:00 p.m. (given the time difference with the west of the continent); in addition, Mr. Marion travels very frequently on weekends for equipment breakdowns. Their salary was set through a common agreement—the same base salary is paid and was set according to the salary that Mr. Lepage was paid previously at another corporation. Overtime is not paid.

[17] Mr. Lepage has acted as guarantor for loans due from Boifor to the Caisse populaire. The Court can validly suppose that Mr. Marion also acted as a guarantor with the Caisse, since Mr. Marion confirmed at the start of his testimony that everything that Mr. Lepage had told was correct and also applied to him.

[18] Ms. Guy testified at the hearing; she explained the process that led her to find that the jobs at issue were not excluded and therefore were insurable, since in her view, neither Mr. Lepage nor Mr. Marion held more than 40% of Boifor's voting shares. Ms. Guy confirmed that she did not research whether the exception under paragraph 5(2)(i) was applicable in this case, namely whether the jobs did not have an arm's-length relationship.

III. POSITIONS OF THE PARTIES

[19] Boifor maintains that since Mr. Lepage and Mr. Marion each held more than 40% of Boifor's voting shares, their jobs were not insurable under the terms of paragraph 5(2)(b) during the Period. In addition, since there is not an arm's-length relationship between Boifor and Mr. Lepage on the one hand and Mr. Marion on the other, their jobs were not insurable during the Period according to paragraph 5(2)(i).

[20] The respondent instead maintains that neither Mr. Lepage nor Mr. Marion controlled more than 40% of Boifor's voting shares and that there was an arm's-length relationship between Mr. Lepage on the one hand and Mr. Marion on the other during the Period. Given that neither the exception under paragraph 5(2)(b) or the one under paragraph 5(2)(i) were applicable and no other exception is applicable in this case, the jobs of Mr. Lepage and Mr. Marion at Boifor were insurable for the purposes of the Act during the Period.

IV. DISCUSSION

1. Paragraph 5(2)(b) — control of more than 40 percent of voting shares in Boifor

[21] The respondent maintains that the conditions under paragraph 5(2)(b) are not met in this case, since Mr. Lepage and Mr. Marion only hold 25.7% and 24.8% respectively of the votes in Boifor. Given that according to paragraph 5(2)(b), the employee must control more than 40% of voting shares, the votes held by Gestion cannot be considered in this calculation. During the hearing, in reply to a question from the Court, the respondent admitted that if Gestion was liquidated, the exception under paragraph 5(2)(b) would be applicable and therefore, the jobs of Mr. Lepage and Mr. Marion at Boifor would not be insurable during the Period, since the 40% test would be satisfied.

[22] The respondent added that the testimonies are clear: Mr. Lepage and Mr. Marion make all the decisions together, they work together, one cannot dismiss the other and one alone cannot decide to pay a dividend or issue shares.

Thus, according to the respondent, each shareholder can always block the control of the other.

[23] For a job to be excluded under the terms of paragraph 5(2)(b), the employee must control more than 40% of the employer's voting shares.

[24] Case law teaches that this paragraph does not mention control of a corporation, but control of the shares (*Canada (Attorney General) v Cloutier*, [1987] 2 FC 222 at para 4, [1986] FCJ No. 778 (QL) [*Cloutier*]). The word "control" specifies not only *de jure* control, but also effective control (*Quincaillerie Le Faubourg (1990) inc v MNR*, 2009 TCC 411 at para 34, [2009] TCJ No 336 (QL) [*Quincaillerie Le Faubourg*]).

[25] Effective control is control that can be freely exercised and not impeded by circumstances independent of the person having control (*Cloutier*, above). In *Cloutier*, above, what stood out from the facts was that Mr. Cloutier had transferred his shares to a trust and that for as long as the shares were held in trust, the voting rights associated with the shares could not be exercised. The Federal Court of Appeal had then found that Mr. Cloutier's employment was insurable because Mr. Cloutier did not have effective control over the shares in his employer that were held in trust.

[26] In *Dupuis v MNR*, 90 NR 399, [1988] FCJ No. 556 (QL) [*Dupuis*], the Federal Court of Appeal observed that:

> As this Court pointed out in Cloutier (1987), 74 N.R. 396, this provision does not speak of control of a corporation but of control of shares: it might now be added that it also does not speak of ownership, but of control. It is quite clear that a person who controls 100% of the shares of a corporation which, in its turn, controls over 40% of the shares of a second corporation controls over 40% of the latter's shares.
>
> [Emphasis added]

[27] The question of whether this same reasoning is applicable arises in the case of Mr. Lepage and Mr. Marion, who each hold 50% of the shares in Gestion, and not 100%, as was the case for Mr. Dupuis in *Dupuis*, above. The Court is of the view that this same reasoning is applicable, given the case law of this Court and the Federal Court of Appeal summarized above.

[28] In *Paris Ladouceur & Associés Inc v MNR*, 2005 TCC 107, [2005] TCJ No. 62 (QL), this Court found that adding a layer to a corporation cannot change the reasoning in *Dupuis*, above. Thus, the Court found that an employee who holds 100% of a corporation, which in turn holds 50% of another corporation that controls 100% of the employer corporation, will be considered as controlling more than 40% of the voting shares in the employer corporation (para 20).

[29] In *Remstar Distribution Inc et al. v MNR*, [2002] TCJ No. 479 (QL), this Court found that the jobs of Maxime and Julien Rémillard were not insurable employment because they controlled more than 40% of the voting shares in the corporations that employed them. The Court had found the following facts (para 46): Maxime and Julien Rémillard each hold 50% of the shares in Remstar Corporation Inc., which controls 100% of the shares in Remstar Distribution Inc. ("Distribution") and Remstar Productions Inc. ("Productions"); Maxime was president and chief executive officer of Productions and Julien was president and chief executive officer of Distribution. Julien and Maxime were the only two administrators for three corporations. Decisions were made consensually and their salary had been set by a common agreement (para 23, 24 and 40). Nadon J.A. of the Federal Court of Appeal found that the judge of the Tax Court of Canada made no error by finding that Maxime and Julien Rémillard each controlled over 40% of the voting shares of the companies for which they respectively worked (*Canada (Attorney General) v Remstar Distribution Inc*, 2004 FCA 8, [2004] FCJ No. 131 (QL) [*Remstar*]).

[30] In addition, the respondent appears to confuse control of voting shares and control over management of the company when she advanced the following facts: Mr. Lepage and Mr. Marion make all decisions together, they work together, one cannot dismiss the other and one person alone cannot decide to pay a dividend or issue shares. Thus, according to the respondent, each shareholder can always block the control of the other. The Federal Court of Appeal clearly found in *Canada (Attorney General) v Acier Inoxydable Fafard Inc*, 2002 FCA 214, 294 NR 384, [2002] FCJ No. 794 (QL), that for the purposes of paragraph 5(2)(b), administrative control of the company is not relevant; rather, it is control of its voting shares that is important (para 9).

[31] Further, the facts in this appeal are completely different from those in *Cloutier*, above, cited by the respondent in support of its theories. In that case, the worker did not exercise his voting rights while the shares were held in trust. In this case, Mr. Lepage and Mr. Marion can exercise their voting rights.

[32] Thus, in accordance with precedent set by the Federal Court of Appeal in *Remstar*, above, the Court finds that the jobs of Mr. Lepage and Mr. Marion for Boifor during the Period were not insurable employment within the meaning of the Act because paragraph 5(2)(b) is applicable: Mr. Lepage controlled 50.45% of voting shares in Boifor (25.7% of votes for shares held directly by Mr. Lepage, plus an average of 49.5% of the votes for shares held by Management) and Mr. Marion controlled 49.55% of them (24.88% of the votes for shares held directly by Mr. Marion, plus an average of 49.5% of votes for shares held by Gestion).

[33] The Court is of the view that applying the Act in the manner put forward by the respondent would give results that are absurd and contrary to the purpose of the Act: it is social in nature and aims to provide financial assistance to workers who lose their jobs for various periods of time (*Quincaillerie Le Faubourg*, above, at para 8). Allowing Mr. Lepage and Mr. Marion to benefit from the advantages offered by the Act when they are both entrepreneurs who control the entire structure of their company and make all the decisions regarding the management and operations of the company would be contrary to the purpose of the Act.

[34] Therefore, the appeal is allowed and the Minister's decision is amended to state that, during the Period, Mr. Lepage and Mr. Marion did not hold insurable employment with Boifor within the meaning of the Act.

[35] In addition, the Court would also have been able to allow the appeal and amend the Minister's decision on the ground that Mr. Lepage and Mr. Marion both held a job as part of which the employer and employee were not dealing at arm's length and, consequently, that each of their jobs at Boifor were not insurable by the terms of paragraph 5(2)(i).

[36] The respondent puts forward that both Mr. Lepage and Mr. Marion were dealing with Boifor at arm's length and it is relying on the definition of "dealing at arm's length" for the purposes of the ITA (*Canada v McLarty*, 2008 SCC 26 at para 62, [2008] 2 SCR 79; *Campbell v Canada (Minister of National Revenue)*, [1998] TCJ No 571 (QL) at para 13; *Peter Cundill & Associates Ltd v The Queen*, 91 DTC 5085 at para 31):

- was there a common mind which directs the bargaining for both parties to a transaction;
- were the parties to a transaction acting in concert without separate interests; and

– was there “de facto” control.

[37] Following those principles, the respondent maintains that there is an arm’s-length relationship between Boifor and Mr. Lepage and Mr. Marion, since neither of them control Boifor and each of them have distinct interests for establishing their respective salaries. The respondent adds that the work conditions in that regard need to be considered and, in this specific case, since the salary was set according to market conditions and since bonuses were paid, there was an arm’s-length relationship between Mr. Lepage and Boifor and Mr. Marion and Boifor.

[38] In order to determine whether the employee and employer are dealing at arm’s length according to paragraph 5(2)(i) of the Act, the Court is of the view that all the circumstances must be analyzed in order to determine whether the job is “employment if the employer and employee are not dealing with each other at arm’s length.” For the following reasons, the Court is of the view that no such arm’s-length relationship exists between both Mr. Lepage and Mr. Marion on the one side and Boifor on the other side.

[39] The facts that were presented as evidence at the hearing clearly show that Mr. Lepage and Mr. Marion act together, without distinct interests, as part of their relationship with Boifor. The evidence showed that Mr. Lepage and Mr. Marion make all the decisions in a concerted manner regarding the company’s operations and management; both of those people act in the best interests of Boifor and, ultimately, in their interest since they are the ultimate owners of Boifor. The efforts made by each of them as part of their employment will first benefit Boifor and then both shareholders. Mr. Lepage and Mr. Marion are both business partners who get along for the good operation of their company. The shareholder agreement has no provision that would grant control to either Mr. Lepage or Mr. Marion.

[40] In considering the relationships of Mr. Lepage and Mr. Marion as employees compared to Boifor as employer, the Court is of the view that a substantially similar contract of service would never have been signed with a person dealing at arm’s length with Boifor.

[41] As mentioned above, Mr. Lepage and Mr. Marion work non-stop; they are always available, starting their work day at 5:30 a.m. and ending it at around 11:00 p.m. Mr. Marion testified that he and Mr. Lepage work 24 hours per day, 7 days per week. The testimonies of Mr. Lepage and Mr. Marion were credible and to me, they seem to be businessmen and entrepreneurs who are totally devoted to their company, Boifor.

[42] Boifor does not impose specific work hours on them. Mr. Lepage and Mr. Marion take vacation at their discretion by synchronizing on the timetable so as not to leave the company with no management. As a result, Mr. Lepage and Mr. Marion have a great deal of freedom.

[43] The salary is set based on one of Mr. Lepage's past jobs. According to the Court, this salary may appear to be reasonable at first glance, but given the hours that each of them dedicates to the company, it is clear that a person dealing at arm's length would never have signed such a contract of service. In addition, no overtime was paid by Boifor.

[44] In addition, Mr. Lepage and Mr. Marion were Boifor's sole directors and administrators. Furthermore, what stood out from the evidence was that Mr. Lepage and Mr. Marion guaranteed Boifor's loans from the Caisse populaire. It is extremely rare that employees dealing at arm's length would guarantee their employer's loans.

[45] For those reasons, the appeal is allowed and the Decision is amended in the following manner:

1. David Marion and Marc Lepage did not hold insurable employment within the meaning of the Act when they worked for Boifor during the period of April 16, 2014 to December 31, 2015; and

2. Since Boifor is not appealing the period from January 1, 2014 to April 15, 2014, the Decision remains unchanged and, more specifically, it is noted that David Marion and Marc Lepage held insurable employment within the meaning of the Act when they worked for Boifor during that period.

Signed at Ottawa, Canada, this 14th day of March 2018.

"Dominique Lafleur"

Lafleur J.

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APPEARANCES:

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