Docket: 2018-4076(EI)

BETWEEN:

BRENDA BULL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Ross Bull (2018-4077(EI)) on August 24, 2023,
at Gander, Newfoundland and Labrador

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant:	Philip C. Whalen
Counsel for the Respondent:	David Lasaga

JUDGMENT

The Appellant's appeal of the decision of the Minister of National Revenue of July 6, 2018 is dismissed, without costs, and the decision is confirmed.

Signed at Toronto, Ontario, this 5th day of September 2023.

"David E. Spiro"

Spiro J.

Docket: 2018-4077(EI)

BETWEEN:

ROSS BULL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Brenda Bull (2018-4076(EI)) on August 24, 2023,
at Gander, Newfoundland and Labrador

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant:	Philip C. Whalen
Counsel for the Respondent:	David Lasaga

JUDGMENT

The Appellant's appeal of the decision of the Minister of National Revenue of July 6, 2018 is dismissed, without costs, and the decision is confirmed.

Signed at Toronto, Ontario, this 5th day of September 2023.

"David E. Spiro"

Spiro J.

Citation: 2023 TCC 133
Date: 20230905
Docket: 2018-4076(EI)

BETWEEN:

BRENDA BULL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Docket: 2018-4077(EI)

AND BETWEEN:

ROSS BULL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] Mr. Ross Bull and Ms. Brenda Bull have been married for over fifty years. They held shares in a corporation that owned a family business in Eastport, Newfoundland and Labrador. The business began in 1975 as a gas station and motor vehicle repair shop and later included snow removal, rental of seasonal cottages, and sale of used vehicles. Mr. Bull ran the garage, did the snow removal, and managed the used vehicle sales. Ms. Bull was responsible for the cottage rentals and all of the office work and administration.

[2] Each Appellant claimed benefits under the *Employment Insurance Act* for periods starting in 2011 or 2012 and ending in 2016 on the basis that they were employed by the corporation that owned the business, Midway Automotive Centre Limited ("Midway"). There is no dispute that the Appellants were employees of Midway. However, the Minister of National Revenue (the "Minister") decided that their employment was excluded from insurable employment under the *Employment Insurance Act* for two reasons:

(a) each controlled more than 40% of Midway's voting shares; and

(b) neither dealt at arm's length with Midway.

[3] Each Appellant has appealed the Minister's decision. The appeals were heard on common evidence. Ms. Bull was the only witness.

[4] On the evidence, the Crown has succeeded in proving, on a balance of probabilities, the facts necessary to support the Minister's decisions that:

(a) each Appellant controlled more than 40% of Midway's voting shares; and

(b) neither Appellant dealt at arm's length with Midway.

The Law

[5] Subsection 5(2) of the *Employment Insurance Act* lists the exclusions from insurable employment. The exclusions relevant to these appeals are set out in paragraphs 5(2)(b) and 5(2)(i) of that statute:

> **Excluded employment**
>
> 5(2) Insurable employment does not include
>
> …
>
> (b) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> …
>
> (i) employment if the employer and employee are not dealing with each other at arm's length.

[6] Paragraph 5(2)(i) also requires consideration of subsection 5(3) of the *Employment Insurance Act* which provides that if the employer is related to the employee within the meaning of the *Income Tax Act*, they are deemed to deal with each other at arm's length only if the Minister is satisfied that it is reasonable to conclude that they would have entered into a substantially similar employment contract had they been dealing with each other at arm's length:

> **Arm's length dealing**
>
> 5(3) For the purposes of paragraph (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
> >
> > (b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[7] The relevant provisions of the *Income Tax Act* are set out in section 251:

> **Arm's length**
>
> 251(1) For the purposes of this Act,
>
> > (a) related persons shall be deemed not to deal with each other at arm's length;
> >
> > …
>
> **Definition of *related persons***
>
> 251(2) For the purpose of this Act, ***related persons***, or persons related to each other, are
>
> > (a) individuals connected by blood relationship, marriage or common-law partnership or adoption;
> >
> > (b) a corporation and
> >
> > …

> (ii) a person who is a member of a related group that controls the corporation,
>
> …
>
> **Definitions concerning groups**
>
> 251(4) In this Act,
>
> **related group** means a group of persons each member of which is related to every other member of the group;

The decisions under appeal

[8] The Minister decided that Ms. Bull was not engaged in insurable employment with Midway during any of the following periods:

June 25, 2012 to September 12, 2012;
July 1, 2013 to October 4, 2013;
January 4, 2014 to May 16, 2014;
January 26, 2015 to June 12, 2015; and
January 11, 2016 to October 21, 2016.

[9] The Minister decided that Mr. Bull was not engaged in insurable employment with Midway during any of the following periods:

August 29, 2011 to May 18, 2012;
February 11, 2013 to June 28, 2013;
January 1, 2014 to April 22, 2014;
January 19, 2015 to June 19, 2015; and
January 11, 2016 to May 27, 2016.

[10] The Minister provided the following reasons for both decisions:

(a) each Appellant controlled more than 40% of the voting shares of Midway (citing paragraph 5(2)(b) of the *Employment Insurance Act*); and

(b) Midway and each of the Appellants were not dealing with each other at arm's length (citing paragraph 5(2)(i) of the *Employment Insurance Act*).

The Appellants' position

[11] Counsel for the Appellants, Mr. Whalen, submitted that:

> … there is no dispute … that at the time relevant to this appeal that Ms. Bull owned one share, Mr. Ross Bull owned two shares and their daughter, Melissa, owned the other seven shares. You know, on account of that fact alone, Ms. Bull and Mr. Bull did not own 40 percent of the controlling shares of the company. However, the Minister goes on then and basically looks at the … activity, the conduct, the facts that they can look at in order to determine whether or not the *de facto* control of the company is held by the Appellants. And with respect to that, Justice, Ms. Bull has provided the evidence and the facts that she believes is relevant to your decision and you know, the facts speak for themselves, Justice.
>
> Our submission would be that … the nature of the work and the business that they did in their company was not fully appreciated in previous rulings and that that's why they appealed to this Court for yourself, Justice, to reassess that and to make a ruling whether it's correct.[1]

[12] Counsel also contended that:

> … this Court has to look at the previous decisions and determine whether or not there was a reasonable adjudication upon the facts that were before it and any new facts that are before this Court, …[2]

The Crown's position

[13] Counsel for the Crown, Mr. Lasaga, submitted that the Appellants were properly excluded from insurable employment as each Appellant had *de facto*, or effective, control of more than 40% of Midway's voting shares within the meaning of paragraph 5(2)(b) of the *Employment Insurance Act*.

[14] In the alternative, counsel contended that:

(a) each Appellant and Midway were related to each other and, as related parties, each Appellant and Midway were not dealing with each other at arm's length under section 251 of the *Income Tax Act*; and

(b) the Minister reasonably concluded that, having regard to all the circumstances of the employment, the Appellants and Midway would not have entered into substantially similar contracts of employment if they had been dealing with each other at arm's length; therefore, the Appellants and Midway were not deemed to have dealt with each other at arm's length within the meaning of paragraph 5(3)(b) of the *Employment Insurance Act*.

Findings of fact relevant to paragraph 5(2)(b) of the *Employment Insurance Act*

[15] After working in the garage and repair business for another employer, Mr. Bull incorporated Midway as a garage and body repair shop in 1975. The first shareholders of Midway were Mr. Bull, Ms. Bull and the mechanic who worked at the garage.

[16] At some point, the mechanic ceased to be a shareholder and Mr. Bull's uncle became a shareholder. The uncle owned seven shares, Mr. Bull owned two shares, and Ms. Bull owned one share.

[17] The Appellants have two daughters − Kelly who is now 45 and Melissa who is now 39. Ms. Bull described how Melissa became a shareholder:

> A. Well, like I said, Ross's uncle had some – the girls were younger, and he had the shares in trust, but –
>
> Q. Which shares, the seven shares that Melissa ended up with?
>
> A. I think at one time it might have been four and three for Kelly and Melissa.
>
> Q. I see.
>
> A. And then Kelly was moved away too. His uncle died. So, then the shares had to be put in somebody's name. So, it was put in Melissa's name. And to be truthful about it, I think at the time, Kelly was involved with a guy that was up to no good. So, we wouldn't put the shares in Kelly's name at the time because we didn't know where they'd end up. So, it was put in Melissa's name. Now, that's the truth of it.[3]

[18] After Melissa became a shareholder, she owned seven shares, Mr. Bull owned two shares, and Ms. Bull owned one share of Midway. Those were the shareholdings between 2011 and 2016.

[19] Although Melissa was kept informed, and her parents solicited her views from time to time, she did not play a meaningful role in any decisions made with respect to Midway. This comes as no surprise as she lived and worked in Yellowknife, far from Eastport, NL.

[20] Melissa's approach was deferential − she was content to leave all decisions relating to Midway to her parents. Day-to-day decisions, as well as major decisions, relating to Midway were made by them. This was confirmed in cross-examination when Ms. Bull agreed that Melissa had no involvement in Midway and was not knowledgeable about its day-to-day operations.[4] Indeed, Ms. Bull's evidence confirmed the central assumption made by the Minister as pleaded in paragraph 7(t) of the Reply:

> (t) Melissa had no knowledge of the day-to-day operations of [Midway], nor did she exercise any of the responsibilities associated with being a controlling shareholder;

Findings of fact relevant to paragraph 5(2)(i) of the *Employment Insurance Act*

[21] Midway could not afford to pay Mr. Bull the same wages he would have earned from his earlier employer in the garage and body repair business – far from it.[5]

[22] Often, Ms. Bull would not deposit her pay cheques. When Midway had accounts payable, including mortgage payments and insurance premiums, she did not deposit her pay cheques. Instead, her shareholder loan account (the amount Midway owed to her) would increase. In her own words "… it was more important to pay the bills that had to be paid before I pay myself."[6]

[23] Both Appellants put in "a good many hours" of work for Midway without remuneration.[7] For example, during the summer season, Ms. Bull worked day and night, seven days a week, in the cottage rental business depending on how busy they were.[8] She was not compensated for all that work.

Applying paragraph 5(2)(b) of the *Employment Insurance Act* to the facts

[24] Paragraph 5(2)(b) of the *Employment Insurance Act* provides:

> 5(2) Insurable employment does not include
>
> …

> (b) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;

[25] In *Boifor Equipment Inc. v MNR*, 2018 TCC 53, affirmed at 2019 FCA 69, Justice Lafleur reviewed a number of earlier decisions on the meaning of the word "controls" in the context of paragraph 5(2)(b) of the *Employment Insurance Act*. It is clear that "controls" includes both *de jure* control and "effective control" of more than 40% of the voting shares of the corporate employer. Justice Lafleur wrote:

> [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). …

[26] The Appellants were not in insurable employment with Midway because each Appellant had effective control of 50% of the voting shares of the company. This is clear from the fact that both Appellants exercised the power to decide in whose name seven of the ten shares of Midway would be registered after the death of Mr. Bull's uncle. In so doing, the Appellants demonstrated that they had effective control of 100% of the voting shares of Midway.

[27] Melissa's nominal ownership of those shares did not carry with it effective control. Put another way, Melissa was the legal owner of seven shares of Midway but the Appellants were the beneficial owners of all of the shares of Midway. Had the business been carried on as a partnership, the only partners would have been the Appellants.

[28] One may wonder why Parliament decided to exclude from insurable employment employees who control more than 40% of the voting shares of their employer. In a passage in *Boifor Equipment* expressly endorsed by the Federal Court of Appeal, Justice Lafleur explained Parliament's rationale:

> [33] … 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.

Applying paragraph 5(2)(i) of the *Employment Insurance Act* to the facts

[29] Although the conclusion that paragraph 5(2)(b) applies is sufficient to dispose of the Appellant's appeals, I will deal with the Crown's alternative argument relating to paragraph 5(2)(i) of the *Employment Insurance Act*. The relevant provisions are set out in paragraphs 5 through 7 above.

[30] As we know, each Appellant had effective control of 50% of the voting shares of Midway. Therefore, each of the Appellants was related to Midway.[9]

[31] In light of that relationship, the Appellants and Midway would be deemed to deal with each other at arm's length only if the Minister was satisfied that it was reasonable to conclude that the Appellants would have entered into a substantially similar employment contract with Midway had they dealt with Midway at arm's length.[10]

[32] But what arm's length employee would work for wages that were below-market? What arm's length employee would extend a loan to their employer in lieu of depositing pay cheques? And what arm's length employee would put in so many hours without remuneration?

[33] The Minister was fully justified in not having been satisfied that it was reasonable to conclude that the Appellants would have entered into a substantially similar employment contract with Midway had they dealt with Midway at arm's length.

[34] Had paragraph 5(2)(b) of the *Employment Insurance Act* not applied to exclude the Appellants from insurable employment for the periods in issue, paragraph 5(2)(i) would have excluded the Appellants from insurable employment for those periods.

Conclusion

[35] For all of these reasons, the Appellants' appeals will be dismissed and the Minister's decisions confirmed.

[36] As the Crown did not seek costs, no costs will be awarded.

Signed at Toronto, Ontario, this 5th day of September 2023.

"David E. Spiro"

Spiro J.

CITATION:	2023 TCC 133
COURT FILE NO.:	2018-4076(EI) and 2018-4077(EI)
STYLE OF CAUSE:	BRENDA BULL AND M.N.R. ROSS BULL AND M.N.R.
PLACE OF HEARING:	Gander, Newfoundland and Labrador
DATE OF HEARING:	August 24, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Spiro
DATE OF JUDGMENT:	September 5, 2023

APPEARANCES:

Counsel for the Appellant:	Philip C. Whalen
Counsel for the Respondent:	David Lasaga

COUNSEL OF RECORD:

For the Appellant:

Name:	Philip C. Whalen
Firm:	Whalen Law Clarenville, Newfoundland and Labrador

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada

[1] Transcript, page 33, line 17 to page 34, line 9.
[2] Transcript, page 32, line 26 to page 33, line 1.
[3] Transcript, page 30, lines 6-20.
[4] Transcript, page 27, line 23 to page 28, line 5.
[5] "Far from it" were the words used by Ms. Bull (transcript, page 22, lines 12-14).
[6] Transcript, page 19, lines 12-14.
[7] Transcript, page 20, line 25 to page 21, line 1.
[8] That business diminished significantly in 2014 when all but one of the cottages were sold.
[9] Subparagraph 251(2)(b)(ii) of the *Income Tax Act* provides that "related persons" include a corporation and a person who is a member of a related group that controls the corporation. Under paragraph 251(2)(a) and subsection 251(4) of the *Income Tax Act*, the Appellants were members of a related group as they were married to one another.
[10] For a recent decision dealing with the interpretation and application of paragraph 5(2)(i) of the *Employment Insurance Act*, see *Bingley v MNR*, 2023 TCC 110.