

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190404**

**Docket: A-120-18**

**Citation: 2019 FCA 69**

[ENGLISH TRANSLATION]

**CORAM: NADON J.A.  
PELLETIER J.A.  
DE MONTIGNY J.A.**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Appellant**

**and**

**BOIFOR EQUIPMENT INC.**

**Respondent**

Heard at Montréal, Quebec, on April 3, 2019.

Judgment delivered at Montréal, Quebec, on April 4, 2019.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

NADON J.A.  
DE MONTIGNY J.A.

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**BETWEEN:**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

[1] The Minister of National Revenue is appealing the decision of the Tax Court of Canada (*Boifor Equipment Inc. v. M.N.R.*, 2018 TCC 53) in which that court held that David Marion and Marc Lepage did not hold insurable employment within the meaning of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), during the period from April 16, 2014, to December 31, 2015.

[2] The Tax Court of Canada (the TCC) concluded that Mr. Marion and Mr. Lepage were excluded from benefiting from the advantages offered by the Act because they were caught by paragraphs 5(2)(b) and (i) of the Act in that, on the one hand, each of them controlled more than 40% of the employer's voting shares and, on the other hand, neither of them was dealing with the employer at arms length.

[3] Despite Mr. Dubé-Sénécal's able argument, I was not persuaded that the TCC committed any error whatsoever. With regard to control of the employer's voting shares, I was not persuaded that *Canada (Attorney General) v. Remstar Distribution Inc.*, 2004 FCA 8, is not precedential. It follows that the TCC did not err in law in applying it to the facts of this case.

[4] Moreover, the question of the non-arm's length relationship between Mr. Marion and Mr. Lepage and their employer is a question of fact reviewable on the palpable and overriding error standard. Contrary to Mr. Dubé-Sénécal's submission to this Court, the three criteria listed in the case law are not prescribed by the Act in the sense that they are determinative in all cases. The question whether the employees concerned had a non-arm's length relationship with their employer is one that must be determined in light of all the evidence, as it was by the TCC. There is no palpable and overriding error in the TCC's reasoning and conclusions.

[5] To conclude, I concur entirely with the TCC in its opinion that:

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. (Reasons at para. 33).

[6] For these reasons, I would dismiss the appeal with costs.

“J.D. Denis Pelletier”

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J.A.

“I agree.

M. Nadon J.A.”

“I agree.

Yves de Montigny J.A.”

Certified true translation  
Erich Klein

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-120-18

**STYLE OF CAUSE:** THE MINISTER OF NATIONAL  
REVENUE v. BOIFOR  
EQUIPMENT INC.

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** APRIL 3, 2019

**REASONS FOR JUDGMENT BY:** PELLETIER J.A.

**CONCURRED IN BY:** NADON J.A.  
DE MONTIGNY J.A.

**DATED:** APRIL 4, 2019

**APPEARANCES:**

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Simon Petit

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Guillaume Richard

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