Docket: 2008-175(EI)

BETWEEN:

GEORGE LOVELESS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on June 18, 2009, at Gander, Newfoundland,

By: The Honourable Justice B. Paris

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jill Chisholm

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the determination of the Minister of National Revenue on the appeal made to him under section 91 of the *Act* for the periods December 22, 2009 to May 1, 2004, January 17, 2005 to April 15, 2005, November 28, 2005 to March 4, 2006, is confirmed.

Signed at Vancouver, British Columbia, this 5th day of August, 2009.

"B. Paris"

Paris J.

Citation: 2009TCC 393
Date: 20090805
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BETWEEN:

GEORGE LOVELESS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Paris, J.

[1] This is an appeal from a determination by the Minister of National Revenue that the Appellant's employment with South Coast Snow Removal Ltd. ("South Coast") during the following periods was not insurable under the *Employment Insurance Act* (the *Act*): December 22, 2009 to May 1, 2004, January 17, 2005 to April 15, 2005, November 28, 2005 to March 4, 2006.

[2] The Minister held that the Appellant and South Coast were not dealing with each other at arm's length, and that the employment was therefore excluded from insurable employment pursuant to paragraph 5(2)(*i*) of the *Act*, which provides:

> 5(2) Insurable employment does not include
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.

Also, subsection 5(3) of the *Act* provides further:

> 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.

[3] The Appellant and South Coast were not dealing at arm's length because the Appellant and his common law spouse Shirley Engram each owned 33% of the shares of South Coast. As common law spouses, the Appellant and Ms. Engram formed a related group as defined in section 251 of the *Income Tax Act*. Given that together they owned over 50% of the shares of South Coast, they controlled South Coast, and therefore did not deal at arm's length with it. (The remaining shares were held by a friend of the Appellant and Ms. Engram.)

[4] The only issue in appeal is the Minister's conclusion that, taking into account all of the circumstances of the Appellant's employment, the Appellant and South Coast would not have entered into a substantially similar contract of employment if they had been dealing at arm's length. I must decide, in light of all the evidence, whether that conclusion is reasonable (*Porter v. The Minister of National Revenue*, 2005 TCC 364).

[5] The facts relied upon by the Minister in making the determination are set out in paragraph 7 of the Reply to Notice of Appeal and read as follows:

> a) the Appellant, Shirley Engram, and Don Sutton each held 33.3% of the shares of the Payor;
>
> b) the Appellant and Shirley Engram were common-law partners;
>
> c) during the periods under appeal, Shirley Engram and Don Sutton worked full time jobs elsewhere and were not employed by the Payor;
>
> d) the Payor's business was snow clearing, salting, and sanding which was achieved using a front-end loader and a 4 wheel-drive pick-up truck with a plough (the "Equipment");

e) the Payor was the registered owner of the front-end loader;

f) the Appellant was the registered owner of the pick-up truck and plough;

g) the Appellant was responsible for the maintenance and operation of the Equipment used in the Payor's business;

h) the Appellant solely managed the day to day operations of the business;

i) Shirley Engram and Don Sutton were not involved in the day to day operations of the Payor;

j) the Appellant was the Payor's only employee in the 2003 and 2004 taxation years;

k) during the 2005 taxation year, the Payor had one other employee who earning from the Payor were $1,025.00 that year;

l) the Appellant was the Payor's only employee again in the 2006 taxation year;

m) the Appellant was paid $12.00 per hour based on a 60 hour work week regardless of the number of hours that he actually worked;

n) the Payor's work and the Appellant's hours were dependant on the weather;

o) the Appellant was often paid for weeks when there was no work to be done by the Payor;

p) the Appellant worked for the Payor outside the periods under appeal;

q) during the periods under appeal, the Payor purportedly paid the Appellant for 24 biweekly pay periods;

r) during the periods under appeal the Appellant received 15 paycheques from the Payor;

s) the Appellant often waited weeks or months before cashing his paycheques; and

t) the frequency of the Appellant's pay was based on the cash flow of the Payor.

[6] The Appellant admitted subparagraphs (a) to (n) of the Reply.

[7] With respect to the assumption in subparagraph (o), the Appellant said that he could not recall any week during the period under appeal in which he did not do any work. He said that there was always something to be done for the job. If there was no snow to clear, he would do maintenance on the equipment.

[8] With respect to subparagraph 7(p) the Appellant testified that he worked for South Coast from November 1 to March 31 each winter. Only on rare occasions would there be any snow to clear after March 31, but if there was, he was obliged to plough it without being paid.

[9] The Appellant submitted that the terms of his contract with South Coast were similar to the arrangements made by the provincial Department of Transport for road snow clearing and sanding. He testified that those contracts ran from November 1 to March 31 each winter, and that the contractors were paid $15 per hour. He also said that he was paid for the work he did, and did not work at any time without pay. The Appellant felt therefore that his employment terms and conditions were similar in nature to those found in arm's length relationships.

[10] On all of the evidence, the Appellant has not persuaded me that the Minister's decision was not reasonable. The fact that the Appellant was paid for 60 hours of work per week throughout the periods under review regardless of the actual hours worked, does not appear to be similar to what would be expected in an arm's length employment relationship. While the Appellant said that his hourly rate and the duration of his employment was in line with the Department of Transport practices, there was no evidence that contractors for the Department of Transport were paid for 60 hours per week for the entire season regardless of the hours they worked. Furthermore, there was no corroboration of the rate paid by the Department of Transport for snow clearing and sanding.

[11] The Appellant did not present any evidence to show that the number of hours for which he was paid reflected the needs of South Coast for his services, or that any similar snow-clearing business paid its workers in the same manner. Neither was there any evidence that South Coast's business was economically viable using this method of remuneration.

[12] The Appellant's evidence that he worked at least three days a week in the relevant periods was not corroborated in any manner. He did not keep a log of his hours and no independent means of verifying his hours was available. The Appellant's testimony regarding the number of days worked per week was inconsistent with an answer given on a questionnaire from the CRA filled out on his

behalf by his accountant and certified by him to be correct. That answer indicated that the Appellant worked between one and seven days a week. I would also note that the Appellant's recollection of the details of his work for South Coast was often quite poor, and he stated that he had memory problems. Overall, I am unable to say with any certainty how many hours the Appellant in fact worked for South Coast each week, and as a result, the Appellant has not shown that the amount he was paid for that work was similar to what an arm's length employee would have received.

[13] In reaching his decision regarding the Appellant's employment, the Minister also considered the fact that the Appellant would have to wait weeks or months to cash his paycheque based on the cash flow of South Coast. The Appellant admitted that this was the case and said that he was only paid after all of South Coast's other bills had been paid. In my view, this is different from what would normally be the case in an arm's length employment relationship.

[14] In light of the above findings, I am satisfied that the Minister's conclusion that the Appellant and South Coast would not have entered into a substantially similar contract of employment if they had been dealing at arm's length was reasonable.

[15] The appeal is therefore dismissed.

Signed at Vancouver, British Columbia, this 5th day of August, 2009.

"B. Paris"

Paris J.

CITATION:	2009 TCC 393
COURT FILE NO.:	2008-175(EI)
STYLE OF CAUSE:	GEORGE LOVELESS and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Gander, Newfoundland
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REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	August 5, 2009

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jill Chisholm

COUNSEL OF RECORD:

For the Appellant:

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Firm:	N/A
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada