Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *P. P. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 14

Tribunal File Nos: GE-15-1498, GE-15-1499 and GE-15-1500

BETWEEN:

P. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: December 16, 2015

DATE OF DECISION: January 29, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The hearing initially scheduled on September 16, 2015 was adjourned. A new hearing date was set for December 16, 2015.

[2] The Appellant, P. P., attended the telephone hearing (teleconference) on December 16, 2015. He was represented by Jean G. Morency, Counsel, of the firm Fasken, Martineau Dumoulin, LLP. S. L., co-shareholder with the Appellant, of the company Plongée sous-marine Nautilus (2005) inc., was also present at the hearing.

INTRODUCTION

[3] Between December 2006 and November 2009, the Appellant filed several claims for benefit after working for the employer Plongée sous-marine Nautilus (2005) inc. In each of his claims for benefit, the Appellant reported that he had stopped working for this employer due to a shortage of work. The Appellant also said he held 20% of the type A shares of the company that employed him. He also stated that he was not self-employed, other than in fishing or in agriculture (Exhibits GD3-3 to GD3-15 of file GE-15-1498, GD3-3 to GD3-15 of file GE-15-1500 and GD3-3 to GD3-18 of file GE-15-1499). More specifically, these claims covered the following periods:

a) Initial claim for benefit filed on December 4, 2006, effective January 14, 2007, in which the Appellant reported working from May 15, 2006 to December 1, 2006 inclusive (Exhibits GD3-3 to GD3-15 of file GE-15-1498);

b) Initial claim for benefit filed on November18, 2008, effective December 7, 2008, in which the Appellant reported working from December 6, 2006 to November 15, 2008 inclusive. The Appellant said he would be returning to work on January 12, 2009 (Exhibits GD3-3 to GD3-15 of file GE-15-1500);

c) Initial claim for benefit filed on November 24, 2009, effective November 29, 2009, in which the Appellant reported working from April 6, 2009 to November 20, 2009 inclusive. The Appellant said he was going to return to work on March 1, 2010 (Exhibits GD3-3 to GD3-18 of file GE-15-1499).

[4] On March 11, 2014, in three similar decisions, the Respondent *Employment Insurance Commission of Canada* (the "Commission") informed the Appellant that it could not pay him Employment Insurance benefits starting on January 14, 2007, December 7, 2008 and November 22, 2009 because he was operating a business and, therefore, it did not consider him to be unemployed (Exhibits GD3-37 and GD3-38 of files GE-15-1498 and GE-15- 1500, Exhibits GD3-40 and GD3-41 of file GE-15-1499).

[5] On July 17, 2014, the Appellant a filed a Request for Reconsideration to challenge the Commission's decisions in his regard on March 11, 2014 (Exhibits GD3-39 to GD3-41 of files GE-15-1498 and GE-15-1500, Exhibits GD3-42 to GD3-44 of file GE-15-1499).

[6] On March 12, 2015, in similar decisions, the Commission notified the Appellant that it was maintaining its decisions dated March 11, 2014 in his regard with respect to the "week of unemployment." In each of these decisions, the Commission issued corrections to have its decisions read as follows:

a) "This letter is to inform you that the start date of your claim for Employment Insurance benefits is January 14, 2007. We cannot pay you Employment Insurance benefits starting on January 14, 2007. Because you operate a business, we do not consider you unemployed." (Exhibits GD3-134 and GD3-135 of file GE-15-1498, Exhibits GD3-133 and GD3-134 of file GE-15-1500);

b) "This letter is to inform you that the start date of your claim for Employment Insurance benefits is December 7, 2008. We cannot pay you Employment Insurance benefits starting on December 7, 2008. Because you operate a business, we do not consider you unemployed." (Exhibits GD3-133 and GD3-134 of file GE-15-1500);

c) “This letter is to inform you that the start date of your claim for Employment Insurance benefits is November 29, 2009. We cannot pay you Employment Insurance benefits starting on November 29, 2009. Because you operate a business, we do not consider you unemployed.” (Exhibits GD3-104 and GD3-105 of file GE-15-1499).

[7] On April 14, 2015, the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Social Security Tribunal of Canada's General Division (the “Tribunal”), (Exhibits GD2-1 to GD2-53 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[8] On June 26, 2015, the Tribunal informed the Appellant and the Appellant’s representative that it had joined the appeals numbered GE-15-1498, GE-15-1499 and GE-15-1500 pursuant to section 113 (sic) [13] of the *Social Security Tribunal Regulations* since “a common question of law or of fact arises in the appeals […]” and “[…] no injustice is likely to be caused to any party […]” (Exhibits GD5-1 and GD5-2 of files GE-15-1498, GE-15-1499 and GE- 15-1500).

[9] This appeal was heard by teleconference for the following reasons:

a) The Appellant will be the only party in attendance; and

b) This type of hearing is consistent with the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances and as considerations of fairness and natural justice permit (Exhibits GD1-1 to GD1-4 of files GE-15-1498, GE-15-1499 and GE-15-1500).

ISSUE

[10] The Tribunal must determine whether the decision to disentitle the Appellant from Employment Insurance benefits, because he failed to show he was unemployed, is justified pursuant to sections 9 and 11 of the *Employment Insurance Act* (the "Act"), and section 30 of the *Employment Insurance Regulations* (the "Regulations").

THE LAW

[11] The relevant statutory provisions concerning disentitlement resulting from a claimant's failure to prove he or she was unemployed are set out in sections 9 and 11 of the Act, and in section 30 of the Regulations.

[12] Section 9 of the Act provides the following concerning the establishment of a benefit period:

> When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[13] Subsection 11(1) of the Act defines "week of unemployment" as: "(1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week."

[14] Subsections 30(1), 30(2) and 30(3) of the Regulations specify the conditions governing "a full working week" for "self-employed" persons and the "circumstances" used to determine whether a claimant is employed or operating a business:

> […] (1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week. (2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week. (3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of

> the minor extent described in subsection (2) are (a) the time spent; (b) the nature and amount of the capital and resources invested; (c) the financial success or failure of the employment or business; (d) the continuity of the employment or business; (e) the nature of the employment or business; and (f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[15] For the purposes of applying section 30 of the Regulations, subsection 30(5) of the said Regulations defines a "self-employed person" as "an individual who (a) is or was engaged in a business; or (b) is employed but does not have insurable employment by reason of paragraph 5(2)(b)."

EVIDENCE

[16] The file contains the following evidence:

a) Several records of employment issued in the period from December 4, 2006 to January 17, 2011 indicate that the Appellant worked for the employer Plongée sous-marine Nautilus (2005) inc. and that he stopped working for this employer due to a shortage of work (Code A – Shortage of work). These records relate to the following periods of employment:

   i. From May 15, 2006 to December 1, 2006 inclusive (record of employment dated December 4, 2006) stating that the Appellant worked, as a "sales associate"), (Exhibit GD3-16 of file GE-15-1498);

   ii. From December 4, 2006 to January 14, 2007 inclusive (record of employment dated January 17, 2011), (Exhibit GD3-17 of file GE-15-1498);

   iii. From December 6, 2006 to November 15, 2008 inclusive (record of employment dated November 17, 2008) stating that the Appellant worked as an "instructor" (Exhibit GD3-16 of file GE-15-1500);

iv. From November 16, 2008 to December 2, 2008 inclusive (record of employment dated January 17, 2011), (Exhibit GD3-17 of file GE-15-1500);

v. From December 6, 2006 to November 20, 2009 inclusive (record of employment dated November 24, 2009) stating that the Appellant worked as an "instructor." The ROE also states that the Appellant would be called back to work on March 1, 2010 (Exhibit GD3-19, file GE-15-1499);

vi. From November 23, 2009 to December 1, 2009 inclusive (undated record of employment). The record also states that the Appellant's planned return to work was "unknown" (Exhibit GD3-20, file GE-15-1499).

b) On February 24, 2015, S. L. stated that the Canada Revenue Agency had determined that the Appellant's employment was insurable, and that he and the company had continued to make Employment Insurance contributions. She contended that the Appellant was therefore entitled to receive benefits. Ms. S. L. explained that the Appellant was professionally trained in marine biology and also had training as a scuba diving instructor and in breathing techniques for scuba divers. She said that the Appellant had initially worked for the employer Plongée sous-marine Nautilus (2005) inc. as a summer student, and later purchased shares in the company. She explained that since purchasing the company (2005), the Appellant, like the other employees, performed customer service, ordered goods, performed inventory, prepared activities, filled cylinders (oxygen tanks) used at Cégeps (general and vocational instruction colleges) and did cleaning. Ms. S. L. said that the company owned an inn (*Gite du plongeur*) located in X (Quebec). She underscored that the Appellant goes there with students on the weekend, but is not paid for his work since the registration fee for this course included accommodation at the inn. She mentioned that the business is open year-round, and that it employs approximately 25 people. Ms. S. L. said that the Appellant still owns 20% of the company's shares. She stated that the Appellant spends 40 hours a week on the business, and is trying to make it his principal source of income. Ms. S. L. underscored that when the Appellant was not working, it was because there was no work for him. She said that while he was unemployed, he would sometimes drop

by or enquire how business (liquid assets) was doing. Ms. S. L. stated that the Appellant had invested $10,000.00 in 2005 to purchase shares. She said that the Appellant and two other shareholders had taken out a loan to purchase the company. Ms. S. L. stated that the shareholders, including the Appellant, had jointly secured two mortgages, one for $110,000.00 and the other for $70,000.00 (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15- 1500, Exhibits GD3-45 and GD3-46 of file GE-15-1499);

c) A copy of a document, "Search for an Enterprise in the Enterprise Register," issued by the *Registraire des entreprises* (Quebec), dated May 8, 2015, shows that the Plongée sous-marine Nautilus (2005) inc. enterprise was registered on June 23, 2005 in the juridical form of a "joint stock company" or "company" under the *Companies Act, Part 1A, CQLR, c C-38*. The document indicates that the Appellant is the company's secretary (Exhibits GD3-18 to GD3-23 of files GE-15- 1498 and GE-15-1500, Exhibits GD3-21 to GD3-26 of file GE-14-1499);

d) In two documents entitled, "Details of the Notice of Debt (DH009)," dated July 16, 2011 and reproduced on May 8, 2015, the Appellant's total debt amounted to $12,313.00 (Exhibits GD3-35 and GD3-36 of files GE-15-1498 and GE-15- 1500, Exhibits GD3-38 and GD3-39 of file GE-15-1499.

e) On or about March 10, 2015, the Appellant forwarded a copy of the financial statements for the "Plongée sous-marine Nautilus (J.F.G.) inc." or "Plongée sous-marine Nautilus inc." enterprise to the Commission for the period from January 31, 2007 to February 28, 2010. These documents contain the following information;

    i. Net losses of $15,148.00 in 2006 (7 months) and net profits of $26,515.00 in 2007. The document states that the company's "net worth" in 2006 was $230,306.00, and in 2007, $199,984.00 (Plongée sous-marine Nautilus (J.F.G.) inc. financial statements as at January 31, 2007), (Exhibits GD3-45 to GD3-56 of file GE-15-1498);

    ii. Net profits of $26,515.00 in 2007 and net profits of $41,336.00 in 2008. The document indicates that the company's "net worth" ("tangible fixed assets") was

$199,984.00 in 2007 and $238,460 in 2008 (Plongée sous marine Nautilus (J.F.G.) inc. financial statements as at January 31, 2008), (Exhibits GD3-79 to GD3-92 of file GE-15- 1498);

iii. Net profits of $41,336.00 in 2008 and net profits of $37,316.00 in 2009. The document indicates that the company's "net worth" ("tangible fixed assets") was $238,460.00 in 2008 and $210,528.00 in 2009 (Plongée sous marine Nautilus (J.F.G.) inc. financial statements as at January 31, 2009), (Exhibits GD3-45 to GD3-58 of file GE-15- 1500);

iv. Net profits of $37,316.00 in 2009 and net profits of $33,202.00 in 2010. The document indicates that the company's "net worth" ("tangible fixed assets") was $210,528.00 in 2009 and $160,824,00 in 2010 (Plongée sous marine Nautilus (J.F.G.) inc. financial statements as at January 31, 2010), (Exhibits GD3-79 to GD3-92 of file GE-15-1500 and Exhibits GD3-48 to GD3-61 of file GE-15-1499);

v. Net losses of $17,908.31 for the period from February 1, 2010 to February 28, 2010 (Plongée sous marine Nautilus inc. statement of operations for the period covering February 1, periodic system) (Exhibits GD3-80 and GD3-81 of file GE-15-1499);

f) On or about March 10, 2015, the Appellant sent the Commission a copy of the corporate income tax return of the Plongée sous-marine Nautilus (J.F.G.) inc. enterprise for the fiscal year ending January 31, 2007 in a document entitled, "*T-2 – Déclarations de revenus des sociétés*" (Revenu Québec). This document reports taxable income of $41,409.00 and a net income of $26,515.00 (based on the financial statements) for the period specified (Exhibits GD3-57 to GD3-59 of file GE-15-1498);

g) On or about March 10, 2015, the Appellant sent the Commission a copy of the corporate income tax return of the Plongée sous-marine Nautilus (J.F.G.) inc. enterprise for the taxation years 2007 to 2010 inclusive in documents entitled, "*T-2 – Déclarations de revenus des sociétés.*" These documents provide the following information:

   i. Taxable income and net income of $41,409.00 for the fiscal year ending January 31, 2007 (Exhibits GD3-60 to GD3-78 of file GE- 15-1498);

   ii. Taxable income and net income of $58,380.00 for the fiscal year ending January 31, 2008 (Exhibits GD3-93 to GD3-112 of files GE-15-1498, GE-15-1499 and GE-15-1500);

   iii. Taxable income and net income of $46,128.00 for the fiscal year ending January 31, 2009 (Exhibits GD3-59 to GD3-78 of file GE- 15-1500);

   iv. Taxable income and net income of $34,055.00 for the fiscal year ending January 31, 2010 (Exhibits GD3-93 to GD3-111 of file GE-15-1500 and Exhibits GD3-61 to GD3-80 of file GE-15-1499);

h) On March 12, 2015, the Appellant sent the Commission a copy of certificate, transfer and transfer and proxy documents that also specified the number of shares held by the Appellant and the other shareholders of the Plongée sous- marine Nautilus (2005) inc. company, as well as transfers of shares by these individuals during the period between June 30, 2005 and October 18, 2013 (Exhibits GD3-114 to GD3-133 of file GE-15-1498, GD3-112 to GD3-132 of file GE-15-1500 and Exhibits GD3-83 to GD3-103 of file GE-15-1499);

i) In the Notice of Appeal filed on April 14, 2015, Counsel Jean G. Morency, representing the Appellant, forwarded a copy of the following documents:

i. Three records of employment issued on January 17, 2011 stating that the Appellant had worked for the employer Plongée sous-marine Nautilus (2005) inc., from December 4, 2006 to January 14, 2007, from November 16, 2008 to December 2, 2008 and from November 23, 2009 to December 1, 2009, stating that in each case, the Appellant had stopped working for this employer due to a shortage of work (Code A – Shortage of work / end of contract or season), (Exhibits GD2-11 to GD2-13 of files GE-15-1498, GE-15-1499 and GE-15-1500);

ii. In two documents entitled, "Details of the Notice of Debt (DH009)," dated July 16, 2011 and reproduced on May 8, 2015, the Appellant's total debt was established as $12,313.00 (Exhibits GD2-14 and GD2-15 of files GE-15-1498, GE-15-1499 and GE-15-1500);

iii. Letter from the Commission dated April 3, 2014 informing the Appellant that his outstanding balance was $4,117.38 (Exhibit GD2-16 of files GE-15-1498, GE-15-1499 and GE-15-1500);

iv. Three similar letters from the Commission dated March 11, 2014 informing the Appellant that it cannot pay him Employment Insurance benefits effective January 14, 2007, November 16, 2008 [December 7, 2008] and November 22, 2009 [November 29, 2009], the start dates for his claims for benefit (Exhibits GD2-17 to GD2-22 of files GE-15-1498, GE-15-1499 and GE-15-1500);

v. Request for reconsideration of an Employment Insurance decision submitted July 17, 2014 (Exhibits GD2-23 to GD2-25 of files GE-15-1498, GE-15-1499 and GE-15- 1500);

vi. Three similar letters from the Commission, dated August 21, 2014, informing the Appellant that it would not reconsider the decisions made concerning his claims for benefit starting January 14, 2007, November 16, 2008 [December 7, 2008]

and November 29, 2009 (Exhibits GD2-26 to GD2-31 of files GE-15-1498, GE-15-1499 and GE-15-1500);

vii. Decision given by the Tribunal on February 17, 2015, granting the Appellant an extension of the deadline for filing a request for reconsideration of the Commission's decisions in his case dated May 20, 2011 (Exhibits GD2-32 to GD2-44 of files GE-15-1498, GE-15-1499 and GE-15-1500);

viii. Three similar letters from the Commission (reconsidered decisions) dated March 12, 2015, informing the Appellant that it was maintaining its decisions in his case on March 11, 2014, concerning his "week of unemployment" (claims for benefit commencing January 14, 2007, December 7, 2008 and November 29, 2009), (Exhibits GD2-45 to GD2-50 of files GE-15- 1498, GE-15-1499 and GE-15-1500);

ix. A certificate dated June 30, 2005 stating that the Appellant holds 10,000 class A shares in the company Plongée sous-marine Nautilus (2005) inc. (Exhibit GD2-51 of files GE-15-1498, GE-15-1499 and GE-15- 1500);

x. Letter from the Canada Revenue Agency (CRA) dated July 11, 2014 informing the Appellant that his employment with the employer Plongée sous- marine Nautilus (2005) inc. for the period from January 1, 2013 to July 9, 2014 is insurable pursuant to paragraph 5(1)a) of the Act (Exhibits GD2- 52 and GD2-53 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[17] The following evidence was presented at the hearing:

a) The Appellant provided background information about the company Plongée sous-marine Nautilus (2005) inc. in which he is a shareholder, and described his role in the company;

b) He stated that the documents that his representative filed with the Notice of Appeal and submitted to the Tribunal, dated April 14, 2015, were true;

c) The Appellant said he had held 20% of the company's shares since 2005 and that the percentage of his shareholdings in the company had not changed as of that date. He reported that he did not have use of a company vehicle or telephone, and did not receive a meal allowance;

d) The Appellant explained that he had started working for the company as a sales associate in 1996, and later as a customer service supervisor. He said he also started working as a scuba diving instructor in 2003. He said he worked about 40 hours a week. The Appellant mentioned that his salary was approximately $30,000.00 a year in 2007;

e) He explained that the scuba diving instruction (courses) portion of his employment amounted to approximately sixty hours a year. He said that these hours were worked during the two or three courses that he taught each year. The Appellant stated that this work was included in the salary paid by his employer. He said that the time he spent on delivering scuba diving training to students, on weekends, at the company's inn (*Gite du plongeur*) was not salaried, and that he performed this work as a volunteer. The Appellant said he delivered this type of training over six or seven weekends between May and November (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-45 and GD3-46 of file GE-15-1499);

f) The Appellant said he did not work for the company in which he is a shareholder during his benefit periods. He said that the 7½ hours he had previously reported working for his company on a weekly basis (one or one and a half hours a day) was spent on making payments or taking receipt of orders from suppliers;

g) He explained that from 2007 to 2010, based on the Employment Insurance benefits he received, his benefit periods lasted approximately from January 14, 2007 to March 2007 (benefit period beginning January 14, 2007), from December 2, 2008 to April 2009 (benefit period commencing December 7, 2008) and from November 29, 2009 to April or May 2010 (benefit period commencing November 29, 2009);

h) The Appellant said he did not actively search for work during his benefit periods because he had a promise of employment from his employer. He said he had received confirmation of his recall to work after the company had been inactive for a number of months. The Appellant underscored that he had made himself available for work;

i) S. L. said she owns 30% of the company's shares. In addition to partial ownership of this enterprise, she said she worked as a scuba diving instructor and sales person in the company store;

j) She said that the company employs approximately 25 people in all. S. L. explained that the company has three full-time employees, and another employee who works on weekends, and that the company uses the services of an accounting technician. She said that about 20 people work on a casual basis in scuba diving instruction;

k) She explained that the company had been making contributions of approximately $3,000 per year (in 2007, 2008 and 2009) to the Employment Insurance plan since 1997. Ms. S. L. said that each employee working for the company contributes approximately $300.00 a year to the plan. She underscored that the company is required to contribute to this plan under the Act. Ms. S. L. said that the Canada Revenue Agency (CRA) had issued a decision on the insurability of the employment of the persons working for the company. She stated that, according to the last letter she received from CRA, (dated July 11, 2014), the fact that Employment Insurance contributions were being made confirmed the Appellant's employee status and entitled him, like the other employees, to Employment Insurance benefits (Exhibits GD2-52 GD2-53 of files GE-15-1498, GE-15-1499 and GE-15-1500);

l) Ms. S. L. reported that the company had earned net profits of $916.00 after amortization in the last fiscal year. She said that the company had invested in a new trailer and truck for delivering cylinders (oxygen tanks). She mentioned that the company had also renovated the interior and exterior of its business premises. Ms. S. L. said that the total value of the building was approximately $220,000.00 (approximately $90,000.00 for the land and $130,000.00 for the building, or vice versa). She explained that the company owed a debt on the building for which it had taken out a $307,000.00 mortgage.

PARTIES' ARGUMENTS

[18] The Appellant and his representative, Jean G. Morency, Counsel, made the following submissions and arguments:

a) The Appellant explained that he started operating the Plongée sous-marine Nautilus (2005) inc. company in 2005. He said he acted as the company's representative and a board member, but was not a self-employed person. The Appellant said he was also an employee of this company and received a variable salary, as determined by the board of directors (ex.: approximately $30,000.00 on an annual basis in 2007), (Exhibits GD3-3 to GD3-15, GD3-24 to GD3-32, GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-3 to GD3-18, GD3-27 to GD3-35, GD3-45 and GD3-46 of file GE-14-1499);

b) He stated that he worked from 40 to 42 hours per week for the company, from Monday to Friday, 9:00 a.m. to 5:00 p.m. (between 2005 and 2010), and that the business was open six days a week. The Appellant said he spent approximately 7.5 hours a week (approximately one to one and a half hours a day) on these activities in the periods he was unemployed. He said that the number of days a week or hours a day he spent on his duties in the business varied. He said that his intention was to work year-round for the company, and that he was making a considerable effort to turn it into his main source of income (Exhibits GD3-25 to GD3-32, GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35, GD3-45 and GD3-46 of file GE-14-1499);

c) The Appellant said he performed the following duties for the company:

i. Act as a sales consultant (sales person);

ii. Provide training (scuba diving instructor);

iii. Work in customer service;

iv. Hire employees;

v. Negotiate contracts on behalf of the company (with assistance from one other person);

vi. Issue employee wages (for example, sign cheques--approximately 25 individuals entered in the payroll ledger);

vii. Manage and sell scuba diving products (make payments related to purchases and sales, place and receive supplier orders);

viii. Oversee the company's daily operations;

ix. Participate in company decision-making (Exhibits GD3-24 to GD3-32, GD3- 42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-27 to GD3- 35, GD3-45 and GD3-46 of file GE-14-1499);

d) He said that from 2006 to 2010, although he was not working, he spent about a day a week on payroll. He said that although he was the company's secretary, as shown in the Quebec Enterprise Register, he did not perform any duties in this capacity (Exhibit GD3-44 of files GE-15-1498 and GE-15-1500, Exhibit GD3-47 of file GE-15-1499);

e) The Appellant said he had invested approximately $10,000.00 in the business in 2005. He explained that the company had borrowed money from a financial institution. He said he had put up personal assets to secure the loans, which amounted to $110,000.00 and $70,000.00. The Appellant said he was signatory to a $20,000.00 line of credit available to the company. He mentioned that the company had purchased the site of its operations, as well as scuba diving equipment, that its inventory was worth approximately $50,000.00 and that its value had increased since the company entered operation. The Appellant said that the company had purchased a truck in 2008 to haul diving equipment. He explained that the company owns the *Gite du plongeur*, a facility it uses for its diving excursions. The Appellant mentioned that the business has a website (Exhibits GD3-25 to GD3-32, GD3-42 to GD3-44 of files GE-15- 1498 and GE-15-1500, Exhibits GD3-28 to GD3-35, GD3-45 to GD3-47 of file GE-14- 1499);

f) He said that about 25 employees are on the payroll (Exhibits GD3-25 to GD3-32 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35 of file GE-14-1499);

g) The Appellant explained that any profits made are reinvested in the business (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-45 and GD3-46 of file GE-15-1499);

h) He reported that he had not searched for work or sent out résumés during the times he was not working between 2005 and 2010 because he knew he would be returning to work again. The Appellant said that in order to obtain Employment Insurance benefits, he would stop working long enough to accumulate seven days without work. He said that if he accepted a job outside the company, he would not be required to hire a replacement. The Appellant said that his intention was to work for the company year round. He said he was willing to accept other suitable employment and that he had searched for work in the management field while he was unemployed (Exhibits GD3-25 to GD3-32, GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35, GD3-45 and GD3-46 of file GE-15-1499);

i) The Appellant pointed out that the Canada Revenue Agency (CRA) had determined that the employment of the Plongée sous-marine Nautilus (2005) inc. company employees and owners was insurable within the meaning of the Act. He explained that he initially wanted to obtain (CRA's) permission to stop paying Employment Insurance contributions on salaries. He said that CRA had decided that the company's employees, and even its owners, qualified for Employment Insurance benefits (Exhibits GD3-39 to GD3-41 of files GE-15-1498 and GE- 15-1500 and GD3-42 to GD3-44 of file GE-15-1499);

j) Jean G. Morency, Counsel, representing the Appellant, contended that the Appellant's employment during the relevant periods was insurable under the Act (S.C. 1996, c 23) and Regulations, but that the Appellant was also obviously entitled to benefits during the periods in question. According to the representative, considering that the Appellant and the company contribute to the Employment Insurance scheme and thus help fund it, it would be unthinkable to disentitle the Appellant to a benefit for which he pays premiums. He argued that it would be inconsistent to require employees to pay over $300.00 a year in contributions into an Employment Insurance scheme while denying them access to such scheme (Exhibits GD2-7 and GD2-8, files GE-15-1498, GE-15-1499 and GE-15-1500);

k) The representative underscored that the Appellant's situation seemed unfair and inconsistent given that the Canada Revenue Agency (CRA) had determined that the company's employments were insurable within the meaning of the Act, yet employees were not covered by the Employment Insurance scheme. He illustrated his argument by citing a remark that he credited to Trahan J. of the Superior Court, namely, "You can't be half pregnant." The representative said that CRA had given a decision dated July 11, 2014 confirming the Appellant's employee status and therefore the insurability of his employment with the company for the period between January 1, 2013 and July 9, 2014. He underscored that the Appellant's employment and situation in the company on July 11, 2013 (sic) [2014], were no different than they had been during the relevant periods (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

l) He explained that the Appellant had owned 20% of voting shares (shares with voting rights) in the company since June 30, 2005, as shown on the share certificate. The representative said that although the Appellant was a shareholder in the company, his work schedule was not left to his discretion, but was determined in advance according to the company's needs, just as it was for the other employees. He underscored that paragraph 5(2)b) of the Act determines that: "(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." The Representative stated that the undisputed evidence shows that the Appellant holds 20% of the company's shares, not 40%. He said that the Appellant was not the controlling force in the company, and that paragraph 5(2)b) of the Act did not apply. According to the representative, the Appellant was not the leader of the company's shareholder group, a role filled by Ms. S. L. (the Appellant's spouse) (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

m) In the representative's opinion, contrary to the Commission's claims, the Appellant is not a self-employed person within the meaning of the Act, but simply a company employee and shareholder (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

n) He said that the Appellant worked for a business in a seasonal employment, and had been promised that he would be rehired the spring after his employment ended. The representative said that the company had hired the Appellant in the spring of 1996, and that he had since worked as sports instructor and received a salary for the hours actually worked. He said that the Appellant did not receive benefits other than a salary (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

o) The representative explained that the Appellant had an interruption of earnings and qualified for entitlement to Employment Insurance benefits pursuant to section 7 of the Act. He underscored that during the periods in question, the Appellant's earnings had been interrupted for more than seven (7) days and he had held insurable employment for the required number of hours (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

p) He said that the Appellant had repaid the amounts claimed from him for benefits paid during his benefit periods from 2007 to 2009 (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

q) In the Representative's view, the Commission's decision is clearly unfounded in fact and in law. He mentioned that the Department (the Commission) had not objected to the appeal filed, and had not submitted arguments (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500);

r) He contended that the appeal before the Tribunal is well-founded in fact and in law, and that the Appellant was entitled to Employment Insurance benefits effective January 15, 2007, December 8, 2008 and November 29, 2009. The representative asked the Tribunal to align with the Canada Revenue Agency analysis, which found that the Appellant's employment was insurable within the meaning of the Act, and to find him entitled to benefits. He argued that the Appellant was justified to ask the Tribunal to allow this appeal. The representative asked that the amounts reimbursed by the Appellant for benefits he received from 2007 to 2009 be returned to him, namely $12,313.00, plus interest (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[19] The Respondent (the Commission) made the following submissions and arguments:

a) The Commission explained that a claimant who operates his own business is presumed to work a full working week unless he can show that his engagement in such activity is limited to such a minor extent that a person could not normally rely on it as a principal means of livelihood. It specified that to determine whether the claimant's self-employment was minor in extent, it had to apply the objective test set out in subsection 30(3) of the Regulations to the circumstances applicable to the claimant's company during his benefit period. The Commission said that time spent and the claimant's intention and willingness to seek and immediately accept alternate employment are the two most important factors (Exhibit GD4-5 of files GE-15- 1498, GE-15-1499 and GE-15-1500);

b) It determined that he evidence on file had shown the following in relation to these six factors:

c) The nature of the employment or business: The company specializes in scuba diving activities. The company owns a store and sells diving articles. The Appellant is the company's representative and a director, and he sits on its board of directors. He has owned 20% of the shares since 2005, and works in partnership with five (5) other persons. The Appellant has a background in marine biology and experience as a diving instructor and in breathing equipment repair. He performs the following tasks: sales consultant, instructor, staffing, payroll, ordering, inventory, activity preparation, tank-filling at Cégeps (general and vocational educational colleges), cleaning and contract negotiations. The Appellant is not paid when he attends board of directors' meetings. He is not paid when he accompanies students on weekend diving excursions at the inn (Exhibits GD3-24, GD3-42 to GD3-44 of file GE-14-1498, Exhibits GD3-27, GD3-45 to GD3-47 of file GE-15-1499, Exhibits GD3-24 and GD3-42 to GD3-44 of file GE-15-1500), (Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15-1500);

d) The time spent: the Appellant began operating the company in 2005. He spent about 40 hours a week on the business, and when he was unemployed, 7 and a half hours a week. He would also call the business while he was receiving Employment Insurance to check on its cash proceeds (Exhibits GD3-25 to GD3-31, GD3-42 and GD3-43 of file GE- 14-1498, Exhibits GD3-28 to GD3-34, GD3-45 and GD3-46 of file GE-15-1499 and Exhibits GD3-25 to GD3-31, GD3-42 and GD3-43 of file GE-15-1500), (Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15-1500);

e) The nature and amount of capital and resources invested: the Appellant invested $10,000.00 in 2005 to buy shares. Among other things, the company owns a building, boats, trailers, diving equipment, material and tools as well as rolling stock. Based on its financial statements, the company had an inventory worth $29,460.00 in the fiscal year ended January 31, 2007 (Exhibit GD3-49 of file GE-14-1498), $46,553.00 in the fiscal year ended January 31, 2008 (Exhibit GD3-83 of file GE-14-1498), $50,799.00 in the fiscal year ended January 31, 2009 (Exhibit GD3-49 of file GE-15- 1500) and $63,583.00 in the fiscal year ended January 31, 2010 (Exhibit GD3-52 of file GE-15-1499 and GD3-83 of file GD-15-1500). The company also owns the *Gite du Plongeur*, where diving students receive accommodation (Exhibits GD3-25 to GD3-31, GD3-42 and GD3-43 of file GE-14-1498, Exhibits GD3-28 to GD3-34 of file GE-14-1499, Exhibits Gd3-25 to GD3-31, GD3-42 and GD3-43 of file GE-15-1500), (Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15- 1500);

f) The financial success or failure of the employment or business: the company earned the following net profits: $26,515.00 in the fiscal year ended January 31, 2007 (Exhibit GD3-47 of file GE-15-1498), $41,336.00 in the fiscal year ended January 31, 2008 (Exhibit GD3-81 of file GE-15-1498), $37,316.00 in the fiscal year ended January 31, 2009 (Exhibit GD3-47 of file GE-15-1500) and $33,202.00 in the year ended January 31, 2010 (Exhibit GD3-50 of file GE-15-1499 and GD3-81 of file GE-15-1500). Twenty-five (25) people were on the payroll during the company's peak period (Exhibits GD3-25 to GD3-31 and GD3-42 to GD3-43 of file GE-14-1498, Exhibits GD3-28 to GD3-34, GD3-45 and GD3-46 of file GE-15-1499, Exhibits GD3-25 to

GD3-31, GD3-42 and GD3-43 of file GE-15-1500), (Exhibit GD4-6 of files GE-15-1498, GE-15- 1499 and GE-15-1500);

g) The continuity of the employment or business: the Appellant has been a shareholder since 2005 and the business is still operating. The company owns a telephone line and it advertises. The Appellant has business cards and is making a significant effort to turn this business into his principal source of income. The company has a website (Annuaire de la plongée.com). (Exhibits GD3-25 to GD3-32, GD3-42 to GD3-44 of file GE-15-1498, Exhibits GD3-28 to GD3-35, GD3-45 to GD3-47 of file GE-15-1499, Exhibits GD3-25 to GD3-32, GD3-42 to GD3-44 of file GE-15-1500), (Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15- 1500);

h) The claimant's intention and willingness to seek and immediately accept alternate employment: the Appellant wants to work year-round for his company. While he was laid off between 2005 and 2010 he did not search for work because he knew he would be returning to his job (Exhibits GD3-25 to GD3-31, GD3-42 and GD3-43 of file GE-15-1498, Exhibits GD3-28 to GD3-34, GD3-45 and GD3-46 of file GE-15-1499, Exhibits GD3-25 to GD3-31, GD3-42 and GD3-43 of file GE-15-1500), (Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15-1500);

i) The Commission argued that, considered objectively, all six (6) factors combined lead to the following observation: the Appellant's engagement in his business is that of a person who would normally rely on such an extent of self-employment as a principal means of livelihood. It stated that the Appellant is a shareholder and director of the company. The Commission contended that the business has been the Appellant's main source of income since 2005. It underscored that the Appellant is in charge of hiring employees, handling the payroll, ordering supplies, making an inventory, preparing activities, filling tanks at the Cégeps, cleaning and negotiating contracts. The Commission added that the Appellant is also a sales consultant and instructor. It said that he is always present to oversee the company's operations. In the Commission's view, the Appellant is engaged in activities considered necessary and important to the company's operations, and that provide him with an income. It stated that the

Appellant's goal is to make this company his main source of income. The Commission underscored that the Appellant had not searched for work. It mentioned that the Appellant also confirmed that if it took seven (7) consecutive days of unemployment to obtain entitlement to Employment Insurance, he would simply stop working (Exhibits GD3-24, GD3-42 and GD3-43 of file GE-15-1498, Exhibits GD3-27, GD3-45 and GD3-46 of file GE-15- 1499, Exhibits GD3-24, GD3-42 and GD3-43 of file GE-15-1500), (Exhibit GD4-7 of files GE-15-1498, GE-15-1499 and GE-15-1500);

j) It pointed out that the Appellant is a shareholder in the company, and that he manages and controls all aspects of it. The Commission underscored that the Appellant is not seeking any other employment and wants to make his company his principal source of income. In its assessment, the evidence shows that the Appellant operated his business to an extent that cannot be considered minor (Exhibit GD4-7 of files GE-15-1498, GE-15-1499 and GE-15-1500);

k) The Commission stated that the Appellant did not show that his business operation activities were minimal or minor, and had therefore failed to prove that he was unemployed. Accordingly, the Commission said it did not consider the Appellant entitled to benefits effective January 14, 2007 (file GE-15-1498), dated December 7, 2008 (files GE-15-1499 and GE-15-1500) given that he was not employed or engaged in the operation of a business to such a minor extent that such employment or engagement would not normally represent his livelihood (Exhibit GD4-7 of files GE-15-1498, GE-15-1499 and GE-15-1500).

ANALYSIS

[20] Section 9 of the Act provides the following concerning the establishment of a benefit period:

> When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[21] Subsection 11(1) of the Act states that a "week of unemployment" for a claimant is "a week in which the claimant does not work a full working week."

[22] Subsection 30(1) of the Regulations contains a general assumption whereby:

> […]where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

[23] However, this presumption can be overturned pursuant to 30(2) of the Regulations where:

> […] a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[24] Subsection 30(3) of the Regulations specifies the circumstances to be considered in determining whether the employment or operation of a business is of "the minor extent" described in subsection 30(2) of the Regulations. These circumstances are: a) the time spent; b) the nature and amount of the capital and resources invested; c) the financial success or failure of the employment or business; d) the continuity of the employment or business; e) the nature of the employment or business; and f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[25] In ***Lemay*** **(A-662-97)** and ***Turcotte*** **(A-664-97)**, the Court upheld the principle whereby a claimant who operates a business is responsible for disproving the presumption that he or she was not working a full working week.

[26] In ***Martens*** **(2008 FCA 240 – A-256-07)**, the Court provided the following clarifications:

> […] Subsection 30(1) effectively denies employment insurance benefits to a claimant who is self-employed or engaged in the operation of a business on his or her own account. […]Subsection 30(2) will negate the application of subsection 30(1) where a claimant is self-employed or engaged in the operation of a business to a minor extent. The test for minor self-employment or engagement in business operations requires a determination of whether the extent of such employment or engagement, when viewed objectively, is so minor that the claimant would not normally rely on that level of engagement as a principal means of livelihood. Subsection 30(3) requires six factors to be considered in determining whether the claimant's self-employment or engagement in the operation of the particular business is minor in extent. These factors represent a codification of the six factors outlined in *Re Schwenk* (CUB 5454). […]In interpreting these provisions, it is important to consider that their objective is the determination of the extent of the self-employment or engagement in a business by a claimant in any given week in a benefit period that has been established pursuant to section 9 of the Act. If such self-employment or engagement is minor in extent, then the claimant will have overcome the presumption contained in subsection 30(1) and will not be regarded as having worked a full working week during that week.

[27] In ***Jouan*** **(A-366-94)**, the Court stated:

> […] the most important, most relevant and only basic factor to be taken into account has to be, in all cases, the time spent. […]In the case of a claimant who spends, on a regular basis, 50 hours per week to the affairs of his own business, there is no way that he can invoke the exception of subsection 43(2). This claimant must necessarily be considered as falling under the general presumption of subsection 43(1) and be regarded as working a full working week.

[28] In ***Charbonneau*** **(2004 FCA 61)**, the Court stated:

> […] not very far behind the "time" factor, in terms of importance, is the factor of "the claimant's intention and willingness to seek and immediately accept alternate employment". As Marceau J.A. pointed out in *Jouan*, "The Act is designed to provide temporary benefits to those who are unemployed and actively seeking other work" (emphasis added). A claimant will not be considered unemployed if, all the while he is receiving payments, he merely says he is available to work and does not undertake serious, real steps to

> find work for himself. […]In conclusion, if it is true to say that all the factors listed in section 30(3) of the *Employment Insurance Regulations* must be taken into consideration, the fact is that the "time" factor" (paragraph (*a*)) and the "intention and willingness" factor (paragraph *(f)*) are of utmost importance. A claimant who does not have the time to work or who is not actively seeking work should not benefit from the Employment Insurance system.

[29] In ***D'Astoli*** **(A-999-96)**, the Court found:

> […] insurability of employment and entitlement to benefits are two factors that the Commission must evaluate in respect of two separate periods. However, Parliament intended the analysis of each of these factors to be subject to separate rules, which must not be confused, "the process for determining the insurability of employment [being] unrelated to that for determining entitlement to benefit". […]While the question of insurability must be determined by the Minister of National Revenue - and the Tax Court of Canada, if there is an appeal - and relates to the qualifying period, on the other hand, where a question of entitlement to benefit arises, it must be decided by the Commission itself - and the board of referees, if there is an appeal - and relates to the benefit period. The determination made with respect to insurability cannot be binding on the Commission with respect to that question, and not when it comes to decide entitlement to benefit.

[30] In ***Pannu*** **(2004 FCA 90)**, the Court stated:

> […] The applicant's complaint is really against the ***Employment Insurance Act***. She says she has contributed during her entire period of employment and that it is unfair that she should be denied her sickness benefits now. However, the ***Employment Insurance Act*** is an insurance plan and like other insurance plans, claimants must meet the conditions of the plan to obtain benefits. In this case, the applicant does not meet those conditions and is therefore not entitled to benefits. […]While the applicant's case is a sympathetic one, the Court cannot rewrite the ***Employment Insurance Act*** to accommodate her.

[31] In ***Mazzonna*** **(A-614-94)**, the Court dismissed the application for a judicial review and affirmed the decision in **CUB 25617,** where the Umpire found:

> In opposition to these arguments, counsel for the Commission referred us to Exhibit 5 which, in her view, was sufficient in itself to allow the Board of Referees to find as it did. She said that she agreed that the work in question was seasonal and that if the claimant were a salaried employee, he would be recognized as being unemployed during the winter season. She claimed, however, that the claimant's situation was totally different because he was operating a business on his own account and this aspect of the matter did not change during the winter months. She declared that as the condition of unemployment had not been proved, the majority decision of the Board of Referees had to stand.

[32] Herein, the Appellant is a shareholder in the Plongée sous-marine Nautilus (2005) inc. company, and has operated this business since its creation in 2005. In the Tribunal's view, the Appellant must be considered a "self-employed person," defined in subsection 30(5) of the Regulations as follows: “an individual who (a) is or was engaged in a business; or (b) is employed but does not have insurable employment by reason of paragraph 5(2)(b).”

[33] The Appellant has held 20% of the company’s shares since 2005. He was an operator of the company from the time of its establishment, and he acted as a “self-employed person” under subsection 30(5) of the Regulations even though the Canada Revenue Agency determined that his employment was insurable under paragraph 5(1)a) of the Act (Exhibits GD2-52 and GD2-53 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[34] The Tribunal would underscore that although the insurability of the Appellant’s employment under paragraph 5(1)a) of the Act is a factor to consider in determining whether he is entitled to benefit, it does not preclude the possibility of considering him a self-employed person under subsection 30(5) of the Regulations.

[35] In appraising the evidence, the Tribunal considers the six (6) circumstances mentioned in subsection 30(3) of the Regulations. These circumstances are used to determine whether the extent of a claimant’s employment or engagement in the operation of a business is "minor" within the meaning of subsection 30(2) of the Regulations.

The time spent

[36] Concerning the “time spent” item in subsection 30(3) of the Regulations, the Tribunal believes that the Appellant, during the benefit periods in question, starting on January 14, 2007, December 7, 2008 and November 29, 2009, and given all of the tasks assigned to him within the company, regularly attended to these duties for the purpose of making this employment his principal means of livelihood.

[37] The Tribunal underscores that "time spent" is the most important and relevant factor to consider in determining whether a claimant is working full working weeks (***Martens*, 2008 FCA 240, *Jouan*, A-366-94**).

[38] In this case, the Tribunal believes that in his testimony and previous statements, and in all of the duties he performed on behalf of a company in which he is a shareholder, the Appellant tried to minimize the time he spent on the company during periods in which he was receiving Employment Insurance benefits.

[39] The Appellant argued that outside his benefit periods, he spent approximately 7.5 hours a week (one or one and a half hours a day) on activities for his company, and also stated that the specific number of days per week or hours per day that he spent performing tasks for this company was variable (Exhibits GD3-25 to GD3-32, GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35, GD3-45 and GD3-46 of file GE-14-1499).

[40] The evidence shows that the Appellant performed the following duties in his company:

a) Sales consulting (sales associate);

b) Training (scuba diving instructor);

c) Customer service;

d) Hiring;

e) Negotiating contracts on behalf of the company (with assistance from other employees);

f) Payroll (i.e., sign cheques for approximately 25 people entered in the payroll ledger;

g) Sales and management of scuba diving products (payments related to purchases and sales, place and receive supplier orders);

h) Oversight of the company's daily operations;

i) Participation in company decision-making.

[41] In his reports, the Appellant also said that he was spending about a day a week exclusively on preparing employee wages (Exhibit GD3-44 of files GE-15-1498 and GE-15-1500, Exhibit GD3-47 of file GE-15-1499).

[42] The Appellant reported that he normally worked from 40 to 42 hours a week as an employee on preparing the payroll, and that this employment was his principal means of livelihood (Exhibits GD3- 25 to GD3-32, GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35, GD3-45 and GD3-46 of file GE-14-1499).

[43] Based on all of his duties within the company, the Tribunal considers the Appellant's assertion that he spent only about 7.5 hours a week on company activities during his benefit periods to be puzzling at best and lacking in credibility. The Tribunal would point out that the Appellant also said he was making a considerable effort to make this company his main source of income, and that he intended to work for it all year (Exhibits GD3-25 to GD3-32 of files GE-15- 1498 and GE-15-1500, Exhibits GD3-28 to GD3-35 of file GE-14-1499).

[44] The Tribunal would also point out that, by his own admission, the Appellant would stop working until he had accumulated the seven days of unemployment he needed to obtain Employment Insurance benefits (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15- 1500, Exhibits GD3-45 and GD3-46 of file GE-15-1499)

[45] In the Tribunal's view, the Appellant's participation in various duties related to the operation of the company Plongée sous-marine Nautilus (2005) inc. was quite extensive and the time spent on these duties was not limited to such an extent that he could not rely on it as his principal means of livelihood.

[46] Although the Appellant's representative drew attention to the seasonal nature of the Appellant's employment, the Tribunal does not believe he necessarily stopped operating his business. Despite the fact that the Appellant temporarily stopped working, in a manner similar to seasonal workers, considering the nature of the company's services and its slow-down in activities for a portion of the year, the Appellant nevertheless remained a shareholder and operator of the company. In these circumstances, the Appellant cannot be considered unemployed during the periods in question (***Mazzonna,* A-614-94**).

[47] Considering the Appellant's many responsibilities for the company in which he is a shareholder, the Tribunal believes that his engagement in the various tasks involved in operating this business was more than considerable.

Capital and resources invested;

[48] As for the "nature and amount of the capital and resources invested" item in subsection 30(3) of the Regulations, the Tribunal considered the fact that the Appellant made very large investments in his business and had entered a number of related financial agreements.

[49] The Appellant invested $10,000.00 in 2005 to purchase shares in the company. He explained that the company had taken out loans with a financial institution, and that he had put up personal property to secure the loans in question (Exhibits GD3-25 to GD3-32 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35 of file GE-14-1499).

[50] The Appellant, jointly, with the company's other shareholders, signed two mortgages on the company's behalf, one for $110,000.00 and the other for $70,000.00. He also reported that he was signatory to a $20,000.00 line of credit in the company's name (Exhibits GD3-25 to GD3-32, GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-28 to GD3-35, GD3-45 and GD3-46 of file GE-15-1499).

[51] The Appellant stated that the company's stock was worth approximately $50,000.00 (2010) and had increased in value.

[52] The documentary evidence also shows that the company owns the following, among other things: a building, boats, trailers, diving equipment, various materials and tools, as well as rolling stock. Based on its financial statements, the company's inventory was worth $29,460.00 in the fiscal year ended January 31, 2007 (Exhibit GD3-49 of file GE-14-1498), $46,553.00 in the fiscal year ended January 31, 2008, $50,799.00 in the fiscal year ended January 31, 2009 and $63, 583.00 in the year ended January 31, 2010 (Exhibit GD3-83 of file GE-14-1498). The company also owns the *Gite du Plongeur* (an inn), which provides accommodation during diving excursions (Exhibits GD3-25 to GD3-31, GD3-42 and GD3-43 of file GE- 14-1498), (Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[53] On the whole, the Tribunal believes that the amount of resources invested by the Appellant in operating a company in which he holds shares is considerable, given his many investments, the resources allocated to it and even the tasks he performs in this regard.

[54] Taking all of these factors into account, the Tribunal believes that the nature and amount of capital and other resources invested in the company are by no means minor or insignificant. The Appellant is heavily engaged at a financial level as a shareholder in his company.

The financial success or failure of the employment or business

[55] Concerning the "the financial success or failure of the employment or business," as specified in subsection 30(3) of the Regulations, the Tribunal believes that the evidence submitted shows the existence of "circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2)," since the work that the Appellant performed for the company from its establishment is that of a person who would normally rely on such self-employment as a principal means of livelihood, which is a fundamental factor in this regard.

[56] The Appellant said he wanted to make the business his principal means of livelihood.

[57] The Tribunal pointed out that the company is still in operation and has approximately 25 employees in all.

[58] The evidence on file indicates that the company's net income for the taxation years 2007 to 2010 inclusive—the years corresponding to the Appellant's benefit periods—was, respectively $41,409.00, $58,380.00, $46,128.00 and $34,055.00 (Exhibits GD3-60 to GD3-78 of file GE-15-1498, Exhibits GD3-93 to GD3-112 of files GE-15-1498, GE-15-1499 and GE-15-1500, Exhibits GD3-59 to GD3-78 of file GE-15- 1500, Exhibits GD3-93 to GD3-111 of file GE-15-1500 and Exhibits GD3-61 to GD3-80 of file GE-15-1499).

[59] During the years in which the Appellant received benefits (2007 to 2010), the company's net profits were as follows: $26,515.00 for the fiscal year ended January 31, 2007, $41,336.00 for the fiscal year ended January 31, 2008, $37,316.00 for the fiscal year ended January 31, 2009 and $33,202.00 for the fiscal year ended January 31, 2010. Net losses of $17,908.31 were also reported for the period from February 1, 2010 to February 28, 2010 (Exhibits GD3-45 to GD3-56 and GD3-79 to GD3-92 of file GE-15-1498, Exhibits GD3-45 to GD3-58 and GD3-79 to GD3-92 of file GE-15-1500, Exhibits GD3-48 to GD3-61, GD3-80 and GD3-81 of file GE-15-1499).

[60] The Appellant also stated that when the company makes a profit, the proceeds are reinvested in the business (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-45 and GD3-46 of file GE-15-1499).

[61] The evidence also shows that additional investments were made in the company, either through renovation work or the purchase of new equipment (ex., a van and a trailer).

[62] In the Tribunal's view, all of these factors are indications of the financial success of the employment or business.

The continuity of the employment or business

[63] Concerning the "continuity of the employment or business," another of the factors mentioned in subsection 30(3) of the Regulations, the Tribunal took account of the fact that the Appellant continues to make an ongoing contribution to the continuity of the employment or business in which he is shareholder, and that the business is still in operation and still represents the Appellant's principal source of income.

[64] In this regard, the Appellant's spouse said that the company has 25 employees in all. She stated that three employees work full time, another works on weekends and about 20 people work on a casual basis. She said that the company also uses the services of an accounting technician.

[65] Investments were also made to renovate the company's store and purchase a new trailer and truck used to deliver cylinders (oxygen tanks).

[66] The evidence shows that his company has a telephone line, a website and advertising. The Appellant also has business cards (Exhibits GD3-25 to GD3-31, GD3-32, GD3-42 to GD3-44 of file GE-15-1498).

[67] The Tribunal considers that the shareholders, including the Appellant, made a sustained and ongoing effort to operate the company and promote its growth.

The nature of the employment or business

[68] Concerning the "nature of the employment or business," mentioned in subsection 30(3) of the Regulations, the Tribunal believes that the type of employment that the Appellant held in the company in which he was a shareholder seems to have held interest for him since it matched his field of training and accounted for his principal source of income from the time the specialized, scuba-diving business was created.

[69] The evidence on file indicates that the Appellant received professional training in marine biology, training as a scuba diving instructor and training in diver respiratory techniques (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-45 and GD3-46 of file GE-15-1499).

[70] The Appellant began working for the business in 1996. Since 2003, he has worked for the company as a scuba diving instructor.

[71] The company owns a business specializing in the sale of diving equipment.

[72] In addition to being a shareholder in the company and a member of its board of directors, the Appellant was a company representative.

[73] Clearly, scuba diving is the Appellant's field of expertise.

The claimant's intention and willingness to seek and immediately accept alternate employment

[74] Concerning the question of "the claimant's intention and willingness to seek and immediately accept alternate employment," also provided in subsection 30(3) of the Regulations, the Tribunal believes that the Appellant did not show such intention or willingness during his benefit periods.

[75] The Tribunal underscores that factors related to this item "are of utmost importance" (***Charbonneau*, 2004 FCA 61**).

[76] The Appellant said he was available for work during his benefit periods, but he did not look for work at these times (ex., send out résumés) because he had a promise of employment from his employer, and knew he would be returning to work for this employer. He said he received confirmation of his recall to work after the company's inactive months ended (Exhibits GD3-42 and GD3-43 of files GE-15-1498 and GE-15-1500, Exhibits GD3-45 and GD3-46 of file GE-15- 1499, Exhibit GD4-6 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[77] The Appellant clearly said he wanted to work year-round for his company.

[78] The Tribunal believes that the Appellant showed his preference for working for his company during his benefit periods, and therefore cannot be considered willing to seek and immediately accept alternate employment (***Martens*, 2008 FCA 240, *Charbonneau*, 2004 FCA 61, *Jouan*, A-366-94**).

Appellant's insurable employment and the payment of Employment Insurance contributions

[79] The Appellant pointed out that the Canada Revenue Agency (CRA) had determined that the employment held by employees and owners of Plongée sous-marine Nautilus (2005) inc. was insurable within the meaning of the Act. The representative argued that the Appellant should therefore be entitled to benefits (Exhibits GD2-7 and GD2-8 of files GE-15-1498, GE-15-1499 and GE-15-1500, GD3-39 to GD3-41 of files GE-15-1498 and GE-15-1500 and GD3-42 to GD3-44 of file GE- 15-1499).

[80] The Appellant's representative also argued that the Appellant owned 20% of the company's shares, but did not have a controlling interest in the company. The representative argued that the Appellant's employment was insurable within the meaning of the Act and that he was not covered by paragraph 5(2)b) of the Act, which states: "(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."

[81] The representative underscored in a letter dated July 11, 2014 that the CRA had also determined that the Appellant held insurable employment under paragraph 5(1)a) of the Act (period from January 1, 2013 to July 9, 2014), (Exhibits GD2-7, GD2-8, GD2-52 and GD2- 53 of files GE-15-1498, GE-15-1499 and GE-15-1500).

[82] The Tribunal does not accept the argument by the Appellant's representative that it is inconsistent and unfair to require an employee to contribute to Employment Insurance while denying the employee entitlement to receive benefits because the employee is a shareholder of the company.

[83] The Tribunal would point out that the insurability of an employment and entitlement to benefit are two factors that must be evaluated separately. The question of an employment's insurability must be determined by the Canada Revenue Agency, while the question of entitlement to benefit must be decided by the Commission (***D'Astoli***, **A-999-96**). "The determination made with respect to insurability cannot be binding on the Commission with respect to that question, and not when it comes to decide entitlement to benefit" (***D'Astoli***, **A-999-96**).

[84] Although the Appellant's employment was insurable within the meaning of the Act and although he made Employment Insurance contributions during the periods he worked for the company, he is not necessarily automatically entitled to receive benefits. A claimant must satisfy all of the Act's requirements to qualify for such benefits (***D'Astoli***, **A-999-96, *Pannu*, 2004 FCA 90**).

[85] To summarize, the evidence shows that as a shareholder of the company Plongée sous-marine Nautilus (2005) inc., the Appellant did not disprove the presumption that he was working a full working week pursuant to subsection 30(1) of the Regulations (***Lemay*, A-662-97, *Turcotte*, A-664-97**).

[86] In the Appellant's case, the Tribunal applied the definition set out in subsection 30(1) of the Regulations:

> […] where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership

> or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

[87] The Appellant was not employed or engaged in the operation of his business, "[…] to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood […]," as specified in subsection 30(2) of the Regulations.

[88] The Tribunal finds that the time the Appellant spent on his company, "the nature and amount of the capital and resources invested" in it by him and the fact that he did not prove his "intention and willingness to seek and immediately accept alternate employment" are the most decisive tests used to reach this finding.

[89] The Appellant did not show that he was genuinely unemployed in each of his benefit periods pursuant to subsection 11(1) of the Act (***Jouan*, A-366-94**).

[90] Therefore, a "benefit period" cannot be established for the Appellant pursuant to section 9 of the Act since he does not "qualify under section 7 or 7.1" of the said Act. Benefits cannot be payable to him "for each week of unemployment that falls in the benefit period," under section 9 of the Act.

[91] Although the Appellant's reasons for deciding to work for a company in which he holds shares are excellent, they do not exclude him from the Act's requirements regarding the proof he must submit to qualify for Employment Insurance benefits.

[92] The Tribunal finds that the Appellant's disentitlement to Employment Insurance benefits is well-founded pursuant to sections 9 and 11 of the Act, and section 30 of the Regulations given that he failed to show that he was unemployed.

[93] The appeal is without merit on this issue.

CONCLUSION

[94] The appeal is dismissed.

Normand Morin,
Member, General Division - Employment Insurance Section