Docket: 2010-256(EI)

BETWEEN:

ROBERT MACKENZIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 2, 2011, at Kingston, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Eric Karrandjas
Counsel for the Respondent:	Christopher Kitchen George Boyd Aitken

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JUDGMENT

The appeal is allowed and the decision made by the Minister of National Revenue on December 11, 2009 under the *Employment Insurance Act* is varied in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 6th day of April 2011.

"Patrick Boyle"

Boyle J.

Citation: 2011 TCC 199
Date: 20110406
Docket: 2010-256(EI)

BETWEEN:

ROBERT MACKENZIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The issue in this case involves a determination of the insurable hours for employment insurance (EI) purposes of a part-time college instructor.

I. Facts

[2] The Appellant, Mr. MacKenzie, testified on his own behalf. The Respondent called the Director of Human Resources for St. Lawrence College, being the college at which Mr. MacKenzie taught in the period in question. In addition, a significant number of documents were put into evidence.

[3] There are few inconsistencies in the evidence as to facts (as opposed to opinions) and none that are material to the question to be determined. There are no credibility or reliability concerns with either of the witnesses' testimony other than (i) Mr. MacKenzie's evidence of preparation and other non-classroom teaching time was, as discussed, below, comprised of estimates, and (ii) Mrs. Koolen was not at the college in the years in question, and was not involved with Council of Regents' EI Working Group recommendations described below. Any concerns regarding these aspects go only to reliability and not to credibility of the witnesses.

[4] Mr. MacKenzie holds a Bachelor of Arts, a Masters of Arts and a Bachelor of Education. He has been teaching a number of subjects in colleges and universities over the last few decades. In the period in question, April 2008 to April 2009, he taught four courses as a part-time instructor at St. Lawrence College ("the College") in Kingston, Ontario.

[5] During the spring 2008 term, from January to April, he taught Introduction to Media Studies. The class was three hours long each Monday for 15 weeks. Only the last two weeks of this course were taught during the period in question.

[6] During the fall 2008 term, from September through December, he taught Media Studies. The students in his class were students from Laurentian University's Bachelor of Nursing Science class. This class was three hours long each Monday for 12 weeks.

[7] During the spring 2009 term, from January to April, Mr. MacKenzie taught Technical Writing Skills. This course was taught to two different classes, one class each Wednesday for two hours and one class each Friday for two hours. The Wednesday classes were scheduled for 15 weeks and the Friday classes were scheduled for only 14 weeks because of Good Friday.

[8] During the spring 2009 term, he also taught a Communications course. The students in this class were high school students in their final term who planned to attend college the following year. This course was designed to help them with the transition and earned them both high school and college credits. This class was two hours long each Wednesday for 10 weeks.

[9] As is the common practice, part-time faculty are neither paid a fixed salary nor paid an hourly rate based on actual hours worked or required to be worked. St. Lawrence College's contract with Mr. MacKenzie specified the total number of classroom hours to be taught for each course and fixed the Total Pay for teaching that course as a function of those classroom hours and a stated rate per classroom hour. The stated rates set for Mr. MacKenzie's courses were $39.27 for Introduction to Media Studies, $118.79 for Media Studies, $50 for Technical Writing Skills and $50 for Communications. Thus, each contract set a total contract dollar amount by multiplying the number of scheduled classroom hours by the rate.

[10] Colleges use the term Total Contact Hours and the acronym TCH to describe the actual classroom hours taught to students. The only adjustment from the

scheduled classroom hours would be if an instructor did not teach a scheduled class. If that were to happen, the fee payable would be revised.

[11] There is no dispute as to Mr. MacKenzie's TCH during the period, how much he was paid under his contracts with the College for teaching these courses, or his insurable earnings.

[12] Not surprisingly, the College requires its part-time faculty to do more under the contracts than teach the scheduled classroom hours. Course, test, assignment and exam preparation, test, assignment and exam marking, meetings with students on their assignment topics, progress and grades, etc. necessarily occur outside the fixed classroom teaching hours. Both the College and Mr. MacKenzie agree that he was required and did work more than just the TCH in order to fulfill his teaching contract obligations. Neither party in fact kept track of the number of hours actually worked. As described below, Mr. MacKenzie was able to provide a reasoned estimate of the amount of non-classroom time he spent per course and express it as an amount of time per classroom hour. The College did not estimate the time actually worked by Mr. MacKenzie but, as described below, estimated his actual worked hours based upon the ratio of a full-time professor's TCH responsibility as a function of a 40-44-hour work week.

II. The Legislation

[13] Under the *Employment Insurance Act* ("*EIA*"), the entitlement to benefits is a function of both one's "insurable earnings" and "insurable hours". In this case, there was no dispute as to Mr. MacKenzie's insurable earnings.

[14] Insurable hours are to be determined by regulations in accordance with section 55 of the *EIA*. The relevant provisions of the *EIA* and *Employment Insurance Regulations* ("*EIR*") are reproduced below:

> [*Employment Insurance Act*]
>
> | | |
> |---|---|
> | 6(3) For the purposes of this Part, the number of hours of insurable employment that a claimant has in any period shall be established as provided under section 55, subject to any regulations made under paragraph 54(*z.1*) allocating the hours to the | 6(3) Pour l'application de la présente partie, le nombre d'heures d'emploi assurable d'un prestataire pour une période donnée s'établit, sous réserve des règlements pris au titre de l'alinéa 54*z.1*), au titre de l'article 55. |

claimant's qualifying period.

. . .

55(1) The Commission may, with the approval of the Governor in Council, make regulations for establishing how many hours of insurable employment a person has, including regulations providing that persons whose earnings are not paid on an hourly basis are deemed to have hours of insurable employment as established in accordance with the regulations.

(2) If the Commission considers that it is not possible to apply the provisions of the regulations, it may authorize an alternative method of establishing how many hours of insurable employment a person has.

(3) The Commission may at any time alter the authorized method or rescind the authorization, subject to any conditions that it considers appropriate.

(4) The Commission may enter into agreements with employers or employees to provide for alternative methods of establishing how many hours of insurable employment persons have and the Commission may at any time rescind the agreements.

[*Employment Insurance Regulations*]

9.1 Where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated.

9.2 Subject to section 10, where a person's earnings or a portion of a person's earnings for a period of

[…]

55(1) La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements concernant l'établissement du nombre d'heures d'emploi assurable d'une personne et, notamment, prévoyant que les personnes dont la rémunération est versée sur une base autre que l'heure sont réputées avoir le nombre d'heures d'emploi assurable établi conformément aux règlements.

(2) Lorsqu'elle estime qu'il est impossible d'appliquer les dispositions de ces règlements, la Commission peut autoriser un autre ou d'autres modes d'établissement du nombre d'heures d'emploi assurable.

(3) La Commission peut, sous réserve des conditions qu'elle estime indiquées, modifier un mode qu'elle a autorisé ou retirer son autorisation.

(4) La Commission peut conclure des accords avec des employeurs et des employés prévoyant d'autres modes d'établissement du nombre d'heures d'emploi assurable et y mettre fin unilatéralement.

9.1 Lorsque la rémunération d'une personne est versée sur une base horaire, la personne est considérée comme ayant exercé un emploi assurable pendant le nombre d'heures qu'elle a effectivement travaillées et pour lesquelles elle a été rétribuée.

9.2 Sous réserve de l'article 10, lorsque la totalité ou une partie de la rémunération d'une personne pour une

insurable employment remains unpaid for the reasons described in subsection 2(2) of the *Insurable Earnings and Collection of Premiums Regulations*, the person is deemed to have worked in insurable employment for the number of hours that the person actually worked in the period, whether or not the person was remunerated.

10(1) Where a person's earnings are not paid on an hourly basis but the employer provides evidence of the number of hours that the person actually worked in the period of employment and for which the person was remunerated, the person is deemed to have worked that number of hours in insurable employment.

(2) Except where subsection (1) and section 9.1 apply, if the employer cannot establish with certainty the actual number of hours of work performed by a worker or by a group of workers and for which they were remunerated, the employer and the worker or group of workers may, subject to subsection (3) and as is reasonable in the circumstances, agree on the number of hours of work that would normally be required to gain the earnings referred to in subsection (1), and, where they do so, each worker is deemed to have worked that number of hours in insurable employment.

(3) Where the number of hours agreed to by the employer and the worker or group of workers under subsection (2) is not reasonable or no agreement can be reached, each worker is deemed to have worked the number of hours in insurable employment established by the Minister of National Revenue, based on an examination of the terms

période d'emploi assurable n'a pas été versée pour les raisons visées au paragraphe 2(2) du *Règlement sur la rémunération assurable et la perception des cotisations*, la personne est réputée avoir exercé un emploi assurable pendant le nombre d'heures qu'elle a effectivement travaillées durant cette période, qu'elle ait été ou non rétribuée.

10(1) Lorsque la rémunération d'une personne est versée sur une base autre que l'heure et que l'employeur fournit la preuve du nombre d'heures effectivement travaillées par elle au cours de la période d'emploi et pour lesquelles elle a été rétribuée, celle-ci est réputée avoir travaillé ce nombre d'heures d'emploi assurable.

(2) Sauf dans les cas où le paragraphe (1) et l'article 9.1 s'appliquent, si l'employeur ne peut établir avec certitude le nombre d'heures de travail effectivement accomplies par un travailleur ou un groupe de travailleurs et pour lesquelles ils ont été rémunérés, l'employeur et le travailleur ou le groupe de travailleurs peuvent, sous réserve du paragraphe (3) et si cela est raisonnable dans les circonstances, décider de concert que ce nombre est égal au nombre correspondant normalement à la rémunération visée au paragraphe (1), auquel cas chaque travailleur est réputé avoir travaillé ce nombre d'heures d'emploi assurable.

(3) Lorsque le nombre d'heures convenu par l'employeur et le travailleur ou le groupe de travailleurs conformément au paragraphe (2) n'est pas raisonnable ou qu'ils ne parviennent pas à une entente, chaque travailleur est réputé avoir travaillé le nombre d'heures d'emploi assurable établi par le ministre du Revenu

and conditions of the employment and a comparison with the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries.	national d'après l'examen des conditions d'emploi et la comparaison avec le nombre d'heures de travail normalement accomplies par les travailleurs s'acquittant de tâches ou de fonctions analogues dans des professions ou des secteurs d'activité similaires.
(4) Except where subsection (1) and section 9.1 apply, where a person's actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the person, subject to subsection (5), is deemed to have worked, during the period of employment, the number of hours in insurable employment obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.	(4) Sauf dans les cas où le paragraphe (1) et l'article 9.1 s'appliquent, lorsque l'employeur ne peut établir avec certitude ni ne connaît le nombre réel d'heures d'emploi assurable accumulées par une personne pendant sa période d'emploi, la personne est réputée, sous réserve du paragraphe (5), avoir travaillé au cours de la période d'emploi le nombre d'heures d'emploi assurable obtenu par division de la rémunération totale pour cette période par le salaire minimum, en vigueur au 1er janvier de l'année dans laquelle la rémunération était payable, dans la province où le travail a été accompli.
(5) In the absence of evidence indicating that overtime or excess hours were worked, the maximum number of hours of insurable employment which a person is deemed to have worked where the number of hours is calculated in accordance with subsection (4) is seven hours per day up to an overall maximum of 35 hours per week.	(5) En l'absence de preuve des heures travaillées en temps supplémentaire ou en surplus de l'horaire régulier, le nombre maximum d'heures d'emploi assurable qu'une personne est réputée avoir travaillées d'après le calcul prévu au paragraphe (4) est de 7 heures par jour sans dépasser 35 heures par semaine.
(6) Subsections (1) to (5) are subject to section 10.1.	(6) Les paragraphes (1) à (5) s'appliquent sous réserve de l'article 10.1.

III. Analysis

[15] It is clear from this regime that sections 9.1 and 9.2 of the *EIR* deal with employees who are paid an hourly amount for each hour worked. Such hourly workers are able to be dealt with in the short and straightforward manner of

section 9.1. Their insurable hours are simply the number of hours which they worked and for which they were paid.

[16] Section 9.2 deals with the possibility of such an hourly worker working hours for which he or she should have been paid but was not paid because of the employer's insolvency. The provision recognizes that such unpaid hours worked should also be included in the worker's insurable hours.

[17] It is clear from the evidence of both parties and the documentary evidence that Mr. MacKenzie was not such an hourly worker. His earnings were not determined on the basis of the actual hours he was required to work and in fact worked. His earnings for the work required were determined solely as a function of his TCH, a subset of the hours he actually worked.

[18] Such an interpretation of sections 9.1 and 9.2 of the *EIR* is confirmed by the more complicated regime set out in section 10 that applies to a person whose earnings are not paid on an hourly basis. In such a case, several methods are set out in order to determine the insurable hours beginning with the possible determination by the employer of the hours actually worked.

[19] Section 10 of the *EIR* clearly applies to salaried employees who are required to work beyond their normal work day or work week, and even if their nominal work week is described in hours. It also applies to piece workers who are paid a set amount per unit of work done if the unit is anything other than actual hours actually worked. Section 10 applies to Mr. MacKenzie because he is paid in accordance with his contract on TCH not on actual hours actually worked. TCH are no more an hourly basis of pay than is a salaried worker's presumed 35 or 40-hour work week. For purposes of determining "insurable hours", the concept of TCH is a comparable unit to a bushel or a piece; neither is a 60-minute hour, nor is either a measure of true time.

[20] Subsection 10(1) provides for the situation where the employer maintains evidence of the hours actually worked by the particular employee even though he or she is not paid on an hourly basis. For example, a manufacturer may pay its workers by the piece but keep their business premises open set hours and keep records of who is in the building or who is working each station during each shift. This might also be the case for salaried employees who are required to report their hours worked for management or other purposes beyond their normal work day or work week, or if their presence at their work station, on their computer, or in the building is

monitored. In such a case, the amount recorded by the employer is deemed to be the worker's insurable earnings.

[21] In Mr. MacKenzie's case, the evidence of St. Lawrence College is that it did not track the hours actually worked by him or by any other sessional or part-time instructor, nor were they aware of any college that did.

[22] Subsection 10(2) of the *EIR* then provides that if the employer cannot determine with certainty the actual number of hours worked, the employer and employee can agree on a number of hours worked that would normally be required to gain the earnings and, if they do agree, and the amount is reasonable, the agreed number is deemed to be the worker's insurable hours. This subsection does not apply in this case because there is no agreement on the hours normally required per TCH. As described in greater detail below, Mr. MacKenzie estimates it is approximately four hours per TCH and the College has used a factor of 2.17 hours per TCH in completing the required Record of Employment ("ROE") for EI purposes.

[23] This brings us to subsection 10(3) of the *EIR*. Subsection 10(3) provides that, if the employer and the worker cannot reach an agreement under subsection 10(2), the employee's insurable hours are deemed to be the number established by the Minister of National Revenue ("Minister") based upon the employment terms and conditions and upon a comparison with the number of hours normally worked by similar workers performing similar functions.

[24] Both witnesses testified to the terms and conditions of Mr. MacKenzie's employment at the College. It was clear that he was required to do significantly more than TCH. Their testimony in this regard was confirmed by such documents as the Associate Dean's contract confirmation letter to Mr. MacKenzie and the Faculty Information Memorandum St. Lawrence College provided to all instructors.

[25] The only evidence of actual hours worked came from Mr. MacKenzie. Mr. MacKenzie did not track his actual hours worked. He testified that he estimated his approximate three hours of additional work per TCH having regard to:

(a) The time at the outset, before teaching occurs, spent reviewing existing course outlines, materials and texts, considering and developing alternatives, consulting with the department head and preparing his own overall course plan. He estimated this averaged 32 hours per course for each of the four courses. He stressed his estimate was an average and more time would have been spent, for example, on the Communications

course which was a new course. In cross-examination, he acknowledged that this work for the spring 2008 Introduction to Media Studies course would have been completed prior to the period in question.

(b) The preparation time for each class taught, spent reviewing the material to be taught and planning its delivery, etc. He estimated this averaged two to three hours for each two or three-hour class. He acknowledged in cross-examination that he spent less time for some classes and some courses but felt that this was a good estimate of an overall average. I note that this is an average preparation time of one hour for each hour of class taught.

(c) The time spent preparing the assignments, tests and examination papers for each course he estimated at 10 hours on average per course. He acknowledged most of this work for the spring 2008 Introduction to Media Studies course would have been completed before the period in question.

(d) The time spent marking the assignments, tests and examination papers, he estimated at 25 hours for each course. He acknowledged in cross-examination that for courses where students were marked in part on oral communications skills by way of an in-class presentation, he was able to mark these during his TCH.

(e) Setting up and maintaining records of students' marks and students' progress was estimated to average 10 hours per course.

(f) Meetings with students for information, advice and counsel on course material, assignment topics or generally regarding their pursuits and fields of study took additional time.

[26] Having heard this evidence and considered it in the overall context of the evidence, but without deciding the matter, Mr. MacKenzie's estimate of an additional three hours per TCH appears to be somewhat high. Adjusting for the overstatements acknowledged in cross-examination and a reasonable range for the inaccuracy of after the fact estimates, etc., I would be more inclined to think a more correct number might be in the range of two additional hours per TCH, made up of approximately one hour of preparation and follow-up time for each TCH, and a further hour in recognition of the overall course preparation grading and follow-up. In the circumstances, all I could do would be to come up with an estimate and I

acknowledge that, if it could ever be tested, my estimate may in fact miss the mark more than either of the parties' estimates.

[27] The only evidence of how much time is allocated to other College instructors for their non-TCH responsibilities came from the College's Human Resources Director. Her testimony was that the College, in completing its ROEs for less than full-time instructors, opted to follow the recommendations of the Ontario Council of Regents. The Council of Regents is made up of representatives from Ontario's colleges. It acts as the colleges' bargaining agent in dealing with their employees including those instructors who bargain collectively. The Council of Regents also serves as an advisory resource on administrative matters to its Ontario college members.

[28] With the advent of new EI ROE reporting requirements on insurable hours, the Council of Regents struck a working group to consider the issue of how to report the insurable hours for its employees, including in particular those who are working less than full-time, and including instructors. This working group was comprised entirely of college administrator nominees. No instructors were represented, nor was any information ever sought from them. The working group asked the Council's member colleges how each college recommended or suggested hours actually worked per TCH should be recorded going forward under the new ROE regime. The working group summarized those suggestions and circulated the summary together with the working group's recommended approaches. St. Lawrence College has chosen to simply adopt those recommendations.

[29] The Council of Regents' working group recommendations for instructors working less than full-time is to multiply their TCH by the ratio that (a) full-time instructors' weekly TCH obligations of 18 to 20 TCH is to (b) the nominal full-time instructors' work week of 42-44 hours. In the case of part-time instructors, a factor of 2.17 is thus applied to their TCH to come up with an estimate of their hours actually worked and "insurable hours". A factor of 2.17 allows for an additional 1.17 hours per TCH of time to fulfill related course teaching obligations other than TCH.

[30] This was the only evidence before the Court of what could be considered at all reflective of hours actually worked by other instructors generally in fulfilling their TCH obligations. As mentioned, it was not the product of any input from instructors whatsoever and entirely equated full-time instructor assumptions to part-time instructors. No attempt appears to have been made to consider if an adjustment was needed for such things as a possible greater efficiency of full-time tenured faculty with perhaps more fixed courses over time compared to part-time instructors, or to

whether full-time faculty were in fact paid by colleges to work a significant number of weeks throughout the year during which no courses were taught and they had no TCH responsibilities, weeks such as reading weeks, summer terms and the December-January period between the fall and spring terms.

[31] The Council of Regents' recommended 2.17 factor per TCH was the only such evidence before the Minister when he made the ruling in question. The ruling states that it rejects Mr. MacKenzie's estimates because he could not provide written substantiating documents or a log of hours worked outside the classroom. The ruling then acknowledged that some credit need be given for preparation and marking, considered the 2.17 factor and concluded: "The insurable hours issued by St. Lawrence College on the Record of Employment . . . totalling 261 hours are therefore accepted as indicated."

[32] This clearly does not satisfy what the Minister is to consider if he was applying subsection 10(3) of the *EIR*. In fairness, the ruling proceeded as if it was applying section 9.1 even though the "hourly basis" of pay was not paid for each hour actually worked.

[33] The Canada Revenue Agency Report on Appeal indicates that it proceeded in its consideration on the same basis as the ruling did.

[34] The recommendations of the Council of Regents together with the information on which they are based are helpful and relevant but do not appear to satisfy the requirements of subsection 10(3) of the *EIR* to consider the time other similarly situated workers actually work to fulfill their TCH obligations.

[35] Bonner J. of this Court rejected a similar formulaic approach adopted by the Canadian Association of University Teachers in *Franke v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 645 (QL), in the case of a sessional lecturer at a university, for similar reasons. See also *Sutton v. M.N.R.*, 2005 TCC 125, where a teacher paid by the classroom hour was recognized not to be paid on an hourly basis in the manner contemplated by section 9.1 of the *EIR* and was required to spend time working outside the classroom.

[36] Similarly in *Judge v. M.N.R*, 2010 TCC 329, Woods J. found that subsections 10(1) and 10(3) did not apply to a part-time secondary school teacher who was not paid on an hourly basis and recognized that the teacher was required to work beyond simply classroom hours.

[37] This brings me to the question of what is this Court's power or standard of review of the Minister's determination under subsection 10(3) of the *EIR* (had the Minister proceeded under 10 instead of 9.1). Subsection 10(3) deems the insurable hours to be the amount determined by the Minister. Is it open to this Court to substitute its own view? Should this Court only review the Minister's determination to ensure that the subsection 10(3) factors were properly considered and that the Minister's determination was reasonable on the information before it? How is the Minister or this Court to balance the two specific considerations in subsection 10(3)? Can the Minister or this Court consider other factors? Certainly, this regulation proves that L'Heureux-Dubé J. of the Supreme Court of Canada was correct in *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] 2 S.C.R. 29, that:

> 35 . . . The least that can be said is that the Act is not a model of clarity and, consequently, its interpretation is not an easy task.

[38] Given the limitations described above in respect of the basis for the Council of Regents' 2.17 factor, I am inclined to conclude it is somewhat light in the case of a part-time instructor such as Mr. MacKenzie by giving only 1.17 hours of additional time per TCH.

[39] I have concluded that, given the further deeming provision in subsection 10(4), I do not need to further consider or decide the questions raised by subsection 10(3) of the *EIR* in order to dispose of this case.

[40] Subsection 10(4) of the *EIR*, by its terms, expressly applies if (i) the employee's earnings are not paid on an hourly basis, in which case section 9.1 applies, and (ii) the employer cannot provide evidence of the hours actually worked by that person, in which case subsection 10(1) of the *EIR* would apply. Such is Mr. MacKenzie's case. In such a case, subsection 10(4) deems the person's insurable hours to be the result obtained when the person's earnings and dollars are divided by the applicable minimum wage, to a possible maximum in subsection 10(5) of the *EIR* of seven hours per day and 35 hours per week.

[41] There is no attempt in the *EIA* to reconcile these two different deeming provisions even though they each can apply by their express terms to the same circumstances and will each yield a different result.

[42] It is clear that the result of the application of subsection 10(4) of the *EIR* is that Mr. MacKenzie's insurable hours will be greater than the number of insurable hours

he asked this Court to determine. This deemed result is certainly an odd result which clearly bears no resemblance to the number I would have determined to be Mr. MacKenzie's actual hours worked had I been required to make such a determination.

[43] I have been guided in this decision by the Supreme Court of Canada's decision in *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, in which it is written:

> . . . Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant. . . .

[44] The Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, similarly supports a broad and generous interpretation of employment benefits-conferring legislation.

[45] Given that the EI legislation is social benefit legislation and to be interpreted accordingly, I see no reason or basis to denying Mr. MacKenzie the benefit of determining his insurable hours to be the number deemed by subsection 10(4) of the *EIR*.

[46] In *McKenna v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 816 (QL), Weisman J. held that subsection 10(4) of the *EIR* applied to a university instructor who was not paid on an hourly basis. Similarly, in *Furtado v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 164 (QL), and in *Keir v. Minister of National Revenue*, 2002 CarswellNat 3525 (TCC), subsection 10(4) of the *EIR* was held to be the correct provision to apply if the hours worked are not ascertainable because of significantly conflicting evidence. It can also be noted that in *Société en commandite Le Dauphin v. M.N.R.*, 2006 TCC 653, the Minister applied subsection 10(4) in the absence of precise data on hours worked and this approach was upheld by the Court.

[47] Accordingly, Mr. MacKenzie's appeal is allowed and, in accordance with paragraph 103(3)(*a*) of the *EIA*, I am ordering that the Minister's decision on Mr. MacKenzie's appeal of the ruling be varied to reflect that his insurable hours are the result obtained when subsection 10(4) of the *EIR* is applied.

Signed at Ottawa, Canada, this 6th day of April 2011.

"Patrick Boyle"

Boyle J.

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