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Progress of Legislation

The House of Commons was scheduled to return from summer recess on September 17, 2007 and the Senate on September 18, 2007. However, on September 4, 2007, the Prime Minister announced that he would recommend to the Governor General that Parliament be prorogued. On September 17, 2007, the following message was posted on Canada's Parliament Web site:

> The Governor General informed the Speaker of the Senate and the Speaker of the House of Commons that the First Session of the 39th Parliament was prorogued on Friday, September 14, 2007. Prorogation is the ending of a parliamentary session.
>
> The Speech from the Throne, which will open the Second Session of the 39th Parliament, will be read on Tuesday, October 16, 2007.

The effect of Parliament proroguing is described on the Parliament Web site as follows:

> The prorogation of Parliament ends a session. This is done by the Governor General, on the advice of the Prime Minister, either by means of a special ceremony in the Senate Chamber, or by the issuing of a proclamation published in the *Canada Gazette*. Both the Senate and the House of Commons stand prorogued until the opening of the next session.
>
> During a period of prorogation (or recess), the Speaker, the Prime Minister, Ministers and Parliamentary Secretaries remain in office and all Members of the House retain their full rights and privileges.

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Inside

The principal effect of ending a session by prorogation is to end business. All government bills that have not received Royal Assent prior to prorogation cease to exist; committee activity also ceases. Thus, no committee can sit after a prorogation.

In order for government bills to be proceeded with in a new session, they must be reintroduced as new bills or they may be reinstated, if the House agrees to this.

The Standing Orders provide for the automatic reinstatement of private Members' bills in a new session. Committee work may also be revived either by motion in the House, or in committee, depending upon the nature of the study.

Prorogation does not affect Orders or Addresses of the House for the tabling government reports required to be tabled by statute. Requests for responses to committee reports or petitions are still valid following a prorogation. These continue in force from one session to another, but are ended by dissolution.

Bills affecting the *Income Tax Act* and payroll professionals that were outstanding in the first session and which will therefore have to be reintroduced, and other pending amendments released as draft legislation or announced in a News Release are set out below.

- On July 4, 2007, the Department of Finance released draft legislation which adds new paragraph 221(1)(*d*.2) to the *Income Tax Act* regarding regulations (also released in draft form on that day) for the timing of the preparation of information slips for reporting income from certain mutual fund trusts and partnerships.

- Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, which contains a consequential amendment to the portion of subsection 224(1.2) before paragraph (*a*), received first reading in the Senate on June 14, 2007.

- On March 19, 2007, the 2007 federal Budget was tabled and the Notice of Ways and Means Motion included with the Budget contained several proposed amendments to the *Income Tax Act*. Some of these proposals were contained in Bill C-52 (Royal Assent June 22, 2007), but many, such as proposals relating to international taxation and foreign affiliates, certain tax credits, and amendments to various remittance and instalment thresholds, will be included in a future bill.

Subscribers will be notified when the legislation is reintroduced.

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Hot News Items

Quebec Parental Insurance Premiums Increase for 2008

Since the Conseil de gestion de l'assurance parentale has not made a regulation to amend the Regulation respecting premium rates under the Parental Insurance Plan within a period the government considers reasonable, the regulation may be made by the government pursuant to section 88 of the *Act respecting parental insurance*.

The amendments are chiefly attributable to a significant increase in the birthrate since the implementation of the plan.

The Regulation modifies the premium rates that apply to employers, employees and self-employed workers, effective January 1, 2008. The 2008 premium rates are as follows:

1. The premium rate applicable to an employer is 0.630%.

2. The premium rate applicable to employees is 0.450%.

3. The premium rate applicable to a self-employed worker is 0.800%.

The majority of workers and employers will be affected by the proposed amendments which have financial implications. The amendments will entail an increase of 4.7¢ per $100 of payroll for employers, 3.4¢ per $100 of salary or wages for employees and 6.3¢ per $100 of income for self-employed workers.

2008 WCB Maximum Assessable Earnings

As of this update, we have received confirmation of the first of the 2008 WCB maximum assessable earnings figures. The 2008 maximum assessable earnings figure for Quebec is $60,500.

The new Quebec maximum assessable earnings figure has been incorporated into PAYSOURCE in the "Workers' Compensation" tab division at ¶80,005.

Need To Know

CRA Announces Fourth Quarter Interest Rates

The fourth quarter interest rates were recently confirmed by the Canada Revenue Agency (CRA). Effective October 1, 2007 through December 31, 2007, the rates will be:

- 9% for interest on unremitted employee income tax source deductions, unremitted CPP and EI contributions, unpaid penalties, overdue personal income tax payments and insufficient income tax instalment payments;

- 7% for interest payable on income tax refunds and overpayments; and

- 5% for deemed interest when computing the taxable benefits on employee or shareholder loan provisions.

The fourth quarter interest rates have been incorporated into PAYSOURCE in the Employee Benefits section at ¶20,155 and ¶20,600, the Statutory Deductions – Employer Remittances section at ¶24,304, the Statutory Deductions – Tax section at ¶27,020, and the Year-End Reporting section at ¶65,686.

Newfoundland and Labrador Minimum Wage Increase Reminder

Newfoundland and Labrador's minimum wage will increase from $7 to $7.50 per hour on October 1, 2007.

The new minimum wage rates are located in the Employment Standards section of PAYSOURCEat ¶5505 and ¶5530.

Northwest Territories New *Employment Standards Act* Receives Royal Assent

Bill 14, the *Employment Standards Act*, which was previously summarized in *PaySource*, newsletter No. 146, dated August 2007, will replace the *Labour Standards Act*, the *Employment Agencies Act* and the *Wages Recovery Act* with a single statute.

The Bill applies to all employers and employees, subject to certain exceptions, and restricts the circumstances in which persons 16 years of age or younger may be employed.

The Bill fixes the standard and the maximum hours of work in a day and in a week, subject to certain exceptions, and provides entitlements to overtime pay, vacation pay and holiday pay, as well as to unpaid pregnancy leave, parental leave, sick leave, compassionate leave, bereavement leave and court leave. The minimum wage would be prescribed by regulation.

An employment standards officer would have primary responsibility for enforcing employment standards and would be empowered to hear complaints and to make orders, including orders to compensate or reinstate an employee. The Bill also provides for the appointment of adjudicators to hear appeals under the Act.

Employers would be required to maintain employment records and to provide advance notice of termination to affected employees and their trade union, if any, where the employment of large numbers of employees is terminated.

The Bill provides for enforcement and establishes offences and penalties for contraventions of the Act or regulations or of orders made under the Act. Orders for wages are deemed to have special priority in relation to other security interests filed under the *Personal Property Security Act* and the *Land Titles Act*.

In general, the new Act is substantively similar to existing legislation with regard to the regulation of employment standards and employment agencies. In addition,the new Act:

- exempts certain employers and employees, or classes of employers and employees, from the general provisions of the Act, by regulation;
- incorporates provisions respecting the employment of young persons;
- establishes new days of rest requirements;
- allows employees to receive lieu time with pay instead of overtime where the employer agrees;
- provides for the establishment of a minimum wage, by regulation;
- requires that employees be granted an annual vacation with vacation pay within six months after the first year of employment;
- establishes the right of employees to unpaid compassionate leave, bereavement leave, sick leave and court leave;
- requires that employers give advance notice of termination to affected employees and their trade union where large numbers of employees are to be terminated at one time;
- establishes a new complaints process and provides for the resolution of complaints by an employment standards officer;
- establishes a new appeal process by which individual adjudicators hear appeals of decisions made by the employment standards officer;
- establishes the priority of employee wages over other claims against an employer to a maximum amount of $7,500 per employee; and
- restricts access to information provided under the Act that could identify the parties to a complaint or appeal.

The Bill authorizes the making of various regulations, including regulations implementing the Act and regulations providing for licensing of employment agencies.

Bill 14 received Royal Assent August 23, 2007 but has not yet been proclaimed into law. Subscribers will be notified when the Bill becomes law.

Recent Cases and Rulings

Collection of employee voiceprints for remote network access did not violate privacy legislation

• • • **Canada** • • • Telus introduced a new technology called "e.Speak" to its operational practices. It uses voice recognition technology to allow Telus employees to access and use the company's internal computer network by speaking commands through a telephone rather than using a computer terminal. Using e.Speak, Telus employees working in the field could execute various network operations using any telephone. In order to set up and use e.Speak, Telus obtained voiceprints from its employees and stored them. Those records, consisting of a matrix of numbers, were then used to verify an employee's voice when he or she called in, allowing or denying them access to the Telus system. A number of employees objected to the collection and use of voiceprints and a complaint was filed with the Privacy Commissioner, on the basis that the collection of such information was a violation of the *Personal Information Protection and Electronic Documents Act*. The Commissioner concluded that Telus was in compliance with the Act, so the employees applied for a hearing in the Federal Court. The Court dismissed the applications, finding that the purpose for which the collection was made would be considered appropriate by a reasonable person. In addition, consent was not required as the collection was clearly in the interest of the employees, and their consent could not be obtained in a timely manner (see 2006 CLLC ¶210-022). The employees appealed this decision.

The appeal was dismissed. Privacy rights are not absolute, but are a balancing act between the privacy interests of the employee and the business interests of the employer. Voice characteristics are toward the lower end of the spectrum of privacy interests for an individual. The Court of Appeal fully endorsed the lower court's finding that a reasonable person would find the use of the new technology to be reasonable in the circumstances. The Court did, however, disagree with the lower court's ruling that Telus had met its obligations with respect to obtaining employee consent. This was not a case where consent could not be obtained, as these specific complainants

expressly refused consent. These employees clearly did not find the collection of their voice characteristics to be within their interest, and this was not a case where the employer could go ahead without their consent because of exceptional or temporary circumstances as set out in the Act. Therefore, Telus was under an obligation to obtain consent before collecting the voice characteristics of the employees. Despite this obligation, however, no disciplinary measures were taken by Telus as a result of the refusal to consent, so the Court found no violation of the Act.

Wansink, Bernat and Fenske v. Telus Communications Inc. and the Privacy Commissioner of Canada, (Federal Court of Appeal), (2007 CLLC ¶210-032)

Employment contract was not frustrated by lengthy illness

• • • **British Columbia** • • • Sandhu had been employed for a number of years by North Star, a lumber remanufacturing mill, and was seen as a hard working employee. Sandhu had a motor vehicle accident and sustained soft tissue injuries, which kept him away from work for some time. North Star provided Sandhu with a record of employment so that he could receive disability benefits, but there was no further communication for a number of months until the insurance company asked that North Star provide it with any available job listings that involved light duties. According to North Star, there were no jobs at the mill that did not require pulling, lifting, standing or sitting stationary for long periods. A while later, Sandhu was involved in another minor car accident that did not aggravate his condition, but he informed North Star of the accident. He was not told at this time that his position had been filled by someone else and that it was no longer open for him to return to. Sandhu assumed that he was still on medical leave, and that he would return to his job when he recovered. Over a year after his first car accident, Sandhu felt well enough to return to work full-time, but was informed that someone else had taken his position. Sandhu brought an action for wrongful dismissal.

The action was allowed. The Court looked at whether the contract of employment was frustrated when Sandhu sought to return to work. Where an employee's illness is the event said to frustrate the employment contract, the law has drawn a distinction between permanent disability and temporary illness. Factors to look at in determining this issue include the terms of the contract, the duration and nature of the employment, the nature of the illness or injury including prospects of recovery, and the period of past employment before the injury. In this situation, Sandhu's disability, although temporary, was of a considerable duration. It took approximately 16 months after he sustained his injuries for him to be fit enough to return to work. But, he was a valued employee who had been with the company for nearly 20 years, his job was not key to the continuing operation of the company, and the nature of this illness was such that recovery was to be expected. Therefore, Sandhu's illness due to injury was temporary, and did not frustrate his contract with North Star. The Court awarded 12 months' notice.

Sandhu v. North Star Mills Ltd., (British Columbia Supreme Court), (2007 CLLC ¶210-033).

Employee terminated following year-long absence from work had not frustrated contract

• • • **Nova Scotia** • • • Wilmot worked for Ulnooweg since October 1991, most recently as Administrative Assistant, and she was considered an excellent and hard-working employee. Beginning in May 2002, Wilmot began to experience emotional difficulties that resulted in long absences from work, totalling 138 days from May 2002 until June 2, 2003. She was diagnosed with panic disorder with agoraphobia, post traumatic stress disorder, and dysthymic disorder. She received full salary until April 2003, and was on an unpaid leave of absence between April and June 26, 2003. In early June, Wilmot received a letter from the CEO of Ulnooweg indicating that her absences from work were impacting the company's operations, expressing concerns about her health and ability to return to work, and informing her that her attendance would have to improve in order to stay on as an employee. Wilmot was terminated on June 26, 2003, because Ulnooweg claimed that Wilmot had not provided a definite plan about her recovery period and proposed return date. Wilmot brought a wrongful dismissal claim. The trial judge determined that there was no just cause for her dismissal, as her employment contract had not been frustrated by her prolonged absenteeism. The company appealed.

The appeal was dismissed. An employee who fails to show up for work without valid reason is subject to dismissal, but an employer cannot dismiss an employee for temporary absence due to illness. If the absence extends beyond a temporary one because of a permanent illness, then the doctrine of frustration of contract can be used to terminate the employee. The question for the court was whether the employee has been incapacitated to such a degree that further performance of the employee's obligations would be impossible, or substantially different from what was initially contemplated. In this case, the trial judge's decision was that Wilmot was a valuable employee who had a serious, but not permanent, illness and this decision was upheld on appeal as not containing any over-

riding error of fact or mistaken interpretation. In addition, the trial judge did not err in not considering post-termination evidence about Wilmot's disability, since the role of the judge was to determine whether the contract was frustrated at the time that she was terminated. The Court of Appeal upheld the conclusion that a year-long absence from her employment did not constitute a permanent disability.

Ulnooweg Development Group Incorporated v. Wilmot, (Nova Scotia Court of Appeal), (2007 CLLC ¶210-035).

Employee returning from maternity leave sought fixed shifts to aid in parental duties

• • • **Canada** • • • Johnstone was a Customs Inspector employed by the Canada Border Services Agency ("Agency") at Pearson International Airport ("Pearson") in Toronto. Her job involved rotating shifts over 24 hours, totalling 37.5 hours per week for a full-time employee. When she returned from her year-long maternity leave, she requested accommodation of fixed 12-hour shifts per week for child care purposes, since her husband also worked at Pearson on a different shift schedule from her. The Agency's accommodation policy provided for fixed shifts up to 34 hours per week for child care responsibilities, so they offered Johnstone fixed shifts up to four days per week, not exceeding 10 hours per day, to a maximum of 34 hours per week. Given the costs of working a fourth day for only four hours against child care costs, Johnstone chose three shifts per week of 10 hours each, but she was not happy with the part-time compromise. She brought a human rights complaint alleging discrimination on the basis of family status. The Investigator recommended the Human Rights Commission go forward with a Tribunal hearing but the Commission dismissed her complaint. Johnstone brought an application for judicial review of this decision.

The application was allowed and the matter was remitted back to the Commission for redetermination. The Court reviewed the Commission's decision to dismiss the complaint using the standard of correctness. First, the Court found that the decision by the Commission that Johnstone had accepted the terms of the accommodation were unreasonable, since the Commission did not give any reasons for having a different view on this matter than the Investigator. The Investigator determined that Johnstone's decision to work part-time was involuntary and there was substantial evidence to support this conclusion. Next, the Court determined that the Commission erred in concluding that the Agency's fixed shift policy did not have a discriminatory impact on Johnstone on the basis of family status, since it interfered with her parental duties. The Commission appeared to look at the fixed shift policy to see if it was discriminatory instead of considering whether that policy was sufficient to fulfill the Agency's duty to accommodate Johnstone's family status needs to the point of undue hardship. Specifically, there was evidence that people who required fixed shifts for medical reasons rather than for family status reasons were not necessarily required to work part-time by the Agency and this was not addressed by the Commission. In addition, the Commission erred in requiring Johnstone to demonstrate a "serious interference" with her protected interests in order to show *prima facie* discrimination. Finally, the Court noted that the complaint was an important human rights issue, as the law was not settled with respect to the balancing of competing workplace interests with respect to family status accommodation.

Johnstone v. Attorney General of Canada, (Federal Court of Canada), (2007 CLLC ¶230-030).

Transport employees – Deduction of meals

Under paragraph 8(1)(*g*), "an employee of a person whose principal business was passenger, goods, or passenger and goods transport" may be entitled to a deduction for meals and lodging where the employee is regularly required "to travel, away from the municipality where the employer's establishment to which the taxpayer reported for work. . . on vehicles used by the employer to transport the goods or passengers", and was required "to make disbursements for meals and lodging". As noted in Information Circular 73-21R9:

"Paragraph 8(1)(*g*) of the *Income Tax Act* contemplates journeys of such substantial distance and duration as to require disbursements for both meals and lodging while away from the relevant municipality and metropolitan area, if there is one. Therefore, to make a claim under paragraph 8(1)(*g*) of the *Income Tax Act*, employees must generally be away from home overnight in the performance of their employment duties. The deduction claimed under paragraph 8(1)(*g*) of the *Income Tax Act* is not intended for employees who return to their homes at the end of each day, and make disbursements for meals only as a matter of course."

It is the CRA's view that the deduction under paragraph 8(1)(*g*) does not apply to an employee involved in the transportation of goods where the employee returns to the municipality where the employer is located at the end of each day. The employee may, however, be entitled to a deduction for meals under paragraph 8(1)(*h*) if the employee is away for more than 12 hours from the municipality where the employer is located (subsection 8(4)) and the employer certifies on Form T2200 Declaration of Conditions of Employment, that the employee is required to pay the expenses (subsection 8(10)).

Technical Interpretation, Business and Partnerships Division, July 12, 2007, Document No. 2007-0219611E5.

Indians – Deduction of RPA contributions – Taxation of RPA benefits

The issue the CRA was asked to comment on involved a taxpayer who was an Indian within the meaning of the term in the *Indian Act*. From 1979 to 1981, all the income of the taxpayer was exempt from Part I income tax in accordance with paragraph 81(1)(a) of the Act and section 87 of the *Indian Act* but in 2006 only a portion of his employment income was exempt since he performed some of his work outside the reserve. In 2006, he made past service pension contributions in respect of the years 1979 to 1981 to a Registered Pension Plan (RPA) (i.e., First Nations Public Security Pension Plan). The CRA was asked if the contributions would be deductible from the taxpayer's income for 2006 and if the future pension benefits he would receive from the plan would be taxable between his hands.

The CRA confirmed that the contributions made to the RPA in respect of past services would be deductible from the taxpayer's 2006 income under paragraph 8(1)(*m*) of the Act provided they were within the limits provided under subsection 147.2(4). The fact that the taxpayer's income for the years 1979 to 1981 was exempted from Part I income tax by virtue of paragraph 81(1)(*a*) of the Act and section 87 of the Indian Act was not a deciding factor to determine if he was entitled to claim a deduction under paragraph 8(1)(*m*) in respect of his past service contributions. To determine the portion of his income eligible for the exemption, he would have to subtract from his gross employment income earned on the reserve any expense (like an RPA contribution) related to that income. If the expense related to income earned on and outside the reserve, he would have to allocate it on a pro rata basis to the two sources to determine the income portion eligible for the exemption. Regarding the second question, the CRA considered that the RPA benefits were employment-related income and should be treated like employment income for tax purposes. As a result, if a portion of the employment income was exempt from tax under paragraph 81(1)(a) of the Act, the employment-related income (including RPA benefits) were also exempt. To determine the portion of the benefits received by the taxpayer that would be exempted from Part I income tax, all relevant factors would need to be considered. However, that portion should normally be directly proportional to the amount of work done by the taxpayer on the reserve.

Technical Interpretation, Financial Sector and Exempt Entities Division, July 12, 2007, Document No. 2007-024068117.

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