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ONTARIO'S NEW PUBLIC HOLIDAY – FAMILY DAY

By: Theo Anne Opie, LL.B. © CCH Canadian Limited.

The Ontario government has created a new public holiday called Family Day. Family Day will be celebrated on the third Monday in February, and for 2008 the date is Monday, February 18.

Adding Family Day to the calendar gives Ontario workers and families a total of nine public holidays per year, putting Ontario on par with Alberta and British Columbia and one less than in Saskatchewan.

The issue that has arisen is: Who is entitled to the Family Day public holiday?

The *Employment Standards Act, 2000* and Regulations set out a number of specific exceptions and special rules relating to public holiday provisions as well as a general provision known as "the greater right or benefit". This article will outline the special rules and exceptions and provide guidance on how to interpret and administer your internal policies with respect to the "greater right or benefit".

Special Rules and Exemptions

There are a number of categories of employees who are not entitled to the public holiday provisions or are covered under special rules.

Firstly, employees who work in federally-regulated workplaces such as banks, telecommunications companies, railways and airlines or who are federal civil servants are not governed by Ontario's *Employment Standards Act, 2000*. Federal government employees fall under federal jurisdiction and are governed by the *Canada Labour Code*. Federally-regulated employees with questions about Family Day should speak with their employer or union official.

Inside

Secondly, there are a number of occupations that are specifically excluded from the public holiday provisions.

The Act specifically exempts from the application of the entire Act (or most of the Act, including the public holiday provisions) the following persons:

- police officers;
- a holder of political, religious or judicial office; and
- Ontario civil servants and employees of a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

The Regulations specifically state that the public holiday provisions do not apply to the following persons:

- full-time firefighters;
- fishing and hunting guides;
- employees engaged in specified horticultural and agricultural pursuits;
- students employed in camps, recreational or charitable programs, or instructing children;
- janitors, superintendents, or caretakers of residential buildings who reside there;
- taxicab drivers;
- seasonal employees of hotels, motels, tourist resorts, restaurants, or taverns who are provided with room and board;
- construction employees who receive 7.7% or more of their hourly rate or wages for vacation pay or holiday pay.
- qualified practitioners of certain professions, registered drugless practitioners, teachers as defined in the *Teaching Profession Act*, and students of the foregoing professions or callings;
- persons employed in commercial fishing;
- registered salespersons of brokers registered under the *Real Estate and Business Brokers Act*;
- salespersons, other than route salespersons, who are entitled to receive all or part of their remuneration as commissions and who normally work other than at the place of business of their employers; and
- employees on farms whose employment is directly related to primary agricultural employment.

Thirdly, there are special rules for specific occupations. Persons employed in a hotel, motel, tourist resort, restaurant, tavern, hospital, or continuous operation can be required to work on a public holiday (i.e., Family Day) if it falls on a day that is ordinarily a working day for them and they are not on vacation. For these operations, the general rule and exceptions with respect to entitlement to public holiday pay and how pay for work on the public holiday is calculated apply, but where there is an option as to how to pay, it is at the employer's choice, with no employee agreement required. The employer must either pay the employee his or her regular wages for the day and provide a substitute day off with pay, or pay the employee public holiday pay for the day plus premium pay (one and a half times his or her regular rate) for each hour worked on the day. A continuous operation is one that normally operates 24 hours a day and shuts down no more than once in each seven-day period.

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Greater Right or Benefit

It is important to remember that employment standards provisions represent the minimum requirements that must be provided in the workplace. The Act specifically states that if a provision in an agreement, whether between an employer and individual employee/employees, or by way of a collective agreement, provides a greater right or benefit than an employment standard (i.e., public holidays), then the provision in the agreement applies instead of the employment standards provision.

With respect to public holidays, collective agreements often contain clauses providing for additional public holidays such as Easter Monday and Remembrance Day. As well, employers very often provide employees with additional days off during the year. For example, while most employers in Ontario give their employees' the first Monday in August off, it is not a public holiday under the *Employment Standards Act, 2000*.

What Should You Do?

It is important to assess your existing public holiday policy in order to determine if you are required to give your employees the new Family Day public holiday.

If you currently provide your employees with 10 or more paid holidays, it is arguable that this policy provides a "greater right or benefit", i.e., 10 paid holidays, than required under employment standards legislation, i.e., 9 paid holidays, and that you may not be required to provide employees with Family Day off work.

However, even if your policy does provide 10 or more paid holidays, you should assess how the policy is written and how it is applied. For instance, many employers provide employees with additional paid days off work in the form of what are called "floater" days. Each year the employer determines when the days will be given and they are often attached to existing holidays, i.e. Canada Day, in order to give employees extra long weekends or extra time off between Christmas and New Year's. While it is arguable that the provision of such floater days would be seen as employer policy regarding public holidays, it is also arguable that the provision of such floater days is in actuality, the provision of additional vacation entitlement. If such an interpretation is supported, you would not be providing a greater right or benefit with respect to public holidays and you would be required to give your employees Family Day off.

As an employer you should check whether the provision of additional time off is included under your public holiday policy or your vacation policy and you may wish to get an opinion on how your policy will be interpreted from either or both legal counsel and the Ontario Employment Standards branch.

Theo Anne Opie is a member of the Canadian Payroll Association's Federal Government Relations Advisory Council and writes for PAYSOURCE.

2008 Automobile Deduction Limits and Expense Benefit Rates for Business

Hot News Items

The Honourable Jim Flaherty, Minister of Finance, recently announced the automobile expense deduction limits and the prescribed rates for the automobile operating expense benefit that will apply in 2008. Specifically:

- The ceiling on the capital cost of passenger vehicles for capital cost allowance (CCA) purposes will remain at $30,000 (plus applicable federal and provincial sales taxes) for purchases after 2007. This ceiling restricts the cost of a vehicle on which CCA may be claimed for business purposes.

- The limit on deductible leasing costs will remain at $800 per month (plus applicable federal and provincial sales taxes) for leases entered into after 2007. This limit is one of two restrictions on the deduction of automobile lease payments. A separate restriction prorates deductible lease costs where the value of the vehicle exceeds the capital cost ceiling.

- The maximum allowable interest deduction for amounts borrowed to purchase an automobile will remain at $300 per month for loans related to vehicles acquired after 2007.

- The limit on the deduction of tax-exempt allowances paid by employers to employees using their personal vehicle for business purposes for 2008 will be increased by 2 cents to 52 cents per kilometre for the first 5,000 kilometres driven and 46 cents for each additional kilometre. For the Yukon Territory, Northwest Territories and Nunavut, the tax-exempt allowance will rise by 2 cents to 56 cents for the first 5,000 kilometres driven and 50 cents for each additional kilometre. The allowance amounts reflect the key cost components of owning and operating an automobile, such as depreciation, financing, insurance, maintenance and fuel costs.

- The general prescribed rate used to determine the taxable benefit relating to the personal portion of automobile operating expenses paid by employers for 2008 will increase by 2 cents to 24 cents per kilometre. For taxpayers employed principally in selling or leasing automobiles, the prescribed rate will increase by 2 cents to 21 cents per kilometre. The amount of the benefit reflects the costs of operating an automobile. The additional benefit of having an employer-provided vehicle available for personal use (i.e., the automobile standby charge) is calculated separately and is also included in the employee's income.

The government reviews these rates and limits annually and announces any planned changes prior to the end of the calendar year. This practice ensures that businesses are aware of the new rates before the beginning of the year in which they apply.

For further information, contact: Chisholm Pothier, Press Secretary, Office of the Minister of Finance 613-996-7861; David Gamble, Media Relations, Department of Finance, 613-996-8080.

Federal Government To Introduce Reservists' Leave

The Honourable Jean-Pierre Blackburn, Minister of Labour and Minister of the Economic Development Agency of Canada for the Regions of Quebec recently announced that the Government of Canada is moving forward with a strategy which will provide protection to Reservists when they return to civilian life. The strategy will include legislative changes which will protect the civilian jobs of reservists who work for employers in federally-regulated sectors and the public service. It will also provide support to student reservists.

Minister Blackburn addressed members of the HMCS Cataraqui in Kingston as part of his national dialogue to ensure that reservists are successfully reintegrated into the Canadian workforce. Canadian Reserve Force personnel play a vital role in protecting Canada's interests at home and abroad. Reservists have been called upon frequently to contribute to international peace, stability and human security throughout the world.

The strategy, which will include the introduction of legislation in the House of Commons when Parliament returns in January, will provide legal protection to some 2,000 reservists in the federally-regulated private sector and the federal public services, and 12,000 student reservists. While a number of provinces have already introduced measures to protect the status of reservists, the federal government will work with other provinces to encourage them to take similar protective measures for reservists under their jurisdiction.

Key elements of the strategy mean:

- Reservists employed in federally-regulated sectors will be able to take leave without pay.
- Changes to the federal government's employment policies will ensure the same right to leave for reservists who are public servants.
- For the purpose of the Canada Student Loans Program, reservists attending a post-secondary institution full-time will retain their active student status.
- Reservists who have student loans will not accrue interest on their loans and will not be required to make payments while on leave.

For more information, please visit Labour.gc.ca. or contact: Michael Winterburn, Office of Minister Blackburn, 819-953-5646; Media Relations Office, Human Resources and Social Development Canada, 819-994-5559.

Need To Know

N.W.T. Changes to Employment Standards Effective April 1, 2008

Changes to Employment Standards including a new *Employment Standards Act*, that was legislated in August 2007, will become effective April 1, 2008. Details of the changes are included in the Backgrounder which follows.

"These changes are the result of many years of consultation and input by employees and employers", said Minister Jackson Lafferty. "Employment in the Northwest Territories is growing and changing, and this new system of Employment Standards will better suit modern Northern employees and workplaces."

In addition to the new *Employment Standards Act*, which combines the *Labour Standards Act*, *Wages Recoveries Act* and *Employment Agencies Act* into one modern and effective legislative framework, corresponding changes to regulations are currently in development, based on input gathered from a consultation paper that was recently released. A summary of the consultation on revisions to the regulations follows the Backgrounder below.

There have been previous public consultations on Employment Standards in the NWT, with the last initiated in 2004. During the same time period, the responsibility for Employment Standards has moved within the Government of the Northwest Territories from the Department of Justice, to Education, Culture and Employment.

For more information, contact: Shawn McCann, Manager, Public Affairs, Education, Culture and Employment, Tel: (867) 920-6222.

Backgrounder – Changes to Employment Standards in the NWT

The *Employment Standards Act* provides a modern and effective legislative framework for employment standards in the NWT. The Act will come into effect on April 1, 2008.

The new Act is the result of extensive consultation with Northerners, including many employers, employer organizations, and labour organizations as well as individuals.

The *Employment Standards Act* combines the *Labour Standards Act*, *Wages Recoveries Act* and *Employment Agencies Act* into one modern and effective legislative framework.

Additionally, the Act:

- allows for certain employers and employees or classes of employers and employees to be exempted from the general standards of the Act;
- incorporates standards regarding employment of young persons, previously dealt with through regulations;
- establishes new days of rest requirements: An employer must provide to every employee at least: One day of rest in each work week, Two consecutive days of rest in each period of two consecutive work weeks, or Three consecutive days of rest in each period of three consecutive work weeks;
- allows employees to receive lieu-time with pay instead of overtime, when employer and employee enter into an employee agreement: Overtime agreements must have certain standards, set out in section 12 of the Act;
- provides for the establishment of a minimum wage by regulation;
- requires that employees be granted an annual vacation with vacation pay within 6 months following the first year of employment;
- requires that employers provide the number of hours of statutory holiday pay, if applicable, on pay advice;
- allows for employers to provide pay advice electronically in lieu of written pay advice;
- establishes the right of employees to unpaid: compassionate leave, bereavement leave, sick leave and court leave;
- requires that employers give advanced 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 and provides the Employment Standards Officer with the authority to dismiss complaints in certain circumstances, including situations where the complaint can be addressed under the processes set out in a collective agreement or under the *Human Rights Act*;
- establishes a new appeal process by which individual Adjudicators hear appeals of decisions made by the Employment Standards Officer;
- ensures that employee wages continue to have priority over other claims against the employer, up to a maximum of $7500 per employee; and
- restricts access to information provided under the Act that could identify the parties to a complaint or appeal.

If you have questions about how the Act will affect you, please contact Labour Services at 1-888-700-5707 or in Yellowknife at 873-7486.

Regulations under the *Employment Standards Act* – A Consultation Paper

This consultation paper is part of the Department of Education, Culture and Employment's review and consultation process to ensure that the regulations that are made under the *Employment Standards Act* support effective employment relationships and reflect northern values. This consultation paper will review options for regulations under the *Employment Standards Act* for public review and comment.

The purpose of this review is to identify your concerns and preferences with respect to issues to be addressed by regulation under the *Employment Standards Act*. Although there is no intention to make regulations addressing matters outside those set out in this paper, the Department will consider all comments and suggestions.

The Department of Education, Culture and Employment welcomes your comments and suggestion on the proposed regulations under the *Employment Standards Act*. Please send your comments and suggestions by February 28, 2008 to:

Legislative Policy Advisor
Strategic and Business Services
Department of Education, Culture and Employment
P.O. Box 1320
Yellowknife, NT X1A 2L9
Fax: (867) 873-0115

Application of the Legislation

The *Employment Standards Act* generally applies to all employment relationships in the Northwest Territories within the Government of the Northwest Territories' jurisdiction. The Act does provide exceptions for employees employed primarily in a managerial role (exempt from hours of work and overtime rules) and employees whose employment is governed by the *Public Service Act*. The Act also provides that exceptions to the application of the Act may be made by regulation.

The Department is considering making regulations that would exempt, in whole or in part, certain employment relationships from the application of the Act.

Members or Students of Professions

On the basis of stakeholder feedback on this issue, the Department is proposing to enact regulations to exempt the nursing, medical, midwifery, legal, accounting and dental professions and their students from the application of hours of work and overtime standards under the *Employment Standards Act*. This proposal allows professional firms greater flexibility in scheduling work, and competitiveness in their ability to recruit and retain employees while maintaining minimum standards for those employees working in the profession.

Question: What concerns if any do you have respecting the proposed partial exemption of professionals from the standards in the *Employment Standards Act*?

Truck Drivers

All long-haul truck drivers are subject to the limitations on hours of work contained in the Hours of Service Regulations under the *Motor Vehicles Act*(NWT). These limitations have been established in consultation with other jurisdictions with a view to ensuring safety for users of public highways. Truck drivers who are employees are also subject to hours of work standards in the *Employment Standards Act* that apply to employees in other industries. The application of the Act to only part of the trucking industry means that drivers who are employees cannot work as many hours as independent contract drivers.

That is, the legislation arguably places certain trucking operations in the NWT at a competitive disadvantage to others. The Department has also received feedback that the requirement to obtain a permit for employees to work extended hours is an unnecessary regulatory burden in light of the extensive regulatory requirements in the Hours of Service Regulations.

On the basis of this feedback and discussions with the Department of Transportation, the Department is proposing to enact regulations to exempt truck drivers from the standards in the Act dealing with maximum hours of work where those standards are in conflict with limitations on hours of work set out in the Hours of Service Regulations.

Question: What concerns if any do you have respecting the proposed partial exemption of employee truck drivers from the standards for maximum hours of work in the *Employment Standards Act*?

Agricultural Workers

Agricultural workers in the NWT are subject to the same employment standards that exist for other employees. In some jurisdictions, agricultural workers are exempted from provisions of employment standards legislation in recognition of the unique demands of working in agriculture and to maintain competitiveness with the agricultural sector in other jurisdictions in Canada.

Questions: 1. Does the agricultural sector in the NWT need to have exemptions in place for agricultural workers that are similar to those in other Canadian jurisdictions? and 2. If so, what standards in the *Employment Standards Act* should not apply to agricultural workers?

Students in Work Experience Programs

Students that are engaged in work experience programs as part of their secondary school curriculum are currently exempted in part from the operation of the *Labour Standards Act* by permit issued by the Labour Standards Officer. These programs exist primarily to provide skill development and experience to students in secondary school, and not as wage employment. As such, there seems to be no reason for extending the Act's provisions respecting minimum wage, hours of work, vacation and statutory holidays, leave and termination. The Department proposes to exempt the student and employer participating in a work experience program from the application of the *Employment Standards Act* without requiring a permit. This exemption will continue to be applicable only when the work experience program is part of the secondary school curriculum.

Question: What concerns if any do you have respecting the proposed exemption of students enrolled in Work Experience Programs from the standards in the *Employment Standards Act*?

Construction Workers

The Department is proposing that the term "construction" be defined as employment for the purpose of clearing brush and trees or constructing, reconstructing, repairing, altering or demolishing any work of construction, including the preparation for or the laying of the foundations of any such work or structure. It is further proposed that the definition exclude activities that can be characterized as mining or regular maintenance to ensure the minimum standards in the Act continue to apply where an employee is not engaged in employment that is primarily construction.

The Department is proposing that the regulations continue to provide that the standards in the *Employment Standards Act* dealing with notice of termination and termination pay not be applicable to employees employed in construction.

Questions: 1. How should the term "construction" be defined for the purposes of setting the scope of the notice of termination and termination pay exemption under the *Employment Standards Act*? 2. How should the terms "mining" and "regular maintenance" be defined to distinguish them from construction? 3. What concerns if any do you have respecting the approach proposed by the Department for clarifying the scope of the exemption provided to the construction industry?

Domestic Workers

The Department does not currently regulate domestic workers under the *Labour Standards Act*. Feedback from stakeholders has indicated that the employment of domestic workers should be regulated under employment standards legislation. Accordingly, the Department is proposing to regulate domestic workers under the *Employment Standards Act*.

The Department proposes enacting regulations that:

1. define "domestic worker";
2. exempt domestic workers from the hours of work provisions in the *Employment Standards Act* where alternate hours of work provisions are addressed in a written employment agreement;
3. exempt domestic workers from the overtime provisions of the Act where the issue of overtime and overtime pay is addressed in a written employment agreement;
4. exempt domestic workers from the days of rest provisions of the Act and, instead, require one day off per week;
5. exempt domestic workers from the statutory holiday provisions of the Act and provide that domestic workers are entitled to statutory holiday pay as a percentage of wages paid; and
6. provide that an employer may deduct a maximum amount each month from the pay of a domestic worker for room and board.

A definition of the term "Domestic Worker" is required to be able to identify when an employee is or is

not a domestic worker. The Department is proposing that the term "domestic worker" means:

- a person who is employed to provide cooking, cleaning, gardening, maintenance, chauffeuring, child care, nursing or other personal services at the residence of his or her employer;
- who is living in the residence where the above-mentioned services are provided; and
- who has entered into a written employment agreement to provide the above-mentioned services.

Employees that do fall within the definition of "domestic worker" will be subject to the general standards set out in the *Employment Standards Act*.

Question: What concerns if any do you have respecting the Department's proposed definition of "domestic worker" and the proposed exemptions?

Definition of "Family Member" for Bereavement and Compassionate Leave

The Act currently provides that the following persons are defined as a "family member" of the employee for the purposes of bereavement and compassionate leave:

- the employee's spouse,
- the child of the employee or the child of the employee's spouse,
- the parent of the employee or the spouse of the employee's parent,
- any additional family members prescribed in the *Employment Insurance Act* (Canada) or in the *Canada Labour Code*, and
- any other persons in a class prescribed by regulation under the *Employment Standards Act*.

The Department is considering additions to the types of family relationships that will be included in the definition of "family member" for the purposes of bereavement and compassionate leave.

Questions: 1. Who should be considered a family member for the purposes of bereavement leave? and 2. Who should be considered a family member for the purposes of compassionate leave?

Minimum Wage

The *Labour Standards Act* provides that minimum wage in the NWT is $8.25 per hour. This rate has not been increased since December, 2003. The Department will be setting the minimum wage by regulation under the new *Employment Standards Act*. Prior to enacting this regulation, the Department will consider feedback from the public respecting the adequacy of the current minimum wage rate.

Questions: 1. Is there a need to change the minimum wage of $8.25 per hour? 2. How often should the Department review the minimum wage? 3. What factors should the Department consider in proposing a minimum wage? 4. How much notice should employers and employees be provided prior to the implementation of any change in the minimum wage? and 5. What is an appropriate minimum wage?

Other Regulations

In addition to the proposed regulatory provisions set out above, the Department will be enacting regulations substantively similar to the current regulations for: Annual Vacations; Meals; Notice of Termination; Pregnancy and Parental Leave; Employment Agencies; Wages; and Reciprocating Jurisdictions Orders.

Minimum Wage Change Reminders

The new minimum wage rates are located in the "Employment Standards" section of PAYSOURCE at ¶5505, ¶5526, ¶5528, ¶5530, ¶5534, ¶5538, and ¶5540.

Manitoba

On April 1, 2008 the minimum wage will increase to $8.50 per hour, up from the current level of $8.00 per hour.

New Brunswick

On March 31, 2008 the minimum wage will increase to $7.75 per hour, up from the current level of $7.25 per hour.

Newfoundland and Labrador

On April 1, 2008 the minimum wage will increase to $8.00 per hour, up from the current level of $7.50 per hour.

Ontario

On March 31, 2008 the minimum wage will increase to $8.75 per hour, up from the current level of $8.00 per hour.

Quebec

On May 1, 2008 the minimum wage is expected to increase to $8.50 per hour, up from the current level of $8.00 per hour.

Saskatchewan

On May 1, 2008 the minimum wage will increase to $8.60 per hour, up from the current level of $8.25 per hour.

Recent Cases and Rulings

Employee entitled to rescind resignation

• • • **Ontario** • • • Movileanu worked at Valcom for 17 years in the heat shield section of the company. As a result of lost contracts, Valcom had to downsize, so it closed down the heat shield part of the company. All employees in the area were let go, although Movileanu was kept on to help close down the heat shield section of the plant. Before leaving, Movileanu was offered the position of Production Manager/Fiberglass Supervisor in another section, which he accepted. After a period of job shadowing, Movileanu began work in this new position. On his first day, Movileanu was required to tell three employees that they were being laid off and one employee that he was being reassigned. After this, Movileanu told his employer that he could not perform his new job and asked for a job similar to what he had had before. He was told that there were no other jobs available, so he was given a letter of resignation at the end of his shift. While Movileanu believed that he had not resigned and that he should be able to continue to work, the company treated him as if he had resigned, and would not let him return to work. Movileanu brought an action for wrongful dismissal.

The action was allowed. The test for determining whether an employee has resigned is an objective one, and requires evidence that the employee clearly and unequivocally intended to resign. In this situation, the employee indicated to the employer that he could not do his new supervisor job, as he had a hard time with his new job requirements, specifically having to let three people go. He was also aware of the difficulties the company was facing, that they were going through downsizing, and that there were no other positions available at the company for him. Therefore, Movileanu had resigned from the company through his actions and statements. Unless an employer acts to its detriment on the expression of an intent to resign, however, an employee may change his mind and take back the resignation. Here, Movileanu did not sign the resignation letter given to him by the company, and came back the next day stating that he would take the supervisor job, but this offer was rejected by the company. The company did not give enough consideration to the fact that Movileanu was required to terminate three people on his first day, and it had not incurred any expense in getting a new supervisor right after Movileanu resigned. Movileanu had taken back his previous position and was willing to take on his job as supervisor, so he was terminated without cause and was entitled to notice of 12 months.

Movileanu v. Valcom Manufacturing Group Inc., (Ont. S.C.J.), 2008 CLLC ¶210-001.

Insurance agent was an independent contractor

• • • **Canada** • • • Combined Insurance Company sold insurance policies throughout Canada. Drapeau was given an undertaking to sell insurance policies for Combined Insurance and signed a contract stating that she would sell the insurance contracts as an independent contractor. She was recruited through an advertisement in the newspaper that was paid for and placed in the newspaper by the district manager, who was himself an individual representative and contractor. The district manager's role was to train new representatives such as Drapeau in the field of insurance, after the eight-day training given to new representatives by Combined Insurance. As Drapeau's supervisor, the district manager helped with the training by accompanying new recruits and supervised all of their activities during their training. Drapeau was a part of the district manager's sales team, but had no contractual relationship with him. Each of the sales representatives were under contract with Combined Insurance to sell its insurance products as independent contractors. Representatives did not have office space available to them, and were required to bear the cost of any promotional material given to them by Combined Insurance, although space was leased for group

"pep" meetings. As set out in her contract, Drapeau was free to sell policies other than those of Combined Insurance, and her tax return after starting work stated she was self-employed. The Minister of National Revenue determined that Drapeau held insurable employment during this time, which was affirmed by the Tax Court. The Tax Court determined that the degree of control exercised by the insurance company was such that a relationship of subordination existed between it and Drapeau, and therefore that there was a contract of employment. Combined Insurance appealed.

The appeal was allowed. In determining whether a relationship involves employees or independent contractors, it is important to look at the intent of the parties. The relevant facts must be looked at in light of the factors set out in *Wiebe Door Services Ltd. v. M.N.R.* 86 CLLC ¶14,062, specifically: degree of control, ownership of tools, chance of profit, risk of loss, and integration. In this case, the Tax Court judge relied solely on the testimony of Drapeau, without considering the testimony of other employees, and he did not consider the *Wiebe Door* factors. Looking at each of the factors in turn, it was clear that Drapeau was the owner of her work tools, as she had to bear the cost of her insurance licence, the liability insurance policy, transportation, and all office supplies. Her income depended largely on her success in selling new insurance policies, so she had a chance of profit and a risk of loss. Her activities were not integrated with Combined Insurance, because she was not an exclusive representative of their policies, so she could sell products of other companies, and she could be replaced by other representatives. In terms of the degree of control over Drapeau, she was a self-employed worker who had complete choice in whom she would solicit for insurance policies and the times and locations of these solicitations. It was up to Drapeau to set meetings with customers, so there was not a required presence at work or a strict observance of a work schedule. Drapeau did not take vacation during her time working for the company, and it was unclear what sort of penalties would result if she did not perform satisfactorily. While all sales people were given certain techniques to help sell policies, there was no way to verify whether the sales force was using these methods in order to sell policies. All sales staff were required to submit activity reports in order to receive their commissions. Finally, while Combined Insurance controlled the quality of work, that did not necessarily create a relationship of subordination. Therefore, Drapeau was an independent contractor and did not hold insurable employment.

Combined Insurance Company of America v. Minister of National Revenue and Drapeau, (F.C.A.), 2008 CLLC ¶240-001.

Employment bonus earned in U.S. was taxable in Canada – Taxpayer was resident in Canada under Canada–U.S. tax treaty

The Minister assessed the taxpayer as a resident of Canada for 2003. On the taxpayer's appeal to the Tax Court of Canada, the parties agreed that the taxpayer was ordinarily resident in Canada during 2003, but was also a resident of the U.S. because he held a green card. The taxpayer argued that: (a) under the tie-breaker rules of the *Canada–U.S. Income Tax Convention (1980)* (the "Treaty"), he was not resident in Canada; and, in the alternative, (b) an employment bonus he received during 2003 was not subject to Canadian tax because: (i) it was "remuneration derived by a resident of [the U.S.] in respect of an employment" under Article XV of the Treaty; or (ii) it related to employment exercised in the U.S. during 2002, before the taxpayer became a resident of Canada.

The taxpayer's appeal was dismissed. Under the tie-breaker provisions of the Treaty, the taxpayer had a "permanent home"available to him in Canada during 2003. However, he had no "permanent home" available to him in the U.S. during 2003. Also, an employment bonus is taxable when received, regardless of when or where the related employment was exercised. Therefore, the taxpayer's arguments about the employment bonus were untenable. The Minister's assessment was affirmed accordingly.

Garcia, (Tax Court of Canada), 2007 DTC 1593.

Employment at Special or Remote Work Site

Where an employee is in receipt of a non-taxable allowance that meets the requirements of subsection 6(6) for employment at a special or a remote work site, the employee and employer should complete form TD4. The form is not required to be filed with the CRA but should be maintained with the employer's payroll records and may be requested by the CRA. The exemption under subsection 6(6) can apply where the individual is employed outside Canada by a non-resident employer.

Technical Interpretation, International and Trusts Division, September 12, 2007, Document No. 2006-0217331E5.

Flexible Benefit Plan

The CRA commented on several provisions that were to be part of a flexible benefit plan.

Paragraph 23 of Interpretation Bulletin IT-523 comments on the ability to use flex credits to purchase additional vacation. As noted in the bulletin, if additional vacation purchased through the plan is carried forward to a subsequent year, the plan may be considered a salary deferral arrangement ("SDA").

Employees would also be permitted to purchase a funded leave of absence that could be taken immediately before retirement. Unless the requirements of Regulation 6801(a) are met, the provision would not be considered a deferred salary leave plan. Under Regulation 6801(a)(v), the employee is required to return to work for a period that is not less than the leave of absence period.

It was also proposed that the employee would be able to cash out unused credits on retirement or termination of employment. It was the CRA's view that the SDA rules would apply to a flex credit that has a cash value. To the extent the cash value of the credits were not otherwise included in income, subsection 6(11) would apply.

Technical Interpretation, Financial Sector and Exempt Entities Division, September 13, 2007, Document No. 2007-0238961E5

Motor Vehicle Expenses – Supply/Substitute Teacher

A deduction for motor vehicle expenses may be available to an employee who "was ordinarily required to carry on the duties of the office or employment away from the employer's place of business or in different places". In this regard it is the CRA's view that the phrase "in different places" generally refers to the situation where the employer does not have a single or fixed place of business.

With regard to a substitute or supply teacher, it is the CRA's view that because the person is "hired by a school board to teach at any one of the schools under its jurisdiction, the employer's place of business is considered to be the particular school at which the particular substitute/supply teacher has been assigned to teach on that particular day". Consequently, the individual would not meet the "required to carry on the duties of the office or employment away from the employer's place of business" condition.

Technical Interpretation, Business and Partnerships Division, October 30, 2007, Document No. 2007-0224001E5.

Source Deductions – Employee Working Abroad

The issue the CRA was asked to review involved the Canadian corporation ACO having employed the French national A in Canada from August 1998 to July 29, 2007. During those years, A had a temporary work permit and was considered a Canadian resident for tax purposes. On July 29, 2007, he moved back to France where he would continue to work for ACO but as a non-resident of Canada. The CRA already confirmed that A was considered non-resident of Canada as of July 29, 2007. ACO has no permanent French establishment but is registered with the appropriate French agencies for the purpose of remitting required social charges in respect of A. All his salary for services rendered in France is subject to French income tax. The CRA was asked if ACO could stop withholding Canadian income tax and employment insurance contributions from A's salary after July 29, 2007, the date he became a non-resident of Canada.

The CRA confirmed that, provided A would not perform any of his employment duties in Canada after July 29, 2007 and would pay French income tax on the remuneration received for those duties, ACO would not have to withhold Canadian federal income tax on that remuneration. Under paragraph 2(3)(*a*) of the Act, a non-resident person employed in Canada during a taxation year is only liable to Canadian income tax on its taxable income earned in Canada. Since paragraph 115(1)(*a*) of the Act provides that a taxable income earned in Canada by a non-resident person comprises only the income from duties of employment performed by that person in Canada, the income earned by A after July 29, 2007 should not normally be included in his taxable income earned in Canada or be subject to a Canadian income tax. Paragraph 115(2)(*c*) of the Act could deem a non-resident to be employed in Canada and have additional taxable income earned in Canada during the year but only if three conditions were met. This provision should not apply to our situation because the third condition in subparagraph 115(2)(*c*)(iii) requiring that A's salary be exempt from French income tax under the Canada–France Income Tax Convention would not be met. We already indicated that A's salary would be subject to French income tax. Note that the employment is normally exercised at the place where the worker is physically located at the time when the income producing activities are exercised even if his work input is used in Canada. Regulation 104(2) exempts from withholding tax the remuneration paid to an employee not

employed or resident in Canada at the time of the payment. Regulation 105(1) would not apply to our case since a true "remuneration" (as defined in Regulation 100(1)), not a service fee or commission, is paid to A. In any event, the services or duties are not rendered within but outside Canada.

Regarding the employment insurance contributions, the CRA confirmed that those contributions would not be required after July 29, 2007 when A became a non-resident of Canada. Section 5 of the Employment Insurance Regulations state clearly that an employment outside Canada is only considered as an insurable employment if four conditions are met, one of which requires the person employed to ordinarily reside in Canada (paragraph 5(a) of those Regulations). Since the CRA already confirmed to A that he would be a non-resident of Canada from July 29, 2007, his employment with ACO would not be insurable from that date and ACO would not have to remit employment insurance contributions in respect of his salary. Regarding the CPP contributions, the CRA noted that ACO, established in Quebec, was governed by the QPP not the CPP and should review the QPP contribution, HSF contribution and Quebec income tax deduction issues with Revenue Quebec.

Technical Interpretation, International and Trust Division, November 14, 2007, Document No. 2007-0245631E5.