Managing statutory holiday pay is like boxing an octopus. Just when you get one tentacle under control, you end up getting decked by one of the 7 others. So we set out to look at the stat holiday pay issue holistically with the hope of giving you a single tool for TKO'ing the entire beast. Last month, we provided guidance on 3 tentacles: determining which days are statutory holidays, the date they’re officially celebrated and the employees who are eligible to be paid for them. Now we turn to what are perhaps the 2 most slippery tentacles of all—calculating holiday pay for both holidays worked and days taken off. So lace up those boxing gloves and let’s get ready to rumble.

What the Law Requires

The point of statutory holiday rules is to ensure that employees get paid time off for statutory holidays. The idea is that employees can stay home and still get paid. Unfortunately, it’s not as simple as that in the real world. First of all, the world doesn’t stop turning just because it’s a statutory holiday. So what happens when businesses stay open and employees work on the holiday? The laws have to address this problem. And what happens when a stat holiday happens to fall on a day employees weren’t supposed to work anyway, like a Sunday? Do employees still get a benefit for the day?

How you handle these situations varies depending on what the employment standards laws of your province say. A good way to determine your obligations is to ask 3 questions:

1. Does the employee work in a continuous operation?
2. Does the holiday fall on what’s not normally a work day?
3. Does the employee have another day off in lieu of the holiday?

The 3 questions deal with the most common statutory holiday pay scenarios that arise in the real world. So to understand stat holiday pay, you need to work through each scenario and break down how the laws of the particular province apply to it. Let’s do that now:

CASE OF THE MONTH

Scotiabank Ruling Breathes New Life into Overtime Class Actions

Single claims for unpaid overtime are a headache that can result in hundreds and maybe even thousands of dollars in penalties. Multiplied by a couple of hundred, the overtime complaint becomes a monster of sinister dimensions. And that’s exactly what the overtime class action is. The dismissal of the CIBC overtime class action lawsuit by an Ontario court last June raised hopes that the threat might have been overblown. But a brand new ruling from Ontario gives employers fresh grounds for concern. Here’s a look at the case and what it portends for employers not only in Ontario but all of Canada.
Question 1: Does the Employee Work in a Continuous Operation?

Some jurisdictions give employers payment options for employees in employment where work is normally done on a Sunday or holiday and/or work for what’s considered a “continuous operation.” The term means work that once started goes on almost continuously without interruption, e.g., in oil refineries. The definition of employees who work in “continuous operation” varies by province but may also refer to work in designated industries. Here are the definitions in each jurisdiction that have such a rule:

- **Federal:** Work in a continuous operation or work that doesn’t stop on a Sunday or holiday or any employment related to trains, planes, ships or other vehicles and to telephone, radio, television, telegraph communications or broadcasting;

- **SK:** Employees who work in a commercial hog farm, hospital, educational institution, nursing home, hotel or restaurant;

- **MB:** Work in a continuous operation or seasonal business, place of amusement, gasoline service station, hospital, hotel or restaurant, or in domestic service;

- **ON:** Employees who work in a continuous operation or hospital, hotel, motel, tourist resort, restaurant or tavern;

- **NB:** Employees who work in a hotel, motel, tourist resort, restaurant, tavern or in any continuous operation;

- **NS:** Work in a continuous operation, work that doesn’t stop on a Sunday or holiday or any employment related to trucks or other vehicles and to telephone or any other communications; and

- **NL:** Work in a continuous operation, work that doesn’t stop on a Sunday or holiday or work in a public utility or in what the government considers a necessary public service.

If you’re not in one of these jurisdictions, skip the rest of this section and go to Question 2. But if you are, you can make the employee work the holiday, so long as you pay the employee:

- **Federal:** Straight time for any hours worked on the holiday, plus a paid day off in lieu (Fed, MB, ON, NB, NS, NL);

- **SK, MB, ON:** Time and a half for any hours worked on the holiday, plus pay for the holiday itself (Fed, SK, MB, ON, NS);

- **NB:** Time and a half for any hours worked on the holiday, plus a paid day off in lieu (SK);

- **MB:** If day in lieu is given, it must be given with 2 days’ notice and within 30 days of the holiday or, with employee’s consent, be given before the next annual vacation;

- **NS:** If day in lieu is given, it must either be taken at a time agreed to by employees or on the first working day following the employee’s next annual vacation; and

- **NL:** The employee rather than the employer picks the option.

Where more than one option is available, selecting which one is normally at the employer’s discretion. But it’s subject to specific limitations, depending on the province:

- **SK:** Options available only for holidays that would normally be working days for employees; employees on a commercial hog farm may request to be paid only at straight time for any work on the holiday, as well as another day off in lieu.

- **MB:** If day in lieu is given, it must be given with 2 days’ notice and within 30 days of the holiday or, with employee’s consent, be given before the next annual vacation;

- **NS:** If day in lieu is given, it must either be taken at a time agreed to by employees or on the first working day following the employee’s next annual vacation; and

- **NL:** The employee rather than the employer picks the option.

CONTINUED ON PAGE 3
STATUTORY HOLIDAYS CONTINUED FROM PAGE 2

Question 2: Does the Holiday Fall on Day That’s Not Normally a Working Day?

Most people consider Monday to Friday a normal work week. Of course, not all employees work such schedules. Those who work different schedules include in retail or service environments that are closed Mondays and open Tuesday to Saturday. Many employees in such environments work part-time, working only on certain days of the week. So what happens to these employees when a stat holiday falls on a day that’s not a working day for them?

Common sense generally dictates whether a day is a normal working day for the employee. However, some jurisdictions have specific rules that employers must use to determine what is and isn’t a normal working day. For example, in Alberta, employees must work the week day on which a holiday falls in at least 5 or the previous 9 work weeks for the holiday to be considered a normal working day for the employee; and in Ontario, a statutory holiday isn’t considered a normal working day if it falls during an employee’s vacation.

Where a holiday falls on a day that would not normally be a working day, some jurisdictions have special rules. The rules for those jurisdictions are set out below. If your jurisdiction isn’t listed below, skip the rest of the section and go on to Question 3:

- The employer may provide another paid day off in lieu (Federal, ON, NB, NU);
- The employer must provide another paid day off in lieu (MB, NS, PE, NL, YT);
- The employer may pay employees for the holiday without more time off (ON, NB, NU); and
- The employer is not required to provide either additional time off or additional pay unless employees actually work on the day (AB).

However, the above rules are subject to restrictions:

- **Federal:** If New Year’s Day, Canada Day, Remembrance Day, Christmas Day or Boxing Day falls on a non-working Saturday or Sunday, paid time off must be given on the working day immediately before or after the holiday. Otherwise, employees may agree to another day in lieu or the employer may add a day to the employee’s next annual vacation;
- **MB:** Where the holiday falls on a Saturday or Sunday, the day in lieu must be the first working day following the holiday. For holidays on other days of the week, without employee consent, a day in lieu must be given prior to the next annual vacation;
- **ON:** A day in lieu must be taken within 3 months of the holiday, or with employee consent, 12 months of the holiday. An employee on pregnancy or parental leave or on layoff where the statutory holiday falls before the layoff becomes a permanent termination must be paid for the statutory holiday without any entitlement to further time off;
- **NB:** Employees must agree to be paid out, rather than taking another day in lieu;
- **NS, PE:** Unless agreed to by the employee, a day in lieu must be the working day immediately following a statutory holiday or the working day immediately following the employee’s next vacation. In PE, any day agreed must be before the next annual vacation;
- **NL:** Unless agreed to by the employee, the day in lieu must be the first working day following the holiday;
- **YT:** The day in lieu must be the first working day following the holiday; and
- **NU:** A day in lieu must be agreed to by employees and must be no later than the employee’s next annual vacation.

Commissioned sales employees who make their sales away from the employer’s principal place of business (other than route sales persons) aren’t eligible for statutory holidays in AB, ON, NB and NS. Other sales persons paid partly or wholly by commission aren’t eligible for statutory holidays in:

- **BC:** where actual wages, including commissions, exceed what would have been owing under the employment standards statutory holiday requirements; and
- **PE:** where an employee’s income is earned primarily as sales commissions.

Question 3: Does a Day in Lieu Apply?

As you’ve no doubt noted by now, a day in lieu may be a potential replacement for a stat holiday worked. This isn’t really an exception since whatever rules applied to the actual holiday are just transferred to the day in lieu. In other words, where a day in lieu is provided, any work on the actual statutory holiday is normally paid as it would be for any other working day.

Granting a day in lieu is similar to shifting formal recognition of the holiday to another day. However, the difference is in the degree of employee consent required. Mostly, where employees may substitute another day for a statutory holiday, this may be done without getting the consent of each affected employee. Consent in the form of a majority vote or in a collective agreement suffices. By contrast, where employers are allowed to offer a day in lieu, individual consent may be required. Even where offering a day in lieu is at the employer’s discretion, employee consent may be required to the specific day that’s offered in lieu.

Remember, that we’re talking here about employees in other than “continuous operations” and for whom a statutory holiday would normally be a working day. Not all jurisdictions allow employers to offer a day in lieu for such employees. Those that do, which are listed below, have slightly different rules:

- Each affected employee’s consent is required to a day in lieu (BC, ON, NB, NL); and

CONTINUED ON PAGE 4
STATUTORY HOLIDAYS CONTINUED FROM PAGE 3

AT A GLANCE: PAY FOR STATUTORY HOLIDAYS THAT FALL ON NON-WORK DAYS

Employee generally gets:

**FEDERAL**: Holiday with pay at another time. If New Year's, Canada Day, Remembrance Day, Christmas or Boxing Day fall on Sat. or Sun., employee gets holiday with pay on working day immediately before or after holiday.

**ALBERTA**: No entitlement to pay. But if holiday falls during his annual vacation, employee gets next working day off or on another agreed date.

**BRITISH COLUMBIA**: Another day off not later than his next annual vacation.

**MANITOBA**: Holiday with pay at another time before his next annual vacation or at mutually convenient time. If New Year’s, Canada Day or Christmas falls on Sat. or Sun., employee gets holiday with pay on working day immediately before or after holiday.

**NEW BRUNSWICK**: Regular wages for day, if employee agrees, or another designated day before his next annual vacation.

**NEWFOUNDLAND/LABRADOR**: Holiday on day after holiday or another mutually agreeable day.

**NORTHWEST TERRITORIES/NUNAVUT**: A substitute day or pay for the day.

**NOVA SCOTIA**: Holiday on working day after holiday or his vacation unless mutually satisfactory arrangements are made.

**ONTARIO**: With employee’s agreement, regular wages for the day or another day that can’t be later than his next annual vacation.

**PRINCE EDWARD ISLAND**: Holiday on next working day after holiday or employee’s vacation or, with employee’s agreement, another day off before his next annual vacation.

**QUÉBEC**: Where there’s a collective agreement with at least 8 holidays, time off for the holiday. If employee’s on vacation when holiday falls, another day or pay. When June 24 is a Sunday, it’s observed on June 25; when July 1 is a Sunday, it’s observed on July 2.

**SASKATCHEWAN**: Another day off with pay. If New Year’s, Christmas or Remembrance Day falls on Sunday, it’s observed the next Monday.

**YUKON**: Holiday with pay on working day immediately after the holiday.

- Offending a day in lieu is at the employer’s discretion (AB, QC, PE, YT, NT, NU);

Days in lieu provided are also subject to the following conditions:

- **AB**: Employers may only offer a day in lieu for a statutory holiday that falls on a normal working day for a holiday. In effect, eligible employees who work on a statutory holiday that wouldn’t otherwise be a working day must be paid time and a half for any actual work, plus pay for the holiday itself and have no ESA entitlements if they don’t actually work the day;

- **ON**: A day in lieu must be taken within 3 months of the holiday, or with employee consent. Within 12 months of the holiday;

- **QC**: For the National Holiday, the day in lieu must be the working day either before or after June 24. For other all holidays, a day in lieu must be taken within 3 weeks of the holiday unless a longer period is stipulated in a collective agreement or decree;

- **NB**: A day in lieu must be before the next annual vacation;

- **PE**: The actual day taken in lieu must be agreed to by each employee;

- **NL**: At the employee’s option, employees may take a day in lieu within 30 days after the holiday or add an extra day to their next annual vacation;

- **YT**: Unless agreed to by the employee, a day in lieu may be added to the employee’s next annual vacation; and

- **NT, NU**: Employees must be given a day in lieu to which they agree before the employee’s next annual vacation.

**PAY FOR HOLIDAY TIME OFF**

The next tentacle to deal with is entitlement to pay for a statutory holiday itself. The issue also applies to pay for days that employees are given in lieu of the holiday. To start out, let’s be perfectly clear that pay for the day itself is different from the pay required for any work performed on the day. The former, which is normally referred to as “holiday pay,” simply means pay stemming from an employee’s eligibility for the holiday itself.

There are 5 different ways to calculate holiday pay. Each method precludes using the other; in other words, if the method applies to the employee, it’s the only way to calculate the employee’s holiday pay. Method 5 is the default that applies when none of the others do.

**Method 1: No Change In Pay**

In some jurisdictions, for some employees, employers aren’t specifically required to calculate holiday pay separately from other pay. This is the case where employee pay is a fixed pay period amount, such as a monthly salary, and that amount doesn’t change for the pay period in which a statutory holiday falls. The idea is that no special recognition for holiday pay is required where pay doesn’t change just because of a statutory holiday. Where this is allowed, there’s also no requirement for the employer to report statutory holiday pay separately on the pay statement. This rule applies to the following kinds of employees in particular jurisdictions:
Employees whose pay is calculated on a weekly or monthly basis (Fed, NS, PE);
Employees whose regular pay period earnings don’t change (SK); and
Full-time employees with regular hours whose pay is calculated on a weekly or monthly basis (YT);

**Method 2: Holiday Pay = Percentage of Earnings**
In some jurisdictions, employees in designated industries get a flat percentage of earnings, instead of pay for the applicable statutory holidays. The following chart shows how this applies:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Industry</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>BC</td>
<td>Silviculture, Commissioned Car or Truck Sales</td>
<td>3.6% of gross earnings or 1/36 x a piece rate</td>
</tr>
<tr>
<td>AB</td>
<td>Construction</td>
<td>3.6% of wages paid for work, except vacation pay and tips and gratuities</td>
</tr>
<tr>
<td>SK</td>
<td>Construction</td>
<td>4% of gross wages, other than overtime and vacation pay</td>
</tr>
<tr>
<td>MB</td>
<td>Construction</td>
<td>4% of gross wages, other than overtime</td>
</tr>
</tbody>
</table>

**Method 3: Holiday Pay = Regular Hours or Regular Wages**
In some jurisdictions, holiday pay is what employees would normally earn in a regular work day. This applies:
- Where employees are paid by time and regular work hours don’t vary by day (Federal);
- Where wages and regular hours don’t vary by day (MB);
- Where wages don’t vary by day (NB);
- Where pay is calculated on a basis other than weekly or monthly (NS, PE);
- To employees who work on the holiday (NL);
- To full-time employees working regular hours whose pay is calculated on a daily or hourly basis (YT); and
- Where wages are calculated on the basis of time (NT, NU).

**Method 4: No Change In Pay**
NL is the only jurisdiction where holiday pay is based on an average of the hours worked per day in previous weeks. This applies to employees who are given the holiday as paid time off. The average is based on total worked hours, including overtime, divided by the number of days worked in the prior 3 calendar weeks.

**Method 5: No Change In Pay**
For all other eligible employees, holiday pay is calculated as a daily average. This calculation has 2 parts:
1. The earnings to be averaged; and,
2. The period of time over which the average is calculated.

In practice, this calculation isn’t required where earnings are the same every pay period. For example, in ON, the daily average is calculated as the earnings received in the 4 work weeks prior to a statutory holiday, divided by 20. For employees who are paid a constant, fixed number of hours per day, mathematically, the average is a normal days pay. The average will only differ from a day’s regular pay where the hours worked per day vary or where there’s been a change in the hourly rate or other earnings paid.

The following chart shows the earnings that are either included or excluded, by jurisdiction from the calculation of a daily average for holiday pay. We don’t include regular pay or normal earnings in the chart since these are included in every jurisdiction:

<table>
<thead>
<tr>
<th>Earnings Type</th>
<th>Included in the Average</th>
<th>Excluded from the Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allowances for room and board</td>
<td>ON</td>
<td>All other jurisdictions</td>
</tr>
<tr>
<td>All other allowances</td>
<td>All jurisdictions</td>
<td></td>
</tr>
<tr>
<td>Expense reimbursements</td>
<td>All jurisdictions</td>
<td></td>
</tr>
<tr>
<td>Production related bonuses or incentives</td>
<td>All jurisdictions</td>
<td></td>
</tr>
<tr>
<td>Discretionary bonuses</td>
<td>All jurisdictions</td>
<td></td>
</tr>
<tr>
<td>Tips and gratuities (controlled tips)</td>
<td>Federal, SK, MB</td>
<td>BC, AB, ON, NB, YT, NT, NU</td>
</tr>
<tr>
<td>Tips and gratuities (direct tips)</td>
<td>All jurisdictions</td>
<td></td>
</tr>
<tr>
<td>Declared or allocated tips</td>
<td>QC</td>
<td>All other jurisdictions</td>
</tr>
<tr>
<td>Employee benefits</td>
<td>QC</td>
<td>All other jurisdictions</td>
</tr>
<tr>
<td>Overtime</td>
<td>NT, NU</td>
<td>All other jurisdictions</td>
</tr>
<tr>
<td>Statutory holiday pay</td>
<td>BC, SK, MB, YT, NU</td>
<td>Federal, AB, ON, QC, NB, NT</td>
</tr>
<tr>
<td>Pay for work on a holiday</td>
<td>Federal, BC, SK, MB, QC, NB, YT, NT, NU</td>
<td>AB, ON</td>
</tr>
<tr>
<td>Vacation pay for time taken</td>
<td>BC, SK, MB, ON, QC, YT</td>
<td>Federal, AB, NB, NT, NU</td>
</tr>
<tr>
<td>Any other vacation pay</td>
<td>MB, ON, QC, YT</td>
<td>Federal, BC, AB, SK, NB, NT, NU</td>
</tr>
<tr>
<td>Wages in lieu of notice</td>
<td>BC, MB, YT</td>
<td>Federal, AB, SK, ON, QC, NB, NT, NU</td>
</tr>
</tbody>
</table>

The chart should help you determine which of your earnings have to be averaged for the purpose of calculating holiday pay. But there are a couple of situations where this isn’t quite so straightforward.

**Explanation:** All jurisdictions base the average on what are defined as wages. But in some jurisdictions, wages include compensation in any form for work or services. For example, the daily average for holiday pay in SK is based on the wages paid in the prior 4 weeks. In SK, wages are defined as “all wages, salaries, pay, commission and any compensation for labour or personal services, whether measured by time, piece or otherwise, to which an employee is entitled.” Some jurisdictions are more explicit about the all-encompassing nature of wages. For example,
PAY FOR WORK ON HOLIDAYS

The basic rule is that employees who work on a statutory holiday must be paid at time and half for the actual hours worked. This includes employees who are subject to holiday pay requirements, but aren’t entitled to holiday pay because they didn’t meet one of the thresholds we discussed last month. For example, an employee in the federal jurisdiction hired within 30 days of a statutory holiday and who works on the holiday, is entitled to both holiday pay and time and a half for any hours worked.

As always, there are exceptions:

- **BC**: Work exceeding 12 hours on a holiday must be paid at double time. However, employees not entitled to holiday pay are only entitled to straight time for any hours worked on a holiday.
- **AB**: For employees paid partly or wholly by commission or any other incentive basis the rate of pay is the greater of minimum wage and the hourly equivalent of any salary paid.
- **SK**: Employees who work in a continuous operation as defined earlier (but not a hog farm) on what otherwise would be a normal working day are entitled to time and a half even if they’re also given another day in lieu;
- **ON**: There are actually several exceptions for employees who don’t fully work the holiday as required, depending on whether there was to be a day in lieu and whether the employee had reasonable cause, as illustrated by the following chart:

<table>
<thead>
<tr>
<th>Was there to be another Day in Lieu?</th>
<th>With Reasonable Cause for Not Fully Working the Day</th>
<th>No Reasonable Cause for Not Fully Working the Day</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>• Straight time for any hours worked;</td>
<td>• Time and a half for any hours worked;</td>
</tr>
<tr>
<td></td>
<td>• Plus another day in lieu</td>
<td>• No holiday pay.</td>
</tr>
<tr>
<td>No</td>
<td>• Time and a half for any hours worked;</td>
<td>• Time and a half for any hours worked;</td>
</tr>
<tr>
<td></td>
<td>• Plus holiday pay;</td>
<td>• No holiday pay.</td>
</tr>
</tbody>
</table>

- **QC, NL**: Employees who work on a statutory holiday must be given a day in lieu, so any work on a holiday is only owing at straight time; and
- **NS, PE, NU**: Employees are only entitled to time and a half if they’re also entitled to holiday pay itself.

**Conclusion**

The tentacles we’ve tied up so far in this series are all subjects that have been written about in other places—albeit rarely in a single and systematic way. But there’s one critical dimension to the statutory holiday pay conundrums that almost always gets overlooked: How applying the various rules to actual payments has a ripple effect that impacts other payroll operations other than those having to do with statutory holiday pay itself. Next month, we’ll delve into this subtle but critical set of links between statutory holiday pay and other dimensions of payroll.
CASE OF THE MONTH (cont’d from page 1)

Scotiabank Ruling Breathes New Life into Overtime Class Actions

THE CASE

What Happened: A group of employees at Scotiabank claimed that they and about 5,000 of their colleagues were routinely expected to work beyond their scheduled 37.5 hours per week just to do their normal job duties—all without ever seeing a dime of overtime. Instead of pursuing their claims individually, they pooled them as a class action lawsuit claiming that the bank’s failure to pay overtime violated:

1. federal labour standards regulations; and
2. their employment contracts.

Scotiabank denied the claims and challenged the employees’ right to file them as a class action.

What the Court Decided: The Ontario Superior Court of Justice ruled that the employees could bring a class action and didn’t have to pursue their claims individually.

How the Court Justified Its Decision: The court distinguished between the 2 claims:

1. The Labour Standards Claim: The Canada Labour Code requires employers to pay time-and-a-half for overtime they require or permit employees to work. However, like provincial employment standards schemes, the federal labour standards law establishes a mechanism for employees to bring their wage complaints. The Scotiabank employees couldn’t sue for damages in civil court but had to use this mechanism to pursue their labour standards code claim.

2. The Contract Claim: Unlike labour standards complaints, civil courts do have jurisdiction, i.e., legal authority to resolve claims for breach of contract. The employees argued and the court agreed that Scotiabank’s duty to pay overtime as required by the labour standards regulation was an implied obligation under the contract. Consequently, the claim for breach of contract could be brought as a lawsuit for damages in civil court. And the court went on to approve the case as a class action. [Fulawka v. Bank of Nova Scotia, [2010] O.J. No. 716, Feb. 19, 2010].

ANALYSIS

If you’re from BC or PE, you needn’t fret about any of this. Explanation: BC courts reject the theory that the employer’s obligation to obey overtime and other employment standards rules is an implied contract obligation. And PE doesn’t allow any kind of class action. So, employees in BC and PE who have a beef about overtime can’t bring class actions.

However, 6 jurisdictions do accept the implied contract theory—AB, Fed, MB, QC, SK and ON. The other 6 jurisdictions haven’t addressed the issue. Accordingly, civil lawsuits, including class actions for overtime, remain a possibility in these jurisdictions.

But getting into civil court is only half the battle. Employees still have to get the court to certify the case as a class action. Blocking certification gives employers a chance to derail the class action before it ever reaches trial. One of the things employees must prove to gain certification is that the issues they raise have enough in common to warrant dealing with them in one proceeding. And that’s anything but a slam dunk. In fact, last June, the Ontario Supreme Court threw out an almost identical class action against CIBC for lack of commonality—the Court said each claim had to be decided on case-specific facts [Fresco v. CIBC, [2009] CanLII 31177, June 18, 2009].

The court in Scotiabank went to great pains to distinguish the case from CIBC. In CIBC, denial of overtime was based on a number of factors, the court explained. But with Scotiabank, the problem was systemic. Like CIBC, Scotiabank policy required overtime to be approved in advance by a branch manager. But unlike CIBC, Scotiabank didn’t allow for approving overtime after the fact. Moreover, employees claimed that Scotiabank culture was based on the belief that working long hours was par for the course; and its procedures made it hard for employees to even request overtime. As a result, overtime was rarely requested—so much so that until 2009, the bank didn’t even have a complete payroll system to track hours worked and overtime accrued.

So where are we now? CIBC raised hopes that courts would regard overtime claims as fact-specific enough to preclude their being brought as class actions. But Scotiabank appears to have dashed those hopes. The case illustrates that when regarded as a systemic practice, denial of overtime can, in fact, be an appropriate cause for a class action. And that may be just the encouragement the trial lawyers need to trot out new class actions. ✨

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**LAWS & ANNOUNCEMENTS**

**Income Allocation**

**Employment Insurance**

**HST**
Feb. 25: The government proposed changes to the place of supply rules determining if and at what rate suppliers must charge the provincial component of the HST on their supplies of taxable property and services in Canada. The proposal also includes changes to rules on rebates of the provincial portion. See [http://www.fin.gc.ca/rn10/data/10-014_1-eng.asp](http://www.fin.gc.ca/rn10/data/10-014_1-eng.asp).

**Summer Jobs**
Feb. 2: Service Canada is now accepting applications for summer jobs funding under the Canada Summer Jobs program. $10 million will be handed out. Participation is open to non-profit, public sector employers and small employers in the private sector. To apply, see [www.servicecanada.gc.ca/csi2010](http://www.servicecanada.gc.ca/csi2010).

**U.S. Commerce**
Feb. 5: The federal government reached an agreement with the Obama Administration to allow Canadian companies to work on U.S. state and local infrastructure projects financed under the American Recovery and Reinvestment Act. Canadian companies will be allowed to participate directly via the procurement process and not simply as sub-contractors and suppliers of U.S. firms.

**Pensions**

**CRA Forms**
Mar. 3: New CRA forms and publications since early Feb.: [BC41010 My Payment Insert] (Mar. 3)
- CPT 105 Certificate of Coverage under the Canada Pension Plan Pursuant to Article 2 of the Convention on Social Security Between Canada and the Government of the Kingdom of Morocco (Mar. 1)
- 2006-G General Income Tax and Benefit Guide 2009 – All Provinces Except Non-Residents (Feb. 26)
- 2013-G General Income Tax and Benefit Guide 2009 – All Provinces Except Non-Residents (Feb. 26)
- B-103 Harmonized Sales Tax – Place of supply rules for determining whether a supply is made in a province (Feb. 26)
- GI-060 Harmonized Sales Tax for Ontario – Point-of-Sale Rebate on Newspapers (Feb. 26)
- GI-061 Harmonized Sales Tax for British Columbia – Point-of-Sale Rebate on Motor Fuel (Feb. 26)
- GI-062 Harmonized Sales Tax for Ontario and British Columbia – Point-of-Sale Rebate on Feminine Hygiene Products (Feb. 26)
- GI-063 Harmonized Sales Tax for Ontario and British Columbia – Point-of-Sale Rebate on Children’s Goods (Feb. 26)
- GI-064 Harmonized Sales Tax for Ontario – Point-of-Sale Rebate on Prepared Food and Beverages (Feb. 26)
- GI-065 Harmonized Sales Tax for Ontario and British Columbia – Point-of-Sale Rebate on Books (Feb. 26)
- T121 Statement of Fishing Activities
- NEWS575 Excise and GST/HST News – No. 75 (Winter 2010) (Feb. 24)
- T4004 Fishing Income (Feb. 19)
- TD1-1N Determination of Exemption of an Indien’s Employment Income (Feb. 19)
- BN41212 Surcharge – Alberta Region (January 2010) (Feb. 18)
- 2010-1 Retirement Compensation Arrangements Guide (2010) (Feb. 18)
- NI5 Excise Tax Act – Application for Refund/Rebate (Feb. 17)
- NIS-1 Excise Tax Act – Application for Refund/Rebate Supplementary Information (Feb. 17)
- T5013-INST Statement of partnership income – Instructions for recipient (Feb. 17)
- T5013A-INST Statement of partnership income for tax shelters and renounced resource expenses – Instructions for recipient (Feb. 17)

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**LAWS & ANNOUNCEMENTS (cont’d)**

**5013CH10 Calculation of Deduction for Cumulative Eligible Capital of a Partnership** (Feb. 17)

**5013CHFL04 T5013SCH Packages – Includes Forms T5013SJM, T5013CHL, 5013CH1D, 5013CH1E and 5013CH1H** (Feb. 17)

**T479 TaxRIP and T491R Guide** (Feb. 15)

**GL-053 Ontario and British Columbia Transition to the Harmonized Sales Tax – Freight Transportation Services** (Feb. 12)

**GL-054 Ontario and British Columbia Transition to the Harmonized Sales Tax – Passenger Transportation Services** (Feb. 12)

**GL-055 Ontario and British Columbia Transition to the Harmonized Sales Tax – Transportation Passes** (Feb. 12)

**GL-056 Ontario and British Columbia Transition to the Harmonized Sales Tax** (Feb. 12)

**GL-057 Ontario and British Columbia Transition to the Harmonized Sales Tax – Memberships** (Feb. 12)

**GL-058 Ontario and British Columbia Transition to the Harmonized Sales Tax** (Feb. 12)

**GL-059 Ontario and British Columbia Transition to the Harmonized Sales Tax – Intangible Personal Property** (Feb. 12)

**RC240 Designation of an Earning Contribution Tax-free Saving Account (TFSA)** (Feb. 12)

**CPR2 Statement of Farming Activities** (Feb. 12)

**NOTICE250 Proposed Changes to the Definition of Financial Service** (Feb. 11)

**75CH506 Ontario Transitional Tax Debts and Credits (2009 and later tax years)** (Feb. 11)

**7209/7 Death of an RRSP Annuitant - Refund of Premiums** (Feb. 11)

**1040 Canada Revenue Agency’s Collections Policies – Individual Income Tax (T1)** (Feb. 11)

**T5013 Statement of Partnership Income** (Feb. 11)

**T403 Farming Income 2009** (Feb. 10)

**EBR1/4 KS08 Filing and Payment Schedules for Brews (2010-2011)** (Feb. 4)

**T711 Tax Withholding Waiver on Accrued Income Payments from RESPs** (Feb. 4)

**T5013CH6 Summary of Dispositions of Capital Property – Schedule 6** (Feb. 4)

**T5013CH2 Summary Information for Partnerships that Allocated Renounced Resource Expenses to their Members** (Feb. 4)

**T5013CH14 Financial Statement Notes Checklist** (Feb. 4).

**CASES**

**Court Rips CRA for ‘Unconscionable’ Handling of Assessment**

Using language that you don’t normally hear from judges, a court struck down an assessment and penalties against a taxpayer for improper contributions to his RRSP. The taxpayer had tried all his life to pay taxes in an honest and forthright manner. But “the confusing forms and sometimes unhelpful officials at the” CRA frustrated his attempts to put the situation right. Not only did the CRA give the taxpayer wrong and confusing advice, it strung him along for 3 months. The court called the CRA’s handling of the case “unconscionable.” invalidated the assessment and awarded the taxpayer $1,200 in lost expenses [Gangrom v. Canada (Revenue Agency), [2010] F.C.J. No. 181, Feb. 16, 2010].

**El Recipient Penalized for Not Disclosing He Quit His Job**

An Umpire awarded an auto body employee El. The court could only scratch its head and wonder why the Umpire didn’t look at the ROE. If he had, he would have clearly seen that the employee had quit without just cause and deserved to be penalized for not revealing this on his El application [Canada (Attorney General) v. Romansky, [2010] F.C.J. No. 172, Feb. 10, 2010].

**Giving Union Employee’s Phone Number Could Be Privacy Violation**

A federal civil servant filed a privacy complaint against her employer for giving a union her home address and phone number without permission. Although she paid dues, the employee didn’t belong to the union and didn’t want it to know her personal information. The Public Service Labour Relations Board sided with the employer because the union needed the information for administrative purposes. Not so fast, said the court. The Board should have weighed the union’s need for the information against the employee’s privacy interests, it held [Bernard v. Canada (Attorney General), [2010] F.C.J. No. 170].

**Court Overrules Denial of Work Permit to Sri Lankan Cook**

A citizen of Sri Lanka applied for a work permit after being offered a job as cook at Denny’s in Calgary for $12 per hour. The visa officer found that he wasn’t qualified as a cook and denied the application. So the gentleman went back to the Denny’s people and got an offer as a kitchen helper for $10.50. The permit was again denied. The court said the decision was unreasonable. The officer assumed that the second offer was just a cleverly disguised version of the first one without considering that the applicant’s plan was to gain experience in the kitchen and work his way up to cook. So the court ordered a new review by a different officer [Wijesinghe v. Canada (Minister of Citizenship and Immigration), [2010] F.C.J. No. 53, Jan. 20, 2010].
**LAW & ANNOUNCEMENTS**

**2010 Budget**
Feb. 9: The 2010 budget is on the table and it projects a $4.7 billion deficit. The budget includes no personal tax changes but personal credit amounts are increased 0.3% for inflation:
- Basic personal and spousal amount: $16,825
- Alberta Tax Credit: $1,683
- Alberta Family Employment Tax Credit (effective July 1): $696 for 1 child, $1,329 for 2, $1,709 for 3 and $1,836 for 4 or more
- Income level for phase out of Family Employment Tax Credit: $33,974.

**Minimum Wage**
Feb. 5: The minimum wage is going to remain $8.80 per hour through all of 2010. Any increases will hurt job growth and competitiveness, the government claims. Last April, the minimum wage rose 40 cents and now stands as the sixth highest in Canada behind ON, NL, SK, QC and MB.

**Payday Loans**
Mar. 1: Payday loan fees are now capped at $23 per $100 borrowed. Regulations took effect last September banning rollover loans, imposing licensing requirements on lenders and giving borrowers a 2-day “cooling off” period. You may also want to advise your employees to use Service Alberta’s online calculator to figure out how much it costs to take out a payday loan. See, www.servicealberta.gov.ab.ca/1608.cfm

**Pensions**
Feb. 10: The Superintendent of Pensions issued its statistical report for 2009-2010. Highlights:
- 725 plans overseen, 637 of which are registered
- 445 plans are defined contributions only
- 168 plans included defined benefits
- 24 plans were Specified Multi-Employer Pension Plans
- 26 plans were terminated in past year.

**Provincial Competitiveness**
Feb. 4: The Assembly gave first reading to a bill called the Alberta Competitiveness Act that would form a new committee to promote government-industry collaboration to make the provincial economy more competitive. Meanwhile, the government opened a new web portal to help businesses increase productivity. See, www.productivityalberta.ca

**Demographics**
Feb. 18: 51,443 babies were born in Alberta last year. That’s the third year in a row for record births. And for an astounding ninth year in a row. Ethan was the most popular boys’ name; Olivia took the title for girls. Some of the less popular names included Bison, Boss, Chaos, Thunder and Whip for boys and Amazyn, Comfort, Epic, Fury, Peanut and, my personal favorite, Twinkle, for girls.

**CASES**
**Union Not Obliged to Represent Employee in Beef with WCB**
A food packer who was injured on the job claimed that the Workers’ Compensation Board (WCB) promised but never paid him 77 hours of back pay. He also accused the WCB of advising his company to fire him. The union refused to take up the packer’s case and the WCB explained, and the union’s duty was only to represent the packer vis-à-vis his employer [Ibrahim (Re). [2010] A.L.R.B.D. No. 12, Feb. 24, 2010].

**Employee Claims Wallace Damages for Sex Harassment Suspension**
An employee claimed that he had been unfairly suspended and demanded Wallace and mental distress damages. Although the company claimed the employee had engaged in the “worst case of sex harassment” in its history, there was plenty of evidence that the investigation was careless and one-sided. So the court refused to dismiss the case and said a jury would have to decide if the company owed the employee damages [Eigert v. Home Hardware Stores Ltd., [2010] A.J. No. 91, Jan. 28, 2010].

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**QUEBEC**

**LAW & ANNOUNCEMENTS**

**Automobile Deductions**
Feb. 24: The limits and rates for calculating taxable benefits related to the use of an automobile and/or deductible automobile expenses are:

<table>
<thead>
<tr>
<th>LIMIT/RATE</th>
<th>2010 AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ceiling on capital costs of passenger vehicles for purposes of CCA</td>
<td>$30,000 (plus GST and QST) for vehicles bought after 2009</td>
</tr>
<tr>
<td>Limit on deductible leasing costs</td>
<td>$800 (plus GST and QST) for leases entered into after 2009 (1)</td>
</tr>
<tr>
<td>Limit on deduction of tax-exempt allowances paid to employees for the use of personal vehicles for business purposes</td>
<td>52 cents per km for first 5,000 kms and 46 per km for each km thereafter</td>
</tr>
<tr>
<td>Maximum allowable interest deduction for amounts borrowed to buy a passenger vehicle</td>
<td>$300 per month for loans related to vehicles acquired after 2009</td>
</tr>
<tr>
<td>Rate to determine taxable benefit for portion of operating expenses relating to employee’s personal use of automobile provided by employer</td>
<td>24 cents per km (2)</td>
</tr>
</tbody>
</table>

**NOTES**
1. Under a separate restriction, deductible leasing costs are prorated where value of passenger exceeds capital cost ceiling.
2. The rate for taxpayers employed principally in selling or leasing automobiles is 21 cents per km

**Taxable Benefits**
Feb. 18: RQ published a notice clarifying that the following amounts provided to a member of an employee’s family for post-secondary studies are considered taxable benefits:
- Bursaries or scholarships
- Amounts paid for tuition fees
- Amounts paid to cover tuition fee costs.

**Health Services Fund**
Feb. 18: A note from RQ to small and medium manufacturing businesses in remote resource regions that claim an exemption from the contribution to the health services fund. Keep in mind the limit on total amount of tax assistance in 2010 regarding a tax holiday and the tax credit for job creation in the resource regions.

**QPP**
Feb. 26: Despite the awful economy, the QPP fund’s rate of investment return in 2009 was a very respectable 9.7%. Remember that just a few years ago, the QPP was performing at the 6% to 7% range.

**Corporate Law**
Feb. 19: A bill making sweeping changes to the Business Corporations Act received royal assent and will take effect in Jan. 2011. The new law will provide stronger protections for minority shareholders and allow corporations to streamline and modernize their governance procedures.

**RQ Forms**
Mar. 2: New forms and publications issued by RQ:
- IN-106-V Recourse for Your Tax-Related Problems (Mar. 2)
- IN-118-V Employment Expenses (Mar. 1)
- ADM-500 Rapport annuel de gestion 2008-2009 (Feb. 25)
- IN-117-V Guide to Filing the RL-2 Slip: Retirement and Annuity Income (Feb. 24)
- IN-311-V Seniors and Taxation (Feb. 23)
- TP-776.47-V Alternative Minimum Tax of a Trust (Feb. 12)
- TP-1000.R Information Return for the Co-operative Investment Plan (Feb. 11)
- TP-965.88-T Application for Valid Share Entry on the AMF List (Feb. 18)
- TP-1029.8.36.FM-T Tax credit for francization or for training in the manufacturing sector (Feb. 11)
- SW-223.CE-NetFile Québec - Ecor Codes - 2009 Income Tax Return (Feb. 10)

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NEW BRUNSWICK

**LAWS & ANNOUNCEMENTS**

**Labour Law**
Feb. 12: A proposed bill, Bill 35, would give casual and part-time civil servants the right to join a union right away and not have to wait 6 months as under current law. The bill, which would go into effect on June 17, would also guarantee part-time and casual workers at least 80% of the scheduled payment classification that applies to their job.

**Social Assistance**
Feb. 17: Under a new policy, individuals receiving social assistance are now allowed to share accommodations with clients or non-clients they’re not married to and receive their own cheque for Household Income assistance.

**Seniors Benefit**
Apr. 1: Effective today, the low-income seniors’ benefit is going up from $300 to $400. To be eligible for the benefit, individuals must be a resident of New Brunswick on Dec. 31, 2009 and receive one of the following federal OAS benefits: Guaranteed Income Supplement (65 or older) Allownace for Survivor Program (60 to 64) Allownace Program (60 to 64).

**Immigration**
Feb. 5: A new category in the Provincial Nominee Program for skilled workers with family support will make it easier for current residents to get their skilled relatives into New Brunswick. The government is also modifying the entrepreneurial program so that entrepreneurial immigrants who set up their business in the province within 2 years can get a refund of the deposit they paid when they immigrated.

**CASES**

**Union Can’t Bring Grievance It Promised to Withdraw**
A union promised not to bring a grievance over healthcare premiums in exchange for other bargaining concessions. But once the agreement was ratified, the union filed a grievance that looked and felt a lot like the one it promised to give up. The court ruled that the second grievance was just a thinly disguised version of the first and said the union was “estopped,” i.e., prohibited in the interests of fairness, from pursuing it [Irving Tissue Co. v. Communications, Energy & Paperworkers Union of Canada. Local 786, [2010] N.B.J. No. 38, Feb. 11, 2010].

NEWFOUNDLAND/LABRADOR

**LAWS & ANNOUNCEMENTS**

**HR Management**
Feb. 11: The government launched new “HR Toolkit” website that provides free information, instructions, model forms, templates and other resources to help HR managers do their job. See. www.nlhrmanager.ca.

**CASES**

**OK to Assign Vacation Days to Employee Receiving Workers’ Comp**
An employee receiving workers’ comp had 17 days of vacation left for the year. Since the employee was absent anyway, the company went ahead and scheduled all 17 of those days. The arbitrator said this violated the collective agreement. But the court overturned the ruling as unreasonable. Even though the agreement didn’t expressly allow the company to do this, it did give management broad discretion to schedule vacations, the court reasoned [Molson 2005 v. Fish, Food Allied Workers Union, [2010] N.J. No. 27, Jan. 29, 2010].

SASKATCHEWAN

**LAWS & ANNOUNCEMENTS**

**Labour Law**
Feb. 19: Newly effective changes to the Trade Union Act will speed up resolution of labour disputes without strikes. Highlights:
- All collective agreements subject to mediation even if contract doesn’t spell this out
- Immunity for individuals involved in resolving disputes
- Simpler and faster procedures for designating mediators/arbitrators.

**Government Fees**
Apr. 1: The government is changing or imposing a number of new fees, effective today (unless indicated otherwise):
- $2,500 fee for immigrants applying to be permanent residents as entrepreneurs (effective Oct. 1)
- Elimination of game farm licence and irrigation site fees
- Increase hourly fees for Public Guardian lawyers from $150 to $200 (effective July 1)
- Increase application fee for Office of Residential Tenancy from $25 to $50
- Increase business licence fees for car dealers, credit reporters, film companies and direct sellers
- Increase late fee for traffic tickets from $40 to $50
- Increase fee to file for divorce from $100 to $200
- Increase authentication fees from provincial Secretary from $10 to $25

**Payroll Earnings**
Feb. 25: December was another month of record average weekly earnings—the fourth in a row. At $832.56 per month, Saskatchewan passed Newfoundland to resume its place as third highest average earning province in Canada behind Alberta ($959.40) and Ontario ($869.55).

**Health & Safety**
Mar. 31: Starting today, individuals ages 14 and 15 won’t be allowed to work unless they provide their employer proof of age, written consent from a parent or guardian and a certificate showing they’ve completed a course called the Young Worker Readiness Certificate Course. The YWRCC requirement is the first of its kind in Canada.

**CASES**

**Saskatchewan Union Has No Claim against Wal-Mart U.S.**

**Okay to Use Video Surveillance Tapes for Disciplinary Investigation**
An employee told his supervisor that he had gotten into a fight but claimed the co-worker started it. The whole incident was caught by the company’s surveillance camera. But the union tried to keep the company from using the tapes because its members accepted the cameras only for security purposes. No dice, said the arbitrator. Both men knew the cameras were there. So they had no “reasonable expectation” of privacy [Sask Joint Board, Retail, Wholesale & Dep’t Store Union v. McKesson Canada Corp. (Birch Grievance), [2010] S.L.A.A. No. 1, Jan. 26, 2010].
Overtime
Feb. 8: Another multi-million dollar class action lawsuit has been filed for overtime violations. A group of financial advisors at BMO Nesbitt Burns Inc. is claiming that the firm wrongly classified them as employees exempt from overtime under the ESA over an eight-year period. (See, Case of the Month on Page 7).

Business Services
Feb. 3: There’s a new toll-free number businesses can call for information on financing options, taxes, permits, licences, regulations and other matters from the federal and provincial government: 1-888-745-8888 or TTY 1-800-268-7095.

Pensions
March 31: That’s when pension plans can start filing their Annual Information Returns to FSco electronically. Electronic filing will be optional. DC plans will get their AIR forms 3 months before they’re due and DB plans will get them 6 months before the due date. For detailed instructions on electronic AIR filing, see, http://www.fsco.gov.on.ca/english/pensions/efilingoption-air.asp.

Family Law
Feb. 17: Changes to the child custody laws take effect today. The new law requires judges to consider a non-parent’s violent history in determining a child’s best interests; it also requires parents to provide annual financial disclosure relating to child support payments.

Revenue Forms
Feb. 2: New forms and publications published by the Ministry of Revenue since Jan. 1:
- Colouring of Fuel (Mar. 2)
- Senior Homeowners’ Property Tax Grant (Feb. 11)
- HST and Status Indians (Feb. 4)
- Definition of “Gross Revenue” and Changes to Installment Payment Requirements, for the Purposes of the Gross Revenue Charge (Feb. 3)
- Tax Changes for a Stronger Ontario. What the changes mean to you (Feb. 1)
- Prepare for Ontario’s HST. Restricted Input Tax Credits (Feb. 1)
- Harmonized Sales Tax Information Notice 5: Temporary Recapture of Input Tax Credits Requirements (Feb. 1)
- Prepare for Ontario’s HST. Invoicing Requirements (Feb. 1)

CASES
Racial Harassment Poisons Workplace but Isn’t Mental Distress-Worthy
After 7 years of racial and homophobic abuse from his all male colleagues and management, a driver of Palestinian origin finally decided he had had enough and left the company. The court ruled that he had been constructively dismissed and awarded him $9,462 in lieu of 4 months’ notice. But it also said that while the harassment poisoned the work environment, it wasn’t “malicious and outrageous” enough to justify extras damages for infliction of mental distress [Quibi v Reprodax Ltd., [2010] O.J. No. 467, Feb. 4, 2010].

Court Okays Partial Wind-Up of Management Compensation Plan
Hydro One sought to partially wind up a management compensation plan in which the airline promised to offer early retirement incentives to “at least 250” highly paid employees per year. The union claimed that offering only 250 employees VSPs in a particular year and rejecting others who met the criteria violated the agreement. The arbitrator agreed. Air Canada had the discretion to grant more than 250 VSPs a year based on what it could afford. But the airline denied all applicants past the 250 threshold without even considering the costs. The court upheld the rules as reasonable [Air Canada v. CLPE, [2010] O.J. No. 239, Jan. 22, 2010].
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Calculating Reportable QPIP Earnings on the T4

SITUATION
Kay Beck was born and bred in Montreal. Montreal is where she lives, and Montreal is where she works. So it’s fair to say that Québec is her one and only province of employment. In 2009, Kay had $48,000 in T4 box 14 reportable income. This figure doesn’t include the value of the group benefits Kay’s company provides, including life, medical, dental and vision care group insurance. For these benefits, the company reports taxable income of $2,500 in RL-1 box A, none of which comes from tips or gratuities. The company reports no amount on the T4 in box 24 because Kay’s EI insurable earnings for the year were at the maximum. All of the exemptions in T4 box 28 are left blank since Kay was subject to CPP, EI and QPIP for all of 2009.

QUESTION
What should Kay’s employer list in T4 box 56 as QPIP insurable earnings?

A. It should leave the box blank because EI insurable earnings are at the maximum.
B. It should leave the box blank because the QPIP insurable earnings are the same as those reported in T4 box 14.
C. It should list $50,500, i.e., the amount in T4 box 14 + the amount in RL-1 box A.
D. It should list $48,000, the same amount reported in T4 box 14.

ANSWER
B. The employer doesn’t need to list any amount in T4 box 56, since the insurable earnings are the same as those reported in T4 box 14.

EXPLANATION
This situation, which is purely hypothetical, illustrates the interplay between T4 reportable employment income and insurable income for QPIP purposes. Generally, QPIP insurable earnings are based on the rules for EI insurable earnings. Non-cash taxable benefits, i.e., those received “in kind”, are generally not insurable earnings. So, unlike the situation with CPP and QPP pensionable earnings, the inclusion of group insurance benefits in RL-1 reported employment income means that RL-1 box A income is higher than QPIP insurable earnings.

There is however, a difference between EI and QPIP earnings with regard to tips. Tips reportable by employees to their Québec employers are included in QPIP earnings, but not EI earnings. Direct tips, controlled by the employer, are included in both. Tips allocated by Québec employers are included in RL-1 box A, but are not insurable under either EI or QPIP. But since Kay had no tips income, the QPIP rules regarding the treatment of tips aren’t relevant in this situation.

WHY WRONG ANSWERS ARE WRONG
A is wrong because the maximum insurable earnings that govern completion of T4 box 56 are those for QPIP, which are higher than those for EI. So even though Kay’s earnings were greater than the EI maximum for 2009, this isn’t the right answer. The maximum insurable earnings for QPIP in 2009 are $62,000 and for 2010, $62,500. By contrast the EI maximum insurable earnings for 2009 and 2010 are $42,300 and $43,200, respectively.

C is wrong because the taxable benefits included in RL-1 box A are not insurable earnings for either EI or QPIP. With a few exceptions, taxable benefits “in kind” are not insurable earnings under either programme.

D is wrong because the reporting rules set out in RC4120, the CRA guide “Filing the T4 Slip and Summary” require you to leave box 56 blank when the QPIP insurable earnings are the same as the employment income reported in box 14.
WINNERS & LOSERS

Are Payments By Employers Loans or Employment Income?

Under sub-section 6(3) of the Income Tax Act, money paid by an employer to an employee is employment income. *Exception:* Payments aren’t taxable income when they’re a loan. Under what circumstances is a payment considered a loan, rather than salary or wages for services rendered? The question has significant tax implications since salary and wages are taxable on a cash basis when received while loans may never be taxable if the employee repays the money. So it’s important for payroll managers to know how to tell whether an employer payment is a loan or employment income. Here are 2 cases that illustrate the principles courts and tax tribunals use to distinguish between loans and payments of salary and wages.

### PAYMENTS = LOANS

**FACTS**

A real estate agent and a partner form a real estate firm in Whistler, BC in 1983. The business doesn’t make enough to pay either partner a fixed salary. So in 1986 and 1987, they work without a salary and draw on the company for funds as needed and offset any sales commissions they receive against prior amounts owing. By the end of 1987, they owe the firm nearly $200,000. A year later, when the partner wants out, it’s agreed that the firm will forgive all amounts outstanding. The agent includes in his 1988 taxable income the amounts forgiven for him. The CRA re-assesses his returns, reducing his 1988 income by the amount forgiven and adding to his 1986 and 1987 income the money he drew from the firm in those years. The agent appeals.

**DECISION**

The Tax Court of Canada rules that the amounts paid by the firm to the agent were loans and overturns the 1986 and 1987 reassessments.

**EXPLANATION**

Both partners testified that the outstanding amounts were interest-free loans from the real estate company to be repaid when they were able. The amounts owing were reported on the company’s 1986 and 1987 financial statements as “loans to directors.” Other than the forgiveness agreement resulting from the transfer of ownership, there was nothing documenting the nature of the payments, e.g., board of directors’ resolutions or promissory notes. And no amount had been reported by the employer as a taxable benefit from the interest-free loans. However, the court felt that it was normal for a small, closely held company to be run informally. It also wasn’t an obstacle that the real estate agent was, as a partner in the business, not dealing with the employer at arm’s length, but was free to treat the company as if it were a private bank.

*R.H. Drew Meredith v. Her Majesty the Queen, [1994] DTC 1271, Jan. 27, 1994*

### PAYMENTS = SALARY

**FACTS**

An Ottawa government agency took on an employee in early December 2006 but didn’t start paying her through its normal payroll system until February 2007. At the end of December, to make up the difference, the employee received—and deposited in her bank account—2 cheques for advances against salary for just over 75% of her gross earnings. No T4 was issued by the employer for 2006. Starting in February 2007, the amount of the advances was added to gross income and recovered by deduction over 5 pay periods. The employer included these 2006 advances in box 14 employment income on the 2007 T4. In filing her income tax returns for 2006 and 2007, the employee included the salary advances as employment income received in 2006. The CRA re-assessed her T1 returns, increasing her 2007 taxable income by the amount of the salary advances reported by the employer on the 2007 T4. The employee appealed.

**DECISION**

The Federal Tax Court ruled that the payments received in 2006 were employment income and overturned the CRA’s re-assessment of the 2007 return.

**EXPLANATION**

The employer indicated on the 2006 cheques themselves that they were salary advances and clearly treated them as loans. The related earnings were only included in employment income when they were processed through the payroll system. This was also the position taken by the CRA, which relied on the employer’s T4 reporting, as well as on the fact that the salary advances were even dollar amounts from which no source deductions had been taken. However, instead of deferring to the employer’s payroll treatment, the court looked at the underlying nature of the payments. The employee had worked in 2006 and was paid in 2006. The court determined that the salary advances were compensation for services performed, irrespective of the employer’s accounting treatment.

*Ziobrowska v. Canada, [2010] TCC 64, Feb. 3, 2010*

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