HOURS OF WORK, OVERTIME, AND EXEMPTED FUNCTIONS

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Hours of Work

Introduction

The legislative intent behind Canada’s hours of work legislation is somewhat uncertain. Some believe it was motivated by concern with physical well-being as was the rationale behind daily and weekly rest legislation and health and safety laws. Others think it was instituted in the same sense as minimum wage legislation because the hours of work rules also require the payment of an overtime rate. Still others are convinced that it may have had a broader social purpose concerning unemployment.¹ What most agree on is that the legislation was initially enacted to palliate abuses enabled by the laissez-fair policies of the nineteenth century.

Canada’s Labour standards legislation began with “factory laws” in 1880s. These laws were designed to ensure women and children workers with minimum provisions for health and safety. The intent was to protect these workers’ health against the ill effects of long hours of work thereby underwriting public health and safety. The idea of limiting hours of work for the purpose of spreading available work and increasing the workforce did not come to the fore until later.² For years the legal regulations of working hours and minimum wages were only applicable to women and children, and in many jurisdictions night work was prohibited to these labourers. “It was reasoned that health and morals of women might be threatened by night work thus warranting prohibitive regulations.”³ The provisions of the Ontario Factory, Shop and Office Building Act of 1913, were typical, stating:

"The hours of employment are limited as follows: No person of any of the classes protected by the Act may be employed for more than ten hours in one day, unless some other arrangement of hours of labour per day has been made for the sole purpose of giving a shorter day's work on such day of the week as may be arranged, and no such person may be employed for more than sixty hours in any one week. The hours of labour are not to be earlier than seven o'clock in the forenoon or later than half past six in a factory, or six o'clock in the afternoon in a shop, unless a special permit in writing is obtained from the Inspector [...]“.⁴

The creation of the International Labour Organization (ILO) at the end of WWI had considerable importance to Canada. It was the ILO’s International Labour Conference that inspired the Federal Government to organize the first Dominion-Provincial Conference in 1922 on the problem of unemployment. At this conference, the Trades and

² Miller, Glenn W., Government Policy Toward Labor: An Introduction to Labor Law, Grid Series in Law, Grid Inc., Columbus.
³ Ibid., at 155.
Labour Congress presented their demand for government responsibility for employment and a standard work week of 48 hours. It was this initiative that subsequently gave effect to four ILO Conventions.\footnote{ILO Conventions: Three concerning the employment of children and adolescents, and the fourth breaking new ground in introducing an Unemployment Indemnity for seamen to be paid by employers in case of loss or foundering of a ship. This initiative resulted in major innovative piece of social legislation contained in the 1924 amendments to the Canada Shipping Act}

**The Present Situation**

Legislation on hours of work and overtime varies significantly across Canada. In many jurisdictions, the permitted hours of work is regulated with a large number of exceptions. While in other provinces there are few, if any, rules on hours of work and minimum exceptions. The same is true regarding overtime provisions. Some provincial legislation afford protection to most employees, while others, are apparently intended to protect only those working at the minimum wage rate.

*Standard and Maximum Workweek*

There are two basic premises regarding hours of work provisions: the standard workweek and the maximum workweek.

It is generally recognized that employers have the right to fix the hours of work of their employees within the limits of law. In some jurisdictions the law provides that it is only after the standard workweek has been exceeded, that overtime must be paid. Other provinces legislate that in addition to the standard hours of work, there is a legal maximum number of hours per day or per week that an employee is permitted to work. Hence, in practice an employee can refuse the overtime schedule submitted to them. Some jurisdictions also give employees the right to refuse overtime if they do not receive adequate notice.

Most jurisdictions allow maximum hours of work to be exceeded where work is urgently required to maintain or repair equipment, the plant/work premise, or in the event of an accident, emergency or any occurrence beyond human control which imperils the life, health or safety of people or which interrupts the provision of an essential service.

*Overtime*

An overtime rate is payable to the employees for each hour or part of an hour they work in excess of the standard hours. Most jurisdictions have established an overtime rate equivalent to one and a half times the employee’s regular rate of pay. British Columbia provides that hours in excess of 12 in a day must be remunerated at twice the regular rate. New Brunswick and Newfoundland and Labrador have established the overtime rate as being one and a half times the minimum wage. In many jurisdictions, subject to certain conditions, an employer and employee may agree to replace the overtime payment by paid leave equivalent to one and a half times the overtime hours worked.
Normally, the hours an employee works or would have worked on a public holiday are not taken into account in calculating any overtime pay the employee may be entitled to in the week the holiday occurs. For example, if the standard workweek is of 40 hours, overtime becomes payable after 32 hours in a week during which a holiday occurs.

**Scheduling: Shifts, Meal, and Break Requirements**

Most jurisdictions require employers to notify their employees, (especially those with variable shifts) of their work hours by posting a notice in a conspicuous place in the establishment. Some provinces require a 24 hour notice of any change in shifts. All scheduling must include any eating period requirement and ensure that every employee disposes of at least eight hours free from work between each shift. Moreover, employees are usually entitled to a weekly rest-day on Sunday, wherever practicable.

The following jurisdictions provide that employees are entitled to a half-hour meal break after each five consecutive hours worked: Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nunavut, Ontario, Prince Edward Island, Quebec, and Saskatchewan and Yukon. Newfoundland and Labrador allow employees a one hour meal break after five consecutive hours worked. Most jurisdictions provide that the meal break can be suspended during an emergency or unforeseeable event, and that employees may, in certain circumstances, shorten or forego the meal break. In Ontario, an employee may agree to split a break in two periods totaling 30 minutes. Employees in Saskatchewan are entitled to take a meal break at another time for medical reasons.

In general employers are not required to pay employees for time spent on a meal break. However, where employees are required to remain at their work station or to be available for work during a meal break, they must be paid for that period. Moreover, no legislation obliges an employer to provide coffee breaks to employees, but Ontario, Quebec and Saskatchewan have provisions stating that if a coffee break is provided, the employer must consider it as time worked.

**Exclusions**

The lists of exclusions from hours of work and overtime pay provisions are usually quite extensive. The most common exclusions include: students, professions, ambulance drivers/attendants, domestics, fishermen, farm workers, construction workers, and managerial staff.

**Flexible Work Hours**

Some statutes make allotment for a more flexible arrangement of working hours. For example, the Canada Labour Code, authorizes the modification of the standard workweek. It also permits the averaging of hours over a period of two or more weeks. Similarly, in Quebec an employer is permitted to stagger work hours other than on a weekly basis with the authorization of the Commission des normes du travail (Labour

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6 In the case of Saskatchewan, this applies to employees who work at least a six-hour shift.
These provisions are especially useful to employers because they provide flexibility and allow savings on overtime premiums. Alberta, British Columbia, Manitoba, Ontario, Saskatchewan and the Yukon specifically allow hours to be varied to establish shorter workweeks. Compressed workweeks are also available pursuant to legislation in most other jurisdictions. Because most of these acts do not stipulate a standard daily number of hours, authorization is not necessary as long as the maximum weekly requirements are respected. However, approval from the labour standards board or director is sometimes required; verification should be made before proceeding.

**Industry Specific Regulations Restricting Work Hours**

Certain industries have additional regulations pertaining to working hours. In Quebec, for example, there are regulations under the Act Respecting Labour Standards and decrees under the Collective Agreement Decrees Act, which regulate the garment industry’s working hours. Similarly, the Manitoba Construction Industry Wages Act, governs work hours in different sectors of the construction industry.

**Conclusion**

This paper is intended to provide a brief overview of federal, provincial, and territorial legislation concerning hours of work in Canada. For a more detailed understanding or specific provision information, one should consult the appropriate Labour Code or Employment Standards Act listed below.7

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7 Jurisdiction: **Federal** – Canada Labour Code, ss.169-177, see also Canada Labour Standards Regulations, ss.4-9; **Alberta** – Employment Standards Code, ss.16-24, see also Employment Standards Regulations, s.2; **British Columbia** – Employment Standards Act (ESA), ss.3, 31-43, 72; **Manitoba** – Employment Standards Code (ESC), ss.9-20, 45-50, see also Minimum Wages and Working Conditions Regulation, s.17; **New Brunswick** – Employment Standards Act, ss.14-17.1; **Newfoundland** – Labour Standards Act, ss.21-26, see also Labour Standards Regulations, ss.5, 7, 9; **Northwest Territories and Nunavut** – Labour Standards Act, ss.4-11, see also Labour Standards Meal Regulations, ss.1-3; **Nova Scotia** – Labour Standards Code (LSC), ss.40(4), 61, 67; **Ontario** – Employment Standards Act, 2000, ss.17-22.2, see also Exemptions, Special Rules and Establishment of Minimum Wage, s.6; **Prince Edward Island** – Employment Standards Act (ESA), ss.15-16; **Quebec** – Loi sur les normes du travail et Règlement sur les normes du travail (An Act respecting labour standards), ss. 52-59.0.1, 78-79; **Saskatchewan** – Labour Standards Act (LSA), ss.5-13.4.

**Source:** Labour Law Analysis
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Human Resources and Skills Development Canada
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Overtime and Exempted Functions

Introduction

Employment and labour standards legislation governing overtime pay entitlements vary across Canada, but they generally include provisions that make managerial staff exempt from overtime compensation. The following is a brief overview of overtime and managerial exemption issues under Canadian law, concerning employment in or in connection with the operation of any federal work, undertaking, or business [e.g. Radio and television broadcasting, telephone and cable systems operations, transportation and shipping, banks etc...].

The main question we will consider is: What are the distinctions between those employees eligible for overtime pay under the *Canadian Labour Code*, and those who are excluded because of their managerial role?

Overview

The *Canadian Code* requires employers to pay employees overtime compensation for all hours worked in excess of the standard hours of work of eight hours per day or forty hours per week. This entitlement does not apply to employees who are managers or superintendents or to those who exercise management functions. Since the *Code* does not define the term manager, it is oftentimes at odds with assumptions employers make about who is and who is not a manager or supervisor.

The determination of whether an employee is in the exempted category requires an assessment of the degree of management functions performed by the employee and the frequency upon which he/she is called upon to perform those managerial functions. The official job description, classification, or even stipulations in the employment agreement that the position is a “management/supervisory position and overtime exempt” plays a relatively minor role in determining whether a person is a manager although it might be an indication of a managerial role. Judges and adjudicators have stated that the determination is more a question of substance than form. They have generally preferred a strict interpretation of the law, allowing the maximum number of employees to receive the protective benefit.

Exemptions

Manager Exemption

The “manager” category includes only senior management positions in a company. The term is narrowly defined as one who exercises a great degree of autonomy and independence not only in their respective work, but also in overall matters of importance.

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8 *Canadian Labour Code*, section 169(1); See also “Managerial Exemption” s.167(2).
to the business. According to the jurisprudence, the factors an employee must have to qualify as a manager are: autonomy, discretion, the power of independent action and decision-making, and administrative responsibilities.

However, adjudicators have stated that these factors are not absolute:

The hurdle is not placed so high as to require the manager to be completely autonomous or even substantially so, rather the manager must be able to operate within a sphere of autonomy and make important business decisions that affect the operation [...].

As mentioned above, an employee must have unilateral decision-making authority in matters of importance to the company such as: policy and planning, budget decisions, contract negotiations, and attending top-level meetings. A further factor is whether the employee exercises supervision and control over day-to-day operations. There has in the past been an over-emphasis on the power to hire and fire employees, but certainly these powers as well as the power to discipline and transfer employees are indicative of managerial responsibilities. It is not required that each of the criteria be present, and any determination will require an analysis of the particular facts and degree of an employee’s overall managerial functions.

Superintendent Exemption

The second category “superintendent,” refers to employees who have substantial authority and responsibility in relation to matters of significance to the enterprise. This term describes an employee who is more senior than the lower levels of managerial employees, but not as senior as a “manager.” Their authority may relate to matters affecting the employment conditions of others, or to the care and control of substantial assets or property of the company as articulated by the Court in Island Telephone:

“The word "chef" in combination with other words seems widely used in the French language, including use as in "chef d'ateliers" for "shop foreman" or "chef d'équipe" for "foreman". While those definitions suggest meanings that may overlap with those given to "manager" or those "exercising management functions" used in the context of an employment situation, they also imply, in my view, that a person holding a position as superintendent has substantial authority and responsibility on behalf of the employer in relation to matters...

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of significance to the enterprise whether, as counsel here suggested, that be in relation to matters affecting employment conditions of others, or whether it be in relation to the care and control of substantial assets or property of the enterprise. In an enterprise of some size, as the plaintiff company is, "superintendent" implies a responsibility greater than that exercised at the lowest level of management and involving more than the supervision, under direction of other managers, of staff at the working level and oversight of the network and operations of a substantial portion of physical plant."12

After considering the factors cited above, if it is shown that the employee exercises substantial authority and responsibility, then they will likely be considered a superintendent, and excluded from the overtime provision of the Canada Labour Code.

Exercise Management Functions Exemption

The “exercise of management functions” exemption is most often the subject of litigation. The elements required to prove an employee is exercising “management functions” are essentially the same as those for the position of manager. Some examples include: participation in the hiring, discharge, and discipline of workers; conducting performance appraisals especially if the review is determinative; exercising discretionary power in important matters such as loan approvals, changing prices, offering special deals; and representing the company in contract negotiations or signing contracts on behalf of the company etc…

The key feature being the employee must have a certain power of independent action, autonomy, and discretion. Moreover, the exercise of this authority should not merely form a minor part of the employee’s functions. However, there are two qualifications to this requirement:

i. It is not necessary the employee’s autonomy or discretion be absolute – For example, this means that an employee whose decisions require approval by a superior would still be exercising management functions if his/her superior rely on the employee’s judgment and recommendations. What is pertinent is that the employee be an effective decision-maker for the characterization of “exercising management functions” to attach.

ii. The managerial functions must be exercised in the administrative arena. This administrative component does not necessarily have to be the employee’s primary duty or central activity, but it must be a significant component of his/her job. Adjudicators have indicated that it was neither possible nor necessary to identify a precise percentage of administrative functions, just that when

viewed globally there is a large enough portion of administrative functions to conclude that the employee be included in the exemption category.

Essentially, an employee must exercise enough management functions to have real decision-making authority in the company.

**Conclusion**

Generally, errors concerning the non-payment of overtime can be attributed to employers’ misconception that if an employee is paid on a salary basis, or considered to be a “senior employee” within the organization, managerial exemption applies. As we have seen, this is not the proper criteria upon which to base an assessment. An analysis must be made on the degree and frequency of managerial functions performed by the employee. In the interest of avoiding adjudicative scrutiny, employers must ask the following questions before excluding “managers” or “supervisors” from overtime pay.

Does the employee:

- Supervise or give direction to workers;
- Hire, fire, discipline, evaluate performance of his subordinates;
- Have independence and discretion in the performance of his duties;
- Have independent decision making capacity;
- Have responsibilities that affect the company’s resources (e.g. policy, budget planning, check signing authority, negotiation on company’s behalf etc…).

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