

EMPLOYMENT Litigation

Has Overtime Class Action Fever Hit Canada?

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Was it only a matter of time?

With the rash of multi-million dollar class actions for unpaid overtime spreading across the U.S. following the federal government's new overtime rules in 2004, businesses and their lawyers throughout Canada wondered if and when overtime class action fever might strike home. Some Canadian observers watched closely as the first big change to U.S. federal overtime laws in more than fifty years took hold—building greater awareness of overtime rights, triggering pricey lawsuits, and sending plaintiffs' counsel trawling for potential class action claims. While U.S. employers scrutinized employee job classifications and compensation packages, Canadian employers considered looking over their own overtime policies and practices more closely. Canada has had its own share of administrative and court cases concerning unpaid overtime through the years, but nothing on the magnitude and nowhere near the frequency of the U.S. experience.

And then, it happened.

In June 2007, a seasoned Canadian bank teller filed a class action against the Canadian Imperial Bank of Commerce (CIBC), the country's fifth largest bank. Still employed with CIBC, the teller claims compensation for the many hours she allegedly clocked beyond

her standard work day in what she calls a non-managerial and non-supervisory salaried position. For its part, the bank states that its clearly defined overtime policies for compensating front-line retail branch employees go beyond what Canadian law requires.

Not surprisingly, the case is raising more than a few eyebrows, some serious questions, and much speculation. CIBC could face an award of over \$600 million, with the complaint seeking \$500 million in compensatory damages and an additional \$100 million in punitive damages. The class could include up to 10,000 CIBC employees nationwide. The case could be Canada's largest unpaid overtime class action ever. Yet, amidst all the speculation, one outcome seems inevitable: more and more employers and their legal counsel are going to take pre-emptive action to make sure their practices are onside with applicable employment standards legislation and reduce their potential liability.

High-profile cases like the CIBC and similar U.S. class actions are not the only thing fanning the fires in Canada. Another big contributor is the seemingly disappearing forty-hour work week. In the past decade, the number of Canadians working longer than fifty-hour weeks reportedly jumped from ten to twenty-five percent¹, with almost thirteen percent of all employees working longer hours without pay.²

CIBC may not be alone: employers of all sizes throughout Canada should check whether they are keeping inadequate overtime records, operating under nebulous policies, exerting lax oversight of employees' hours, and laboring under dangerous misconceptions about who has a right to what overtime and when. The good news is that, like their U.S. kin, Canadian employers need not watch and wait for problems to crop up; rather, Canadian employers can take affirmative steps to reduce their liability.

The following discussion summarizes the Canadian legislative scheme and identifies the areas of greatest risk for employers given recent developments and trends in Canadian cases. Finally, we offer practical tips for Canadian employers to reduce their risks, avoid complaints, and mitigate losses when complaints or lawsuits are filed against them.

Canadian Laws

Both federal and provincial/territorial legislation set minimum employment standards for, among other matters, maximum daily and weekly work hours, required days of rest, breaks, and, of

deemed to form part of an implied contract between employers and their employees. Employees cannot contract out of or waive the minimum standards and any contractual provision purporting to do so is void, even where employees have freely agreed. On the other hand, employees may contract for greater standards and tribunals will enforce contracts whose terms surpass the law's minimum requirements. In practice, however, determining whether a given contract's terms truly exceed the minimum requirements is not always cut and dried. The entire contract must be reviewed against the legal minimums in each instance to be sure legal minimums are met.³

Additionally, some provinces allow employers and employees to finesse these entitlements in certain circumstances. For instance, Ontario allows employees to agree to take extra time off ("lieu time") instead of overtime pay at the same rate of time and one-half for every overtime hour. Ontario also permits overtime averaging agreements, where employees consent to have their work hours averaged over an agreed period of two to four weeks for calculating overtime pay. However, the agreement must

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course, overtime. The laws establish when and how employers and employees can alter these requirements by mutual agreement and what happens when employers fall below the standards. Canada's federal legislation covers the relatively few employers who come within federal jurisdiction (such as banks, telecommunications firms, airlines, and interprovincial transportation companies). Provincial and territorial legislation covers all other employers. Even so, employment standards laws throughout Canada bear strikingly similar concepts, structure, purposes and provisions, with the differences residing mostly in the details, like the number of hours that must be worked in a day or week to trigger overtime pay and the procedures for filing complaints against employers.

The minimum employment standards generally are

follow specific legal requirements, including being in writing.

Minimum Standards

At the heart of Canadian employment standards lie some key elements, not unlike those at the core of comparable U.S. federal and state laws. First, across Canada, the legislation establishes a premium wage of one and one-half times an employee's regular pay rate for all hours worked beyond a designated number of hours per day or week, with the particular weekly overtime thresholds ranging from forty to forty-eight hours in a week. The statutes generally define the work week as seven consecutive days, either named by the employer or beginning Sunday and ending the following Saturday. Many provinces also set a maximum number of hours employees may be required to work and mandate a period of rest

(often twenty-four hours) after a certain number of hours worked.

Perhaps the most potentially contentious and risky aspect of these laws for employers is their exemptions: misunderstanding and misapplying the exemptions has cost some employers dearly. Some of the exemptions exclude certain industries or employees from entitlement to a premium wage for overtime, while others set higher thresholds for triggering entitlement to overtime pay. For example, the Ontario ESA's hours and overtime provisions do not protect certain professionals (such as professional engineers, lawyers, architects and medical doctors), landscapers, residential superintendents, certain information technology professionals, and anyone in a supervisory or managerial position who performs non-supervisory/managerial tasks only irregularly.⁴ Other employees, such as road construction workers and seasonal hotel staff, must work more than the standard forty-four hour overtime threshold in Ontario before being entitled to overtime pay. Because experience reveals several

The Common Causes

Certain employer behaviors are more likely than others to attract complaints and litigation in Canada. One area ripe for controversy comes from the widespread misconception that salaried employees are never entitled to overtime pay. In Canada, this generally is not true; many salaried employees in a number of provinces across the country are entitled to overtime pay. In these provinces, salaried employees are covered unless the nature of their work brings them within a specific exemption from coverage, such as the exemptions for certain professionals, information technology employees, and managers and supervisors whose managerial and supervisory responsibilities take up the majority of their work time. And, because of this misconception, many employers not only fail to compensate eligible salaried employees, but also find themselves lacking adequate records and documentation of hours worked to successfully defend against these claims and keep their potential damages down.

Unless otherwise exempt, salaried employees in

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snarls lurking within these exemptions, employers need to tread with care (as we will soon discover).

Risky Business

The U.S. experience suggests that some employers are more susceptible to overtime and related claims than others. A survey of U.S. cases reveals the most hard-hit industries to be over-the-counter and fast food, retail, insurance, computer software and gaming, telecommunications, pharmaceuticals, and banks. Although cases have covered a range of circumstances, some digressions seem more prevalent than others, namely misclassifying employees as managerial, high-tech or professional, incorrectly assuming that certain employees are exempt, poorly documenting work hours, and treating some work-like working from home—as off-the-clock. How does the Canadian experience stack up against the U.S. cases and where does Canada seem to be headed?

these provinces must be paid the premium rate of one and one-half times their regular rate for all hours worked beyond the statutory work day or week. Often, salaried employees' regular rates are calculated simply by dividing their weekly salary by the hours in their regular (non-overtime) work week. Figuring out salaried employees' regular work weeks involves weighing all available evidence from several sources alongside the employer's own practice.⁵

Misclassifying employees as exempt is another common violation, with incorrectly treating employees as exempt managers or supervisors coming up most frequently. Although legislation in most provinces does exempt many managerial and supervisory employees from entitlement to overtime pay, simply calling employees "manager" or "supervisor" in their job titles or descriptions does not make them exempt. Rather, the employees' duties must be examined in light of the definition of manager and supervisor in the

applicable provincial exemption. For instance, Ontario's ESA exempts those whose work is supervisory or managerial only if any non-supervisory/managerial tasks are incidental to the job. Determining whether an employee falls within this exemption generally means looking critically at the duties and activities employees actually do on the job.⁶

Misclassifications also frequently surface with information technology workers, as many provinces exempt only certain information technology professionals from entitlement to overtime. To fall within the exemption, the employee's position must entail exercising professional judgment, a skill not used in all information technology positions. Take for instance British Columbia's exemption, which does not cover those providing basic operational technical support, like help desk workers. Likewise, engineers and other professionals generally are exempt from entitlement to overtime. Even so, in most provinces, only licensed practitioners who are members of the particular professional licensing body are exempt.

hours. Most provinces require employers to compensate employees who voluntarily put in overtime hours without being asked. In fact, employers in many provinces face liability for overtime even where the employee's contract expressly forbids, limits, or requires advance authorization for overtime hours and the employee could be disciplined for putting in the unauthorized hours.

The Consequences

As in the U.S., employer non-compliance with employment standards legislation can trigger a range of potential consequences depending on the jurisdiction. In Canada, the threat of court action generally causes employers the most concern, particularly since we are seeing more lawsuits regarding overtime reach the courts. Just how and when court action is taken against employers varies from one jurisdiction to the next. However, some key considerations apply across the board:

1. employees may be precluded from filing claims with an administrative body (see

information technology workers as many provinces professionals from entitlement to overtime.

Problems also arise from employers' and employees' failed attempts to alter the requirements by agreement, without realizing that their agreed hours and wage—particularly where a salary or flat rate is involved—bring the employee below legal minimums. Pitfalls also can occur when compensation for an increased workload is bundled into an employee's bonus or raise instead of separated out into a distinct overtime payment, as one unfortunate employer in British Columbia learned the hard way. There, the employer was ordered to pay overtime to an employee who had already been recognized with two bonuses, one with a card thanking the employee for "all your time and efforts" attached. The presiding adjudicator found these payments to be discretionary bonuses rather than overtime compensation.⁷

Finally, employers are tripped up again and again by failing to pay employees overtime for unsolicited or unauthorized time worked beyond their regular

below) and court actions regarding the same matter at the same time and an administrative complaint may need to be withdrawn before a court action can be filed;

2. an administrative order that has not been appealed may preclude a court action on the same matter;
3. the administrative process tends to be far quicker, easier, and cheaper than court proceedings;
4. a greater range and higher amount of damages may be available through court proceedings than through administrative proceedings;
5. different limitations periods generally apply to administrative proceedings than to court proceedings, and
6. class actions are available through the courts only.

Although individual employee lawsuits can be an expensive proposition for employers and bring

unwanted bad press, it is the class action with its potential for astronomical awards, huge plaintiff classes, and extensive media coverage that strikes the most fear in employers' hearts. Though far less common in Canada, class actions are no less notorious here and when they hit, they hit hard.

A fairly recent phenomenon in Canada, class action proceedings were unavailable until 1978 when Quebec first embraced them. Soon after, other provinces implemented class action legislation and by 2004 class proceedings could be had in all federal and provincial court systems throughout Canada. Even so, class action litigation had a sluggish start, with courts reluctant to certify class actions, as evidenced by the 1998 decision in *Halabi v. Becker Milk Co.*⁸ (*Halabi*). In *Halabi*, the court denied certification of a class suing for unpaid wages under Ontario's ESA, ruling that the ESA's faster and less costly administrative procedure was preferable to resolving the common issues through a class action. Commentators suggested that this reluctance likely stemmed from fear of opening the floodgates to U.S.-style multi-million-dollar class action litigation and traditionally "un-Canadian" behavior like lawyers searching out potential class action litigants.

The tides have now turned with cases like *Kumar v. Sharp Business Forms Inc.*⁹ taking a decidedly different tack. Rejecting *Halabi's* reasoning, the *Kumar* court certified a class action for unpaid overtime, holiday and vacation pay, observing that the provincial statute (again Ontario's ESA) expressly allowed court actions as an alternative to administrative proceedings. The court further noted that class proceedings in particular serve important public policy objectives like access to justice, judicial economy, and behavior modification. Since then, a class action was filed by retail managers and assistant managers at Michaels Stores, who allegedly performed mainly non-supervisory/managerial duties and claim that they were required to work more than the statutory maximum hours per week without receiving overtime pay. Cases like these are particularly interesting since they could encourage still more litigation by similarly situated employees working for like establishments all over Canada.

Employers also run the risk that one or more employees will file a complaint against them with the agency that administers the law, for example, the Employment Standards Branch of the Ministry of Labour in Ontario. The complaint triggers an administrative procedure that typically includes

an administrative officer's investigation, employer's production of related documentation, fact-finding meeting, before the officer, and officer's dismissal of the complaint or issuing an order to pay. Because some provinces limit the amount of wages an officer may order an employer to pay any one employee (for instance, \$10,000 in Ontario), employees seeking larger amounts must instead file an action in court. Unionized employees must file a grievance under their collective bargaining agreement, triggering a grievance process that could lead to a hearing before and decision by a labor arbitrator.

Beyond the potential orders officers can issue, administrative complaints can be a catalyst for more complaints against an employer. In many jurisdictions, government officers looking into one employee's complaint have the power to investigate whether unpaid wages or overtime pay might be due to other employees. To avoid this risk, employers might want to settle with the employee who filed the complaint before the agency begins investigating. When settling, however, employers will want to try keeping the settlement terms as confidential as possible to avoid encouraging other employees to follow suit. Although many employees are squeamish about filing a complaint against their current boss, this reticence often fades where one or more others have already led the charge. Worse still, some provincial Ministries conduct random surprise workplace spot-checks for contraventions where no complaints have been filed.

In some provinces, employers also can face hefty fines and even (in the case of individuals who are charged and convicted) jail time for certain offences. Even though offences are provincial rather than criminal, the penalties pack a real punch. Just look at Ontario, where violating the ESA can result in conviction for a provincial offence carrying a fine of up to \$50,000 (and \$100,000 for a corporation), up to twelve months in jail, or both. Corporations face fines of up to \$250,000 and \$500,000 for second and third offences. To add to the sting, the Ontario Ministry of Labour has a practice of issuing a press release with every conviction, naming the employer.

Taking Action

Given the many ways to get snagged, how can Canadian employers keep themselves from ending up defending the next big class action lawsuit over unpaid overtime? Of course, the best way to avoid trouble is to make sure all employees receive their full overtime entitlement. One way employers can achieve

this is to fully audit their overtime policies, practices, and record keeping. Among other questions, a solid audit should consider whether:

- the employer's policies and procedures ensure compliance,
- managers understand and implement the policies and procedures and employees are aware of them,
- employees are properly classified as exempt or non-exempt,
- approved and clearly written Excess Work Hours and Overtime Averaging agreements are in place (where permitted by applicable employment standards legislation),
- overtime is properly paid and documented in all instances, and
- lieu time is properly calculated, recorded and used.

Mid- to large-sized businesses may have human resources personnel on hand with expertise in conducting an overtime audit. Particularly where allegations have been made, best practices support engaging an experienced external professional to conduct the audit and having a trusted legal adviser review the results, recommend changes, and help implement those changes. Privilege is another impor-

tant consideration when deciding who should do the audit; the only way to attach lawyer-client privilege to an investigation that might reveal employer transgressions is to have a lawyer conduct the audit. Even then, it is likely that privilege will attach only if the dominant purpose of the audit is to receive legal advice or to prepare for anticipated litigation. If an employer wishes to avoid creating evidence that could be obtained by regulators and used against it, the employer should consider using a lawyer in order to be able to assert privilege. Although more costly than handling the audit and follow-up changes internally, this up-front investment is an important part of a strategy of managing the risk of overtime liability.

In the event that an overtime complaint is filed or an investigation is launched, the most prudent approach employers can take is to obtain legal advice, and develop a good rapport with the administrative officials involved. Employers are wise to provide requested documentation quickly, be open and respectful, and keep in mind that treating a disgruntled employee unfairly could instigate other employee complaints. And, when faced with seemingly valid claims, a quick and confidential settlement may well be an employer's best way to reduce the risk of a class proceeding.

1. Melnitzer, Julius, "Backpay Burdens: Are you in a minefield of unpaid overtime?" (2005) 2 Workplace News 1 at 1.
2. Statistics Canada, "How much we work," on-line: <http://142.206.72.67/02/02e/02e_006a_006a_e.htm>
3. Falconbridge Nickel Mines Ltd. v. Egan, (unreported) January 18, 1982 (Ont. Div. Ct.); appeal dismissed (1983), 148 D.L.R. (3d) 474 (C.A.), leave to appeal to S.C.C. refused (1983), 52 N.R. 238n (S.C.C.); *Queens University v. Fraser* (1985), 51 OR (2d) 140, 8 O.A.C. 347 (Ont. Div. Ct.).
4. See E.S.A., s 3 (5) and Exemptions, Special Rules and Establishment of Minimum Wage, O. Reg. 285/010, s 8 (exemption Regulations).
5. See, for example, *Schacter et al v. Ontario Nurses' Association*, [1998] O.E.A.S.D. no. 194 (Misra).
6. See *Bomatic Inc.*, [2005] O.E.S.A.D. No. 1199 (McKellar) and *Singer v. McMaster University*, [2000] O.L.R.B. 389 (Goodfellow).
7. Re: *Petroglyph Animal Hospital Ltd.*, [2000] B.C.E.S.T.D. No. 211 (Wolfgang).
8. *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Gen. Div.).
9. (c.o.b. Bell Label Ticket & Tag) [2001] O.J. No. 1729 (Ont. Sup.Ct.)

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