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September 18, 2015

DELIVERED VIA COURIER
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Mr. C. Michael Mitchell
Hon. John C. Murray
The Changing Workplaces Review
Employment Labour and Corporate Policy Branch,
Ministry of Labour
400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Dear Sirs:

RE: Submissions on The Changing Workplaces Review
Overtime Premium Pay

INTRODUCTION

Dentons is a global legal practice providing client services worldwide through its member firms, including Dentons Canada LLP ("**Dentons**"). Dentons' Global Employment and Labor Group includes over 200 lawyers across Canada, the United States, Europe, the Middle East, Africa and Asia. Our Canadian lawyers include the authors of the popular *Your Employment Standards Questions Answered – Federal and Provincial Guidance, 6th Edition.*[1]

Dentons has the privilege of representing a group of national employers who collectively employ more than **25,000** individuals across Canada in various roles and capacities ("**National Employers**"). The National Employers commend the Government of Ontario for conducting a review of how the *Employment Standards Act, 2000* (the "**ESA**") could be amended to best protect workers while supporting businesses in our changing economy as part of *The Changing Workplaces Review*.

The National Employers wish to make submissions on a discrete issue that may be in danger of being overlooked. In summary, the National Employers submit that Ontario should give further consideration to amending its approach to entitlements for premium rates of pay for overtime. The daily and weekly maximum hours of work are borne of industrial factory work. Premium rates of pay operated as a penalty to encourage employers to hire additional staff and, thereby, encourage full employment in the Ontario economy. However, it is questionable whether overtime premium rates of pay incentivize employers in the knowledge economy in the same way as might be expected in an industrial factory context.

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[1] Anneli LeGault and Andy Pushalik, *Your Employment Standards Questions Answered – Federal and Provincial Guidance, 6th Edition* (Toronto: CCH Canada Limited, 2013).

The hours of work and overtime model adopted by Ontario in stages has never been appropriate for professionals who have responsibilities that transcend duties to their employers. These employees have duties to their licensing bodies as well as to the public generally. Their duties are not confined to specified hours of the day. Furthermore, these professionals may – for the most part – be employed or self-employed. A system of overtime and premium pay would lead to inequities between these groups. Thus, the larger legal, professional and economic context in which these professionals operate – one which frequently gives these employees a privileged economic position – makes the concept of fixed maximum hourly and weekly hours and overtime premium pay inappropriate. As a result, there have always been exceptions from the daily and weekly maximum hours of work and premium pay for numerous classes of employees.

Of concern to the National Employers is that the scope of practice of professionals and the duties for which they are employed has been changing more rapidly than the exemptions that apply to these professionals. The National Employers submit that a principled approach should be taken to exclude all professionals who are subject to statutory-mandated codes of ethics, unless the specific circumstances of the profession suggest that employed practitioners should be treated differently from self-employed practitioners in these professions.

RECOMMENDATION

In revisiting the issue of entitlements for premium pay for overtime, the Government of Ontario has a number of models that may achieve broader socio-economic goals in a more principled manner. One revision would be to amend O. Reg. 285/01 to ensure that the exclusions for professionals are applied consistently even as the scope of practice for these professions change and evolve. Given the obligations of these employees to their licensing body and the public, and the advantages that these employees have, the National Employers recommend that the wording of the exceptions be broadened to refer to an employee practising his or her skill, trade or calling.[2]

HISTORY OF MAXIMUM HOURS AND OVERTIME PREMIUM PAY

Ontario's regulation of hours of work dates back to the *Factories Act of 1884*,[3] which was focused on regulating the maximum hours of work for women and children in factories and, subsequently, shops and mines. Ontario introduced an 8 hour maximum workday and a 48 hour maximum work week in s. 2(1) of *The Hours of Work and Vacations with Pay Act, 1944*.[4] This was a fixed maximum beyond which employees could not legally work. These maximums were not simply upper thresholds for a work week beyond which premium time would be paid. The intrusion on the freedom of employers and employees to negotiate the terms of employment should not be underestimated, given that contemporaneous

[2] Another approach would be to implement a professional exclusions provision along with a wage-based test (based on the industrial average wage) as in Manitoba; or a wage-based test based on the minimum wage as is the approach in Quebec. This would not interfere with workers who earn pay at above the set minimum to bargain for particular overtime pay rates, bonus structures, time-in-lieu or other benefits for overtime.
[3] 47 Vict., c. 39.
[4] S.O. 1944, c. 26.

indications were that about 60 per cent of the male workforce was working more than a 48 hour work week just prior to the enactment of this legislation.[5]

In light of the potential labour market disruption caused by this statutory maximum, there were numerous exceptions. These maximums were not applicable to supervisors, managers or those who whose employment included duties of confidentiality. In addition, the regulations[6] made under *The Hours of Work and Vacations with Pay Act, 1944*, specified that the Act did not apply to employees in certain specified professions, trades or callings. These included employees who were qualified under the following statutes and who were engaged in the practice of his profession, trade or calling, as well as students and articled apprentices under those statutes:

The Architects Act,	*The Barristers Act,*
The Certified Public Accountants Act	*The Chartered Accountants Act*
The Chartered Shorthand Reporters Act	*The Dental Technicians Act*
The Dentistry Act	*The Drugless Practitioners Act*
The Land Surveyors Act	*The Medical Act*
The Nurses Act	*The Optometry Act*
The Pharmacy Act	*The Professional Engineers Act*
The Public Accountancy Act	*The Solicitors Act*
The Teaching Profession Act and	*The Veterinary Science Practice Act.*

In addition, a duly registered drugless practitioner was excluded.

An entitlement to a premium was introduced in the *Employment Standards Act, 1968*.[7] Section 14 of the *Employment Standards Act, 1968*, set a premium of 1.5 times the employee's regular wage rate for hours in excess of 8 hours per day or 48 hours per week. Employees were permitted to refuse overtime. The maximums were later reduced to 44 hours in 1975. As the Ontario Task Force on Hours of Work and Overtime noted in its report in 1987, the overtime premium rate of pay functioned, in effect, as a penalty tax on employers to discourage exceeding the maximum daily and weekly hours of work.[8]

Similar to its predecessor legislation, the *Employment Standards Act, 1968*, excluded certain classes of employees from the maximum hours of work and the premium entitlement. Of the exceptions under the 1944 statute, only nurses and chartered shorthand reporters were dropped from the list of excluded professions under the 1968 Act.

Although the excluded professions remained largely in the same form as under the 1944 statute, the expression of the exception was altered. Instead of referring to employees qualified in a profession, trade or calling under specified statutes, the regulation referred to duly qualified practitioners" of certain

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[5] Ontario Task Force on Hours of Work and Overtime, *Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime* (Toronto: May 1987) at p. 24.
[6] R.R.O. 1950, Reg. 144, s. 2(a).
[7] S.O. 1968, c. 35.
[8] Ibid. at p. 25.

professions.[9] In particular, duly qualified practitioners of the following professions were not subject to the maximum hours of work and overtime premium pay requirements of the Act.

Architecture	Chiropody
Dentistry	Law
Medicine	Optometry
Pharmacy	Professional Engineering
Psychology	Public Accounting
Surveying	Veterinary Science

Evidently, the Ministry of Labour did not consider drugless practitioners or teachers to be professions. Employees in these categories were not included in the list of professions but were included in separate clauses.[10]

The enactment of the *Employment Standards Act, 1974*[11] did not alter the excluded professions.[12]

When the *Employment Standards Act 1974* was replaced with the *Employment Standards Act, 2000*, the basic structure of the exclusions for professionals remained the same. However, by this time there were additional regulated professions that were added to the list. Among the additions were:[13]

Chiropractic	Massage therapy	Physiotherapy	Psychology

REASONS FOR THE EXCLUSIONS

Writing in 1987, the Task Force could not identify documentary evidence on the original rationale for the exemptions. However, the Task Force listed a number of likely factors that led to the exclusions. Of those factors, the following likely informed the exclusion of the professional groups:

- the difficulty of establishing or measuring regular hours;
- the absence of a need to provide a safety net of protection to groups having sufficient bargaining power or covered by other legislation;
- the reluctance of managerial, professional and skilled groups to have their hours of work regulated; and

[9] R.R.O. 1970, Reg. 244, s. 3.
[10] Under ss. 3(b) and 3(c) respectively of R.R.O. 1970, Reg. 244, duly registered drugless practitioners and teachers under *The Teaching Profession Act* were excluded from maximum working hours and overtime pay.
[11] S.O. 1974, c. 112.
[12] The exceptions for professions set out in s. 3 of R.R.O. 1980, Reg. 285 were the same as under R.R.O. 1970, Reg. 244.
[13] O. Reg. 285/01.

- the potential for inequity in an industry or occupation having a high proportion of self-employed individuals (if standards applied only to the employed segment).

The National Employers submit that these rationales continue to apply today. However, the National Employers also submit that the Task Force overlooked one important rationale. One of the common threads linking all of the listed professions is that they are professions regulated in the public interest in which the employed professionals have a significant degree of control over his or her working hours.[14]

These professionals owe multiple duties that are regulated in the public interest. A lawyer owes a duty to his or his client (which may be the same or different to his or her employer) as well as to the Law Society of Upper Canada and to the public. An accountant similarly owes duties that transcend the employer-employee relationship. These duties cannot be confined to a set working day in favour of permitting employees in these professions to refuse overtime. A psychiatrist must attend to a matter outside the statutory maximum workday or workweek if it is necessary to do so to fulfill his or her duties to a client, to the College of Psychiatrists or to the public. In each of these cases, these professionals have substantial control over their working hours and market for these professional services includes competition by employed and self-employed individuals.

This appears to have been understood by the drafters of *The Hours of Work and Vacations with Pay Act, 1944* and the associated regulations. It is notable that all regulated professionals appear to have been excluded in 1950. Subsequently, nurses were removed from the list of exceptions, possibly as a result of the vulnerability of that group of employees and the limited numbers of self-employed individuals in that profession. However, as additional professions became regulated, it appears that the trend was to include the professionals to the list of those excluded from maximum hours of work and overtime premium pay.

Unlike Manitoba, which takes a principled approach by excluding all professionals who are governed by a statute, Ontario's initially principled approach has become ad hoc, as the number of professions governed in the public has increased. The issue affects all industries.

Even though professional engineers and surveyors are excluded from premium overtime pay provisions, professional geoscientists are not. Given the similarity of their professions, it is not clear what the basis would be for the differential treatment. Professional geoscientists are governed by the *Professional Geoscientists Act, 2000*.[15] The Code of Ethics of Professional Geoscientists[16] requires that geoscientists act with regard to the public interest, among other duties. Geoscientists play an important role with respect to technical geochemical and geological data in the development of mines and other resource extraction. They also play an important role in Ontario's capital markets. Under National Instrument 43-101 – Standards of Disclosure for Mineral Projects, scientific or technical information made by an issuer of securities in Ontario, including disclosure of a mineral resource or mineral reserve, concerning a mineral project on a property material to the issuer must be either (a) based upon information prepared by or under the supervision of a qualified person or (b) approved by a qualified person. One of the qualifications of a qualified person is that the person is a professional geoscientist.

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[14] The lack of control over working hours may explain why nurses do not remain on the list of excluded professions.
[15] SO 2000, c 13.
[16] O Reg 60/01.

Similarly, duly registered practitioners of chiropractic, massage therapy and physiotherapy are all excluded from the overtime pay provisions. However, kinesiologists are not. Kinesiologists are governed by the *Kinesiology Act, 2007*[17] and *Regulations Governing Professional Misconduct*.[18] They are also governed by the *Regulated Health Professions Act, 1991*[19] (as are chiropractics, massage therapists and physiotherapists). There appears to be no principled basis for the differential treatment.

Even when a profession is included, the changing nature of the profession may create ambiguity. For example, the professional designations of Chartered Accountant, Certified General Accountant and Certified Management Accountant are becoming vestiges of history, as these professions merger to become Certified Professional Accountants. This change alone requires reconsideration of the applicable exclusion in O. Reg. 285/01.

Another example that creates ambiguity is the situation of foreign legal consultants (and other similar foreign practitioners of other professions). In Ontario, lawyers licensed outside of Canada must apply to the Law Society of Upper Canada for a permit to give legal advice in Ontario respecting the law of a foreign jurisdiction. Are these professionals *duly qualified* practitioners of *law* if they have obtained a permit? The concept of such a permit did not exist at the time that the original exception was enacted. Arguments could be made either way.

These examples illustrate the dangers in allowing vague references to professions whose definitions have changed since the enactment of the regulations to govern overtime hours and premium pay entitlements. On behalf of the National Employers, we submit that a more logically defensible and principled approach would be to exclude from the overtime pay premium all professions that are governed by a statute prescribing a code of professional conduct for its members. This would be very similar to the approach in Manitoba.[20]

In particular, the National Employers recommend that paragraphs 2(1)(a) to (e) and 2(1)(g) of O. Reg. 285/01 be replaced by a provision that read:

> Parts VII, VIII, IX, X and XI of the Act do not apply to an employee who is qualified to practise and is practising or employed in a profession that is governed by rules of professional conduct or similar professional standards enforced by a discipline committee authorized under an Act of the Legislature that applies to the profession or is registered or enrolled and employed as a student-in-training in respect of such a profession, except: (a) *Nursing Act*, 1991, S.O. 1991, c. 32, ...

If there are legitimate socio-economic reasons for not including some professions, such as there appears to be nursing, these would be addressed in the form of exceptions from the overall exclusion. The Employment Standards Branch could do so by reviewing periodically the wage rates and working

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[17] SO 2007, c 10, Sch O.
[18] O Reg 316/12.
[19] SO 1991, c 18.
[20] Section 5 of Manitoba's *Employment Standards Regulation*, Man. Reg. 6/2007 provides that the standard hours of work and overtime provisions contained in the *Employment Standards Code* do not apply to an employee who:(a) is qualified to practise and is practising or employed in a profession that is governed under an Act of the Legislature that applies solely to the profession; or (b) is registered or enrolled and employed as a student-in-training in respect of such a profession.

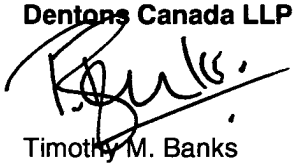
conditions for groups in these professions and amending the regulations as economic conditions change. This would be a far better outcome than the antiquated system that Ontario currently employs.

CONCLUSION

The application of employment standards legislation should be principled, logical, clear and unambiguous. At a minimum, the National Employers are of the view that the manner of handling the exemptions for professionals must be addressed in order to ensure that those exemptions operate in a predictable manner while taking into account the broader regulatory and economic context in which those professionals practice their evolving professions.

Yours truly,

Dentons Canada LLP



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