

Retail Council of Canada

A Submission to the Employment Standards Code Review

**Presented to:
Employment Standards Code Review
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Winnipeg, MB R3C 0P8**

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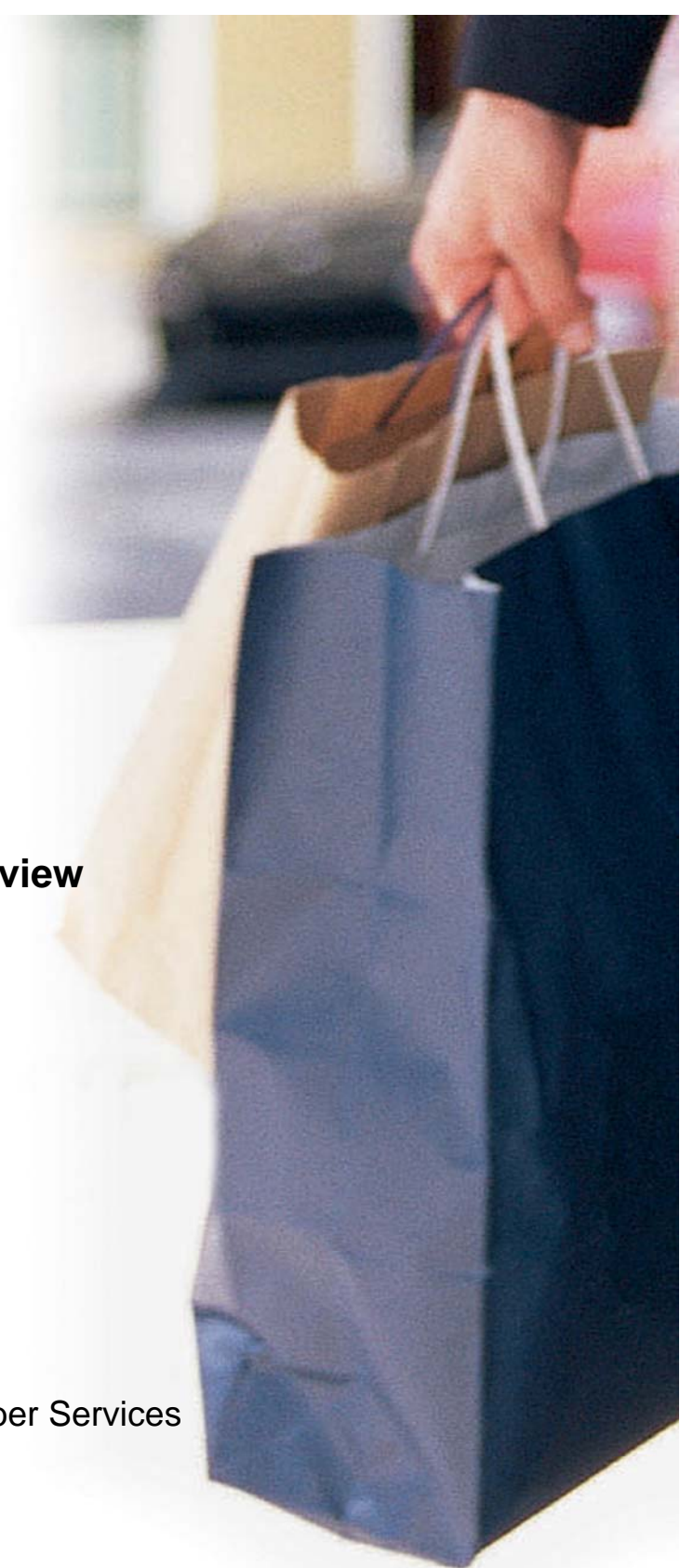


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RETAIL COUNCIL OF CANADA

Retail Council of Canada (RCC) was founded in 1963 to be the voice of retailing in Canada. It is a non-profit, member-funded industry association representing the general merchandise retail trade.

RCC's more than 9,000 members include national department store chains, national and regional discount chains, mid-sized specialty stores and independent merchants.

About 90% of RCC's members are small store operators, typically with one or two outlets. Together, RCC's members account for 65% of Canada's general merchandise sales. Current annual general merchandise sales comprise approximately \$100 billion of the \$260 billion total retail market.

In order to better serve our members in Western Canada, RCC established a permanent regional office in Manitoba in August 2003.

From that office, RCC provides regional representation to its members and establishes a voice for retail with the Manitoba and Saskatchewan governments.





THE REALITIES OF RETAIL

Retail, above all else, is customer driven. Generally speaking, retailers do not operate for only 8 hours a day. Due to increasing consumer expectations and demands, the scheduling of hours has become complex and it requires a great deal of flexibility. There are times of the year, week or day when there is a greater need by customers for the services retailers provide. Therefore, the need for part-time hours can fluctuate greatly. Different retailers experience these peaks at different times of the year. Seasonal sales, for example, are extremely important to retailers in Manitoba. Full and part-time workers are crucial to our sector in order to ensure quality customer service during the peaks and valleys that accompany these seasonal periods.

Young workers - those under the age of 25 - make up a significant portion of the retail workforce. Workers under the age of 25 account for approximately 32 per cent of the retail workforce. Retail, for many Canadians, is the portal to the world of work, providing many young Canadians with their first job. Retail has a significantly higher rate of employment for young workers than most other economic sectors.

Women also make up a large portion of the retail workforce. Female workers account for approximately 54 per cent of the retail workforce. Many women see retail as an attractive occupation for the same reason students do – flexibility. Many women, especially single parents, need the flexibility retail employers provide in order to care for their children while still remaining in the workforce. Very few other industries can provide this type of flexibility for an employee.

The retail trade is an attractive employer for these types of workers, because retailers can provide both the flexibility and the employment they require.

It is also important to clarify and dispel a number of misconceptions about employment, especially part-time employment, in retail. One misconception is that part-time workers in retail are scheduled for few hours per week. The reality is that part-time workers often have only slightly less than the 30 hour-per-week definition of full-time employment. In fact, the average hours worked by retail employees is relatively close to the average of all other economic sectors in Canada.

There is also a tendency to characterize retail as being an industry focused on low-paying sales and cashier jobs. In fact, retail, because of its many locations, employs a much larger share of managers than other economic sectors. It is also true that some of the retail sub-sectors employ an above-average proportion of finance and administration professionals relative to the economy as a whole.

In this context, Retail Council of Canada is pleased to have the opportunity to provide the views and perspectives of Manitoba's retailers to the Employment Standards Review.

HOURS OF WORK AND OVERTIME

Hourly Workers

As stated previously, retailers require flexibility in order to properly serve their customers. It is also the ability of retailers to have flexible scheduling arrangements with employees that makes retail an attractive employer. Flexible arrangements which alter the standard eight hour day have been shown to benefit both employees and employers in the retail sector. In RCC's view, this flexible approach allowing solutions to be achieved at the workplace and to be tailor-made to fit individual circumstances should be maintained and enhanced.

Salaried Employees

There are many advantages in certain circumstances to an approach which compensates employees on the basis of a salary rather than an hourly wage. Employers frequently provide more flexibility to salaried employees to take time off without loss of pay. Salaried employees are not subject to the constant scrutiny of a time clock.

At present, the approach taken by the Employment Standards Branch and the Labour Board of affording the right to overtime to non-managerial salaried employees appears designed to protect employees. Certainly there is no lack of decisions awarding overtime to salaried employees in circumstances where the Labour Board is satisfied that hours had been worked without compensation at overtime rates.

The Code clearly mandates that the terms and conditions of a salaried employee's requirement to work overtime hours without additional pay be set forth specifically in the contract of employment. There is a need, however, to amend the legislation so that a clear intention expressed by the parties that the salary of the employee is intended to cover all hours worked is given effect so long as the employee does not fall below the minimum wage for either standard hours or overtime hours.

RCC agrees with the Manitoba Employer Council's recommendation that the legislation allow a clause such as the following to be contained in an employment agreement and to be upheld:

"Your salary is fashioned to compensate you for all hours worked including hours in excess of eight (8) in a day and forty (40) in a week so long as you earn minimum wage for the first forty (40) hours per week and time and a half minimum wage thereafter, unless otherwise agreed."



Incentive-Based Workers

Properly constructed incentive systems are a good way of motivating employees and allowing highly productive employees the opportunity to earn income which is much greater than their basic rate. At the same time, the employer benefits through increased productivity and profitability.

By definition, incentive systems which are unfairly weighted in favour of the employer will fail in their intended purpose - to motivate employees and increase productivity. This in our view is the best safeguard against schemes which exploit employees.

Current Manitoba law is not significantly out of line with those of other provinces across Canada. Therefore, RCC suggests that no change in this area is required.



DEFINITION OF “MANAGER”

There is an obvious need to address the current legislation in this area. As became very clear in the wake of the recent decision involving Nygard, the absence of the term "Manager" in the definition of "Employer" has caused considerable uncertainty and concern.

Previously, the Employment Standards Act included the word "Manager" in the definition of the "Employer". This was taken out when the *Employment Standards Code* was enacted.

RCC recommends that the definition of "Employer" be revised to return "Manager" in the definition. We suggest that the term "Supervisor" similarly be defined since that word is used in the regulations.

The definition of “Manager” must also reflect the realities of the modern workplace. As previously stated, retail, because of its many locations, employs a much larger share of managers than other economic sectors. Most managers in retail spend a significant amount of time performing non-supervisory functions. Managers not only manage people, but they manage functions as well. In some cases, managers don’t supervise any employees; rather they supervise a function. Or, those being supervised by a manager may not be employees of the company but instead are contractors or agents.

RCC recommends that the definition of “Manager” reflect these realities and include those individuals who have management level responsibilities. The new definition should also include those individuals who supervise other employees even though they may not have the responsibility to “hire and fire” those employees.

A need would then arise to consider what provisions of the Code, if any, would still apply to a “Manager” who otherwise would be excluded from the operation of the Code in its entirety. We agree with the Manitoba Employer Council’s suggestion that “Managers” should be entitled to maternity and parental leave, compassionate care leave, as well as the equal pay provisions. This approach will not carry the danger of employers taking advantage by simply giving them the title of "Manager". The Labour Board has had little difficulty over the years differentiating between someone who merely supervises and someone who exercises true managerial functions.



PROMOTING COMPLIANCE

In Manitoba, enforcement of *The Employment Standards Code* is effected on a complaint based model. Considerable protection exists in both *The Employment Standards Code* and *The Labour Relations Act* for employees who choose to bring a complaint or who provide information once a complaint has been given.

The Code has recently been amended to enhance these protections. In some areas (such as Section 7 of *The Labour Relations Act*), the protection afforded to employees in Manitoba exceeds that which is available in other jurisdictions.

While rarely used, the Code also provides a number of offences which can be prosecuted at the discretion of the Director. The existence of an offences and penalties division serves as a deterrent to employers who would violate the Code. The requirement to pay large awards (such as in the event of overtime claims) is itself a significant deterrent.

In our view there is no need to change current enforcement tools. We do however support an approach to improve education of employers and employees. Specific ways to achieve greater knowledge and understanding should be fashioned in consultation among stakeholders. For instance, RCC is currently working in partnership with the Government of Saskatchewan's Labour Standards Branch to develop a Labour Standards Guide for Retailers in Saskatchewan. This initiative will provide retailers with reference material to increase their awareness of Labour Standards in that province.



IMPROVING THE WORK-LIFE BALANCE

Termination Notice

One area in which Manitoba clearly lags behind other Canadian jurisdictions is with respect to individual notice of termination. It frankly does not make sense for an employee of 31 days to receive the same notice as one with many years of service.

Accordingly, we would support amendments to the Code which provide notice on a graduated scale. However, this should be done with care and amendments should be focused on notice of termination (which could be given either as working notice or pay in lieu of notice). It should also be stipulated that mitigation is an element to be considered in the context of entitlement to notice for both the individual and group termination provisions.

It should remain possible for employers and employees to agree to alternate arrangements. However, such arrangements would be subject to approval by the Director of Employment Standards.

Employees should remain obligated to provide notice of resignation on a basis which is equivalent to notice of termination. The current right to collect a financial penalty from an employee who leaves without giving proper notice should be continued. As well as the right to hold back vacation pay, the employer should be entitled to hold back statutories in order to satisfy the monetary value of a claim against an employee who leaves without giving proper notice.

In the context of termination, an exception to the obligation of either the employer or the employee to give notice should include circumstances where just cause to terminate (or resign) exists. The test of just cause should be the same as applies at common law. The current lack of reference to just cause in the Code creates needless confusion and expensive legal disputes which would be avoided with a uniform approach to the common law.

Statutory Holiday Pay for Part-Time Workers

Retailers feel that it is reasonable for individuals who are employed on a regular part-time basis to receive statutory holiday pay on a pro rata basis. While this practice has not traditionally taken place in Manitoba, it is common in other provinces. However, casual employees by the very nature of their engagement should not be entitled to statutory holiday pay unless they are employed on a basis which brings them within the 15 in 30 days standard.



The way to achieve payment for regular part-time employees is simply to pay a percentage of their wages representing the number of statutory holidays. The same definition of "wages" as is used for vacation allowance should be applied in order to achieve consistency and ease of administration.

The requirement for a regular part-time employee to be actively employed for 15 of the last 30 calendar days should be retained as a prerequisite.

Wage Deductions

Currently in Manitoba the provisions of the Code and policy applied by the Employment Standards Branch requires specific authorization for a wage deduction. Accordingly, a blanket authorization by an employee permitting deductions of any amounts owing by the employee to the employer is not enforceable.

In our view, this provides adequate protection and no changes should be made except for failure to give notice of resignation.

Unpaid Leaves and Work-Life Balance

It is noted that Manitoba has maternity and parental leave provisions which reflect the norms in other jurisdictions. Further, Manitoba, with the introduction of compassionate care leave, remained at the forefront of Canadian jurisdictions in this area. It is noted that a number of jurisdictions have yet to enact compassionate care leave provisions.

In RCC's opinion, Manitoba does not, on the whole, lag behind other jurisdictions in this area and no additional change is necessary.



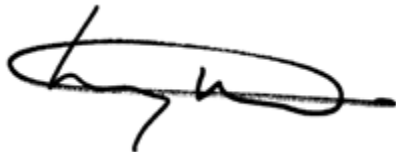
CONCLUSION:

In closing, RCC hopes that the Manitoba government appreciates and understands the important contribution that a healthy and competitive retail industry makes to the workforce. Retailers will continue to provide opportunities by offering jobs for new labour market entrants, students pursuing their education, workers choosing to work part-time, and those wishing to pursue a career in retail.

Creating a climate that welcomes private investment and growth will go a long way to ending the cycle of young workers in Manitoba who feel the need to leave the province for job opportunities. Instead, they will have the ability to choose to stay in Manitoba to work and live and Manitoba employers will have a well educated, highly skilled labour pool.

This submission lays out, frankly and fairly, the concerns, recommendations, and suggestions of the retail trade. We ask that you give it careful consideration.

All of which is respectfully submitted,



Lanny McInnes
Director, Government Relations and Member Services
(Manitoba & Saskatchewan)
Retail Council of Canada



APPENDIX 1: RETAIL IN MANITOBA

Sales:

The retail industry is one of the most competitive and vibrant sectors of the economy.

The retail sector is a vital contributor to Manitoba's economy accounting last year for 6.5 per cent of the provincial GDP. It achieved close to \$12 billion in 2004 annual sales – an increase of 7.6 per cent which outpaced the national average. (Figure 1)

Figure 1: 2004 Annual Retail Store Sales by Province

Jurisdiction	2004 Sales \$ Millions	2004/2003 % Change
Canada	346,877.10	5.0%
Manitoba	11,754.90	7.6%
Newfoundland & Labrador	5,721.50	0.8%
Prince Edward Island	1,380.20	0.0%
Nova Scotia	10,236.20	2.5%
New Brunswick	7,963.40	2.1%
Quebec	78,626.50	4.6%
Ontario	128,844.60	3.0%
Saskatchewan	10,273.70	4.2%
Alberta	43,789.60	11.2%
British Columbia	47,106.90	7.0%
Yukon Territory	424.7	0.6%
Northwest Territories	523.1	-1.7%
Nunavut	232	-0.4%

Source: Adapted from Statistics Canada, Table 080-0014 - Retail trade, sales by trade group based on the North American Industry Classification System.



Manitoba's year-to-date sales (January - July 2005) are more than \$7 billion, an increase of 6.7 per cent. (Figure 2)

Figure 2: Year-to-Date Retail Store Sales by Jurisdiction

Jurisdiction	2005 Year-to-Date Sales \$ Millions	2005/2004 % Change
Canada	206,885.50	6.3%
Manitoba	7,026.80	6.7%
Newfoundland & Labrador	3,265.10	2.5%
Prince Edward Island	796.5	2.8%
Nova Scotia	5,949.50	2.6%
New Brunswick	4,692.20	5.6%
Quebec	47,693.10	7.1%
Ontario	75,557.60	4.8%
Saskatchewan	6,249.10	8%
Alberta	27,010.70	11.7%
British Columbia	27,916.90	4.8%
Yukon Territory	251.9	4.7%
Northwest Territories	337.2	13%
Nunavut	138.7	5.5%

Source: Adapted from Statistics Canada, Table 080-0014 - Retail trade, sales by trade group based on the North American Industry Classification System.

Employment:

Retail is Manitoba's third largest employer. Retail employment represents more than 11 per cent of the province's total labour force, directly employing close to 69,000 Manitobans. (Figures 3 & 4)



Figure 3: 2004 Retail Labour Force

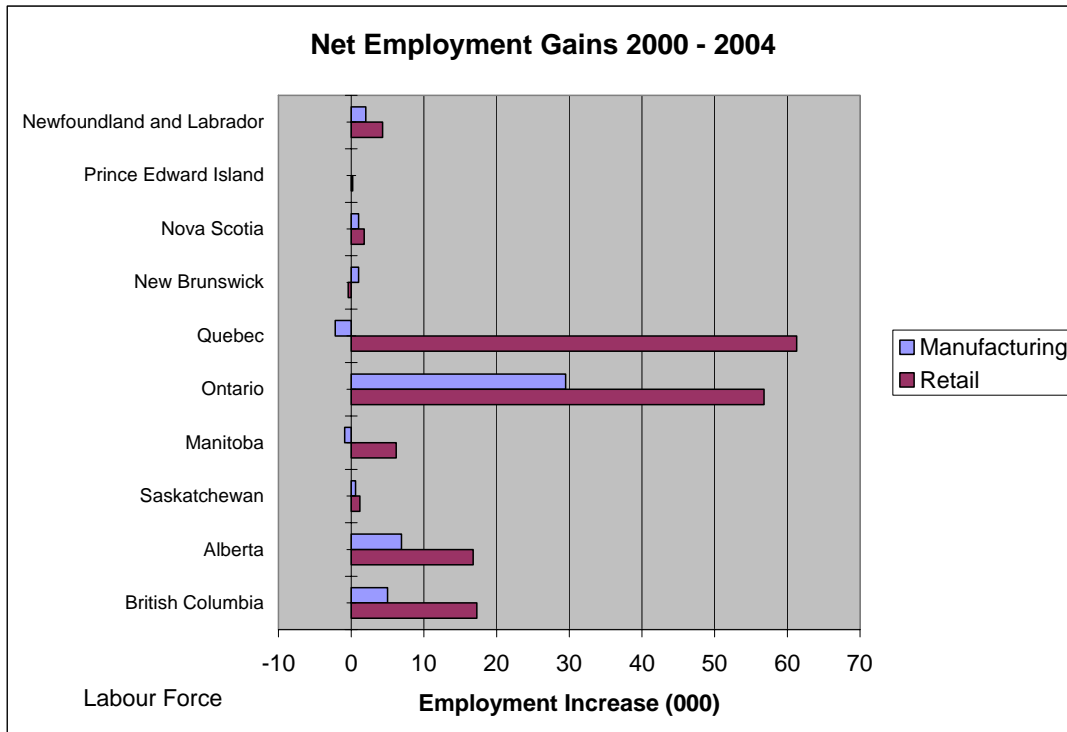
Region	Total, All Industries (in 000s)	Retail trade (in 000s)	% of Provincial Labour Force	Rank by # in Labour Force
Canada	17,183.4	2,024.7	11.78%	2nd
Manitoba	608.2	68.8	11.31%	3rd
British Columbia	2219.2	266.9	12.03%	1st
Alberta	1843.4	211.2	11.46%	1st
Saskatchewan	507	61.2	12.07%	1st
Ontario	6775.3	760.1	11.22%	2nd
Quebec	4016.5	493.6	12.3%	2nd
New Brunswick	388.3	46.4	11.95%	3rd
Nova Scotia	484.3	63.2	13.05%	1st
Prince Edward Island	75.2	9.5	12.63%	1st
Newfoundland & Labrador	255	36.4	14.27%	1st

Source: Statistics Canada, Labour Force Historical Review 2004®, adjusted by RCC\

Figure 4: Manitoba Labour Force by Sector, 2004

INDUSTRY	LABOUR FORCE (IN 000's)
Total, all industries	608.2
Health care and social assistance	79.3
Manufacturing	72
Retail trade	68.8
Educational services	44.2
Public administration	38.2
Accommodation and food services	36.6
Transportation and warehousing	35.8
Finance, insurance, real estate and leasing	31.1
Agriculture	30.3
Construction	30.1
Other services	26.9
Professional, scientific and technical services	25.5
Information, culture and recreation	24.7
Business, building and other support services	22.4
Wholesale trade	19.7
Unclassified industries	9
Utilities	7
Forestry, fishing, mining, oil and gas	6.4

Figure 5: Net Employment Gains in Retail by Province, 2000 – 2004



The retail industry is a gateway to the labour force. With its mix of part-time and full-time occupations, it appeals to people in a variety of circumstances. For those who are students seeking their first job, to those who are looking to re-enter the workforce such as mothers coming off maternity leave, and new retirees who aren't quite ready to stop working, there are many Canadians who appreciate the flexibility that a retail job allows them.

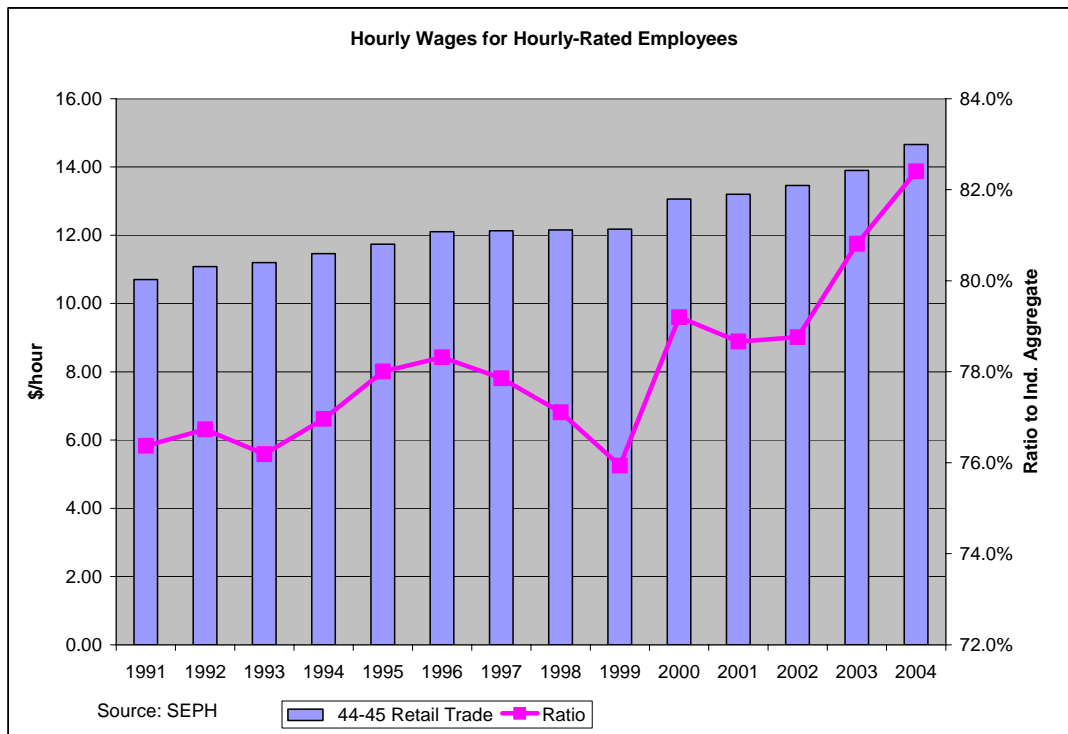
Between 1999 and 2003, 15,400 new stores have been opened across the country, resulting in the creation of a similar number of manager positions, a large number of assistant manager positions, and many of the total new retail jobs.

Because the growth in employment has been driven by the stronger investment activity, it has been complemented by an increase in retail wages, both absolutely and relatively. (Figure 6)





Figure 6: Wage Rates in the Retail Trade



Number of Retail Establishments:

There are approximately 7000 retail establishments in Manitoba which represent 9 per cent of the provincial total.

When considering businesses with a payroll and a fixed address (the key criteria Statistics Canada uses to classify a business establishment), the retail industry has the third largest number of business establishments in Manitoba (7006)

When including “indeterminate” businesses such as sole proprietorships and partnerships, (i.e. usually without a payroll) retail is still Manitoba’s third largest industry – 2,555. (Figure 7.)

RCC has included the figures for “indeterminate” businesses because they are representative of a number of businesses in the retail trade.

Figure 7: Retail Establishments in Manitoba, 2004

Sector	(A) Total Business Counts	(B) Indeterminate Businesses	(A-B) Subtotal
Total	78119	42236	35883
11 - Agriculture, Forestry, Fishing and Hunting	16393	12917	3476
23 - Construction	7498	4217	3281
44-45 - Retail Trade	7006	2555	4451
81 - Other Services (except Public Administration)	6081	2316	3765
54 - Professional, Scientific and Technical Services	5955	3550	2405
53 - Real Estate and Rental and Leasing	4582	3361	1221
48-49 - Transportation and Warehousing	4199	2456	1743
41 - Wholesale Trade	3765	1615	2150
All Other Industries	22585	9249	13391

Source: Adapted from Canadian Business Patterns, June 2004, SGC 2001, Statistics Canada.

The retail sector reaches into every corner and community of the province. However, more than half of all retail establishments in Manitoba are found in Winnipeg. (Figure 8)

Figure 8: Number of Retail Establishments for selected Manitoba Census Metropolitan Areas (CMA's) by Employee Size, 2004

CMA	Total	Indeterminate	Subtotal	1 - 4	5 - 9	10 - 19	20- 49	50- 99	100- 199	200- 499	500+
										28	
Portage la Prairie	154	45	109	50	31	16	7	3	2	0	0
Brandon	385	124	261	87	73	58	34	3	3	3	0
Thompson	73	18	55	12	20	7	9	4	3	0	0

Source: Adapted from Canadian Business Patterns, June 2004, SGC 2001, Statistics Canada

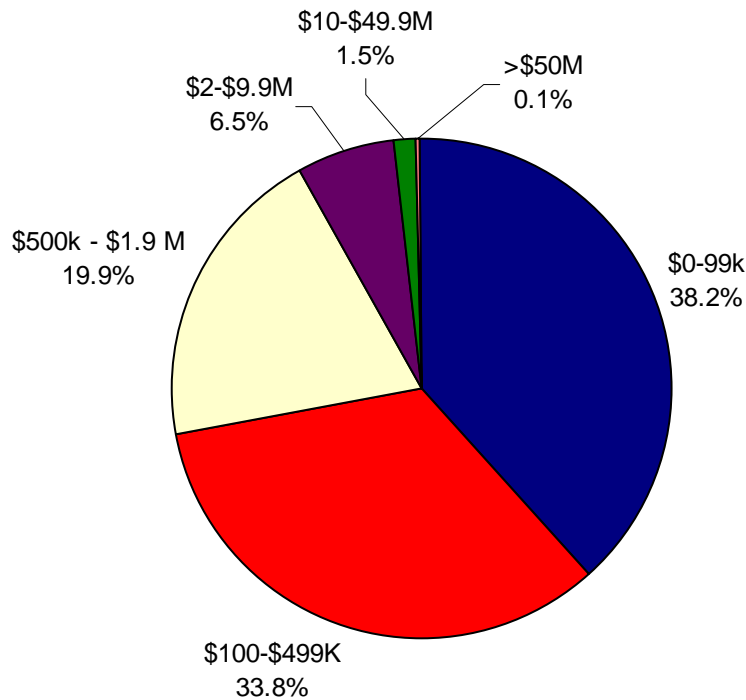
Retail is Small Business:

A fact often overlooked is that, in spite of some high-profile big players, the retail business is still essentially small business. The majority of retail businesses employs fewer than four people and has sales of less than \$500,000 annually.



There is a strong correlation in retail between employee size and revenue. As sales and revenue increase, the number of employees is also highly likely to rise. (Figures 9 and 10.) Although the figures in Figure 10 are approximately 5 years old, RCC believes the pattern holds true today.

Figure 9: Number of Retail Establishments by Revenue, 2000*

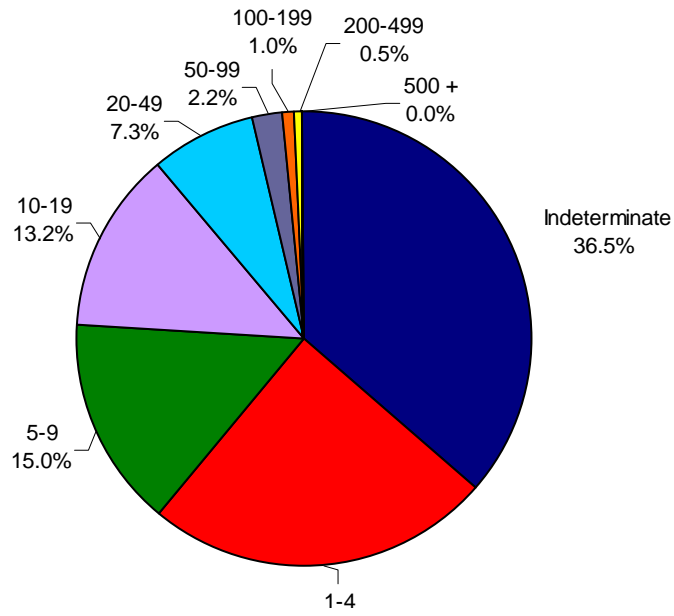


Source: Statistics Canada, Canadian Business Patterns, December 2000: Special Run, adjusted by RCC.

* Most recent data available from Statistics Canada.



Figure 10: Retail Businesses in Manitoba by Employee Size



Source: Adapted from Canadian Business Patterns, June 2004, SGC 2001, Statistics Canada



NOTES:

