

REPORT TO THE MINISTER

AVERAGING REVIEW

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Labour Standards Division

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Averaging Review

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Executive Summary

The Labour Standards Code provides direction to employers and employees on a wide range of topics, including the management of overtime hours. In October 2003, the Code was amended to improve overtime benefits for employees. Then in December 2003, Government made other changes to increase flexibility for employers where there was an unintended impact in regard to the management of overtime hours.

At the same time, Government committed to a review of averaging. The review gave Government an opportunity to assess the impact of averaging of overtime hours in Nova Scotia.

In Nova Scotia the maximum work week is 48 hours. When the maximum work hours are exceeded, overtime is generally payable. However, where averaging is allowed, such as in the construction and property maintenance sectors, employers count an employee's total hours of work over a period of weeks, instead of being limited to just seven days. This means an employee would qualify for overtime pay if his or her average hours exceed the threshold. In construction and property maintenance the threshold is 110 hours worked over a two week period of time.

Some industries such as the forestry, fishing and farming sectors are exempt from the overtime provisions because of their remote locations, reliance on weather conditions, as well as their varied methods of payment for hours worked. These industries frequently pay by the hectare or by a percentage of the catch, making the hourly rate more difficult to calculate. There are often issues related to licensing, quota, and product availability that do not exist in the construction and property maintenance industry.

Construction and property maintenance sectors shares some of the same concerns with forestry, fishing, and farming. The common factor is that they are all affected by weather conditions. However, this review concludes that it is not appropriate to fully exempt construction and property maintenance from the overtime provision. The current standard, averaging over a two week period of time, is found to be appropriate.

The review of the averaging provision was conducted by the Labour Standards Division. It included a review of the legislation in other jurisdictions, a focussed stakeholder consultation, and a broad public consultation. The Department received 27 written submissions; 11 from associations representing employer interests, 10 from individual employers, five from associations representing employee interests, and one from an individual employee.

The review addressed two specific questions:

- (1) Should changes be made to the averaging provision for the construction and property maintenance industry?
- (2) Should averaging be extended to other industries?

This review has concluded that:

- (1) There should be no change to the averaging provision for the construction and property maintenance industry. The study found that Nova Scotia treats the construction and property maintenance industry in a comparable manner to other provinces, and that the current standard of 110 hours over a two-week period is appropriate.
- (2) There should be flexibility for employers and employees to use averaging where there is a greater benefit to the employee in the form of an extended period of time off. The report sees these predetermined, cyclical schedules as providing a more favourable benefit to workers than overtime. The typical example of a pre-determined, fixed cycle of work that repeats over a specific period of time is found in the health care sector where it is not uncommon for nurses to work 6 days on and four days off. The Labour Standards Code allows a benefit to an employee that is more favourable than the rights conveyed under the Code. This type of benefit does not require the approval of the Director of Labour Standards. An employer can simply implement these measures.
- (3) Other than the above noted circumstances, the review does not recommend extending any other form of averaging to other industries. Typically retail, ski operations, food and beverage service, as well as other employers with seasonal workers would like to see a broader application of averaging. However, there have been no conclusive arguments that such an extension would be favourable for the employees, as is the case under (2).

Background

Effective October 30, 2003, the overtime legislation in Nova Scotia changed. Employees are entitled to receive 1½ times their regular wage for each hour worked over 48 in one week. Before October 30, 2003, employees were entitled to overtime at 1½ times the minimum wage for each hour worked over 48 in one week.

The *Labour Standards Code* allows some exceptions to the overtime rules. The exceptions cover occupations or industries where it is recognized that the exception does not undermine the purpose or protections of the *Labour Standards Code*, and where the nature of the work requires alternative forms of compensation, for example a piece rate of pay versus hourly. When employees receive an alternative form of pay, it is then impractical to apply the overtime rate and as a result they are exempt from the overtime provisions of the *Labour Standards Code*. Professionals, managers, logging and forestry workers, among others, are exempt from the overtime provisions.

Effective December 12, 2003, Government implemented new averaging rules for the construction and property maintenance industries. The old rule applied only to road building and heavy construction and required employers to pay employees overtime after they had worked 96 hours over a two week period of time. Overtime was payable at 1½ the minimum wage. The new rule applies to a broader range of workers and includes construction workers, road builders, snow removal workers, and sawmill workers. The rule allows employees to work a maximum of 110 hours within two consecutive weeks at the regular rate of pay. For hours worked over the maximum, the employee is paid a minimum of 1½ times his or her regular hourly rate. In order to offset an unintended impact, Government increased the overtime threshold for these industry sectors by 14 hours over a two week period of time.

Analysis

Survey of Legislation

Overtime legislation in other jurisdictions

The purpose of the survey is to examine general trends in other jurisdictions, since the same social and economic forces drive legislation across the country. Traditionally, the rationale for overtime legislation is job creation. Job creation occurs, at least in part, when employers avoid the cost of overtime by hiring more employees. However, some labour market reports indicate that overtime legislation has a small impact on job creation. This is due, in part, to technology. From an employer's perspective, where significant capital investments have been made, it is more efficient to assign overtime hours to current employees. In order to assign hours to current employees employers are looking for greater flexibility in the form of, among other things, averaging. Averaging is a mechanism that assists some employers in the management of overtime, and provides a greater benefit to some employees in the form of an extended period of time off.

The following paragraphs indicate the overtime rate and maximum daily and/or weekly working hours in all jurisdictions:

New Brunswick and Newfoundland¹ are the only provinces where the overtime rate is still only 1½ times the minimum wage. In all other provinces and territories, overtime for most employees is 1½ times the regular rate of pay (for treatment of the construction industry please see the section on Construction and Property Maintenance).

Nova Scotia and Prince Edward Island allow the highest number of hours worked in one week before requiring overtime pay. Employees are entitled to receive overtime for each hour worked after 48 in one week. This is the highest statutory threshold in the country. Since overtime is not payable until an employee works more than 48 hours in one week, a high threshold is a benefit to employers. In British Columbia, Manitoba, Saskatchewan, Quebec, Northwest Territories, Yukon, Newfoundland, and Nunavut the threshold is 40 hours in one week; and in Alberta, Ontario, and New Brunswick it is 44 hours.

In addition to the weekly maximums, many jurisdictions legislate daily maximum work hours. In British Columbia, for example, daily overtime pay is 1½ times regular rate after 8 hours worked in a day and double-time after 12 hours. The following 6 jurisdictions place the daily maximum at 8 hours: Alberta, British Columbia, Northwest Territories, Nunavut, Saskatchewan, and Yukon. Unlike many other jurisdictions, Nova Scotia does not legislate a daily maximum.

¹ In Newfoundland, overtime legislation has been passed but not proclaimed, meaning it is not in force.

This is a benefit to employers.

As stated previously, in most jurisdictions, overtime is payable at 1½ the regular rate of pay and this has been the norm for many years. In these provinces it is also common to find averaging provisions that provide flexibility to assign overtime hours to existing employees.

In jurisdictions such as Newfoundland and New Brunswick, where the overtime rate is 1½ the minimum wage, averaging provisions do not exist.

Averaging in other jurisdictions

Government reviewed averaging in other jurisdictions to determine the scope of averaging across the country before finalizing its own averaging provisions.

In response to problems concerning the management of overtime, across Canada specific industries and sectors consistently request averaging. These include: construction, fish plant operations, retail, health care, home care, group homes, ski operations, food and beverage service, employers with seasonal workers, mining, security, oil and gas, and other employers in isolated locations. These industries request averaging because the demand for labour varies as a result of, among other things, weather, season, market fluctuations, and perishable products.

The following nine jurisdictions allow averaging by legislation: Alberta, British Columbia, Manitoba, Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan, and Yukon. In Nova Scotia, limited averaging is done by regulation (See Appendix 3).

Currently, British Columbia is the only jurisdiction that allows employers and employees to enter into an averaging agreement without the consent of the Director of Labour Standards. The legislation in British Columbia is complex, and as a result averaging agreements are not common in that jurisdiction. In Ontario, averaging had existed in a “pure” form, meaning that there were fewer limitations than in British Columbia, and the parties were free to enter into averaging agreements without the consent of the Director. However, effective March 1, 2005, employers who want employees to work more than 48 hours a week must receive approval from the Ministry of Labour. From an employer’s perspective, this change in Ontario is a significant interference in the “free market” because employers will no longer be allowed to form averaging agreements with employees, unless they have the approval of government.

In Alberta, Manitoba, and Yukon averaging is attached to either compressed work week schedules or shift work. For instance, in Alberta averaging may be approved by the Director if it is part of a regular compressed work week, and overtime is payable after 12 hours of work in one day, instead of eight. Under shift work arrangements, employees receive additional time off in exchange for working longer day. The reason averaging is attached to shift work is because it safeguards employee interests while providing the employer with the flexibility to assign work hours.

In North West Territories and Nunavut, averaging may be approved where the nature of the work requires irregular distribution of work hours, particularly where the work is in a remote location. When employees are a long distance from home, it is more efficient to work longer hours and more days, in exchange for an extended period of time off. In this context, shift cycles, such as 21 days on and 21 days off, are common.

In Nova Scotia averaging exists by regulation. As of December 12, 2003, in construction and property maintenance overtime is payable after employees work more than 110 hours during a two-week period of time. Prior to December 12, 2003, averaging provisions were different and applied to a narrower range of workers. At that time, employees in road building and heavy construction were entitled to overtime at 1 ½ times the minimum wage after working 96 hours over a two-week period of time. In order to offset an unintended impact, Government increased the overtime threshold from 96 to 110 hours. In construction and property maintenance, Government set the threshold higher than the norm because of unique operating hours and conditions.

In considering how averaging should be applied in Nova Scotia, Government looked at the practice in other jurisdictions. Where averaging is allowed, the common characteristic is that overtime is generally payable after the average number of hours worked in the cycle exceeds the legislated overtime threshold. Therefore, if overtime is generally payable after more than 48 hours of work in one week then overtime under an averaging agreement is payable after an employee works more than an average of 48 hours per week in the cycle.

Averaging provides employers with the flexibility to schedule work hours without incurring undue labour costs. The rationale is that it would be unfair for employers to bear the cost of the overtime if averaging can be applied in a way that does not undermine the purpose or protections of the Labour Standards Code, and employees receive compensation in some other form.

General Labour Standards Issues

Nova Scotia's *Labour Standards Code* ensures that minimum standards are maintained in the employment relationship, while allowing employers and employees to negotiate higher standards. For most non-union employees the *Code* is the primary source of employment rights. Typically, minimum standards only become an issue when an employer attempts to reduce his or her obligations to employees.

Averaging is a legal way to contract out of the provincial standard respecting overtime pay. Therefore, a greater benefit to the employee must be demonstrated in order to justify non-payment of overtime wages. In order to determine whether averaging is a benefit to employees, the department considered the following two indicators:

- (1) Averaging is bargained for in collective agreements; and
- (2) There is legal authority for the position that an extended period of time off may be a "greater benefit" than the overtime rate of pay.

Averaging, attached to a shift cycle, is common in the collective agreements of some industry sectors, especially unionized health care. Averaging works well in a continuous operation (24 hours a day / 7 days a week) because the employer has the flexibility to assign working hours (in a pre-determined, fixed cycle) and the employee has the benefit of an extended period of time off. This means that employees may work more than 48 hours in one week of the scheduled cycle, without the benefit of overtime pay, in exchange for a greater benefit in the form of an extended period of time off. If an employee works more than an average of 48 hours per week over the period of the cycle then overtime is payable. Shift cycles were common before the overtime provisions were introduced in 2003. The overtime legislation implemented at that time had an unintended impact on shift cycles.

There is legal support for the position that an extended period of time off may be a greater benefit than the overtime premium. The courts have stated that Labour Standards legislation must be interpreted in such a way that it expands rather than reduces the protections available to the employee. Interpretations should be broad rather than narrow to ensure that the true intent and meaning of the legislation is fulfilled.

Generally, the objective of the *Labour Standards Code* is to protect vulnerable employees. Therefore, there is a prohibition against contracting out of the statute. This means that employees cannot agree to a lesser benefit than that provided for in the *Code*. However, an employer can offer a "greater benefit" in the form of an extended period of time off. For example, in *Echo Bay Mines Ltd. v. Marren, 1997*, the North West Territories Superior Court reviewed a decision of the Labour Standards Board and reached the conclusion that a shift system with an averaging formula attached was more generous to the employees than if they had been paid the overtime premium for the excess hours they had actually worked. Overtime was

not payable because the majority of employees voted for a “greater benefit” in the form of the rotating shift system which included an extended period of time off. In order to arrive at this conclusion, an employer must prove that the specific benefit offered to the employee is directly related to, and greater than, the overtime benefit of the *Labour Standards Code*.

Legislating an overtime threshold raises unique operational concerns for employers who wish to introduce shift cycles. The issue concerns the calculation of overtime when the employer’s cycle does not conform to the calendar week. As a solution, Government recognizes that employers may use averaging where there is a greater benefit to the employee in the form of an extended period of time off.

Construction and Property Maintenance

The law in Nova Scotia

On December 12, 2003, Government introduced new averaging rules for the construction and property maintenance industry. The rules allow employees to work 110 hours over a two week period of time at the regular rate of pay. For each hour worked over 110 overtime is payable at 1½ times the regular rate of pay. The new rule applies to a specific set of employees that includes construction workers, road builders, snow removal workers, and sawmill workers.

Before December 2003, the rules only applied to road building and heavy construction. Under the old rules, employers were required to pay employees 1½ the minimum wage for each hour worked over 96 in a two week period of time. In order to offset an unintended impact of the overtime legislation, Government increased the threshold for these industry sectors by 14 hours over a two week period of time.

The decision to increase the threshold from 96 hours every two weeks to 110 hours is supported by many factors. Construction is a seasonal business; the industry is impacted by weather patterns, specifically rain. It is customary for construction workers to work between 50 and 65 hours per week during this already short season in order to earn a fair wage. Generally construction is not a minimum wage industry. With respect to the construction and maintenance of roads and bridges, public expectations require longer hours of work in order to complete repairs during a shorter period of time to minimize traffic disruption.

The law in other jurisdictions

In most jurisdictions, special rules for managing overtime apply to crown construction. Crown construction includes road building, bridge, and water and sewermain construction. Government reviewed the law in other jurisdictions to better assess the provisions in Nova Scotia.

In New Brunswick, crown construction is covered by regulation. The crown construction work regulation provides a schedule of minimum wages which range from \$6.77 per hour to \$18.31 per hour. Overtime is payable once an employee's weekly hours exceed between 44 (for building) and 50 (road & bridge) hours, at a rate of 1½ the scheduled rate of pay. Averaging is not available in New Brunswick.

In comparison, the wage rate in the construction industry is not fixed by government regulation in Nova Scotia. Employers and employees are free to negotiate the rate of pay. Since employers in New Brunswick must pay overtime at 1 ½ the scheduled rate, the rules in New Brunswick are comparable to those in Nova Scotia (for crown construction) where the overtime rate is 1 ½ the rate of pay. Overtime is payable, in Nova Scotia, after an employee works more than 110 hours over a two week period of time, instead of 50 hours per week which is the rule in New Brunswick. In Nova Scotia the rules are more favourable to employers in that the threshold is higher, wages are not regulated, and averaging is allowed over a two week period of time.

In Prince Edward Island the Employment Standards Board has issued an Order which applies to heavy equipment operators and seasonal construction workers. Overtime is payable after 55 hours of work per week at 1 ½ times the rate of pay. In addition, research indicates that construction workers bank overtime in Prince Edward Island, even though there is no explicit statutory authority to do so. It is important to note, if overtime is banked then an employee is entitled to 1½ hours of paid time off for every 1 hour of overtime worked. Again, the rules in Nova Scotia are more flexible than the rules in Prince Edward Island because averaging is allowed.

In four jurisdictions (British Columbia, North West Territories, Nunavut, and Yukon) there are no special regulations for the construction industry generally or crown construction.

In Newfoundland, the overtime rate of pay is 1 ½ the minimum wage and therefore not an issue for construction and road building. If special treatment is necessary, employers may request an exemption from the hours of work provisions of the statute which includes minimum rates for overtime. An application must be made to the Minister.

In Ontario, overtime is payable in on site road building (street, highways, and parking lots) after 55 hours of work per week. Or if the employee does not work 55 hours during one week, up to 22 hours may be added to the second week for the purpose of determining overtime pay. In on site road building (bridges, tunnels, or retaining walls) in connection with streets or highways the threshold is 50 hours per week. Or the same averaging mechanism described above. Workers involved in sewer and watermain construction earn overtime after 50 hours of work per week.

In Alberta, municipal employees engaged in road construction, maintenance and snow removal receive overtime after 10 hours of work per day (instead of eight), or 191 per month (instead of 44 per week), whichever is greater. All other road construction workers receive overtime after 10 hours per day or 44 hours per week, whichever is greater.

In Manitoba, overtime does not apply to an employee whose hours are determined under *The Construction Industry Wages Act*. This Act does not include persons employed in the house building sector of the construction industry. Different schedules must be referenced for hours of work and wage rates throughout Manitoba. Wages range from \$7.00 per hour to \$24.50 per hour; and the standard hours of work are between 40 and 44 in building construction, and 50 in heavy construction. Hours worked in excess of the standard weekly or daily maximums are payable at not less than 1½ times the regular rate of pay.

In Saskatchewan, overtime is payable at 1 ½ times the regular rate of pay for highway workers after 100 hours of work every two weeks. Other construction industry sectors may make an application to the Director of Labour Standards to approve an averaging agreement.

This review concludes that special rules for crown construction is consistent with the treatment of this industry sector in other jurisdictions. Generally, the rules in each province minimize the unintended impact of overtime legislation on crown construction. There is no jurisdiction in Canada where crown construction is exempt entirely from the requirement to pay employees overtime. The threshold of 110 hours is either comparable to, or more generous to employers than, other jurisdictions. Finally, taking into account that wages are regulated by some provinces, such as New Brunswick, our overtime rate - at 1½ the regular rate of pay - is consistent with our closest competitor.

Recommendations

As a result of this review, the Director of Labour Standards recommends the following to government for its consideration:

- (1) Maintain the current averaging provisions of 110 hours over two weeks for construction and property maintenance sectors.
- (2) Extend the averaging provision to workplaces where there is a pre-determined, fixed cycle of work that repeats over a specific period of time, provided that the average hours worked does not exceed 48 per week. If the average exceeds 48 then overtime is payable.

The cycle of work weeks must be scheduled in advance, the schedule must show all the work weeks that make up the cycle, the maximum number of hours of work that an employee may be scheduled to work in a day, and the maximum number of work hours that an employee may be scheduled to work in a week.

Specifically, an employer may institute a work schedule which provides for a regular schedule of hours (for example 12 per day) and a shift cycle (for example 5 on and 5 off). The cycle must repeat itself over a period of time.

- (3) Other than the above noted circumstances, the review does not recommend extending any other form of averaging to other industries. Typically retail, ski operations, food and beverage service, as well as employers with seasonal workers would like to see a broader application of averaging to their sectors. There have been no conclusive arguments that such an extension would be more favourable for the employees. Unless an employer can extend a more favourable benefit under (2), the review concludes that the current arrangements are appropriate.

Appendix 1 - Stakeholder Consultation Construction and Property Maintenance

From the employer's perspective, the overtime legislation adopted by Nova Scotia in 2003 imposed rights and obligations upon the employment contract that did not previously exist. Employers voiced concern that the legislation interferes with economic efficiency and operational need. In particular, they cited problems where multi year contracts are negotiated based on cost projections, and unique operating hours or conditions exist. From the employer's perspective the new overtime rate is economically inefficient. And during a period of changing economic conditions employers are pressured to reduce their labour costs in order to remain competitive. From the employer's perspective, legislation ought to support economic growth by providing flexible employment laws.

Employers' submissions

Some industry sectors have requested the same exemption from the overtime provision that is granted to forestry, fishing and agriculture - a complete exemption from the application of the overtime provision. These sectors state that averaging is not a suitable alternative. It is submitted by an association that the following factors impact the sector and create unique conditions: the length of the construction season due to rain, the seasonal nature of the construction industry, regulation, the timing of many calls for tenders, and public expectations.

Historically, employers and employees alike have known and accepted that their work incomes are seasonal and weather dependent. On average 15-30 days of work are lost annually during an already short season due to adverse weather conditions. Heavy rainfalls often require a 2-3 day drying period before road construction sites are suitable for work to resume, and asphalt can only be laid between May and November when it is not raining. Whether it is the "time of year" or "weather related" nature of the industry, by all definitions road building is seasonal.

Both employers and employees have recognized and accepted that longer hours of work are required to complete projects on schedule and to earn a satisfactory seasonal income. A large portion of road work is done in rural areas, often hundreds of kilometres away from home, therefore employees are used to working at least 65 hours a week, and have come to expect it. When job sites are a long distance from home, it is inefficient for both the employer and the employee to remain idle.

Finally, a construction industry association states that government contracts (federal, provincial & municipal) account for approximately 75% of the members' work. It is the position of the association that the overtime amendment has significant human resource, cost, and scheduling implications. In order to remain sustainable members will be forced to make upward adjustments to bid prices or reduce hours of work for employees. The former will have increased costs primarily for Governments; the latter will restrict the earning capacity for employees.

Employers' comments:

- Road building is not a minimum wage industry
- Overtime changes were intended for workers at the lower end of the income scale who work in non-seasonal industries and that is why it was necessary to make subsequent changes by Regulation exempting the seasonal industries of forestry, fishing and agriculture
- The increased cost resulting from the overtime averaging provisions will be between \$18-20 million. These costs will have to be passed on to customers [which means the public on government contracts] or hours of work for employees will be reduced which restricts their earning capacity
- An employer notes that Nova Scotia has a significant infrastructure deficit requiring a balance in public policy initiatives
- The new legislation will ultimately cost the province and its taxpayers more money in higher costs of construction

For the reasons stated above, construction and property maintenance receive special treatment in Nova Scotia. The issue is whether the current rule should be expanded.

Employees' submissions

A Council, representing building trade and construction unions, states that averaging of overtime in the unionized industrial and commercial sector does not exist. For at least 40 years, the unionized construction industry has never viewed averaging as an acceptable method of calculation of overtime entitlement. From a worker's point of view, no justification exists to treat industrial and commercial construction employees different from workers outside this sector of the construction industry with respect to overtime pay.

The Council takes the position overtime tends to have an impact on job creation. If employers hire enough employees to avoid paying overtime, for every one million hours of work within the industry, employers would hire an additional 50 trades people. In October 2003, the Nova Scotia legislature unanimously passed Resolution No. 216 wherein the value of trades people was recognized. Averaging provisions are in direct conflict with this position. With less incentive to hire new employees, the group that will be hardest hit will be those with the least amount of experience. This means younger trades people are affected.

A construction worker adds concern that there is no legal right to refuse overtime under the *Labour Standards Code*, with the exception that employees are entitled to one day off in seven. In the absence of protection to refuse overtime employees have little choice but to accept the hours of work required by employers. However, this worker also believes that employers will increase their manpower to avoid the cost of paying overtime. Thus, if the province reduced the overtime threshold to 40 hours per week, one more person would be hired for every three now employed at 55 hours per week.

Appendix 2 - Stakeholder Consultation

Other Industry Sectors

The practice of legislating an overtime threshold raises unique operational concerns for employers who wish to introduce a shift cycle that involves compressed working hours. For example, the work week established by an employer's particular shift cycle may involve five, twelve hour days during the first week of the cycle; and two twelve hour days during the second week of the cycle. The problem respecting the calculation of overtime arises when the employer's cycle does not conform to the calendar week. In this situation averaging is sought as a solution because it gives employers the flexibility to determine the length of the work day and/or week.

Employers' submissions

Employers and their representative associations state that averaging is usual and customary in continuous operations. For example, in offshore oil and gas averaging is standard practice for all continuously operated facilities, and the ability to average is essential to efficient and competitive operations. Remoteness of the facilities, harsh weather conditions, and the difficulty with and high costs of transporting crews by helicopters are some of the unique working conditions that justify averaging. Generally, averaging is done in a predetermined cycle in which employees work 12 hour days with 21 days on and 21 days off. Extended time off is a positive aspect of the work schedule.

In a submission presented by the operator of continuous long term care facilities it is stated that averaging is a generally accepted practice in unionized health care sectors. Article 14.01 of the Collective Agreement between the Nova Scotia Government Employees Union and the Capital District Health Authority is offered as support for this position. Although, in this specific example, the benefit illustrated is greater than the minimum provided by the *Labour Standards Code*, the article of the Collective Agreement illustrates that averaging is, at least in theory, bargained for by employees.

14.01 (a) Unless this Agreement provides otherwise, the hours of work shall be seventy-five (75) hours per biweekly period, normally consisting of ten (10) seven and one half hour (7 ½) shifts.

(b) Where, during a regular scheduled shift rotation, an employee may be required to work in excess of seventy five (75) hours in a two (2) week period, additional hours shall not constitute overtime in that two week period, provided that hours of work average seventy five (75) hours per two (2) weeks of each completed cycle of the shift rotation.

A significant portion of staff in long term care facilities are not unionized, but work beside

unionized employees who may enjoy a benefit of averaging in the form of extended time off.

The security industry also presented a case for averaging in a continuous operation and argues that the potential benefit is an extended period of time off. An employer states that due to its highly competitive nature the security business is one of the lowest paying sectors in the province and contends that many of its employees are among the “working poor”. It is common for employees to request additional hours of work in order to meet their financial obligations. However, in many cases where overtime is an issue, employers cannot afford to offer additional work and employees have sought additional work elsewhere.

An employer submitted the following:

- Because the overtime rate has increased, we are now in the position of having to deny our personnel the chance to work overtime, unless there is an operational necessity
- The legislation has not helped the employees receive higher wages for overtime work it has eliminated most of the overtime hours they were willing to work
- changing shifts to accommodate personal situations will not be allowed where it exceeds 48 hours

Employees’ submissions

The purpose of the *Labour Standards Code* is to guarantee the employee’s “floor of rights”. This means that employers and employees are free to bargain for greater benefits than those contained in the legislation, but are prevented from bargaining for anything less than the statutory minimum. Legislation guarantees a “floor of rights” because the employer has the power to determine the terms and conditions of the employment contract. Although there are exceptions, which include high level managers and professionals, most employees contract on a “take it or leave it” basis. As a result, a form of averaging that allows the employer to simply avoid meeting obligations under the *Code*, should be avoided.

Employee representatives submitted the following:

- In our view there is a serious problem with the management of overtime that would only exacerbate with a two-week averaging mechanism
- I do not agree with the new ruling which states that you cannot work in excess of 48 hours
- I ... would like to make it known that I want to work extra hours. I don’t believe it to be fair that our right to do so be taken away²

² These last two comments reflect the practice of employers to limit the work week to 48 hours to avoid the costs of overtime.

Higher pay for working overtime is meant to deter employers from requiring longer working hours from employees. In theory, the result is job creation and a work / family balance. While some groups of employees are working excessively long hours to the detriment of family, other groups are underemployed or unemployed.

As more lower income Nova Scotians work longer hours, larger numbers may be working shorter work weeks, with many unable to get the hours they need to make ends meet. This is particularly important where regional disparities exist. Unemployment is the least severe in Halifax, but it increases to rates close to 19% in Sydney, the industrial heartland of Cape Breton.

An employee representative submits that:

- Abuse is more likely to occur in areas where there is high unemployment or during periods of high unemployment when workers can exercise fewer options
- Not everyone is fortunate enough to have a pension to fall back on
- Next to minimum wage, working extra hours was a way of increasing my income

Overtime legislation puts a premium on overtime in the hope that employers will hire more employees, instead of assigning overtime to existing employees. Although it does not necessarily have this result, in principle, more jobs ought to be created. According to the Genuine Progress Index for Atlantic Canada, which studies work trends in Nova Scotia, in just one week in 2001 the amount of paid overtime clocked in Nova Scotia was equal to more than 6,000 full-time jobs (based upon Statistics Canada information). If even half these overtime hours were converted to new jobs there would be 8,787 new jobs.

Appendix 3 - Treatment of Overtime By Province

Province	Calculation or treatment of overtime
Alberta	<p>1½ regular rate after 8hrs/day; or 44 hrs/wk, whichever is greater</p> <ul style="list-style-type: none"> - averaging attached to compressed work week (12hrs/day & 44/wk max) - if compressed work week is part of a cycle then the max average weekly hours is 44 - may accumulate the 1 in 7 days of rest, up to 4wks - banking is allowed by written agreement
British Columbia	<p>1½ regular rate after 8hrs/day; 2x regular rate after 12hrs/day; or 1½ after 40hrs/wk</p> <ul style="list-style-type: none"> - “pure” form of averaging with many restrictions, rarely used - banking overtime
Manitoba	<p>1½ regular rate after 40 hours</p> <ul style="list-style-type: none"> - averaging attached to shift work approvals - banking overtime - Labour Relations Board can permit employer to schedule in excess if it is unreasonable to apply the regular overtime rate.
New Brunswick	<p>1½ <u>min. wage</u> after 44hrs (threshold determined by regulation)</p> <ul style="list-style-type: none"> - no averaging - Director may grant exemptions if employer suffers special hardship or if er can prove ee receives other benefit or advantage which compensates
Nova Scotia	<p>1 ½ regular rate of pay after 48 hours</p> <ul style="list-style-type: none"> - averaging in construction and property maintenance 110 hrs over 2 weeks (except municipal employees engaged in street construction, restoration or maintenance) - averaging in transport, overtime paid at 1 ½ the minimum wage after 96 hours over two weeks
Nfld.	<p>1½ minimum wage after 40hrs/wk (threshold determined by regulation)</p> <ul style="list-style-type: none"> - no averaging - banking overtime - Director does not have authority to vary or authorize exemptions - all authority rests with the Minister.
NWT	<p>1 ½ regular rate 8hrs/day & 40hrs/wk</p> <ul style="list-style-type: none"> - averaging where nature of work requires irregular distribution of work hrs - max hrs may be increased by permit (LS Officer has power in statute) where work is seasonal or intermittent in nature

Nunavut	<p>1½ regular rate & 8 hrs/day & 40 hrs/wk</p> <ul style="list-style-type: none"> - averaging where nature of work requires irregular distribution of work hrs - max hrs may be increased by permit (LS Officer has power in statute) where work is seasonal or intermittent in nature
Ontario	<p>1½ regular rate after 44 hours unless another threshold is prescribed</p> <ul style="list-style-type: none"> - had a “pure” form by written agreement - Bill introduced that requires permission of Director
PEI	<p>1 ½ regular rate after 48hrs/wk</p> <ul style="list-style-type: none"> - Board may exempt employers or industries from hours of work provisions where customary in the industry; due to seasonal nature of work
Quebec	<p>1 ½ regular rate 40hrs/wk</p> <ul style="list-style-type: none"> - with authorization may stagger working-hours on a basis other than a weekly basis provided the average is equivalent to the norm - overtime does not apply to fishing, fish processing, or fish canning - banking & right to refuse working overtime is legislated
Sask	<p>1½ regular rate 8hrs/day or 40hrs/wk</p> <ul style="list-style-type: none"> - averaging with approval - legislated right to refuse overtime
Yukon	<p>8hrs/day or 40hrs/wk 1½ regular rate after the above</p> <ul style="list-style-type: none"> - attached to a short work week & by agreement. No more than 12hrs/day and 80/ 2 wks banking by agreement

Appendix 4 - Variance for Road Building, Construction and Maintenance Sectors By Province

Province	variance / exemptions for road building, construction & maintenance
Alberta	municipal employees engaged in road construction, maintenance & snow removal after 10hrs/day (instead of 8) or 191/mos (instead of 44/wk), whichever is greater all other road construction after 10hrs/day or 44/week, whichever is greater
British Columbia	overtime provisions apply to construction industry
Manitoba	overtime does not apply to an employee whose hours are determined under <i>The Construction Industry Wages Act</i> hrs of work & wage rates differ throughout Manitoba ranging from \$7.00-\$24.50/hr
New Brunswick	crown construction work regulation: building, road & bridge. Schedule of minimum wages from \$6.77-\$18.31 after 44-50 hours 1½ the scheduled minimum
Nfld.	No special rules.
Nova Scotia	construction & property maintenance, overtime paid at 1 ½ the regular rate of pay after the employee works 110 hours over two weeks.
NWT	no special rules for this industry in the statute or regulations may be done by permit of a Labour Standards Officer.
Nunavut	no special rules for this industry in the statute or regulations may be done by permit of a Labour Standards Officer.
Ontario	road construction overtime after 55hrs/wk + an odd averaging mechanism attached sewer & watermain construction after 50hrs/wk
PEI	by an Order of Board, overtime after 55 hrs/wk at 1 ½ regular rate of pay.
Quebec	overtime after 40hrs/wk at 1 ½ regular rate of pay.
Sask.	highway workers 100 hrs/2 week period then overtime at 1 ½ no overtime exemptions for construction - may get an averaging permit
Yukon	nothing in the statute or regulations may be done by an Order by the Director.