

## Minimum Standards Monitor

### Is a Pier a Road for the Purpose of Overtime Pay Entitlement?

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As any employer will know, the overtime rules in the Ontario *Employment Standards Act, 2000* (ESA) contain a myriad of exclusions that are difficult to interpret at the best of times. However, emerging case law provides new guidance around the interpretation of applicable provisions. In this Minimum Standards Monitor we address the “road building” exclusion as it relates to “pier building.”

#### What Rules Apply to Exempt Certain Employees from Overtime Provisions?

The general overtime pay provisions are set out in Part VIII of the ESA, but are subject to a number of exemptions and exclusions. The exemptions and exclusions are set out primarily in sections 2, 8, and 13-18 of Regulation 285/01.

Common and often relied upon exclusions include those for supervisory / managerial employees (section 8(b), Regulation 285/01) and information technology professionals (section 8(l), Regulation 285/01). As can be expected, debates often occur regarding whether an employee does or does not fall within an enumerated exclusion, with the employee usually arguing they do not fall within the exclusion and are thus entitled to overtime pay, and the employer taking the position that they are excluded from the overtime provisions and are not entitled to overtime pay.

In addition to exclusions based on the particular duties performed by the employee in question, there are also exclusions based on the nature of the work or industry the employer is engaged in.

#### ***J.K.F. Contracting Ltd.***

In *J.F.K. Contracting Ltd. v Danny Penner*, 2016 CanLII 80013 (ON LRB), the Ontario Labour Relations Board (OLRB) addressed the issue of whether the road building exemption found section 13 of Regulation 285/01 applies to pier building. In other words, is a pier a road?

Section 13 provides:

(1) Despite Part VIII of the Act, in the case of an employee *engaged at the site of road building in relation to streets, highways or parking lots,*

(a) subject to clause (b), the employer shall pay overtime pay for each hour worked in excess of 55 hours in a work week, at an amount not less than one and one-half times the employee’s regular rate; and

(b) if the employee works less than 55 hours in a work week, the difference between 55 hours and the number of hours actually worked, up to an amount not exceeding 22 hours, may be added to the maximum set out in clause (a) for the purpose of determining the employee’s overtime pay for the next work week.

(2) Despite Part VIII of the Act, in the case of an employee *engaged at the site of road building in relation to structures such as bridges, tunnels or retaining walls in connection with streets or highways,*

(a) subject to clause (b), the employer shall pay overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee’s regular rate; and

(b) if the employee works less than 50 hours in a work week, the difference between 50 hours and the number of hours actually worked, up to an amount not exceeding 22 hours, may be added to the maximum set out in clause (a) for the purpose of determining the employee's overtime pay for the next work week.

Section 1 of Regulation 285/01 defines road building as follows:

"road building" means the preparation, construction, reconstruction, repair, alteration, remodelling, renovation, demolition, finishing and maintenance of streets, highways or parking lots, including structures such as bridges, tunnels or retaining walls in connection with streets or highways, and all foundations, installation of equipment, appurtenances and work incidental thereto

The employer in *J.F.K. Contracting Ltd.* argued that the employee was engaged at the site of road building in relation to streets, highways or parking lots, as per s.13(1), and thus was not entitled to overtime pay until he worked more than 55 hours, rather than the standard 44 hour overtime threshold otherwise applicable. The employer tried to draw analogies between a pier and a road. The employer first submitted that the pier is largely used by vehicles (such as garbage and maintenance trucks and emergency vehicles) and pedestrians in a manner similar to a street. Second, the employer submitted that the pier should be considered a sidewalk, given the number of pedestrians that use it, which it submitted come under the road building exemption.

The OLRB found that the work done building the pier did not constitute road building pursuant to section 13 of Regulation 285/01. The OLRB relied heavily on the interpretation principle that exceptions to the general ESA provisions should be narrowly construed, given its nature as remedial legislation.

More substantively, the OLRB determined that:

- The features of the pier relied upon by the employer were insufficient to bring the work of pier building within the exemptions of the ESA. Many other surfaces, such as beaches and parks, share these features yet are not considered roads.
- Building the pier cannot be said to have occurred "at the site of road building," as the site where the pier was being built was not a site where road building was the primary activity.
- Building the pier was not "in relation to streets, highways or parking lots" or "in relation to structures such as bridges, tunnels or retaining walls in connection with streets or highways."
- Without determining whether a pier is like a sidewalk or not, sidewalks do not come within the road building exemption.

The OLRB also relied on an earlier case for the principle that "the site of road building" refers to a site where road building is the primary, not incidental, activity.

## Key Takeaways

Employees engaged in pier building are not excluded from the overtime pay provisions of the ESA and are entitled to overtime pay. Accordingly, employers engaged in pier building should arrange employee schedules in such a way so as to avoid triggering the overtime threshold, if and where possible (or consider alternative options to meet their obligations, such as averaging agreements or time off in lieu of pay).

As the exclusions to overtime pay take away a benefit that an employee would otherwise be entitled to, adjudicators will narrowly construe those exclusions and only uphold them where it is clear the work in issue falls squarely within the exclusion. Adjudicators are unlikely to extend the application of the overtime pay exclusions to work that is arguably analogous; not only does such work not fall within the exclusion, but it could have been expressly included had the legislature intended for the exclusion to apply.