

**Control Over Working Time and Work-Life Balance:
A Detailed Analysis of the Canada Labour Code, Part III**

A Report prepared for the Federal Labour Standards Review

By

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I. Introduction

Time, like pay, provides a standard metric, and both are central elements in every employment relationship (Beaujot 2000, 24; Bosch 1999, 131). Time and pay are also key sources of conflict between employees and employers; but, unlike conflicts over pay, conflicts over time cannot be resolved by expanding the pie (Jacobs and Gerson 2004, 2). There are only so many hours in a day, and the demands on people's time – to earn an income, to have affective relationships, to care for others, and to enjoy leisure – are often irreconcilable. How time is allocated between these different spheres of social activity not only affects the well being of individuals and families (Duxbury and Higgins 2002, 2003; Higgins, Duxbury, and Johnson 2004), it also influences the level of equality between people in a society (Bosch 1999; Rubery, Smith, and Fagan 1998).

“Control over the time of the worker lies at the heart of the contract of employment” since with industrialization, employers purchased “a worker’s time rather than the products of his or her labour” (Collins 2002, 100, 101). Control over working time is about choice and power. Thus, working time has long been “at the heart of political and social debate” (Anxo et al. 2004, 1). Unable to bargain limits on employers demand for long working hours, workers and their representatives turned to the state for protection (Marx 1865-7 in Fowkes 1990). Since the mid-nineteenth century, laws imposing limits on the length of the work day have been a central and constant demand of the labour movement, and employers have resisted these attempts to interfere with their prerogative to control working time. In the nineteenth century, the first legislation limiting hours of work was designed to protect women and child workers in specific industries (Conaghan 2006; Tucker 1990). Almost immediately after World War I, the International Labour Organization adopted its first convention, which established the eight hour day and the forty-eight hour week as general standards for industry (ILO 2005, 2-6).¹ Despite these early demands, the form of legal regulation did not shift from protecting specific groups of workers to establishing general working-time standards until the end of World War II.

Through a blend of collective bargaining and legislation, a standard working day of eight hours and working week of forty hours (with companion entitlements to overtime, time-off work, and paid vacations), emerged across industrialized countries at the end of World War II and took root during the 1950s and 1960s (Bosch 1999; Campbell 1997, 201). These norms balanced protection for employees against flexibility for employers, and they were based upon a division of labour for household and caring responsibilities in which women did this work on an unpaid basis (Mutari and Figart 2001, 39).

Over the past twenty years there has been a profound change in the distribution of paid working time; the standard work day and work week are in decline. According to Lonnie Golden and Deborah Figart (2000, 2), “a social organization of time that served to synchronize hours of work and leisure for much of the 20th century is gradually disintegrating. Working time is becoming more differentiated and variable, triggered by a combination of economic, technological, and cultural influences.” These changes are being driven by supply factors, such as the increased proportion of women (especially those with young children) in the labour

¹ The Hours of Work (Industry) Convention, 1919 (No.1).

force and changes in the life-course (for example, life-long learning, and longer-life spans), and demand factors, which include digital technology, global integration and competition, just-in-time production, and twenty-four hour service provision (ILO 2005, 9; Anxo et al. 2004, 2; Tergeist 1995, 10).

The growing diversification, decentralization, and individualization of hours that people work has resulted in increasing tension between employers' business interests and workers' needs and preferences (ILO 2005, 9). Control over working time is prominent in public policy once again. The legal regulation of working time has also attracted renewed attention at the international level because of the perceived need to redistribute work to counter unemployment, employers' need for flexibility to compete efficiently, and employees' need to achieve a better work-life balance (ILO 2005, 10; OECD 1995, 2004).

The legal regulation of working time has received attention from policy makers in Canada. In 1986, the Ontario Minister of Labour appointed a Task Force on Hours of Work and Overtime to study hours of work legislation from a public policy perspective, and especially to assess the impact of changes to hours of work rules on unemployment (Ontario 1987). In 1994, the federal Minister followed suit, appointing an Advisory Group on Working Time to examine the redistribution of working time and to study how regulation affects the balance between work and family life (Canada 1994). Subsequently, there has been a flurry of changes to the working-time rules provided in employment standards legislation in several jurisdictions in Canada. These changes have been designed either to increase the flexibility of employers and employees to vary work hour standards or to provide employees with access to time off work (typically unpaid) to accommodate their health needs and family responsibilities.²

This report examines the legislation regulating working time in the federal jurisdiction in Canada, and it has four objectives: 1) to provide a detailed description of the legal regulation of working time in the federal jurisdiction; 2) to compare the blend of protection and flexibility contained in the federal legislation with that provided in other Canadian

² Changes to hours of work provisions in employment standards legislation in Ontario in 2000 and British Columbia in 2002 were specifically designed to increase employers' flexibility. By contrast, in 2002, Quebec imposed greater legislative restrictions on hours of work. All jurisdictions either added or increased parental leave during the 1990s and into 2000. Many of the changes in minimum standard legislation that were designed to accommodate family responsibilities were made in response to the federal governments changes to parental benefits under the *Employment Insurance Act* and the introduction of compassionate care leave.

jurisdictions; 3) to evaluate the effectiveness of the federal provisions in assisting employees to achieve a work-life balance and in affording flexibility to employers; and 4) to sketch a series of recommendations based on the evaluation and the evidence. It begins by identifying the elements of a working-time regime and describes working-time patterns by different groups of employees in Canada. It then moves to a discussion of the key public policy issues at stake in the legal regulation of working time. Here the focus is on how flexibility and work-life balance are defined, and how public policy trade-offs are identified, measured, and evaluated. The legal rules regulating working time in the federal jurisdiction are then described and compared with the legal standards in other jurisdictions in Canada. This description and comparison is followed by an evaluation of the existing evidence about the relationship between the federal legislation regarding working time, hours worked, flexibility, and work-life balance. The report concludes with some recommendations regarding the legal regulation of working time in the federal jurisdiction.

II. Working-Time Regimes

1. Working-Time Regimes: Components and Types

The legal regulation of working time has taken three general forms: laws aimed at the protection of particular groups of workers (such as women and children); standardized limits on working time combined with restrictions on the scheduling of work (limits on shift work, provision for rests, breaks, etc.); and the regulation of “new” working-time arrangements (part-time work, temporary work, or leave provisions, for instance).³ While the different forms co-exist, one form tends to dominate the others, although which form dominates changes over time.⁴ After World War II, the second form prevailed in most industrialized countries in the

³ This typology is based on Bosch’s (1999, 131-3) classification of ILO working-time conventions into four groups, although I have collapsed two of his groups to make the second of my categories.

⁴ The first form of regulation of hours of work was introduced in the UK in 1833 to restrict the working hours of women in factories (Lee 2004). In Canada, the 1880s factory legislation restricted the hours of work of women in manufacturing and in the 1930s legislation restricting working time that was limited to women and children was extended to men. After World War II, across the country legislation that restricted the number of hours of work employees were

OECD. The standard (or norm) of working time was “40 hours per week, distributed in equal daily segments over the daytime hours from Monday to Friday and joined with paid annual leave and public holiday entitlements equivalent to several weeks per year” (Campbell 1997, 201). The standard employment relationship, which consists of full-time, full-year continuous employment providing both a family wage and a range of social entitlements, stabilized this working-time regime. It was based on male-breadwinner/female-housewife model for allocating time between paid work and leisure (Conaghan 2002; Fudge and Vosko 2001a; Supiot 2001). This working-time norm was supported by a web of regulation at the national and international level that imposed limits on normal hours of work and premiums for long or unsocial (evening, night, and weekend) work (Supiot 2001, 59-60). As Deirdre McCann (2004, 10-11) notes, these regulations “stemmed partly from a concern for the needs of workers for both health and safety protection and for adequate time outside of paid work, usually conceptualized as ‘leisure’ time in the gendered assumption that it would not involve other forms of labour.” The male breadwinner model of working life and the legal limitation of working hours led to a definition of “working time” and “leisure time” that resulted in socially necessary but unpaid work “being virtually ignored” (Supiot 2001, 60).

Legally prescribed norms operate alongside voluntary and customary norms (including those derived from collective bargaining) to create a national system of regulation called a working-time regime. There are three general types of regulation: 1) state-initiated in which statutory regulation and state interventions are crucial; 2) negotiated regulation in which collective agreements at the industrial and plant level dominate; and 3) market-based regulation in which agreements on working time are reached at the enterprise or individual level (Lee 2004, 31). While a specific form of regulation may dominate in a specific regime (for example, state-initiated in France as compared to market-based in the US and UK), most (like the federal jurisdiction in Canada) are composed of all three. Moreover, the relationship between the legal regulation of working time and actual work hours is neither direct nor

permitted to work in a week and providing for annual vacations as well as general holidays was gradually enacted. Although British Columbia had legislation providing for maternity leave as early as 1921, most jurisdictions in Canada did not follow suit until the 1960s, and it was not until the 1970s, after the unemployment insurance scheme began to provide maternity benefits that such leave became universal. In the 1980s, attention shifted to parental leave and part-time work (Brennan 2000).

uncontroversial. Different legal approaches and divergent labour markets as well as the prevailing institutional and regulatory framework in a country have a profound impact on the actual hours worked by different groups of people (Lee 2004, 32).

Working-time regimes are a major influence on working-time practices. They “act to limit or extend variations in working hours for full-timers, promote or discourage part-time work and unsocial hours working, and influence the terms and conditions under which overtime, unsocial or atypical work contracts are taken” (Rubery, Smith and Fagan 1998, 75).⁵ Differences in working-time regimes lie in the specific characteristics of national institutions, the features of particular sectors, and the strategies adopted by firms and trade unions (Bosch 1995, 17). However, it is possible to classify different working-time regimes by identifying the key components of a regime and looking at the relationship between them and working-time practices.

The key components of a working-time regime are: 1) restrictions on the hours and scheduling of work; 2) paid time-off work; 3) leaves of absence from work; and 4) the treatment of working-time arrangements that deviate from the norm. The first component is the most complex since it is as much involved with establishing procedures for authorizing exceptions and extensions to hours of work rules as it is with setting standards. Each working-time regime comprises a model or norm of standard working time and a series of carefully crafted provisions for formal variation from this norm. In addition, there is also “informal variation,” which occurs when the employment relationship falls outside of the scope of regulation. Iain Campbell (1997, 201) explains that:

The generalization of a norm of standard working-time does not mean that everyone, or even a majority of the economically active population, must work according to the norm. Variation can arise in two main ways – either formally or informally. Formal variation arises on the platform provided by the model of standard working-time, and it represents the second fundamental component in the standardization of working-time arrangements. It occurs as a result of provisions for deviation from the standard through leave, flexitime arrangements, overtime, short-time working, work in unsocial hours, shift systems and non-standard employment contracts. Informal variation, by contrast, arises in the gaps in the regulatory system.

⁵ This claim is based upon empirical research undertaken by the European Commission’s network of experts on women’s employment and covers working-time practices in the twelve countries that were members of the European Union in 1994.

The working time regime that was based on the standard employment is under increasing pressure.⁶ On the demand side, the process of globalization, the intensification of competition, the spread of digital technologies, and the rise of just-time production and the 24-hour service economy have led to the proliferation of flexible forms of working time that diverge from the standard. Standard reference points in working time regulation, such as daily and weekly working time or the boundary between standard working time and overtime, are increasingly blurred (Bosch 1999). On the supply side, demographic changes such as the feminization of the labour force, the increasing labour force participation of women with young children, the shift to dual-earner households, and the aging of the population have led to a variety of working-time arrangements that do not conform to the norm. Part-time work has increased, as have the range of family-related leaves to which workers are entitled.

Working-time regimes have significant distributive consequences. A number of researchers have examined working-time regimes in Europe and have developed taxonomies that highlight the relationship between working time and gender equality.⁷ Using a taxonomy that focused on long working hours and high levels of unsocial hours in twelve countries in Europe in the mid-1990s, Jill Rubery, Mark Smith, and Collette Fagan (1998, 72) found a correlation between particular working-time norms and national regulatory regimes, with varying distributive effects for men and women. They discovered that although women performed the bulk of the domestic labour across Europe, the extent and degree of the inequality in women's paid work varied between countries, and depended upon the national working-time regime. Using a framework that emphasizes the degree of flexibility in work hours and relative gender equity in work schedules and economic roles, Deborah Figart and Ellen Mutari (2001, 851-2) identified four working-time regimes in the European Union with very different outcomes for gender equity. They found, in general, that the countries with

⁶ Rubery, Smith and Fagan (1998, 91) identify "three types of pressures for the restructuring of working time...: to increase competitiveness, to reduce unemployment and to reconstruct the employment contract to make it more compatible with the trend towards dual-earner families."

⁷ Mutari and Figart (2001, 39) define gender equity as "a similar distribution of men and women across possible work schedules, along with higher levels of women's labour force participation and a relatively narrow wage gap. In addition, long hours jobs should be kept to a minimum so that breadwinners can be caregivers." Rubery, Smith, and Fagan (1998, 72) define equity in terms of the time allocation between the sexes and the time allocation between wage and non-wage work for both sexes.

shorter workweeks have less divergence between men's and women's labour market behaviour (Figart and Mutari 2001, 866).

Several researchers have found that divergent patterns of working time are associated with the institutional and regulatory environment in which they operate (Anxo 2004; 63-4; Bosch 1999; Jacobs and Gerson 2004, 146). Deregulation and wage inequality exacerbates the polarization (too few and too many) of hours of work (Bosch 1999). Countries with weak and ineffective statutory regulation, decentralized bargaining, and individual agreements exhibit the largest variation in working time across industries and individuals (Anxo, 2004, 64). The increase in annual working time of full-time employees is particularly marked in countries where income inequalities have widened and labour markets have been deregulated. Canada is an example of such a country (Bosch 1999, 135, 137, Table 3; Morissette, Myles, Picot, and Garnet 1994; Morissette and Johnson 2005).

2. Hours of Work in Canada

In Canada, there has been a growing diversification, decentralization, and individualization of working time. Patterns of working time have polarized and the prevalence of the standard working week has declined. By the mid-1960s, the standard working week levelled off and stabilized at thirty-seven to forty hours of work over five days (Ontario 1987, 13). Between 1976 and 1998, the proportion of employees working thirty-five to forty hours declined from sixty-five per cent of all workers to fifty-four per cent, while the proportion of employees working more or fewer hours increased.

This diversification in working-time arrangements has accompanied the increasing labour force participation of women. Men and women have very different work schedules (Sheridan, Sunter and Diverly 1996, C-6). Women are (and historically have been) far more likely than men to work short hours of employment. In 1998, fifty per cent of women and just twenty-eight per cent of men worked less than thirty-five hours per week (Hall 1999, 30).⁸ Men outnumber women at the long hours end of the distribution. At least twice as many men than women worked between forty-one and forty-nine hours a week (fifteen per cent compared with seven per cent), and women were much less likely than men to work very long hours. In 1998,

⁸ In part, this difference is due to the fact that women's absence rate is almost twice that of men.

six per cent of men and one percent of women worked more than sixty hours a week (Hall 1999, 30).

Hours worked also vary by industry and occupation. Long hours are more common in good-producing industries (where men predominate), and short hours more common in service-producing industries (where women are crowded) (Hall 1999, 32). Trades and production workers put in the most paid overtime (Hall 1999, 36). Type of occupation also accounts for some of the variation in hours worked; long hours are common among managers. In 1998, thirty-eight per cent of managers worked more than forty hours a week, with fourteen per cent putting in between forty-nine and fifty-nine hours, and another eight per cent working sixty hours or more (Hall 1999, 33). Not surprisingly, men are much more likely to be managers than are women. Between 1998 and 2004, the percentage of managers in the labour force ranged from 5.8 to 5.4, whereas the percentage of women managers in the labour force ranged from 3.2 to 3.1.⁹ Professionals also work long hours; nearly twenty-five per cent worked more than forty hours a week. However, professionals were less likely than managers to work very long hours (only four per cent worked over sixty hours) and more likely than managers to work less than thirty-five hours a week (thirty-eight per cent). Managers and professionals were the least likely to work paid overtime, but the most likely to work unpaid overtime (Hall 1999, 36).¹⁰

The continued gender division of labour within the family is linked with women's paid employment. Despite the huge increase in women's labour force participation since the 1960s, their share of unpaid work has remained the same, at about two-thirds of the total.¹¹ This domestic work includes caring for children and other family members, such as elders, housework, and emotional labour. In 2001, women were twice as likely as men to spend at least thirty hours a week on cooking and cleaning or on childcare, and twice as many men as women say they do no domestic work at all. Women also spend more time caring for elderly

⁹ Labour Force Historical Review, "Labour Force Estimates by Detailed Occupation, Sex, Canada, Province, Annual Average, 1987-2004, File #cd1t06an.ivt.

¹⁰ Managers and many professionals in most jurisdictions in Canada are excluded from the legal provisions pertaining to overtime pay, see Charts V and VI.

¹¹ Statistics Canada, *Women in Canada 2000: A Gender-based Statistical Report* (Ottawa: Statistics Canada, 2000), 111. Women with children are still less likely to be employed than women without children and women who are lone parents are less likely than mothers in two parent families to be employed.

parents than do men, and they are more likely than men to reduce their hours of paid work to accommodate caring responsibilities (Jenson 2004, 14.) Unpaid labour is distributed unequally even when both men and women are working full time. On average, women work two more weeks a year than men do when both paid and unpaid work are combined.¹² Even when employed full-time, women are responsible for the bulk of the work of looking after their families and households.

The proportion of women working part-time is twice as high as men (Comfort, Johnson, and Wallace 2003, 18-22; Cooke-Reynolds and Zukewich 2004, 24). The growth in part-time work outpaced the growth in the full-time workforce by a ratio of three to one between the late 1970s and 1990s. Part-time employees represented twenty per cent of the labour force in 1999 (Comfort, Johnson and Wallace 2003, 10). Although a third of part-time employees work short hours because they cannot find full-time jobs, the majority report working part-time by choice. One of the most frequently cited reasons by women for working part-time is family responsibilities. For over thirty years, women have consistently represented seventy per cent of the part-time workforce (Comfort, Johnson and Wallace 2003, 10). And although the quality of part-time jobs differ (indeterminate and on-going part-time jobs provide more benefits than do temporary ones), full-time work is much more likely to provide a full array of benefits than any type of part-time work (Zeytinoglu and Cooke 2005, 56-7). The data suggests that the flexibility that women gain through part-time work bears costs in terms of job quality (Comfort, Johnson and Wallace 2003, 10).

Recent survey data reveal a rising trend in both the incidence of absences from paid work and time lost from paid work on account of illness or disability and personal and family demands (Akyeampong 2005, 75). On average in 2004, each full-time employee lost 9.2 days over the year for reasons including their own health and personal and family demands; women working full-time lost more days (10.9) than men (who lost 8.0).¹³ The presence of preschool – age children exerts a strong influence on work absences, although the growing prevalence of family-leave entitlements is eliminating the differences between men and women in work absences for family reasons. By 2004, women with preschool-age children lost 4.5 days for

¹² Freeze, C., 'Women outwork men by two weeks every year', *The Globe and Mail*, 13 March 2001, A1, 9, reporting on Statistics Canada General Social Survey: Time Use (November 1999), available online at: <http://www.statscan.ca:80/daily/English?991116/d991116a.htm>.

¹³ Women on maternity leave were excluded from these calculations.

personal or family responsibility, while men lost 4.3; in 1997, women lost 4.2 days, while men lost 1.8 (Akeampong 2004, 76). Industry, occupation, union coverage, job status, workplace size, and job tenure were all factors that influenced work absence rates. Workers in managerial jobs recorded the fewest days lost, and workers in unionized jobs, jobs in large workplaces, and jobs with longer tenure registered more days off (Akeampong 2005, 77).

The average weekly hours in Canada appeared to decline in three consecutive years – 2001, 2002, and 2003 – before rising slightly in 2004. The decrease averaged at 1.4 hours per week per worker, which in annual terms amounted to a drop of two weeks of work. This decline led some economists to question Canada’s employment record since there is generally a correspondence between increased employment and increased hours worked (Galarneau, Maynard, and Lee 2005, 5). However, detailed analysis of work hours indicated that failure to account for general (statutory) holidays in the reference week contributed to half of the decline in hours work. Once this methodological problem was controlled for, the decline amounted to an annual average of just under one hour per week per employee. Parental leave, which was extended from 18 to 35 weeks across Canada in 2001, accounted for nearly one-third of the drop. Vacation (annual) leave, which tends to increase with the age of the worker, was the second biggest factor contributing to the decline in hours worked. Moreover, the increase in vacation leave is also “partly attributable to the new union demands, which are oriented more toward a better balance between work and personal life” (Galarneau, Maynard, and Lee 2005, 10). The increased propensity for part-time work also contributed to the decrease in hours worked. Thus, instead of reflecting a lack of economic vitality, the decrease in adjusted hours reflected “the aging of the workforce and the greater value assigned to a better balance between work and personal life” (Galarneau, Maynard, and Lee 2005, 14).

III. Public Policy and the Legal Regulation of Working Time

Much has changed in the Canadian labour market since the key features of federal law regulating hours of work were put in place in the mid-1960s (Fudge and Vosko 2001a; Jenson 2004). There is growing misfit between the legal standard and working time practices. The related policy question is how we should respond. Historically, the legal regulation of working

hours has been a contentious issue; it raises questions of control that go the heart of the employment relationship and it has significant distributive implications. Moreover, it involves a number of policy goals; some of these goals compete, and others complement one another.

In a recent policy brief, the OECD (2004, 6) cautioned that:

a first lesson for policymaking is that working time is at the nexus of a number of policy concerns, including achieving strong economic growth, an inclusive labour market that supports high employment rates and conditions that allow employees to achieve a balance between work and the rest of their lives. This means that policymakers should avoid focusing narrowly on how work hours affect a single policy objective and be alert to potential trade-offs. For example, the flip-side of the growth advantage associated with an increase in per capita hours is the “time crunch” faced by working parents and the possibility that a “long hours culture” is undermining the work-life balance in certain professions. Similarly, flexibility in working hours may be detrimental to family life if it takes the form of non-standard work schedules dictated by the logic of just-in-time staffing for the “24/7” economy, rather than an increased chance for workers to select the work schedule that best reconciles their work with their family life.

In order to determine the policy trade-offs, it is important first to identify the policy interests at stake, and then it is necessary to assess the benefits and the costs of different policies. This is not a simple task. There are questions of the definition and the meaning of terms, as well as issues relating to the identification of relevant interests and principles involved regarding working time. For example, the meaning of “flexibility” is not at all clear. The term denotes a wide variety of different practices, even when it comes to flexible working time arrangements, and which arrangements are considered to be flexible depend both upon perspective and interest (Bosch 1995, 38; Fredman 2005; Picchio 1999; Messenger 2004, 153). Assessing the effects of different policies is also complex; costs and benefits can be direct and indirect, measured on a short-term and long-term basis, and they can be distributed in a variety of ways.

Working-time flexibility and achieving a better balance between work and life are the issues that consistently dominate the contemporary working time debate (OECD 2004). The following sections examine what these terms mean, identify the policies associated with them, and discuss the research that has examined the general relationship between working-time regimes, hours of work, and public policy.

1. Flexibility

There has been an increased interest in flexible scheduling of work by both employers and employees (OECD 1995).¹⁴ However, the use of the common term flexibility to express both employers and employees pressures for changes to the working time standards does not mean that their interests are identical or that the range of policies used to make paid working time more flexible are compatible. Campbell (1997, 209) argues that

a more scrupulous examination ... reveals that they involve two opposed conceptions of flexibility. For employers the common theme has been the desire to increase the flexibility of the supply of labour time in order to perceived constraints of the enterprise ... For employees, on the other hand, the common theme has been a desire to secure greater flexibility from the employing enterprise in order to respond to the constraints in the individual's extra-enterprise activities and responsibilities.¹⁵

The question of flexibility often comes down to the issue of control; who gets to choose how hours of work are scheduled. Laws and policies influence not only who gets to make the choices, but the range of choices that can be made. Different choices involve different trade-offs.

In the 1980s, pressures for flexibility from employers mounted. Employers wanted arrangements for the variable distribution of working hours. These are methods of organizing working time which allow for its adjustment in accordance with variations in the volume of an undertaking's activities over a certain period, by extending hours over their normal length on certain days and shortening them on other days, so that the total length of the working hours over the period does not exceed certain limits.¹⁶ Transposed into legal form, according to ILO researcher Deidre McCann (2004, 12), "flexibility" has involved the relaxation of restrictions on varying and individualizing working time schedules and on work during unsocial hours introduced with the goal of increasing capital utilization and extending opening hours" (McCann 2004, 12).

¹⁴ For example, "an overriding finding," which emerged from a recent Study of Federal Labour Standards was that "employers and workers expressed a general desire for more flexibility in federally regulated workplaces to address workplace change" (Canada HRDC 2000, 41).

¹⁵ Employers tend to want flexibility to reduce labour costs or to schedule labour to fit the needs of the operation in changing, competitive, and increasingly global markets. Employees tend to want more flexibility to design their own work schedules and the labour force is increasingly heterogeneous in terms of preferences for scheduling working time.

¹⁶ This technique is known as averaging in most jurisdictions across Canada, although in Quebec it is known as staggering.

Overtime hours, the cost of which was reduced through the introduction of reference periods over which overtime premiums and working time limits can be averaged, has been very popular amongst certain employers. Other employers prefer to use part-time work to increase flexibility. Part-time work tends to be associated with lower wages, fewer benefits, and less opportunity for career advancement (Fagan 2004, 140). Manufacturing and retail appear to follow different paths in scheduling working time. In manufacturing, which is capital intensive, hours of work are extending, whereas in retail, where increased costs are incurred through longer opening hours, cheaper part-time work is substituted for more expensive working-time arrangements (Bosch and Tergeist 1995, 211-2).¹⁷

In the 1990s, employees' preference for increased flexibility in order to balance work and personal and family life reached the public policy agenda. The increased labour force participation rate of women with young children, the growth in dual-earner and lone-parent households, the aging population, the declining birth rate, and the need for longer education and life-long learning have led to a demand for increased diversity in working hours. In part, this demand for a variety of different working-time arrangements has led to the increase in non-standard work, especially part-time work (Fagan 2004; Fredman 2005). But the problem with non-standard work as a solution to the time crunch is that much non-standard work is poorly paid and lacking benefits, which makes it difficult for these workers, the majority of whom are women, to be economically self-sustaining (Fredman 2005; Fudge 2005). The difficulty in combining paid work with personal needs and family demands has led to increased stress, and research has begun to reveal the costs to individuals, employers, and society in general (lower fertility and higher health care costs) of the conflict between work and life (Duxbury and Higgins 2002, 2003; Higgins, Duxbury and Johnson 2004; OECD 2005).

Working-time flexibility for employees is about work-life balance, and it is more accurately described as "employee control over working time". Employee control over working time is "the ability of individual workers to increase or decrease their working hours and to alter their work schedule" (Berg et al. 2004, 331). Moreover, it is important to contrast "individual control over working time with collective control, which may have a positive or negative effect on individual control" (Berg et al. 2004, 331).

¹⁷ In Canada, retail has a very large proportion of part-time work which is less costly than full-time workers (Bellemare et al. 2004, 100).

Flexibility is also used to describe forms of regulation that allow for a variety of different working-time arrangements and that involve a range of techniques – other than command and control – for establishing standards and enforcing the norms. Individual opt-out and collective derogations are legal techniques of providing flexibility to deviate from general standards and restrictions. The legal requirement to prepare risk management plans that replace legal rules is an example of a more flexible form of regulation.¹⁸

The Canadian government is on record at the ILO as wanting more flexible legal norms and more flexible forms of regulating working time. The Committee of Experts at the ILO reported that, “the Government of Canada points out that the provisions of Conventions No. 1 and 30,” which provide the standard eight hour day and forty-eight hour week,

are too restrictive to meet the needs of employees for flexible and varied work arrangements, the requirements of employers and today’s dynamic and global economy. While the underlining principles of ensuring protection for workers are still relevant and important, the inflexible approach to the regulation of working time embodied on these instruments no longer appropriate or desirable (ILO 2005, 87).

The difficulty in balancing flexibility with protection is that as working time becomes more flexible there is a risk that working hours will actually become longer since they can no longer be so easily monitored (Bosch 1999, 148). Thus, there is a strong possibility that employer-driven flexibility and regulatory flexibility may exacerbate work-life conflict for employees.

2. Work-life Balance

Work-life policies build upon the work-family and family-friendly policies that began to be popular in the 1980s. In the late 1990s the term “work-life” replaced “work-family” to signal that conflicts between work and life can potentially affect all workers, not just caregivers and family members (Johnson, Lero and Rooney 2001, 3). The increased attention to the social, medical, and work consequences of the stress resulting from work-life conflict helps to explain the broader focus (Duxbury and Higgins 2002, 2003; Higgins, Duxbury and Johnson 2004). So, too, is the growing recognition of the need to develop working-time policies that are attentive both to life-cycle and to the need for life-long learning.

¹⁸ A Canadian example of this type of flexibility is in the railway sector (see Appendix I for a brief discussion).

The health and safety of workers was the initial rationale that was offered for limits on the hours of work (ILO 2005, 10), and it continues to feature as a component of work-life policies. However, the policy focus is increasingly upon assessing the extent and costs of work-life conflict. Linda Duxbury and Chris Higgins, who have been directing a major research project exploring work-life conflict and its costs in Canada,¹⁹ conceptualize work-life conflict

to include role overload (RO) (having too much to do and too little time to do it in) as well as role interference (when incompatible demands make it difficult, if not impossible, for employees to perform all their roles well). Role interference, in turn, can be divided into two factors: family to work interference (FTW) and work to family interference (WTF). In the first case, interference occurs when family-role responsibilities hinder performance at work..... In the second case, interference arises when work demands make it harder for an employee to fulfill their family responsibilities (Duxbury and Higgins 2001, 3).²⁰

There is now a growing body of reliable data of different kinds (detailed surveys, shorter questionnaires, and qualitative studies) that demonstrate the costs of the growing conflict between work and life. Research on the health implications of working long hours has revealed that an increase in working hours is associated with increased cigarette and alcohol consumption, weight gain, and depression (Sheilds 2000, 49). Work-life conflict, especially role overload and work to family interference, results in a decline in physical and mental health, lower job satisfaction and commitment, and an increase in absenteeism and employee turnover. The evidence is that this conflict not only detrimentally impacts upon the quality of life for workers and their families, but that employers and society are also bearing the costs of this conflict (Duxbury and Higgins 2002, 2003; Higgins, Duxbury and Johnson 2004). There is also increasing concern that work-life conflict is contributing to the declining fertility rate in Canada, which has long-term implications for the country's ability to sustain economic growth and prosperity (Fredman 2005; OECD 2005, 18).

The goal of work-life balance policies is to institutionalize a form of family-friendly flexibility that enables workers to allocate their time between paid and unpaid work in order to meet their individual needs and domestic responsibilities (ILO 2005, 10). Family-friendly flexibility makes it easier for individuals and households to combine family life and working

¹⁹ The study is discussed in Part V.

²⁰ Duxbury and Higgins use a child's illness preventing attendance of the work as an example of FTW interference and long hours preventing attendance at a family function as WTF interference.

life by providing employees with the right to change their working hours to accommodate changes in family composition and to adjust to sudden changes in the family timetable. Key components of work-life balance policies are leave for family responsibilities and flexible working-time arrangements that allow employees to control the hours that they work.

3. Policy Trade-Offs

This Part began by quoting from a recent policy brief of the OECD (2004) which identified some of the policy goals – economic growth, inclusive employment, and work-family balance – that policymakers must be attentive to in designing working-time regulations. Moreover, a gender-sensitive analysis, which is attentive to the need to provide equal opportunities for employment to women and men and to value unpaid care work, is also a crucial element in public policy. In fact, the OECD (2005, 11) identifies the promotion of gender equality as a key component of family-friendly policies. How these goals are ranked in importance will shape how the policy trade-offs are evaluated. The time frame for assessing the impact of the policies (whether short or long term) as well as the level of analysis (individual enterprise or societal) at which they are assessed will also influence the evaluation.

It is useful to identify and to evaluate some of the trade-offs involved in a specific policy. Flexibility to use overtime and long hours is a good example. In the short term, increasing working hours moderately and making them more flexible is likely to enhance the productivity of an individual enterprise. However, using excessively long hours is likely to have the opposite effect. There is a substantial body of empirical evidence demonstrating that reductions in excessively long hours of work (over 48 hours per week) have resulted in substantial productivity gains (Anxo et al. 2004, 205-6).

Moreover, a policy of extending hours of work and reducing overtime payments is also likely to either to reinforce or to exacerbate inequality between women and men in the division of labour between paid and unpaid work, and control over economic resources. This is because increasing limits on maximum hours of work and reducing the overtime premium through averaging agreements is likely to drive up employer demand for average overtime hours per employee (due to the reduced short run marginal cost of overtime) and make working weeks and schedules more unpredictable (Gonas 2002, 63). This policy “runs the risk of actually making workplaces more family unfriendly than friendly, thus harming worker ‘utility’ on the

balance” (Rubery, Smith and Fagan 1998, 72). Moreover, since women, who continue to shoulder the heaviest burden of caring responsibilities, have a stronger preference than men for flexible working hours, they are “vulnerable in relation to employer-driven flexibility and changing work hours” (Gonas 2002, 63). Combined with the unequal gender division of labour in the household and family, employer-driven working-time flexibility will likely reinforce gendered and unequal patterns of working time, which, in turn, will likely reinforce occupational segregation and labour market segmentation (Gonas 2002, 63; Rubery, Smith and Fagan 1998, 72).²¹ These kinds of policies are also likely to reinforce a declining fertility rate and create barriers to women’s full participation in the labour force, which undermines economic growth in the long-term (Fredman 2005; OECD 2005 18, 207).

Part IV - The Working Time Regime in the Canada Labour Code, Part III: Description and Comparison

The regulation of working time in employment standards legislation across Canada, including the *Canada Labour Code, Part III* (the *Code*) can be divided into three distinct components. The first, and by far the most complex, is the regulation of hours of work that employees can be permitted or required to work. Hours of work rules establish standard hours of work, overtime premiums, maximum hours of work, and minimum daily and weekly rest periods. They also provide various mechanisms for injecting flexibility into the general legal norms or standards. The second component is concerned with general entitlements to paid-time off work, either in the form of general (or statutory) holidays and paid vacations (annual leave). The third component addresses leaves of absences from work for specific types of reasons, typically, although not exclusively, related to health and family responsibilities (such as illness, pregnancy, parenting, and caring).

This taxonomy provides a useful framework both for describing the components that make up the working-time regime in the *Code* and for comparing it with provincial and territorial regimes. The key features of each of the three main components of the federal working-time regime are identified and sketched, and then they are compared with how

²¹ Leave policies can also be designed either to reinforce or to challenge the traditional gendered division of unpaid care labour provided by members of a household (Fredman 2006).

working time is regulated in other jurisdictions in Canada (see Appendix II for a detailed description of the hours of work rules in the federal jurisdiction and Charts I to VI for a comparison with key elements in British Columbia, Ontario, and Quebec). Working time rules across Canada are not only very detailed and diverse, they are in a state of flux. Although only a few jurisdictions have significantly revised the working time rules in their minimum standards legislation recently, the process of introducing specific changes and housekeeping amendments is on-going. The focus here is on the key elements and distinctive features of the different components, and this comparison will concentrate on the extent to which each component either protects or benefits employees by providing them with control over their working time or affords flexibility to employers by providing them with control over the hours that employees work.

1. First Component: Hours of Work

Hours of work laws influence the supply and demand for labour in two ways – by imposing obligations on employers to pay an overtime premium once employees work beyond specified thresholds and by establishing limits on maximum hours of work and requirements for minimum rest periods for employees. Standard work days and work weeks function as triggers or thresholds for overtime pay. Limits on maximum hours of work and requirements for minimum rest periods prohibit employees from working hours in excess of the limits or during rest periods.

However, laws that impose restrictions or requirements on hours of work also provide mechanisms to provide employers with flexibility to deviate from these restrictions or requirements. There are a variety of methods for providing flexibility from overtime requirements and restrictions on hours of work: 1) exemptions; 2) averaging or flexible scheduling; 3) permits from a government official; 4) regulations that provide special rules for specific sectors; 5) emergencies; and 6) custom or practice. The more requirements and restrictions imposed on hours of work, the greater the number of mechanisms for providing flexibility. The number of different elements that make up hours of work rules together with the wide variety of ways that they can be combined, means that hours of work rules are very detailed and complex, making it difficult to compare across jurisdictions.

The *Code* provides both a standard and maximum work week, as well as a standard work day. In comparison with other jurisdictions across Canada, hours of work in the federal jurisdiction are highly regulated. All jurisdictions in Canada provide a standard work week which requires an overtime premium to be paid once an employee works a set number of hours in a week. But less than half also have a daily overtime trigger. Moreover, there is greater variation regarding maximum hours of work. Many jurisdictions do not impose limits on the maximum hours of work in a week. However, a few that do not impose a maximum weekly limit on hours work provide employees with the right to refuse overtime, although most do not. Several jurisdictions provide maximum daily hours of work either directly or indirectly by imposing minimum daily rest requirements. Jurisdictions that impose daily or weekly limits on hours of work typically provide employers with the flexibility to exceed these limits in the case of emergencies.

Since the *Code* imposes daily and weekly overtime thresholds and maximum hours of work in a week, it provides various mechanisms for injecting flexibility into these requirements and restrictions. These mechanisms are: 1) exemptions; 2) averaging agreements (for overtime and maximum hours of work); 3) modified work schedules (for overtime); 4) permits for excess hours; 5) regulations for specific sectors or occupations; and 6) emergencies. In most situations, the *Code* allows employers to vary the hours of work provisions established in the legislation if the employer obtains the consent of the union that represents the employees. If the employees are not represented by a trade union, in most cases the *Code* requires the employer either to obtain the consent of a majority of the employees affected or the permission of a designated official. However, there is no requirement to obtain the consent of an employee, the majority of the employees, their union (if any), or a government official where the nature of work of an establishment is such that it requires that the work of an employee be irregularly distributed. The number of restrictions combined with the variety of mechanisms for injecting flexibility into the working-time rules makes the hours of work rules in the *Code* very complex.

The following description of the main features of the working time provisions in the *Code* breaks the rules into their component parts, and then compares each component with the distinctive features in other jurisdictions. This comparative analysis both draws upon, and is supplemented by, six charts located at the end of the Report. Charts I, II, III, and IV provide a

schematic outline of the key elements of the hours of work provisions in the federal jurisdiction, British Columbia, Ontario, and Quebec, respectively; Chart IV provides a list of the occupations and industries that are exempted from the hours of work provisions in these four jurisdictions; and Chart VI presents how all of the jurisdictions across Canada treat managers when it comes to hours of work rules.

Scope of application

The hours of work provisions apply to employment, employees, and employers connected with the operation of any federal work, undertaking or business, to any corporation established to perform a function or duty for the Government of Canada, and to any Canadian carrier that falls under the definition in section 2 of the *Telecommunications Act*.

Exemptions

Federal

There are a number of exemptions to hours of work rules in the *Code*. While most employees of Crown corporations are covered by the hours of work provisions, federal public service employees are not. Managers and designated professionals are exempt from overtime entitlements and limits on maximum hours of work. The managerial exemption is interpreted narrowly and is confined to employees who exercise powers of independent action, autonomy, and discretion over matters of importance, and who have authority to make final decisions to hire, fire, promote, transfer, or discipline employees.²² There are specific regulations for many industries. Some of these regulations exempt the employees in the industry or undertaking from the hours of work provisions entirely. Other regulations provide specific rules for that industry or undertaking.

Comparison

²² The question of identifying whether or not an employee is a manager typically is decided in relation to the unjust dismissal provisions under Part III (see *Leontsini v. Business Express Inc.*, [1997] F.C.J. No. 26 (Fed. Ct); *Canadian Imperial Bank of Commerce v. Bateman*, [1991] 3 F.C. 586 (Fed. Ct.); *Island Telephone Co. v. Canada* (1991), 50 F.T.R.161 (Fed. Ct.).

Most jurisdictions exclude managers, supervisors, professionals, and Crown employees from the hours of work rules (see Chart V). Only Manitoba, New Brunswick, and Prince Edward Island do not specifically exclude managers from standard work hours and overtime provisions (see Chart VI).²³ Several jurisdictions also provide regulations that either exempt the employees in an industry or undertaking from the restrictions on hours of work or provide rules specifically designed for the industry or occupation. There are few exemptions in the Atlantic provinces because there are few restrictions on, and requirements for, hours of work. However, as Chart IV indicates, there are numerous exemptions from hours of work provisions in British Columbia, Ontario, and Quebec; while many of the exempted occupations overlap in these jurisdictions (for example, farm workers, many professionals), several are *sui generis* (for example, in British Columbia faculty members are excluded and in Ontario massage therapists and swimming pool installers are).

Relationship Between Statutory Standards and Collective Agreements

Federal

In general, the *Code* provides minimum standards that prevail over collective agreements. However, if employees are covered by a collective agreement, the union can authorize variations from the legislative standards in cases where the variation is permitted.

²³ Despite the fact that managers are not specifically excluded from the overtime provisions in the Manitoba *Employment Standards Code*, in *Nygard International Partnership Associates (Re)*, [2005] M.L.B.D. No. 1, Case No. 735/03/ESC, the Manitoba Labour Board considered whether the manager in that case was an employer under the *Code* and thus excluded from overtime pay. The Board concluded that the manager was not an employer under the *Code*, and thus was entitled to overtime pay. However, the Manitoba Court of Appeal granted leave to appeal from the Board's decision on other questions, including whether the Board "erred in law when it decided that an employment contract that presumes to provide a salary 'inclusive of all hours required to be workers' is inconsistent with the *Code*" (*Nygard International Partnership Associates (Re)*, [2005] M.J. No. 309 (Philp J.A. Man. C.A.)).

Moreover, the officials who administer the Manitoba *Employment Standards Code* interpret the term "employer" so as to exclude managers for the purposes of the right to refuse overtime. Given the fact that employment standards legislation is remedial legislation which the Supreme Court of Canada has characterized as benefit-conferring legislation that ought to be given a broad and liberal interpretation (*Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27), it is questionable whether this interpretation of employer as excluding managers is legally sound.

Comparison

The British Columbia legislation was amended in 2002 to exempt any collective agreement from the statutory hours of work rules if it contains any provision respecting hours of work or overtime. The provisions relating to hours of work in Prince Edward Island's *Employment Standards Act* do not apply to employees covered by a collective agreement. Other jurisdictions, such as Ontario, provide that unions can authorize variations from hours of work standards on behalf of employees.

Standard Hours of Work and Overtime

Federal

The standard hours of work is eight in a day and forty in a week, and these standards function as daily and weekly thresholds for entitlement to overtime pay of one and a half times the regular wage for every hour worked above the standard. The *Code* provides flexibility to employers for overtime obligations by permitting overtime averaging, providing for modified work schedules, allowing work practices to prevail over legal rules in limited circumstances (switching shifts between employees), and designing special rules via regulations for specified industries.

Overtime averaging

Overtime averaging provides employers with the flexibility to ignore the requirement to pay overtime after eight hours in a given day or forty hours in a given week and allows them to determine overtime entitlements at the end of the averaging period. Overtime averaging is only available where the nature of the work of an industrial establishment requires irregular distribution of hours of work and such a requirement is normally caused by external factors (demand and climate, for example) over which the employer has little control.²⁴ The overtime averaging provisions are designed to assist businesses that are traditionally seasonal by providing them with the flexibility to reduce overtime costs. However, there are limits on overtime averaging agreements, including the prohibition on exceeding the maximum hours of

²⁴ Typical examples are non-driving employees in the moving business and employees in seed operations.

work limit (which is forty-eight hours in a week). There is no requirement for Ministerial permission or for the employer to obtain the consent of an affected employee, the majority of the employees, or a union representing the affected employees in order for an overtime averaging agreement to take effect. There are detailed rules regarding averaging agreements that stipulate notice requirements.

Modified Work Schedules (Compressed Work Weeks)

Modified work schedules (typically for compressed work weeks) provide an alternative method for employers to obtain flexibility in scheduling and reduce overtime costs. Unlike overtime averaging agreements, these schedules are not limited to situations in which the nature of the work requires an irregular distribution of hours of work. However, in order to take effect, modified schedules require either the consent of the union that represents the employees or, in situations in which the employees are not represented by a bargaining agent, the support of seventy per cent of the affected employees. Moreover, there are limits on modified work schedules – ten hours a day for four days per week. Where a modified work schedule is in effect, an employee is only entitled to overtime for hours worked in excess of his or her regular daily hours of work.²⁵ The *Code* and regulations set out detailed rules regarding modified work schedules stipulating notice requirements, the conduct of votes, and the duration of the schedule.

The *Code* does not provide for the right to refuse overtime, nor does it permit employees to take paid time off work in lieu of receiving overtime pay.

Comparison

All jurisdictions provide standard work weeks. Nine jurisdictions set the standard at forty hours, although the standard work week ranges as high as forty-eight hours. Eight jurisdictions also provide a standard work day of eight hours. In the majority of jurisdictions, including federal, the overtime rate is one and a half times the regular wage. The overtime rate is time and a half the minimum wage in New Brunswick and in Newfoundland and Labrador, while in British Columbia it is double the regular hourly wage after twelve hours in a day.

²⁵ For example, an employee who works four ten-hour shifts is entitled to overtime for any hours worked in excess of the ten scheduled hours per day or forty hours per week.

Most jurisdictions permit time-off work at a rate of one and a half hours off work for every hour of overtime in lieu of overtime pay. Several jurisdictions provide a system for banking overtime. Most require that time off be taken within three months from the date on which the overtime was earned, and that time off or overtime pay be finalized within twelve months of that date.

Some jurisdictions (Manitoba, Quebec, and Saskatchewan) that do not impose restrictions on maximum hours of work in a week allow for an approved compressed work week or averaging provisions that exempt employers from the overtime premium and the right to refuse overtime (if there is such a right). The Atlantic provinces do not have compressed work week or averaging provisions because they have no limits on maximum hours of work and some have low overtime premiums (one and a half the minimum wage, rather than one and a half the regular wage rate).

Jurisdictions that provide for compressed work weeks or averaging agreements for overtime impose some restrictions on these devices for achieving flexibility and reducing overtime costs. These restrictions are: limits on maximum hours worked under these schedules or agreements (Manitoba and Ontario); official approval (Ontario); individual consent (British Columbia); the union's or the majority of the employees' consent to these types of modifications (Quebec and Saskatchewan).

In several jurisdictions, the approval of a designated government official is required before employers are entitled to average hours of work for the purpose of overtime entitlements, although this is not the case in the federal jurisdiction. Ontario has recently reinstated the requirement to obtain such an approval in order to average overtime, while British Columbia amended its legislation in 2002 simply to require the consent of the individual employee before overtime averaging is given effect.

Several jurisdictions provide for a modified work schedule, otherwise known as a compressed work week. It is not necessary to provide mechanisms for modifying work schedules in jurisdictions, like the Atlantic provinces, that do not have standard work days or maximum weekly hours. A modified work schedule in the federal jurisdiction requires the consent of seventy per cent of the affected employees if the employees are not represented by a trade union or the union's consent if they are. The *Code* also provides limits on modified work

schedules. Until 2002, British Columbia had a similar (although not as stringent) requirement to obtain the support of sixty-five per cent of the employees affected by the proposed schedule.

Manitoba, Saskatchewan, and, in more limited circumstances, the Yukon and Quebec provide employees with a right to refuse overtime.²⁶ Jurisdictions that do not provide limitations on maximum hours of work are more likely to provide a right to refuse overtime than jurisdictions that impose maximums. The right to refuse overtime and limits on maximum hours of work function as alternative methods of limiting hours of work.

Maximum Hours of Work

Federal

Under the *Code* the maximum number of hours of work an employee is permitted to work in one week with a single employer is forty-eight. The *Code* provides for flexibility regarding this limit through the following mechanisms or in the following circumstances: exemptions, averaging agreements, ministerial permits, emergencies, and regulations.

Averaging Limits on Hours of Work

Averaging agreements regarding the limits on maximum hours of work always require either the consent of any trade union that represents the employees or the approval of seventy per cent of the employees affected if the employees do not have a bargaining agent unless the nature of the work in the establishment necessitates that the hours of work of certain employees be irregularly distributed. In such establishments, employers are entitled to average overtime entitlements without obtaining the employee's or the union's consent.

²⁶ In Manitoba, the parties may contract out of the right to refuse overtime. Saskatchewan provides a right to refuse, subject to limited exceptions, after forty-four hours. In the Yukon, the employee has to have cause to refuse. In Quebec, the employee has a right to refuse a request for additional hours of work if the request is for more than four hours in excess of regular work hours or more than fourteen hours in twenty-four (whichever is less) or fifty in a week. There is also some limited protection for employees who refuse to work beyond their regular hours if the refusal is to fulfill specified family obligations. In Ontario, before the *Employment Standards Act, 2000* came into effect on September 4, 2001, there was a right to refuse overtime after eight hours in a day and forty-eight hours in a week. Moreover, prior to September 4, 2001, when the *Employment Standard Act, 2000* came into effect, employees had the right to refuse overtime even if there was an approved compressed work week or a permit to exceed the maximum hours of work.

Permits

Employers can also apply for a permit from the Minister of Labour to allow employees to work hours in excess of forty-eight in a week. The *Code* imposes a number of substantive (including the well-being of the employees and the exceptional nature of the circumstances) and procedural (notice) requirements on employers before they can obtain a ministerial permit for excess hours. Neither the consent of a union that represents the affected employees, nor the support of a majority of the affected employees is required as a condition for granting a permit. There are no explicit statutory limits on the number of excess hours that an employer is allowed to schedule under a permit, although the permit is required to specify both the limits on excess hours and its duration. Employers who have obtained permits are required to provide the Minister of Labour with a written report stating the number of employees who worked in excess of the maximum hours and the total number of additional hours worked.

The *Code* permits the limits on maximum hours of work to be exceeded in cases of an emergency, which is narrowly limited to those circumstances in which an industrial establishment is faced with an accident to machinery, equipment, plant or people or if urgent and essential work is needed to be carried out on machinery, equipment or plant, or in the situation of other unforeseen or unpreventable circumstances. The employer is obliged to provide a written report to any trade union that represents affected employees and/or the regional director regarding excess hours worked by employees on account of an emergency.

Comparison

Less than half of the jurisdictions in Canada establish a limit on the maximum hours that an employee can work for one employer in a week. Several impose limits (which range from ten to sixteen hours) on the maximum number of hours an employee is permitted to work for one employer in a day.²⁷ Although neither Manitoba nor Saskatchewan provide for limits on maximum hours of work, employees in both provinces are entitled to refuse to work hours in excess of the standard work week.²⁸ In Manitoba, officials of Department of Labour and

²⁷ These limits are often imposed indirectly by requiring minimum daily rest periods.

²⁸ In Manitoba, the parties may contract out of the right to refuse overtime and in Saskatchewan, employees are entitled to refuse overtime after forty-four hours.

Immigration have interpreted the statutory provision as allowing the parties to contract out of (or waive) the right to refuse.

Several jurisdictions permit employers to comply with the limits on maximum hours of work by averaging the number of hours employees work over a number of weeks. Except in the federal jurisdiction, the employer must obtain the permission of a designated official to average these limits. However, the federal *Code* provides stringent safeguards for averaging the limits on the maximum hours of work by requiring the employer to obtain either the union's consent or the support of the seventy per cent of the affected employees.

Several jurisdictions, including the federal one, entitle an employer to apply to a designated official for a permit (sometimes called an approval or a variance) allowing employees to work in excess of the statutory limits. None of these jurisdictions provides explicit statutory limits on the excess hours that can be scheduled under these permits. British Columbia requires the employer to obtain the signatures of a majority of the employees affected on the application for the variance, which ensures that the permit for excessive hours is acceptable to the majority of the employees. The permit system in the *Code* does not require the employer to obtain either the union's or the majority of the employee's consent to the application as a condition of applying for a permit.

The legislation in British Columbia also provides that an employer must not require or allow an employee to work excessive hours or hours that are harmful to the employees' health and safety. However, this provision does not apply to employees who are covered by a collective agreement.

Maximum Daily and Weekly Rest Periods

Federal

Under the *Code*, hours of work in a week are to be scheduled and worked so that each employee has at least one full day of rest per week. Sunday is the normal day of rest where practicable. Regulations exempt firms with continuous operations from the requirement to make Sunday a common rest day.

There are no specified meal breaks or minimum daily rest periods in the *Code*.

Comparison

Unlike the federal *Code*, most jurisdictions provide minimum daily periods of rest that range from eight to eleven hours. Most jurisdictions (including the federal jurisdiction) establish a weekly rest period of twenty-four consecutive hours. However, British Columbia and Quebec provide for thirty-two consecutive hours of rest in a week, and Yukon provides for two days. The requirement in British Columbia for a minimum rest period of thirty-two hours can be waived if a premium of double the hourly wage is paid for hours worked in the rest period. Saskatchewan provides for two days of rest per week for employees who work twenty or more hours per week in establishments with more than ten employees.

Most jurisdictions provide a thirty-minute unpaid break after five hours of work; however, several jurisdictions (British Columbia, Manitoba, Newfoundland and Labrador, Prince Edward Island, and Quebec) specify that any provisions in a collective agreement prevail over the statutory provision. British Columbia permits employers to apply to have minimum rest periods varied if fifty per cent of the affected employees sign the variance application. The federal jurisdiction and Nova Scotia do not restrict how long an employee can be required to work without a meal period or rest break.

Treatment of Part-time Employment: Benefits and Right to Change Hours

Federal

Nothing in the *Code* provides for equal or comparable treatment with respect to pay or benefits of part-time work (work that is usually scheduled for fewer hours than the number usually scheduled for full-time employees.) The federal *Code* does not provide employees with a specific right to request that hours of work be shortened or lengthened in order to accommodate family responsibilities or other reasons, such as education. However, there is some jurisprudence under the Canada *Human Rights Act* that imposes a duty on employers to accommodate the needs of employees who need to change their work schedule or hours of work in order to care for children.²⁹

Comparison

²⁹ In *Brown v. M.N.R., Customs and Excise*, 1993, 19 C.H.R.R. D/39 (C.H.R.T.); *Woiden v. Dan Lynn* (2002), 43 C.H.R.R. D/296 (C.H.R.T.)

Most jurisdictions permit different treatment (pay and benefits) of full-time and part-time employees who work for the same employer. Only two jurisdictions, Quebec and Saskatchewan, provide for some parity of treatment for part-time workers. In Quebec, employers are prohibited from paying part-time workers a lower rate than other full-time employees performing the same tasks; however, employees who are earning twice the rate of the minimum wage are exempted from the requirement.³⁰ Saskatchewan has, through regulations, imposed an obligation on employers who employ ten or more full-time employees to pay employees who work between fifteen and thirty hours in a week fifty per cent of the benefits provided to comparable full-time employees.³¹ There are strict service and work intensity requirements in order for a part-time worker to be entitled to benefits. The benefits covered are dental, group life, and accidental death and dismemberment plans providing individual coverage, as well as prescription drug plans covering employees, their spouses, and their dependents. If the employee works more than thirty hours, he or she is entitled to 100 per cent of the benefits provided to a comparable full-time employee. Full-time students are exempted from this requirement, and nothing precludes employers from providing managers with different benefits than those provided to other employees.

No jurisdiction in Canada imposes an obligation in the labour standards legislation on an employer to consider an employee's request to have her or his hours of work so that the employee can accommodate either the employee's family responsibilities or other reasons, such as education. However, there is case law under the *Canada Human Rights Act* that imposes an obligation on employers to accommodate the need of employees to schedule working time to meet care obligations.³²

³⁰ Bellemare, Molinari, and Poulin-Simon (1995, 111) discuss the regulation that exempted employees working in stores whose main activity is food retailing from this requirement.

³¹ To be eligible the part-time employee must have been continuously employed for 26 weeks and have worked 360 hours in that period, and continue to work at least 780 hours in a calendar year. Where a benefit formula is based on the employee's earnings (for example, accidental death) the level of benefits is to be calculated on the same basis as for full-time employees. Labour Standards Regulations, 1995, L-1, Reg. ss. 23-28, subsequently amended.

³² In *Brown v. M.N.R., Customs and Excise*, 1993, 19 C.H.R.R. D/39 (C.H.R.T.); *Woiden v. Dan Lynn* (2002), 43 C.H.R.R. D/296 (C.H.R.T.)

Work-schedule and Working-time Flexibility for Employees

In Canada, no jurisdiction imposes an obligation on an employer either to consider or to accommodate an employee's request to modify hours of work or working time for any reason, including caring for family members. However, the prohibition against discriminating against employees on the basis of family status in human rights legislation has been interpreted as imposing an obligation on employers to accommodate employees caring responsibilities by modifying their work schedules or hours of work (Ontario Human Rights Commission 2005, 24-32).

Industry- and Undertaking-Specific Regulations

Federal

There are several regulations that either exempt the employees in an industry or an undertaking from the hours of work provisions entirely or provide specific rules for that industry or undertaking. Three sets of regulations exempt the employees employed in the occupations and industries described in the regulation from the hours of work rules in the *Code* and do not provide any rules regarding hours of work: *Railways Running-Trades Employees Hours of Work Regulations*, C.R.C. 1978, c. 991; *Broadcasting Industry Commission Salesmen Hours of Work Regulations*, SOR/79-430; *Ontario Hydro Nuclear Facilities Exclusion from Part III of the Canada Labour Code Regulations*, SOR/98-181. There are also four sets of regulations that provide specific hours of work rules for transportation industries – aviation, motor vehicles, railways, and shipping. These regulations are designed for the specific industry.³³ The *Railway Safety Act*, for example, is used to regulate working hours on Canada's railways.³⁴ It imposes rules regarding maximum hours of work and minimum required rest periods via emergency orders which it combines with imposing a requirement on the railway companies to implement and maintain fatigue risk management plans.

³³ The following regulations are discussed in detail in Appendix I: the *East Coast and Great Lakes Shipping Employees Hours of Work Regulations*, 1985, C.R.C. 1978, c. 987; the *West Coast Shipping Employees Hours of Work Regulations*, C.R.C. 1978, c. 992; the *Canadian Aviation Regulations*, SOR/96-433 (under the *Aeronautics Act*, RS 1985, c.A-2).

³⁴ *Railway Safety Act*, RS 1985, c.32 (4th Supp.), Work Rest and Rules for Railway Operating Employees (June 20-05).

Comparison

Several jurisdictions provide different overtime triggers and limits on maximum hours of work for specific industries and occupations. Some provide these different standards directly in the legislation, and others provide them via regulations.

Trucking

Federal

The hours of work rules for commercial vehicle drivers are very complex, involving two sets of regulations under two different statutes. The *Motor Vehicle Operators Hours of Work Regulations* govern commercial vehicle (bus and truck) drivers and they replace the standard hours of work and overtime entitlements set out in the *Code*. The *Commercial Vehicle Drivers Hours of Service Regulations*, 1994, SOR/94716 (made under the authority of the *Motor Vehicle Transport Act*, 1987) govern the maximum driving times and minimum off-duty times of commercial vehicle (bus and truck) drivers employed or otherwise engaged in extra-provincial transportation. These regulations also require drivers to keep a record of their daily driving and other work activities in a prescribed format and to make these records available to designated enforcement officials upon request. Provincial governments are responsible for enforcing the hours of service regulations.

Under the *Motor Vehicle Operators Hours of Work Regulations*, the standard hours of work for a city motor vehicle operator are nine hours in a day and forty-five hours in a week. The standard hours of work for a highway motor vehicle operator are sixty hours in a week. The hours of work of a highway motor vehicle operator who does not normally drive on public roads can exceed sixty hours per week if authorization is granted pursuant to the *Commercial Vehicles Drivers Hours of Service Regulations*.

The daily limits on maximum driving and maximum on-duty time are thirteen hours in a day and fifteen hours in a day, respectively. The limits on driving time are sixty hours in seven days, seventy hours in eight days, or 120 hours in fourteen days. These limits are also very flexible. There are provisions in the regulations allowing any driver, under certain circumstances, to take shorter rest periods and allowing drivers in the North to work longer hours. There is a permit system for truck and bus drivers that allows truck drivers up to fifteen hours of driving time and eighteen hours of on-duty time in a day.

The *Commercial Vehicles Drivers Hours of Service Regulation* allow motor vehicle operators to drive and to be on duty for very long periods with very short periods of consecutive hours of rest. These regulations have been subject to reconsideration since the mid-1990s, and consultations with all of the major stakeholders have been conducted. The proposed regulations would increase minimum rest periods and lower the limits on maximum hours of work.

Comparison

Most jurisdictions simply cover truck drivers under the general hours of work provisions. Ontario, like the federal jurisdiction, also has an elaborate system of overtime and maximum hours of work for commercial vehicle drivers. Overtime entitlements, which are established in regulations under the employment standards legislation, are similar (although slightly less generous) in Ontario and the federal jurisdiction (after fifty hours for local drivers and sixty for highway drivers). The maximum hours of work are set out in the *Highway Traffic Act*.

Summary

Individually, each of the general standards (standard working day and working week, overtime premium, maximum hours of work) provided in the *Code* are similar to those prevailing across Canada. However, the federal jurisdiction provides both daily and weekly standard work hours, which function as triggers or thresholds for overtime pay, and limits on maximum hours of work in a week. It applies both a market-based (through overtime premiums) and regulatory approach to restricting hours of work. By contrast, only a few jurisdictions (the Northwest Territories, Nunavut, Ontario and Alberta, which has limits on maximum daily hours) combine both approaches.

Because there are different kinds of restrictions on hours of work in the *Code*, it provides several mechanisms for varying the standards and limits. Averaging agreements and modified work schedules permit employers to average overtime over a period longer than a week. Employers are also entitled to exceed the limits on maximum hours of work if they obtain either another form of averaging agreement, modified work schedule, or a permit. Each of these different mechanisms for varying standards is subject to different requirements and a

different level or type of scrutiny. There are also occupational exemptions and special rules for specific industries for the hours of work rules.

The flexibility for employers to vary the hours of work rules is not matched by an individual right to refuse overtime and long hours of work in the federal jurisdiction. Nor does the *Code* provide employees with much flexibility to determine their schedules or to vary their regular work hours to accommodate family obligations or education. There is nothing in the *Code* that limits the use of split shifts (for example, British Columbia limits split shifts to twelve hours in a day) or unsocial hours. The *Code* only prohibits night work for employees under the age of 17. The *Code* does not provide for meal breaks or minimum daily rest periods.

2. Second Component: Paid Time Off Work – Annual Vacations and General Holidays Vacations and Vacation Pay

Annual Vacation Leave

Federal

Employees are entitled to at least two weeks of vacation with pay per year after one year of service and three weeks vacation with pay per year after six consecutive years. Vacation pay is equal to four per cent of an employee's yearly wages until an employee has been working for six consecutive years of employment, and then the employee is entitled to six per cent of her or his wage as vacation pay. The *Code* is silent as to whether vacation leave is to be taken in periods of at least a week in length or in shorter periods.

The *Code* permits employees to enter into written agreements with their employers to postpone or waive their annual vacations; however, employees who waive taking their vacation are still entitled to vacation pay.

Comparison

Most jurisdictions provide two weeks of paid vacation after one year of service and three weeks after either five or six years. The norm for vacation pay is four per cent for employees entitled to two weeks and six per cent for those entitled to three weeks. Saskatchewan provides the most generous vacation leave – three weeks after one year and four weeks after ten years. In Quebec, employees who have completed at least one year of service

but who are not yet entitled to three weeks of vacation with pay are entitled to take one additional week of vacation without vacation pay. Like the federal jurisdiction, several jurisdictions, including Ontario, also allow employees to waive their annual vacations, but the federal jurisdiction imposes the fewest restrictions on such waivers. Some jurisdictions specifically provide that an employee can take vacation in periods shorter than one week in length.

The notice requirements for vacations, the period in which vacation is to be scheduled, the definition of vacation pay, and the right to postpone leave, as well as other matters, differ from jurisdiction to jurisdiction.

General Holidays

Federal

The *Code* designates nine general holidays on which employees, including managers and professionals, are entitled to a day off with pay. Employees are entitled to a holiday with pay on each of the general holidays falling within their employment period. Managers or professionals who work on a general holiday must be given a holiday with pay at some other time mutually agreed upon by employee and employer. Employees who are covered by the terms of a collective agreement that entitles them to at least nine holidays per year with pay, exclusive of annual vacation leave, are exempt from the statutory general holiday provisions of the *Code*.

Employees who have been employed by their employer for less than thirty days are not entitled to general holiday pay if they do not work on the holiday. Employees who do not work on a general holiday are not entitled to be paid for the holiday if they do not earn wages for at least fifteen days during the thirty days immediately before the holiday. However, employees in this situation are entitled to be paid 1/20 of the wages they earned during the thirty calendar days immediately preceding the general holiday.

Employers have some limited flexibility regarding general holidays via provisions that allow for substituted holidays and a special regime for continuous operations. The ability to substitute one holiday for another holiday requires either the consent of a union (in situations in which employees are covered by a collective agreement) or the consent of seventy per cent of affected employees (where there is no bargaining agent). Employers in continuous operations

can choose one of four options, which include either providing the employee with the general holiday off with pay or requiring the employee to work on the holiday as a regular work day with a day off at another time.³⁵ An employee in a continuous operation who refuses to work on a holiday when requested to do so by the employer is not entitled to holiday pay. There are only limited situations in which employees employed in a continuous operation are not entitled to be paid for a general holiday.

Comparison

General holidays across Canada range from six to ten in a year. Several jurisdictions (including the federal) impose both a minimum service requirement (typically thirty days) and a work intensity requirement (of a certain number of days in a specified period) as a condition for obtaining holiday pay on holidays that the employee does not work. Most require that the employee work a certain number of days within a reference period (typically a month or a year). A few jurisdictions have no preconditions. Each jurisdiction provides employers with some flexibility either to allow the employee to take the holiday off work or to pay the employee a premium for working on the holiday. In most jurisdictions, the premium for holiday pay is time and a half the regular rate of pay. In Newfoundland and Labrador and Quebec employees are entitled to their regular wage rate plus general holiday pay (or a compensatory holiday).

Summary

The *Code* provisions regarding paid-time off work (annual vacation leave and general holidays) are consistent with the standards across Canada. However, the Northwest territories provides more holidays than the federal jurisdiction and several jurisdictions (Ontario, Quebec, and Saskatchewan) have no length of service requirements.

3. Third Component: Leaves – Maternity, Parental, Compassionate Care, Sickness, and Bereavement Leave

³⁵ The other options are described in full in Appendix I.

Leaves that Dovetail with the Employment Insurance Scheme

General Provisions

Federal

There are four types of leaves provided by the *Code* to accommodate relatively long-term absences, and these leaves are designed to dovetail with the benefit system provided in the *Employment Insurance Act*. They are maternity, parental, sickness, and compassionate care leave. Their purpose is to guarantee employment security, employment continuity, the accumulation of employment service, and entitlement to benefits under certain circumstances during the period of absence. Although the requirements for taking each leave differ, as do the lengths of each of the leaves, employees on each of these leaves are entitled to the same benefits and the same right to return to their jobs upon termination of the leave.

Entitlements while on Leave

While an employee is on a leave of absence, her or his pension, seniority, and health and disability benefits accumulate during the entire period of the leave. Where an employee is required to contribute to any of these benefits, the employee is responsible for paying those contributions for the period of the leave of absence. For the purposes of calculating other benefits, the return of an employee who was absent from work due to a leave is to be deemed continuous with employment before the employee's absence. Employers are prohibited from dismissing, suspending, laying off, demoting, or disciplining an employee because the employee is on or has applied for a leave of absence.

An employee who chooses to take, or is required to take, a leave of absence is entitled to be reinstated into the same position she or he occupied before the leave began. However, where an employer is unable to reinstate an employee into the same position due to a valid reason, the employer must reinstate the employee into a comparable position with the same wages and benefits at the same location.

Comparison

Several jurisdictions, including the federal, provide for the accrual of service, and not simply its maintenance, during leaves of absence. Quebec's legislation ensures that employees on maternity or sickness leave do not lose any of their entitlements to vacation pay and

Saskatchewan ensures that employees do not lose their entitlement to vacation leave (although vacation pay is not protected). Each jurisdiction provides employees with a right of reinstatement after their leave expires.

Employment Insurance Benefits

To be entitled to maternity, parental, sickness, or compassionate care benefits, an employee's regular earnings must have decreased by more than forty per cent and the employee must have 600 insured hours in the last fifty-two weeks or since the last claim (whichever is shorter). Employees who qualify for benefits must serve a two-week waiting period, and they are entitled to a maximum benefit of fifty-five per cent of their average insurable earnings up to a maximum of \$413 per week. An employee may receive up to seventy-one weeks of combined compassionate care, maternity, parental, and sickness benefits subject to certain conditions.

Maternity Leave

Federal

This leave is designed to accommodate a woman's health-related needs surrounding pregnancy and childbirth. All female employees who have completed six consecutive months of continuous employment with an employer are entitled to a leave of absence from employment for up to seventeen weeks. The employee must give her employer four weeks written notice of her intent to take a leave, and the notice must indicate the length of leave that the employee intends to take. The leave can begin eleven weeks prior to the estimated delivery date and must end no later than seventeen weeks following the actual delivery. There is no possibility for extensions to deal with medical problems accompanying a woman's pregnancy. An employee who has taken seventeen weeks of maternity leave is entitled to thirty-five weeks of parental leave.

Comparison

The service requirement for maternity leave varies across Canada from nothing (British Columbia and New Brunswick have no service requirement while Quebec has one day) to

twelve months. The length of leave varies from fifteen to eighteen weeks and the timing of the leave varies from jurisdiction to jurisdiction. Extensions are possible in some jurisdictions in order to accommodate medical problems that might accompany a women's pregnancy. The federal jurisdiction, Quebec and Saskatchewan permit a pregnant woman or nursing mother to request that her employer temporarily modify her duties or assign her to another position if the continuation of her present duties puts her health or the health of the foetus or nursing infant at risk. In Quebec, an employee may be absent from work without pay for an examination by a physician or midwife related to her pregnancy.

Parental and Adoption Leave

Federal

This leave is designed both to accommodate the extra time demands on parents when a child is introduced into a household and to provide a means for caring for children when care demands are very high. Employees who have completed six consecutive months of continuous employment with an employer are entitled to a leave of absence for up to thirty-seven weeks to care for their new-born child or a child who is in the care of the employee for the purpose of adoption. The employee must give her or his employer four weeks written notice of her or his intent to take the leave, and the notice must indicate the length of leave that the employee intends to take. Parental leave must be completed within the fifty-two week period following the birth of the child or following the day that the child comes into the employee's care.

If both parents work for an employer falling under the jurisdiction of the *Code*, both employees may take parental leave. The aggregate amount of leave that may be taken by two employees for the same birth or adoption is not to exceed thirty-seven weeks. This time can be taken simultaneously by two parents or one after the other. The aggregate amount of maternity and parental leave that may be taken by one or two employees in respect of the same birth is not to exceed fifty-two weeks.

Comparison

Across Canada the service requirement for parental leave varies from nothing to twelve months. The length of leave varies from thirty-five to fifty-two weeks. In Quebec, an employee is entitled to five days of leave (including two days with pay if she or he has at least sixty days

of uninterrupted service) following the birth or adoption of a child. In ten jurisdictions, the full parental leave is available to both parents, if they are eligible. However, in Alberta, New Brunswick, the Yukon, and the federal jurisdiction, parental leave is to be shared between both parents as long as the total does not exceed the maximum. In Alberta, there is no requirement to grant parental leave to more than one parent at a time if both parents are employed by the same employer. In the Yukon, parents who share parental leave cannot normally take their leave at the same time even if they do not work for the same employer.

Leave provisions also differ in terms of the requirements for giving notice of the leave (length, form, and accompanying materials), and the possibility of postponing, interrupting, or extending leave in the event of exceptional circumstances such as the hospitalization of a child. The federal jurisdiction does not provide employees with as much control over the timing of their leaves as other jurisdictions provide to employees.

In most jurisdictions, adoptive parents are entitled to the same parental leave as birth parents. Others (for example, Newfoundland and Labrador and Saskatchewan) provide a distinct adoption leave to eligible adoptive parents, in addition to parental leave. In Quebec, an employee who adopts the child of her or his consort is entitled to two days of leave without pay.

Employment Insurance Maternity and Parental Benefits

Maternity benefits run for one two-week waiting period plus fifteen weeks. Employees are entitled to a combined maximum of fifty weeks of maternity, parental, and sickness benefits, with the exception of a woman who received sickness benefits before or after her maternity benefits. In such circumstances a woman could, subject to certain conditions, receive up to a maximum of sixty-five weeks of combined sickness, maternity, and parental benefits.

Parental benefits can be claimed by one parent or shared between the two parents but the maximum length of benefits (whether combined or not) is thirty-five weeks. If both parents share the parental benefits or take maternity and parental benefits, only one two-week waiting period applies. If a woman serves the two-week waiting period for her maternity benefits, she is not required to serve another two-week waiting period before collecting parental benefits.

An employee receiving parental benefits is entitled to earn up to twenty-five per cent of her/his weekly benefits or \$50 a week (whichever is higher) in order to assist the employee in returning to work. With the exception of parental and compassionate care benefits, which are designed to allow employees to accommodate family and work obligations, each dollar earned reduces by an equivalent the amount of benefits to which the employee is entitled.

Comparison with the Quebec Parental Insurance Plan

Since January 1, 2006, Quebec has its own parental insurance plan that replaces the maternity and parental benefits paid under the federal Employment Insurance program.³⁶ The Quebec plan differs from the federal plan in the following respects: 1) lower eligibility requirements (\$2,000 of income instead of a minimum number of hours worked); 2) broader scope of coverage (self-employed workers are covered); 3) broader range of benefits (paternity benefits are provided); 4) no waiting period; 5) a higher replacement rate of income and a higher income cap; and 6) greater flexibility in the length of benefits and replacement rate.

To be eligible for the Quebec plan, the employee or the self-employed person must have an insurable income of at least \$2,000, regardless of the number of hours worked, and his or her income must have decreased by forty per cent on account of the leave. Both employees and self-employed workers are covered. The maximum insurable earnings established under the Quebec plan is \$56,000 (compared with \$39,000 under the federal scheme). The Quebec plan will offer the following types of benefits: 1) maternity benefits; 2) paternity benefits; 3) parental benefits; and 4) adoption benefits. Maternity benefits are payable exclusively to the mother, while paternity benefits are paid exclusively to the father. By contrast, parental and adoption benefits may be shared between the parents, who can take their benefits weeks simultaneously or consecutively.

A mother may choose to take a maximum of eighteen weeks of benefits at seventy per cent of her gross weekly income or a maximum of fifteen weeks of benefits at seventy-five per cent of her gross weekly income. A father may choose to take a maximum of five weeks of benefits at seventy per cent of his gross weekly income or a maximum of three weeks of benefits at seventy-five per cent of his gross weekly income. Parental and adoption benefits can be taken by one parent or shared between two. Parents can choose between two options for

³⁶ *Parental Insurance Act*, RSQ c. A-29.011

benefits during leaves taken with respect to the birth of their child: 1) a benefit period of thirty-two weeks (with seven weeks of benefits at seventy per cent of gross weekly earnings followed by twenty-five weeks of benefits at fifty-five per cent of gross weekly earnings) or 2) twenty-five weeks of benefits at seventy-five per cent of gross weekly earnings. The Quebec plan also offers two options for adoptive parents: 1) a benefit period of thirty-seven weeks (twelve weeks of benefits at seventy per cent of gross weekly earnings followed by twenty-five weeks at fifty-five per cent of gross weekly earnings) or 2) twenty-eight weeks of benefits at seventy-five per cent of gross weekly earnings. In the cases of birth and adoption, benefit weeks may be taken concurrently by the parents. The premiums for the Quebec Parental Insurance Plan are \$175 per year per employer and \$125 per year per employee.

The Quebec plan is broader, more generous, and more flexible than the federal plan. It also provides a specific paternity benefit designed to involve fathers in the care of infants. Employees in Quebec who are employed in a federally regulating establishment or undertaking would not have sufficient maternity and parental leave under Part III of the *Code* to cover the period of benefits to which they would be entitled under the Quebec Parental Insurance Plan.

Sick Leave

Federal

This leave is designed to provide employees with employment security during periods of temporary illness. While on leave, some employees may also qualify for sickness benefits under the *Employment Insurance Act*. An employer is not permitted to dismiss, suspend, lay off, demote, or discipline an employee because of an absence due to illness or injury if the employee has completed three consecutive months of continuous employment with the employer prior to the absence, the absence is twelve weeks or less, and if, within fifteen days after returning to work, the employee is able to provide the employer with a certificate from a qualified medical practitioner stating that she or he was incapable of work due to illness or injury. The entitlement for sick leave is defined in terms of each occurrence of an illness or injury. If upon returning to work after a sick leave the employee is unable to perform the work she or he did prior to his or her absence, the employer may assign the employee to a different position with different terms and conditions of employment.

Comparison

Employers are prohibited from dismissing, suspending, laying off, or demoting employees who are on sick leave in six jurisdictions. However, only a few jurisdictions provide for leave for illness that requires more than a few days off work. The federal jurisdiction and Saskatchewan provides for twelve weeks of leave and Quebec provides twenty-six weeks of sickness leave. Like the federal jurisdiction, Quebec and Saskatchewan both require three months of service. However, unlike the federal jurisdiction, Quebec and Saskatchewan limit the entitlement to such leave to each period of fifty-two weeks, and do not provide leave for each occurrence of an illness or injury, as is the case in the federal jurisdiction. Saskatchewan also provides for a leave of twelve days per year for non-serious illnesses or injuries. The Yukon provides one day per month, New Brunswick provides for five days per year, Prince Edward Island for three days in a twelve month period, while Ontario provides for ten days of leave per year for reasons that include personal illness but only for those employees who are employed by employers that regularly employ a minimum of fifty employees. All of the sick leaves are unpaid.

The leave provided in Ontario and Saskatchewan covers both personal illness or injury and the illness or injury of a family member.

Employment Insurance Sickness Benefits

An employee is entitled to fifteen weeks of benefits subject to the usual two week waiting period. The *Canada Labour Code's* sick leave provisions do not provide sufficient leave to protect an employee who avails her or himself of the sickness benefits (fifteen weeks plus a two week waiting period) under the *Employment Insurance Act*.

Compassionate Care Leave

Federal

This leave is designed to allow employees to care for a narrow range of close family members (spouse, common law partner, child, or parent of the employee or the employee's spouse or common law partner) who are facing imminent death. Employees are entitled to a leave of absence from employment of up to eight weeks to provide care or support to an ailing

family member. In order to be entitled to this leave, a qualified medical practitioner must issue a certificate stating that the family member has a serious medical condition with a significant risk of death within twenty-six weeks from the date the certificate is issued. If the employee's family member is still gravely ill at the end of the twenty-six weeks, the employee is entitled to an additional period of up to eight weeks of compassionate care leave. The minimum period of leave is one week. If two or more employees take a leave to care for and support the same family member, the total aggregate amount of leave is not to exceed eight weeks. Unlike both maternity and parental leave, compassionate care leave can be split into one-week segments.

Comparison

Although provincial and territorial compassionate care leave provisions largely mirror the provisions found in the *Canada Labour Code*, there are some significant differences.³⁷ Distinguishing elements include the definition of family member (i.e. persons for whose care an employee may take leave), eligibility requirements (i.e. required length of service and minimum notice periods) and the manner in which the leave may be taken (i.e. fractioning and/or sharing of leave).

Under the federal *Canada Labour Code* employees are eligible for compassionate care leave in order to care for an ill family member. The Code defines family member as a: child or child of a spouse/common law spouse, wife, husband or common law partner, father or mother, father's wife or mother's husband, or the common law partner of a father or mother. Family member is defined more broadly in a number of the provincial/territorial labour statutes. For example, in addition to those family members included in the federal definition, a number of provinces and territories include:

- foster parents and foster children (Ontario);
- siblings (New Brunswick, Quebec, Prince Edward Island, Saskatchewan, Yukon);
- grandparents (New Brunswick, Quebec, Yukon);
- grandchildren (New Brunswick, Yukon);
- persons who, whether or not related by blood demonstrate an intention to extend to one another the mutual affection and support normally associated with a close family relationship (New Brunswick); and

³⁷ This discussion is drawn from Oliver and Margo 2005, 14-8.

- step-parents, various in-laws and any relative permanently residing in the same household as the employee (Yukon).

In a number of provinces, an employee must have completed a minimum length of service with her or his current employer to qualify for leave. For example, an employee must have worked with his or her current employer for thirty days in Manitoba and Newfoundland/Labrador, and for three months in Quebec and Nova Scotia. In Saskatchewan, a worker not receiving the federal benefit must have been employed by his or her current employer for at least thirteen weeks; however this requirement does not apply to those receiving the Compassionate Care Benefit. An employee must provide his or her employer with a copy of a medical certificate attesting to the family member's state of health in Manitoba and Prince Edward Island; in other jurisdictions, a copy of the medical certificate must be given only if the employer requests it in writing.

An employee must provide advance notice of the leave to her or his employer "as soon as possible" in New Brunswick, Nova Scotia and Ontario, and at least one pay period before the start of the leave in Manitoba, although a shorter period may be given if circumstances so necessitate. In Manitoba, an employee who wishes to end her or leave before it expires must in addition provide at least forty-eight hours' notice to the employer.

All provinces and territories with compassionate care leave legislation provide at least eight weeks of leave, to be taken within a specified twenty-six-week period. Should the family member die before the expiry of this period, leave typically ends on the last day of the week in which the death occurs. Saskatchewan extends the maximum length of leave from the eight weeks provided in the federal legislation to twelve weeks where the individual is not receiving the federal benefit, and sixteen weeks where the individual is receiving the federal benefit. Quebec extends the maximum length of leave to twelve weeks, with the notable extension to 104 weeks in cases where the employee takes leave to care for a child who is a minor.

Compassionate care leave may be split or fractioned in most jurisdictions, but most Provinces and territories set a minimum leave period of one week. In Manitoba, leave cannot be divided into more than two periods of leave, totaling no more than eight weeks within the

twenty-six-week period. Legislation in New Brunswick, Nunavut, Prince Edward Island, Ontario and Yukon stipulates that where two or more employees wish to avail themselves of compassionate care leave to provide care or support to the same person, their combined periods of leave may not exceed a total of eight weeks (including the two-week qualifying period). In contrast, eligible employees in Manitoba and Nova Scotia are entitled to the full eight-week leave, even if other persons also take compassionate care leave in relation to the same family member.

Alberta, British Columbia, and the Northwest Territories do not provide for leave to care for a close family member who is dying.

Employment Insurance Compassionate Care Benefits

Compassionate care benefits require one two-week waiting period and then run for six weeks. Compassionate care benefits can be shared between family members up to a combined maximum of six weeks, but only one two-week waiting period applies when the benefits are shared.

Bereavement Leave

Federal

Every employee is entitled to a bereavement leave during the three days directly following the death of a member of the immediate family. Bereavement leave covers only scheduled working days.³⁸ Employees who have completed three consecutive months of continuous employment are entitled to their regular rate of wages during this leave.

Comparison

Nine jurisdictions provide bereavement leave. Those jurisdictions that allow employees to take time off provide between three days and one week. Most jurisdictions do not require the employees to be paid during bereavement leave. Shorter bereavement leaves in

³⁸ For example, if the employee does not normally work on Saturday and Sunday and the death occurs on a Friday, the employee is only entitled to a leave on the Monday. However, if the death occurs on a Monday, the employee would be entitled to a leave for Tuesday, Wednesday, and Thursday. If a death occurs during an employee's vacation, bereavement leave does not apply.

Nova Scotia, Prince Edward Island, and Quebec are available to employees for the death of more distant relatives.

Family Responsibility Leave

Federal

The *Code* does not provide for leave to allow employees to take time off work in order to care for, or attend to, family members.

Comparison

The length of dedicated family responsibility leave varies in other jurisdictions from three to ten days. Ontario restricts this leave to employees whose employer employs more than fifty employees. Saskatchewan provides for two different types of leave for family-related responsibilities. An employee who have been employed by her or his current employer for thirteen consecutive weeks and who is absent from work in order to provide care for an ill or injured family member is entitled to twelve weeks of leave within a fifty-two week period. If the illness or injury is not serious the employee is entitled leave for twelve days within a calendar year. In Ontario and Saskatchewan, there is no separate entitlement to leave for personal illness and injury and leave to care for a family member.

Who counts as a family member for the purpose of accessing the job-protected leave differs from jurisdiction to jurisdiction. In Ontario, for example, the leave is available for an employee to attend to broad range of individuals (including a spouse, child, parent, sibling, and grandparent) although there must be a family connection (a relative dependent upon care or assistance). By contrast, in British Columbia family care leave covers the employee's spouse, child, parent, sibling, grandparent and a person who lives with the employee as a member of the person's family. The reasons for which a person can take leave also differ from jurisdiction to jurisdiction, although most cover the illness of, or health-related reason relating to, a family member. In Ontario the permissible reasons for taking leave also includes an urgent matter involving a family member, while in British Columbia they include a matter pertaining to a family member's education.

Wedding or Civil Union

Federal

The *Code* does not provide for leave for an employee to attend her or his wedding or civil union or to attend the wedding or civil union of the employee's child, father, mother, brother, sister, or child of her or his spouse.

Comparison

Quebec provides for one day of leave without loss of pay on the day of the employee's wedding or civil union and one day leave without pay on the day of the wedding or civil union of the employee's child, father, mother, brother, sister, or child of her or his spouse.

Summary

The federal *Code* provides for a number of leaves that give employees job security in the event of personal illness and pregnancy, and enables them to accommodate family responsibilities. The service requirement for these leaves vary from nothing (compassionate care) to six months (pregnancy and parental); the minimum service requirement for sick leave is three months. The federal jurisdiction imposes a lengthy service requirement for eligibility for maternity and parental leaves. The leaves are designed to dovetail with the income replacement system provided in the *Employment Insurance Act*. An employee's willingness to take unpaid leave depends upon her or his access to income replacement and the amount of income that is replaced.

The federal jurisdiction provides only one short leave – bereavement leave. There is no provision that entitles employees to time off without discipline or reprisal in order to attend to an urgent family matter. Unlike most jurisdictions, the federal government does not provide unpaid leave for jury duty.

V. Evaluation of Federal Working-Time Regime: The Research and Evidence

There is a growing body of research in Canada about patterns of paid and unpaid working time, employers' and employees' preferences for greater flexibility in scheduling

work, and the consequences of work-life conflict for individuals, employers, and society in general. Much of this research is based upon reliable data collection instruments (administrative statistics, surveys, key informant interviews, and focus groups). A series of reports conducted for Human Resources and Development Canada (now Human Resources and Skills Development Canada) in the late 1990s, directly addressed the legal regulation of paid working time in the federal jurisdiction. Another series of reports, resulting from a study funded by Health Canada, focussed on work-life conflict in Canada, and its costs to individuals, families, employers, and the health-care system. These reports provide an empirical basis for evaluating the working-time rules in Part III of the *Canada Labour Code* in relation to flexibility and work-life balance. The findings in these reports are supplemented by a discussion of some data relating both to averaging agreements, permits, and violations under Part III and to benefits provided under the *Employment Insurance Act*.

1. Evaluation of Part III of the Canada Labour Code

The three reports evaluating Part III of the *Canada Labour Code* build upon each other and provide data (in the form of literature reviews, surveys, focus groups, and interviews) pertaining to hours of paid work; the preferences of employees, employers, and unions regarding working time; work-life balance and conflict; and compliance with the *Code*, including the opinions of the officials who administer the legislation.

Phase I, which was published in 1997 and was based upon a 1996 national survey of 600 federally regulated employers, 150 union representatives, and 100 Labour Affairs Officers (who administer Part III), a review of the administrative data, and interviews with 40 key informants, concentrated on the level of compliance with Part III, and provided an analysis of the costs and benefits and socio-economic aspects of compliance.³⁹ It begins by acknowledging the difficulty of measuring compliance; not only are most complaints filed by employees when their employment relationship terminates, compliance audits and inspections are not used to enforce the legislation.⁴⁰ However, the survey of employers suggests that non-compliance is

³⁹ Canada, HRDC, August 1997, 13-15. No component of this study directly obtained the views of employees.

⁴⁰ The administrative data indicated that the number of complaints had doubled through the early 1990s, reaching 5,000 per year by 1997. Violations were discovered in one-third of the

more widespread than the administrative data indicates.⁴¹ A large proportion of federally-regulated employers simply did not know their legal obligations under Part III; 26.3 % were unaware of maternity and parental leave and reassignment provisions; 19.4 % did not know about the overtime threshold (and 5% who knew did not conform to it), while 20.9% did not know of the overtime pay premium; 24.6% were unaware of the sick-leave entitlement for employees; and 20% did not know about bereavement leave (Canada HRDC 1997, 37-9).⁴² Moreover, the data indicated that compliance with labour standards is associated with the following characteristics: unionization (which was correlated to higher levels of compliance); employer size (smaller employers are less likely to comply); how long a firm has been in operation (firms in operation for longer periods were more likely to comply than newly created businesses); and sector (employers in the trucking industry were more likely not to comply, although this correlation was modest) (Canada HRDC 1997, 41-2).

The 1996 survey data was consistent with the administrative data concerning rate of violations, but not with the rate of complaints (Canada HRDC 1997, 42). Violations were high in the following sectors: trucking, grain and seeds, air transportation, and First Nations. Moreover, past violations were a meaningful predictor of current non-compliance, suggesting a high rate of persistent non-compliance. The Report concluded that the survey supported “the view that non-compliance with the Code is widespread in a number of areas, particularly for normal hours of work and severance pay provisions. Lack of awareness may be a major driving force behind non-compliance with the Code, but there are also indications that deliberate non-compliance occurs for a small number of firms” (Canada HRDC 1997, 44).

More recent administrative data regarding detected violations Part III indicate the number of violations for the hours of work rules ranged from 332 in 2001/02 to 318 in

complaints, although the data does not include violations in situations where the employer settled immediately. Violations pertaining to vacation and hours of work were less than 5 per cent of all violations (Canada, HRDC 1997, 36). In 2004, the Audit of the Labour Program noted that proactive inspections and policies are not used to enforce Part III (Canada HRSDC 2004, 11).

⁴¹ This data is likely to over estimate the extent of compliance since employers have no incentive to indicate they are not complying.

⁴² Based upon an indicator of over-all compliance, the Phase I Report concluded that “only about 25 percent of employers were in compliance with most provisions of Part III, about half of all employers being more compliant than not, and about 25 percent generally likely to be in non-compliance with most provisions” (Canada HRDC 1997, 41).

2003/04, with the vast majority being violations of the overtime provisions; violations of annual vacations ranged from 875 to 854 during the same period, and from 433 to 405 for general holidays. Violations of maternity reassignment and maternity and parental leave during this period were small, never rising above 6 in a year. Bereavement leave violations were also very few, ranging from 8 to 12 a year.⁴³ The number of hours of work violations for motor vehicle operations ranged from a low of 5 to a high of 35 each year between 2000/01 and 2003/04.⁴⁴ The low number of recorded violations is not surprising given that the data regarding complaints filed between April 1, 2001 and March 31, 2005 shows that for each year less than 10% of the employees who complained were still employed.⁴⁵ The 2004 audit of the Labour Program Part III concluded that there were few incentives for employers to respect the legislation (Canada, HRSDC 2004, 6).

The 1996 survey indicated that employers and unions have different positions on compliance strategies. Employers supported education and voluntary mechanisms, but opposed inspections and spot checks, while unions supported the latter two strategies (Canada HRDC 1997, 45, 49). Labour Affairs Officers also supported education as the “best” strategy for achieving compliance with the Code, especially when it came to statutory holidays and leave provisions. However, they reported that stronger enforcement activities and penalties were the most effective way to achieve compliance with respect to specific provisions such as overtime premiums and normal hours of work (Canada HRDC 1997, 49). They considered simplifying the Code to be the best compliance strategy only with respect to entitlements to statutory holidays, which is very complex on account of the special provisions relating to continuous operations and averaging of hours (Canada HRDC 1997, 50). The Report also suggested that a complaint-driven process (which is how Part III is currently enforced) may be ineffective in situations in which employees fear retaliation, and

if both employers and employees benefit by not having the legislation enforced. This is particularly an issue with regulations on long hours of work. Employees who work

⁴³ Data provided by the Federal Labour Standards Review Commission, Part III Violations by Division with Time Period, 2001-04-01 to 20004-03-31, NHQ010.

⁴⁴ Data provided by the Federal Labour Standards Review Commission, CCS55 Pt III Violations by Division & Business Line.

⁴⁵ Data provided by the Federal Labour Standards Review Commission, Complaints Where Employee is Still Employed by Business Line within the Time Period 2001-04-01 to 2005-03-31, CCs59.

long hours often want the additional income. The unemployed and underemployed who could potentially benefit from the work sharing aspect if hours were reduced are seldom at the worksite to lodge a complaint. Unions may also find it difficult to complain if they run the risk of alienating their members who want the long hours”(Canada HRDC 1997, 51).

The Report also found that less than one percent of survey respondents reported having sought permits from the Minister to extend hour of work in 1996. More recent data relating to permits indicates that while few firms apply for permits, those that do are very likely to obtain them.⁴⁶ Between April 1, 2000 and March 31, 2005, 121 permits for excessive hours, covering 27,292 employees, were approved by the Minister. The majority of the permits were granted for a short period of time (several months), and grain, railways, and telecommunications firms obtained the majority of the permits.

There is also some data about averaging plans, which allow an employer to average entitlement to overtime pay over a period longer than a week. There is no requirement that these plans be approved by the Minister, although there is a requirement to notify the Regional Director. Averaging plans are typically of a longer duration than a permit, one or more years instead of a few months. Between April 1, 2004 and August 8, 2005, the Director was notified of 199 averaging plans, which tended to predominate in grain, bus, and air charter operations.⁴⁷

The survey also explored at some length the perceived costs (both administrative and payroll) of labour standards.⁴⁸ Generally, the results indicated that administrative costs of hours of work provisions were not a significant issue to employers. Additional payroll costs relating to specific labour standards were reported more frequently by employers than payroll costs, but the difference was not substantial. However, employers’ perceptions of payroll costs associated with labour standards were highly variable, but overall very low (Canada HRDC 1997, 68). Major costs were reported by a minority of employers in such areas as loss of flexibility in scheduling work and difficulty in adjusting to the market. But the large majority

⁴⁶ In 2003/04, 19 permits were granted and two were refused; no permits were refused in either 2002/03 or 2004/06 as of August 31, 2006. Data provided by the Commission Reviewing Federal Labour Standards, CCS111 Permit 176.1 with No. of employees.

⁴⁷ Data provided from the Commission of the Review of the Federal Labour Standards, CCS106 Averaging Plans.

⁴⁸ Administrative costs associated with hours of work provisions include record keeping, work scheduling, applying for permits, obtaining authorizations from employees and unions to exceed maximum limits.

of employers indicated that these elements represented minor or no costs to their firm. On the basis of the survey results, the Report concluded that: “contrary to ‘corporate wisdom’, the costs of labour standards are generally not an issue for most firms” (Canada HRDC 1997, 69). However, it noted that some industries, such as grain, may be particularly susceptible to issues regarding flexibility, and that since most employers comply only in part with Part III their compliance costs are also partial (Canada HRDC 1997, 69).

The Phase I Report suggested eliminating the permit system and introducing two other provisions the right to refuse overtime and the right to take time off in lieu of overtime pay (Canada HRDC 1997, 79). These recommendations balance the greater flexibility given to employers to schedule hours with the right of employees to refuse overtime. Another recommendation was to impose a second and significantly higher rate of overtime premium when employees work more than the current ceiling since the current overtime premium does not constitute a disincentive to the use of overtime.

The Phase II Study examined in greater depth the relationship between Part III of the *Canada Labour Code* and labour-market changes, and focussed upon (among other things) hours of work, flexibility, life-long learning, and the quality of family life using multiple methods, including a literature review, fifty-five interviews with stakeholders and experts, and two major surveys.⁴⁹ The findings of the interviews and surveys are particularly pertinent to the issues of hours of work, flexibility, and work-life balance, and indicate a polarization of perceptions and preferences between employers and managers, on the one hand, and unions and employees, on the other.

⁴⁹ The surveys were conducted of four random samples: two samples of 600 employers and 600 workers in the federally regulated sector and two comparison samples of 200 employers and 200 employees in the provincially regulated sector (Canada HRDC 1998, 37-8). The stakeholder and expert interview selection process is described at page 23 of the Report. The surveys do not break the responses of the workers down by gender.

According to research staff with the Federal Labour Standards Review Commission, employers groups “harshly attacked” the second and third evaluation reports, and raised some criticisms of the research methodology, such as the survey samples and interview bias in conducting the focus groups. However, it is important to note that many of the findings relating to hours of work, employees preference, and work-life stress were confirmed in the reports based upon the *2001 National Study on Balancing Work, Family and Lifestyle* *2001 National Study on Balancing Work, Family and Lifestyle* that are discussed *infra*.

The stakeholder interviews indicate that management and unions were far apart on the issue of workplace stress, long hours of work, and work-family balance. According to the Report:

to some extent management viewed the stresses of the workplace as normal and not confined to employees only. The hours-of-work issue and to some extent the flexibility and leave situations caused stress to both managers and employees. However, many managers came up the ladder of working extremely long hours; in other words, it has become the norm for a manager to accept long hours as a reasonable entry fee to pay for promotion and higher pay (Canada HRDC 1998, 29).

By contrast, union officials regarded the new culture of work – which endorses long hours and regularized overtime – as contributing to workers’ insecurity. They reported that their members often feel so insecure that they will likely not refuse overtime when it is offered, and the union officials were worried about the stress, with its consequences for poor health and strains on family relationships, that it places on their members. Union officials indicated that women found hours-related stress more severe than did men. They believed that stress has increased in recent years on account of increased participation rates by women in the labour force, the increase in single-parent families, and the aging population (Canada HRDC 1998, 29). Unions were also very concerned about improving the balance between work and family life, and strongly favoured legislative provisions with respect to hours of work and family-related leaves. They were particularly concerned about the impact of extended long-hour shifts and twenty-four hour operations on family life, and believed that governments “should educate employers to see the social costs of some of their practices” (Canada HRDC 1998, 29).

Employers, by contrast, “desire more flexibility in the enforcement of labour standards and see this as the direction to move in. Employers see flexible schedules as adapting to family needs but generally want to control the type of flexibility obtained” (Canada HRDC 1998, 29).

Employers also believed that the lower pay and benefits provided to part-time employees was a self-correcting problem that will change over time. Employees emphasized the “need for additional voluntary choice in terms of hours of work” (Canada HRDC 1998, 29). However, the survey data indicated that there was a very wide discrepancy between the benefits provided by federally regulated employers to full-time employees and the benefits (or lack thereof) provided to part-time employees; 55.7% of employers offered full-time employees paid sick leave, while only 13.9 % offered that benefit to part-time employees.

While 63.5% of employers provided more than two weeks of paid vacation per year to full-time employees, only 12.8% provided the same benefit for part-time workers. The discrepancy between what was provided for full-time and part-time employees was smaller for a range of family-related leaves and benefits simply because employers were less likely to offer these benefits to full-time employees.⁵⁰

Unions and employers also differed on how to obtain compliance with minimum standards. Unions emphasized traditional enforcement techniques, whereas employers and officials from labour departments across the country stressed voluntary compliance mechanisms, such as education and communication. Employers emphasized that their most important competitors reside in the United States, where “labour standards are not being reviewed from the perspective of decreasing flexibility” (Canada HRDC 1998, 34). In general, employers regard labour standards as a burden, and not a benefit, whereas unions’ interest in labour standards is higher than before (Canada HRDC 1998, 34).

The survey data indicated that there is a high proportion of chronic overtime in the federally regulated sector. Both employers and employees reported a very high incidence of regular overtime; 45% of federally regulated employers and 42% of federally regulated employees reported work days of longer than 8 hours and work weeks that were longer than 40 hours (as compared with 31% of provincially regulated employers (Canada HRDC 1998, 41)). Moreover, a significant proportion (24%) of federally regulated employers reported that the percentage of their employees working over forty hours a week had increased in the past two years (Canada HRDC 1998, 41). Sixty per cent of workers in two sectors (trucking and grain, feed, and fertilizer) report that they regularly work overtime, and between 40% and 59% of workers in other transportation industries, banking, and telecommunications reported regularly working overtime (Canada HRDC 1998, 183). The incidence of unpaid overtime in the federal sector is 28.8%, which is smaller than the incidence in the provincially regulated sector (34.5%), despite the fact there is a higher proportion of managers and professionals in the federally-regulated workforce (Canada HRDC 1998, 95, 97). Employers also report that a high

⁵⁰ Employers provide supplemental employment insurance plans (or top-ups) for Employment Insurance maternity benefits for 11% of full time employees and only 4.7% of part-time employees; provide paid leave for emergencies regarding children for 33.3% of full-time and 8.9% of part-time employees; and paid leave for emergencies for elderly parents for 22.1% of full-time and 6.3% of part-time workers (Canada HRDC 1998, 148-9).

proportion of their employees work on weekends (44% as compared with 32% of provincially regulated employees) and travel out of town on weekends (24% as compared with 10% of their provincial counterparts) (Canada HRDC 1998, 40).

Recent data confirmed the high incidence of overtime establishment under federal jurisdiction. In 2004, 21.5% of employees with federally regulated employers regularly worked overtime. The evidence also indicates the incidence of usual work weeks of fifty hours or more is highest in transportation and warehousing.⁵¹

A majority of employees working for federally-regulated firms who were surveyed in 1996 indicated that one or another factor about their jobs detrimentally impacted upon the quality of family and personal lives; 31% reported long hours as the most common obstacle to the quality of family life; 19% reported that specific schedule features (days and times) conflicted with family responsibilities; and 17% reported that lack of predictability of work schedules affected the quality of their family life (Canada HRDC 1998, 47). By contrast, employers were less likely than employees to see working time as interfering with the family lives of their employees; however, they were concerned that their employees' family lives interfered with their work (Canada HRDC 1998, 48). Although a substantial minority (41%) of federally regulated employers reported that they were aware of situations where work was disrupted by family needs, very few (3.5%) reported that family life had been the subject of internal studies and that practices were in place to aid family life (Canada HRDC 1998, 48).

Only a minority of the employers surveyed had family-friendly policies in place. Forty per cent reported paid emergency leaves for children; 31% reported paid leave for care of elderly parents; 25.6% reported unpaid care leave for children; and 21% reported unpaid care leave of elderly parents (Canada HRDC 1998, 48).

The majority of the workers who were surveyed wanted their employers to provide them with more flexitime (62%) and time-off in lieu of overtime pay (61%). When asked to rank what workplace changes were most important to them personally, 22% ranked job security as their number one concern, followed by: paid leave for educational upgrading (21%); paid leave for family emergencies (19%); more skills training (18%); right to time-off in lieu of overtime pay (17%), and better access to flexitime (14%) (Canada HRDC 1998, 50). When asked about which three changes they thought should be the highest priority for

⁵¹ Graham Lowe, Report for the Federal Labour Standards Review, Figures 5 and 6.

governments, they indicated; job security provisions such as severance and termination (20%), assistance with child care (15%), improved health and safety (12%); paid leave for family emergencies (14%); skills training (13%); the transfer of benefits between jobs and employment statuses (employee to self-employed, for example) (13%), and the right to time off in lieu of overtime pay (12%). While employers expressed “a somewhat similar pattern of concerns,” a significant minority (30%) felt that their workplaces needed no changes and that no actions were needed by government on any of these issues (Canada HRDC 1998, 51).

Employees and employers were questioned about two specific techniques for addressing the problem of chronic overtime – time-off in lieu of overtime pay and the right to refuse overtime. Employees who were surveyed supported both time off in lieu of overtime pay (61.4%) and the right to refuse overtime (44%), although they ranked the former significantly higher than the latter when asked about the most important changes for workplaces in Canada (Canada HRDC 1998, 139-41). Employers also supported time-off in lieu of overtime pay (58.2%) ; however, most did not support employees’ right to refuse overtime (only 23.9% supported it) (Canada HRDC 1998, 161).

The incidence of long hours of work, which is particularly pronounced in industries under the federal jurisdiction, is increasing in Canadian workplaces, and this trend has resulted in social strains on family and personal life (Canada HRDC 1998, 93). The evaluation data suggests that balancing family priorities with work will continue to be a struggle for most Canadians; “there is considerable stress involved in balancing work and family responsibility, hence a rising level of employee absenteeism and various types of stress” (Canada HRDC 1998, 100). According to the Report:

The extent of the willingness of employers to shift toward more flexible hours for employees helps to alleviate some of these problems and concerns, but the incidence of flexible hours –which meet workers’ needs, as well as employers –is still relatively small. Moreover, for workers, flexible hours have not necessarily improved their ability to manage home and work relationships. Far too often, the evaluation data suggest that flexible for the employer does not necessarily mean flexibility for the worker (Canada HRDC 1998, 93).

The Report recommends a “bundling” or “cafeteria” approach within the *Code* “to provide these options and flexibility for managing work and family issues. The cafeteria of items might include longer leaves, education leaves, family leaves, shorter or more flexible workweeks, and longer vacations” (Canada HRDC 1998, 100).

The third Report, which was released in 2000, provides the results of a 1999 follow-up (Phase III) study, and links these results with selected findings in the two earlier studies. The 1999 study was based on a literature review and collected new data from focus groups with workers, employers, unions, and employer associations, and it confirms many of the findings of the employer and employee surveys discussed above (Canada HRDC 2000, 5-6. 35).⁵² Employees reported on the intensification of work, increased demands for long hours, and the difficulty in balancing both work and family life and work and learning. The focus group discussions and interviews also confirmed that employers and unions have opposite positions about the need for, and content of, labour standards and that flexibility means different things for workers and employers. Employers indicated that they would like Part III to be more flexible, so that they could make arrangements with their workers or unions which would better meet the particular needs of their types of business. Simply put, they would like less regulation and more flexibility in labour standards overall. Many employers also indicated that they would like to give more input to HRDC on labour standards (Canada HRDC 2000, 36).

By contrast, union officials wanted stronger enforcement of Part III, stronger support for family friendly policies, and provisions to address gaps (such as the absence of work breaks) in the *Code*. Workers indicated that they knew little about their rights under Part III, and that such information should be provided directly to them (Canada HRDC 2000, 36).

Specifically, employers in the focus groups desired the virtual deregulation of overtime and limits on hours of work; they wanted to be able to average overtime without either administrative hurdles or limits (except those necessary for health and safety) on maximum hours of work (Canada HRDC 2000, 38-39).⁵³ Employees in the focus groups also supported unlimited access to overtime (Canada HRDC 2000, 39), and both employers and employee supported time-off in lieu of overtime pay (Canada HRDC 2000, 39). Workers and unions supported the right to refuse overtime (although this right was advocated by only a minority of workers and generally only as a second choice to time-off in lieu of overtime pay), family

⁵² See the Report (HRDC 2000, 6, 23) for a description of the composition of the focus groups and a description of the stakeholders who were consulted. The gender composition of the groups was not provided.

⁵³ The banks wanted more flexibility to schedule, especially daily overtime (HRDC 2000, 27), and some firms wanted the only limits on their right to schedule to be employee's refusal to consent and health and safety concerns (HRDC 2000, 100).

leave, educational leave, three weeks of holiday each year, and increased adoption leave.⁵⁴ The study participants suggested that although some of the need for flexibility could be addressed by Part III, that “equal or stronger emphasis ... should be placed on information, education, partnerships, etc.” (Canada HRDC 2000, 42)

2. 2001 National Study on Balancing Work, Family and Lifestyle

A major empirical study of work-life balance funded by Health Canada has led to a series of reports that probe in greater detail the individual and social consequences of work-life conflict. The study, which was conducted in 2001 by Linda Duxbury and Chris Higgins, was designed: to identify the issues associated with balancing work and life in 2001; to quantify the benefits to employees, employers, and Canadian society of work-life balance; and to quantify the costs to the Canadian health care system of high levels of work-life conflict (Higgins, Duxbury, and Johnson 2004, vi-vii).⁵⁵ They received responses to their surveys from more than 31,500 employees in 100 public, private, and not-for-profit organizations (each of which had at least 500 employees),⁵⁶ and they have released a series of research reports tracking the incidence (and increase) in work-life conflict, and detailing its consequences for individuals, the workplace, and health-related costs. The first report, released in 2002, put the series into context by describing the sample of employees who participated in the research and examining the factors that were associated with increased work-life conflict. In 2003, the second report made the business case for change by looking at how levels of role overload affect workers, their families, and employers. The third report, released in 2004, focused on how work-life conflict affects Canada’s health care system, and quantified the demands associated with this conflict. The fourth report, released in 2005, identified the most important predictors of the various forms of work-life conflict and the factors that place employees a risk of this conflict. It also looked at the gender dimension of work-life conflict.

⁵⁴ Some employers also supported family and education leave (Canada HRDC 2000, 39-40).

⁵⁵ The empirical research in the reports spanned two decades. In 1989-90, 25,000 Canadians were surveyed on issues relating to work-life conflict. In 2001, the 1990 survey was replicated.

⁵⁶ These large firms are more likely to be unionized and have policies to deal with work-life conflict.

Comparing their 1991 samples to those in 2001, Duxbury and Higgins found that working time had increased. Only one in ten respondents in 1991 worked over fifty hours in a week, but one in four did so in 2001. The proportion of employees working between thirty-five and thirty-nine hours declined from forty-eight to twenty-seven per cent (Duxbury and Higgins 2002, 47). Thirty per cent of the sample in 2001 worked paid overtime, higher than the twenty-per cent reported by Statistics Canada in 1997 (Duxbury and Higgins 2002, 51), and men were more likely to work overtime than women. Fewer than half the respondents (forty-seven per cent) perceived that they could refuse overtime if they wanted. Duxbury and Higgins note that, since perceived control over one's time has been a key predictor of stress and work-life conflict, this data indicate that less than half of the employees employed by large employers are able to control the amount of time they devote to paid overtime (Duxbury and Higgins 2002, 51). The proportion of employees who perform unpaid overtime almost doubled from one in four of the respondents to one in two. The responses indicated that managers and professionals have a particularly difficult time meeting work demands within a regular work week.

The time men spend on child care has increased since 1991 to the extent that the time spent by women and men was almost equal in 2001. However, in 2001 the majority of both men and women indicated that it was the women in the household who had primary responsibility for child care (Duxbury and Higgins 2002, 64). This is an important finding since "responsibility for a role has been found to have a higher positive association with stress than has time spent in role-related activities" (Duxbury and Higgins 2002, 64). Duxbury and Higgins (2002, 44) also found employees who have the greatest need for flexible work arrangements (that is, parents and employees with elder care responsibilities) do not have access to them. Managers, professionals, and private sector employees are more likely to have access to and to use flexitime arrangements than non-professional employees.

In their second report, Duxbury and Higgins (2003, 63) discovered that the percentage of the workforce with high role overload has increased over the past decade; fifty-eight per cent of the respondents to the 2001 survey reported high levels of role overload – an increase of 11 percentage points over what was observed in the 1991 sample. They also discovered that work to family interference was a real problem for one in four Canadians working for large employers; 38% of Canadians report moderate levels of interference (Duxbury and Higgins

2003, 63). High levels of caregiver strain, the stress involved in providing care to assist a disabled or elderly dependent, was reported by one in four of the respondents (Duxbury and Higgins 2003, 69). Moreover, the evidence is clear that employed Canadians with dependent care responsibilities have the greatest difficulty in balancing work and family responsibility. Not surprisingly, women are more likely than men to report high levels of role overload and high caregiver strain; they devote more hours per week than men to activities such as child and elder care, and are more likely to have responsibility for those tasks (Duxbury and Higgins 2003, 71-3).

Job type is associated with work-life conflict, although different types of jobs encounter different types of conflict. Managers and professionals who have higher demands at work are more likely than those in other jobs to experience high levels of role overload, while those in other jobs were likely to report higher levels of caregiver strain due to the financial stresses associated with elder care (Duxbury and Higgins 2003, 75). Duxbury and Higgins (2003, xiv) note that when job type is taken into account and work-life conflict is broken into its component parts, many of the gender differences in work-life conflict disappear, which suggests that “many of the gender differences in work-life conflict may be attributed to the fact that women are typically compressed into a different set of jobs than men.”⁵⁷

The 2001 survey responses suggest that conditions within Canadian organizations have declined since 1991, and the responses indicate that organizational commitment also appears to have declined (Duxbury and Higgins 2003, 73). Role overload, which was associated with long hours of work and a lack of control over working hours, and work to family interference affect a company’s bottom line since they are associated with employees’ stress, absenteeism, use of employee assistance programs, drug use, intention to leave, and dissatisfaction with work (Duxbury and Higgins 2003, 33-34, 41, 65). Duxbury and Higgins (2003, 38) estimate that the direct costs of absenteeism due to high work-life conflict are approximately \$3 to \$5 billion a year.

⁵⁷ However, managers and professionals are in better mental and physical health than workers in other jobs, and Duxbury and Higgins suggest that the sense of control that managers and professional enjoy accounts for this difference. Women report higher levels of perceived stress, burnout, and depression than men do, and Duxbury and Higgins suggest that such differences may have more to do with gender differences in socialization than in either work or non-work demands.

The third Report, by Higgins, Duxbury and Karen Johnson (2004), focuses on the relationship between work-life conflict and health care costs. They found that respondents to the 2001 survey who experienced high levels of work-life conflict made higher use of the health care system, including mental health professionals, care on an out-patient basis, more physician visits, more likely to have stayed overnight in a hospital, and to have visited a hospital emergency room (Higgins, Duxbury and Johnson 2004, 32-3). Role overload was the “greatest culprit” in increasing work-life conflict and health care costs associated with it, although care giver strain also made a significant contribution. They calculated the direct health-care related costs of high role overload to be \$6 billion, as well as \$5 billion for high caregiver strain, \$2.8 billion for high work to family interference, and a half billion dollars for high family to work interference (Higgins, Duxbury, and Johnson 2004, 51).⁵⁸

The fourth Report, which was released in September 2005, identified the major predictors of role overload, work to family interference, family to work interference, and caregiver strain. It also identified the key factors that place employees at risk of the various forms of work-life conflict.⁵⁹ The report explored not only the demographic conditions and life circumstances of employees, it also examines the link between workplace culture and work-life conflict. In particular, Duxbury and Higgins focused on “work or family” cultural expectations in which employees are expected to put work ahead of family in order to advance and “the culture of hours” which refer to expectations that associate security and promotion with working long hours of work. They found that work culture is the most powerful predictor of role overload for both men and women – work or family and long hours cultures were strongly associated with role overload (Duxbury and Higgins 2005, 30-32). The amount of time spent in unpaid overtime a month and the total number of hours spent in work per week are key predictors of role overload for both men and women (Duxbury and Higgins 2005, 35). However, the most important predictors of caregiver strain and family to work interference are associated with the family domain (family type, adult role responsibilities, etc.) (Duxbury and Higgins 2005, 33).

⁵⁸ They also acknowledge that the four forms of work-life conflict are correlated with the result that there is some degree of overlap associated with the costs associated with each form.

⁵⁹ For a discussion of the research methodology see Duxbury and Higgins 2005, Chapter 2.

Organizational culture is a key predictor of role overload, work to family interference, and family to work interference for both men and women (Duxbury and Higgins 2005, 40-2). However, family type and adult roles are predictive of role overload and work to family interference for women but not for men. Women with a stay-at-home spouse report lower levels of role overload and family to work interference but higher levels of work to family interference than other women. As Duxbury and Higgins (2005, 54) point out, women in this family type manifest work-life conflict patterns that are more typically reported of men.

There is a common conclusion in each of the four reports: that the link between hours in work and role overload, burnout, and physical and mental health problems suggests that these workloads are not sustainable over the long term (Duxbury and Higgins 2002, 63; Higgins, Duxbury and Johnson 2004, 52; Duxbury and Higgins 2005, 59). A clear contributing factor to role overload is the increased use of overtime. Non-professional employees fear that their refusal to work overtime will lead to loss of jobs, while professionals worry that their careers will not progress (Higgins, Duxbury and Johnson 2004, 52). Duxbury and Higgins (2003, 79) recommend that employers adopt measures to provide employees with flexibility in work-time arrangements and to increase employees' control over their working time. Specifically, they suggest that employees be given the right to refuse overtime work, to time off in lieu of overtime pay, to paid child care leave, and the opportunity to transfer from full-time to part-time work, which provides pro-rated benefits, full seniority, and the right to return to full-time status.

3. Leaves and Benefits: Who Takes Them and for How Long?

Since parental leaves under Part III of the *Code* and parental benefits under the *Employment Insurance Act* were extended from 18 to 35 weeks on January 1, 2001 (Calder 2003), there has been some evaluation of how these, and related changes, have influenced women's and men's labour market behaviour. The changes were intended to enhance the duration, flexibility, and accessibility of parental benefits (CEIC 2005, 19).⁶⁰ The data indicate that more women are taking benefits and for a longer duration, and that there is increased

⁶⁰ In 2002, amendments were made that made it easier to combine a range of benefits – maternity, parental, sickness, and compassionate care, for example. For a discussion of the benefits and leave provisions see CEIC 2005, 19 and Appendix I.

sharing of parental benefits between men and women, although women continue to predominate.

In 2004, 63% of all new mothers received maternity and parental benefits, up from 54% in 2000. More than 70% of the claimants used at least 11 months of leave, and the average duration of the benefits has been increasing (OECD 2005, 191).⁶¹ In 2001, 10% of male parents claimed parental benefits, up from 3% before the duration of the benefits was extended (Perusse 2003). Parental benefits exceeded the rate for maternity claims for the fourth consecutive year in 2003/4. The majority of the new parental claims (85.8%) continue to be established by women, although biological parental claims by men are increasing; they rose to 14.2 % in 2003/4. The average duration of parental benefits for parents sharing the benefits was 9.6 and 21.4 weeks for men and women, respectively (CEIC 2005, 20).

Over 650 employers were surveyed in order to observe the impact that enhanced parental benefits had on firms. Overall, the findings indicated that employers were supportive of the extension of benefits and they did not encounter major difficulties in adapting to the enhanced leave, nor did they anticipate negative impacts of the new program. Small employers with no experience of leaves were concerned about negative impacts, although those who had experience were supportive of the initiative (CEIC 2005, 64).

A recent report on an evaluation study of the extension and enhancement of parental benefits in the *Employment Insurance Act* in 2001⁶² summarized a number of important findings including the increased participation rate of men and women, reduced mothers' stress, increased the likelihood of the employee's working, and the perception of most of the surveyed employers (65 to 75 per cent) that the enhanced program imposed little by way of additional cost (Canada HRSDC 2005, ii-vi). Smaller employers viewed the program changes less favourably than larger employers, with employers who had no experience of the enhanced

⁶¹ Women do not receive benefits if they are not in the labour force, ineligible or did not apply for benefits, or were self-employed. One in three self-employed mothers return to work within two months, compared to 5% of employees.

⁶² The study involved a literature review, program administrative data, a survey of participants in the original 2000 program and the enhanced 2001 program, data from the Survey of Labour and Income Dynamics, and a Survey of Employers. The number of hours for qualifying for the benefits was reduced from 700 to 600, the second waiting period was waived if a mother took maternity benefits and either parent took parental benefits, and employers were entitled to earn up to 25 per cent of their parental benefits in a week without reducing their benefits.

program expressing the strongest negative views (Canada HRSDC 2005, vi). The Report also found that the majority of working parents are eligible for maternity/parental benefits, and that eighty to eighty-five per cent of mothers with paid employment are covered by EI benefits under the enhanced system. Self-employed spouses or parents (47.6 per cent) were considerably less likely to take time off work related to their child's birth or adoption compared to spouses or partners who were employees (78.1 per cent) (Canada HRSDC 2005, 83). Under the enhanced program 18.5 per cent of dual earner couples reported that they shared benefits, up from 8.1 per cent under the pre-2001 program (Canada HRSDC 2005, 88).

An important factor influencing the length of maternity and parental leave that employees take are employer "top-up" plans (supplementary unemployment benefits that provide additional income to parents on leave). A recent study found that 18% of the mothers with paid employment the year prior to child birth received a top up. Although the average length of leave taken by mothers who received a top up was the same as mothers who did not, those who received top ups were less likely to take short leaves and more likely to return to work (CEIC 2005, 71). The Canadian Employment Insurance Commission speculated that this pattern was explained by the fact that receiving a top-up is often conditional on returning to the same employer after child birth and returning within a specified amount of time. Employer top ups are more likely among unionized and full-time employees. Top ups are also much more likely in the public than the private sector. According to the recent report of the evaluation study of the enhanced parental benefit program, of the employers surveyed who provided top ups, 68 per cent were public sector and 9 per cent were private sector (Canada HRSDC 2005, 92). Top ups for parental leave are less common than top ups for maternity leave.

Another factor that influences how long an employee stays on maternity and or parental leave is the mother's income. Employees' lower individual earnings were strongly associated with a quicker return to work, which suggests that they are financially unable to stay at home for the entire year on 55% of their insurable earnings (Marshall 2003, 18-9).

The generally low participation rate of men in parental benefits is likely explained by a combination of social norms about the roles of men and women when it comes to parenting young children and economic calculation. The mother's desire to stay with her child was the most frequently reported reason for the father's not taking parental leave, followed by financial

reasons.⁶³ Given the way that parental employment insurance benefits are structured, it makes economic sense for the lower earner, typically the women, to take parental leave. The low ceiling on the maximum amount of benefits (which was \$413 Can. per week in 2005) combined with benefits levels pegged at only 55% of average weekly earnings, and the requirement that the parental benefits be shared between the parents creates an incentive for the lower income earner in a dual-earner household, typically the woman, to take parental leave (Evans and Pupo 1993; Iyer 1997; Madsen 2002; Marshall 2003). Dominique Perusse (2003, 4) found that in 2002 “30% of women receiving parental benefits had average weekly insurable earnings lower than \$400 during their qualification period, compared with 11% of men. Similarly, during this period, 67% of men had average weekly insurable earnings of \$600 or more, compared with only 44% of women.” Few employers supplement the income that employees receive while on maternity or parental leaves, and those that do, do so only for a short period of time – the median duration was only 15 weeks (Marshall 2003, 19-20).⁶⁴ Thus, in their current form, the leaves institutionalize a norm of temporary homemaking for women, who, in turn, face potentially negative consequences for their earnings and long-term employment trajectories (Fudge 2005; Morgan and Zippel 2002).

Since the compassionate care benefits were introduced in January 2004, the actual number of claimants has been disappointing (CEIC 2004, 64). Only 2,033 claimants benefited during the first three months of 2004, and the vast majority of the claimants were women (71%). Moreover, a recent evaluation of the program revealed a number of serious problems with the benefit and leave provisions (Osborne and Margo 2005). Less than four per cent (\$7.25 million) of the \$190 annual budget was expended on claims in 2004/5. The low level of benefits paid out was attributed to the very restricted nature of the program. Since the program is delivered through the *Employment Insurance Act* it does not benefit the self-employed (who comprise approximately fifteen per cent of workers) and part-time, contract, temporary, and

⁶³ Employment Insurance Coverage Surveys, 2002, 2003, 2004, reported in the Daily, Statistics Canada, January 14, 2004, June 22, 2004, June 22, 2005, respectively. In 2002, nearly one half the mothers who themselves received maternity benefits reported their desire to stay home as the primary reason, another 17% said that it was easier for them to take time off work, while 14% said it was more financially advantageous if they, and not their spouse, stayed home.

⁶⁴ Only 25% of employees who took maternity or parental leave in 2001 and planned to return to work received any kind of employer top-up. Half of these employees received a substantial top-up equal to 90% of their previous earnings.

season workers who do not have sufficient hours of work to qualify. Moreover, under the *Canada Labour Code* and *Employment Insurance Act* the definition of family member for whom an employee is entitled to leave and benefits in order to provide care is very narrow and does not include siblings, aunts, uncles, grandparents, and grandchildren. The result of the narrow definition of eligible family member is that a number of employees are unable to access the benefits and leave to care for close family members who are seriously ill or dying. All of the stakeholders who were consulted by the authors of the evaluation report emphasized the need for a broader definition of family member in both the benefit and leave provisions that would include, at a minimum, siblings, and grandparents. Many argued for a more expansive definition that would include step-children, step-parents, aunts, uncles, grandchildren and grandparents. This approach is consistent with the broader definition of family member in the compassionate care leave provisions in some of the provincial and territorial labour statutes. Some organizations, including the Senate Subcommittee on End-of-Life Care, went a step further, recommending that the definition not be restricted to family members at all, to enable patients to determine the best person to be their caregiver (Oliver and Margo 2005, 24-25). The six week period of benefits and eight weeks of leave was considered to be too short, and the twenty-six week window in which the family member is expected to die is too restrictive. Moreover, the eight weeks of leave and six weeks of benefits is limited to one family and not extended to each family member. Enabling each employee to access the full eight-week leave period to care for the same family member would acknowledge the difficulty of determining the length and course of the dying process, and the potential need for more than one family member to be absent during this period to provide the requisite care and support (Oliver and Margo 2005, 32). These changes may result in increased costs to employers who might have to absorb the costs of compassionate care absences for multiple employees within the same dying member's family. However, it would not increase access or costs to the Compassionate Care Benefit Program unless the program was also amended to allow more than one employee per family to access the eight-week benefit or the same dying family member within the 26-week period.

The take-up rate of sickness benefits has been increasing. In 2003/4, the average weekly sickness benefit was \$276, and the average length of benefits was 9.6 weeks (49.1% of claimants received 11 to 15 weeks of benefits; 21.6% received 6 to 10 weeks; and 29.3%

received 1 to 3 weeks) (CEIC 2004 55). Women were the majority (comprising 59%) of claimants (CEIC 2004, 18).

4. Summary

The evidence suggests that there is a widespread failure to comply with hours of work rules in the federal jurisdiction, that overtime hours are increasing, and that work-family conflict is on the increase. There is a great deal of evidence that the direct costs to individuals, their families, employers, and the health-care system are immense. However, there is little evidence that either large or federally-regulated employers are putting work-life arrangements in place. The research reveals that employers prefer to retain control over the scheduling of working time, and they want increased flexibility to use overtime. It is also clear that they are relying on a large proportion of employees to perform excessive hours or chronic overtime. The evidence also is that employees want to have greater control over scheduling working time, and that employee control over their working time reduces work-life conflict.

Moreover, research indicates that part-time employment continues to be less likely to provide employment-related benefits than full-time work, and it continues to be disproportionately performed by women (Comfort, Johnson, and Wallace 2003). The evidence also is that employees with lower-status jobs are less likely to have either family friendly work environments or access to employee benefits plans that cover some of the costs of needed services (CAALL 2002, 27). Moreover, the design of the leave and benefit structure for maternity and parental benefits (the low benefits replacement rates and income ceilings combined with the permission to share the benefits between parents), means not only that mothers are more likely to take leaves than fathers, but also that women with low income are more likely than women with higher income to return to work soon after the birth of a child.⁶⁵

VI. Recommendations

There is a gap between what individuals need and prefer regarding working time schedules and the ones they are required to work (Anxo et al 2004, 195). Employees want greater control over their working time. They also want a variety of work schedules; research

⁶⁵ The requirement to share the leave exacerbates this problem in the federal jurisdiction.

indicates that employees' preferences are shaped by income and household composition. High income employees would prefer to work fewer hours, while lower income employees want to work more. Households in which there are two working adults desire fewer hours of work, while men who have an unemployed spouse prefer more. Married women with care responsibilities for younger children would prefer shorter work hours, whereas lone-parent mothers are willing to work more hours because they need the income (Drolet and Morissette 1997; OECD 2005, 184).

Employers also want greater control over scheduling working hours – they want to be able to schedule longer hours of work and to reduce their overtime costs. Most employers have not voluntarily embraced work-life balance (or family friendly) policies. The costs and benefits of for employers of such policies “is a function of i) the difficulty with which (skilled) workers can be replaced and ii) how important it is to these that these workers have family-friendly support” (OECD 2005, 206). Moreover, policymakers in Canada “are hesitant to pass additional costs to Canadian employers in face of competition with the United States” (OECD 2005, 206).

At the federal level, the United States adopts a market model for the regulation of their working time (Block, Berg, and Roberts 2003, 447).⁶⁶ Generally, Canadian labour standard relating to working time especially with respect to paid vacation leave, general holidays, and maternity and parental leave) are higher in Canada than in the United States (Block and Roberts 2000, 299). The *Fair Labor Standards Act*, which is the primary federal legislation setting nation-wide employment standards, does not impose daily or weekly limits on the number of hours worked. Instead, it imposes a standard workweek of 40 hours, and requires that hours in excess of that standard be paid at a premium of time and a half the employee's regular wage. Although employers are not allowed to reduce the cost of overtime through averaging provisions or compressed work weeks, there are extremely broad exemptions to the overtime provisions.⁶⁷

⁶⁶ *The Fair Labor Standards Act*, 29 U.S.C. 201-219 (2000), passed in 1938, is the primary federal legislation governing national wage rates. State legislation also regulates working time.

⁶⁷ These exemptions range from farm workers to transportation workers. Recently, the “white-collar” exemption of executive, administrative, and professional employees was expanded (Rowan 2004, 119).

Given such light regulation and very low union density, it is not surprising that a growing portion of employees in the United States work very long hours (Jacobs and Gerson 2004, 39). There is also a high degree of polarization in working time (Jacobs and Gerson 2004, 163-5). Women continue to bear the brunt of family responsibilities, and this translates into the type of jobs they have and the income they earn (Jacobs and Gerson 2004, 167-8). There is nothing on a nation-wide basis in the United States that requires employers to provide part-time workers with benefits. The only federal family-friendly legislation requires large employers who have at least 50 employees to provide 12 weeks of unpaid leave to employees for the birth and care of a child, care of an immediate family member who has a serious health condition, or the employee's serious health condition.⁶⁸

One problem with this market model for regulating working time is that it shifts the costs of flexibility that enhances employer control over the scheduling of work to employees. Although employers bear some of the costs of excessive and unsocial hours through lost productivity, reduced morale and commitment, and increased absenteeism and benefits costs, they are able to shift a great deal of the costs onto workers, their families, and public services. As a group of experts on the regulation of working time has recently noted, "estimates of costs vary, depending on whether the policy measures are considered as a short-term consumption or a long-term form of investment, and also whether the costs are calculated from a macro-economic societal level or from an enterprise perspective" (Anxo et al. 2004, 207). They also noted that since the benefits of these policies are not reaped by enterprises alone, their cost should not be borne exclusively by enterprises but also shared among government, employers, and workers (Anxo et al. 2004, 207).

Another problem is that the market model has a very thin notion of choice. Choice is regarded as an endogenous property of free will, not as shaped by the opportunities available and prevailing cultural norms. Women who choose to take on family responsibilities bear the burden of accommodating their family and work roles. Yet, policy discourse has barely begun to register ideas about men's greater involvement in family life. As long as men can choose not to do domestic labour women will have no choice but to do it, and occupations and

⁶⁸ *Family Medical Leave Act*, 29 U.S.C. 2654, <http://www.dol.gov/esa/whd/fmla/> Accessed October 28, 2005.

employment will continue to be structured in ways that limit women's choices (Olsen 2002; Probert 1997).

Europe has taken a different approach to regulating working time, one that continues to impose limits on hours of work and provides greater flexibility for employees to control their hours of work. The basic directive on the organization of working time stipulates minimum daily (11 hours) and weekly (24 hours) rest periods, and a maximum work week (48 hours). Flexibility for employers is provided through averaging agreements as well as individual and collective derogations, which are subject to time limits.⁶⁹ Annual paid leave must amount to at least 4 weeks. Moreover, the part-time work directive provides for parity in treatment of full-time and part-time work as well as greater flexibility for employees to schedule working time.⁷⁰ Part-time employees are not to be treated in a less favourable manner than full-time employees unless the different treatment can be justified on objective grounds. Moreover, employers are obliged to give consideration to requests to transfer from full-time to part-time work and vice-versa.

In theory, the federal working-time regime falls mid-way between the market model of the US and the European "social" model. While the *Canada Labour Code, Part III* regulates standard working time, it does little either to provide employees with access to flexible working time or to ensure that part-time work is treated comparably to full-time work. Moreover, in practice, the federal regime is moving closer to a market model since many employers simply do not comply with the legislation. Ontario and British Columbia have also moved in this direction, although Quebec is traveling the opposite way towards a social model.

The hours of work rules for Canada's national infrastructure were established in the late 1960s. A standard 40 hour week and 8 hour day were combined with a limit of 48 hours per week, and employers were provided with flexibility through a range of averaging and excess hour mechanisms. However, much has changed in the labour market over the past forty years. The legal regime has adapted to the changing demographics of the workforce by providing workers with job-protected leaves to accommodate family responsibilities. However, these provisions were simply grafted on to the old working-time norms, and they have tended to

⁶⁹ Organization of Working Time (Basic Directive) 2003/88/EC.

⁷⁰ Part-time Work Directive, 97/81/EC, amended by Council Directive 98/23/EC of 7 April 1998. For a discussion of this Directive see Fredman 2005.

reinforce the traditional division of labour between men and women over caring responsibilities. The drift towards a market model has exacerbated work-life conflict and has contributed to a polarization in the distribution of paid working time.

A market model of regulating working time in which hours of work are regulated via individual negotiation not only ignores the inequality in bargaining power between individual employees and employers, it also ignores the extent to which the consequences and the costs of long working hours are borne by third parties – especially families and taxpayers who pay for the Canadian health care system. Such a model of regulating working time focuses on short-term productivity at the level of the individual firm rather than the longer term productivity of the economy in general. Moreover, a market model is inconsistent with improving gender equality in employment as women continue to bear a disproportionate burden of socially necessary but unpaid care responsibilities. For too long control over working time and gender equality have been treated as separate policy spheres when all of the evidence demonstrates that they are deeply connected. While collective negotiation of working time goes some way towards alleviating the inequality of bargaining power between employers and employees, collective control over working time may have a positive or negative effect on individual control (Berg et al. 2004, 331).

For these reasons, state regulation of working time is both justified and necessary. The important question is not whether there should be state regulation of working time, but what are the principles that should inform government policies and the laws regulating working time. In elaborating its decent work agenda in the area of working time the ILO has identified five principles of “decent working time: that it should be safe and healthy; ‘family-friendly’; promote gender equality; advance productivity; and facilitate worker choice and influence” (McCann 2005a, 1; Anxo et al. 2004, 195).

It is time to begin to institutionalize new working-time norms in the federal jurisdiction that better reflect the needs and preferences of the workforce and the operational requirements of employers. The following recommendations are based upon the evidence about the impact of laws regulating working time and the ILO’s five principles concerning decent working time.

Hours of Work Rules

Standard Hours, Overtime, and Flexibility

The hours of work rules in the Canada *Labour Code, Part III* attempt to balance rigid overtime standards and limits on maximum hours of work by providing a range of devices – from occupational exclusions, industry-specific regulations, averaging agreements, modified work schedules, and excess hours permits— to inject flexibility into the regulation. However, the problem is that these forms of flexibility lead to real difficulties in monitoring compliance, and contribute to long hours of work and excessive overtime in the federally regulated sector.⁷¹ The challenge is how to simplify the working time rules while at the same time balancing flexibility for employers with protection for employees. The goal is to institutionalize a form of regulated flexibility (Bosch 1999).

The Ontario Task Force on Hours of Work and Overtime (Ontario 1987) and the federal Advisory Group on Working Time and the Distribution of Work (Canada HRDC, 1994) recommended moving away from daily and weekly limits on hours of work and moving to an annual cap on hours in excess of the standard work week.⁷² As a *quid pro quo* for enhanced employer flexibility they proposed the right of individual employees to refuse overtime. A system of annualized excess hours combined with an individual right to refuse to work and minimum rest periods would provide employers and employees with greater flexibility and simplify the working-time regime. However, even flexible annual working hours require regulation to establish minimum rest periods, stipulated periods over which standard working time can be averaged, and how overtime work is to be compensated (Bosch 1999).

⁷¹ Based on the findings of the Ontario Task Force on Hours of Work and Overtime (1987), the 1997 Phase II Part III Evaluation Report (Canada HRDC 1997, 54) suggested that the complexities of the averaging, modified-work schedule, and permit provisions in Part III result in an extremely complicated system that invariably contributes to rampant non-compliance.

⁷² The Ontario Task Force recommended an annual block of 250 overtime hours per employees, which is not transferable. By contrast, the Advisory Group recommended an annual block of 100 hours of overtime hours per employee paid at the premium rate, and an additional block of 100 hours, which is paid at a rate of double the employee's regular wage or must be taken as time off in lieu.

Overtime Entitlements

In the federal jurisdiction, the standard work week that functions as the overtime threshold should remain at 40 hours a week, and employees would be entitled to refuse to work more than 44 hours in any week. The right to refuse to work after 44 hours would provide employers with some flexibility to deal with exigencies; however, employees could refuse to work in excess of 40 hours in a week if they had a good reason (care responsibilities or education) for doing so. The annual overtime permitted should be 200 hours per employee (and the 100 hours of overtime should not be transferred between employees). For the first 100 hours of overtime per employee, employees should be entitled to choose between overtime pay at time and a half the regular wage rate and time off in lieu at a rate of an hour and a half off work for every hour of overtime worked. For the second 100 hours of overtime per employee, the employer would be required to provide time-off in lieu (at a rate of an hour and a half for every hour of overtime worked) instead of overtime pay. These limits could be phased in over time. There would be no need for excess hours permits or agreements to average excess hours.

Averaging Agreements, Minimum Rest Periods and Meal Breaks

Agreements to average overtime entitlements or to modify work schedules would continue to be available to employers, but they would have to be approved by the affected employee's bargaining agent, if there is one, or an enhanced (70%) majority of the employees.⁷³ To ensure that employees do not work excessively long hours, there should be a minimum daily rest period of eleven consecutive hours within 24 hours and a half hour unpaid meal (rest) period after 5 consecutive hours of work. Requiring 32 hours of consecutive rest a week, as is already the case in several jurisdictions in Canada, would also improve work-life balance.

Individual and Collective Derogations from Employment Standards

Individual and collective derogations from hours of work standards and entitlements are techniques for injecting greater flexibility into the hours of work rules. Individual and collective derogations mean that standard hours of work, overtime entitlements, and limits on

⁷³ This recommendation simply extends the current requirements in Part III regarding modified work schedules to all overtime averaging agreements

maximum hours of work no longer function as fixed entitlements but instead operate as default rules. “The differentiation between rights that require collective negotiation for alienation or modification and those that permit individual alienation depends upon an assessment of whether individual employees will have the bargaining strength to achieve the optimal outcome” (Collins 2002, 467).

Currently the *Canada Labour Code* does not contemplate individual derogations from hours of work provisions, except in the case of the right of an individual to waive annual vacation leave. However, the *Code* permits collective derogations, with the consent of seventy per cent of the affected employees or the consent of the union representing affected employees, from the standard work week and limits on the maximum work week. These provisions allowing for modified work schedules entitle employers to average overtime and the standard work week over a reference period of several weeks. Several Canadian jurisdictions provide for collective derogations from working-time standards. Collective derogations are justified on the ground that they provide employers and employees with greater flexibility over working time while simultaneously ensuring that employers are not exploiting their superior bargaining power by requiring either the consent of the union (if any) of the affected employees or the consent of an enhanced majority of the affected employees.

Since 2000, both British Columbia and Ontario have introduced individual derogations from working-time rules. In British Columbia, the right of individuals to opt-out of labour standards has been confined to over-time entitlements on a weekly basis in order to permit the averaging of overtime over a longer reference period. In Ontario, individual opt-outs also cover limits on maximum work hours, although in 2005 the government introduced a *pro forma* government approval process with the individual opt out. Individual opt-outs of this kind raise the possibility that an employee’s consent is more apparent than real and they do little to counter the culture of long hours.

The EU Working Time Directive provides for individual derogations that severely limit the effect of the maximum forty-eight hour limit to working time.⁷⁴ Introduced at the insistence of the United Kingdom, the United Kingdom is the only member state which has utilized a general derogation which applies to all sectors and occupations covered by the Directive. Empirical research has discovered that the individual opt-out is in widespread use in

⁷⁴ Directive 93/104/EC.

a wide range of sectors with the result that the law implementing the Directive in the United Kingdom has had a minimal impact on the prevailing culture of long hours (Barnard, Deakin, and Hobbs 2003). It has

done little to discourage the systematic use of overtime working, which remains popular with some workers as a way of boosting earnings and with employers as tried and tested mechanisms for varying labour inputs. Because of the width and simplicity of application of the individual derogation, collective agreements combining the annualization and reduction of working hours, common in a number of continental systems, have been rare in the UK (Deakin and Wilkinson 2005, 340).

Another technique for injecting flexibility into the legal rules regulating working time is to allow for the bundling of individual standards in a package and to permit deviation from the individual statutory standard so long as the package “meets or exceeds” those provided in the legislation. The British Columbia *Employment Standards Act*⁷⁵ used to require an assessment of whether collective agreements provisions met or exceeded the corresponding requirements of the legislation. This provision led to a great deal of interpretive problems centring on whether the requirement called for an assessment with regard to the individual employee or the entire bargaining unit (Hall 2001-2). Although the bargaining unit approach to the meet or exceed test gained currency, it led to a number of problems, the most profound of which was the lack of certainty in the law which resulted from “the difficulty of comparing superior/inferior provisions as between different groups of employees” in the bargaining unit (Hall 2001-2, 329).

Individual derogations from hours of work standards and limits should not be permitted. Not only is it difficult to ensure that the agreement is based upon the voluntary choice of the employee, individual derogations from limits on excess hours make a mockery of any attempt to combat the culture of long hours. Variation either by the bargaining agent of the affected employees or a majority of the affected employees should be permitted, subject to an individual employee’s right to refuse excess hours. The bundling of statutory benefits, such as longer hours in excess of the limits in exchange for additional annual vacation leave, makes it very difficult both for employees to know what they are entitled to and to enforce their entitlements and, thus, should not be permitted.

⁷⁵ R.S.B.C. 1996, c. 113 ss. 43, 49, 61 and 69.

Exclusions

The vast majority of occupational exclusions should be repealed. Managers are commonly excluded from working time provisions and both the ILO and European Union permit exemptions for managers on the ground that their jobs are unsuited to limits on working hours due to the degree of autonomy granted to them to determine their working time (McCann 2005b, 143).⁷⁶ However, the exclusion of managers leads to time-consuming demarcation disputes (the question of managerial status is a perennial problem), promotes a culture of long hours, ignores the need of managers for work-life balance, and may have a discriminatory impact upon women who want to progress through the occupational ladder and have a family. Moreover, there is evidence that managers work excessively long hours and that many would prefer to reduce their hours of work. This suggests that long hours may not always be the outcome of genuine choice (McCann 2005b, 143).

There are compelling public policy reasons for questioning the existence or extent of managerial exclusion from working time. All managers, other than very high ranking managers who are in a fiduciary relationship with their employer and real decision-making power should be covered by hours of work rules and overtime. The onus should be on the employer to justify the exclusion of any particular manager. Professional employees should also be covered by hours of work rules and overtime provisions, subject only to professional responsibilities.

Sectoral-Specific Standards

Sector-specific regulations for some industries, such as railways, aviation, and shipping, are designed to adapt working-time rules to continuous operations. Some sectors, such as railways, are highly unionized (collective agreement coverage for operations employees on the railways in 79.1%), whereas, others, such as trucking, have a very low

⁷⁶ See ILO Conventions No 1, art. 2(a); Convention No 30, art 1(3)(c). The EU Working Time Directive (art 17 (1)(a)) requires that due regard must be given to managers safety and health.

collective agreement coverage (only 15.6% of employees).⁷⁷ In densely unionized sectors unions and employers can work out a regulatory approach that balances flexibility and protection. However, individual employees should still have the right to refuse overtime without providing a reason after 44 hours or for reason of dependent responsibility or education after 40 hours. By contrast, in sectors with low union density, the use of regulations to establish working-time rules runs the risk of exposing workers to standards that are not sufficiently protective of their interests. In the federal jurisdiction, trucking is an example of weak legal regulation (low standards combined with low compliance) and low union density. The standard workweek for a highway motor vehicle is set at 60 hours a week, and the actual hours worked in transportation are very long. The hours of work rules in the trucking sector are out of step with the regulations in other industries and they permit employees to drive and be on duty for very long periods. The hours of work rules in the trucking industry are dangerous for employees in that sector and to public safety, and the draft Commercial Vehicle Drivers Hours of Service Regulations should be enacted.

Employee Control over Working Time

There is no legislation in Canada that places an obligation on employers to consider, let alone to accommodate, an employee's request that her or his hours of work be shortened, extended, or modified. However, human rights legislation, including the Canada *Human Rights Act*,⁷⁸ which prohibits discrimination in employment both on the basis of sex and family status, may in certain circumstances require employers to accommodate employees' request for changes to their hours of work. Where a requirement, qualification, or factor results in the exclusion of, restriction of, or preference for a group of persons identified by a prohibited ground, such as sex and/or family status, this requirement violates the Canadian *Human Rights Act* unless it can be shown that it is reasonable and *bona fide* in the circumstances in that the needs of the group cannot be accommodated without undue hardship. Rigid workplace policies and procedures regarding hours of work, such as rotating shifts that required night work for a

⁷⁷ In 2004, just over 70% of employees employed in shipping, 57.3% employed in air transportation, and 10.3 % employed in finance were covered by a collective agreement. Statistics Canada, Employees for Canada, Union Members and Coverage, Annual Average.

⁷⁸ *Canadian Human Rights Act*, R.S. 1985 c.H-6.

mother of a young child and extending hours of work for a lone parent (mother) of three children, have been found to be violations of the *Act* which employers must accommodate.⁷⁹ Moreover, according to the Supreme Court of Canada in *British Columbia (Public Service Employees Relations Commission) v. B.C.G.E.U.*,⁸⁰ conceptions of equality must be built into workplace standards – the male norm of employee is no longer sacrosanct. The duty of reasonable accommodation requires the employer to modify the rule to make it more inclusive. Where this is impossible without undue hardship, the employer should consider accommodating the needs of the individual. Such individual accommodation

may involve short-term or one-off arrangements to deal with temporary needs (such as helping an aging parent to make the transition into assisted living), emergencies (such as when a spouse, partner, parent or child becomes gravely ill), or recurring family responsibilities (such as attending parent-teacher interviews). It may also involve more long-term accommodations, such as flexible or reduced hours, scheduling changes, or leaves (Ontario Human Rights Commission 2005, 25).

Despite the potential of human rights legislation to challenge working time norms and practices and discriminatory, the likely impact of human rights litigation is small. In Canada, working time norms and practices have not been linked either to gender in what little case law there is or to positive obligations and redesigning workplace standards (Ontario Human Rights Commission 2005, 26). Moreover, it is the nature of litigation that principles emerge gradually and unevenly, and that remedies are tailored to the individual complaint (Murray 2005, 82).

In Europe, there are a number of different techniques for providing employees with longer term caring responsibilities to obtain flexible schedules to accommodate these demands. They range from a simple right to request consideration for a flexible work schedule in order to care for a young child to a right to request, without providing a reason, the employer to reduce, extend or modify hours of work and an obligation for the employer to comply with the request unless the employer can demonstrate a specific reason based on the serious interests of the enterprise or service (Fredman 2005; Murray 2005b).

⁷⁹ In *Brown v. M.N.R., Customs and Excise*, (1993), 19 C.H.R.R. D/39 (C.H.R.T.); In *Woiden v. Dan Lynn* (2002), 43 C.H.R.R. D/296 (C.H.R.T.).

⁸⁰ [1999] 3 S.C.R. 3.

Hugh Collins (2005, 117) identifies three models of implementing flexibility for employees to gain greater control over their working time. The type of legal duty imposed on the employer distinguishes each of the three models. Collins notes that these models are “framed primarily in terms of legal rights” and that it is likely that better outcomes for employees could be achieved through collective bargaining. However, he also acknowledges that there is some question as to whether collective bargaining alone is the most appropriate way of addressing the problems associated with work-life balance since what is needed is a diversity of arrangements to respond to the range of divergent needs (Collins 2005, 118).

The first model is drawn from the Framework Agreement on Part-time Work, which requires an employer to “give consideration to requests by workers to transfer from full-time to part-time work that becomes available in the establishment (and vice versa)”.⁸¹ This model requires the employer to negotiate in good faith about the proposed variation or flexible arrangement. Although it is a weak requirement, it would impose a duty on the employer to listen to the request, examine its implications, and to put forward counter proposals (including the outright rejection of the request). In effect, this model would create a legal incentive to overcome the employer’s “initial reluctance to incur the expense of trying a new scheme for organizing working time” (Collins 2005, 119). However, it is a very weak requirement and in cases of individual bargaining would do little to shift the balance of power over the control over working time in the direction of the employee.

The second model is based on the United Kingdom legislation that provides parents of (or those who care for) children under the age of six (or eighteen if the child is disabled) to request an employer to vary the hours, times, and place of work in order to enable the employee to care for a child (Anderson 2003; Collins 2005; Croucher and Kelliher 2005; Fredman 2005; Murray 2005b). The employee must have at least twenty-six weeks continuous service with the employer at the time of application and there is a detailed procedure that applies to the right to request. The employer can only refuse the request on eight specified grounds which include the burden of additional costs, detrimental effect on the ability to meet customer demand, detrimental impact on quality, and inability to re-organize work among existing staff. There is no mechanism by which the employer’s decision can be challenged or examined; the only appeal is to the Employment Tribunal on the grounds that the employer

⁸¹ Directive 87/91, Appendix Clause 5.3 (OJ L 14, 20.1.98, p.9).

failed to adhere to the process established by the legislation. If the employee establishes that the employer failed to adhere to the correct procedure all she or he is entitled to is up to eight weeks pay.

Studies of the impact of this law indicate that there has been a significant increase in the willingness of employers to accept requests for flexible hours (Holt and Granger 2005). The Second Flexible Working Employee Survey found that fourteen per cent of employees reported that they had requested a change to their working time arrangements in the last two years, and the majority of employees (eighty-one per cent) had their request either fully or partially accepted. This compares with seventy-seven per cent of requests that were accepted before the new right to request was introduced. Only eleven per cent of the requests were declined. Notably, while more than one-third (thirty-five per cent) of employees made the request to meet child care needs, a further ten per cent said they made the request in order to have more free time (Holt and Granger 2005, 2-3). It is interesting to note that the rate of rejection for requests to vary working time was much the same regardless of whether or not the employee was eligible under the legislation to make the request (Collins 2005, 120; Holt and Granger 2005, 2). In their case study of the response of four large firms to the legislation, Richard Croucher and Claire Kelliher (2005, 518) found that “all employers extended the right to request flexible working beyond parents and in fact none made any specific reference to parents. They were concerned about the possibility of demotivating and divisive effects on staff of limiting the right to request flexible working in the way envisaged by the law.”

A third model would place an obligation on an employer to reasonably accommodate the requests of employees to vary working hours or times (Collins 2005, 121). It would require the employee to provide reason for the request, although these reasons would not be limited to depend care responsibilities but would include the right to enjoy a private life. Collins bases this model on human rights legislation and the duty to accommodate, and he characterizes it as placing the most onerous obligations on employers’ to accommodate employees’ request to vary their working time.

The Netherlands’ *Adaption of Working Time Act* has some features that overlap with this model. It grants employees a restricted right to reduce or extend their individual working time without having to provide the employer with a reason for the request. An employer may only refuse an application to adapt working time if there are specific reasons based on “the

serious interests of the enterprise or service” (Jacob and Schmidt 2001, 373). Since the legislation came into effect in 2000, there has been an increase in requests for working time adjustment. More than half of the requests for a reduction of working time were granted, and one in ten were partially granted. Requests to extend working time are granted less often; thirty-nine per cent of such requests were accepted, twenty-three per cent were partially accepted and fourteen per cent were still under consideration (Burri 2006, 322).⁸² There are, however, some significant shortcomings in the *Adaption of Working Time Act*. It does not provide a right to a temporary reduction of working time, it does not apply to employers who employ less than ten employees, derogations in collective agreements are permitted, and there is a lengthy service requirement of one year for eligibility (Burri 2006).

The research indicates that few employers in Canada have voluntarily introduced work-life policies that allow employees to request variations in their working time in order to balance work and life. For this reason, it is necessary to provide some legal support for employees to request and obtain some accommodation from employers of their need to balance work and life. The right to request a variation in working time – whether it be reducing or extending working hours or changing the scheduling of working time – should not be limited to dependent care responsibilities and the employee should not be required to provide a reason for her or his request. As well, an employee should be entitled to require a temporary as well as permanent variation in working time. As a first step, an employer should be required to give serious consideration to the request and, if the request is denied, indicate the reasons for the denial. Given that many new jobs are of short duration (Morrisette and Johnson 2005), there should be no minimum service requirement before employees are entitled to request a variation in working time. Failure to follow this process and to provide reasons would lead to a complaint and legal sanctions. If after study and review it was discovered that this weak form of entitlement to working variation did not result in an increase in employers granting more of employees’ requests for variations of working time, a more robust form of legal obligation (such as a duty to accommodate up to undue hardship) should be imposed on employers. This

⁸² There has been relatively little litigation on working time adjustment; of the twenty-two cases lodged between July 1, 2000 and May 1, 2003, twelve requests were granted and seven rejected (in the other cases no decision had been issued) (Burri 2006, 322).

obligation should not be limited to employers of a specific size since the duty of accommodation can be tailored to deal with small and large employers.

Part-time Employment

It is also important to consider the introduction of legal provisions that improve the terms and conditions of part-time work and facilitate part-time work and transitions between part-time and full-time work (Fredman 2005). Employees with significant care-giving responsibilities are more likely to seek part-time, casual or contract work. The vast majority of part-time workers are women. Statistics Canada figures for 2004 indicate that 27.5 per cent of all part-time workers aged 25-44 have chosen part-time work in order to care for children. This choice is highly gendered; 33.7 percent of female part-time workers aged 25-44 have chosen this as a means of balancing work and child care responsibilities; this is true for only 3.2 percent of men in the same age group. Only 4.7 per cent of men in this age group are working part time; while 20.6 percent of women in this age group are working part-time (Ontario Human Rights Commission 2005, 29). Women have consistently represented 70 percent of the part-time workforce since the 1970s.

The problem is that part-time work imposes significant costs on women. Research indicates that part-time workers are perceived as less committed than their full-time counterparts, and therefore have less access to promotional opportunities. Part-time employees are unlikely to have senior or supervisory positions. There is also an association between part-time work and lower wages, and access to pension and health-related benefits is very low for part-time workers (Ontario Human Rights Commission 2005, 29). The lack of opportunities and benefits for part-time workers has a disproportionately negative impact on women workers, especially those who shoulder a disproportionate share of the burden of family responsibilities.

The time for requiring employers to provide part-time workers with treatment equal to full-time workers has come.⁸³ The European Union Part-Time Directive combines the principle of non-discrimination as the basis for social protection with an emphasis in flexibility both in procedures and norms (Sciarra 2004). The notion of a comparable full-time worker was

⁸³ As Zeytinoglu and Cooke (2005) discuss, in 1983 the Wallace Commission into Part-time work advocated comparable treatment for part-time workers.

introduced as a means of defining part-time and the principle of non-discrimination (actually a ban on less favourable treatment unless justified on objective grounds) was introduced, as was recourse to the principle of *pro rata temporis*.

There are, however, problems with using a non-discrimination approach, especially one that hinges on the principle of comparability, to ensure the quality of atypical jobs. Not only does the Directive allow for discrimination between full-time and part-time workers if the grounds for the discriminatory treatment can be objectively justified in defining what is comparable full-time work “due regard” may be given to “other considerations which may include seniority and qualifications/skills” (Jeffery 1998, 196). Given that women’s parenting responsibilities take a toll on their ability to accumulate seniority and that skill is gender-saturated and highly correlated with sex segregation and organizational hierarchies that disadvantage women, these considerations are likely to make it difficult for part-time women workers to find comparable full-time workers.

Pro-rated benefits for part-time workers have long been advocated in Canada (Fudge 1991, 36-8), and they were legally mandated in Saskatchewan in the mid-1990s (Broad 1997, 64-6). However, there are some significant shortcomings with the Saskatchewan legislation. It does not apply to pay, there is a minimum hours of work threshold of fifteen hours per week and 780 hours in a year,⁸⁴ the list of benefits is closed, and pro-rated employer benefit contributions may not be very helpful in many situations on account of the employee’s low overall wage package (Fudge and Vosko 2001b, 339).

The Dutch legislation on part-time work provides a better model for improving the terms and conditions of part-time work and counteracting indirect discrimination than either the EU Directive or the Saskatchewan legislation. Since 1996 a specific law has prohibited differences based on working time, unless such differences can be objectively justified (Burri 2006, 316). There is no need to find a full-time comparator – the point of reference is the differentiation of working time. According to Susanne Burri (2006, 316), the test to decide whether a difference is objectively justified is the same as in a case of indirect sex discrimination and the nature of the treatment depends on the working conditions at stake. She elaborates that:

⁸⁴ Hours of work thresholds simply create an incentive for employers to schedule hours under the threshold to reduce costs.

The application of the principle of *pro rata temporis* will mostly not amount to a breach of this law: pay, for instance, has to be proportionate to the hours worked. But sometimes the same treatment may be required. Compensation for travel costs, for example, should be identical for full-timers and part-timers: that is, the real costs have to be paid (Burri 2006, 316).

General Holidays

The general holiday provisions in Part III are both very complex and very rigid. The continuous service requirement and the requirement to work a specified number of days within a set period should be abolished as prerequisites for paid holidays, and there should be greater flexibility for employees to substitute other days off for holidays. The *Code* should permit the substitution of any day (and not just another holiday) for a general holiday with the agreement of a union, if any, or the majority of affected employees. Moreover, individual employees should be entitled to substitute the holidays of their religious faith for a general holiday.

Vacations

Compared with other industrialized countries, Canada provides very short annual vacation leave entitlements (McCann 2005a, 44-47). In industrialized countries, annual vacation leave range from zero in Australia and the United States, to ten days in Japan to thirty days in Denmark, Finland, and France. The most widespread entitlement, reflected in half of the laws that offer a right to annual leave, is twenty-four or twenty-five days. The federal jurisdiction provides a minimum entitlement of ten days paid vacation leave, rising to fifteen days after six consecutive years with the same employer. Paid vacations should be increased to a minimum entitlement of three weeks (fifteen) days, which rises to four weeks (twenty days) after five years. The proposed new minimum entitlement is designed to reflect that fact that new jobs are for a shorter duration than jobs previously were.

Individual waiver of vacation leave should not be permitted. Not only is it difficult to determine whether individual waivers are truly voluntary given the inequality of bargaining power between employers and individual employees, the right of individuals to opt-out of annual vacation leave does little to counter a culture of overwork.

Maternity and Parental Leave

The current maternity and parental leaves in the *Code* are rigid and biased towards a traditional male breadwinner and female care giver division of labour. The continuous service requirement, which is six months, for eligibility for maternity and parental leaves should be abolished. Several jurisdictions in Canada do not impose service requirements for maternity or parental leave. The *Code* should permit greater flexibility in the timing of maternity leave in order to allow women better to accommodate some of the health consequences of pregnancy. Parents should also be provided with greater flexibility to postpone, interrupt, and extend parental leave to respond to the health and medical needs of new born and adopted children.

The biases in the design of both the leave and benefit provisions that reinforce the traditional sexual division of labour for care responsibilities should be removed or mitigated. For example, the requirement that parental leave be shared between the parties should be abolished, and a specific period of leave should be reserved for fathers, as is the case in Quebec and some countries in Europe (Fredman 2005). The federal government should follow the example of Quebec, and redesign the maternity and parental leave and benefit regime in order to provide parents with greater flexibility in using benefits, a higher rate of benefits, and greater equity in the treatment of parents. Consideration should be given to how to address the problems faced by lone parents (Fredman 2005).

Illness or Injury Leave

The *Code* provides for twelve weeks of unpaid leave for each illness or injury. The length of this leave should be extended to fifteen weeks in order to coincide with the period of sickness benefits provided under the *Employment Insurance Act*. The three months service requirement for this leave should be abolished since such a service requirement may be a violation of the Canada *Human Rights Act* requirement to accommodate disabled employees up to undue hardship.

Care or Dependents Leave

It is important to provide a care or dependents leave entitlement in the *Code* that is separate and distinct from an employee's entitlement to sick leave. Combining the two types of leaves would have a detrimental and indirectly discriminatory impact on people who provide care for others, who are typically women, as they would be required to sacrifice personal sick leave in order to care for other people who are dependent upon them. Moreover, providing a dedicated emergency leave also has the positive impact of increasing gender equality, since men are also likely to take emergency leave (Akeampong 2004, 76). This leave should be for a minimum of ten unpaid days, and an employee should be entitled to take such leave to deal with the health care, emergency, or education needs of "any person who reasonable relies" on the worker for care. In the United Kingdom, emergency leave is available on this basis. Broadening the scope of emergency leave beyond the traditional concepts of family and household (to which it has been confined in Canada) strengthens social solidarity and does not discriminate against people who are not in traditional familial relationships (Murray 2005, 72).

Compassionate Care Leave

The definition of who an employee is entitled to take leave in order to provide care should be extended to include persons who, whether or not related by blood demonstrate an intention to extend to one another the mutual affection and support normally associated with a close family relationship. The eight weeks of leave should no longer be required to be shared between family members but should cover each family member. An extended leave to care for a dying minor child should also be included in the *Code*.

Summary

These recommendations only begin to touch the surface of designing working-time policies and laws that are more sensitive to, and compatible with, the changing life-cycle of Canadians. A life-cycle approach would also consider how to make paid working time more compatible with education, training, caring for elders, and phased-in retirement. Nor do these recommendations consider how to design and develop incentives for employers to provide working-time arrangements that are flexible for employees. They do, however, address the key elements of any working-time regulations relating to control over working time and work-life

<p><i>Entitlement:</i> Time and a half regular wage.</p> <p>Weekly 40</p> <p><i>Entitlement:</i> Time and a half regular wage.</p>	<p>1) Averaging <i>Scope:</i> Industrial establishments in which the nature of the work requires irregular distribution of hours. <i>Requirements:</i> Notify Regional Director and relevant union. Post notice of intention to average. <i>Averaging Period:</i> not specified. <i>Duration of Averaging Agreement:</i> 3 year maximum. If unionized, duration of the agreement.</p> <p>2) Modified Work Schedules (Compressed Work Weeks) <i>Scope:</i> Unlimited. <i>Requirements:</i> Posting of notice. If unionized, union must consent. If non-union, 70% of affected employees must consent (secret and confidential vote). <i>Duration:</i> 3 year maximum. If unionized, duration of the agreement..</p>
<p style="text-align: center;">Maximum Hours</p> <p style="text-align: center;"><i>Function:</i> Limits working hours.</p> <p style="text-align: center;"><i>One standard.</i></p> <p>Weekly 48</p>	<p style="text-align: center;">Flexibility</p> <p style="text-align: center;"><i>Function:</i> Extends working hours beyond the limit.</p> <p style="text-align: center;"><i>Three forms of flexibility.</i></p> <p>1) Modified Work Schedules <i>Scope:</i> Unlimited. <i>Requirements:</i> If unionized, union must consent. If non-union, 70% of affected employees must consent (secret and confidential vote). Post notice. <i>Duration:</i> 3 year maximum. If unionized, duration of the agreement.</p> <p>2) Permits <i>Scope:</i> Unlimited application. Ministerial discretion. <i>Requirements:</i> i) Notice to affected employees and union if employees are unionized and ii) Minister must be satisfied of exceptional circumstances. Report to Minister after expiry of permit. <i>Duration:</i> To be specified in the permit and only as long as there are exceptional circumstances.</p> <p>3) Emergencies <i>Scope:</i> Only to the extent necessary to prevent serious interference with the ordinary working of an industrial establishment in cases of: i) accident, ii) urgent and essential work on machinery, plant, or</p>

	<p>equipment, or iii) unforeseen and unpreventable circumstance.</p> <p><i>Requirements:</i> Report to Regional Director and union.</p> <p><i>Duration:</i> length of emergency.</p>
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Chart II

**British Columbia Employment Standards Act
– Hours of Work**

Post 2002	
<p>Standards <i>Function:</i> Thresholds for Overtime Pay</p> <p><i>Three standards</i></p>	<p>Flexibility <i>Function:</i> Reduces Overtime Costs</p> <p><i>Three forms of flexibility</i></p>

<p>Daily 8 <i>Entitlement:</i> Time and a half regular wage or time off in lieu (with employee's written request) at a rate of an hour and a half off for each hour of overtime worked.</p> <p>Daily 12 <i>Entitlement:</i> Double time regular wage.</p> <p>Weekly 40 <i>Entitlement:</i> Time and a half regular wage or time off in lieu (with employee's written request) at a rate of an hour and a half off for each hour of overtime worked.</p>	<p>1) Averaging (<i>applies to daily and weekly</i>) <i>Scope:</i> No collective agreement covering any provision regarding hours of work and overtime.</p> <p><i>Requirements:</i> Individual written agreement. <i>Averaging Period:</i> 2 to 4 weeks. <i>Duration:</i> Not specified.</p> <p>2) Variance (<i>applies to daily and weekly</i>) <i>Scope:</i> No overtime averaging agreement. <i>Requirements:</i> Majority of employees and employer sign application; Director consents. <i>Averaging Period:</i> Not specified. <i>Duration:</i> Not specified.</p> <p>3) Collective Agreements If a collective agreement contains any term relating to hours of work, none of the statutory hours of work provisions apply.</p>
<p align="center">Maximum Hours: No excessive hours detrimental to health. No Daily or Weekly Maximums</p>	

Pre 2002	
Standards	Flexibility
<p align="center"><i>Function:</i> Thresholds for Overtime Pay</p> <p align="center"><i>Four standards</i></p>	<p align="center"><i>Function:</i> Reduces Overtime Costs</p> <p align="center"><i>Two forms of flexibility</i></p>
<p>Daily 8 <i>Entitlement:</i> Time and a half regular wage (with employee's written request) at a rate of an hour and a half off for each hour of overtime worked.</p>	<p>1) Averaging (<i>applies to daily and weekly</i>) <i>Scope:</i> Unlimited. (The standard hours of work and overtime provisions applied even if employees covered by a collective agreement.) <i>Requirements:</i> 65 per cent of employees</p>
<p>Daily 11 <i>Entitlement:</i> Double time regular wage rate.</p>	<p align="right">s</p>
<p>Weekly 40 <i>Entitlement:</i> Time and a half regular wage (with employee's written request) at a rate of an hour and a half off for each hour of</p>	<p align="right">u p p o rt ;</p>

<p>overtime worked.</p> <p>Weekly 48 <i>Entitlement:</i> Double time regular wage.</p>	<p>Director's approval. <i>Averaging Period:</i> 2 to 4 weeks. <i>Duration:</i> Minimum of 26 weeks and maximum of two years.</p> <p><i>2) Variance (applies to daily and weekly)</i> <i>Scope:</i> No overtime averaging agreement. <i>Requirements:</i> Majority of employees and employer sign application; Director consents. <i>Averaging Period:</i> Not specified. <i>Duration:</i> Not specified.</p>
<p>Maximum Hours: No excessive hours detrimental to health No Daily or Weekly Maximums</p>	

Chart III

Ontario Employment Standards Act – Hours of Work

After March 1, 2005	
<p>Standards <i>Function:</i> Thresholds for Overtime Pay.</p> <p><i>One standard</i></p>	<p>Flexibility <i>Function:</i> Reduces Overtime Costs.</p> <p><i>One Form of Flexibility</i></p>

<p>Weekly 44 <i>Entitlement:</i> time and a half regular wage or (with employee's written agreement) time off in lieu at rate of time and a half off for each hour of overtime worked.</p>	<p>Averaging <i>Scope:</i> Unlimited. <i>Requirements:</i> If unionized, union must consent. If not unionized, information sheet provided to employee and written agreement of employee. Approval from Director required in all cases. <i>Averaging Period:</i> No restriction if approval. Pending approval, two week averaging period. <i>Duration:</i> 2 year maximum if not represented by a trade union.</p>						
<p style="text-align: center;">Maximum Hours</p> <p style="text-align: center;"><i>Function:</i> Limits working hours.</p> <p style="text-align: center;"><i>Three limits</i></p> <table style="margin-left: auto; margin-right: auto;"> <tr> <td style="padding-right: 20px;">Daily</td> <td>8</td> </tr> <tr> <td>Daily</td> <td>13</td> </tr> <tr> <td>Weekly</td> <td>48</td> </tr> </table>	Daily	8	Daily	13	Weekly	48	<p style="text-align: center;">Flexibility</p> <p style="text-align: center;"><i>Function:</i> Extends working hours beyond the limit.</p> <p style="text-align: center;"><i>Two forms of flexibility</i></p> <p><i>Scope:</i> If the employer has not established a longer work day.</p> <p><i>Scope:</i> If the employer has established a work day longer than 8 hours. (Minimum 8 hours between shifts unless written agreement to the contrary.)</p> <p>1) Excess Hour Agreements (daily and weekly hours) <i>Scope:</i> Unlimited. <i>Requirements:</i> If unionized, union must consent. If not unionized, information sheet provided to employee and written agreement of individual employee. Director's approval for agreements to work hours in excess of weekly hours is needed but Director's approval is not needed for agreements to work in excess of daily hours. <i>Limits:</i> Daily (11 hours), weekly (24) or bi-weekly rest (48). This means that an employee could work up to 84 hours in a week (although the next week would be shorter as the employee would be required to take 48 consecutive hours of rest). <i>Duration:</i> 3 years if up to 60 hours per week; 1 year if more than 60 hours per week.</p>
Daily	8						
Daily	13						
Weekly	48						

	<p><i>Employee's right to refuse:</i> Two weeks written notice of revocation of the agreement.</p> <p>2) Emergencies: <i>Scope:</i> Emergencies, unforeseen events, and essential public services; unforeseen event and continuous or seasonal operation; urgent repair work on employer's premises or plant. No requirement to report to Director.</p>
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September 4, 2004 to April 30, 2005	
<p style="text-align: center;">Standards</p> <p><i>Function:</i> Thresholds for Overtime Pay.</p> <p style="text-align: center;"><i>One standard</i></p> <p>Weekly 44</p> <p><i>Entitlement:</i> time and a half of regular wage or (with employee's written agreement) time off in lieu at a rate of time and a half off for each hour of overtime worked.</p>	<p style="text-align: center;">Flexibility</p> <p><i>Function:</i> Reduces Overtime Costs.</p> <p style="text-align: center;"><i>One Form of Flexibility</i></p> <p>Averaging <i>Scope:</i> Unlimited. <i>Requirements:</i> If unionized, union must consent. If not unionized, employee's written agreement to average up to 4 weeks. <i>Averaging Period:</i> Director's approval needed if averaging period over 4 weeks. <i>Duration:</i> 2 year maximum if not represented by a trade union.</p>
<p style="text-align: center;">Maximum Hours</p> <p><i>Function:</i> Limits working hours.</p> <p style="text-align: center;"><i>Three limits</i></p> <p>Daily 8</p> <p>Daily 13</p> <p>Weekly 48</p>	<p style="text-align: center;">Flexibility</p> <p><i>Function:</i> Extends working hours beyond the limit.</p> <p style="text-align: center;"><i>Two forms of flexibility.</i></p> <p><i>Scope:</i> If the employer has not established a longer work day.</p> <p><i>Scope:</i> If the employer has established a work day longer than 8 hours. (Minimum 8 hours between shifts unless agreement to the contrary.)</p> <p>1) Excess Hour Agreements (daily and weekly hours) <i>Scope:</i> Unlimited.</p>

	<p><i>Requirements:</i> If unionized, union must consent. If not unionized, written agreement of individual employee. Director's approval for agreements to work hours in excess of weekly hours required only if agreement is for over 60 hours a week.</p> <p><i>Limits:</i> Daily (11 hours), weekly (24) or bi-weekly rest (48).</p> <p><i>Duration:</i> 3 years if up to 60 hours per week; 1 year if more than 60 hours per week.</p> <p><i>Employee's right to refuse:</i> Two weeks written notice of revocation of the agreement.</p> <p>2) <i>Emergencies:</i> <i>Scope:</i> Emergencies, unforeseen events, and essential public services; unforeseen event and continuous or seasonal operation; urgent repair work on employer's premises or plant. No requirement to report to Director.</p>
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Prior to September 4, 2001	
<i>One Standard</i>	<i>One form of flexibility</i>
<p>Weekly 44</p> <p>Entitlement: Time and a half regular wage.</p>	<p><i>Function:</i> Reduces Overtime Costs</p> <p><i>Averaging:</i> <i>Scope:</i> Unlimited. <i>Requirements:</i> If unionized, union consent. If not unionized, individual consent. <i>Duration:</i> Unspecified.</p>
<i>Two limits</i>	<i>Two forms of flexibility.</i>
<p>Daily 8</p> <p>Weekly 48</p>	<p><i>Function:</i> Increase Flexibility <i>Scope:</i> If the employer had not established a longer regular day.</p> <p><i>1) Permit:</i> Ministerial approval (3 types of permit.) <i>Scope:</i> Unlimited. <i>Duration:</i> Unspecified. <i>Employee's right to refuse:</i> Right to refuse hours in excess of standard regardless of averaging agreement or permit.</p>

	<p>2) Emergencies: <i>Scope:</i> Emergencies, unforeseen events, and essential public services; unforeseen event and continuous or seasonal operation; urgent repair work on employer's premises or plant. (No right to refuse.)</p>
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Chart IV
Quebec – An Act Respecting Labour Standards
Hours of Work

<p style="text-align: center;">Limits</p> <p style="text-align: center;">No maximum hours of work</p>	<p><i>Function:</i> Employers can maintain operation for long hours.</p>
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<p><i>Limitation:</i> An employee is entitled to a weekly minimum rest period of 32 consecutive hours.⁸⁵</p> <p style="text-align: center;">Right to Refuse Work</p> <p><i>Function:</i> Introduces an element of personal choice into long hours of work</p> <p><i>Daily:</i> 4 hours after regular daily working hours or more than 14 hours in a 24 hour period (whichever is shorter).</p> <p>Employees with flexible or non-continuous hours: more than 12 hours in a 24 hour period.</p> <p><i>Weekly:</i> More than 50 hours per week.</p> <p>Employees working in isolated or James Bay territory: more than 60 hours per week.</p> <p><i>General:</i> An employee is entitled to refuse to work beyond her or his regular hours for child care or to care for an ill family member.</p>	<p><i>Flexibility:</i> An employee cannot refuse work where there is a danger to the life, health, or safety of employees or the population, where there is a risk of destruction or serious deterioration of moveable or immoveable property or in any other case of superior force, or if the refusal is inconsistent with the employee's professional code of ethics.</p>
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Chart V

Exemptions from Hours of Work Provisions in Selected Employment Standards Legislation

Canada Labour Code, Part III

Exemptions from Limits on Hours of Work, Minimum Weekly Rest Periods, and Overtime
Managers and superintendents

⁸⁵ In the case of a farm worker the day of rest may be postponed to the following week if the employee consents.

Professionals (architecture, dental, legal, medical)
Broadcast commission salespeople
Running trades employees
Ontario hydro nuclear employees (note these employees are covered by the Ontario
Employment Standards Act.)
Shipping (special rules)
Truck drivers (special rules)
Flight crews (special rules)

British Columbia Employment Standards Act

*Exemptions from Limits on Hours of Work, Exemptions from Minimum Weekly Rest Periods,
and Overtime*

Employees covered by collective agreements if the collective agreement contains any provision relating to hours of work
Fishing or hunting guides
Mineral exploration employees (with listed exceptions)
Teachers and teacher's aids
Part-time employees at public institutions providing instruction or recreation
Managers
Farm employees
Tender vessel employees
Guards, fish wardens, fish camp workers in commercial fishing operations
Towboat employees (excluding boom or dozer boat or camp tender) in connection with a commercial logging operations
Police officers
Firefighters
Commercial travelers
Motor vehicle operators who transport students to and from school and people to and from church
Masters or crew of chartered boats
Running trades employees on BC rail
Live-in home support employees
Counselors, instructors, therapists, childcare workers who are employed by a charity to assist in rehabilitation of physically, mentally or otherwise disabled persons
Faculty members
College instructors, counselors, librarians, administrators at colleges
Senior tutors employed by Open Learning Agencies
Night attendants
Residential care employees
Live-in camp leaders
High technology professionals
Student nurses
Sitters
Registered real estate sales persons
Registered securities sales persons
Registered insurance agents or adjusters

Professionals (architecture, law (or articling students), engineering (or students), surveying (or articling students), accounting (or students), veterinary science, podiatry, chiropractic, dentistry, medicine, forestry, optometry, naturopaths)
Truck drivers (special rules)

Ontario Employment Standards Act, 2000

Exemptions from Limits on Hours of Work

Construction employees

Road maintenance employees

Crown employees

Embalmers

Farm employees

Firefighters

Swimming pool installers

Registered real estate salespeople

Superintendents and janitors who reside on premises

Commercial fishers

Residential care workers

Harvesters of fruit and vegetables

Information technology professionals

Managers and supervisors

Landscape gardeners

Homemakers

Hunting and fishing guides

Professionals (architecture, law, engineering, surveying, accounting, veterinary science, chiropody, podiatry, chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy, physiotherapy, psychology, naturopaths, osteopaths, teachers, and students training for these professions)

Commission salespeople (off site and not selling automobiles)

Exemptions from Minimum Daily and Weekly Rest Periods

Construction employees

Road maintenance employees

Crown employees

Embalmers

Farm employees

Firefighters

Registered real estate salespeople

Superintendents and janitors who reside on premises

Commercial fishers

Residential care workers (special rules)

Harvesters of fruit and vegetables

Information technology professionals

Managers and supervisors

Homemakers

Hunting and fishing guides

Professionals (law, engineering, surveying, accounting, veterinary science, chiropody, podiatry, chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy, physiotherapy, psychology, naturopaths, osteopaths, teachers, and students training for these professions)

Commission salespeople (off site and not selling automobiles)

Exemptions from Overtime

Construction employees (special rules)

Students at a residential camp

Vegetable and fruit processing (special rules)

Residing at hotel, motel, resort (special rules)

Road maintenance employees (special rules)

Highway truck drivers (special rules)

Residential care workers (special rules)

Local cartage drivers and driver helpers (special rules)

Liquor servers (special rules)

Ambulance drivers and first aid attendants

Crown employees

Embalmers

Farm employees

Firefighters

Registered real estate salespeople

Superintendents and janitors who reside on premises

Commercial fishers

Harvesters of fruit and vegetables

Information technology professionals

Managers and supervisors

Homemakers

Hunting and fishing guides

Professionals (law, engineering, surveying, accounting, veterinary science, chiropody, podiatry, chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy, physiotherapy, psychology, naturopaths, osteopaths, teachers, and students training for these professions)

Landscape gardeners

Taxi drivers

Commission salespeople (off site and not selling automobiles)

Quebec An Act respecting Labour Standards

Exemptions from Limits on Hours of Work, Minimum Weekly Rest Periods, and Overtime

Caregivers whose exclusive duty it is to take care of or to provide care for a child or to a sick, handicapped or aged person, in that person's dwelling, including, where so required, the performance of domestic duties that are directly related to the immediate needs of that person, unless the work serves to procure a profit for the employer.

Generally, all employers and workers in the construction industry (all work relating to buildings and civil engineering executed on construction and job sites).

Employees whose remuneration is set by another act or regulation (ex. election officers).

Students who work during school year in an establishment elected pursuant to a job induction program approved by the Minister of Education.

Senior managerial personnel

Employees in establishments within the meaning of subparagraph *a* of the first paragraph of section 1 of the Act respecting health services and social services (R.S.Q., c. S-5) are wholly exempted of the application of the Act respecting labour standards and its regulations with respect to the recipients within the meaning of subparagraph *p* of the first paragraph of section 1 of the Act respecting health services and social services, who work in them for their physical, mental or social re-education

Professions: physicians, dentists, optometrists, and pharmacists.

Exceptions from the Standard Workweek Provisions

Different standard work weeks:

Watchmen [sic] who guards a property for an enterprise supplying a surveillance service that standard workweek is 44 hours

Any other watchmen [sic] the standard workweek is 60 hours.

Employees working in forestry operations the standard workweek is 47 hours.

Employees working in sawmills the standard workweek is 47 hours.

Employees working in remote areas or the James Bay territory the standard workweek is 55 hours.

Exemptions from Overtime in the Standard Workweek

Students employed in vacation camps

Students employed in social or community non-profit organizations

Managers

An employee working outside the establishment whose hours can't be controlled

Canning, packaging, freezing fruit and vegetables during harvesting

Fishing, fish processing, fish canning industry

Farm workers

Caregivers whose exclusive duty it is to take care of or to provide care for a child or to a sick, handicapped or aged person, in that person's dwelling, including, where so required, the performance of domestic duties that are directly related to the immediate needs of that person, unless the work serves to procure a profit for the employer.

Exemptions from Weekly Rest

The weekly day of rest of a farm worker may be postponed to the following week if the employee consents to the postponement.

Chart VI

Treatment of Managers regarding Hours of Work Provisions: Standards, Overtime, Limits on Hours of Work, and Daily and Weekly Rest Periods

Jurisdictions in which managers receive some protection from the labour standards legislation regarding hours of work:

Manitoba

Managers are not excluded from the right to refuse or from overtime provisions.⁸⁶

By virtue of Reg. 62/99, s.9 (b) excluded from weekly day of rest: Employees employed in supervisory, managerial, and confidential positions.

New Brunswick

Managers are not excluded. (Note, the only hours of work protections are a day of rest per week and entitlement to time and a half the minimum wage after working 44 hours).

Newfoundland and Labrador

Managers are not excluded from overtime or daily rest.

Prince Edward Island

Managers are not excluded from overtime (which is time and a half the regular wage after 48 hours).

Quebec

By virtue of s. 3(6) of An Act Respecting Labour Standards excluded from overtime, right to refuse, and weekly rest: senior managerial personnel.

By virtue of s.54(3) excluded from overtime pay: The managerial personnel of an undertaking. Intermediate and lower managerial personnel are covered by the right to refuse long hours of work in s.59.0.1 and the weekly rest provision.

Jurisdictions in which managers are excluded from the protection offered in labour standards legislation regarding hours of work:

Federal jurisdiction

Excluded by virtue of s. 167(2)(a) of the Canada Labour Code, Part III from hours of work, overtime, and weekly rest: Employees who are managers or superintendents or exercise management functions.

Alberta

By virtue of Reg 2(1)(a) Employment Standards Regulation excluded from hours of work and overtime pay:

(a) an employee who is employed in

(i) a supervisory capacity,

(ii) a managerial capacity, or

(iii) a capacity concerning matters of a confidential nature

and whose duties do not, other than in an incidental way, consist of work similar to that performed by other employees who are not so employed; (Alta. Reg. 114/2000, s. 3(a).)

British Columbia

⁸⁶ Officials responsible for administering and enforcing labour standards in Manitoba consider that managers are excluded from hours of work and overtime provisions based on the definition of 'employer'.

By virtue of s. 34(1)(f) of Employment Standards Regulation excluded from hours of work and overtime requirements: A manager.

Nova Scotia

Excluded by virtue of s. 61(2) Labour Standards Code (from weekly rest):

This Section does not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.

Excluded by virtue of s. 2(2b) of the Regulations pursuant to Sections 4(2) and 7 of the Labour Standards Code from overtime:

Persons holding supervisory or management positions, or who are employed in a confidential capacity are exempt from the application of subsection 40(4) and Section 61 of the Code. (N.S. Reg. 200/2003, s. 3.)

Northwest Territories

By virtue of s. 2(2) of the Labour Standards Act excluded from hours of work provisions: employees who are employed primarily in a managerial capacity.

Nunavut

By virtue s.2(2) of the Labour Standards Act excluded from hours of work provisions: employees who are employed primarily in a managerial capacity.

Ontario

Excluded by virtue of Regulation 285, s. 4(1)(b) from limits on hours of work and hours free from work: “a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.”

Excluded by virtue of Regulation 285, s. 8(b) the overtime provision: “A person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.”

Saskatchewan

By virtue of s. 4(2) of the Labour Standards Act exempted from hours of work provisions (overtime and the right to refuse to work hours in excess of the standard (40 hours in a week): Part I of this Act does not apply to an employee who performs services that are entirely of a managerial character.

Yukon

By virtue of s. 4(1)(c) and 4(2) of the Employment Standards Act excluded from hours of work provisions:

An individual whose duties are primarily of a supervisory or managerial character;

An individual to whom paragraph 4(1)(c) applies is not included in the application of this Part solely because of the occasional performance of duties other than those of a supervisory or managerial character.

Appendix I *

**Detailed Description of the Federal
Working-time Legislation**

Hours of Work – Division I

* This description is equally co-authored by Valerie Baker (Osgoode Hall Law School, Class of 2007) and Judy Fudge.

Coverage

Section 167 sets out the scope of application of Part III of the Code, which includes Division I, the hours of work provisions. The hours of work provisions apply to employment, employees, and employers connected with the operation of any federal work, undertaking or business, to any corporation established to perform a function or duty for the Government of Canada, and to any Canadian carrier that falls under the definition in section 2 of the Telecommunications Act.⁸⁷

There are wide exemptions to the hours of work provisions. While most Crown corporations are covered, federal public service employees are not covered. Managers and professionals are exempted, and there are specific regulations for many industries that either exempt the employees in the industry or undertaking from the hours of work provisions entirely or provide specific rules for that industry or undertaking.

Exemptions

General

Section 167(1)(a) exempts a work, undertaking or business of a local or private nature in the Yukon or Northwest Territories from Part III of the Code. Section 167(1)(d) exempts a department, as defined in the Financial Administration Act.⁸⁸

⁸⁷ “Canadian carrier” means a telecommunications common carrier that is subject to the legislative authority of Parliament (Telecommunications Act 1993, c. 38, s.2(1)).

⁸⁸ These include: Department of Agriculture and Agri-Food, Department of Canadian Heritage, Department of Citizenship and Immigration, Department of the Environment, Department of Finance, Department of Fisheries and Oceans, Department of Foreign Affairs and International Trade, Department of Health, Department of Human Resources Development, Department of Indian Affairs and Northern Development, Department of Industry, Department of Justice, Department of National Defence, Department of Natural Resources, Department of Public Works and Government Services, Department of the Solicitor General, Department of Transport, Treasury Board, Department of Veterans Affairs, Department of Western Economic Diversification, Atlantic Canada Opportunities Agency, Canada Border Services Agency, Canada Industrial Relations Board, Canadian Artists and Producers Professional Relations Tribunal, Canadian Environmental Assessment Agency, Canadian Firearms Centre, Canadian Forces Grievance Board, Canadian Grain Commission, Canadian Human Rights Commission, Canadian Human Rights Tribunal, Canadian Intergovernmental Conference Secretariat, Canadian International Development Agency, Canadian International Trade Tribunal, Canadian Radio-television and Telecommunications Commission, Canadian Security Intelligence Service, Canadian Space Agency, Canadian Transportation Agency, Copyright Board, Correctional Service of Canada, Courts Administration Service, Department of Human Resources and Skills Development, Department of International Trade, Economic Development Agency of Canada for the Regions of Quebec, Federal-Provincial Relations Office, Financial Consumer Agency of Canada, Financial Transactions and Reports Analysis Centre of Canada, Hazardous Materials Information Review Commission, Immigration and Refugee Board, Library and Archives of Canada, Military Police Complaints Commission, NAFTA Secretariat - Canadian Section, National Energy Board, National Farm Products Council, National Film Board, National Parole Board, Northern Pipeline Agency, Office of Indian Residential Schools Resolution of Canada, Office of Infrastructure of Canada, Office of the Auditor General, Office of the Chief Electoral Officer, Office of the Commissioner for Federal Judicial Affairs, Office of the Commissioner of Official Languages, Office of the Communications Security Establishment Commissioner, Office of the Co-ordinator - Status of Women, Office of the Correctional Investigator of Canada, Office of the Governor

The exemption in s.167(1)(d) from Part III also excludes a commission under the *Inquiries Act* that is designated by order of the Governor in Council as a department for the purposes of the Financial Administration Act and the staffs of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer and office of the Ethics Commissioner.

Managerial Exemption

Subsection 167(2) exempts managers, superintendents or individuals who exercise management functions from the hours of work provisions in Division I. The managerial exemption is interpreted narrowly and is confined to employees who exercise powers of independent action, autonomy, and discretion over matters of importance, and who have authority to make final decisions to hire, fire, promote, transfer, or discipline employees. A detailed discussion of which employees are exempted from the hours of work provisions as managers is provided in 802-1/815-1-IPG-049/Operations Program Directives (OPDs)/Interpretation, Policies and Guidelines (IPGs), date: 22-05-92.

Professional Exemption

Subsection 167(2)(b) exempts professions that are designated by regulation. *Canada Labour Standards Regulations*, C.R.C., c. 986, s.3 exempts members of architectural, dental, engineering, legal, or medical professions from the hours of work provisions.

Industry and Occupation Exemptions

In addition, the regulations provide industry-based and occupation-based exemptions to specific aspects of the hours of work provisions and include industry-specific rules governing working hours. The majority of the industry-specific regulations have to do with transportation industries that operate twenty-four hours a day and seven days a week. The industry- and occupation-specific regulations will be taken-up at the end of the general discussion.

General's Secretary, Office of the Grain Transportation Agency Administrator, Office of the Superintendent of Financial Institutions, Offices of the Information and Privacy Commissioners of Canada, Patented Medicine Prices Review Board, Privy Council Office, Public Service Commission, Public Service Human Resources Management Agency of Canada, Public Service Staffing Tribunal, Public Service Staff Relations Board, Registrar of the Supreme Court of Canada and the portion of the public service of Canada appointed under subsection 12(2) of the *Supreme Court Act*, Registry of the Competition Tribunal, Royal Canadian Mounted Police, Royal Canadian Mounted Police External Review Committee, Royal Canadian Mounted Police Public Complaints Commission, Security Intelligence Review Committee, Statistics Canada, Transportation Appeal Tribunal of Canada, Canada Customs and Revenue Agency, Canada Employment Insurance Commission, Canada School of Public Service, Canadian Centre for Occupational Health and Safety, Canadian Food Inspection Agency, Canadian Institutes of Health Research, Canadian Nuclear Safety Commission, Canadian Polar Commission, Canadian Transportation Accident Investigation and Safety Board, Law Commission of Canada, The National Battlefields Commission, National Research Council of Canada, National Round Table on the Environment and the Economy, Natural Sciences and Engineering Research Council, Parks Canada Agency, Social Sciences and Humanities Research Council.

Standard Hours of Work

Section 169(1) sets out the standard hours of work as 8 hours per day and 40 hours per week.⁸⁹ The standard hours of work in a week functions as the threshold for entitlement to overtime pay. To provide flexibility for employers, the Code also allows for averaging of hours (s.169(2)) and modified work schedules (s.170).

The averaging provisions permit an employee to work more than 8 hours per day or 40 hours per week as long as the average hours worked over the averaging period do not exceed more than 40 hours per week. The averaging provisions are regarded as assisting businesses that are traditionally seasonal, providing them with the flexibility to reduce their overtime costs.

The provisions allowing for a modified work schedule are more stringent than those required to average standard work hours; before a modified work schedule can lawfully come into effect, either the agreement of the relevant trade union or the support of 70% of the affected employees is required.

1) Averaging Agreements⁹⁰

The averaging agreements described in s.169(2) provide employers with the flexibility to ignore the requirement to pay overtime after 8 hours in a given day or 40 hours in a given week, or both, and determine overtime entitlements at the end of the averaging period. Where the nature of the work of an industrial establishment⁹¹ requires the irregular distribution of hours of work of an employee, the hours of work in a day and a week can be calculated, as prescribed by the regulations, as an average for a period of 2 or more weeks (s.169(2)). There must be a substantial need for irregular distribution of hours of work, and such need is normally caused by external factors (demand, climate, etc.) over which an enterprise has little or no control. Examples of situations where such averaging may apply are non-driving staff in household moving and employees involved in the planting or harvesting of seeds.⁹²

If the employees are represented by a trade union, the union must agree to the averaging unless the industrial establishment necessitates that the hours of work of certain employees be irregularly distributed. However, if the employees are not represented by a trade union all that is required for the averaging agreement to take effect is that the employer post a notice of the averaging period for the purpose of establishing the standard work week (40 hours a week). By contrast, if the employer wants a modified work schedule (s.170) or an agreement to average hours for the purpose of exceeding the maximum hours of work limits (which is 48 hours in a week (s.172) or other limits set by regulation by virtue of s.175) in a situation in which the employees are not represented by a trade union, 70% of the affected employees must

⁸⁹ According to s.166, “day” means any period of 24 consecutive hours and “week” means the period between midnight on Saturday and midnight on the immediately following Saturday.

⁹⁰ For a detailed discussion of averaging agreements see 802-1-IPG – 053/Operations Program Directives (OPDs)/Interpretation, date: 05-11-98.

⁹¹ Section 166 defines an industrial establishment as any federal work, undertaking or business and includes such branch, section or other division of a federal work, undertaking or business as is designated as an industrial establishment by regulations made under paragraph 264(b)).

⁹² 802-1-IPG-053/Operations Program Directives (OPDs)/Interpretation, Policies and Guidelines(IPGs), date: 05-11-98.

approve the modified work schedule or the averaging agreement with respect to maximum hours of work.

Duration of Averaging Agreements

If there is a written agreement between an employer and a trade union regarding the averaging of hours, the arrangement will last for the length of time set out in the agreement or may end on an earlier date if agreed upon by the parties. If there is no agreement made in writing, the arrangement can last for a maximum of 3 years (s.169(2.1)) .

Requirements for Averaging Agreements

Section 6 of the Canada Labour Standards Regulation (C.R.C., c. 986) sets out the rules regulating the averaging of hours. Averaging may be adopted for periods of two or more consecutive weeks when the irregular distribution of hours results in either (a) no regularly scheduled hours, or (b) regularly scheduled hours where the number of hours differs from time to time (s.6(1)). There is no limit on the length of the averaging period, although s.6(2) stipulates that the averaging period can last only as long as the number of weeks necessary to deal with the requirement for irregularity. The employer must also post a notice indicating its intention to average hours of work or change the number of weeks in the averaging agreement and must provide the information described in Schedule IV.⁹³

Subsection 6(3) sets out rules pertaining to establishing an averaging period before an averaging agreement is in effect and s.6(12) deals with changing an averaging period once an agreement is in effect. In both situations, the employer is required to post a notice 30 days in advance, inform the regional director and any trade unions of the proposed averaging agreement or change to the averaging period.

A copy of the notice must be given to the regional director and to every union that represents affected employees (s.6(3)). The information required in Schedule IV must be posted while the averaging of hours is in effect (s.6(4)).

However, where the parties to a collective agreement have agreed to average the hours of work of employees or change the averaging period and this agreement is in writing, dated and contains the information set out in Schedule IV, a notice need not be posted 30 days in advance, notice need not be given to the regional director, and a notice containing the information set out in Schedule IV need not be posted while the agreement is in effect (s.6(5)).

Where an employee's hours of work are calculated as an average, standard hours of work are 40 times the number of weeks in the averaging period. The maximum hours that may be worked is 48 hours multiplied by the number of weeks in the averaging period (s. 6(6)). The overtime rate of at least 1.5 times regular pay (as set out in section 174 of the Code) will be

⁹³ Schedule IV requires the employer to provide the following information: name of the employer, identification of the affected employees, address or location of the workplace, number of weeks in the averaging period, information to establish that there is an irregular distribution of hours of work that is necessitated by the nature of the work in the industrial establishment, reasons for the length of the averaging period, date the averaging of hours comes into effect, date the averaging of hours of work ends, and date the notice was posted.

paid for all hours worked in excess of the standard hours of work (40 times the number of weeks) (s.6(6)).

There are a number of provisions that are designed to ensure compatibility between the averaging rules and practices and other elements of the hours of work provisions.⁹⁴

2) Modified Work Schedules

Section 170 permits an employer to establish a modified work schedule in which the hours of work exceeds the standard hours of work. For example, a modified work schedule may involve four 10-hour shifts in a week. The employer must meet specified conditions in order to establish a modified work schedule, including the agreement of a relevant trade union or 70% support from the affected employees in non-unionized workplaces.

Unionized Employees

For employees who are covered by collective agreements, there must be a written agreement between the trade union and employer regarding the schedule, or its modification or cancellation(s.170(1)). The average hours of work for a period of two weeks or more must not exceed 40 hours a week.

Non-Union Employees

Seventy per cent of the employees who are not covered by a collective agreement (s.170 (2)) must approve the schedule, or its modification or cancellation. The average hours of work for a period of two weeks or more must not exceed 40 hours a week.

Posting and Voting Requirements

The Code provides a procedure for posting a notice of a new work schedule (s.170(3)) and a voting procedure (s.172.1). Votes are conducted by an inspector; the votes are secret and the results are confidential.

Canada Labour Standards Regulations, C.R.C., c. 986, sections 4 and 5 set out some of the rules relating to modified work schedules, specifically the information required in both the notice and the written agreement with the trade union.

Duration

For employees under a collective agreement, the duration of a modified work schedule is the timeframe agreed to in writing between the employer and trade union (s.172.2(1)). For

⁹⁴ When there is a week where an employee is entitled to bereavement leave with pay, annual vacation with pay, leave of absence with pay (s.205 (2)) of the Code), holiday with pay, or a normal working day when the employee is not entitled to wages, the standard hours of work and the maximum hours of work will be reduced by 8 hours per day (s.6(7)). Where an employee is away for a week due to an annual vacation with pay, a leave of absence with pay (s.205(2) of Code) or if it is a normal week where the employee is not entitled to regular wages, the standard hours of work and maximum hours of work will be reduced by a maximum of 40 hours (s.6(8)). Where an employee is not entitled to regular wages for 7 consecutive days, his/her standard hours of work and maximum hours of work will be reduced by 40 hours (s.6(9)).

employees who are not covered by a collective agreement, the duration of a modified work schedule is a maximum of three years (s.172.2(2)).

Overtime

Overtime is defined as hours of work in excess of standard hours of work, which are 8 in a day and 40 in a week (s. 166). Section 174 states that when an employee is required or permitted to work in excess of the standard hours of work, the employee must be paid for the overtime at a rate of at least one and a half times her or his regular rate of wages.⁹⁵ Thus, the Code requires that overtime be paid when the standard hours of work are surpassed on a daily or weekly basis. However, the Code provides flexibility to employers regarding overtime obligations by permitting averaging agreements (see the discussion above regarding s.169(2)), allowing work practices to prevail over legal rules (s.174), and designing specific rules via regulations for specified industries (s.175).

Section 174 (the obligation to pay overtime pay) of the Code does not apply in circumstances where there is an established work practice that requires or permits an employee to work in excess of standard hours for the purposes of changing shifts, permits an employee to exercise seniority rights to work in excess of standard hours of work pursuant to a collective agreement, or permits an employee to work in excess of standard hours as the result of his or her having exchanged a shift with another employee (Canada Labour Standards Regulations, C.R.C., c. 986, s.7).

Section 175 of the Code empowers the Governor in Council to make regulations relating to overtime pay. The Governor in Council may exempt any class of employees from the application of section 174 if she or he is satisfied the section cannot reasonably be applied to a particular class of employees. The Governor in Council may also determine that the section does not apply in circumstances where work practices are followed that make the application of the section unreasonable or inequitable. Furthermore, the Governor in Council may outline a method to be used for the calculation of hours worked by employees in any class who are employed in an industrial establishment.

Where a modified work schedule is in effect, an employee is only entitled to overtime for hours worked in excess of his/her daily standard hours of work. For example, an employee who works four 10-hour shifts is entitled to overtime for any hours worked in excess of the 10 scheduled hours per day or 40 hours per week.

The Code does not provide for the right to refuse overtime; nor does it permit time off in lieu of overtime pay.

⁹⁵ "Wages" include every form of remuneration for work performed but do not include tips and other gratuities. Moreover, in a week where there is a general holiday, the standard hours of work for the week are to be reduced by eight hours for each holiday. Accordingly, an employee is to be paid overtime for hours worked in excess of 32 where there is one general holiday in the week. However, there is nothing in the Code or regulations to determine the overtime rate when an employee is paid by a method other than an hourly rate.

Maximum Hours of Work

Section 171 establishes a maximum work week of 48 hours. The maximum functions as a limit on the amount of time in a day or a week an employee is legally permitted to work for a particular employer. The Code also provides for flexibility in the maximum number of hours that employees are permitted to work in a week through the following mechanisms or in the following circumstances: averaging agreements (s.172); ministerial permits (s.176); emergencies (s.177); and regulations (s.175).

1. Averaging Agreements in Operations necessitating the Irregular Distribution of Work of Certain Employees: s. 169(2)

Where the nature of the work in an industrial establishment necessitates the irregular distribution of hours of work of certain employees and there is no regularly scheduled weekly hours or the regularly scheduled hours differs from time to time, the employer is allowed to require employees to work more than forty-eight hours in a given week. The need for irregular distribution of hours is normally caused by external factors over which an enterprise has little or no control, most commonly climatic or seasonal demands.

Notice: Canada Labour Standards Regulations, C.R.C. 986, s. 6(3)

The employer must post a notice of its intention to average hours of work or trade union after an averaging period and provide a copy of the notice to the Labour Regional Head and every union representing affected employees.

Maximum Hours: Canada Labour Standards Regulations, C.R.C. 986, s. 6(5)(b)

The maximum hours of work for an employee shall not exceed 48 times the number of weeks in the averaging period.

2. Modified Work Schedules⁹⁶

The maximum number of hours set out in s.171 (48 hours in a week) or by regulation can be exceeded in a week where there is an averaging agreement in effect as long as the average hours for the weeks are less than 48 hours and the following conditions are fulfilled (s.172).

Unionized employees

There must be a written agreement between a trade union and employer (s.172(1)(b)) and the average hours for the period shall not exceed 48 hours in a week (s.172(1)(a)).

Non-union employees

If there is no collective agreement (s.172(2)), employees can work more than 48 hours in a week if the average hours of work for a period of two or more weeks does not exceed 48 hours per week and the schedule, or its modification or cancellation, has been approved by a least 70% of the affected employees.

⁹⁶ For a detailed discussion of averaging agreements see 802-1-IPG – 053/Operations Program Directives (OPDs)/ Interpretation, date: 05-11-98.

The Code also imposes a number of procedural requirements on employers who seek to obtain agreements to average maximum working hours limits.

Posting: s.172(3)

The employer is required to post a notice of a new schedule, or its modification or cancellation, in a place where it is likely to be seen by the affected employees at least 30 days before the new schedule takes effect.

Vote: s. 172.1

Employees who are not covered by a union must vote to approve a new schedule, or its modification or cancellation, and this is a secret (and confidential) vote conducted by an inspector.

Duration: s. 172.2(1)

For employees under a collective agreement, the duration of an averaging agreement is that agreed to in writing between the employer and trade union. For employees who are not covered by a collective agreement, the duration of an averaging agreement is a maximum of three years.

3. Ministerial Permit and Excess Hours

Section 176 allows employers to apply for a Ministerial permit from the Minister of Labour allowing employees to work hours in excess of the maximum established in s. 172 (48 hours) or by regulation (under s.175). A number of substantive and procedural requirements are imposed on employers before they can obtain a ministerial permit for excess hours.

The Minister must be satisfied that there are exceptional circumstances justifying the permit. Moreover, notice of the application for the permit must be posted for at least 30 days in a place that is readily accessible to the affected employees, and, if a union represents the employees, it must be given written notice of the application (s.176(2)). The duration of the permit shall not exceed the period during which it is anticipated that the exceptional circumstances will continue (s.176(3)). The permit may specify either the total number of additional hours in excess of the maximum or the additional hours that may be worked in any day or week (s.176(4)). Moreover, where a permit is issued the employer who has obtained the permit is required to report in writing to the Minister (within 15 days after the expiration of the permit) stating the number of employees who worked in excess of the maximum hours and the total number of additional hours worked (s.176(5)). There is no requirement that a trade union or a majority of the affected employees support the employer's application for a permit.

4. Emergency Work and Excess Hours

Section 177 permits the limits on maximum hours of work to be exceeded in cases of emergency. Emergency is narrowly limited to those circumstances in which an industrial establishment is faced with an accident to machinery, equipment, plant or people or if urgent and essential work is needed to be carried out on machinery, equipment or plant, or in the situation of other unforeseen or unpreventable circumstances (s.177(1)).

Where the maximum hours of work have been exceeded, an employer is required to report in writing to the regional director and any trade union representing the affected employees. A time limit for and contents of the report are specified (s.177(2)).

4. Regulations and Excess Hours

Section 175 authorizes the Governor in Council to make regulations modifying sections 169 (standard hours of work), 171 (maximum hours of work), and 174 (overtime pay) where certain conditions are met.

Maximum Daily and Weekly Rest Periods

Weekly Rest Periods

According to section 173, unless otherwise prescribed by the regulations, hours of work in a week will be scheduled and worked so that each employee has at least one full day of rest per week and Sunday is the normal day of rest where practicable.

Modified Work Schedule

Where a modified work week is in place, the work schedule will include no fewer days of rest than the number of weeks in the work schedule (Canada Labour Standards Regulations, C.R.C., c. 986, s.8(1)).

Averaging Agreements

Canada Labour Standards Regulations, C.R.C., c. 986, s. 9 establishes that during an averaging period, hours of work may be scheduled and worked without regard to section 173.

Ministerial Permits for Excess Hours

Where the excess hours worked are allowed through the use of a Ministerial permit, (section 176) the Minister has the discretion to allow the weekly rest provision in section 173 of the Act to go unobserved. This situation lasts only for the duration of the permit. The Minister may also prescribe alternative days of rest to be observed after considering the conditions of employment in the industrial establishment and the welfare of the employees (Canada Labour Standards Regulations, C.R.C., c. 986, s.8(2)).

Meal Breaks and Rest Periods

There are no specified meal breaks in the Code.

There are regulations that set out the hours of work for employees in the following industries and undertakings:

- Motor Vehicle Operators (Trucking)

- East Coast and Great Lakes Shipping (Employees on ships)
- West Coast Shipping (Employees on ships)
- Railways (Running Trades Employees)
- Broadcasting (Commissioned Salespersons)
- Hydro Nuclear Facilities (ON)

Industry-Specific Regulations regarding Hours of Work

Motor Vehicle Operators Hours of Work Regulations, C.R.C. 1978, c. 990 (under the Canada Labour Code) and the Commercial Vehicle Drivers Hours of Service Regulations, 1994, SOR 94716 (under the Motor Vehicle Transport Act 1987, R.S. 1985 c. 29 (3rd Supp)).

The Motor Vehicle Operators Hours of Work Regulations govern commercial vehicle (bus and truck drivers) and they replace the standard hours of work and overtime entitlements set out in the Canada Labour Code (ss.169 to 171). If an employee is requested to work longer than the standard hours, the employee is entitled to be paid at least one and one-half times his or her regular amount of pay.

The *Commercial Vehicle Drivers Hours of Service Regulations* 1994, SOR/94716 (made under the authority of the Motor Vehicle Transport Act, 1987) govern the maximum driving times and minimum off-duty times of commercial vehicle (bus and truck) drivers employed or otherwise engaged in extra-provincial transportation. These Regulations require drivers to keep a record of their daily driving and other work activities in a prescribed format and to make these records available to designated enforcement officials upon request. Provincial governments are responsible for enforcing the hours of service regulations.

The Regulations allow commercial motor vehicle operators to drive and be on duty for very long periods with very short periods of consecutive hours of rest. These regulations have been subject to reconsideration since the mid-1990s and consultations with all of the major stakeholders have been conducted. The proposed regulations would increase minimum rest periods and lower the limits on maximum hours of work.

Standard Hours of Work and Overtime Entitlements under the Motor Vehicle Operators Hours of Work Regulations, C.R.C. 1978, c. 990

Coverage

The Motor Vehicle Operators Hours of Work Regulations covers employees in the federal motor transport industry including bus operators,⁹⁷ city motor vehicle operators, and highway motor vehicle operators who are employed in connection with an industrial establishment

⁹⁷ “Bus operator” means a motor vehicle operator who operates a bus.

involved in the transportation of goods or passengers by motor vehicle⁹⁸ from within a province to outside that province or the transportation of mail anywhere in the country (s.3).

City motor vehicle operators and highway motor vehicle operators are exempt from the application of s. 169(2), which is the provision in the Code allowing the averaging of hours of work over a period of two or more weeks. This exemption does not apply to bus operators (s.4(2)).

City Motor Vehicle Operator

The standard hours of work for a city motor vehicle operator⁹⁹ are 9 hours in a day and 45 hours in a week (s.5(1)). In no situation may the working hours of a city motor vehicle operator be averaged.

If during a period of two or more weeks, an employee works in at least two classes of employment (a city motor vehicle operator, a highway motor vehicle operator, or an employee whose hours of work are calculated according to the *Canada Labour Standards Regulations* but not described in these regulations) his/her standard hours will be deemed to be the standard hours of work in the class of employment where s/he worked the most hours that week (s.8(1)). Where an employee is employed in any week in at least two of the classes of employment described, and s/he works the greatest number of hours as a city motor vehicle operator or a highway motor vehicle operator, standard and maximum hours of work must be determined according to the class of employment in which s/he works the greatest number of hours in a day or week.

During a week when there is a general holiday for which a city motor vehicle operator is entitled to holiday pay, the standard hours of work can exceed 32 but cannot exceed 36. However, in calculating the time worked by a city motor vehicle operator, time worked on the holiday or time during which the employee was at the disposal of the employer will not be taken into account (s.5(2)).

Highway Motor Vehicle Operator

The standard hours of work for a highway motor vehicle operator¹⁰⁰ shall not exceed 60 hours in a week (s.6(1)). In no case may the working hours of a highway motor vehicle operator be averaged.

If during a period of two or more weeks, the employee works in at least two classes of employment (a city motor vehicle operator, a highway motor vehicle operator, or an employee whose hours of work are calculated according to the *Canada Labour Standards Regulations*

⁹⁸ “Motor vehicle” means any vehicle that is operated by an employee and is propelled by a method other than muscular power, and excludes any vehicle designed for running on rails.

⁹⁹ “City Motor Vehicle Operator” means a motor vehicle operator who operates only within a 10 mile radius of his/her home terminal and is not a bus operator. It includes any motor vehicle operator who is classified as a city motor vehicle operator in a collective agreement or is not classified in any such agreement but is considered to be a city motor vehicle operator according to the prevailing industry practice in the geographical area where s/he is employed.

¹⁰⁰ “Highway motor vehicle operator” means a motor vehicle operator who is not a bus operator or a city motor vehicle operator.

but not described in these regulations) his/her standard hours will be deemed to be the standard hours of work in the class of employment where s/he worked the most hours that week (s.8(1)).

The hours of work of a highway motor vehicle operator who does not normally drive on public roads can exceed 60 hours per week if authorization is given pursuant to the *Commercial Vehicles Drivers Hours of Service Regulations* (s. 6(3)). Where this type of permit is issued, the hours of work set out in the permit will be regarded as the standard hours of work for that operator (s.6(4)).

Mixed Employment

Where an employee works in any day or week in at least two of the following classes: city motor vehicle operator, highway motor vehicle operator, or employee whose hours of work are not calculated based on the Canada Labour Standards Regulations, standard hours of work will be deemed to be the standard hours of work for the class in which s/he works the greatest number of hours in a day or week (s.7(1)).

For an employee partaking in mixed employment, s.174 (overtime pay) of the Canada Labour Code does not apply to time worked by the employee when s/he is employed as a highway motor vehicle operator (s.7(2)). When the employee's working hours¹⁰¹ exceed 60, the additional hours will be counted as overtime.

Bus Operator

When calculating the hours worked by a bus operator, time from when the shift begins to when it ends will be taken into account except for time when the bus is in a garage or parked and the employer does not require the operator to remain with the bus. (s. 9) Standard hours for bus drivers are 8 hours per day and 40 hours per week (Pamphlet 9A). Under certain circumstances the standard hours of bus operators may be averaged over a period of two or more weeks.

Weekly Rest

Where the nature of the work in an industrial establishment requires irregular distribution of hours of work for motor vehicle operators and the operators thus have no regularly scheduled daily or weekly hours or have regularly scheduled hours but the number of hours varies, hours of work can be scheduled and worked without regard to the provision in the Code setting out that each employee be granted at least one full day of rest per week and where practicable, that day be a Sunday (s.10).

Limits on Maximum Hours of Work and Minimum Rest Requirements under the Commercial Vehicle Drivers Hours of Service Regulations, 1994, SOR 94716

¹⁰¹ "Working hours" means all hours from the time that a motor vehicle operator begins his/her work shift as required by her or employer until the time she or he is relieved of job responsibilities but does not include any time during a shift when s/he is relieved of job responsibilities for authorized meals and rest *en route*, any time spent during stops en route due to illness or fatigue, resting en route as one of two operators of a motor vehicle that's fitted with a sleeper berth, or resting while en route in a place of rest where sleeping accommodation is provided (for example, hotel, motel).

Off-duty Time

The regulations provide minimum hours of off-duty time for commercial vehicle drivers. Where on-duty time during a day includes driving time, a driver is entitled to at least 8 consecutive hours of off-duty time (s.4). This period can be reduced to four hours once in any period of 7 consecutive days subject to limits on accumulated-on duty time and requirements of minimum off-duty time. Drivers operating motor vehicles equipped with sleeper berths can accumulate the equivalent of 8 consecutive hours of off-duty time by having one period of rest, of no less than two consecutive hours, between two periods of driving time that combined do not exceed 13 hours (s.5).

Drivers must take a minimum of 24 consecutive hours of off-duty time after accumulating more than 75 hours of on-duty time without taking a minimum of 24 consecutive hours of off-duty time(s.7(5)).

Limitations of Driving Time and On-Duty Time

Drivers are not permitted to drive after accumulating 13 hours of driving time or 15 hours of on-duty time (s.7(1)). Drivers shall not drive after accumulating 60 hours of on-duty time during a period of 7 consecutive days, after accumulating 70 hours of on-duty time during a period of 8 consecutive days, or after accumulating 120 hours of on-duty time during a period of 14 consecutive days (s.7(2)).

Drivers who drive north of the 60th parallel shall not drive after accumulating 15 hours of driving time or 20 hours of on-duty time. Such drivers shall not drive after accumulating 70 hours of on-duty time during a period of 7 consecutive days, after accumulating 80 hours of on-duty time during a period of 8 consecutive days, or after accumulating 120 hours of on-duty time during a period of 14 consecutive days (s.7(3)).

Permits

Motor vehicle carriers can apply for a permit that allows drivers to exceed the limits on driving hours and on-duty time and to take reduced rest periods. Two types of permits are provided. The first type allows drivers to drive up to 15 hours following 8 consecutive hours of rest, to be on duty up to 18 hours following 8 consecutive hours of rest, or to accumulate 70 hours of on-duty time during a period of 7 consecutive days (s.8(6)). The second type of permit only pertains to extra-provincial bus undertakings, and it allows the bus driver to drive up to 10 hours following at least 8 consecutive hours of off-duty time, be on duty for up to 15 hours following at least 8 consecutive hours of off-duty time, or to accumulate up to 60 hours of on-duty time during a period of 7 consecutive days (s.8 (7)). The duration of a permit is one year.

Declaration of Out of Service

Inspectors can declare drivers to be out of service if they exceed the limits on maximum hours of driving and on-duty time and the limits on the minimum off-duty periods (s.9).

Extension of Driving Time and On-duty Time

In an emergency, a driver may exceed the driving time and on-duty time limits. In the case of adverse driving conditions, a driver can exceed the limits on driving time and off-duty time by not more than two hours if the trip would have been completed within the driving time and on-

duty time limits under normal driving conditions.

Daily Logs

Drivers are obliged to keep detailed logs of their starting times, miles, driving and on-duty time and the motor carrier is required to keep all daily logs for a period of six months. An inspector can inspect these logs (s.18).

Proposed Regulation

A draft regulation is available (Canada Gazette vol. 137, No. 7 – Feb. 15, 2003), as is a regulatory impact statement.¹⁰²

Objectives of Draft Regulation

The main objective of the proposed regulations is to reduce the risk of fatigue-related commercial vehicle accidents by providing drivers with the opportunity to obtain additional rest. The proposed regulations also aim to reduce the complexity of the rules by making them easier to comply with and to enforce, for example through the reduction of the number of cycles and the elimination of the options to reduce off-duty time.

The proposed Regulations are patterned after an applicable National Safety Code Standard (NSC). The NSC is a comprehensive code of minimum performance standards designed to ensure the safe operation of commercial vehicles, drivers, and motor carriers. One of these standards — NSC No. 9 — Hours of Service, contains the basic rules on hours of service. On September 20, 2002, the federal/provincial Council of Ministers responsible for Transportation and Highway Safety approved NSC No. 9 as the basis for amendments to federal and provincial regulations. Based on the Council of Ministers' commitment, the Department is initiating changes to the hours of service regulations at a federal level. Similar changes are being initiated by provinces for intra-provincial transportation.

Description of Proposed Regulation

Transport Canada is proposing to repeal and replace the *Commercial Vehicle Drivers Hours of Service Regulations 1994*, under the *Motor Vehicle Transport Act, 1987* (MVTA). The central changes featured in the proposed regulations include:

- Increasing the minimum daily off-duty period by 25 percent from 8 hours to 10 hours;
- Requiring that no fewer than 8 of the hours of off-duty time be taken consecutively, with the additional 2 hours to be taken in increments of no less than a half hour;
- Reducing the daily maximum driving time by 18.8 percent from 16 hours to 13 hours;
- Reducing the daily maximum on-duty time by 12.5 percent from 16 hours to 14 hours, of which no more than 13 hours can be on-duty driving time;
- Eliminating the option to reduce the off-duty time from 8 hours to 4 hours;
- Increasing the minimum rest period for co-drivers using a sleeper berth from 2 hours to 4 consecutive hours;

¹⁰² Labour Gazette, Vol. 137, No. 7 — February 15, 2003, Commercial Vehicle Drivers Hours of Service Regulations, Statutory Authority: *Motor Vehicle Transport Act, 1987*; Sponsoring Department: Department of Transport, REGULATORY IMPACT ANALYSIS STATEMENT, <http://canadagazette.gc.ca/part1/2003/20030215/html/regle1-e.html> (site accessed: 25 July 2005).

- Permitting, within defined parameters, the averaging of on-duty and off-duty time over a 48 hour period;
- Reducing the number of available work/rest cycles from three to two: a maximum 70-hour cycle over 7 days and a maximum 120-hour cycle over 14 days;
- For drivers who wish to switch or reset cycles, requiring a minimum of 36 consecutive hours off-duty before “resetting the clock to zero” for the 70-hour cycle and a minimum of 72 consecutive hours off-duty for the 120-hour cycle; and
- Requiring a minimum 24-hour off-duty period, at least once every 14 days for all drivers.

East Coast and Great Lakes Shipping Employees Hours of Work Regulations, 1985 C.R.C. 1978, c. 987

These regulations modify the provisions of section 169 of the Code which set out standard hours of work, discuss the possible averaging of hours of work over a period of two or more weeks, and describe provisions regarding general holidays in a week (s.3). They also exempt employees from section 171 of the Code which sets out maximum number of hours (48) to be worked in a week (s.5). These regulations provide employers engaged in East Coast and Great Lakes Shipping with a great deal of flexibility regarding weekly rest and maximum hours of work through modified work schedules, averaging agreements, and lay-day plans.

Coverage

These Regulations apply to employees employed on ships engaged in shipping from any East Coast or Great Lakes Port¹⁰³ and operated by an undertaking or business within the legislative authority of Parliament (s.3).

Standard Hours

In general, the standard hours of work of an employee should not exceed eight hours in a day and 40 hours in a week (s.4(1)). Work schedules need not take into account one full day of rest per week and Sunday need not be the normal day of rest (s.4(2))

Modified Work Schedule

Modified work schedules require the Minister’s approval.

An employer or employer’s organization may apply to the Minister of Labour requesting an alteration to the standard hours of work. If the Minister is satisfied that the modification is justifiable due to the operational requirements of the undertaking, and if the Minister considers the request not to be detrimental to the welfare of the employees, then s/he may authorize the request. The Minister is empowered to impose conditions and specify the duration of the modification. However, the Minister cannot consent to an alteration that requires employees to work in excess of 40 hours per week on average for the period specified in the authorization (s.6).

¹⁰³ “East Coast or Great Lakes Port” means any port in Canada east of the 96th parallel of longitude.

Where an employee terminates his/her employment of his/her own accord during a period authorized by the Minister, s/he will be paid at his/her regular rate of wages for all the hours worked during that period (s.11(1)). If an employer terminates an employee's employment before the end of a period authorized by the Minister, the employee must be paid overtime pay at a rate of at least one and one half times his/her regular rate of wages for hours worked in excess of 40 times the number of weeks in which s/he worked during the period (s.11(2)).

Averaging Agreements

Averaging agreements are available to enterprises where the nature of the work necessitates irregular distribution of working hours to any class of employees with the result that employees have no regularly scheduled daily or weekly hours of work. An averaging agreement does not require prior Ministerial approval in order to take effect; however, employers are required to notify the Minister of the class and number of employees to which an averaging agreement applies and the period over which the hours of work is averaged.

Where an averaging agreement is in place, the daily and weekly hours of work of an employee may be averaged for a maximum period of 13 consecutive weeks (s.7(1)). The standard hours of work over an averaging period of 13 weeks is 520 hours. If the averaging period is less than 13 weeks, standard working hours can be calculated by multiplying the number of weeks by 40 (s.7(2)). Where an employer adopts an averaging period, the Minister must be notified of the class and number of employees to which the agreement applies and the duration of the agreement (s.7(3)).

If, during the averaging period, an employee is granted a general holiday or other holiday with pay when s/he does not work or if the employee takes annual vacation time, the number of standard hours is to be reduced by 8 hours for every day off. No more than 40 hours can be deducted for any full week of annual vacation (s.9).

For any seven consecutive days during an averaging period in which an employee is not entitled to his/her regular remuneration, earnings or salary, the number of standard hours is to be reduced by 40 hours for every seven consecutive days (s.10).

Where an employee terminates his/her employment of his/her own accord during an averaging period, s/he will be paid at his/her regular rate of wages for all the hours worked during that period (s.11(1)).

If an employer terminates an employee's employment before the end of an averaging period, the employee must be paid overtime pay at a rate of at least one and one half times his/her regular rate of wages for hours worked in excess of 40. If an employee worked more than one week during that period, the calculation requires multiplying any hours worked in excess of 40 by the number of weeks in which s/he worked during the period (s.11(2)).

During a week in which an employee is granted a general holiday or other holiday with pay when s/he does not work, or if the employee takes annual vacation time, the number of standard hours is to be reduced by 8 hours for every day off. But, no more than 40 hours can be deducted for any full week of annual vacation (s. 8).

Lay-Day Plan

Lay-day plans provide the employer with scheduling flexibility without requiring prior Ministerial approval.

An employer may adopt a lay-day plan¹⁰⁴ for employees on board a ship. The employer must notify the Minister of the commencement of the plan (s. 12(1)(2)). Employees employed under such a plan are not subject to standard hours of work of eight hours per day and 40 hours per week nor will 8 hours per day be deducted for general holidays, other holidays with pay and annual vacation time (s.12(3)).

Where an employee is entitled to, at minimum, 1.13 lay-days for each day s/he works on board a ship, standard working hours may exceed 8 hours in a day and 40 hours in a week, but cannot exceed 12 hours per day (s.13).

Where an employee is entitled to, at minimum, 0.4 of a lay-day for each day s/he is on board a ship, standard working hours can exceed 40 hours in a week, but cannot exceed eight hours in one day (s.14).

Generally speaking, no employee is permitted to accumulate more than 45 lay-days. However, where there are exceptional circumstances, the Minister may allow the accumulation of more than 45 lay-days by way of permit; the ministerial permit will set out a period for which this accumulation is acceptable (s.15, 16).

West Coast Shipping Employees Hours of Work Regulations, C.R.C. 1978, c. 992

These regulations provide employers engaged in shipping on the West Coast with a great deal of flexibility in terms of standard work hours, maximum work hours, and weekly rest periods. Unlike the East Coast and Great Lakes Shipping regulations, which provide for modified work schedules and averaging agreements, these regulations simply set a standard work week and limits on maximum hours of work.

These Regulations modify the provisions of section 169 of the Code which set out standard hours of work, discuss the possible averaging of hours of work over a period of two or more weeks, and describe provisions regarding general holidays in a week. The regulations also modify section 171 of the Code which sets out maximum hours of work of work (48) in a week (s.3).

Coverage

These Regulations apply to employees who work on ships that are engaged in shipping from any port in the province of British Columbia and that are operated by an undertaking or business that comes within the legislative authority of Parliament.

¹⁰⁴ “Lay-day plan” means a day off work with pay to which an employee becomes entitled by working on board a ship for a number of days (s. 2).

Standard Hours of Work

Where an employee is entitled to, at minimum, 1.13 lay-days for each day s/he is on board a ship, working hours can exceed 8 hours in a day and 40 hours in a week but cannot generally exceed 12 hours per day (s.4(1)).

Where an employee is entitled to, at minimum, 0.4 of a lay-day for each day s/he is on board a ship, working hours can exceed 40 hours in a week, but cannot exceed eight hours in a day (s.4(2)).

Generally speaking, no employee is permitted to accumulate more than 45 lay-days. However, where there are exceptional circumstances, the Minister may allow the accumulation of more than 45 lay-days by way of permit; the permit must set out a period for which this accumulation is acceptable (s.4(3)(4)).

Overtime

Where an employee is generally not permitted to work in excess of 12 hours per day, additional hours over the 12 prescribed are permitted as long as the total number of hours of overtime in a period of seven consecutive working days does not exceed 18. Where an employee is generally not permitted to work in excess of 8 hours per day, additional hours over the 8 prescribed are also permitted as long as the total number of hours overtime in a period of seven consecutive working days does not exceed 12. An exception to these provisions is the emergency work conditions under section 177 of the Code (s.5(1)).

Where an employee works a number of consecutive working days other than 7, the maximum number of hours of overtime that are permitted during those consecutive working days must equal the same proportion as the above-stated hours which are calculated based on 7 days (s.5(2)).

Where, in any working day during a period of 7 consecutive days, an employee is relieved of duties because s/he cannot work due to the loading or unloading of the ship, and the employee's daily working hours are thus reduced, the total number of overtime hours that the employee may work will increase by the number of hours that the employee's daily work has been cut short (s.6).

Daily and Weekly Rest

Hours of work may be scheduled and worked without regard to section 173 of the Code, which establishes that employees are entitled to at least one full day of rest each week and where practicable, Sunday should be the day of rest.

Railways Running-Trades Employees Hours of Work Regulations, C.R.C. 1978, c. 991

These regulations provide railway operators with complete flexibility to schedule work hours in the running trades. However, the *Railway Safety Act*, RS 1985, c.32(4th Supp.) provides a statutory basis for regulating hours of work on Canada's railways, and Work/Rest Rules for

Railway Operating Employees (June 2005)¹⁰⁵ were issued under its authority. These rules impose limits on hours of work and minimum rest periods for railway operating employees and require railway companies to develop fatigue management plans.

Coverage

These regulations apply to yardmasters, assistant yardmasters, locomotive engineers, locomotive firemen helpers, hostlers, train conductors, train baggage, brakemen, yard foremen, yardmen, switch tenders, and car retarder operators in railroads that are within the legislative authority of Parliament.

Exemption

Employees who fall under these regulations are exempt from the application of section 169 of the Code, which deals with standard hours of work, averaging, and general holidays in a week. They are also exempt from section 171 of the Code which deals with maximum hours of work (s. 3). This means that standard hours of work for these employees is not 8 hours per day and 40 hours per week and further, that these employees are permitted to work more than 48 hours in a week.

Daily and Weekly Rest

Hours of work may be scheduled and worked without regard to section 173 of the Code. Section 173 of the Code sets out that employees are entitled to at least one full day of rest each week and where practicable, Sunday should be the day of rest (s. 4).

Work/Rest Rules for Railway Operating Employees (June 2005)

Under these Rules, the maximum continuous duty time ranges from twelve to sixteen hours (for work train service), and permits split shifts. They also impose a limit of eighteen hours of combined duty time. The rules require that operating employees be given minimum rest periods (ranging from six to eighth hours between shifts). They also provide flexibility to deal with emergencies, and rules relating to resetting shifts and to travel between locations. The requirement to develop and implement fatigue management plans, and the involvement of employees and unions in this process, is an interesting new regulatory development.

Broadcasting Industry Commission Salesmen Hours of Work Regulations, SOR/79-430

These regulations provide employers of commission broadcasting salespeople with complete flexibility regarding hours of work.

Coverage

These regulations apply to employees who are commission salespeople employed in connection with radio and television broadcasting in Canada and paid on the basis of commission or salary and commission.

Exemption

¹⁰⁵ Available at <http://www.tc.gc.ca/includes/aspscripts/printable.asp?lang=en> >date accessed: 23 October 2005>.

Employees who fall under these regulations are exempt from the application of section 169 of the Code, which deals with standard hours of work, averaging, and general holidays in a week. They are also exempt from section 171 of the Code which deals with maximum hours of work. This means that the standard hours of work for these employees is not 8 hours per day and 40 hours per week and these employees are permitted to work more than 48 hours in a week. Additionally, hours of work may be scheduled and worked without regard to section 173 of the Code. Section 173 of the Code sets out that employees are entitled to at least one full day of rest each week and where practicable, Sunday should be the day of rest. Also, employees are not subject to section 174 of the Code which states that employees who work in excess of standard hours of work are entitled to be paid at least one and one half times their regular rate of wages (s.3).

Canadian Aviation Regulations, SOR/96-433 (under the Aeronautics Act, RS 1985, cA-2)

Flight Time Limitations

No private operator¹⁰⁶ can assign, and no flight crew member¹⁰⁷ can accept, a flight if the flight crew member's total flight time¹⁰⁸ in flights conducted under Part IV, subpart 4 (Private Operator Passenger transportation) or Part VII (Commercial Air Services) will exceed: 1200 hours in 12 consecutive months, 300 hours in 90 consecutive days, 120 hours in 30 consecutive days or, 8 hours in any consecutive 24 hour period the flight crew member conducts where single-pilot IFR flights (s.604.26).¹⁰⁹

Flight Duty Time Limitations

No private operator shall assign a flight crew member for flight duty time,¹¹⁰ and no flight crew member can accept, if the member's flight duty time will exceed: 14 consecutive hours in any consecutive 24 hour period, 15 consecutive hours in any consecutive 24 hour period where the flight crew member's total flight time in the previous 30 consecutive days does not exceed 70 hours, or where the rest period prior to the flight is at least 24 hours. The only exceptions to

¹⁰⁶ "Private operator" means the holder of a private operator certificate; "private operator certificate" means a certificate issued under Subpart 4 of Part VI that authorizes the holder of the certificate to operate a Canadian aircraft for the purpose of transporting passengers (s.101.01(1)).

¹⁰⁷ "Flight crew member" means a crew member assigned to act as pilot or flight engineer of an aircraft during flight time (s.101.01(1)).

¹⁰⁸ "Flight time" means the time from the moment an aircraft first moves under its own power for the purpose of taking off until the moment it comes to rest at the end of the flight (s.101.01(1)).

¹⁰⁹ "IFR flight" means a flight conducted in accordance with the instrument flight rules (s.101.01(1)).

¹¹⁰ "Flight duty time" means the period that starts when a flight crew member reports for a flight, or reports as a flight crew member on standby, and finishes at "engines off" or "rotors stopped" at the end of the final flight, except in the case of a flight conducted under Subpart 4 or 5 of Part VII, in which case the period finishes 15 minutes after "engines off" or "rotors stopped" at the end of the final flight, and includes the time required to complete any duties assigned by the air operator or private operator or delegated by the Minister prior to the reporting time and includes the time required to complete aircraft maintenance engineer duties prior to or following a flight (s.101.01(1)).

these provisions are split flight duty times, extensions of flight duty times, and unforeseen operational circumstances (s.604.27(1)).¹¹¹

Split Flight Duty Time

Where the flight duty time includes a rest period, it may be extended beyond the maximum flight duty times set out in the above paragraph. This extension can be up to one-half the length of the rest period, to a maximum of 4 hours. This extended flight duty time is only possible if the private operator provides the flight crew member with advance notice of the extension and a rest period of at least 4 consecutive hours in suitable accommodation.¹¹²

The minimum rest period following flight duty time referred to in the “flight duty time limitations” paragraph will be increased by an amount at least equal to the extension of the flight duty time (s.604.28).

Extension of Flight Duty Time

Flight duty can also be extended beyond the maximum time set out in the “flight duty time limitations” paragraph if the extension of the duty time is authorized in the private operator certificate and the private operator and the flight crew member comply with the *Private Operator Passenger Transportation Standards* (s.604.29).

Unforeseen Operational Circumstance

In the case of unforeseen operational circumstances, it is also possible to extend flight duty time beyond the maximum flight duty times discussed in the “flight duty time limitations” paragraph and in the “split flight duty time” paragraph. In order for this to occur, the pilot-in-command must consider the time extension to be safe after consulting with the other flight crew members, the flight duty time must be extended due to actual unforeseen operational circumstances, and the private operator and the pilot-in-command must comply with the *Private Operator Passenger Transportation Standards* (s.604.30).

Delayed Reporting Time

If a flight crew member is notified of a delay in reporting time within 2 hours preceding the reporting time, and the delay is more than 3 hours, the flight crew member’s flight duty time will start three hours after the original reporting time (s.604.31).

Rest Periods

A private operator must ensure that prior to any flight duty, a flight crew member is given the minimum rest period¹¹³ plus any additional rest period required by the Division; the flight crew

¹¹¹ “Unforeseen operational circumstance” means an event (such as unforecast adverse weather, or equipment malfunction or air traffic control delay) that is beyond the control of an air operator or private operator (s.101.01(1)).

¹¹² “Suitable accommodation” means a single-occupancy bedroom that is subject to a minimal level of noise, is well ventilated, and has facilities to control the levels of temperature and light or, where such a bedroom is not available, an accommodation that is suitable for the site and season, is subject to a minimal level of noise, and provides adequate comfort and protection from the elements (s.101.01(1)).

¹¹³ “Minimum rest period” means a period during which a flight crew member is free from all duties, is not interrupted by the air operator or private operator, and is provided with an opportunity to obtain not less than eight

member must use the rest periods to obtain the necessary rest so as to be adequately rested prior to reporting to flight duty (s.604.27(2)(3)).

A private operator must provide each flight crew member with at least one period of 36 consecutive hours within each consecutive 7 days or at least one period of 3 consecutive calendar days within each 17 consecutive days as time free from duty (s.604.32).

When a flight crew member is required to travel for the purpose of positioning after the completion of flight duty time, the private operator must provide the flight crew member with an additional rest period of at least one-half the time spent traveling that is in excess of the flight crew member's maximum flight duty time (s.604.33).

Ontario Hydro Nuclear Facilities Exclusion from Part III of the Canada Labour Code Regulations, SOR/98-181

Employment on or in connection with a nuclear facility¹¹⁴ is excluded from the application of Part III of the Canada Labour Code, except sections 265 to 267 (s. 2).

Sections 265-267

The Governor in Council may make regulations stating that this Part of the Code applies or does not apply to any employment, class or classes of employment that is/are connected with a work or undertaking as part of a provincial crown corporation regulated, in whole or in part, by the *Atomic Energy Control Act* (ss.265, 266(1)). If the Governor in Council utilizes this provision to make regulations, on the recommendation of the Minister, s/he may also make regulations relating to labour standards in relation to employment (s.266(2)).

Section 267 deals with the incorporation of a provincial law, administration and enforcement of the regulation, offence and penalty for contravention, possible defences, and the procedure for prosecuting an offence.

Annual Vacations – Division IV

Vacation Length

consecutive hours of sleep in suitable accommodation, time to travel to and from that accommodation and time for personal hygiene and meals (s.101.01(1)).

¹¹⁴ “Nuclear facility” means a nuclear facility in Ontario that is subject to the *Nuclear Safety and Control Act* or any regulations made under that Act and that is owned and operated by Ontario Hydro, or owned or operated by a person other than Ontario Hydro if, on the day on which these Regulations come into force or on a day after that day, it is owned and operated by Ontario Hydro (s.1).

Unless otherwise provided, every employee is entitled to at least two weeks of vacation with pay per year. If an employee has been working for one employer for six consecutive years, s/he is entitled to three weeks vacation with pay per year (s.184).

Vacation Pay

Section 183 sets out the method for determining the value of vacation pay. For employees employed for less than six years, vacation pay is equal to 4% of an employee's yearly wages. After six consecutive years of employment with one employer, the employee is entitled to 6% of his/her wages as vacation pay.¹¹⁵

The vacation pay provisions do not apply to employers and employees who are parties to a collective agreement that provides rights and benefits which are at least as favourable as those in the Code and that contains provisions for the settlement of disputes by a third party (s. 168(1.1)).

Calculating Vacation Entitlement

Section 185 sets out the employer's responsibility with regards to granting vacation time with pay. The employer must grant the employee the vacation to which s/he is entitled within 10 months of the completion of the year of employment that establishes the employee's entitlement to the vacation time (s.185(a)). The employer must also pay the employee the vacation pay to which s/he is entitled for that vacation time (s. 185).

For the purposes of annual vacation provisions, a year of employment may be defined in two different ways. It is either the continuous employment of an employee by one employer for a period of 12 consecutive months beginning with the date of employment or any subsequent anniversary date thereafter or it may be defined as a calendar year or other year determined by the employer, as set out by regulations (s.183).

If the employer chooses to define year of employment using the calendar year or other year, she or he must communicate certain information to employees in writing at least 30 days prior to putting the year of employment into effect. The employer must notify employees of the dates of commencement and expiry of the year of employment and convey the method of calculating the length of vacation and the vacation pay for a period of employment that is less than 12 consecutive months (Canada Labour Standards Regulations, C.R.C., c. 986, s.12).

Furthermore, if the employer chooses to define year of employment using the calendar year or other year, within 10 months after the commencement date or after each subsequent anniversary date, the employer must grant a vacation with vacation pay to each employee who has completed less than 12 months of continuous employment at that time. The vacation to be granted in this scenario is calculated by taking the number of weeks of the employee's vacation entitlement, dividing it by twelve, and then multiplying it by the number of completed months of employment. For employees who begin work after the commencement of the year of employment, the completed months of employment are considered from and including the date

¹¹⁵ Section 186 further clarifies that vacation pay shall be deemed to be wages. For a detailed discussion of the definition of wages for the purpose of calculating vacation pay see 805-1- IPG-012/Operational Program Directives (OPDs)/Interpretation, Policies and Guidelines (IPGs), date: 1993/09/10 (revised).

the employment began. For all other employees, the completed months of employment are based on the commencement date of the year of employment previously in effect (Canada Labour Standards Regulations, C.R.C., c. 986, s.13(1)(2)).

Timing of Vacation

In general, an employee can take vacation at the discretion of the employer or at a time mutually agreed upon by the employer and the employee. There is nothing in the Code or the regulations that specifies how much vacation time should be taken at one time. Where an employee is entitled to annual vacation and there is no agreement between the employer and employee regarding when the vacation is to be taken, the employer must give the employee at least two weeks notice before his/her vacation time commences (Canada Labour Standards Regulations, C.R.C., c. 986, s.13(3)).

Payment of Vacation Pay

The Canada Labour Standards Regulations (C.R.C., c. 986, s.13.4) set out when employers must actually pay vacation pay. Generally, the employer must pay the employee within the 14 days prior to the beginning of the vacation. However, when it is not practicable to do so or when it is an established practice in an industrial establishment that vacation pay be paid on the regular pay day during or immediately following the vacation, this practice is allowed.

General Holidays and Vacations

Where a general holiday occurs during an employee's vacation time, the employee is entitled to a one-day extension of the vacation and the employer must pay the employee for the general holiday in addition to the vacation pay earned by the employee (s. 187).

Waiving Vacation

An employee is permitted to enter into a written agreement with the employer to postpone or waive his/her entitlement to an annual vacation for a specified year of employment. Where an employee's annual vacation is waived, the employer must pay the employee her or his vacation pay within 10 months after the end of the specified year of employment (Canada Labour Standards Regulations, C.R.C., c. 986, s.14).

Termination and Vacation Pay

When the employment relationship ceases to exist, the employer must pay the employee immediately any outstanding vacation pay owed by the employer for work from previous years (s. 188(a)) and any vacation pay accrued up to the date of termination (s.188(b)).

Where part, or all of, a federal work, undertaking, or business is sold, leased, merged, or otherwise transferred from one employer to another employer, notwithstanding the transfer, the employment of the employee is to be deemed to be continuous with one employer (s.189(1)).

Under section 190, the Governor in Council is empowered to make regulations in regards to the vacation provisions.¹¹⁶

¹¹⁶ These regulations may relate to: defining the circumstances and conditions under which the rights of an employee may be waived or postponed, prescribing notices to be given to employees indicating when vacations may be taken, setting out timelines indicating when vacation pay must be paid, defining work absences that shall

General Holidays – Division V

A general holiday is a special day designated in the Code on which employees, including managers and professionals, are entitled to a day off with pay.¹¹⁷

Unless otherwise provided, every employee is entitled to and must be granted a holiday with pay on each of the general holidays falling within his/her employment¹¹⁸ period (s. 192). Section 194 exempts those employees who are governed by the terms of a collective agreement that entitles the employees to at least nine holidays per year with pay, exclusive of annual vacation.

There are nine general holidays recognized by the Code. These include: New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, and Boxing Day. The term general holiday may also include any day substituted for any such holiday pursuant to section 195 (s.166).

Employers are provided with flexibility regarding general holidays through provisions that allow for substituted holidays and via a special regime for continuous operations.

1. Substituted Holidays

Section 195 outlines two situations in which other holidays may be substituted for general holidays. First, in a workplace where employees are subject to a collective agreement, an employer may substitute any holiday for a general holiday as long as the substitution is agreed to in writing by the employer and the trade union (s.195(1)).¹¹⁹ Second, in a workplace where employees are not subject to a collective agreement, another day may be substituted for a general holiday if this substitution has been approved by at least 70% of the affected employees (s.195(2)). Where such agreements are made, the substituted holiday will be

not be deemed to interrupt continuity of employment, considering the determination of a year of employment set out by the employer in an industrial establishment, relating to calculating and determining vacation and vacation pay for seasonal or temporary employees, granting vacation or the payment of vacation pay in the event of a temporary cessation of employment, providing for the application of the provisions from this Division to situations where an employee has been absent from his/her employment due to illness or other unavoidable absences (s.190).

¹¹⁷ Pay granted to an employee for a general holiday on which the employee does not work is for all purposes deemed to be wages, which exclude tips and other gratuities (s. 200).

¹¹⁸ For the purposes of this section, a person is deemed to be in the employment of another person when that person is available at the call of another person, whether or not that person is called on to perform any work (s. 202(2)).

¹¹⁹ The written agreement must contain: the name of the employer, an identification of the affected employees, the address or location of the workplace, the dates of the general holiday and substituted holiday, and the dates the substitution comes into effect and expires. An application must include the following information: the name and address of the employer, the calendar year or other year for which approval is sought, the reasons for requesting such approval, a statement of the present vacation arrangements in effect for employees of the employer and any other information that the Minister may require. The Minister may approve the application as submitted, approve the application for a definite or indefinite period of time and subject to such terms and conditions as she or he deems desirable, or deny the application (Canada Labour Standards Regulations, C.R.C., c. 986, s.16(1)(2)(3)).

deemed to be a general holiday for the affected employees. This provision for substituting a general holiday is very restrictive since it requires that a holiday must be substituted for a general holiday. By contrast, similar provisions regarding continuous operations are more flexible as they allow any day to be substituted for a general holiday (s.198(b)).

In order to determine whether 70% of the affected employees who are not subject to a collective agreement are in accordance with a holiday substitution, a secret and confidential vote is to be conducted by an inspector.¹²⁰ In the case of such a vote, the duration of a holiday substitution is a maximum of three years (s.195.1).

Furthermore, when another holiday is substituted for a general holiday in a non-unionized working environment, at least 30 days before the substitution takes place, the employer must post a notice of the substitution in accessible places where employees are likely to read the notice (s.195(3)). Canada Labour Standards Regulations (C.R.C., c.986, ss.15, 16) set out the information required to be posted in the notice.¹²¹ This notice must remain posted for the duration of the substitution (Canada Labour Standards Regulations, C.R.C., c. 986, s.15(2)).

When a holiday falls on a non-working day

When New Year's Day, Canada Day, Remembrance Day, Christmas Day or Boxing Day falls on a non-working day of an employee, the employee is entitled to a holiday with pay at some later date. This extra day may be added to his/her annual vacation or granted as a holiday with pay at a time mutually agreed upon by the employer and the employee (s.193(1)).

When a general holiday falls on a weekend that is a non-working day, the employee is entitled to a holiday with pay on the next working day immediately preceding or following the general holiday (s. 193(2)).

Calculation of Pay Employees Who Do Not Work on Holidays

Where an employee's wages are calculated on a weekly or monthly basis, weekly or monthly wages cannot be reduced because the employee did not work on the general holiday (s. 196(1)). Where an employee is paid at a daily or an hourly rate, the employee must be paid at least the equivalent of the wages s/he would have earned at his/her normal hours of work for the holiday (s.196(2)). Additionally, if an employee's wages are calculated on a basis other than those described above, the employee must be paid at least the equivalent of the wages s/he would have earned at his/her regular rate of wages for a normal working day (s.196(3)).

Canada Labour Standards Regulations (C.R.C., c. 986, s. 17) set out how to calculate pay for employees who are paid at a daily or hourly rate and whose hours of work differ day to day or who are paid on a basis other than time. These employees will be paid the average of their daily earnings exclusive of overtime for the 20 days they worked immediately preceding the

¹²⁰ "Inspector" means any person designated as an inspector under s. 249; s. 249 states that the Minister may designate any person as an inspector.

¹²¹ The notice of substitution of a general holiday must contain: the name of the employer, an identification of the affected employees, the address or location of the workplace, the dates of the general holiday and substituted holiday, the dates the substitution comes into effect and expires, the date of posting, and a statement that at least 70% of the affected employees must agree to the substitution of the general holiday for the substitution to come into effect (Canada Labour Standards Regulations, C.R.C., c. 986, s.15(1)).

general holiday or will be paid an amount calculated by a method agreed upon under or pursuant to a collective agreement.

Employees who do not work on a general holiday are not entitled to be paid for the holiday if they did not earn wages for at least 15 days during the 30 days immediately before the holiday. However, employees in this situation are entitled to be paid 1/20 of the wages they earned during the 30 calendar days immediately preceding the general holiday (s. 201(4)).

Employees who are on a modified work schedule pursuant to section 170 of the Code must establish eligibility according to the number of days calculated or determined pursuant to any regulations (s.201.1).¹²²

An employee who has been working for one employer for less than 30 days is not entitled to general holiday pay if s/he does not work on the holiday (s.202(1)).

Calculation of Pay for Employees Who Are Required to Work on Holidays

Generally, an employee who is required to work on a day in which s/he is entitled to a holiday with pay must be paid at a rate of at least one-half times his/her regular wages for the time worked on that day (s.197). The holiday pay premium does not apply, however, to employees working in a continuous operation.

2. Continuous Operations

The policy is that continuous operations should not be required to shut down for holidays and as a result there are special provisions to accommodate these operations. The Code allows for flexibility by providing employees in continuous operations with general holidays, and allows the employer to choose one of the following scenarios:

- a) provide the employee with the general holiday off with pay;
- b) require the employee to work on the general holiday with a time and one-half premium for the hours worked on the holiday;
- c) require the employee to work on the holiday as a regular work day with a day off at another time (s.198 (b)); or
- d) require the employee to work on the holiday if there is a collective agreement in place that states that the employee is paid for the first day in which the employees does not work after that day.

Section 191 defines the expression “employed in a continuous operation”. This term refers to employment in any industrial establishment where in each seven-day period, operations that have commenced will continue normally without cessation until the completion of the regularly scheduled operations for that period; any operations or services concerned with the running of trains, planes, ships, trucks and other vehicles, whether in scheduled or non-scheduled operations; telephone, radio, television, telegraph or other communication broadcasting operations or services; or any operation or service that is normally carried on without regard to Sundays or public holidays.

¹²² The Governor in Council may make regulations setting out the manner of calculating or determining the number of days required for eligibility for employees who follow a modified work schedule under s.170.

Not all employees who work in industries considered “continuous operations” are considered to be employed in a continuous operation since for some job positions, employees’ presence is not required outside of regular business hours (Pamphlet 4A).

There are two situations in which an employee employed in a continuous operation is not entitled to pay for a general holiday: if an employee does not report for work after having been called in on that day, and if an employee makes him/herself unavailable to work on that day in accordance with the conditions of employment in the industrial establishment. (s. 201(2)).

The Canada Labour Standards Regulations (C.R.C., c. 986, s.18) outline the method of calculating the regular rate of wages for employees whose wages are calculated on a daily or hourly basis and that differ from day to day and for employees whose wages are calculated on a basis other than time and are used to calculate holiday pay for both continuous operations and non-continuous operations employees. The regular rate of wages for a holiday is the average of daily earnings, excluding overtime, made during the 20 days immediately preceding the holiday. If, however, another calculation method is described in a collective agreement, then that becomes binding on the employee and the employer.

If an employee who has been working for an employer for less than 30 days is required to work on a general holiday, then the employee must be paid at a rate of at least one and one-half times his regular rate of wages for the time s/he works that day. However, if the employee is employed in a continuous operation, the employee is only entitled to regular rate of wages for the time that the employee works on that day (s.202(1)).

Managers and Professionals

Section 199 sets out provisions regarding general holidays for those who are not covered by Division I of the Code. This includes managers and superintendents who exercise management functions, as well as members of the architectural, dental, engineering, legal and medical professions. When an employee who falls within one of these categories works on a general holiday and is entitled to a holiday with pay, s/he must be given a holiday with pay at some other time mutually agreed upon by employee and employer (s. 199).

Reassignment, Maternity Leave, Parental Leave and Compassionate Care Leave - Division VII

General Provisions Regarding Leaves

In this Division, there are three types of leaves that are provided by and that are designed to dovetail with the benefit system provided in the Employment Insurance Act.¹²³ These leaves are maternity leave, parental leave, and compassionate care leave. The purpose of these leaves is to guarantee employment security, continuity and accumulation of employment service, and entitlement to benefits under certain circumstances during the period of the leave. Although the

¹²³ S.C. c..23.

requirements for taking each leave differ, as do the lengths of each of the three leaves, employees on each of these leaves are entitled to the same benefits and the same right to return to their jobs.

Employees who are entitled to these leaves might be entitled to benefits under the Employment Insurance Act or benefits provided by the employer as part of an individual employment contract or a collective agreement.

Entitlements while on Leave

While an employee is on a leave of absence, her or his pension, seniority, and health and disability benefits accumulate during the entire period of the leave (s.209.2(1)). Where an employee is required to make contributions to any of the above-mentioned benefits, the employee is responsible for paying those contributions for the period of the leave of absence within a reasonable time. The only exception to this provision is if the employee notifies the employer before taking the leave, or within a reasonable time after taking the leave, of his/her intention to discontinue contributions during that period (s.209.2(2)). If the employer also pays contributions towards one of the above-mentioned benefits, then the employer must continue to pay during the employee's leave of absence in at least the same proportion as would be paid if the employee was present at work (s.209(2.1)). If the employee or the employer does not pay these contributions, the benefits will not accumulate during the leave of absence but when the employee returns to work, her or his employment shall be deemed continuous with her or his employment before her or her absence (s.209.2(3)).

For the purposes of calculating benefits other than pension, seniority, and health and disability benefits, the return of an employee who was absent from work due to a maternity or parental leave is to be deemed continuous with employment before the employee's absence (s.209.2(4)). The Canada Labour Standards Regulations (C.R.C., c. 986 s.29(b)) reiterate this point in stating that the absence of an employee from employment shall be deemed not to have interrupted continuity of employment where the employer permits or condones the employee's absence from work. In addition, no employer can dismiss, suspend, lay off, demote, or discipline an employee because the employee is pregnant or has applied for a parental leave of absence under Division VII. An employer is also not permitted to take into account an employee's pregnancy or intention to take a leave of absence when making any promotion or training decisions regarding the employee (s.209.3).

If there is an income replacement scheme or an insurance plan in force in the workplace, an employee on leave is entitled to benefits on the same terms as any employee absent from work due to health-related reasons (s.209.21).

Every employee who intends to or is required to take a leave of absence from employment may request in writing that the employer keep him/her informed of every employment, promotion, or training opportunity for which s/he is qualified that arises while s/he is away from work. Upon receiving such a request, the employer must ensure that this information is communicated in writing to the employee who is on a leave (s.209).

Continuity of service for the purpose of entitlement to the leaves is maintained through the sale or transfer of a business (s.209.5).

Right to Return to Employment after the Leave

An employee who chooses to take, or is required to take, a leave of absence is entitled to be reinstated into the same position s/he occupied before the leave began. However, where an employer is unable to reinstate an employee into the same position due to a valid reason, the employer must reinstate the employee into a comparable position with the same wages and benefits at the same location (s.209.1(1)(2)).

Reorganization

Section 209.1(3) sets out the consequences of a reorganization of an industrial establishment during the period in which an employee is away on a leave of absence. If the wages and benefits of the employee's group are changed, upon his/her return to work, the employee is entitled to receive the wages and benefits that s/he would have been entitled to receive had s/he been working when the reorganization took place. Furthermore, in such circumstances the employer must, as soon as possible, notify all employees on leave of these changes in writing (s.209.1(4)).

Subsection 209.4 allows the Governor in Council to make regulations relating to leaves.¹²⁴

Maternity Leave

This leave is designed to accommodate a woman's health-related needs surrounding pregnancy and childbirth. The Employment Insurance Act provides maternity benefits to employees while they are on leave.

All female employees who have completed six consecutive months of continuous employment with an employer, and provide the employer with a certificate from a qualified medical practitioner confirming pregnancy, are entitled to a leave of absence from employment for up to seventeen weeks. The leave can begin eleven weeks prior to the estimated delivery date and must end no later than seventeen weeks following the actual delivery date (s.206). Labour Canada's policy is to consider any termination of a pregnancy (whether due to miscarriage, abortion, or still birth) after the 19th week of the pregnancy to be confinement. For any earlier termination, the woman is entitled to take advantage of the provisions in Division XIII (sick leave).¹²⁵

An employee who has taken 17 weeks of maternity leave is entitled to 35 weeks of parental leave.

¹²⁴ These regulations may relate to: specifying the absences from employment that will be deemed not to have interrupted continuous employment for maternity and parental leave, prescribing classes of people for the purposes of the definition of "family member", specifying what does or does not constitute an essential function of a job, and outlining what does or does not constitute a valid reason for not reinstating an employee into his/her pre-leave job position.

¹²⁵ 808-1- IPG-017/Operations Program Directives (OPDs)/ Interpretation, Policies and Guidelines (IPGs), date: 1993/09/10.

The only circumstance in which an employer is able to require an employee to take a leave of absence from work due to a pregnancy is when the employee is unable to perform an essential function of her job and no appropriate alternative job is available for her. In such circumstances, the employee is able to restart work as soon as she is able to perform the essential function once again. The burden of proving that a pregnant employee is unable to perform an essential job function rests with the employer (s.208).

A request made by an employee for reassignment and job modification due to a potential health risk to her or her fetus or child, and the employer's obligation to fulfill that request where reasonably practicable, take precedence over the employer's ability to require a pregnant employee to take a leave of absence when the employee cannot perform an essential job function and no appropriate alternative job is available (s.208.1). This practice favours health and safety and stability of employment.¹²⁶

¹²⁶ The Code provides for job reassignment or leave in the event of job-related risks to the employee's health or the health of the fetus or child during the employee's pregnancy or the period of time that she is nursing. This leave is specifically health related and depends upon a determination by a qualified health practitioner of the health risk. When an employee is pregnant or nursing, she may request the employer to modify her job functions or reassign her to another job if continuing her current job functions may pose a risk to her health or to that of the fetus or child. This request can be made any time from the beginning of the pregnancy to the end of the twenty-fourth week following the birth (s.204(1)). The request must be accompanied by a certificate from a qualified medical practitioner indicating the expected duration of the potential risk and the activities or conditions that must be avoided in order to eliminate the risk (s.204(2)). The employee can choose the qualified medical practitioner (s.204(2)). "Qualified medical practitioner" is defined as a person who is entitled to practice medicine under the laws of the province (s.166).

An employer who receives such a request from an employee must examine the request in consultation with the employee and where it is reasonably practicable, must modify the employee's job functions or reassign her to another position (s.205(1)). The employee who has made the request is entitled to continue in her current job while the request is being examined by the employer. But, if continuing her current job poses a serious health risk, she is entitled to a leave of absence with wages at her regular rate of pay until the employer modifies her job functions, reassigns her, or informs her in writing that it is not reasonably practicable to modify her job functions or to reassign her (s.205(2)). Section 132 in Part II of the Code also deals with the issue of work cessation and reassignment. If the pregnant employee feels that continuing any of her current job functions may cause a risk to her health or to that of the fetus or child, she is able to cease to perform her job until a medical practitioner is able to establish the possible risks posed by her current position. On being informed of such a cessation, the employer must notify the work place committee or the health and safety representative. Once the medical practitioner has made her or his assessment of the working conditions, the employee is no longer permitted to cease to perform his/her job for fear of hazardous health risks. If the employee's job is deemed a health risk, the employer may reassign the employee to another job that would not pose such a risk.

The onus is on the employer to show that a job modification or reassignment that would allow for the dangerous activities to be avoided is not reasonably practicable (s.205(3)). Furthermore, the employer must inform the employee in writing of this decision (s.205(4)). The employee is then entitled to a leave of absence without pay for the duration of the risk (as indicated in the medical certificate where the job modification or reassignment is not reasonably practicable (s.205(6)).

If it is reasonably practicable and if the employee is reassigned to another position or if her job functions are modified, she will be deemed to continue to hold the job she had at the time of the request and she will continue to receive the wages and benefits attached to that job (s.205(5)). An employee who is pregnant or nursing is entitled to an unpaid leave of absence during the period from the beginning of the pregnancy to the end of the twenty-fourth week following the birth. The employee requesting such a leave must provide the employer with a certificate from a qualified medical practitioner of her choice indicating she is unable to work due to her pregnancy or nursing and the duration of her inability (s.205.1).

An employee whose job functions have been modified, who has been reassigned, or who is on a leave of absence must give at least two weeks notice in writing to the employer should any change occur in the duration of the risk

Notice for Maternity and Parental Leave

Every employee who intends to take maternity or parental leave must give four weeks notice in writing to the employer, unless there is a valid reason why notice cannot be given. In this notice, the employee must indicate the length of leave she or he intends to take. Should the employee later wish to modify the length of her or his leave, the employee must give the employer at least four weeks notice in writing unless there is a valid reason why such notice is not possible (s.207(1)).

Employment Insurance Maternity Benefits

To be entitled to maternity benefits, employees' regular earnings must have been decreased by more than 40% and employees must have 600 insured hours in the last 52 weeks or since the last claim (whichever is shorter). Maternity benefits run for 15 weeks of benefits (at 55% of the employee's average insurable earnings up to a maximum of \$413 per week) following a two-week waiting period and.

Maternity, parental, and sickness benefits can be received up to a combined maximum of 50 weeks, with the exception of a woman who received sickness benefits before or after her maternity benefits. In such circumstances a woman could, subject to certain conditions, receive up to a maximum of 65 weeks of combined sickness, maternity, and parental benefits.

When a pregnancy terminates during the first 19 weeks of pregnancy, it is considered to be an illness.

Parental Leave

This leave is designed both to accommodate the extra time demands on parents when a child is introduced into a household and to provide a means for caring for children when care demands are very high.

All employees who have completed six consecutive months of continuous employment with an employer are entitled to a leave of absence for up to 37 weeks to care for their new-born child or a child who is in the care of the employee for the purpose of adoption (s. 206.1(1)).¹²⁷ This leave of absence may only be taken during the 52 week period beginning when the employee's child is born or when the child comes into the actual care of the employee, as is the case in adoption (s.206.1(2)). Parental leave under s.206(1)(d) does not accrue after a miscarriage, abortion, or still birth since the employee must have actual care and custody of the newborn child.¹²⁸

or in the inability as described in the medical certificate, unless there is a valid reason why such notice cannot be given. Such notice must also be accompanied by a new medical certificate (s.205.2).

¹²⁷ An amendment relating to proposed changes to the parental leave provisions under s.23(1)(c) of the *Employment Insurance Act* has been proposed for s.206.1. If section 23(1)(c) is proclaimed into force, it will extend parental leave benefits to situations where a child meets requirements set out by Regulations and thus parental leave would not be limited to situations where a child is a biological or adopted child.

¹²⁸ 808-1- IPG-017/Operations Program Directives (OPDs)/Interpretation, Policies and Guidelines (IPGs), date: 1993/09/10.

An employee who intends on taking parental leave must provide her or his employer with written notice four weeks in advance of taking the leave, unless there is a valid reason that such notice cannot be given (s.207(1)). The written notice must inform the employer of the length of leave that the employee intends on taking (s.207(2)). The employee must also give his or her employer four weeks written notice of any change in the length of leave that she or he intends to take.

If both parents work for an employer falling under the jurisdiction of the Code, both employees may take parental leave. The aggregate amount of leave that may be taken by two employees for the same birth or adoption shall not exceed thirty-seven weeks (s.206.1(3)). This time can be taken simultaneously by two parents or one after the other. The aggregate amount of maternity and parental leave that may be taken by one or two employees in respect of the same birth shall not exceed 52 weeks (s.206.2).¹²⁹

Employment Insurance Parental Benefits

To be entitled to parental benefits, employees' regular earnings must have been decreased by more than 40% and employees must have 600 insured hours in the last 52 weeks or since the last claim (whichever is shorter). Parental benefits require one two-week waiting period and then 35 weeks of benefits (at 55% of the employee's average insurable earnings up to a maximum of \$413 per week). Parental benefits are paid to biological or adoptive parents. Parental benefits can be claimed by one parent or shared between the two parents but benefits will not be paid for a period exceeding a combined maximum of 35 weeks. If both parents share the parental benefits or take maternity and parental benefits, only one two-week waiting period applies. If a woman serves the two-week waiting period for her maternity benefits, she is not required to serve another two-week waiting period before collecting parental benefits.

An employee receiving parental benefits is entitled to earn up to 25% of her or his weekly benefits or \$50 a week (whichever is higher) to assist the employee in returning to work. With the exception of parental and compassionate care benefits, which are designed to allow employees to accommodate family and work obligations, each dollar earned reduces by an equivalent amount the benefits to which the employee is entitled.

Compassionate Care Leave

This leave is designed to allow employees to care for family members who are facing imminent death. For the purpose of entitlement to compassionate care leave, family members are defined as a spouse or common-law partner of the employee, a child of the employee or the employee's spouse or common-law partner, parent of the employee or the employee's spouse or common law partner, or any person persuaded in the *Employment Insurance Act*. In the case of the imminent death of a family member, all employees are entitled to a leave of absence from employment of up to eight weeks to provide care or support to the ailing family member. In order to be entitled to this leave, a qualified medical practitioner must issue a certificate stating that the family member has a serious medical condition with a significant risk of death

¹²⁹ For a detailed discussion of when natural and adoptive parents can begin parental leave see 808-IPG-014/Operations Program Directives (OPDs)/Interpretation, Policies and Guidelines (IPGs), date: 20/11/02.

within 26 weeks from the date the certificate is issued.¹³⁰ If the leave is commenced before the certificate is issued, there must be a significant risk of death within 26 weeks from the day the leave began (s.206.3(2)). The leave of absence is deemed to commence the first day of the week in which the certificate was issued or, if the leave was commenced before the certificate was issued, the first day of the week in which the leave was commenced.¹³¹ The leave ends on the last day of the week in which the family member dies or at the expiration of 26 weeks as outlined in the medical certificate (s.206.3(3)).

If the employee's family member is still gravely ill at the end of the 26 weeks, the employee is entitled to an additional further period of up to 8 weeks of compassionate care leave. This situation would require a qualified medical practitioner to issue a second medical certificate stating the family member has a serious medical condition with a significant risk of death within the next 26 weeks (Pamphlet 5A).

If a period shorter than 26 weeks is prescribed by regulations, then the certificate provided by a qualified medical practitioner must state that the family member has a serious medical condition with a significant risk of death within that shorter timeframe. The leave is then deemed to end either when the family member dies or at the expiration of the time period indicated in the medical certificate (s.206.3(4)). When a shorter period is prescribed and it expires, no further compassionate care leave may be taken until the minimum number of weeks approved has elapsed (s.206.3(5) and s.12(4.3) of the Employment Insurance Act).

The minimum period of leave is one week (s.206.3(6)). If two or more employees take a leave to care for and support the same family member, the total aggregate amount of leave cannot exceed eight weeks (s.206.3(7)). While the employer must provide job security, the employer is not required to continue wage payments while the employee is on leave. Employees are entitled to take compassionate care leave in several periods of at least one week each.

If an employee is asked in writing by his/her employer to present a copy of the medical certificate within 15 days after the leave ends, the employee must honour this request (s.206.3(8)).

The provisions relating to continuity of service, entitlement to benefits, and the right to return to work for employees on compassionate care leave are exactly the same as they are for employees on maternity and parental leave (s.209. 2).

Employment Insurance Compassionate Care Benefits

To be entitled to compassionate care benefits employees' regular earnings must have been decreased by more than 40% and employees must have 600 insured hours in the last 52 weeks or since the last claim (whichever is shorter). Compassionate care benefits require one two-week waiting period and then last for 6 weeks (at 55% of the employee's average insurable

¹³⁰ The employer must preserve the confidentiality of any certificate from a qualified medical practitioner provided to the employer concerning an employee (Canada Labour Standards Regulations, C.R.C., c. 986, s.24(5)).

¹³¹ "Week" means the period between midnight on Saturday and midnight on the immediately following Saturday (s. 206.3(1)).

earnings up to a maximum of \$413 per week). Compassionate care benefits up to a combined maximum of six weeks can be shared between family members, but only one two-week waiting period applies when the benefits are shared between family members.

An employee receiving compassionate care benefits is entitled to earn up to 25% of her/his weekly benefits or \$50 a week (whichever is higher) to assist the employee in returning to work.

An employee may receive up to 71 weeks of combined compassionate care, maternity, parental, and sickness benefits subject to certain conditions.

Sick Leave – Division XIII

This leave is designed to provide employees with employment security during periods of temporary illness. Employees on sick leave may be entitled to sick benefits under the Employment Insurance Act.

An employer is not permitted to dismiss, suspend, lay off, demote, or discipline an employee because of absence due to illness or injury if the employee has completed three consecutive months of continuous employment with the employer prior to the absence, the absence is 12 weeks or less, and if, within 15 days after returning to work, the employee is able to provide the employer with a certificate from a qualified medical practitioner stating that s/he was incapable of work due to illness or injury (s.239(1)). If upon returning to work after a sick leave the employee is unable to perform the work s/he did prior to his/her absence, the employer may assign the employee to a different position with different terms and conditions of employment (s.239(1.1)). In the federal jurisdiction, the entitlement for sickness leave is defined in terms of each occurrence of an illness or injury, not in terms of a calendar year or a specific period of fifty-two weeks.

The provisions relating to continuity of service, entitlement to benefits, and the right to return to work for employees on sick leave are exactly the same as they are for employees on maternity, parental, and compassionate care leave (s.209. 2).

Under s.239(4), the Governor in Council may make regulations defining the absences from employment that are deemed not to have interrupted continuity of employment.

When a federal work, undertaking, business or a part of one of those is sold, leased, merged or otherwise transferred from one employer to another employer, notwithstanding the transfer, the employment of the employee is to be deemed continuous with one employer (s.239(5)).

Employment Insurance Sickness Benefits

An employee's income must have decreased by at least 40% and an employee must have accumulated at least 600 hours of insurable employment to qualify for 15 weeks of sickness

benefits (55% of the employee's average insurable earning up to a maximum of \$413 per week) subject to the usual two-week waiting period.

Work-related Illness and Injury - Division XIII.1

No employer is able to dismiss, suspend, lay off, demote, or discipline an employee because of an absence from work due to a work-related illness or injury (s.239.1(1)).

Every employer must subscribe to a plan that provides wage replacement to employees who are absent from work due to work-related illness or injury; these wages must be paid at an equivalent rate to that provided under the applicable workers' compensation legislation in the employee's province of permanent residence (s.239.1(2)).

Where reasonably practicable, an employee will be returned to work after the employee's absence (s. 239.1(3)). However, if the employee is unable to perform the work s/he carried out prior to the leave, then the employer may assign him/her to a different position with different terms and conditions of employment (s.239.1(4)).

The Canada Labour Standards Regulations, C.R.C., c. 986, s.34 describe the employer's obligation to accept the employee back to work after an absence due to work-related illness or injury. The employer is obligated to return an employee to work the day the employee is deemed fit to return to work, without qualifications, by a medical practitioner in a medical certificate, and that obligation runs for 18 months after the date the employee was deemed fit. If the employer is unable to return the employee to work within 21 days after receipt of the medical certificate, the employer must notify the employee in writing within those 21 days of whether or not the employee's return to work is reasonably practicable. If it is not deemed reasonably practicable, then the employer must also give the employee reasons for this decision. Furthermore, if the employee is subject to a collective agreement, the trade union representing the employee must receive a copy of the notification.

If the employee returns to work and within 9 months of his or her return the employer lays her or him off, terminates her or his employment, or discontinues one of the employee's functions, the employer is responsible for demonstrating to an inspector¹³² that the change in the employee's job status is unrelated to the employee's work-related illness or injury leave (Canada Labour Standards Regulations, C.R.C., c. 986, s. 34).

The pension, seniority, and health and disability benefits of an employee who is absent due to a work-related illness or injury continue to accumulate during the period of the absence (s.239.1(5)). Where an employee is required to make contributions to any of the above-mentioned benefits, the employee is responsible for paying those contributions for the period of the leave within a reasonable time. The only exception to this provision is if the employee

¹³² "Inspector" for the purposes of Part III of the Code, it is defined as any person designated as an inspector under s. 249; s. 249(1) indicates that the Minister of Labour may designate any person as an inspector.

notifies the employer before taking the leave, or within a reasonable time after taking the leave, of his/her intention to discontinue contributions during that period (s.239.1(6)).

If the employer also pays contributions towards one of the above-mentioned benefits, then the organization must continue to pay during the employee's leave of absence in at least the same proportion as would be paid if the employee was present at work, unless the employee doesn't pay her or his contribution (s.239.1(7)).

If the employee or the employer fail to pay these contributions, the benefits will not accumulate during the leave of absence. But, when the employee returns to work, her or his employment shall be deemed continuous with employment before the employee's absence (s.239.1(8)).

For the purposes of calculating benefits other than pension, seniority, and health and disability benefits, the return of an employee who was absent from work due to a work-related illness or injury is to be deemed continuous with employment before the employee's absence (s.239.1(9)).

Subsection 239.1(10) empowers the Governor in Council to make regulations relating to work-related illness and injury.¹³³

When a federal work, undertaking, business or a part of one of those is sold, leased, merged or otherwise transferred from one employer to another employer, notwithstanding the transfer, the employment of the employee is to be deemed to be continuous with one employer (s.239.1(11)).

Bereavement Leave – Division VIII

Every employee is entitled to a bereavement leave during the three days directly following the death of a member of the immediate family (s.210(1)).¹³⁴ Bereavement leave covers only scheduled working days. For example, if the employee does not normally work on Saturday and Sunday and the death occurs on a Friday, the employee is only entitled to a leave on the Monday. However, if the death occurs on a Monday, the employee is entitled to a leave for

¹³³ The Governor in Council may make regulations determining the duration of the employer's obligation to return an employee to work; providing terms applicable to the employer in the event of a termination, layoff or discontinuance of a function in an industrial establishment; and providing any other terms and conditions with regards to the return to work provisions.

¹³⁴ Immediate family is defined as the employee's: spouse or common-law partner, father and mother and spouse or common law partner of the father or mother, children and the children of a spouse or common-law partner, grandchildren, brothers and sisters, grandfather and grandmother, father and mother of the spouse or common-law partner or the common-law partner of the father or mother, and any relative who resides permanently with the employee or with whom the employee permanently resides. Common-law partner is defined as a person who has been cohabiting with an individual in a conjugal relationship for at least one year or who has been cohabiting with the individual for at least one year immediately before the individual's death (Canada Labour Standards Regulations, C.R.C., c. 986, s. 33).

Tuesday, Wednesday, and Thursday. If a death occurs during an employee's vacation, bereavement leave does not apply.

Employees who have completed three consecutive months of continuous employment are entitled to their regular rate of wages¹³⁵ for their normal hours of work (s.210(1)(2)). Employees who have not completed three consecutive months of continuous employment are entitled to the leave, but not to wages. The Canada Labour Standards Regulations (C.R.C., c. 986, s.17) set out the method of calculating pay for employees who are paid at a daily or hourly rate and whose hours of work differ day to day or who are paid on a basis other than time. These employees are to be paid the average of their daily earnings exclusive of overtime for the 20 days the employee worked immediately preceding the first day of bereavement leave. If, however, a collective agreement is in force and it sets out another method for this calculation, its provisions will be followed.

The bereavement provisions of the Code do not apply to employers and employees who are parties to a collective agreement if the agreement provides rights and benefits that are at least as favourable as those in the Code and contains provisions for settlement of disputes by a third party (s.168(1.1)).

Section 210(3) empowers the Governor in Council to make regulations relating to bereavement leave.¹³⁶

Other Applicable Provisions from the Canada Labour Standards Regulations

An employer cannot permit an employee under the age of 17 years of age to work between 11 p.m. on one day and 6 a.m. on the following day (Canada Labour Standards Regulations, C.R.C., c. 986, s.10(2)).

If an employer calls an employee into work, and the employee reports for work, the employee is entitled to be paid for at least three hours of work at his/her regular rate of wages. This applies regardless of whether or not the employee is called on to perform any actual work after his/her arrival (Canada Labour Standards Regulations, C.R.C., c. 986, s.11.1).

The Canada Labour Standards Regulations, C.R.C., c. 986, s.19 discusses provisions that apply to multi-employer employment relating to longshoring employment.¹³⁷ There are provisions pertaining to the determination of holiday pay and continuous employment

¹³⁵ Wages include every form of remuneration for work performed, but do not include tips and other gratuities (s.166).

¹³⁶ The Governor in Council may make regulations defining immediate family, regular rate of wages, and normal hours of work. S/he can also define the absences from employment that are not to be deemed to have interrupted the continuity of employment (s.210(3)).

¹³⁷ "Multi-employer employment" means longshoring employment in any port in Canada where by custom the employee engaged in such employment would in the usual course of a working month be ordinarily employed by more than one employer. "Longshoring employment" means employment in the loading or unloading of ship's cargo and in operations related to the loading or unloading of ship's cargo.

Appendix II

Canadian Legislation and Government Departments

Alberta:

Employment Standards Code, R.S.A. 2000, c. E-9

Alberta Human Resources and Employment: <http://www3.gov.ab.ca/hre/index.asp>

Workplace Health and Safety and Employment Standards Unit:
<http://www3.gov.ab.ca/hre/employmentstandards/index.asp>

British Columbia:

British Columbia Employment Standards Act, R.S.B.C. 1996, c.113

Employment Standards Regulation, B.C. Reg. 396/95

British Columbia Ministry of Labour and Citizens' Services:
http://www.gov.bc.ca/bvprd/bc/channel.do?action=ministry&channelID=-8392&navId=NAV_ID_province

Employment Standards Branch: <http://www.labour.gov.bc.ca/esb/>

Manitoba:

Employment Standards Code, C.C.S.M. c. E110

Manitoba Department of Labour and Immigration: <http://www.gov.mb.ca/labour/>

Employment Standards Branch: <http://www.gov.mb.ca/labour/standards/index.html>

New Brunswick:

Employment Standards Act, S.N.B. 1982, c. E-7.2

Department of Training and Employment Development:
<http://www.gnb.ca/0105/index-e.asp>

Employment Standards Branch: <http://www.gnb.ca/0308/0001e.htm>

Newfoundland and Labrador:

Labour Standards Act, R.S.N.L. 1990, c.L-2

Newfoundland Labour Relations Agency: <http://www.hrle.gov.nl.ca/lra/>

Labour Standards Division: <http://www.hrle.gov.nl.ca/lra/labourstandards/default.htm>

Northwest Territories:

Labour Standards Act, R.S.N.W.T. 1988, c. L-1

Northwest Territories Department of Education, Culture and Employment:

<http://www.ece.gov.nt.ca/>

Labour Services: <http://www.ece.gov.nt.ca/Divisions/Labour/index.htm>

Nova Scotia

Labour Standards Code, R.S.N.S. 1989, c. 246

Department of Environment and Labour: <http://www.gov.ns.ca/enla/>

Labour Standards Division: <http://www.gov.ns.ca/enla/labourstandards/>

Nunavut:

Labour Standards Act (Nunavut), R.S.N.W.T. 1988, c.L-1, as enacted for Nunavut, pursuant to the Nunavut Act, S.C. 1993, c.28.

Nunavut Department of Justice:

<http://www.gov.nu.ca/Nunavut/English/departments/JUS/index.shtml>

Labour Standards Administration & Labour Standards Board (no website)

Ontario:

Employment Standards Act, 2000, S.O. 2000, c. 41

Exemptions, Special Rules and Establishment of Minimum Wage, O. Reg. 285/01

Terms and Conditions of Employment in Defined Industries, O. Reg. 291/01

Terms and Conditions of Employment in Defined Industries – Live Performances, Trade Shows and Conventions, O. Reg. 160/05

Terms and Conditions of Employment in Defined Industries – Production of Recorded Visual or Audio-visual Entertainment, O. Reg. 161/05

Terms and Conditions of Employment in Defined Industries – Public Transit, O. Reg. 390/05

Ontario Ministry of Labour: <http://www.labour.gov.on.ca/english/index.html>

Employment Standards Branch: <http://www.labour.gov.on.ca/english/es/>

Prince Edward Island:

Employment Standards Act, R.S.P.E.I. 1988, c. E-6.2

Prince Edward Island Department of Community and Cultural Affairs:
<http://www.gov.pe.ca/commcul/index.php3>

Labour and Industrial Relations Division: <http://www.gov.pe.ca/commcul/lair-info/index.php3>

Quebec:

Labour standards, An Act Respecting, R.S.Q. c. N-1.1

Labour standards, Regulation respecting, R.Q. c. N-1.1, r.3

Order respecting the retail food trade, R.Q. c. N-1.1, r.1

Institutions subject to section 90 of the Act respecting labour standards, Regulation excluding the, R.Q. c. N-1.1, r.2

Minimum labour standards in certain sectors of the clothing industry, Regulation respecting, R.Q. c. N-1.1, r.1.1

Commission des normes du travail: <http://www.cnt.gouv.qc.ca/en/index.asp>

Saskatchewan:

Labour Standards Act, R.S.S. 1978, c. L-1

Saskatchewan Department of Labour: <http://www.labour.gov.sk.ca/INDEX.HTM>

Labour Standards Division: <http://www.labour.gov.sk.ca/standards/>

Yukon:

Employment Standards Act, R.S.Y. 2002, c. 72

Yukon Department of Community Services: <http://www.community.gov.yk.ca/>

Labour Services: <http://www.community.gov.yk.ca/labour/index.html>

Appendix III

Working Time Regime:

Components of the Legislation

Hours of Work

- coverage
- exemptions
- standard hours
- maximum daily and weekly hours
- daily and weekly rest periods
- variations (1) method: individual; workforce; collective agreement; government
(2) substantive basis for granting
- regulation of schedules (split shifts)
- modified work week
- emergencies
- industry-specific provisions
- daily breaks
- definition of work or working
- definition of work week

Overtime

- exemptions
- threshold
- compensation
- time off in lieu (amount, scheduling)
- right to refuse
- averaging (method: individual, collective agreements, workforce, government)
- industry specific provisions
- definition of work or working
- definition of work week

Vacation leave

- entitlement (continuous service)
- length
- timing – who controls
- how taken (week long periods, daily)
- pay
- can vacation time off be waived

General Holidays

- exemptions
- number
- requirements – service requirements
- requirement to work on general holiday
- substitution (how determined, timing)

- treatment of continuous operations
- payment for work
- definition of work or working

Leaves

- types – sickness, maternity, parental, adoption, bereavement, compassionate
- who is entitled – definitions
 - qualifications (service requirements)
 - requirements (notice to employer, medical certificate)
- timing and variations
- stacking leaves
- exemptions
- protections while on leave – continuity, benefits, seniority
- right to return to job

Asocial work

- right to refuse Sunday work
- night work
- exemptions
- requirements

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