The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

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Ontario:
A Mirror for the Future of Hours Law in the United States?

This bill is so damaging and your arguments are so stupid that it boggles the mind that you've been given the power to make this the law without anybody having a say. Who in their right mind is going to say to their boss, "Yes, over the next four weeks I want to work a little bit of overtime, but let's make sure we use that new law that guarantees I don't get paid overtime rates for it. What do you say we do that?"¹

I am surprised at the number of people who take for granted that they have a job. I am saying this in regards to...Toyota employees upset about having to work mandatory overtime.

Do these people not understand that if you don't get the product out when it is needed by consumers, that they will look elsewhere? ...

When these people have no job, maybe they will think that the overtime wasn't such a big deal after all....

It could be worse; they could be working in some other country for next to nothing, working seven days at [sic] week for 12 or 14 hours.²

A sense of the kind of working-hours regime that employers in the United States have had in mind in urging Congress to amend the FLSA to raise the premium-overtime threshold from 40 hours per week to 80 hours every two weeks or 160 hours every four weeks³ may be gleaned from the amendments to the Employment Standards Act (ESA) that the ruling Progressive-Conservatives pushed through Ontario's legislature in 2000. It is suggestive of the role that the United States has come to play as the tempting bottom of advanced capitalist labor stan-


³See above ch. 1 and below ch. 18.
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dards that Ontario employers have “indicated that they could lose business to the United States...if they were hampered with more restrictions on their use of overtime.” They also used the threat of U.S. competition as grounds for requesting special permits for additional overtime hours to meet increased demand—that is, until the amended statute did away with the need to obtain government permission to work overtime altogether.

Ironically, the Tories were purportedly inspired to bestow on employers the privilege of overtime-averaging over several weeks—which would enhance firms’ flexibility and lower their wage costs, while reducing workers’ freedom and lowering their incomes—by congressional Republicans’ failed efforts in the United States. However, the root notion of enhancing employers’ flexibility in utilizing their human and capital resources by modifying protective hours legislation was in no way devised by the Republican Party or U.S. firms, and, as already discussed, in fact animated reform discussions in the European Union beginning in the late 1970s. Indeed, legislators and administrators in Ontario themselves had been acutely aware of the need to propitiate employers by offering them exemptions from the first general maximum hours law enacted in 1944, just as their counterparts in Pennsylvania had been in 1937.

The recent course of overtime and maximum hours regulation in Ontario is especially interesting because it is the sole Canadian jurisdiction to combine a maximum hours provision with a right to refuse to perform overtime work. As a result, it sheds important light on the difficulties inherent in crafting and administering maximum hours regulation that confers real protection on workers without antagonizing employers sufficiently to provoke them into exercising their power to neutralize the law. By the same token, the fact that a significantly higher proportion of Ontario’s workers are covered by collective bargaining agreements, a much larger proportion of which afford workers some rights to re-

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6 See above ch. 16.

7 See above ch. 7.


9 Although Ontario recorded the second lowest rate (27.9 percent) of employees covered by collective bargaining agreements of all Canadian provinces in 2001, the rate nevertheless exceeded that of the state (New York) with the highest rate of employees represented by unions (27.7 percent) in 2001 in the United States, where the aggregate national rate was only 14.8 percent compared to 32.2 percent for Canada as a whole. Sta-
fuse to work overtime than in the United States, means that a weakening of the U.S. hours law might well produce more detrimental consequences for U.S. workers who are protected only by the financial disincentive that FLSA’s overtime provision exerts on employers. Finally, because Ontario accounts for about 40 percent of all employees in Canada, a country in which labor law is highly decentralized and national labor law plays a minor role, Ontario’s labor law transcends the provincial.

II

Employers in Ontario in search of greater “flexibility” at the end of the twentieth century faced greater statutory obstacles than their U.S. counterparts because, since World War II, the province had had on the books a law resembling a maximum-hours regime. Enacted under a newly elected minority Conservative government (facing the social-democratic Co-operative Commonwealth Federation as the official opposition party) in 1944—until then the Factories Act of

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10 In 1984, 49.6 percent of collective bargaining agreements in Ontario contained some provision authorizing workers to refuse to work overtime; more than half the workforce was covered by union agreements. Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime, tab. 9.1 at 73, 142. In the late 1990s in Canada as a whole, only 8.4 percent of workers covered by major collective bargaining agreements had an unconditional right to refuse overtime, while 23.6 percent had a conditional right, triggered, for example, by having worked a certain amount of overtime. Canadian Labour Congress, “Creating More and Better Jobs Through Reduction and Redistribution of Working Time” (1998), on http://www.clc-ctc.ca/policy/jobs/create/ html. For the U.S. data, see above ch. 2.

11 In the first half of 2001, Ontario accounted for 5,036,000 of Canada’s 12,628,000 employees. Statistics Canada, Perspectives on Labour and Income: The Online Edition: Fact-Sheet on Unionization, tab. 1 at 4.


1884 had made it unlawful to employ children or women more than 10 hours a day or 60 hours a week—\textsuperscript{14} the Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings also applied to men, encompassed, in addition to industry, "all work in or about any business, trade, or occupation,"\textsuperscript{15} and provided that "the working hours of an employee in any industrial undertaking shall not exceed eight in the day and forty-eight in the week."\textsuperscript{16} Since more than one-half of covered workers were working longer weekly hours at the time, the law "required a substantial reduction" in working hours and "a significant adjustment of practices in industry."\textsuperscript{17}

Although the statute clearly sought to achieve more than one objective, John Kinley, one of the principal researchers for the Ontario Task Force on Hours of Work and Overtime, was surely not wrong to characterize its maximum-hours component "as an instrument of employment policy" to deal with the consequences of a fall in demand after the war.\textsuperscript{18} Such regulation of working hours as a means of redistributing and increasing employment had been considered by the government of Ontario as early as 1935, after related federal legislation had been invalidated, but it never went beyond the stage of draft legislation.\textsuperscript{19} In 1925 the Supreme Court of Canada had held that any obligations that Canada had assumed by virtue of having ratified conventions adopted by the International Labour Organization of the League of Nations in 1919 dealing, inter alia, with hours of labor, were properly discharged by bringing the convention before the Lieutenant-Governor of each province for legislative action (except for matters concerning employees of the Dominion).\textsuperscript{20} Nevertheless, during the Great Depression, in a burst of "Tory radicalism,"\textsuperscript{21} the Conservative Prime Minister Robert Bennett, a former corporation lawyer, after five years in office, in 1935 pushed through a New Deal-like program (which, however, did not even formally seek to promote unionization), including a maximum-hours law and other labor laws

\begin{itemize}
\item[]\textsuperscript{14} An Act for the Protection of Persons Employed in Factories, § 6(3), Ontario Stat. 1884, ch. 39, at 146, 149.
\item[]\textsuperscript{15} Ontario Regulation 8/44, § 1(a), in Ontario Gazette 77:736 (1944).
\item[]\textsuperscript{17} John Kinley, \textit{Evolution of Legislated Standards on Hours of Work in Ontario (A Report Prepared for the Ontario Task Force on Hours of Work and Overtime)} 10 (Sept. 1987).
\item[]\textsuperscript{18} Kinley, \textit{Evolution of Legislated Standards on Hours of Work on Overtime} at 12.
\item[]\textsuperscript{19} Kinley, \textit{Evolution of Legislated Standards on Hours of Work and Overtime} at 12.
\item[]\textsuperscript{20} In re Legislative Jurisdiction over Hours of Labor, [1925] Canadian Supreme Court Reports 505.
\item[]\textsuperscript{21} J. Bartlett Brebner, \textit{Canada: A Modern History} 460-61 (1960).
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of national scope, in order to deal with the "'crash and thunder of toppling capitalism.'"22 The hours law created a maximum eight-hour day and 48-hour week subject to a series of expansive exceptions, including hours-averaging.23 Although Bennett had aimed at a reform to bring about "the end of laissez faire,"24 it was the Tory government that the electorate brought about the end of a few months later; the Liberals, who gained a lopsided parliamentary majority, referred the case to the Privy Council, which held the labor laws beyond the Parliament's constitutional powers.25

At the outset of the legislative debate on the 1944 bill, Charles Daley, the provincial Labour Minister, declared: "I think the purpose behind this bill is quite obvious. As regards hours of work, I think, when possible,—possibly not altogether during the war period—in these days of high speed activity in industry, eight hours a day is plenty for anybody to work." Indeed, Daley was "not prepared to disagree" with other legislators who thought a 48-hour week "too long" and 40 hours "plenty" and even mentioned the possibility of a 30-hour week.26 Fatigue and leisure, however, were not the only purposes the government had in mind in shortening the workday. Daley was also "thinking of the possibility at the termination of the war, that, no matter how optimistic we are, there is no doubt bound to be a surplus of labour over jobs for certain periods and I think it would be well to establish a forty-eight hour week. It certainly would not inter-

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26 Ontario Legislative Assembly, Hansard: Official Report of Debates 3:2269-70 (21st Legislature, 1st Sess. 1944). Doggedly and generously, Ted Tjaden, the coordinator for information services at the Bora Laskin Law Library of the University of Toronto, located, copied, and made available the relevant pages from a rare copy at the Ontario Legislative Library of the Hansard transcript of debates, which, fortunately, "officially began in Ontario in 1944. These first Hansard reports covered the first session of the 21st parliament and were prepared by shorthand writers and typewritten. Onion-skin carbon copies were made for distribution only to the Premier, each cabinet minister and for the party leaders. Previous to these official reports of debates there were some legislature records and parliamentary events reported through the newspapers. After complaints about the inadequacy of onion-skin copies, Hansard started distributing the records in copied form during 1945 and 1946." http://www.ontla.on.ca/hansard/about_hansard/index.htm.
fere with any hours of labour that are below that." 27 Leslie Frost, the provincial Treasurer added that the intention underlying the bill was "that when the war is over we will spread the labour that there is as far as it will go [in] what I believe anybody will consider a reasonable way..."28

When the leader of the opposition, Edward Jolliffe, pointed out that the bill failed to protect workers whose weekly hours would be reduced because they exceeded 48 from a parallel reduction in weekly wages,29 Attorney General Leslie Blackwell admitted the possibility of such "disadvantageous results on the question of wages," but tried to make a virtue of the "necessity of extreme flexibility" embedded in the bill by voicing the government’s intent that "re-adjustment takes place...in the usual way by collective bargaining."30 Thus instead of incorporating a proposed clause that would have prohibited employers (for example, in the long-hour, low-wage textile industry) from reducing workers’ wages,31 the government chose to permit collective bargaining and the private labor market to work out the accommodation of the new maximum hours by promoting a maximum of regulatory elasticity for firms. Indeed, as Kinley noted, "the government’s reliance on flexibility in application of the hours standard became such a refrain in the debates that it prompted both the Opposition and the responsible Minister to express concern that employers might attempt to...circumvent...the intent of the legislation." To the extent that "overzealous application" of the ceiling interfered with the statutory re-employment objectives, "sensitive administration" became the order of the day.32

Although the 1944 legislation was "motivated by a desire to share the work among the returning troops" demobilized after World War II, postwar "prosperity...led to a reduction in the need for worksharing...so that the rationale for the legislation tended to focus on the safety net for the unprotected" with "little individual or collective bargaining power."33 By the 1970s, the statute bestowed on
employers a total of five different means of avoiding the rigors of a maximum hours regime: workdays in excess of eight hours, 100-hour annual permits; special permits, industry permits, and hours averaging.

From the outset, the 1944 hours statute had provided for three kinds of exceptions to its ceilings. First, where the Industry and Labour Board was of the opinion that it was “not feasible to apply” the statutory hours limit, the Board was empowered to “authorize such daily and weekly limit of working hours in the industrial undertaking...or by any class or group of employees, as may be agreed upon in writing between organizations of...the employees and employers affected.”34 Second, exceptions were permitted for specified emergencies: “The limit of hours of work...may be exceeded in case of accident, or in case of work urgently required to be done to machinery or plant, or in case of force majeure, but only so far as may be necessary to avoid serious interference with the ordinary working of the undertaking.”35 Finally, the Board was also authorized to make regulations “prescribing industrial undertakings and branches thereof in which” the eight-hour day and 48-hour week “may be exceeded either by specified times or under specified conditions or generally, prescribing, in each case, the maximum of such excess....”36

The regulations issued in 1944 dealt with the various patterns of overtime. The first two applied to longer days. First, initiating what would become a venerable regulatory tradition that downplayed the importance of strictly enforcing the eight-hour day,37 one provision permitted employers that “by custom or practice” had established workweeks of no more than 48 hours but with workdays of more than eight hours to continue those daily hours until the Board ordered otherwise.38 Second, firms that reduced the number of hours in the workweek to comply with the law but wanted to establish a week of fewer than six days were permitted to

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34 An Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings, §4 at 108.
35 An Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings, § 6 at 108. These emergency provisions have “not proved to be contentious and there are no significant decisions” interpreting them. R. Parry, Employment Standards Handbook 5-5 (1986).
36 An Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings, § 10(b) at 110.
38 Ontario Regulation 8/44, § 2(1).
adopt workdays in excess of eight hours with the Board’s approval.\textsuperscript{39} The third exception, headed “special circumstances,” in language that years later would be incorporated into the successor statute, permitted overtime work in excess of the daily or weekly maximums “where the Board was satisfied that the nature of the work or the perishable nature of the raw material being processed requires such extended...hours.”\textsuperscript{40} The fourth exception—and the only one labelled “overtime” proper—permitted an employer, with the Board’s prior written consent, to “adopt one or more overtime work periods” up to an annual limit of 120 hours (which was computed in such a manner that the overtime hours performed by one worker reduced the number of overtime hours that an employer was permitted to adopt).\textsuperscript{41}

Of greatest interest in this context, the regulations provided—apparently with respect only to this annually limited overtime—that: “The granting by the Board of a permit to an employer to work overtime shall not preclude an employee from refusing to work overtime.”\textsuperscript{42} Finally, with regard to the statutorily permissible emergency overtime, the regulations required employers to report such work to the Board “forthwith...stating the reason therefor,”\textsuperscript{43} and excluded such overtime from the 120-hour annual limit.\textsuperscript{44}

The most significant means of creating flexibility for employers was the elaborate permit system, which initially granted employers, “automatically...upon request,”\textsuperscript{45} without an accompanying explanation as to why the excess working time was needed, 120 annual hours of overtime per worker; this permit remained valid until and unless the administrator revoked it. The overtime—which was now called “excess working hours”—ceiling was lowered to 100 hours, effective 1946, and liberally reconfigured so that employers were privileged to extract this number of hours from “each employee,” with the Board’s approval.\textsuperscript{46} The Labour Ministry regarded this “buffer arrangement” as a vital part of flexible maximum hours regulation because “a fixed standard...without a zone of tolerance would simply lead to extensive noncompliance....”\textsuperscript{47} The new regulations issued in 1945 established the system for the rest of the century in a number of other respects as

\textsuperscript{39} Ontario Regulation 8/44, § 2(2).
\textsuperscript{40} Ontario Regulation 8/44, § 3.
\textsuperscript{41} Ontario Regulation 8/44, § 4(1)-(2).
\textsuperscript{42} Ontario Regulation 8/44, § 4(3).
\textsuperscript{43} Ontario Regulation 8/44, § 5(1).
\textsuperscript{44} Ontario Regulation 8/44, § 5(2).
\textsuperscript{46} Ontario Regulation 92/45, § 5(1)(b), in Ontario Gazette 78:2037, 2038 (1945).
\textsuperscript{47} Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 20.
well. They introduced the exclusion from hours regulation of numerous professions such as doctors, lawyers, nurses, architects, accountants, and engineers, in addition to workers employed in farming, commercial fishing, steamship and railway operations, fire departments, funeral directing, and embalming, and as stevedores and domestic employees. The Industry and Labour Board also bifurcated the excess working hours system by creating a separate classification of workers encompassing stationary engineers, watchmen, firemen, shippers, "and other persons engaged in non-productive work," whom employers were permitted, with the Board's approval, to employ up to 12 additional hours every week above and beyond the ceiling of 48.

III

Later, the Ontario government expanded the scope of permissible overtime by issuing permits to whole industries to exceed the statutory limits and special permits (authorizing up to 100 additional hours but also even more hours if the first set was insufficient) when "the nature of the work" or perishable nature of raw materials being processed required excess hours. Two of the factors that the Employment Practices Branch (EPB) later took into consideration in determining whether the work required special excess hours were whether denial of a permit would just cause the employer to contract out the work or "go south of the border" instead of generating new employment. Although "[t]he strongest ground for securing this 'Special Permit' is a well-documented labour shortage," in the course of the postwar period, other factors such as unforeseen levels of demand for a firm's product became recognized reasons for granting the permit. Most commonly firms adduced high product demand and lack of capacity to expand their workforce as reasons for needing overtime. "However,

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48 Ontario Regulation 92/45, § 2.

49 Ontario Regulation 92/45, § 5(1)(a). Later the Board also set the maximum number of hours permitted to elapse between the beginning and the end of the daily work period in restaurants at 12. Regulations 144, § 7(1), in Consolidated Regulations of Ontario, 1950, 1:687, 688.


52 Kinley, Evolution of Legislated Standards on Hours of Work and Overtime at 27.

53 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 23.
the clinching argument for a permit is that ‘if we don’t get it we will move
the...jobs...out of the country to maintain our competitive position.’” Conse-
sequently, in this context the Labour Ministry’s decision concerning whether to
withhold or issue a permit tended to focus on the maximum hours provision’s
goal of creating jobs.54

The transition from an hours of work (and paid vacation) law to a more
comprehensive employment standards code was marked by the addition in 1964
of a mandatory 30-minute eating period so that no worker would work more than
five consecutive hours without a break.55 Then in 1968, in lieu of implementing
long-standing suggestions for the 40-hour week,56 the new Employment Stan-
dards Act (ESA) for the first time supplemented the regulatory system with a
time-and-a-half overtime penalty for weekly hours beyond 48 (reduced to 44 in
1973, where it remains)57 and on public holidays.58 Unlike the U.S. Congress
when it enacted the FLSA,59 the Ontario legislature prohibited employers from
reducing a worker’s regular rate in complying with the new overtime provision.60
But the new statute also further enhanced employers’ flexibility by entitling
firms, with the approval of the Director of Employment Standards, to extend
the workday beyond eight (limited in 1974 to 12) hours, provided that the weekly
total of 48 was not exceeded.61

Even more flexibility for employers was facilitated by a 1968 regulation
authorizing hours-averaging designed “to coincide with the introduction of the

54Kinley, *Current Administration of Legislated Standards on Hours of Work and
Overtime* at 23, 25.

55An Act to Amend the Hours of Work and Vacations with Pay Act, 1964, § 2, On-

56Kinley, *Evolution of Legislated Standards on Hours of Work and Overtime* at 11.

172, at 1409, 1409; An Act to Revise the Law Relating to Employment Standards, § 22.
(1), Ontario Stat. 2000, ch. 41, at 799, 819. There was discussion during the debates on
the original law in 1944 of providing for overtime wages in the regulations, but no such
provision was ever promulgated. Ontario Legislative Assembly, *Hansard: Official Report


59See above ch. 9.

ch. E.14).

overtime pay standard.\textsuperscript{62} This regulation, which prefigured both the Republicans’
hours-averaging proposals in the United States and the mechanism actually en­
acted in Ontario in 2000, excluded any employee from the applicability of the
premium overtime requirement “who, under any agreement or arrangement with
his employer that is approved by the Director, has his hours of work averaged
over an extended period for the purpose of determining his overtime hours of
work and is paid an amount of not less than one and one-half times his regular
rate for each overtime hour worked in excess of forty-eight as determined on that
basis.”\textsuperscript{63}

After the overtime-premium threshold was lowered to 44 hours, the ESA was
amended to authorize promulgation of a regulation “providing for and requiring
the approval of the Director of any agreement or arrangement between an em­
ployer and an employee or his agent providing for the averaging of daily hours
of work for a work week or daily or weekly hours of work over a longer period
of time than a work week.”\textsuperscript{64} The regulation issued in 1975 differed from the
earlier one in providing: “Where, under an agreement or arrangement between an
employee and an employer approved by the Director, a period of two or more
work weeks is the period in which the hours of work of an employee may be
averaged for the purpose of determining the hours of work in each work week in
the period,” the eight-hour day and 48-hour week maximums did not apply.\textsuperscript{65} In
addition, the time-and-a-half overtime premium for weekly hours worked in
excess of 44 did not apply to a workweek in which the averaged hours did not ex­
ceed 44.\textsuperscript{66}

By the mid-1980s, the Ministry was granting about 200 such averaging ar­
rangements annually, largely in hospitals, hotels, service stations, and other
places of employment in which “work stations have to be covered for periods that
are not compatible with” the eight-hour day or 48-hour week. As a precondition,
the Labour Ministry required employers to furnish evidence of employee ap­

\textsuperscript{62}Ministry of Labour, Employment Standards Branch, \textit{Employment Standards Act of
Ontario: Policy and Interpretation Manual} § 10.1.1 at 10-1.

\textsuperscript{63}Reg. 244, § 2(2), in Revised Regulations of Ontario, 1970, 1:1455. This regulation
(originally O. Reg. 366/68) was presumably based on Employment Standards Act, 1968,
§ 29(1)(f), Ontario Stat. 1968, at 163, which broadly empowered issuance of a regulation
“exempting any class of employers or employees from the application” of the act.

\textsuperscript{64}The Employment Standards Act, 1974, § 65(j), at 1034 (codified at Employment

\textsuperscript{65}Regulation 325, § 2(2)(a), Revised Regulations of Ontario, 1990, 3:498, 498. It was
originally issued as Ontario Regulation 803/75.

\textsuperscript{66}Regulation 325, § 2(2)(b).
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approval of the arrangement.67

Under the ESA in effect until 2001, the Director continued to be empowered to “issue a permit” to employers authorizing their employees to work a maximum of 100 hours per year in excess of eight hours per day or 48 hours per week.68 In addition, under an updated version of the bifurcated approach of 1946, the Director was authorized to issue permits for 60-hour weeks “in the case of an engineer, firefighter, full-time maintenance worker, receiver, shipper, delivery truck driver or the driver’s helper, watchman or...other person who, in the opinion of the Director, is engaged in a similar occupation....”69 Based on a 50-week year, these permits thus enabled employers to work such employees “a substantial 600 hours of overtime per year.”70 The Act prohibited employers from requiring or permitting workers, and workers from working or agreeing, to work more than the prescribed maximum hours.71 To be sure, it took the government 42 years to bring its one and only prosecution under this section—which is unusual among modern labor protective statutes in its stringent application to the protected class of workers as well and also resulted only in one prosecution—which was dismissed.72

The ESA also continued in force workers’ entitlement to refuse to work even those additional hours that their employer had been authorized by the Director to request them to work: “The issuance of a permit under this section does not require an employee to work any hours in excess of those prescribed by section 17 or approved under section 18 without the consent or agreement of the employee or the employee’s agent to hours in excess of eight in the day or forty-eight in the week.”73 To be sure, the EPB took the position that workers did not possess un-

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67Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 28.


limited freedom to change their minds: for example, if a worker consented to work excess hours on a particular occasion and then failed to report for work, he or she might be properly subject to disciplinary action including termination.74

Over the years the Director of Employment Standards generously issued permits. Indeed, in the mid-1980s, one close student of the Employment Standards Branch concluded that, despite its orientation toward information, investigations, and audits, its “primary focus in the administration of the 8-hour day and 48-hour week maximum is on permitting exceptions to it.”75 By 1990 the Labour Ministry had issued a total of 37,500 100-hour permits.76 Employers were not even required to offer an explanation of their need for such permits; nor were hours worked under the statute’s emergency exemption charged against these 100 hours, which by the mid-1980s amounted province-wide to a total of more than 1.2 million overtime hours.77

In addition, industry permits—which “evolved as an administrative convenience” during the act’s first years78—covering 26 industries, including (in descending order of the number of employees) retail stores, hotels and restaurants, highway transport, auto repair and gas stations, mining, building supply, baking, logging, and taxis, offered additional hours for certain classes of employees. In the mid-1980s the 865,000 workers in these industries accounted for about one-fourth of the 3.5 million employees covered under the law and one-third of the 2.6 million not excluded from the hours provisions. In all of these industries, the maximum workday was extended from eight to ten hours.79 Industry permits “establish substantially less favourable working conditions” than the statute’s provisions themselves and exacerbated this outcome by “tend[ing] to remove the employer subject to them from close scrutiny by the Employment Standards Branch.” And since one of the chief reasons industry permits were granted in the first place was “the insistence of industry organizations on securing special treat-

75Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 13.
76Papp, “Paying the Price for Hard Work.”
78Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 18.
ment," a vicious circle of suspect employer motive, inferior conditions, and lack of enforcement was set in motion.

Finally, the special permits issued where the Director was “satisfied that the work or the perishable nature of raw materials being processed” required additional hours\(^8\) provided “the residual flexibility that may be necessary once the annual 100-hour permit is exhausted and additional hours are still required.” The special permits were most commonly granted to firms that needed to meet an increased demand; automobile manufacturers—Ontario’s largest manufacturing industry, by far its largest exporter, and second in North American only to Michigan in automobile output\(^8\)—were the heaviest users, their primary reason, perversely, being the need to accommodate the restrictions on hiring part-time workers in collective bargaining agreements.\(^8\)

In contrast, the emergency provisions of the act, which were carried over intact to the ESA and “remove[ ] the right of an employee to refuse work,”\(^8\) have been interpreted narrowly. In particular the clause authorizing employers to exceed the statutory maximum hours “in case of work urgently required to be done to machinery or plant,”\(^8\) was interpreted by the Employment Standards Branch to exclude rush orders, inventory taking, absenteeism, avoidance of loss of business, uneven patterns in deliveries. The Branch also required employers to account in detail for the alleged urgency in case their decision is later challenged.\(^8\)

The very fact that the regulatory framework, and especially the 48-hour maximum, remained basically unchanged over more than half a century meant that the relationship between that standard and the prevailing normal hours of work changed radically. In the mid-1940s, when about one-half of the workforce worked in excess of 48 hours per week, the statutory maximum operated to reduce the workweek; decades later, however, when the same 48-hour maximum

\(^{80}\)Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 27.


was well in excess of the most usual regular hours of 40 if not fewer, "the system for permitting excess hours [wa]s serving different purposes than it did when put in place" and the maximum "may...[have] been an invitation to exceed normal or regular hours of work."88

Thus despite the appearance that the "standard was an absolute prohibition," from the outset the hours-ceiling was not absolutely fixed. In Kinley's words: "The high level of anxiety in industry and the government of the day over the practicality of a comprehensive maximum hours standard ensured that arrangements for granting overtime permits and other devices for relaxing the standard were put in place quickly." He argued that the degree to which the government pursued "the doctrine of 'flexible administration'" in the ensuing decades in an effort to make sure that the provision not become "unduly disruptive" raised a question as to whether the maximum hours standard was in fact even "a standard like the others" in the statute.89 Kinley also viewed the issuance of excess hours permits as a kind of realpolitik designed to lessen pressure from employers for additional outright exemptions from the statute.90 Looking back at the 1944 statute more than four decades later, the Task Force itself articulated it as a quasi-universal principle of systems that regulate overtime directly by means of quantitative restrictions rather than indirectly through financial disincentives that the greater the "stringency" of the hours maximums, the greater the need to offset it with "flexibility" created by exemptions: "Thus, some of what the legislation gave with one hand was taken away by the other."91

In 1986, when unemployment in Ontario persisted at 7 percent, the minority Liberal provincial government began considering whether revamping the overtime law might create employment for some of the jobless by reducing excessive

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87Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 17-18.
88Kinley, *Evolution of Legislated Standards on Hours of Work and Overtime* at 15.
90Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 14.
The initiative was prompted by the social-democratic New Democrats—who, with their ally the United Steelworkers, were demanding union veto power over any applications for overtime beyond four hours per week and 100 annually—with whose assistance the Liberals had been able to form a government in 1985. To this end it created the Ontario Task Force on Hours of Work and Overtime, whose hearings triggered "frantic buzzings of alarm in business circles...." The Canadian Manufacturers Association adamantly insisted to the Task Force that "[r]estricting the employer's flexibility in responding to changing circumstances...would affect Ontario's ability to compete in the international arena...." The Manufacturers Association together with the Toronto Board of Trade and the Canadian Chamber of Commerce argued that overtime gave employers "essential flexibility to meet urgent and unpredictable work requirements...." Indeed, the Chamber of Commerce went so far as to propose that, "in a renewed spirit of free enterprise, Ontario should abolish all restrictions on allowable hours of work."\textsuperscript{94} Although the Task Force in 1987 recommended making overtime voluntary after 40 hours rather than 48,\textsuperscript{95} neither the Liberal government (1985-90) nor the New Democratic government (1990-95) included any pertinent changes among the many amendments to the ESA that were enacted at every legislative session from 1986 to 1992 and in 1995.\textsuperscript{96} In particular the leftist New Democrats, instead of carrying out a thoroughgoing reform of the ESA, injected "a bit more equity into the legislation," but also cut back the Labour Ministry's personnel, thus leaving "even fewer resources for enforcement."\textsuperscript{97}


\textsuperscript{95}Working Times: \textit{The Report of the Ontario Task Force on Hours of Work and Overtime} at 129.


Ontario

When the Progressive Conservatives, who had controlled the provincial government from 1943 to 1985, regained power in 1995, their Common Sense Revolution"98 "platform might have seemed normal in Texas or Iowa: drastic deregulation, government downsizing, welfare bashing, massive tax cuts...."99 Both they and their business supporters were determined to increase rather than decrease working hours. In particular, General Motors of Canada Ltd., the country's largest industrial employer, soon began complaining to the new Tory government about "facing serious competitive disadvantages, including restrictions on how many hours the company can make employees work," which gave "rivals in bordering U.S. states an edge." After the president of the company had met with the Labor Minister, the Canadian Auto Workers (CAW) charged that GM has asked for an increase in the limit on the compulsory workday from 8 to 10 hours and the workweek from 48 to 56 hours.100

Although "Chrysler Canada and a few other companies...cautioned the government that it may be swinging too far to the right" in dismantling labor law protections,101 in May 1996 the Conservative government at first proposed that employers and unions be authorized to ignore the hours law, a proposal that labor feared as creating pressures that "many unions will not be able to resist...." At the time, Labour Minister Elizabeth Witmer expressed the hope that this new ""flexibility"" could eventually be extended to nonunion workplaces as well.102 The proposed provision would have permitted collective bargaining agreements to prevail over an employment standard "if the collective agreement confers greater rights relating to hours of work, overtime pay, public holidays, vacation with pay and severance pay than the Act confers, when those matters are assessed together."103

The proposal, according to one left-wing columnist for the daily Toronto Star, was the creature of "thinkers of the new right," to whom "any employment

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101Van Alphen, "GM Says It's Hurt by Limit on Hours of Work."
standards at all are by definition a nefarious form of government intervention in the private marketplace.” The effect of the proposal would have been to “remove the floor from collective bargaining at a time when unions are fighting for their lives. Weak unions will find it more difficult to resist bargaining away even minimum standards.”

Even newspaper editorial writers worried about the consequences of “encouraging companies and unions to trade off standards that together were meant to impose a broad range of social (and family) values on the conditions of work,” especially where “employers are able to ‘negotiate’ with a gun to their employees’ heads.” If an employer could plausibly argue, for example, that greater severance pay outweighed the elimination of overtime pay, then unionized workers would have to decide whether to strike or accept the new “package,” whereas in the past the statutory floor would have outlawed the employer’s proposal.

Following public hearings in August, Witmer withdrew the section permitting waiver of statutory standards on the grounds that it would be revived later in the year when she launched “a more comprehensive review of the act.” Seeking to preempt such legislation and to outflank General Motors’ lobbying, the CAW proposed that the existing statutory hours standard be incorporated directly into their collective bargaining agreement. In the event, however, the Act to Improve the Employment Standards Act that passed in 1996 lacked the waiver provision.

Early in 1997 the Conservatives undertook a new initiative to deregulate hours. In connection with the party’s anti-red-tape campaign, a committee of its members of parliament proposed lengthening the workweek to 50 hours or to 200 hours over four weeks and eliminating the requirement that employers obtain permits to work employees 100 hours of overtime annually. The reform was required because: “Given the challenge many companies face in trying to improve


productivity and maximize efficiencies so as to compete in a global economy, the need to adjust work schedules in response to market fluctuations is becoming a vital component to success."" Indeed, the only hours limits that the Red Tape Review Commission wished to impose were those ""subject to empirical evidence on health and safety risks associated with overtime hours worked."" Because, as one Toronto newspaper editorialized, ""[h]ard-pressed"" workers in the 1990s were accepting or even asking for overtime in order to ""make up losses in their real incomes,"" it ""would be fine"" with the Tories ""if a worker was willing to work 72 hours a week,"" provided he ""could do so without falling flat on his face.""""

In August 1998 the Tories ""launched the second phase of the Employment Standards Act reform process"" by circulating a discussion paper entitled ""The Future of Work in Ontario."" Its basic premise was that ""[n]ew trade rules, investment policies and technological change have led to greater competition from producers in other countries. Firms need the flexibility to respond to competitive pressures. New technologies and the development of delivery systems that require an immediate response to new orders have affected the way in which work is done and added to the need for flexibility."" This characteristically one-sided managerial conception of ""flexibility"" was tempered only by the unmediated insight that workers ""want standards that...help them to balance work, family and other needs"" and the equally unmediated question: ""Can hours of work flexibility help to address needs of working parents?"" The discussion paper was so lacking in specificity as to proposed statutory amendments that a contemporaneous commentator divined that only after ""private discussions...at the Ministry level over the next couple of years"" would legislative changes take place.""

In the run-up to the provincial elections in June 1999, the Tories issued a ""Blueprint"" in April, which added a modicum of detail to their plans. Against the background of the party's objective to ""restore the balance of power between unions and employers,"" the ""Blueprint"" argued: ""With the way the workplace is changing, more workers and companies want to set up arrangements other than the traditional Monday to Friday work week. We'll give workers and employers

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114Boniferro, ""The Future of Work in Ontario.""
more flexibility in designing work arrangements to meet their needs, such as flex-
time or four-day weeks."115 Apart from such innocuous sounding changes Labor	Minister Jim Flaherty assured unions that his party was planning "no other labour	law changes": "we have written down what we intend to do."116

A year after their re-election with 59 of 103 seats in the Legislative Assem-
bly,117 on July 26, 2000 the Conservatives began preparing the public for their	real plans for amending the ESA. Declaring that the "workplaces and workers of	Ontario are flexible, modern, and adaptable.... We need laws that give them the	ability to respond quickly to emerging economic opportunities,"118 Labour Minis-
ter Chris Stockwell released the government's consultation paper on reforming	employment standards, which was designed to form the basis for province-wide
tpublic discussions in August and September.119 The paper, after noting that the	Red Tape Commission had found that 500 Ontario businesses and institutions it	had surveyed "identified reform of the ESA as a top priority to improve the prov-
tince's competitive status as a place to invest," argued that the "current hours of	work standards...do not always accommodate the needs of employers to run their	businesses in a way that meets market pressures, new manufacturing processes	or the intensive requirements of high technology industries. The hours of work	standards also do not accommodate the needs of employees to vary working	hours according to individual preference or to balance work and family responsi-
bilities."120 The consultation paper then put the public on notice that the govern-
tment saw the solution to these problems in: eliminating the permit system; in-
creasing the maximum workweek to 60 hours, which in addition could be aver-
gaged over three weeks; and subjecting overtime premiums to three-week averag-
ing as well. Although the new standards "would require the employee's agree-
ment,"121 the paper did not reveal how a 60-hour week would accommodate work-

117 Scott Morrison, "Tax-Cut Premier Holds on to Ontario," Financial Times, June 5,
1999, at 6 (Lexis).
118 "Ontario to Modernize Employment Standards," Government of Ontario Press Re-
leases, July 26, 2000, on http://www.newswire.ca/government/ontario/english/releases/
July2000/26/c6406.html.
ann/00-39be.htm.
Legislation: A Consultation Paper 2, 7 (July 2000).
121 Ministry of Labour, Time for Change at 7.
The Ontario Federation of Labour (OFL) took the proposed changes very seriously. Chiding those who were wont to give the ESA short shrift because they “don’t think legal entitlements are important” or “think such standards are of little importance to unionized workers who collectively bargain working conditions,” the Federation stressed that the presence of compulsory labor standards meant there was “less incentive for employers to try to defeat or decertify a union. These laws also form the ‘floor’ so unionized workers don’t have to start from scratch when negotiating their collective agreement.”

The OFL’s response to the government’s proposal to make changes in the workweek contingent on workers’ agreement was to ask “who is kidding who? While the government says that employees would have the right to refuse to work more than 48 hours a week, how many employees can freely choose not to do what their employers want and still maintain a good working relationship?”

Instead, the OFL advocated premium overtime for and a right to refuse to work hours in excess of 40 per week. On behalf of its 170,000 Ontarian members, the CAW, which, however, was especially concerned about the 81 percent of the workers in the province’s private sector who were not members of any union, pointed out that the proposed overtime averaging “may eventually eliminate overtime pay as a brake on excessively long hours.”

In initiating a series of public consultations in August and September on the Tories’ proposed changes, Labour Minister Stockwell justified the need for them on the grounds that “at work, there are more demands for flexibility because of market pressures, new manufacturing processes or intensive requirements of high-technology industries and the trend toward 24-hour-a-day, 7-day-a-week business hours.”

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124 Submission by the Ontario Federation of Labour on the Consultation Paper” at 4.
125 Letter from CAW President Buzz Hargrove to Premier Mike Harris and Labour Minister Chris Stockwell, re Bill 147 (Nov. 30, 2000), on http://www.caw.ca/campaigns&issues/ongoingcampaigns/ontarioemployment/hargroveletter.asp.
in parliament on November 23, 2000 were, according to Stockwell, designed to "reflect the realities of 21st-century workplaces." In refutation of Stockwell's insistence that any changes in working hours made by the bill were contingent on workers' agreement, David Christopherson, the labor critic (spokesperson) of the opposition New Democratic Party (NDP), reminded him during the first reading of the bill "of the reality of the workplace. You make it sound as if being at work is belonging to some kind of social club where everybody sits around and is palsy-walsy. The fact of the matter is that it's very difficult for a lot of people to say no to a boss who pressures them to work overtime." When another NDP member of parliament, Shelley Martel, charging that the bill would "force workers to choose between their families and their jobs," asked Stockwell: "What planet are you living on, Minister?" he, pointing out that the NDP had done nothing when it was in power to abolish the permit system, replied that he lived on Earth and invited her to "visit it once in a while."

As ultimately enacted, the new law—which, according to the Labour Ministry, was needed to replace a law that "no longer suited the way people really work in Ontario"—eliminated the governmental overtime permit system. Instead, although the normal workday and workweek remain eight and 48 hours, respectively, now: "An employer may permit an employee to work up to a specified number of hours in excess" of those limits if "the employee agrees to work those hours" and "the employee will not work more than 60 hours or such other number of hours as are prescribed in a work week." And employers may work employees even beyond this 60-hour threshold if "the employee agrees to work those hours" and the Director of Employment Standards approves the agreement.

129 Ontario Legislative Assembly, Official Report of Debates (Hansard), 37th Parl. Sess. 1 (Nov. 23, 2000), on http://www.ontla.on.ca/hansard/house_debates/37_parl/session1/1107.htm#P658_160214 (no pagination). This belligerent heckling style characteristic of the Westminster form of parliamentary government is nevertheless embedded in a system that makes the outcome of legislative debates a foregone conclusion where, as with the Tories in Ontario, the government has a substantial parliamentary majority. Moreover, despite the aggressive tone of the colloquies, very few members of the legislature were actually present at the debates. Telephone interview with Mary Gellatly, Community Legal Worker, Parkside Community Legal Services, Toronto (Feb. 26, 2002).
131 An Act to Revise the Law Relating to Employment Standards, § 17. (1) at 817.
133 Ontario Regulation 285/01: Exemptions, Special Rules and Establishment of Mini-
Though not expressly, the new law in effect limits the length of the workday to 13 hours because it requires employers to give workers "a period of at least 11 hours free from performing work in each day," but even this protection "does not apply to an employee who is on call and called in during a period in which the employee would not otherwise be expected to perform work for his or her employer."\(^{134}\)

Although 44 hours remains the statutory threshold for time-and-a-half premium overtime wages, firms have attained much greater latitude to demand additional hours by means of the averaging mechanism that Republicans led by Senator Ashcroft had unsuccessfully tried to push through Congress in the 1990s: "if the employee and the employer agree to do so, the employee’s hours of work may be averaged over a period of not more than four weeks for the purpose of determining the employee’s entitlement, if any, to overtime pay."\(^{135}\) In other words, an employer who previously was required to pay the overtime penalty after 44 hours in any week, can now work employees as many as 60 hours a week without incurring any overtime liability, provided that the worker’s total hours over four weeks do not exceed 176. For nonunion workers such averaging agreements can last as long as two years and are renewable;\(^{136}\) once they agree to averaging, however, workers who change their mind are locked into it unless the employer agrees to revoke the agreement.\(^{137}\) The statute even permits the government to make a regulation permitting hours-averaging periods of more than four weeks,\(^{138}\) the only condition attached by the regulation being approval by the Director of Employment Standards.\(^{139}\)

As the Liberal Party’s parliamentary labor spokesperson at the bill’s third reading sarcastically described the interaction of the two provisions permitting employees to agree to 60-hour weeks and to average weekly hours for purposes of calculating overtime premiums:


\(^{136}\) An Act to Revise the Law Relating to Employment Standards, §§ 22. (3) and (4), at 819.


\(^{138}\) An Act to Revise the Law Relating to Employment Standards, § 141. (1) 7, at 886.

You’ve got to wonder, who is asking for this? Certainly we don’t know, because we’ve had no public hearings, who has come forward. But somehow I don’t think the single mom working at Tim Hortons was knocking on Mike Harris’s door and saying, “Premier, please, give me a 60-hour workweek. I’m not working long enough,” or, “Premier, please, limit my overtime. I want to work 60 hours without overtime.” I’m sure there’s a lineup at the Premier’s door of working people who wanted these changes. I’m sure that’s what’s driving and motivating this government. It is not the corporations or their Bay Street friends, of course not; it’s working people. ... Of course they want to be screwed out of 25 hours of overtime in a month, because they make way too much money.140

Although the new statute141 in general entitles a worker to revoke his or her agreement to work more than 48 hours by giving the employer two weeks’ written notice,142 it carves out a special exemption—which was not in the original bill, but was added by the Tories at the time of the bill’s second reading143—for any such agreement “that was made at the time of the employee’s hiring and that has been approved by the Director,” making it “irrevocable unless both the employer and the employee agree to its revocation.”144 This potentially far-reaching regulation would thus imprison newly hired workers for the duration of their employment in an “agreement” that an overreaching employer may have foisted on them at an especially vulnerable moment in their working lives. It would subvert a labor-protective regime by permitting an employer’s unilaterally imposed condition of employment to trump a societal norm. This predictably biased recreation of pseudo-voluntarism among the nonorganized underlies management-side lawyerly acclamation of the new ESA as giving “employers and employees more autonomy to determine certain aspects of their relationship...by eliminating the requirement for Ministry of Labour approval for certain working relationships.”145

140Ontario Legislative Assembly, Official Report of Debates (Hansard), Dec. 19, 2000 (Dominic Agostino). Tim Hortons is a large coffee and donut shop chain owned by Wendy’s International; Bay Street is Toronto’s financial district.


143Ontario Legislative Assembly, Bill 147, Second Reading, on http://www.ontla.on.ca/documents/Bills/37_Parliament/Session1/b147rep_e.htm.


145The Employment Standards Guide: Adapted from the Ontario Ministry of Labour
One possible constraint on employers’ use of at-the-time-of-hire adhesion agreements is the guideline on agreements that “permit employers and employees to agree to vary from the legislative minimum standard and agree to a different standard” that the Ministry of Labour published on the day on which the new ESA went into effect. One of the relevant factors in determining whether such an agreement is enforceable is: “Whether the employee was coerced into making the agreement.” The Ministry guidelines state: “An agreement will be invalid if an employee entered into it because his or her employer: threatened to fire him or her; threatened to reduce his or her hours of pay; penalized the employee’s co-workers because they had refused to enter into the agreement, and the employee entered into the agreement to avoid being similarly penalized.”

Although these examples refer to those already in an employer’s employ, the principle fully applies to job applicants as well. The analogous threat to prospective employees is the warning that they will not be hired unless they agree to work excess hours; this threat to withhold a livelihood is just as perniciously coercive as the threat to terminate one. Moreover, if employers’ recourse to this type of coercion were upheld as consistent with the ESA, it would eventually, through attrition, enable firms to create a workforce consisting wholly of employees who had waived their right to refuse to work beyond the normal eight-hour day or 48-hour week.

Interpretation Guide A-33 (Eric Roher ed. 2001 [1997]).


ESAlert: News Bulletin of the Employment Standards Work Group 2:8 (Apr. 2002). Although the anti-coercion principle of contract law may be more encompassing than the anti-reprisal principle of labor law, the latter also applies here: “No employer...shall intimidate, dismiss or otherwise penalize an employee or threaten to do so...because the employee...asks the employer to comply with this Act and the regulations,...makes inquiries about his or her rights under this Act,...[or] exercises or attempts to exercise a right under this Act....” An Act to Revise the Law Relating to Employment Standards, § 74(1)(a), at 846-47.

To be sure, as with the enforcement of any ban on discrimination, there may be evidentiary barriers to proving an employer’s illicit motive where the alleged discriminator is too sophisticated to blurt out the real reason in front of witnesses and is able to specify other plausible reasons for not hiring a worker who insisted on her right to work only normal hours. Such complications, however, cannot justify failure to enforce the ban. Ronald Ehrenberg and Paul Schumann, “The Overtime Pay Provisions of the Fair Labor Standards Act,” in Report of the Minimum Wage Study Commission 3:149-233, at 221 (1981), express “serious doubts as to whether” a law requiring employers to obtain workers’ consent to working overtime “would be enforceable; employers could presumably still require willingness to work mandatory overtime as a condition of employment, and if this was agreed to at the date of hire, it is hard to see what the net effect of the legis-
Parallel to this prospective irrevocability provision, the regulations also include a grandfather clause that confers quasi-parity on employers who had entered into similar at-the-time of-hire agreements with employees under the old statute which, but for this exemption, the workers would presumably have been entitled to revoke with two weeks' notice under the new law. This provision carries over to the new ESA section 18 of the old ESA, which enabled employers to extend the regular workday beyond eight hours, as long as the workweek did not exceed 48 hours. Labelled “Exemption Re Certain Existing Arrangements: Existing arrangements for long shifts,” it provides that the clause in the new ESA prohibiting an employer from requiring or permitting an employee to work more than “eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day,”

(1)...does not apply with respect to the class of employees each of whom,
(a) has an arrangement described in subsection (2) with an employer to whom a permit was issued under section 18 of the Employment Standards Act; and
(b) is not required by the employer to work more than 10 hours a day.

(2) The arrangement
(a) provides that the employee is willing to work, at the employer’s request, more hours per day than the number of hours in his or her regular work day;
(b) was made at or before the time of the employee’s hiring and before September 4, 2001; and
(c) has not been revoked by the mutual consent of the employer and employee.

(3) The terms of the arrangement need not be reduced to writing.

...
Although the actual universe of employers and "class of employees" affected by this regulation are not clear, it permits employers that had government approval under the old ESA to adopt a regular workday of more than eight but fewer than 12 hours to adopt a 10-hour day under the new ESA, provided that each worker in "the class" in question had expressed a willingness, orally or in writing, to work such additional hours at the time he or she was hired and before the new ESA went into effect, and that the employer had not in the meantime released the workers from this arrangement.

Presumably this grandfather clause was designed to aid nonunion employers in retaining law-backed power to impose longer workdays, and one such prominent firm was acutely aware of the privilege bestowed and made sure its workers were too. In a notice concerning the new ESA issued to employees in January 2002, the Human Resources Manager of Toyota Motor Manufacturing Canada Inc., immediately after declaring that "TMMC focus has always been to manage a successful business that meets our customers' needs by scheduling well-balanced hours of work that considers both T/Ms [team members] and the market demand for our product," stressed: "Employers can require workdays of up to 10 hours a day and not to exceed 48 hours in the week." Many workers at Toyota's only assembly plant in Ontario have concluded that the government added the grandfather clause at Toyota's request. Whether Toyota actually lobbied...
for or merely received this benefit as a gift from the Tory government, management at Toyota's Cambridge plant takes the position that, based on the "agreements" that the company required workers to sign at the time they were hired before September 4, 2001, the regulation gives it the right to "force" workers to work ten-hour days.156

More than five months after the act went into effect (ironically on Labor Day, September 4, 2001) the Ministry of Labour had received only two requests to approve prospective irrevocable at-time-of-hire agreements: both were from the automobile manufacturing industry and both were approved.157 Toyota management confirmed that it had received such approval,158 and the CAW surmised that the other firm must be Honda, which owns the only other nonunion automobile manufacturing plant in Ontario, since unionized firms' collective bargaining contracts would make such agreements unnecessary.159 To be sure, union officials suspect that typically employers would not bother to seek approval or even formal written agreement from employees.160 Despite the potentially overwhelming significance of this imposition, neither the president nor the research director of the OFL, which led the opposition against the bill, was even aware of its existence, believing erroneously that the clause merely dealt with Sunday work.161

The one innovation in the bill that incontestably favors workers is the strong anti-retaliation provision empowering the administrative agency officer to reinstate workers without court enforcement.162 As the labour minister touted this

(April 5, 2000) that Ontario Premier Mike Harris visited the Toyota plant (for Toyota's announcement that it would begin production of a Lexus SUV), word circulated among the employees that he had promised Toyota management that the firm would be permitted to retain under the new ESA whatever working hours system it had had under the old ESA. Telephone interview with David Leaman, Guelph, Ontario (Mar. 28, 2002).

157 Telephone interview with Suzanne Craig, Provincial Specialist on Hours, Employment Practices Branch, Ontario Ministry of Labour, Toronto (Feb. 11, 2002), who did not identify the firms.
158 Telephone interview with Greig Mordue.
159 Telephone interview with Tom Rooke.
160 Telephone interviews with Wayne Samuelson (president) and Chris Schenk (research director), OFL, Toronto (Feb. 11, 2002).
161 Telephone interviews with Wayne Samuelson and Chris Schenk. Although aware that the provision was not widely known, the Provincial Specialist on Hours, Employment Practices Branch, Ontario Ministry of Labour, observed of the union's ignorance: "That's not funny." Telephone interview with Suzanne Craig, Toronto (Feb. 11, 2002).
revision, which even the OFL welcomed, during the bill’s second reading:

der the old legislation [t]he inspector could go out there and make a finding that you should rehire this person. All the employer had to do was submit a request to the Ontario Labour Relations Board and then they’d have a hearing, and the hearing would take up to six months to be heard. Under the old legislation, that employee would be out of work, without pay, without any form of support, unable to buy their groceries, unable to pay their rent for six months, even though they’re right as rain. Under the new provision, an employer may still appeal the decision of the inspector to the Ontario Labour Relations Board, but that employee, after that inspector makes that decision, goes back to work the next day.

As potentially radical as the new law is, it nevertheless fell “far short of the anti-union package sought by many members of the Tory caucus, and by party insiders...” On the other hand, the party welcomed unions protests because they “enable[d] the government to tell its supporters that it is still fighting to roll back the protections enjoyed by organized labour....”

Five months after the Act went into effect, the Ministry of Labour reported that no worker had yet filed a complaint about having been intimidated by an employer into signing a 60-hour-week agreement. OFL officials speculated that nonunion workers are simply too vulnerable to complain about virtually any labor law violation until they have left the employ of the firm in question. However, Parkdale Community Legal Services in Toronto did receive reports of workers at nonunion workplaces who had been intimidated by employers into signing such agreements. Whether the anti-reprisal provision in the new statute will prove to provide an adequate legal basis for reinstating workers who have been fired by employers that are sophisticated enough to avoid divulging the real (unlawful) reason for terminating workers who try to exercise their right to refuse to work overtime under their quasi-at-will employment regimes remains to be seen. (The ESA requires employers to give workers termination notice ranging from one week to eight weeks, depending on their length of employment, but does not

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166Telephone interview with Suzanne Craig, Provincial Specialist on Hours, Employment Practices Branch, Ontario Ministry of Labour, Toronto (Feb. 7, 2002).
167Telephone interviews with Wayne Samuelson and Chris Schenk.
168Telephone interview with Mary Gellatly.
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otherwise constrain employers' power to fire—except that the ESA makes it unlawful to fire workers for exercising their rights under the ESA.)\(^{169}\)

But before being tested with regard to its capacity to protect workers from retaliation by employers that seek to conceal their violation of the new law, the ESA was finally subjected to a direct confrontation in February 2002, when two workers at the Toyota factory in Cambridge, Ontario—which in 1998 had recorded the fewest worker-hours per vehicle of any assembly plant in North America\(^{170}\)—filed complaints with the Labour Ministry about being required to work weekday overtime despite the fact that they had not agreed to any such arrangement.\(^{171}\) The previous summer the CAW had failed in its campaign to organize the plant, which is located in the southern part of the province not far from Niagara Falls and employs 3,200 workers. The mandatory overtime regime, which according to the company is "required" by the high sales of the cars produced there, imposes an additional 90 minutes daily, Monday through Thursday, on day-shift workers and two hours on the night-shift. Toyota defends the compulsory system, which it instituted in January 2002 and has enforced on an "almost-daily basis," on the grounds that "we have a production plan to meet and we have to meet it."\(^{172}\)

To observers it was clear that the company's approach "reflects" the changes in the ESA that went into effect in 2001.\(^{173}\) As a local newspaper editorialized: "Overtime used to be voluntary at Toyota, but Ontario's new workplace legislation has tilted the scales somewhat in favour of employers, which can now—generally and broadly speaking—insist on overtime activity."\(^{174}\) Employers no longer need government-issued permits, but they must still secure the workers' agreement to extend the workweek to 60 hours. And although workers are generally entitled to revoke such agreements, the new ESA, as noted earlier, privileges employers to lock employees into consents they gave at the time of hire. Toyota, all of whose North American plants are nonunion, is acutely aware of this provision. Ironically, Toyota Motor Manufacturing Canada Inc.'s manager of cor-

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\(^{169}\) An Act to Revise the Law Relating to Employment Standards, §§ 57 and 74, at 837, 846-47.

\(^{170}\) Tony Van Alphen, "Toyota Plant in Cambridge Rated Best," Toronto Star June 18, 1999 (Westlaw).

\(^{171}\) David Leaman, "Think of the Workers," Kitchener-Waterloo Record, Mar. 25, 2002, at A10 (Lexis) (letter to editor by one of the complaining workers).


\(^{173}\) DeRuyter, "Some Workers Upset by Forced Overtime."

porate affairs, Greig Mordue, when asked whether the company regarded workers’ statutory right to refuse overtime as restrictive, replied that “this is one of those strange twists where it would almost be easier to work with a union,” because then Toyota would need to deal with only one party rather than 3,200 individual employees.\(^{175}\) In spite of this attractive aspect of collective bargaining, Toyota insisted during the unsuccessful organizing campaign in 2001 “that it would be in the best interests of the workers and the company if they voted against a union.”\(^ {176}\)

Toyota’s corporate affairs manager also offered the company’s legal interpretation of the aforementioned regulatory grandfather clause:

> the probationary contracts employees sign when they are hired by Toyota constitute irrevocable agreements because employees are told they will have to work overtime.

> “There is a series of means by which people would clearly understand upon their hiring that overtime is a pretty consistent and regular requirement of this particular auto plant.”\(^ {177}\)

The complaining workers have argued that whatever adhesion agreements the employees may have had to sign at the time of hire requiring them to “support scheduled overtime” are no longer valid because they were contracts of employment for the position of full-time probationary team member and as such expired, together with their probation period, after six months. Moreover, even if the contracts were still valid, the workers argue that they fail to satisfy the elements of specificity relating to hours that the Ministry of Labour has prescribed since they specifically refer to overtime as “hours in excess of...40 hours per week....”\(^ {178}\) According to the Ministry’s guidelines on the formal requirements of enforceability of such agreements, the terms must be clear and specific, and the employee must understand the consequences of entering into the agreement. The Ministry especially cautions that the word “overtime” should be avoided because the statutory overtime threshold of 44 hours is different from the excess hours threshold of 48.\(^ {179}\)

But even if Toyota eventually were to lose on the issue of the irrevocability

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\(^ {175}\) Telephone interview with Greig Mordue.

\(^ {176}\) Tony Van Alphen, “Union Seeks Certification Vote at Toyota Cambridge Plant,” \textit{Toronto Star}, July 26, 2001, at D6 (Lexis).

\(^ {177}\) DeRuyter, “Some Workers Upset by Forced Overtime.”

\(^ {178}\) Letter from Daryl Wilson, General Manager, Human Resources Dept., Toyota Motor Manufacturing Canada Inc., to David Leaman (June 26, 1997) (quotes); Letters from David Leaman to Lynn Haley, Human Resources Manager, Toyota Motor Manufacturing Canada Inc. (Jan. 30 and Mar. 3, 2002).

of the so-called agreement, management knows that it "has other options." In particular, Toyota knows that the right to refuse overtime extends only to statutory overtime beyond eight hours daily or 48 hours weekly; where, however, for example, the normal workweek is 40 hours, workers would have no right under the ESA to refuse to work overtime hours 41 to 48 if the employer scheduled them for a sixth day of the week and thus avoided exceeding the daily eight-hour maximum. Under the ESA employers have always been allowed to schedule six eight-hour days without government permits or employees' consent. Toyota believes that such a six-day week is "less appealing" to the workers: "Our people prefer, by and large, to work a little additional overtime during the week so they don't have to come in on Saturdays." In other words, if workers fail to "support our hours of work" and refuse to agree to work compressed five-day, 48-hour weeks, Toyota will deprive them of their two-day weekends, which for decades has seemed to be an irrevocable working-class achievement. During its organizing drive, the CAW had warned Toyota workers that without a union in place to contest such plans, the company would avail itself of the revised ESA to impose overtime on them, but some had argued: "No, Toyota won't do that." 180

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The situation at Toyota 181 makes it clear that no meaningful assessment of the effect of the new amendments is possible without first determining the real-world impact of the right to refuse overtime work under the old ESA. Judging by the volume of administrative hearings, arbitrations, and court decisions, the issue of whether workers have agreed to work the additional hours that permits authorized employers to employ them has been litigated frequently. Why an analysis must distinguish between unionized and non-unionized workers is explained in the leading treatise on the Ontario statute:

Whether an employee or his agent has consented or agreed to work additional hours as provided for in a permit is a more controversial issue in unionized workplaces than in non-unionized workplaces. In a non-unionized workplace, each employee has an individual contract of employment with the employer. Each employee deals with the employer on an individual basis in all respects of his employment, including consenting or refusing to work additional hours.... Conversely, in a unionized workplace, there is no room left for individual negotiation and agreement between the employee and the employer, subject to the provisions of the collective agreement. ... The collective agreement...can

180 DeRuyter, "Some Workers Upset by Forced Overtime."
181 The processing of the complaints against Toyota, including a scheduled hearing, was delayed by a strike of the Ontario Public Service Employees Union that lasted from Mar. 13 to May 6, 2002.
contain an agreement on behalf of the employees to work additional hours. In such a case, the union has acted as the agent, in law, of the employees as permitted by s. 20(3) of the Act.\textsuperscript{182}

Although the interpretive complications introduced by the presence of a collective bargaining agreement are undeniable, the more important difference between the two sectors lies in the lack of countervailing worker power in the atomized sector. This difference is presumably also reflected in the fact that “few, if any” complaints about violations of the maximum hours standard were ever filed by unorganized workers as opposed to unions.\textsuperscript{183} The apparent absence of any reported administrative tribunal or court decisions dealing with disputes from the nonunion sector is, therefore, hardly surprising. And this lack of enforcement and litigation is thoroughly consistent with Kinley’s conclusion that, despite workers interest in “having a legal right to refuse work in excess of the maximum hours standard...there is no clear evidence that it is of practical benefit to unorganized workers, especially those in relatively small establishments.”\textsuperscript{184}

This divergence between union and nonunion workers in the corpus of reported dispute resolution regarding the right to refuse overtime work is extraordinary: after all, it is unorganized workers who have only statutory protection to rely on in seeking to fend off overreaching employers, while unions, with their strength in numbers and collectively bargained rules, tend to regard state-enforced labor standards as primarily designed for non-members or, at best, as creating a floor which they can take for granted and about which it is not necessary to negotiate. This attitude is also fully consistent with the position taken by the OFL vis-à-vis the amendments to the ESA’s hours provisions proposed and enacted by the Conservatives in 2000—namely, that it was nonunion workers who would “face unsocial hours...and health and safety risks associated with extensive or periodic overtime.”\textsuperscript{185} In fact, however, the reported cases make it clear that it is unions that have used the interaction of the ESA and collective bargaining agreements to enable members to refuse overtime demands in ways that would not have been possible had they had to rely solely on their contracts.

The explanation for the lack of litigation surrounding unorganized workers’ right to refuse overtime is straightforward: there was nothing to litigate because

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\textsuperscript{182}Parry, \textit{Employment Standards Handbook} at 5-8.

\textsuperscript{183}Kinley, \textit{Current Administration of Legislated Standards on Hours of Work in Ontario} at 11.

\textsuperscript{184}Kinley, \textit{Evolution of Legislated Standards on Hours of Work and Overtime} at 28.

the Employment Standards (later: Practices) Branch took the position that: "The only remedy for a Part IV [i.e., hours of work] non-monetary violation, is a prosecution pursuant to s. 78(1) of the Act." Because the ESA gave workers a right to appeal only decisions by the Branch denying their claims that employers owed them back wages, the EPB argued that it could not secure them reinstatement and that the only recourse open to the agency was prosecuting employers, who, upon conviction, could be subject to a monetary penalty and prison sentence. In fact, however, such prosecutions under any provisions of the ESA were extremely rare—one official stated that there had been fewer than a handful in the past decade—because the Ministry of Labour believed that prosecutions were not an efficient use of its resources. According to the Ministry itself: "To our knowledge, a jail term has been imposed only twice against an individual charged under the ESA." 

To be sure, another approach was also available. From its original enactment, the ESA prohibited employers from dismissing or threatening to dismiss, intimidating, or coercing any employee “because the employee has sought the enforcement of this Act.” A worker who tried to assert his statutory right to refuse to work overtime was arguably seeking to enforce the statute, though the new ESA of 2000 makes this connection even clearer by prohibiting employers from penalizing any worker because he or she asked the employer to comply with the statute, made inquiries about his rights under it, filed a complaint with the government, or exercised or tried to exercise his or her rights under it, and even places the burden on the employer to prove that he did not contravene the act. Upon conviction, the original 1968 statute mandated that “the magistrate...shall...order the employer to reinstate the employee in his employ...”; after 1974, mandatory judicial reinstatement was made permissive.

In fact, such prosecutions were so rare that the Labour Ministry’s own Policy and Interpretation Manual refers to them hypothetically: "To obtain a conviction..."
under s. 76(1), the Crown would have to prove its case beyond a reasonable doubt, which is the standard of proof in criminal or quasi-criminal cases,...that there was a reprisal by the employer...."194 The Labour Ministry deemed this standard of proof too great a barrier because the government would have been put to the test of proving the employer’s retaliatory state of mind “beyond a reasonable doubt.”195 With the enforcement agency exercising such self-restraint, it is hardly surprising that Kinley observed in the 1980s that it “may be exceedingly difficult to ensure” that unorganized workers are not penalized for exercising their right to refuse to perform overtime. Despite this lack of enforcement, workers who were excluded from the statute were concerned about being deprived of the right to refuse, while the suggestion of granting them that right created “deep anxiety” for their employers in such exempt industries as farming and fishing.196

In the one reported tribunal case that could have raised the issue of the right of nonunion workers to refuse overtime the employer and the EPB agreed that the issue before the referee was the extent to which the workers’ individual contracts of employment obligated them to work overtime.197 Because the (unexplicated basis for the) EPB’s conclusion that statutory protection was unavailable itself suggests that the government enforcers take a broad view of employers’ prerogatives and a correlatively narrow view of workers’ rights to refuse, the case is worth examining in detail.

The two employees involved, who had worked as warehousemen in North Bay for the Outboard Marine Corporation of Canada (a subsidiary of a U.S. firm) since 1972 and 1978, respectively, had no written contract, but their normal working hours were Monday to Friday 8:30 a.m. to 5:30 p.m. with an hour for lunch. The more senior employee had worked overtime Saturdays in 1972-74,

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194 The Employment Standards Guide: Adapted from the Ontario Ministry of Labour Interpretation Guide ¶19.2.2 at 19-5. The Ministry mentions only case (R. v. Hartro Office Systems) in which an employer was convicted under this section because “the only logical explanation of the reason for the employee’s dismissal was that he filed a complaint under the Act.” Id. The case, however, had nothing to do with the refusal to work overtime. Van Duyvenvoorde, [1996] O.E.S.A.D. No. 133 (involving the same parties and discussing the decision of Sept. 7, 1994 in the Provincial Division of the Ontario Court).

195 Telephone interview with John Hill.

196 Kinley, Evolution of Legislated Standards on Hours of Work and Overtime at 28.

but later both had worked overtime only sporadically. Nevertheless, on cross-examination they conceded that reasonable amounts of overtime continued to be a part of their jobs. In 1985, however, the district manager informed them that the closing of another depot would result in additional orders that had to be filled during the peak summer season, which the manager wanted to deal with by hiring two additional workers, but that the head office had denied that request, “at least until the existing employees were already working a reasonable amount of overtime.”

May 16, 1985 (which the decision fails to mention was a Thursday) was the first day the senior employee was asked to stay to work overtime; having planned to watch a hockey game on television, he refused. Indicating that “he might be required to stay and work overtime 3 or even 4 nights a week with a total of 6 to 8 over-time hours a week,” management suggested that “he ought to give some thought to what his priorities were.” The worker then decided to “give it a try” and did work that night, but the next day he told management that he had changed his mind and would not be prepared to work any overtime. At the hearing he testified that at that point the warehouse had been in “‘chaos,’” his “‘nerves were shot,’” and he was having difficulty dealing with the pressure. In response to the district manager’s admonition that taking that position could jeopardize his job, he offered to wind up his employment that day, but the manager replied that he should remain working there but also look for a job elsewhere.

The junior employee was first asked to stay and work overtime on May 19, 1985. Being in a rehabilitation program for alcoholics and attending Alcoholics Anonymous meetings three or four times a week, he declined; when asked the next day to reconsider, he replied that he and his wife felt (and his doctor agreed) that he should avoid the additional strain of overtime.

After both workers continued to refuse to work overtime, ten days later the company’s assistant personnel director traveled to North Bay to try to talk them out of their position. The junior employee, Richard Cuthbertson, was well prepared for the conversation: he “had a booklet from the Employment Standards Branch, and it appears likely that it was Mr. Cuthbertson who raised the question of ‘daily’ overtime, pointing out that the company could not require an employee to work more than 8 hours in a day.” The assistant personnel director “agreed with that, but pointed out that that could simply mean having to schedule Saturday overtime.” In response Cuthbertson stated that he had decided not to work any overtime. The other employee also made his refusal final and both were terminated that day. At the hearing neither contested statements in their “‘exit in-

\[198\] Outboard Marine Corp. of Canada at 5.
\[199\] Outboard Marine Corp. of Canada at 5-6.
\[200\] Since May 19, 1985 was in fact a Sunday, the date may be a typographical error.
\[201\] Outboard Marine Corp. of Canada at 6-7.
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terviews" that they acknowledged that overtime work was required, but that they did not want to work it, and preferred to seek work elsewhere.202

The case came to the EPB not on the hours issue, but on the question of whether Outboard Marine had violated the ESA by failing to give the workers the eight and four weeks' notice (or pay in lieu), respectively, on termination to which they were statutorily entitled, unless they had been "guilty of wilfull misconduct or disobedience...that has not been condoned by the employer."203 The referee decided that the workers had in fact been wilfully disobedient because they had refused to "give the situation a try, to see if the demands that it produced upon them were (adopting their own test) in fact unreasonable. Rather, each took the position...that they were not prepared to work any overtime because of the concern each...had for the impact that overtime might have on their personal lives." To be sure, from an individual employee's perspective "there may be any number of reasons why a particular job may become unsatisfactory.... But the company having had the contractual right to require some overtime...the decision to refuse to work any overtime at all was not one" the workers "were entitled to make and insist on retaining their current job...."204

Regardless of whether the unwritten and (presumably unilaterally imposed) individual employment contract entitled the workers or the employer to refuse or demand the performance of overtime work, the question is why the workers' entitlement to termination notice was not decided on the basis of the employer's unlawful demand that they work more than eight hours per day against their will. It is true that, since their normal workweek was only 40 hours, if the employer had demanded that they, and they had refused to, work Saturday overtime of up to eight hours, they would have had no basis under the ESA to refuse, and in that case the interpretation of the reasonableness of their refusal under the contract would have been relevant. But their refusal to work overtime on Saturdays was merely speculative because the employer had not yet made that demand: they were in fact fired for having refused to work more than eight hours on their regular work days. Once they had refused, it became unlawful for the employer to insist that they choose between overtime and their job; in fact, the statutory entitlement to say No was designed precisely to override employers' overwhelming power to make good on such a demand. The EPB's decision, in agreement with the employer, to frame the issue as non-statutory was especially ironic in light of Cuthbertson's express reliance on the EPB's own publication as authority for his refusal to work more than eight hours.

202 Outboard Marine Corp. of Canada at 7-8.
204 Outboard Marine Corp. of Canada at 10-11.
In contrast to the absence of cases from the nonunion sector, the number of union-sector reported disputes is large. Though considerable, the volume of arbitral decisions regarding overtime is small as a proportion of all arbitrations and even declined as overtime rose, from 7.7 percent in 1975 to 3.6 percent in 1983. Moreover, reflecting “the ambivalent attitude of employees to overtime,” compulsory overtime accounted for only 14 percent of all reported arbitration awards between 1980 and 1986, compared to the 25 percent accounted for by the entitlement to and distribution of overtime.

In order to understand the surprising “revolution” that the statutory right to refuse to work hours in excess of eight per day or 48 per week brought about in unionized workplaces, it must be borne in mind that, in the absence of statutory intervention or specific treatment in a collective bargaining agreement, Canadian labor arbitrators “are generally agreed that...the employer has the right to schedule overtime assignments as required and that such assignments are to be regarded as being compulsory,” though even then a worker “may still be exonerated for a refusal to work an overtime assignment if...he had a legitimate and reasonable personal excuse....” Once the legislature intervenes, however, and imposes maximum daily or weekly hours, the compulsory overtime regime in unionized workplaces becomes unlawful unless the union as the workers’ agent has agreed to employers’ overtime requirements. The question in arbitrations and court cases—generated by grievances filed by workers who either were disciplined for refusing to work overtime or obeyed the order and grieved afterward—has centered on what type of contractual language qualifies as adequate consent where employers had valid overtime permits. Despite an early “landmark” decision on the matter by the Supreme Court of Canada, the reported de-

205 Working Times at 74-75.
207 Working Times, tab. 9.3 at 75.
210 For a case involving an employer that lacked such a permit, see National Starch and Chemical Co. (Canada) Ltd. and Canadian Union of Distillery Workers, 11 Labour Arbitration Cases (2d) 288 (1976).
decisions, though predominantly requiring specificity in collective bargaining agreements and thus upholding workers’ right to refuse—at least apart from cases involving statutory emergencies—have remained conflicting.

In the final years of the Hours of Work and Vacations with Pay Act (1966-68), several arbitrations inaugurated discussion of the possible impact of the statutory imposition of maximum hours on workers’ obligation to perform compulsory overtime under collective bargaining agreements and arbitrators’ jurisdiction to interpret such agreements in part by reference to the statute. The issue first arose in two (unreported) arbitrations involving the Ford Motor Company and the UAW, in which the union argued that, because the employer’s overtime demands violated the statute, the workers could not be disciplined for refusing to obey them.

In another Hours of Work Act arbitration in 1968, the last year that law was in effect, J. A. Wilson Display Ltd. suspended for one day without pay three workers who had refused to work overtime on short notice to deal with a production bottleneck. One of the workers, who was also president of the Electrical Workers local union executive, gave as her reason for refusing her feeling that she should not work overtime while co-workers were laid off. Despite the fact that the collective bargaining agreement merely stated that its normal hours of work provision “shall not be construed as limiting the right of the Company to request any employee to work any specified number of hours either per day or per week,” a majority of the arbitration board interpreted “request” as intending compulsory performance of overtime work. The board then rejected the union’s argument that the suspensions violated the Hours of Work Act, thus entitling the

212 Why, despite so many adverse decisions, firms continue to litigate this issue is unclear. Canadian counsel to the United Steelworkers, the union that has most frequently challenged employers with regard to the issue of consent under the ESA in reported arbitrations, speculated that employers’ adamance may simply be rooted in its sensitiveness to all matters impinging on management rights. Telephone interview with Paula Turtle, Canadian counsel, United Steelworkers, Toronto (Feb. 27, 2002).


214 Parry, Employment Standards Handbook at 5-8, asserts that “conflicting arbitral decisions appear to be rooted in opposing philosophical opinions” without identifying them.

215 In the first case, the arbitrator “Judge Lang applied the Act...to the collective agreement. That award was quashed on certiorari by the Ontario Court of Appeal apparently because it did not decide the question before the board and the case was returned for arbitration by Judge Fuller. That second decision involved limited terms of reference and is not relevant here.” International Union of Electrical Workers, Local 566, and J. A. Wilson Display Ltd., 19 Labour Arbitration Cases 352, 358 (1968).
workers to refuse to engage in acts that would make them co-participants in the illegality. It took the position that the statute's penalty for employees who violated the law did not apply to workers who were not voluntarily working overtime, but only under a disciplinary threat. Procedurally the board ruled that the collective bargaining agreement provision denying the board any jurisdiction to change any of its provisions was precise enough to prohibit the board from considering an alleged statutory breach.  

A major step toward acceptance of the subordination of collective bargaining agreement arbitrations to statutory hours regulation was marked by Professor Paul Weiler's (quasi-reported) 1969 decision in a dispute between Lake Ontario Steel Company Ltd. and the United Steelworkers of America involving two-day suspensions of two workers who had refused to work overtime. Management had instructed the workers near the end of their shift to work about one hour of overtime on a rush order that otherwise (because of a mill changeover) could not have been completed for three days. Because failure to complete the order that day would, in addition, have caused cancellation of a later shift and might have required some steel to be scrapped (and in fact the lack of a full complement of workers caused the overtime work to take 15 minutes longer), Weiler held the employer's scheduling of overtime to be reasonable, but nevertheless found it difficult to characterize the circumstances as constituting an "emergency in the sense of an unforeseeable, fortuitous occurrence," especially since the firm's announced policy had alerted workers to the possibility of required overtime in connection with every Friday night shutdown. Although the collective bargaining agreement did not expressly state whether overtime was mandatory or voluntary, Weiler noted the longstanding arbitral presumption that "overtime is compulsory...in the absence of a reasonable excuse." After observing that the two aforementioned Ford Motor Company arbitration decisions had concluded that the maximum hours provision in the Hours of Work Act served to reverse that presumption, Weiler pointed out that the same arbitrator who had taken the opposite position in *J. A. Wilson Display Co. Ltd.* had in an earlier (unreported) case involving the USW and Lake Ontario Steel Company "in principle" held the statute to "make overtime voluntary." Consequently, Weiler concluded that because "prima facie an employee has the right to refuse to work overtime," he could not be disciplined for insubordination. Moreover, dismissing the implausible reason that one of the workers had given the foreman for not wanting to work overtime, Weiler held that the "real justification" was the worker's belief that overtime was

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217 Though not reported in Canadian arbitration reports, the USW published it in its *Union-Management Arbitration Cases*. 
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voluntary and that the earlier arbitration decision “must have been” the “basis” on which the workers had “relied.” Finally, in addition to rejecting the employer’s claim that the work fell within the statutory emergency overtime provision, Weiler ruled that even if it had been possible to construe the situation as an emergency, the workers’ behavior had failed to rise to the level of the statutorily required “serious interference with the ordinary working of the undertaking.”

In the wake of the enactment of the ESA in 1968, the first arbitral interpretation of the interaction between the new law and collective bargaining agreements lacked analytic subtlety. In the 1971 case of United Steelworkers, Local 2894, and Galt Metal Industries Ltd., which the Supreme Court of Canada eventually decided, a shop steward had informed his supervisor several hours ahead of time that he intended to leave at 4:30 p.m. rather than work overtime until 5:00 p.m. because he had already worked 48.75 hours that week and, by virtue of the ESA, could not be compelled to work any longer; for leaving at 4:30 p.m. the employer suspended him for three days. Because the collective bargaining agreement provision defining the standard workweek as consisting of five eight-hour days and specifying overtime rates contained no “limitation upon the power of the company to schedule overtime,” the arbitrator concluded that under the management rights clause giving the employer the right to schedule its operations as it deemed advisable, “it is beyond dispute that...overtime is compulsory.”

After the union pointed to the aforementioned arbitration decisions from the 1960s under the repealed Hours of Work Act stating that overtime provisions in collective bargaining agreements had to be read subject to that statute, the arbitrator tentatively assumed that he had jurisdiction to interpret the new ESA, despite the fact that the collective bargaining agreement limited his authority to interpreting the latter’s express language. The arbitrator then observed that, since the older act lacked the language under which a worker was not required to work hours in excess of the maximum hours without the consent or agreement of the employee’s agent, those earlier arbitration decisions had to be read with that

220Ironically, a quarter-century later the Conservatives amended the ESA to make it enforcible through arbitration against unionized firms as if it were part of the collective bargaining agreement; workers were deprived of the right to file complaints with the Labour Ministry and were bound by their union’s decision as to whether to seek enforcement of alleged violations. An Act to Improve the Employment Standards Act, § 18, Ontario Stat. 1996, ch. 23, at 685, 689-92. These amendments were then carried over to the new ESA. An Act to Revise the Law Relating to Employment Standards, §§ 99-101, at 857-60.
significant distinction...in mind." The effect of those additional words, in the arbitrator's view, was "to leave the question as to whether overtime is voluntary or compulsory for determination under the collective agreement.... That being so, the finding made earlier herein that the collective agreement provides that overtime is compulsory remains unaffected by" the ESA.221

Because that approach clearly rendered the ESA nugatory, it opened the way to judicial revision. As Galt Metal Industries was wending its way through the judicial system, Professor Weiler issued a reported arbitration decision in 1972 upholding an arbitration board's jurisdiction to consider the ESA in evaluating discipline meted out to workers for refusing to work overtime, but nevertheless effectively negating the ESA's impact on collective agreements. Weiler found that the overtime provision in the collective bargaining agreement did confer power on management to schedule compulsory overtime because it provided that where the company "may require an employee to perform in excess of his regularly scheduled hours, the Company will undertake to give him reasonable advance notice...."222 Weiler then found that it was permissible to use the ESA to interpret the agreement in order to avoid illegal outcomes, especially since a worker "would be committing a personal offence" by obeying an unlawful order to work overtime and such obedience is not a defense to a criminal charge. The employer had a valid overtime permit and the workers in question had not yet worked their 100 annual overtime hours, but the question still remained as to whether the union as their agent had given its consent or agreement to compulsory performance of overtime work by virtue of the collective bargaining agreement. In his short-circuited argument, Weiler asserted that although the ESA "is not artistically drafted to make the answer clear, we would answer in the affirmative" because the board had already determined that the contract contained an "explicit 'agreement' for compulsory overtime." He did, however, leave open the question, not raised by the case in his view, of whether the mere "implication that the reserved powers of management to schedule compulsory overtime are continued" would also satisfy the ESA's requirement of union agreement.223

In the meantime, the arbitration award in Galt Metal Industries had been quashed by a judge who held that management's normal right to demand over-

221United Steelworkers, Local 2894, and Galt Metal Industries Ltd., 23 Labour Arbitration Cases at 35-36. The arbitrator, who was citing the older statute second-hand from earlier decisions, erroneously believed that he was quoting § 5(2) of the Hours of Work and Vacations with Pay Act, whereas in fact he was quoting the regulation.


time work had been limited by the ESA: the employee was entitled to determine whether to agree to longer hours. Since the collective agreement did not contain such a consent, the arbitrator had impermissibly varied the agreement by reading that consent into it.\(^{224}\) The Ontario Court of Appeal set aside that order without indicating how it would have decided the case had it been construing the disputed language. Instead, it merely ruled that the law in Ontario clearly precluded finding legal error in an arbitration award where the issue in dispute was a matter of construction and the language would reasonably bear that construction.\(^{225}\)

Then in 1974 the Supreme Court of Canada found that “the arbitrator did not find in the agreement anything which could be construed as a specific consent to overtime beyond the statutory limit of 48 hours.... What he relied on was an agreement that the Company could require overtime work beyond the total of 40 hours per week stipulated in the collective agreement.”\(^{226}\) In contrast, the Supreme Court held that the requisite consent or agreement must relate specifically to the performance of work by the employee beyond the normal statutory limits. There is no such consent or agreement to be found in...the collective agreement. ... By the operation of the statute, the right to require overtime beyond 48 hours per week from any individual employee had been taken away from the employer and became subject to the rights of the employee under s. 11(2).\(^{227}\)

Because the Court found that nothing in the contract could “possibly be construed” as satisfying the statutory requirement of consent or agreement, it left undecided the question as to “whether this particular consent can be given by a collective agreement.”\(^{228}\) Thus, apart from this much more expansive issue of whether any contract could embody the requisite consent, Supreme Court laid down what seemed to be a clear guideline for understanding the interaction between the ESA’s right to refuse overtime and the overtime provisions of a collective bargaining agreement.

Nevertheless, as the leading Canadian treatise on labor arbitration noted, “the issue of what may properly be characterized as consent has already been and will likely continue to be a matter of some debate.”\(^{229}\) Initially, and until about 1980, arbitration boards and courts applied the Supreme Court’s guideline strictly. For

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\(^{224}\)McLeod v. Egan, 46 Dominion Law Reports (3d) 150, 154 (Sup. Ct. Canada 1974) (paraphrasing the judge’s opinion).

\(^{225}\)McLeod v. Galt Metal Industries Ltd., 2 Ontario Reports 602 (1972).

\(^{226}\)McLeod v. Egan, 46 Dominion Law Reports (3d) at 154.

\(^{227}\)McLeod v. Egan, 46 Dominion Law Reports (3d) at 155.

\(^{228}\)McLeod v. Egan, 46 Dominion Law Reports (3d) at 155.

\(^{229}\)Brown and Beatty, Canadian Labour Arbitration at 454.
example, in a case involving a collective bargaining agreement that the arbitrators viewed as making overtime "compulsory," they nonetheless recognized that that finding was not "dispositive" of the issue because the contract was subject to the ESA. The collective bargaining agreement did not purport to express the worker's or the union's consent to work hours beyond those permitted by the ESA; instead, it "merely preserves the prerogative of management to schedule employees as it deems proper." Because the agreement lacked the requisite specific reference to the ESA, the "Act takes precedence over such general provision."230

Another arbitration board found that a collective bargaining agreement provision in which the union agreed that "the proper operation of the business will require overtime work periodically and that the employees will cooperate fully in the matter" did not constitute the statutorily required consent.231 The Ontario Divisional Court even expressed "considerable doubt" as to whether "the required consent can be given in a collective agreement...."232 Yet another arbitration board that found that a collective bargaining agreement providing that overtime was voluntary only for weekends lacked the requisite specificity, also ruled that, where an employee had answered No to a question on his job application form asking whether he objected to overtime work, the form failed to "disclose with sufficient specificity that the employee...in effect waives his rights under" the ESA, which "are not to be lightly taken away...."233

Finally in 1980-81234 an influential arbitration (Algoma Steel Corp.) and court decision (Walker Exhausts), both involving the United Steelworkers, rejected the position that to constitute consent a collective bargaining agreement had to refer specifically to the ESA.235 After several arbitrations had adopted this new po-

230Adams Mine Cliffs of Canada Ltd and United Steelworkers, 8 Labour Arbitration Cases (2d) 204, 208, 210 (1975).
231Dominion Stores Ltd and Retail, Wholesale and Department Store Union, Local 545, 17 Labour Arbitration Cases (2d) 52, 54 (quote), 57 (1977).
233Dashwood Industries Ltd. and United Brotherhood of Carpenters and Joiners, Local 3054, 24 Labour Arbitration Cases (2d) 237, 240 243, 244 (1979).
234An earlier arbitration, Ingersoll Cheese Co. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 458, 10 Labour Arbitration Cases (2d) 268, 272 (1975), had ruled against a worker on the grounds that, by virtue of his conduct and the long established practice in his department of working overtime, he had "tacitly consented to work overtime when he accepted the assignment to work" in that department and "knew what was expected of him."
235Algoma Steel Corp. v. United Steelworkers of America, Local 2251, 28 Labour Arbitration Cases (2d) 31 (1980); Walker Exhausts and United Steelworkers of America. Local 2894, 32 Ontario Reports 507 (Divisional Ct. 1981).
In 1998 the Ontario Arbitration Board in *Ontario Hydro* ruled that both the Supreme Court and the *Walker Exhausts* court had held that “the language relied upon as constituting consent or agreement must evidence a clear intent to relinquish the statutory right of affected employees to refuse work beyond the statutory maximum.” To be sure, such intent could be evidenced by a reference to the statute, the hours permit, or “to the specific hours beyond the statutory maximum that are compulsory,” but: “Language that simply makes overtime compulsory, where either the daily or weekly hours of work are less than the statutory maximum, is not sufficiently specific and, therefore, is equivocal with respect to whether the intent was to give up the statutory right to refuse work beyond the statutory maximum.”

In 2001 another arbitrator was called on to interpret contract language that expressly and precisely confirmed the employer’s power to impose overtime work: for example, the rather detailed hours provisions in the collective bargaining agreement between DDM Plastics, Inc. and the International Association of Machinists (IAM) stated that it was “understood that Customer and business requirements may make it necessary to work hours other than” the normal eight-hour day, “which shall not constitute...a limitation upon the scheduling of employees for work.” More specifically, the contract provided: “The parties recognize that the needs of the Business will require overtime work and it is understood that employees will work overtime as required by the Company.” Moreover, whenever all employees declined the employer’s request to work overtime on a rotational system, “the company shall have the right to require overtime commencing with the employee with the least seniority.” Nevertheless, building on *Ontario Hydro*’s “unanswerable” analysis and reasoning, the arbitrator found the alleged waiver of statutory rights too ambiguous or equivocal to meet the test set by the ESA. In allowing the union’s grievance, which raised the question of the employer’s violation not of the contract but of the ESA, the arbitrator stressed:

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236 E.g., Robert Hunt Corp. and United Brotherhood of Carpenters and Joiners of America, Local 3054, 4 Labour Arbitration Cases (3d) 14 (1982). The arbitrator in Richmond Die Casting Ltd. and the Canadian Automobile Workers, Local 1994, 44 C.L.A.S. 197 (1996) (Lexis), decided the matter in the employer’s favor apparently unaware of the Supreme Court’s decision.


239 DDM Plastics Inc. and International Association of Machinists and Aerospace Workers, Local 2792, 94 Labour Arbitration Cases (4th) at 228, 229.
Given the public interest component of the principle of a maximum 48-hour workweek, it seems to me reasonable to expect that any derogations from that principle that are allowed by Ontario legislation should be narrowly construed and strictly proved. It is one thing for an arbitrator to conclude that a bargaining agent has implicitly agreed to forego rights provided for in the collective agreement, since the bargaining agent and the employer created those rights in the first place, but quite another...to conclude that statutory rights, enacted in the public interest and with underpinnings in public international law [as expressed in Canada's ratification of the International Labour Organization's Hours of Work Convention], have been waived.240

To be sure, the IAM had unambiguously consented to mandatory overtime, but the contract failed to address the issue expressly of whether mandatory overtime beyond 48 hours weekly was permissible or not. And although there was some extrinsic evidence that, under the employer's just-in-time system producing bumpers for the automobile industry, "the parties must have envisaged that employees would be subject to more mandatory overtime, including overtime that would lead to workweeks of more than 48 hours," such an invitation to the arbitrator to find an implied term by which the union consented to waive the workers' statutory rights fell far short of the requisite express waiver.241

In another case in 2001, an arbitrator further weakened the force of Walker Exhausts by interpreting it to mean that "to override an employee's statutory right to refuse overtime, the language must unequivocally evidence such an intention"; and to the extent that there was a line of cases asserting that the requisite consent could be found in a compulsory overtime clause making no reference to the ESA, the hours permit, or any other wording "specifically ousting an employee's statutory right not to work more than forty-eight hours in a week," he also declined to follow it.242 Thus despite the fact that workers for at least 10 years had been voluntarily working overtime beyond the maximum prescribed in any permits, a collective bargaining agreement that merely provided that "[o]vertime work will be performed by employees when required to maintain efficient operations" failed to satisfy the standard of specificity.243

240 DDM Plastics Inc. and International Association of Machinists and Aerospace Workers, Local 2792, 94 Labour Arbitration Cases (4th) at 228-29.
241 DDM Plastics Inc. and International Association of Machinists and Aerospace Workers, Local 2792, 94 Labour Arbitration Cases (4th) at 229.
Overall, then, the Employment Standards Act has empowered individual organized workers to resist employers' imposition of overtime work under collective bargaining agreements that, standing alone, lacked terms favorable enough to have produced the same protective outcomes. However, unionized workers have not succeeded in expanding the right to refuse into a collective right to refuse overtime work that exceeds the statutory maximum but is covered by a government permit. Thus, for example, a Canadian Automobile Workers local acknowledged this gap when it distributed a circular to members advising them that while they retained the "personal" right to refuse to work overtime, "such individual decisions are much different than refusing to work overtime as a group," which "would be a violation of...The Labour Relations Act and is not supported by the Union." Consequently, union workers have failed to overcome the prohibition in the Ontario Labour Relations Act of union bans on overtime work—which have been interpreted as strikes during the pendency of a collective bargaining agreement.

In contrast, nonunion workers in Ontario appear to have been able to make little if any use of their statutory right to refuse to work overtime, in large part because the provincial Ministry of Labour has not sought to secure judicial reinstatement of workers who were fired for having exercised that right. On the other hand, by generously and automatically permitting employers to exceed the eight and 48-hour maximums, the statute and the Labour Ministry facilitated a level of working-time "flexibility" that, at least in the de facto unprotected nonunion sector, may have left firms as well-positioned as if there had been no maximum hours law at all. The principal remaining constraint—the obligation to pay time and a half after 44 hours—is not only less onerous than the 40-hour threshold in the United States, but has in part been eliminated by the hours-averaging amendments introduced in 2000.

245The Labour Relations Act, § 1(1), Rev. Ontario Stat. 1990, ch. L.2, at 851, 853, defines a strike as including a refusal to work or to continue to work by employees in combination or in concert or in accord with a common understanding.
The right to refuse to work overtime, as the example of more than a half-century of experience in Ontario demonstrates, is not an unambiguously positive instrument of achieving a normal working day or week. Because the laissez-faire underpinnings of the right to say no are inextricably linked to the right to say yes, its libertarianism not only makes it possible for workers to become complicit in the race to the bottom that compulsory labor norms are designed to prevent, but also makes effective enforcement against employers intent on using subterfuges to transmogrify coercion into consensualism difficult and sometimes impossible. These perverse outcomes should be contrasted with the operation of an absolute maximum-hours law, which is designed to create an “overwhelming societal obstacle” to such transgressions.248

The question raised in 1987 about the maximum hours standard by Kinley, the Ontario Task Force on Hours of Work and Overtime researcher, has thus proved to be prophetic:

Reduced hours of work in the community, exemptions, and permits to exceed the hours standard have reduced its relevance to such an extent as to render it of no effect across much of Ontario industry. Might a guideline more relevant to existing conditions reinforced by a strong premium rate policy be a more effective approach to hours control?249

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249 Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 29.