

## Overtime - Not What it Used to Be

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Ordinarily, the payment of overtime to employees is a straightforward affair. Alberta's *Employment Standards Code* [the *Code*] tells us that employees exceeding the daily or weekly maximum hours are entitled to overtime pay. However, managers and supervisors are not entitled to receive overtime pay.

Those plain statements disguise potentially complex questions. When is a manager really an employee? What if an employment contract doesn't mention overtime? Can employees bring civil actions to claim for overtime pay? Two recent Court decisions may impact how these questions are answered in Alberta.

In *Re Nygard International Partnership Associations*, [2006] M.J. No. 366 (C.A.)(QL), Sharon Michalowski was a "retail merchandise supervisor", earning a contracted salary that was "inclusive of all hours required to be worked" to fulfill her duties. There was no mention of overtime pay. When she resigned, Michalowski's own time records revealed that she had worked 284 hours more than Manitoba's maximum hours. She claimed those hours as overtime from Nygard.

The Manitoba Court of Appeal made three key findings in awarding Michalowski the overtime she claimed. First, despite her job title, they found that she was actually an employee, not a supervisor. The important issue was what she was actually doing when performing her work. The Court held that her actual supervisory responsibilities were minimal. She was therefore entitled to claim for overtime pay.

Second, employees are entitled to know, prior to starting their employment, the wage they will be paid and the hours required of them. The Court found that Michalowski's contract for a salary "inclusive of all hours to be worked" was actually an improper attempt to contract out of the overtime provisions in the Employment Standards legislation.

Third, even though there was no specific mention of overtime in Michalowski's employment contract, she was nonetheless entitled to receive overtime pay under the legislation. The Court then effectively incorporated the overtime pay provisions of the legislation into Michalowski's contract of employment, and awarded her the overtime pay she claimed.

A similar situation arose in *Macaraeg v. E Care Contact Centers Ltd.*, [2006] B.C.J. No. 3211 (S.C.)(QL), where the Court was asked to determine whether the overtime pay requirements in British Columbia's employment standards legislation formed implied terms of an employee's contract of employment. Again, Macaraeg's contract did not explicitly mention overtime pay. Following a detailed review of the case authorities, Justice Wedge found that rights conferred on employees by statute are implied by law into employment agreements, regardless of the subjective intentions of the employer or employee. He therefore upheld Macaraeg's claim for overtime benefits based on the statutory minimums.

The second issue was whether Macaraeg could claim for overtime pay in a civil



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action against the employer, or whether she was limited to the administrative procedures described in the legislation. British Columbia's legislation preserves the rights of an employee to bring a civil action, even though the Act had other potential mechanisms in place to assist employees. The Court therefore found that the Director of Employment Standards did not have exclusive jurisdiction over claims arising under the Act, and that Macaraeg was entitled to make her claim for overtime through the civil courts.

How will these decisions impact the Alberta employment landscape? As in *Nygaard*, Alberta employers should be aware that a job title alone will not decide whether an individual is an employee or manager. Care should be taken in drafting employment contracts and assigning work to ensure that your managers are indeed managing. If they are not, and are in fact performing work as employees, they may be entitled to claim for overtime pay.

More significantly, these cases indicate that the Courts will strictly enforce employment standards to protect employees even when contracts may not mention overtime pay. Section 4 of Alberta's *Code* makes it clear that the minimum standards it describes cannot be avoided by agreement. It now appears that the minimum standards also cannot be avoided by silence.

In addition to existing Alberta authority that supports *Macaraeg* (see *Gordon v. CAM Distributors Ltd.*, [2002] A.J. No. 1130 (Q.B.)(QL), section 3 of the Alberta *Code* states that nothing in the *Code* affects any civil remedy of an employer or employee – wording very similar to that considered by Justice Wedge of the British Columbia Supreme Court in *Macaraeg*. This indicates that Alberta employees will be able to claim overtime pay in civil actions, and not just through the Director of Employment Standards.

Both *Nygaard* and *Macaraeg* rely heavily on first principles – particularly the presumption that the rights of all employees under employment standards legislation should be strictly protected. Those principles would likely be equally compelling to an Alberta court – which means that Alberta employers should take notice.

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