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Feature

Travel Time as Work Time? Nature and Scope of Canadian Labor Law's Protections for Mobile Workers

Dalia Gesualdi-Fecteau, Delphine Nakache, and Laurence Matte Guilmain

Abstract

The spectrum of employment-related geographical mobility ranges from hours-long daily commutes to journeys that take workers away from home for an extended period of time. Although distance and travel conditions vary, there is a strong consensus within existing literature that mobility has physical, psychological and social repercussions. However, is time spent travelling considered as working time? This question is crucial as it dictates whether or not workers can effectively access different sets of labor rights. The objective of this paper is twofold. First, contributing to a deeper understanding of travel time by offering a more sustained and complex representation of the various employment-related travel schemes. Second, assessing the circumstances under which travel time counts as work time with regards to the employment standards legislation in force in four Canadian provinces : Quebec, Ontario, Alberta and British Columbia.

Keywords: Mobility, Working time, Travel Time, Working conditions, Employment standards

Introduction

Distances travelled to work, and the time spent in transit, are increasing globally across many sectors in both rural and urban contexts. The spectrum of extended employment-related geographical mobility (E-RGM) ranges from hours-long daily commutes to journeys that take workers away from home for days, weeks, months, or even years. Canada is no exception to this phenomenon. In Canada, “journeys to and from work are becoming more sustained and complex in terms of time spent travelling, distance travelled, number of stops along the way, and time spent away from home.”¹ Intra- and inter-urban daily commuting is widespread, as well as rural–urban and urban–rural commuting. Inter-provincial travel for work is also common in the Canadian context and many Canadians, particularly those working in remote workplaces, engage in Fly-in/Fly-out, Drive-in/Drive-out, or Bus-in/Bus-out schemes.¹⁻⁵ Furthermore, a growing number of temporary foreign workers (TFWs) from an increasing number of countries are employed in Canada to meet labor needs in both high- and low-skilled occupations. This number increased drastically from 1995 (50,000) to 2017 (370,000).^{1,6}

There is a strong consensus within the existing scholarly literature that E-RGM should be distinguished from permanent relocation: indeed, temporariness is a key-element in the conceptualization of E-RGM.^{2, 3, 7} Workers who engage in extended E-RGM (mobile workers) have various employment statuses and experience a wide range of working conditions. They may work on a full- or part-time basis and their employment can be seasonal (agricultural, forestry, tourism) or temporary and short-term as in many parts of the service sector. They may work in fixed locations (offshore oil and gas installations or mines), transient worksites (as with construction and tree-planting), mobile workplaces (as in airlines, trucking, and seafaring), or multiple workplaces (as with homecare). They may be on-call or may have an irregular or interrupted work schedule; their wages may be based on piecework, an hourly rate, or they may receive a fixed salary, determined on a daily, weekly, monthly, or annual basis.

Given the increase in extended E-RGM, its diversity and the diverse modes of transportation and types of work it includes, a key question is whether time spent travelling is to be considered work time

and thus compensated and protected by employment standards. From a labor law perspective, determining whether and when time spent travelling by workers counts as work time will have repercussions for workers' remuneration and related benefits, such as the possibility to resort to legal provisions limiting the duration of work as well as overtime and vacation pay calculations. It will also influence protections found in health and safety law and the ability of injured and ill workers and their families to access workers' compensation benefits for travel-related injuries and illnesses. Thus, the objective of this paper is twofold. First, we want to contribute to a deeper understanding of travel time by offering a more sustained and complex representation of the various employment-related travel schemes. Secondly, we want to assess the circumstances under which travel time counts as work time. Part I presents a conceptualization of existing travel schemes and presents an overview of the numerous social and personal consequences associated with work-related travel. As we show, mobile workers are likely to experience diverse and overlapping situations in which they spend time travelling. Part II presents and analyzes the applicable employment standards legislation and case law in four Canadian provinces (Quebec, Ontario, Alberta, and British Columbia),^a allowing us to better circumscribe when travel time is generally considered as work time.

Conceptualizing travel time in work-related contexts

E-RGM refers to mobility to, from, and between workplaces, as well as mobility as part of work.⁸ Some E-RGM schemes also include rotational cycles of weeks or months at work, "circular migration" or "pendular migration."⁸

Across the spectrum of E-RGM, travel time can range from daily commutes to seasonal or continuous mobility. E-RGM can lead to better jobs for workers and to an improvement in family incomes,^{2, 3, 9, 10} but research also suggests that extended E-RGM often has negative impacts on workers' physical and mental health. Some studies have highlighted the significant link between mobility and cardiovascular risk, transport injuries and fatalities, and occupational injury and illness.^{3, 9} Such injuries can result from driving for extended hours and also from exhaustion that is a direct

consequence of such mobility patterns. Indeed, several studies on long-distance commuters, whether they must undergo daily long-distance commuting or "circular" or "rotational" commuting, have shown that long commutes can lead to disrupted sleeping patterns and trigger feelings of loneliness.¹¹ A recent study on the hypermobility of highly-paid professionals highlighted that although the negative impact of their mobility was less important than for low-paid workers, such hypermobility exposed them to various physical, psychological, and social consequences. Hypermobile professionals suffer the side effects of jetlag, frequent radiation, and stress due to transportation schedules.¹²

There are also important work-life balance challenges faced by long-commute workers. A growing body of literature illustrates the numerous consequences of unbalanced work-family relationships (e.g., anxiety, depression, and distress; emotional and physical exhaustion), and how they lead to lower job productivity, poorer work quality, higher absenteeism, staff turnover, and family disruption.¹³⁻²³ A Statistics Canada study conducted in 2010 shows that the percentage of workers satisfied with their work-life balance decreases as the duration of their daily commute increases, and this, to the point where some workers who travel for more than forty-five minutes to get to and from work admit not being able to take on family responsibilities anymore.²⁴ A fair load of pressure is then transferred onto the family as a whole, and the stress of the spouse who will be mostly responsible for chores and child care can disrupt the family unit.^{3-5, 7, 25} A very recent study also highlights the repercussions of extended commuting and family care responsibilities for Canadian workers employed in the home health care, air transport, and higher education sectors.²⁶

Finally, the lack of socialization time can also affect the worker's sense of community.^{3, 25} Indeed, circular mobility patterns have an impact on "home communities."⁴ In addition to the dwindling population available for paid and volunteer work, including the loss of skilled workers, several communities in Canada with large mobile labor forces are faced with a lack of public services and lack of vitality within their communities.^{3, 4, 25} Conversely, this flow also causes an increase in demand for housing and housing costs in "host communities."²⁷ Despite an increase in demand for services

provided by the host community, economic benefits for such communities may be only temporary or minimal.²⁷ For example, a study conducted in Fort McMurray in the height of the oil boom showed that mobile workers spent only 5.6% of their annual income in the host community.^{2, 28} Thus, there are personal and social impacts associated with E-RGM: its repercussions are felt in various employment settings, with great variations in terms of wages, skill sets, and workers' sociodemographic characteristics.^{12, 26}

When is the time spent engaged in E-RGM considered as work time? Work time is generally conceptualized as a clock-measured activity defined, controlled, and compensated for by the employer. The hermetic separation between work and non-work time was introduced during the transition toward industrial capitalism. Gradually, work time became a framework and a structural principle for organizing industrial society.^{29, 30} Mobile workers are likely to spend time travelling in a variety of settings. Conceptualizing travel time therefore requires moving beyond a single and unitary understanding of what travel time entails.^b

This section conceptualizes different travel time schemes. The *first travel time* (Figure 1) encompasses the time spent commuting from home to a single, fixed workplace that remains unchanged. However, even these workers may need to travel, occasionally, to an unusual workplace to attend a training program or to report to a different place of business. Other workers travel from their home to a workplace that regularly differs from one shift to the next (Figure 1.1). Several mobile workers, such as business travelers and health care workers employed by temporary employment agencies, experience this situation.

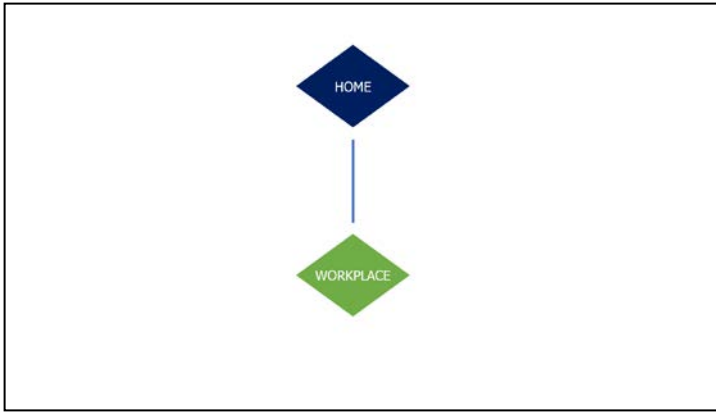


Figure 1: *Commuting scheme: travelling from home to a single fixed workplace*

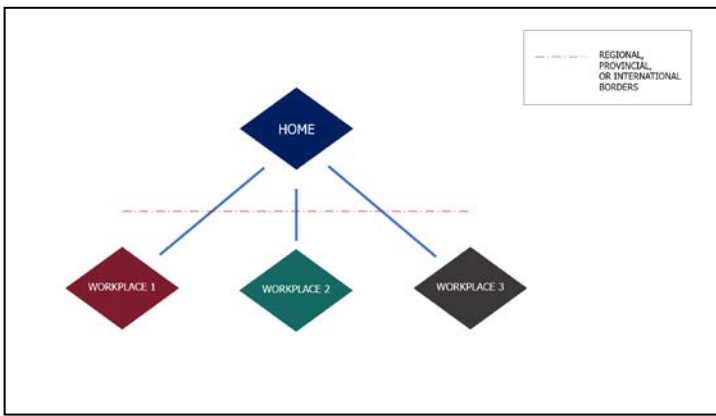


Figure 1.1: *Commuting scheme: travelling from home to various workplaces*

The *second type of travel scheme* encompasses employment arrangements where workers must perform tasks in several jobsites. This “multisite scheme” encompasses workers who commute from home to their first jobsite and then travel to different jobsites during the same shift. Health workers employed in the home care sector, as well as sales representatives are likely to engage in this kind of E-RGM (Figure 2).

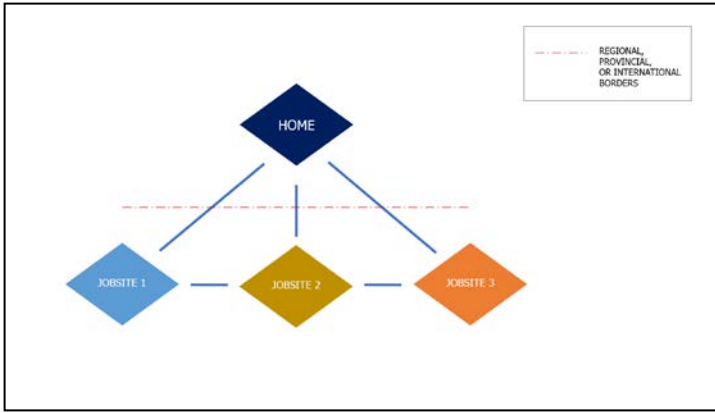


Figure 2: *Multisite scheme*

The third category (Figure 3) encompasses workers who travel in the first instance to a “marshalling point,” also called a “pick up location,” a “meeting point,” from which they journey on, often in a group, to temporary housing or to the actual worksite. There is no explicit definition of “marshalling point” in employment legislation but it can be defined as a location where employees are required to congregate prior to making the trip to the worksite or camp. Travelling to a marshalling point is common for those performing work at remote sites. Travelling to and from the marshalling point can occur daily or less frequently (weekly or monthly), before and after a work rotation. This mobility scheme is common in sectors where employment is seasonal and transportation options are limited including transient urban construction work for precariously employed workers, or when workers are employed in locations that are geographically remote as with mining, on and offshore oil and gas work, seafaring, and fish harvesting.

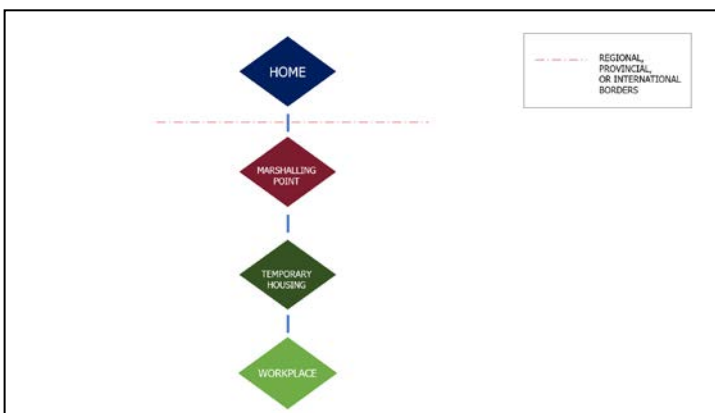


Figure 3: *Remote work scheme*

For some workers, several of the schemes outlined above overlap (Figure 4), as is the case with employees travelling to a marshalling point and then performing their work at several jobsites over the course of their shift or rotation. Workers performing house cleaning, for example, will often meet at a “pick-up” point and then travel from one jobsite to another with a group of co-workers. Workers employed in the forestry industry, where work is often performed far from communities, are also likely to travel to a “meeting point” from where they will be assigned specific jobsites and transported to those sites (or transport themselves). These overlapping schemes are further complicated when employees travel from one region to the other or across provincial or international borders while commuting or making the trip to a marshalling point or to various jobsites.

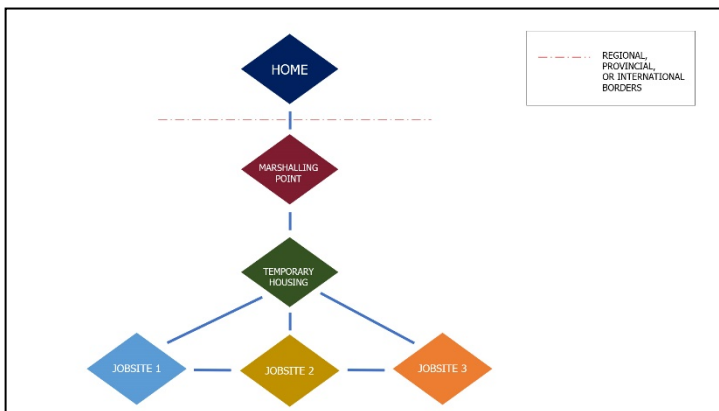


Figure 4: *Remote work scheme + multisite scheme*

We found no research that has examined travel time in relation to work time in labor law for these diverse typologies with a focus on the nature and scope of employers’ obligations. This is an important gap because for these mobile workers, determining what counts as work time has major consequences for their employment contract, which in turn affects income, reimbursement of expenses and hours of activity as well as producing potential repercussions for occupational health and safety.

Is time spent travelling work time? An analysis of the nature and scope of labor law protections regarding travel time

Employment standards are minimum standards governing the basic terms and conditions of employment (wages, vacations, statutory holidays, hours of work and overtime, leaves of absence, etc.) that neither the employee nor the employer can validly override by contract. Since, in Canada, labor law falls under provincial jurisdiction, the employment standards legal framework is different in each Canadian province and territory.^{30 c} In Canada, provinces have the exclusive power to regulate labor relations, but the federal government has exceptional jurisdiction over employment relations in sectors that fall under its jurisdiction. Federally regulated activities include inter-provincial or international transportation, radio, television, postal services, ports, telecommunications, banking, and the federal government also has jurisdiction on some crown corporations. While provincial and territorial labor laws apply to about 90% of the Canadian workforce, the remaining 10% are federally regulated.^d

When is travel time treated as working time? The boundaries between social times (family time, work time, recreation time, care work time, etc.) were gradually formalized through the introduction of legal standards aimed at creating a distinction between work time and non-work time. From a labor law perspective, work time corresponds to the “time of subordination”.³¹ outside this work time, workers are theoretically free to pursue their own endeavors without being under the direction and control of their employer.³² However, changes in the nature of work and its organization have progressively blurred the lines between work time and non-work time.³³ Workers’ subordination thus often exceeds the temporal framework of working time and the spatial framework of the workplace. For mobile workers, time spent travelling is an iconic example of this reality. Travelling in a work-related context is not necessarily carried out under the direct and immediate control of the employer but nor are workers entirely free to pursue their personal endeavors and the degree of this varies across groups of workers and types of work.

The only Canadian province that explicitly regulates travel time is Quebec. The *Act respecting labour standards* stipulates that time spent travelling at the employer’s request is deemed to be time devoted to work.³⁴ Ontario’s employment standards legislation also defines the concept of “deemed

work” but without explicit reference to travel time.^{35, 36 e} In British Columbia and Alberta, the relevant legislations do not refer to the “deemed work” concept but, instead, simply define the concept of “work” or of “hours of work.”^{37, 38} Nonetheless, in these three provinces, an analysis of policy manuals and case law reveals that time spent travelling for the benefit, or at the request, of the employer will generally be considered as work time. In Alberta, the *Employment Standards Tool Kit for Employers* explicitly mentions that an employee will be considered at work, whether being a driver or a passenger, when he or she “goes from the employer’s business or a place designated by the employer to a work site; goes from one job site to another job site; is directed to pick up materials or perform other tasks on the way to work or home.”³⁹ In Ontario, the Ministry of Labour in an official publication considers “the time an employee spends getting to or from a place where work was or will be performed (with the exception of commuting time) as working time.”⁴⁰ In British Columbia, the *Interpretation Guidelines Manual* of the Employment Standards Branch states that “travel time is considered work time when “an employee is acting on instructions from the employer and therefore providing a service to the employer when travelling to and from a work place.”⁴¹

Although the time spent travelling at the employer’s request is usually deemed to be devoted to work and hence to be work time, determining the specific circumstances under which travelling will be considered as part of the “time of subordination” is a matter of factual interpretation. In the remainder of this paper, we further explore when and why travel time is considered as work time in the following circumstances: (1) when workers commute; (2) when workers travel from one jobsite to another on the same shift; and, (3) when workers travel from their home to a marshalling point.

Considering that most provinces studied do not explicitly regulate travel time, the very little case law arising from the interpretation of employment standards legislations by provincial courts and boards is generally based on the general concept of work time, or of what is properly construed as deemed working hours. Our analysis thus also relies on case law in unionized workplaces: we include decisions interpreting travel time and work time in a broad context (e.g., when collective agreements

are silent on “travel time”) but exclude decisions in which grievances were solely based on the interpretation of a specific “travel time” provision included in the collective agreement.

Commuting scheme

It is generally accepted that “commuting time,” which means travelling from home to work, does not count as work time: reporting to work is a “job requirement”:⁴² employees are responsible for getting to work and the commute is thus seen as being done “on the employee’s own time.”⁴² If both parties have agreed to working conditions requiring that the worker travels from home to different workplaces, even if only on an exceptional basis, time spent commuting to and from the changing workplaces will not be considered as work time (Figure 1.1).⁴³ The trip to a location where “work” actually starts, and from a location where it stops, will generally not be compensated.^{44–46} Whether the commute is short or long, the scope of the commute is seen as stemming from the nature of the employment or from the specificities of the sector or industry, and will remain mere commuting.^{41, 47} Case law sometimes also equates commuting time with “preparatory time” or “pre-time” for which the employer cannot be held strictly accountable.⁴⁸

However, “commuting time” will, at times, be considered as work time. *First*, workers who are required to perform certain tasks while travelling from and to their home will, under certain conditions, be considered at work while commuting and hence be compensated. Workers required to drive a company vehicle to and from the workplace (for example, to protect the contents or to remain available for service calls beyond their normal working hours) should be paid for the commute because it is performed “under the direction and control of the employer” and to the employer’s benefit. Time spent going from home to work will also be payable if workers must “pick up materials or perform other tasks on the way to work or home,” i.e. when performing work-related duties while commuting.^{45, 49, 50} Thus, when an employee travels under the direction or control of an employer or is performing work for the employer, this time is considered work time and the employee must be paid. Conversely, if workers are authorized to leave their workplace with the employer’s vehicle but for their convenience,

the time spent commuting will not be considered work time.^{45 f} From an employment standards perspective, commuting is a “fundamental obligation of any employee” that can be done in a number of ways, including by public transportation (when available), with a personal vehicle or a company-owned vehicle. Even though commuting arrangements between workers can, at times, ease the scheduling task of employers and may come from an employer’s suggestion, carpooling does not change the fact that driving from and to home is considered to be commuting because workers can still make their own way to the worksite.⁴² However, travelling will be considered as work time when employers require a worker to transport other workers to/from work.^{51, 52}

Second, the time spent travelling from home to an unusual workplace could, under very specific circumstances, count as work time. Travelling to an unusual workplace can imply that a worker is asked by the employer to carry out a work assignment or to attend a training program, conference, orientation session, or board meeting in a location other than the usual workplace. Even if travelling to the unusual location is made mandatory by the employer,⁵³⁻⁶⁵ this does not necessarily mean that the worker will be compensated for that travel time: the commute to the unusual location will be compensated only if the worker incurs a “substantial inconvenience.”^{62, 65-69} A substantial inconvenience can result from the extra time spent commuting because the location is geographically farther than the usual workplace or because of traffic congestion extending the commuting time. Workers are likely to receive compensation based on the distance between the workplace and the unusual location, rather than from home to the unusual location, also called compensation based on “fictitious time.”⁷⁰ The analysis of the relevant case law and policy manuals also shows that workers can lawfully receive a lower rate of pay, as long as the parties have predetermined the amount of the compensation, which must be at least equivalent to the minimum wage.^{39, 41, 71-75} As noted by a 2015 Ontario Labor Relations Board decision, this is a potentially abusive practice because “different wage rates are attributed to different parts of the same position.”⁷⁶

What if the employer modifies the employment arrangements entailing longer commutes to and from work? Could such a change be considered a constructive dismissal? A constructive dismissal occurs when an employee resigns as a result of the employer unilaterally deciding to make a substantial change to the employee's working conditions. In such cases, courts will generally conclude that the employee did not resign, but has rather been dismissed.^{77, 78} In Quebec, changes to the employment conditions that require workers to travel longer or to more distant locations have been considered as "substantial" changes: case law adopts a "case-by-case" approach, and several factors are considered such as the original employment conditions, the predictability of such changes, and the direct effect on the worker's personal life.⁷⁹⁻⁸² In Ontario, case law will consider whether the original agreement between the parties precluded a unilateral change to the worker's workplace and if the proposed relocation is a "fundamental" change to current working conditions.⁸³ In 2004, the Ontario Court of Appeal found that a customer service representative was constructively dismissed when transferred to an office twice as far away from home.⁸⁴ In Alberta, courts consider whether the employer acted in good faith: if the relocation of the worker is intended "for legitimate economic reasons," such modifications to the employment arrangements will be seen as being within the employer's prerogative.⁸⁵

In sum, time spent commuting from a worker's home to the workplace is generally not considered as work time. However, some exceptions apply, mainly when the commute is occurring "under the direction and control of the employer" or for the benefit of the employer. The general rule about commuting is likely to have negative repercussions for workers who have unusual schedules, such as "split shift" employment arrangements, and for workers employed in industries or sectors that, by their nature, entail long commutes. If these workers pay for some services while commuting (such as daycare), the commuting time actually results in negative earnings.²⁶

Multisite scheme

The "multi-site" travel scheme applies to workers who travel between worksites in the same shift (Figure 2). Although time spent travelling to the first site before reporting for work is a commute, there seems to be a broad consensus in various provinces that time spent travelling from one jobsite to the other during the same shift is work time and must therefore be compensated. Workers will be "deemed "at work"⁸⁶ because they cannot meaningfully do what they wish.⁸⁷ Thus, even if workers are considered as having "voluntarily" agreed to travel to different jobsites, a series of factors will be considered in the analysis. Case law will mainly examine if time spent travelling is for the benefit of the employer and whether the employer controls the travel schedule. In Quebec, case law even acknowledges that workers can be compensated for the delays resulting from unexpected events occurring while travelling from one jobsite to another and at the employer's request.⁸⁸

Case law, however, seems to give importance to the "nature of the employment" when determining if multi-site travelling should be considered as work time. More specifically, if employees work in a "split shift" employment arrangement across jobsites, employers will not be required to consider travelling between jobsites as work time.⁸⁶ Workers performing their work in multiple locations and who have interrupted work schedules will thus be required to travel on their "personal" time. Seemingly, when the employer offers extra shifts that require workers to travel to another jobsite, the time spent will not be "deemed work" unless the worker is required to perform tasks while travelling, such as transporting tools or equipment.⁸⁹ Case law and policy manuals consider that workers are entitled to undertake personal endeavors between shifts or to refuse the extra shifts. Faced with the emergence of zero-hour contracts and employment at-will arrangements for several categories of workers,⁹⁰ it is possible that an increasing proportion of these workers will be expected to travel in a work-related context on their own time.

Thus, outside of the context of split shifts, travelling from one jobsite to the other at the employer's behest in order to perform labor or services for the employer is generally considered as work time. To what compensation are workers entitled in such cases? Case law analysis reveals that adjudicators

grant a great deal of discretion to the parties. If parties did not explicitly convene to compensate workers for time spent travelling, those remunerated on a piecework basis will likely not be paid for such time as it is assumed that their wage already includes compensation for time spent travelling.⁷⁵ Here again, travelling from one jobsite to the other is often considered to be “corollary” to the workers’ “principal duties” and can therefore justify a lower rate of pay.⁹¹

The marshalling point scheme

Some workers will have to travel to a marshalling point, also referred to as a “meeting point” a “pick up location” or a “pick-up point (Figure 3). Two sets of litigation can arise when workers travel to a marshalling point. Some decisions raise the issue of the time spent travelling from home to the marshalling point while other decisions refer to the time spent travelling from the marshalling point to the jobsite.

How does case law consider the case of workers travelling from home to a marshalling point? Unless the worker is required by the employer to travel to a marshalling point, travelling to a marshalling point will generally not be considered work time.^{75, 92–95} Here again, the nature of the employment or of the worker’s duties should also be considered. In Quebec, it has been ruled that the travel time of a forester or of a miner assigned to a remote area travelling from home to a “pick up point” should not be considered as working time.⁹⁴ Locations of the workers’ homes and the type of employment to which they commit themselves are seen as the result of personal choices over which the employer has no direct control.

Another set of litigation refers to the time spent travelling from the marshalling point to the jobsite. In such cases, case law usually distinguishes employment arrangements through which employers facilitate transportation from the marshalling point to the jobsite from employment arrangements where the employer requires workers to report to a pick-up point from which they are taken to the jobsite. Most of the time, if workers have a practical alternative means of getting to the jobsite, travelling from the “meeting point” to the jobsite will not be considered as work time.^{50, 96} If workers

are without an alternative method of getting to the jobsite, the travel time will be considered to be work time.⁹⁷ For example, if a substantial portion of the route between the marshalling point and the jobsite involves travel on a primary provincial highway on which workers could in all likelihood travel independently to the jobsite, it will likely not be considered as work time.^{39, 93}

The fact that the employer provides a vehicle is not decisive: such travel will still be considered as work time if workers have the responsibility to drive the employer-supplied transportation. The Ontario Labor Relations Board underlined that had the employer provided a bus or other means of transportation, it would certainly have paid that driver for the time spent transporting.⁹⁸ Hence, a co-worker who is assigned by the employer to undertake the responsibility should be treated the same way.

Conclusion

Travelling in work-related contexts is heterogeneous and the time spent travelling to and within work appears to be increasing in Canada and globally. Thus, determining when and why travel time is considered as work time, triggering the implementation of employment standards legislation, is not an easy task. However, this kind of determination is important because it has an immediate consequence on determining when and how much workers should be compensated for this time. A determination of whether time spent travelling counts as work time also dictates whether or not workers can effectively access different sets of rights, such as those regarding hours of work or the provisions that provide for compensation for overtime or the calculation of vacation pay. A worker injured while travelling will access workers compensation only in cases where the travel is considered to arise out of/ in the course of employment, as is discussed in more detail in Lippel & Walters⁹⁹.

Aside from a few distinctions explicitly governed by statute in Quebec, in all other provinces studied, travel time issues are determined by case law. Nonetheless, several overarching interpretation principles can be identified in all provinces, the first being the *degree of control* exercised by the

employer over the worker. Thus, when an employee travels under the direction or control of an employer, or is performing work for the employer while travelling, the employer is considered to have effective control over the worker's activities, which means that the time spent travelling will generally be considered as work time. The second overarching principle is the *nature of employment*. Case law sets forth that employees "voluntarily" agree to different employment arrangements that can entail travel that is long or complicated and thus should not be considered as work time. In this conception, which is an extension of the principle of individual freedom of choice, dissatisfied employees are perceived to be free to resign at any given time and therefore "accept" the disadvantages that come with certain employment arrangements. The question remains as to whether various categories of workers, such as those who have interrupted schedules or who work for temporary employment agencies, truly "voluntarily" accept such employment arrangements. Travelling in a work-related context can add another "layer of vulnerability" to workers who already hold precarious jobs.¹⁰⁰

How would workers view a policy recommendation forcing employers to exercise greater control over travel to and within work, thus allowing them to determine how and when travel should occur? The travel time issue sheds light on how issues of choice, freedom, and control are intertwined and how workers are likely to mobilize their agency in unexpected spaces. Different groups of mobile workers are also likely to foresee time spent travelling differently. A "one size fits all" approach to travel time as work time would probably be unsatisfactory and its concrete effectiveness dubious.

Nonetheless, under the current system it can be hard to determine when travel time is considered work time; results can be unpredictable and can be disorienting for employees. Regulators should at least define key concepts, such as "commuting" in order to rethink and reposition the drivers behind the "freedom of will" that workers are considered to exercise when choosing their employment arrangements or their place of residence.

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Notes

- a. Statistics Canada population estimates (July 1 2018): Ontario 14,193,384; Québec 8,394,034; British Columbia 4,817,160; and, Alberta 4,286,134. See: <https://www150.statcan.gc.ca/n1/pub/12-581-x/2018000/pop-eng.htm>
- b. The travel schemes that are discussed here do not capture mobile workers who travel continuously in the course of their employment, such as those working in the freight industry.
- c. Although the power to legislate on labor issues is not expressly provided for in Articles 91 and 92 of the *Constitution Act*, 1867, which lists the respective powers of the federal Parliament and the provincial legislatures, the courts have determined attribution of jurisdiction. In 1925, the Privy Council, in *Toronto Electric Commissioners v. Snider*, established the principle that labor relations directly connect to property and civil rights, which fall under the exclusive jurisdiction of the provinces under subsection 92 (13) of the *Constitution Act*, 1867. See: *Constitution Act-1867*, 30 et 31 Vict., R.-U., c. 3.
- d. The *Canada Labour Code* (R.S.C., 1985, c. L-2) defines (s. 2) a “federal work, undertaking or business” as:

- (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
- (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
- (c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
- (d) a ferry between any province and any other province or between any province and any country other than Canada,
- (e) aerodromes, aircraft or a line of air transportation,
- (f) a radio broadcasting station,
- (g) a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,
- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and
- (j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the *Oceans Act* apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act.

e. *Employment Standards Act* O. Reg. 285/01: Exemptions, special, rules and establishment of minimum wage. s. 6(1)(a)(i); this “deemed work” provision states that employees are “at work” when their employer exercises direct control over them.

- f. The Board mentions that “the rather indefinite concept of convenience (what it means, how much, to whose benefit, to what degree, etc.) is not part of the applicable legislation and has not been used in arriving at the Board’s decision in this case.”

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