

ED18.6.32

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Via Email (clerk@toronto.ca)

Mayor and Members of Council
City of Toronto
c/o Economic Development Committee
Toronto City Hall
100 Queen Street West
10th Floor West Tower
Toronto ON M5H 2N2

Dear Sirs/Mesdames:

**Re: Item ED 18.6 Holiday Shopping
City of Toronto Council Meeting, November 27 and 28, 2012**

Further to my November 7th and 23rd correspondence on the above-noted Item ED18.6, Holiday Shopping, we have looked at database searchable decisions under the *Employment Standards Act, 2000*, S.O. 2000, c.14 ("ESA") and, to the best of our knowledge, we are unaware of any reported ESA decisions where an employer has committed a reprisal contrary to Part XVIII of the ESA in relation to retail business establishments opening on statutory holidays. A summary of the application of the ESA to Holiday Shopping in the City of Toronto is attached.

Enforcement of the ESA is largely complaint driven and employees will either pursue ESA enforcement through the Ministry of Labour's Employment Standards Branch or will start a court proceeding. Given the employee-initiated nature of enforcement, it is fair to say that it is possible that employees may have complaints but have not yet made them to the Employment Standards Branch. However, since January 2011, section 96.1(1) of the ESA has required that employees, for the most part, notify their employers about a perceived violation of their ESA rights before the Director of Employment Standards will assign their complaint to an Employment Standards Officer. This change to the ESA generally ensures that employers have an opportunity to address a complaint before it proceeds through the Ministry's formal processes.

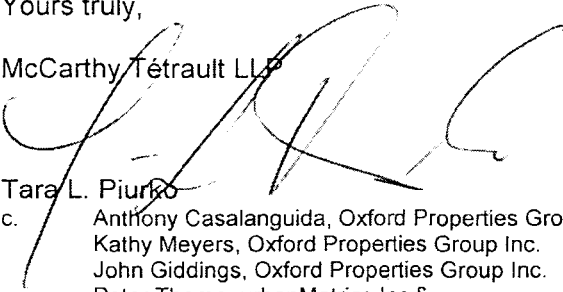
The case law available concerns appeals of Orders or findings of ESA Employment Standards Officers. To the extent that employees have exercised their rights under the ESA and have been successful in obtaining an Order against their employers, those initial decisions are not searchable. However, if ESA Orders have been made through a Standards Officer, it is arguable that the ESA's enforcement regime is functioning as intended.

It should also be kept in mind that Staff's recommendation is for voluntary holiday openings. Like the right of an employee to refuse to work on a holiday under the ESA, retail business establishments will have the option to open should the recommendation be approved. The recommendation does not mandate store openings.

Thank you for your consideration of the submissions contained herein.

Yours truly,

McCarthy Tétrault LLP

A large, stylized handwritten signature in black ink, appearing to read 'Tara L. Piurko', is written over the text 'McCarthy Tétrault LLP' and 'Tara L. Piurko'.

Tara L. Piurko

c. Anthony Casalanguida, Oxford Properties Group Inc.
Kathy Meyers, Oxford Properties Group Inc.
John Giddings, Oxford Properties Group Inc.
Peter Thoma, urbanMetrics Inc. §

Holiday Shopping - City of Toronto

Application of *Employment Standards Act, 2000*, S.O. 2000, c. 14

Should retail business establishment currently not exempt under Section 3 of the *Retail Business Holidays Act* be allowed to open on a public holiday, there are employment protection provisions in the *Employment Standards Act, 2000* for employees who may not want to work on a public holiday.

Retail Business Holidays Act, R.S.O. 1990, c. R.30 ("RBHA")

Subsection 1.1(2) of the RBHA provides that despite non-application of the RBHA to the City of Toronto Part XVII of the *Employment Standards Act, 2000* applies as if the RBHA applies to the City and to retail business establishments located in the City.

Employment Standards Act, 2000, S.O. 2000, c.14, PART XVII

PART XVII **applies to** retail business establishments (premises where a retail business is carried on); employees employed to work in those establishments; and employers of those employees (Subsection 72(1) (a) – (c)).

PART XVII **does not apply** to retail business establishments in which the primary retail business is one that (a) sells prepared meals; (b) rents living accommodations; (c) is open to the public for educational, recreational or amusement purposes; or (d) sells goods or services incidental to a business described in (a), (b) or (c) and is located in the same premises as that business (Subsection 72(2)). Exemptions for opening on a holiday are provided for such retail business establishments under Section 3 of the RBHA.

Right to Refuse Work - An employee of a retail business establishment may refuse to work on a public holiday (Subsection 73(1)). Also, an employee may refuse to work on a Sunday (Subsection 73(2)).

Notice of Refusal by Employee - An employee who agrees to work on a public holiday or a Sunday may then decline to work on that day, but only if he or she gives the employer notice that he or she declines at least 48 hours before he or she was to commence work on that day (Subsection 73(3)).

Reprisals by Employer Prohibited – Pursuant to Part XVIII of the *Employment Standards Act, 2000* no employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so because, among other things: the employee asks the employer to comply with the *Employment Standards Act, 2000* and the regulations; makes inquiries about his or her rights under the *Act*; files a complaint under the *Act*; exercise or attempt to exercise a right under the *Act*; or gives information to an employment standards office under the *Act*. The onus of proof lies with the employer to show that the *Act* was not contravened. (Subsections 74(1) and (2))