

IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT



BETWEEN:

Jeremy Marcotte;

Represented by Irene Phan, Employment Standards Officer

AND

Stone's Edge Granite Company Ltd., 2024 Quebec Avenue, Saskatoon, SK S7K 1W1;

**Richard Kasel, being a director Stone's Edge Granite Company Ltd., Box 479,
Warman, SK S0K 4S0; and**

**Melissa Kasel, being a director Stone's Edge Granite Company Ltd., Box 479,
Warman, SK S0K 4S0;**

Represented by Richard Kasel

Date of Hearing: January 18, 2017

**Place of Hearing: Sturdy Stone Building
Saskatoon, Saskatchewan**

Preliminary Matters:

The Director of Employment Standards issued Wage Assessment # 8348. It was signed by the 'Director's Delegate' at Saskatoon, Saskatchewan, and dated October 30, 2016. It directed Stone's Edge Granite Company Ltd., 2024 Quebec Avenue, Saskatoon, SK S7K 1W1; Richard Kasel, being a director Stone's Edge Granite Company Ltd., Box 479, Warman, SK S0K 4S0; and Melissa Kasel, being a director Stone's Edge Granite Company Ltd., (the 'employer') to pay \$7,273.61 in wages to Jeremy Marcotte (the 'employee').

The Ministry of Labour Relations and Workplace Safety ('Ministry') was represented at this hearing by Irene Phan, Employment Standards Officer. The employer was represented by Richard Kasel. No objections were made with respect to my jurisdiction to hear this matter.

Agreed Facts:

At the beginning of the hearing, Mr. Kasel for the employer and Ms. Phan for the Ministry agreed that Stone's Edge Granite Company Ltd. is an existing Saskatchewan corporation, and that both Richard Kasel and Melissa Kasel are, and were at all relevant times, directors of the corporation. The parties also agreed that Jeremy Marcotte was employed by the corporation from November 2, 2015 until April 26, 2016, and that his annual salary was \$55,000 throughout the period of employment.

Issue

The primary issue in this matter is whether Jeremy Marcotte is entitled to overtime pay pursuant to *The Saskatchewan Employment Act*. If Mr. Marcotte is entitled to such overtime pay, there is a second issue in that the employer questions some aspects of the calculation of wages.

Decision

Stone's Edge Granite Company Ltd. ("Stone's Edge"), imports stone and manufactures granite countertops. In the fall of 2015 Stone's Edge advertised for three employees. Jeremy Marcotte responded to the advertisement. Richard Kasel was clearly very impressed with Mr. Marcotte. Following an interview, Mr. Kasel offered Mr. Marcotte a job. The written offer was entered as Exhibit ER-1. This offer was of a "full time salaried position", and contained in a summary fashion what was called an "intended one year career path" for Mr. Marcotte.

Mr. Kasel indicated in his testimony that he was very impressed with Mr. Marcotte as a potential employee. He testified that Mr. Marcotte exceeded the qualifications they had advertised for. Mr. Kasel also testified that he was very impressed that Mr. Marcotte had worked with his previous employer for nine consecutive years, before being laid off. Mr. Kasel testified that he created a new position with Stone's Edge based on Mr. Marcotte's skills and experience, and this newly created position is the one Mr. Marcotte accepted.

In this new position, Mr. Marcotte was to spend November and December of 2015 completing training on all of the machines used by Stone's Edge. In addition, Mr. Marcotte was to develop a comprehensive understanding of software used in the business, called Moraware, and attend in the field with installers to gain understanding of the installation process and "customer expectations of the final product".

Mr. Marcotte came to Stone's Edge as a trained and experienced machinist. He had considerable experience with machines similar to those used by Stone's Edge. Mr. Marcotte's experience was in working with metal, and so he did require some training and familiarization to use the machines this employer used with stone. Mr. Kasel testified that Mr. Marcotte was a quick study and in fact an excellent employee.

The employer designated Mr. Marcotte's 'minimum hours' (Mr. Kasel's term) as 6:00 am until 4:30 pm, from Monday through Friday. The one year 'career plan' laid out by Mr. Kasel for Mr. Marcotte, (contained in Exhibit ER-1) indicated the following:

"Approx. mid Feb moving forward start up an afternoon shift consisting of two or three individuals for operations designed to run from 12:30 pm to 10:00 pm. Expectation is to be able to guide/supervise this shift and it's (sic) staffing during after-hours operations, while meeting production goals of senior management."

Mr. Kasel testified that his intention was to expand the business, and have Mr. Marcotte run a second shift producing countertops. This expansion never occurred, and no second shift was created. I express no opinion on whether Mr. Marcotte's duties related to this second shift would have been of a managerial character.

Mike Walker is the general manager for Stone's Edge. He too testified to Mr. Marcotte's high skill level.

The primary issue here is whether Mr. Marcotte is entitled to overtime pay pursuant to *The Saskatchewan Employment Act*.

The requirement to overtime pay is established by the interaction of *The Saskatchewan Employment Act* definitions of 'employee' and 'employer'

contained at ss. 2-1 (f) and 2-1 (g) respectively, and s. 2-17, 2-18, 2-19 and 2-20 as well as ss. 3(4) of *The Employment Standards Regulations* (S-15.1 Reg. 5).

Mr. Marcotte was clearly an employee. He fits within each of the first three ways in which the word is defined by the legislation:

2-1 (f) "employee" includes:

- (i) a person receiving or entitled to wages;
- (ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;
- (iii) a person being trained by an employer for the employer's business;

Stone's Edge is just as clearly an employer under the legislation. Section 2-1 says:

(g) "employer" means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:

- (i) has control or direction of one or more employees; or
- (ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees

"Overtime" and "overtime pay" pay are defined in section 2-1 (O)

- (i) pay at a rate of 1.5 times an employee's hourly wage; or
- (ii) pay at a prescribed rate for a prescribed category of employees;

Mr. Marcotte does not fall within any prescribed category of employees regarding overtime, so if he is entitled to overtime, the overtime is to be calculated at 1.5 times his hourly rate. This is not in dispute. The evidence establishes that Mr. Marcotte's \$55,000 annual salary works out to an hourly rate for the purposes of the legislation of \$26.44. The overtime rate of 1.5 times this hourly rate works out to \$39.66. I want to clearly point out that the fact that Mr. Marcotte was on an annual salary is not relevant to the issue of whether or not he is entitled to overtime pay.

Section 2-17 sets out the basic obligation for employers to pay employees overtime pay. It says:

2-17 (1) An employer shall pay an employee overtime pay for each hour or part of an hour in which the employee is required or permitted to work or to be at the employer's disposal that exceeds the hours determined in accordance with sections 2-18, 2-19 and 2-20.

Section 2-18 requires employers to pay overtime whenever the employee is 'required or permitted' to work more than 8 hours in a day or 40 hours in a week. There are exceptions, but none of the exceptions are relevant in the present case. Employers may schedule employees to work 10 hours per day for 4 days

per week. Mr. Marcotte's offer of employment, as well as evidence given by all the witnesses establish that Mr. Marcotte was not scheduled to work 10 hours per day for 4 days per week. There are also exceptions where the employee is working in accordance with either a modified work arrangement or an averaging authorization. These exceptions are further explained in s. 2-19 and 2-10. Mr. Kasel's testimony establishes that neither of these exceptions was present in this case.

Not every employee is entitled to receive overtime pay however. The employer's claim in this case is, in plain language, that Mr. Marcotte is not entitled to overtime pay because he is management. The exception by which management is not entitled to overtime pay comes from section 3(4) of *The Employment Standards Regulations* (S-15.1 Reg. 5). It says:

3 (4) Except for sections 2-15 and 2-16, Subdivisions 2 and 3 of Division 2 of Part II of the Act do not apply to an employee who performs services that are entirely of a managerial character.

The previously quoted sections establishing the employer's responsibility to pay overtime to employees are contained in Subdivision 3 of Division 2 of Part II of *The Saskatchewan Employment Act*. Sections 2-15 and 2-16 are not relevant to this issue. Therefore, the employer is required to pay Mr. Marcotte overtime pay unless Mr. Marcotte "performs services that are entirely of a managerial character". I will call this exemption from paying overtime the 'management exemption'.

In *Michael Hill v. Robert C. Begg, Keith O'Shea, and Mr. Mechanic Sales and Service (1982) Ltd.*, Sask. Q.B. 686/86 (unreported) Wimmer J. interpreted the word 'entirely' in this context as meaning "in the sense of continuously in contradistinction to from time to time". In that case Wimmer J. held that a 'hands on' manager who also performed mechanic's work nevertheless performed services entirely of a managerial character. This definition was approved and adopted by Klubec J. (as he then was) in *Westfair Foods Ltd. v. Director Of Labour Standards Branch*, 1995 CanLII 6185 (Sask. Q.B.). Therefore the fact that some of Mr. Marcotte's duties were not of a managerial character does not necessarily mean he is not within the management exemption. If an employee continuously performs duties of a managerial character, that employee may fall within the management exemption even where that employee also performs some duties that are not of a managerial character.

In determining what constitutes duties of a managerial character, Klubec J. said that an all-encompassing definition would be unworkable, since the specific duties which constitute duties of a managerial character will vary with the facts of each case. Nevertheless, he did provide a non-exclusive list, which provides guidance. This list is as follows:

- (1) the supervision and direction of other workers;
- (2) the discipline of subordinates, individually or as part of a management team;
- (3) evaluating the performance of subordinates;
- (4) hiring and promoting of subordinate staff;
- (5) some independence and discretion in performing assigned duties;
- (6) supervision of a collective agreement, where the work place is unionized;
- (7) negotiating remuneration individually rather than collectively;
- (8) level of remuneration, vis-a-vis, non-managerial staff;
- (9) participation in carrying out the employer's budgets and performance requirements.

Klebuc J. indicated that not every one of these criteria need be present for a person's duties to be of a managerial character. He also indicated that each of the criteria are not to be weighed equally. He said "only the functions of supervision and right to discipline are of fundamental importance and therefore of greater significance".

In the present case, Mr. Kasel and Mr. Walker referred to Mr. Marcotte as a manager throughout their testimony. However, in every case when they explained what Mr. Marcotte's actual duties were, it became clear that he was not a manager. In my view, virtually none of Mr. Marcotte's duties were of a managerial character. Although the Westfair Foods list is not to be used as a shopping list, I shall use it as a guide to explain my conclusion that Mr. Marcotte did not perform duties of a managerial character.

Mr. Marcotte did not supervise or direct any other employees. Both Mr. Marcotte and Mr. Walker suggested he did, as from time to time Mr. Marcotte would correct co-workers on safety procedures. Mr. Marcotte was a skilled machinist with approximately 10 years experience. He indicated in his testimony that he believes safety is everyone's concern, and if an employee is not correctly using safety equipment or otherwise not following proper procedure, he would, and believes other co-workers should, point this out. This does not constitute supervising or directing co-workers.

Mr. Kasel and Mr. Walker testified that they asked for Mr. Marcotte's views on two employee who were fired. While I accept this as true, it simply does not indicate a management function. Mr. Marcotte has no ability to discipline any other employee. Stone's Edge is a reasonably small workplace, with

approximately 12 employees. Mr. Kasel did not work in the production area, and Mr. Walker split his time between the production area and the front. It simply makes sense that they would ask employees who work in the production area, such as Mr. Marcotte, for their views regarding employees whose work performance was unsatisfactory. Mr. Marcotte may have shared his views with management, but was not a participant in any disciplinary actions or performance reviews. Mr. Marcotte had no role in hiring, firing, disciplining, evaluating or supervising other employees. Neither did he have any role in setting or meeting budgets, or in setting or evaluating performance targets.

Mr. Kasel and Mr. Walker suggested that Mr. Marcotte was able to leave the shop by simply informing Mr. Walker. He did not need to ask permission. He had access to a company vehicle and a company credit card. He used his discretion to determine when countertops should be returned to the polishers for further work. Mr. Kasel characterized this as being in charge of quality control of the product. Mr. Marcotte was also responsible for determining which pieces of cut-off granite to keep and which to disposed of. In addition, Mr. Marcotte was said to have developed and implemented a policy regarding maintenance logs for machines. While at first blush these duties may seem to be of a managerial character, on closer inspection it is clear that they are not. In fact each of the claims appears have been made in a way which was highly misleading, although perhaps technically not actually false.

It is true that on a couple of occasions Mr. Marcotte had appointments, which required him to leave work a little early. It is hardly surprising that an employee who is required to work from 6:00 am until 4:30 pm, and who the evidence establishes regularly worked even more hours, would occasionally have to leave work for an appointment. This in no way suggests Mr. Marcotte was a manager, or that he had any control over the hours he worked. He simply had to leave on the odd occasion for an appointment.

The reality behind Mr. Marcotte's 'access to a company vehicle' is that he borrowed a company truck on one or two occasions when his own vehicle was being repaired. The company credit card he occasionally used was not issued to him. On occasion Mr. Marcotte would borrow a credit card from Mr. Kasel or Mr. Walker and use it to purchase supplies from stores like Home Depot. This could happen for example if an installer ran out of screws or required a tool. On cross examination Mr. Kasel said these supplies were small purchases which did not require specialized knowledge. In fact he said "anyone could do it". The company credit cards were issued to Mr. Kasel and Mr. Walker. On the occasions when Mr. Marcotte would borrow one of these credit cards and use it to purchase supplies for the company, he was simply running an errand. He was not performing anything close to a managerial duty.

The so-called quality control exercised by Mr. Marcotte turns out to be simply looking at the granite countertop and seeing if there were scratches or other

spots that had to be polished out. Mr. Kasel even testified that anyone could do this. It was simply a matter of seeing if the countertop was scratched or rough. Mr. Marcotte, and other employees, had been asked to check on this while the product was in production because it was much cheaper to provide additional polishing before the product left the shop. Again this does not raise any suggestion of a managerial duty.

It was suggested that Mr. Marcotte exercised discretion in determining whether to keep or dispose of granite cut-offs. Mr. Marcotte explained granite cut-offs larger than a certain size would be kept, and the rest disposed of. Again there is no managerial gloss on this responsibility.

Finally, Mr. Marcotte was said to have developed and implemented a policy regarding maintenance logs for machines. In fact, Mr. Marcotte printed a simple form off the internet. It was titled 'Maintenance Log' and had three columns. One titled 'Date', one titled 'Task Completed' and one titled 'By Who'. In other words Mr. Marcotte, with Mr. Walker's knowledge and at least implied permission, simply put a piece of paper by each machine so that he and others would know when the proper maintenance tasks had been performed and by whom. Examples of these logs were entered as Exhibit ER-2. Mr. Marcotte is a skilled machinist. Suggesting a written maintenance log be kept for the machines he uses is simply common sense, and does not represent a managerial function.

For the sake of clarity, I am not suggesting that Mr. Marcotte would necessarily come within the management exemption had the responsibilities described above been established in fact. I described the evidence in the detail I did simply because these duties were the only duties which remotely resembled duties of a managerial nature. Mr. Marcotte clearly does not come within the managerial exemption.

This result may or may not have been different if Mr. Marcotte had actually been given responsibility for supervising a second production shift. Since this did not occur, I express no opinion as to whether or not Mr. Marcotte would then be considered to be performing services that are entirely of a managerial character.

Having concluded that Mr. Marcotte is entitled to overtime pay at the rate of 1.5 times his usual salary, I now turn to the calculation of the total number of hours worked.

Mr. Marcotte testified that his time sheets automatically indicated that he worked 40 hours per week. When he asked Mr. Kasel why the actual hours were not recorded he says that Mr. Kasel told him it was because Stone's Edge used a payroll service, and this was the simplest way to record the hours of a salaried employee. I accept Mr. Marcotte's testimony as fact.

Mr. Kasel raised several questions about the way the total hours were calculated, but he did not provide evidence of any errors in the calculation, with one minor exception, which I discuss below. I will go through each of Mr. Kasel's objections.

Mr. Kasel testified that there were some inconsistencies in the way Mr. Marcotte clocked in and clocked out. Employees including Mr. Marcotte were required to punch a time card when they began and ended work. The purpose of this was unclear to me, since the employer refused to record the actual hours employees worked on the employee's pay slips. Mr. Kasel testified that every employee was required to take a 30 minute unpaid lunch break. On nine occasions Mr. Marcotte did not punch out for lunch, and so the lunch period was included in the overtime calculation. These dates were Nov., 6, 19, 25, Dec. 11, Jan. 8, 15, March 11, 18 and April 1. Mr. Kasel suggests that the overtime hours should therefore be reduced by 4.5 hours. Mr. Marcotte indicated that on occasion, he would be out with installers over lunch, and so would not punch out on those occasions. Mr. Kasel confirmed this adding that on some of those occasions, he paid for lunch. Of course if an employee eats lunch while working, the employee is entitled to be paid no matter who bought the lunch. Mr. Marcotte also candidly admitted that on occasion he may have simply forgotten to punch out at lunch and then punch back in. Given that there is no evidence of whether Mr. Marcotte worked through his lunch break on every one of those nine occasions, and given that the employer, whose responsibility it is to maintain accurate records of hours works, created a system whereby employees were required to punch in and out, but yet intentionally falsely recorded their hours worked as 40 hours per week, and given that the evidence established that Mr. Marcotte worked through at least some of those lunch breaks, I am not convinced that the total overtime hours should be reduced for Mr. Marcotte's failure to punch out for nine lunch periods.

On Sat. Nov. 21 Mr. Marcotte punched in, but not out. An estimate of 4.88 hours worked was used for that day. Mr. Kasel objected to the estimate, but offered no suggestion of what number of hours should have been used. Mr. Marcotte testified that he did work the occasional Saturday, and was likely picking up some material on this day. Mr. Marcotte also testified that there were likely other Saturday's where he worked, but for which he did not punch in or out. No additional hours were recorded for days when the punch clock was not used. I accept Mr. Marcotte's testimony as truthful. Given that there is evidence that Mr. Marcotte worked on Nov. 21, but not as to the actual number of hours, and given that the employer, whose responsibility it is to maintain accurate records of hours works, failed to do so, I accept the estimate of 4.88 hours as reasonable and do not believe the total overtime hours should be reduced for Nov. 21.

Mr. Kasel objected to the hours being recorded by the time cards as representing the time worked. Mr. Kasel testified that Mr. Marcotte routinely punched in when he arrived, and then changed into his work clothes. He also testified that Mr. Marcotte routinely changed back into street clothes before clocking out. Therefore he suggests Mr. Marcotte's hours should be reduced by some

unknown amount. There are two answers to this objection. First of all there are certainly circumstances where changing into and out of work clothing may be considered as time worked. No evidence was presented on this in this matter, so I make no conclusion, other than to say it is possible that such time would be considered as time worked. Secondly, in my view the fact that both of Mr. Marcotte's supervisors (Mr. Walker as his immediate supervisor and Mr. Kasel as his ultimate supervisor) observed Mr. Marcotte's practice and made no objection, provides a complete answer to Mr. Kasel's objection. Therefore I accept the time shown on Mr. Marcotte's time cards as accurate for the purpose of determining the hours worked.

Mr. Kasel objected to Mr. Marcotte being paid for a total of 57.637 hours when he came in prior to 6:00 am or stayed after 4:30 pm. It was clear from Mr. Kasel's testimony as well as that of the other witnesses that 6:00 am to 4:30 pm were considered Mr. Marcotte's minimum hours (which is the term Mr. Kasel used in his testimony). I find that Mr. Marcotte coming in before 6:00 am and staying later than 4:30 pm was not only encouraged, it was in fact Mr. Kasel's expectation. Therefore hours before 6:00 am and after 4:30 pm were properly included. There is no doubt that the employer permitted the employee to work these hours.


Mr. Kasel objected to Mr. Marcotte being paid for a total of 54.22 hours for days when he had failed to punch in or to punch out. I find that the Labour Standards Officer made reasonable estimates of the hours worked on these occasions, and I will not alter these hours. Mr. Marcotte clearly worked on these occasions and he is entitled to be paid for that work.

Finally Mr. Kasel pointed out an incorrect entry related to November 5. When the hours were being totalled, the hours worked on that date were inadvertently overstated by .1 hours – or six minutes. Given that Mr. Marcotte's overtime rate was \$39.66, I will reduce the amount of the Wage Assessment by \$3.97 to compensate for this error.

Conclusion

Wage Assessment 8348 is reduced from \$7,273.61 to \$7,269.64. The appeal is otherwise dismissed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 10th day of February, 2017.


Doug Surtees
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.