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CANADIAN CENTRE
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BC Office

Building a Stronger Foundation of Basic Workplace Rights for BC Workers

RESPONSE TO THE BC LAW INSTITUTE CONSULTATION PAPER ON THE
EMPLOYMENT STANDARDS ACT

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Introduction

This brief represents our response to the BC Law Institute Consultation Paper on the Employment Standards Act (ESA). It highlights key findings from the Canadian Centre for Policy Alternatives' research on workplace rights and outlines key recommendations for reform.

The CCPA-BC has a long track record of producing research and policy recommendations on this issue. We have analyzed in depth the effects of the sweeping ESA changes made in the early 2000s that affected vulnerable workers in particular and we have identified a series of reforms that would address the problems our research exposed. In particular, these eight reports examine in detail specific areas of Employment Standards that need substantial reform:

- *Citizenship and Precarious Labour in Canadian Agriculture* (2015)
<https://www.policyalternatives.ca/publications/reports/citizenship-and-precarious-labour-canadian-agriculture>

- *Precarious: Temporary Agency Work in British Columbia* (2014) <https://www.policyalternatives.ca/publications/reports/precarious>
- *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC* (2009) <https://www.policyalternatives.ca/publications/reports/cultivating-farmworker-rights>
- *Workplace Rights for Immigrants in BC: The Case of Filipino Workers* (2007) <https://www.policyalternatives.ca/publications/reports/workplace-rights-immigrants-bc>
- *Improving the Economic Security of Casual Workers in BC* (2008) <https://www.policyalternatives.ca/publications/reports/improving-economic-security-casual-workers-bc>
- *Negotiating Without a Floor: Unionized Worker Exclusion From BC Employment Standards* (2007) <https://www.policyalternatives.ca/publications/reports/negotiating-without-floor>
- *Child and Youth Employment Standards: The Experience of Young Workers Under BC's New Policy Regime* (2005) <https://www.policyalternatives.ca/publications/reports/child-and-youth-employment-standards>
- *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards* (2005) <https://www.policyalternatives.ca/publications/reports/eroding-worker-protections>

The extensive research CCPA-BC has published on workplace rights in BC reveals significant gaps in the current Employment Standards Act and serious problems with the existing enforcement practices that leave many workers unprotected. The status quo is failing too many vulnerable workers. Major reforms to BC's employment standards and their enforcement are needed to establish a strong foundation of basic workplace rights and protections that meaningfully apply to everyone.

It is our assessment that the BC Law Institute Consultation Report makes some useful recommendations that would represent improvements to existing employment standards, however, the report is notably less ambitious than the recent Ontario Changing Workplaces Review, and does not go nearly far enough to address the challenges faced by vulnerable workers in BC, particularly those employed in precarious sectors.

Context of the BC Law Institute review of employment standards

The last independent review of BC's employment standards legislation – the laws that set out basic workplace rights and protections for workers in the province – was the Thompson

Commission in 1993-94. Since then, a number of significant changes have been made to employment standards, including sweeping reductions in protections for workers and changes to enforcement mechanisms between 2001 and 2004. However, there has been no subsequent effort by successive BC governments to systematically review workplace rights.

In 2014, the BC Law Institute, a not-for-profit law reform agency embarked on a project to review the current employment standard legislation. The project received some government funding (among other sources) but was not initiated by government, unlike the Thompson Commission or the recent Ontario Changing Workplaces Review. The project also appears to have been significantly under-resourced, as demonstrated by the length of time it has taken to produce an interim report (four years), the project's inability to commission independent research, and the lack of public outreach and consultation with ordinary workers. In contrast, the Thompson Commission included a public hearing process and produced a final report in less than a year. More recently, the Ontario Changing Workplaces Review completed an interim report in 1.5 years and in that time consulted experts and leading academics who focus on workplace issues, commissioned several research studies, held 12 public sessions across the province (hearing over 200 public presentations) and received over 300 written submissions.

The BC Law Institute released a 450-page Consultation Paper on the Employment Standards Act on June 18, 2018 and has requested responses from stakeholders and the public by August 31, 2018. The report's summer consultation period and the relatively short timeframe to respond appears designed to limit input. In addition, the requirement to make written submissions or complete a long online survey provided in English only means it is highly unlikely that the BC Law Institute will hear from many workers, let alone the most-vulnerable workers for whom Employment Standards are binding.

BC's Employment Standards Act has not kept up with changes in the labour market, leaving vulnerable workers unprotected

Technology, globalization and automation are changing workplaces cross Canada (and BC is no exception). BC's ESA was written at a time when it was the norm for workers to spend their entire careers in a permanent full-time job with one or two employers. However, today younger workers increasingly face project-based or term-limited employment options and the very structure of what a job looks like is changing. Technology is redefining work by unbundling traditional jobs into smaller tasks, many of which can be performed by workers located anywhere in the world. As a result, we've seen a rise of project-based contract work and the so-called gig economy – a business model that uses online platforms to match

buyers of on-demand services with individuals who are seeking to sell their labour. Thus, the gig economy is more accurately described as the “on-demand service economy.”¹

Advances in digital technology have enabled new structures of organizing work that the existing employment standards framework in BC (and globally) was not designed to deal with. What is worse, it appears that the owners of online platforms derive much of their profit and gain a competitive advantage over traditional service providers by exploiting gaps in the existing employment standards regulation and enforcement, specifically by classifying their workers as independent contractors and avoiding the responsibilities (and costs) that come with more traditional employment relationships.²

This has created a growing group of workers who lack basic workplace rights and protections that the ESA is designed to provide, and goes against the principle of “decent work” put forward in the Arthurs Report, which states that our legislation “should ensure that, no matter how limited his or her bargaining power, no worker...is offered, accepts or works under conditions that Canadians would not regard as ‘decent’.”³

The size of the on-demand service economy and the number of workers involved in BC is not known at this time but it is likely significant judging by the results of a recent CCPA-Ontario study of gig-economy workers and consumers in the Greater Toronto Area.⁴ The study found that this new way of doing business exacerbates existing inequalities as lower-income earners are more likely to provide services through online platforms while higher-income earners are more likely to be consumers of services. Similarly, the majority of on-demand service providers are racialized workers while the majority of consumers are non-racialized.

Aside from the gig economy, there are signs of eroding employment security and “a slow but steady deterioration” in job quality across the broader labour market as measured by the CIBC index of job quality.⁵ Anecdotal evidence suggests that millennials are facing

¹ Block, Sheila and Trish Hennesy, 2017, “Sharing economy” or on-demand service economy? A survey of workers and consumers in the Greater Toronto Area, CCPA-ON. <https://www.policyalternatives.ca/sharingeconomy>

² See Clark, Liat, 2017, “The gig economy threatens to take us back to pre-Industrial Revolution times,” *Wired Magazine*, June 23, 2017. <https://www.wired.co.uk/article/gig-economy-bank-of-england-worker-rights> and Temperton, James, “The gig economy is being fuelled by exploitation, not innovation,” *Wired Magazine*, February 8, 2018. <https://www.wired.co.uk/article/gig-economy-dpd-courier-taylor-review>

³ Arthurs, Harry W., 2006, *Fairness At Work: Federal Labour Standards for the 21st Century*, Government of Canada. <http://publications.gc.ca/site/eng/324676/publication.html>

⁴ Ibid.

⁵ Tal, Benjamin, 2016, “On the quality of Employment in Canada.” *In Focus*, Nov. 28, 2016. https://economics.cibccm.com/economicsweb/cds?ID=1974&TYPE=EC_PDF

increasingly insecure work arrangements with few, if any, benefits, unpredictable hours of work and highly variable earnings.⁶

Since most working-age British Columbians rely on employment earnings as their main source of income, changes in the labour market have significant implications for family incomes and well-being. The anecdotal evidence of workers finding it harder to make ends meet despite working harder is corroborated by a 2015 study documenting increasing rates of working poverty in Canada's big cities.⁷ Moreover, a lack of access to work-related benefits like pensions and extended health benefits, or even the most basic benefits like paid sick time, can compound the challenges created by low pay and insecure work.

In a recent original data collection project, the SSHRC-funded Poverty and Employment Precarity in Southern Ontario (PEPSO) research team found that 40% of workers in the Greater Toronto and Hamilton areas are now working in jobs with some degree of precarity. The study documented in detail the harmful impacts of precarious employment on the health and well-being of the affected workers and their families, and the costs that precarious work imposes on society more broadly.⁸ The researchers found that workers from racialized communities and, in particular racialized women, were disproportionately affected by precarious work.

Further, increased reliance on temporary foreign workers in a number of sectors has created unique challenges and jurisdictional grey zones because migrant worker programs are federal initiatives but enforcement of workplace rights and health and safety regulations are left to each province.

Recognizing these numerous labour market shifts, the Ontario provincial government commissioned the Changing Workplaces Review in 2015 to consider what changes need to be made to existing provincial labour code and employment laws in order to better meet the needs of workers dealing with these labour market shifts. The Review was unique in Canada in that it was mandated to specifically address the challenges of precarious and vulnerable workers and to examine both employment standards and the labour code. In other words, it was intended to holistically review the entire system of workplace rights in Ontario from the

⁶ See, for example, a recent article by Geoff Johnson in the *Times Colonist*, "'Precarious work' is reality for the young." Jan 16, 2018. <http://www.timescolonist.com/opinion/columnists/geoff-johnson-precious-work-is-reality-for-the-young-1.23145197>

⁷ Stapleton, John and Jasmine Kay, 2015, *The Working Poor in the Toronto Region: Mapping working poverty in Canada's richest city*. Metcalf Foundation. <https://metcalfoundation.com/stories/publications/the-working-poor-in-the-toronto-region-mapping-working-poverty-in-canadas-richest-city/>

⁸ PEPSO, 2015, *The Precarity Penalty: The Impact of Precarious Employment on Individuals, Households and Communities - And What to Do About It*. PEPSO, McMaster University and United Way Toronto. <https://pepsocanada.ca/documents/precarity-penalty.pdf>

point of view of the workplace and the inter-relationships that exist between unionized and non-unionized workplaces.⁹

While the recommendations in the Ontario Changing Workplaces Review did not go as far as our research indicates is needed to protect vulnerable workers, it remains relevant as a starting point for employment standards reforms in other provinces and is particularly useful for articulating some of the key challenges faced today by precarious workers in Canada.

The Changing Workplaces Review resulted in the Ontario *Fair Workplaces, Better Jobs Act*, which was passed in November 2017. The *Act* did not implement all of the Review's recommendations, however, it significantly modernized workplace rights and improved protections for some of Ontario's most-vulnerable workers. Importantly, the *Act* was accompanied with a commitment from the Ontario government to step up enforcement of employment standards and its labour code.

The new BC government has made welcome commitments to increase the general minimum wage, if a little slower than what the CCPA recommended. However, to successfully tackle the thorny issues of employment insecurity and eroding job quality, and the accompanying large personal and social costs, we need to do more. The following recommendations for Employment Standards reforms are the first step to building a fairer and more inclusive economy for all workers in BC.

Re-establish proactive enforcement

There is an inherent power imbalance in employer-employee relationships. To level the playing field, societies have established minimum workplace rights to which workers are entitled.

Employment standards are the basic terms and conditions of employment below which employers are not permitted to go. They cover a number of aspects of work, including minimum pay, limits on the length of the work day or work week, statutory holidays, parental leave, annual vacation and sick leave provisions. Employment standards exist to protect individual employees from exploitation but also aim to ensure reasonable conditions of work and a decent standard of living for all workers. The basic workplace rights enshrined under the ESA are particularly important for vulnerable workers such as new immigrants, young workers, low-wage workers, women, workers of colour and those

⁹ For a great summary, see this 2017 presentation by C. Michael Mitchell, one of the two Special Advisors to the Ontario's Changing Workplaces Review. <http://www.sfu.ca/labour/news-events/news-events-2017/the-ontario-changing-workplaces-review--lessons-for-b-c-.html>

employed in more precarious sectors – all of whom are less likely to be represented by a union and less able to secure workplace conditions better than the minimum requirements laid out in the ESA. Employment standards also protect employers by eliminating unfair competition from unscrupulous businesses.

However, without proactive enforcement even the best workplace rights and protections are meaningless.

Unfortunately, for too many vulnerable workers in our province today, workplace rights exist only on paper. The key enforcement bodies for provincial workplace rights, the Employment Standards Branch of the Ministry of Labour and the Labour Relations Board have been underfunded to a point where they cannot adequately administer and enforce the law.¹⁰ This tilts the playing field too far in favour of the employer and severely undermines access to justice for vulnerable workers.

We make the following recommendation:

1. Eliminate the policy requirement for workers to use the self-help kit before being allowed to make a formal complaint about violations of their workplace rights (as per BC Law Institute recommendation 59). The self-help kit poses a significant barrier for vulnerable workers to demand that their rights be respected and fails to recognize the current reality that most complaints are filed by former employees.
2. Proper investigation of individual complaints should replace the current model of handling complaints through mediation designed to get to a settlement, often under terms that are less favourable for the employees than would they would be entitled to under the law. The goal of enforcement should be that employees receive the full remedy and/or compensation to which the law entitles them, not a lesser amount acceptable to an offending employer.
3. Improve procedural fairness of the Employment Standards Branch's handling of complaints, as per BC Law Institute recommendations 60 through 63, and minority recommendation 64a.
4. Increase the penalties for contraventions as outlined by the BC Employment Standards Coalition.
5. Adopt a proactive enforcement model and address non-compliance at a systematic level across the province, with a particular focus on specific industries and types of workplaces that are known for their non-compliance. In addition, the Ministry of

¹⁰ See Fairey, David, 2005, *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards*. CCPA-BC. <https://www.policyalternatives.ca/publications/reports/eroding-worker-protections>. Research commissioned by the Ontario Changing Workplaces Review similarly finds that fear of employer reprisal deters workers from using self-help kits to seek redress when their rights are violated.

Labour should reconstitute the Agricultural Compliance Team, a highly successful program that proactively enforced workplace rights for farmworkers that was eliminated in 2001.¹¹

The reality is that a complaints-based enforcement model will not be effective in ensuring broad-based compliance with employment standards. It is unfortunate that the BC Law Institute fails to recommend the adoption of a proactive enforcement model. Our review of the research suggests that the only way for BC to ensure that workplace rights and protections are meaningful for all workers is to proactively enforce the law, using as a model the Ontario Changing Workplaces Review's recommendations for a "strategic enforcement" regime.

This will require considerable additional resources need to be dedicated to enforcement, including increased staffing in the Employment Standards Branch of the Ministry of Labour, hiring more enforcement officers, the return to regular, random and unannounced visits of workplaces (particularly in sectors that employ large numbers of vulnerable workers or sectors where widespread non-compliance with the ESA has been documented).

While there is little hard data available on compliance with employment standards laws in Canada, a 2016 Ontario Ministry of Labour inspection blitz focusing on precarious employment found that 78 per cent of workplaces were in violation of the Employment Standards Act.¹² There is no reason to believe BC employers are better informed about their responsibilities or more compliant with the law than their Ontario counterparts. However, BC no longer proactively inspects workplaces despite successfully utilizing this enforcement technique prior to 2001.

The Ontario evidence suggests that sectors that are more likely to employ vulnerable and precarious workers such as security services, recreation facilities, personal services, retail and food service establishments and temporary employment agencies require targeted enforcement mechanisms.

Enforcement efforts must be supported by improved education and outreach so that both workers and employers are aware of basic workplace rights. This is particularly important for new immigrants, especially those who come from countries where employment standards

¹¹ As the authors of the 2008 CCPA-BC report *Cultivating Farmworkers Rights* wrote, "Although agricultural employment constitutes about 1 per cent of total provincial employment, 15 to 20 per cent of ESB staff resources had been focused on enforcement activity in the agricultural sector in the years prior to 2002. This concentration reflected the high level of employer non-compliance with the Act identified in the 1993-1994 review of the ESA, especially in the seasonal hand-harvesting sector."

¹² Mojtehedzadeh, Sara, 2016, "Inspection blitz finds three-quarters of bosses breaking law," *The Toronto Star*. Jan 20. <https://www.thestar.com/news/gta/2016/01/20/inspection-blitz-finds-three-quarters-of-bosses-breaking-law.html>

are significantly weaker and/or not enforced, which leaves them susceptible to exploitation in Canada.

6. Mandate that the workplace rights and protections provided by the ESA be posted in all workplaces, ideally in multiple languages.
7. Create a hotline for the Employment Standards Branch to provide information and answer questions from individuals.
8. Translate all public information about workplace rights and complaints filing instructions on the Ministry of Labour website into multiple languages to make them more accessible to new immigrants to BC.
9. Report all ESA violations and penalties on the Ministry of Labour website similarly to the way Health Authorities report on the health inspections of restaurants and other facilities.

Extend the basic workplace rights embedded in Employment Standards legislation more broadly

1. EXPAND THE DEFINITION OF EMPLOYMENT TO REFLECT EMERGING LABOUR MARKET TRENDS

The BC Law Institute report makes a passing reference to the profound transformations that technology has made in the workplace, “leading to decentralization, the emergence of telecommuting, and the “gig economy,” in which widely dispersed workforces interact with their employers or nominal employers only through an electronic platform.” However, the report makes no attempt to consider how these changes are affecting workers nor makes any recommendations to address these changes. This is highly problematic because changes in the organization of work have created significant gaps in coverage and protection under the ESA.

One of the big challenges of adapting the ESA for the 21st century is that new technologies are disrupting the traditional employer-employee relationship and, as a result, the old definitions of employer and employee in the *Act* do not address the complexity of the current labour market reality. It is essential that new provisions be included to ensure workers in these new employment arrangements are entitled to rights and protections comparable to workers in more traditional employment relationships.

In particular, workers in the gig economy – or the on-demand services economy – have few protections under the current BC employment standards framework. Gig economy workers use online platforms to connect to potential clients but they are not considered employees of the platform. Instead, they are typically characterized as independent contractors and

therefore excluded from basic protections such as minimum wage, maximum hours of work, paid vacation or sick time, termination and severance pay or employment insurance.

However, gig economy workers often have little control over their labour, working at rates set by the platform that may not average above the minimum wage after expenses. Work is not always available and the lack of predictability of work volume – and thus earnings – frequently results in lower incomes and never-ending stress. These workers are part of the growing army of people in employment arrangements with some degree of precarity, which could include not knowing one's schedule in advance, frequent on-call work, short-term contracts, large variability in income week to week, and few, if any, benefits.

The common law recognizes dependent contractors as a type of employment relationship that falls in between employee and independent contractor. While the Labour Relations Code explicitly includes dependent contractors in the definition of employees covered by the Code, the ESA does not. One could make the argument that dependent contractors should rightfully be considered employees under the ESA, however, the current legislation requires workers to prove they are employees and therefore entitled to protections under the ESA. Although many workers in the new on-demand service economy would probably meet the definition of dependent contractor, putting the burden on them to prove it is an unduly heavy burden.

Misclassification of employees was already a widespread problem when the Thompson Commission produced its report 24 years ago and recommended that enforcement of the ESA be based on the common law principles to determine whether a worker is an independent contractor or not. These principles were useful at the time they were developed (mid 20th century) but they are not designed to deal with the more fluid relationships that technological advances have enabled in the 21st century.

Technology is changing the labour market but governments have the power – and responsibility – to shape how workers experience this change. New strategies are needed to support gig-economy workers, not all of whom would meet the definition of dependent contractor, but all of whom deserve protection from exploitation and a basic floor of statutory rights to paid sick time, paid vacation, advance notice of scheduling, equal pay for equal work and a guarantee to earn at least the general minimum wage. To protect the rights of all workers, we recommend:

10. Include “dependent contractors” in the definition of “employee” under the Act and put the onus on the employer to prove that a worker is an independent contractor, not an employee (or a “dependent contractor”). Make the misclassification of employees as independent contractors a priority enforcement issue.

11. Reform the ESA to specifically address the increasingly complex employment relationships arising in the 21st century economy and develop a framework to guarantee basic workplace rights for all workers regardless of their employment arrangement. Given that the BC Law Institute Consultation Paper is completely silent on these fundamental issues, this would require commissioning independent research to develop appropriate recommendations as well as consultation with workers in the affected sectors and their advocates.

2. ELIMINATE EXCLUSIONS FOR WHICH NO OBJECTIVE JUSTIFICATION EXISTS

Excluding large segments of the workforce from the protections of parts or all of the ESA runs counter to the basic principle of equality before the law (or universality). As the BC Law Institute Consultation Paper notes, the current exclusions are “bewildering in their number and complexity” and “no readily discernible principle exists why some occupations and job situations are excluded from the *Act* entirely (e.g., some professions, sitters, students employed by their schools, registered investment dealers), others from specific parts of the *Act* (e.g., managers, resident caretakers), others from parts of the *Act* except certain provisions (e.g., fishers, farm workers, election workers), others from specific sections (e.g., taxi drivers, livestock brand inspectors, loggers)”. The Ontario Changing Workplaces Review came to a similar conclusion, highlighting the lack of transparency and questioning whether the existing exclusions are objectively justifiable.

Exempting groups of workers, be it farmworkers or high technology professionals, from maximum daily and weekly hours after which higher overtime rates must be paid represents a significant wage subsidy to their employers. The cost is born not just by these workers and their families, but also by society as whole because workers’ health and safety can be compromised after long hours of work, leading to higher public medical costs. There are additional social costs of burnout and stress for workers who have to contend with excessively long work hours. While the work of farms or high technology firms may well require long daily hours during certain periods of time, these demands must be balanced against the rights of their workers, who – just like any other workers – have to reconcile work with family obligations and have a right to enjoy rest and recreation and to fully participate in their communities.

It seems that over the past two decades, business lobby groups in BC (and across Canada) have won a wide range of exemptions without presenting much evidence for the need for them to exist. In virtually all cases, the exemptions have been granted without any consultation with workers or their representatives. These exemptions must be curtailed and the minimum basic standards must apply to everyone unless there is a transparent, evidence-based policy rationale for excluding a particular group from particular provisions of the ESA. Where feasible, when exemptions from certain provisions are granted, the workers affected should receive compensatory benefits.

We were pleased to see the BC government has already taken steps in this direction by announcing the phasing out the lower minimum wage for liquor servers (although we maintain that the timeline for this should have been faster) and adopting the recommendations of the Fair Wages Commission with respect to minimum wages for resident caretakers, live-in camp leaders and live-in home support workers. However, the BC government failed to adopt the Commission's recommendation with respect to farmworkers paid piece rates and continues to permit some farmworkers to be paid less than the general minimum wage.

We recommend:

12. All workers, without exception, should earn at least the general minimum wage. This would require replacing piece rates for hand-harvesting crops with an hourly wage system (as is already the case under the Seasonal Agricultural Workers' Program) or at a minimum, setting piece rates at a level that allows all farmworkers to earn, with reasonable effort, at least the general minimum wage for the hours they work.¹³
13. Systematically review all other existing exclusions from the ESA and eliminate the ones for which a clear, evidence-based policy rationale does not exist. Do not grant any further exclusions without compelling, evidence-based justification (in line with the BC Law Institute's recommendations 5 and 6).

We already know that certain exclusions lack objective justification from research done in BC and in other jurisdictions. Those exclusions should be immediately discontinued.

Specifically, we recommend:

14. Extend the fundamental protections of the ESA to unionized workers by ensuring that collective agreements supersede the ESA only if they set out equal or better employment conditions than those in the ESA (i.e., return to the "meet or exceed" provisions contained in the 1994 – 2001 ESA).¹⁴
15. Reintroduce the entitlements to statutory holidays, annual vacation, hours of work and overtime pay for farmworkers.
16. Reintroduce the entitlements to hours of work and overtime pay for high technology professionals.

¹³ See Klein, Seth and Igljka Ivanova, 2017, *Charting a Path to \$15/Hour for all Workers – and the Road Beyond: CCPA-BC Submission to the BC Fair Wages Commission*, CCPA-BC. <https://www.policyalternatives.ca/publications/reports/charting-path-15hour-all-workers%E2%80%94and-road-beyond>

¹⁴ For a history of employment standards exclusion for unionized workers and more details on why reform in this area is important, see Fairey, David with Simore McCallum, 2007, *Negotiating Without a Floor: Unionized Worker Exclusion From BC Employment Standards*, CCPA-BC. <https://www.policyalternatives.ca/publications/reports/negotiating-without-floor>

Strengthen basic workplace standards for vulnerable workers

1. BETTER PROTECT CHILDREN WHO ARE EMPLOYED

BC provides significantly less protection to child workers than other Canadian jurisdictions, a fact recognized by the BC Law Institute Consultation Paper. In particular, permitting children as young as 12 to work with the permission of only one parent and without direct government oversight is unusual.

To adequately protect all BC children and ensure that their employment does not compromise their health, education or psycho-social development, we support the *Child Employment Standards Framework* submission and policy recommendations of First Call: BC Child and Youth Advocacy Coalition. In addition to a call for adequately resourced, proactive enforcement, these recommendations include:

17. Raise the minimum age at which children can start working without special government oversight to 16 – the age of completing compulsory schooling – in line with Canada’s commitments under the International Labour Organization’s Convention 138 on the minimum age of employment.
18. Reinststitute direct government oversight over the employment of children under 16 through a permit system.
19. Strengthen workplace protections for children under 16, including developing age-appropriate criteria for acceptable work, placing age-appropriate restrictions on the length of time and time of day children can work (e.g., prohibit night work) and restricting potentially hazardous activities and industries.
20. Prohibit potentially hazardous tasks and worksites for 16- and 17-year-old workers.

First Call also recommends additional record-keeping and reporting requirements for workplaces employing children under 18 and the creation of an Advisory Committee including the voices of young workers to assist the Ministry of Labour develop the regulations needed to implement these changes such as deciding on the types of hazards that make a workplace unsafe for young people.

2. MANDATE EQUAL TREATMENT OF WORKERS DOING COMPARABLE WORK

To ensure there are no second-class workers in BC’s workplaces, the ESA should be changed to:

21. Mandate equal rates of pay and benefits for part-time, casual, temporary and seasonal employees, as well as for temporary agency employees, relative to full-time, permanent employees performing the same work for the same employer.

22. Extend eligibility for statutory holiday pay to every employee, regardless of their length of employment or hours of work. The current requirement to have been employed for at least 30 days and earned wages for 15 out of the last 30 days in order to qualify leaves many part-time, temporary or casual workers ineligible for statutory holiday pay.

Notably, the BC Law Institute recommendation on statutory holiday eligibility (recommendation 29) is in some ways more restrictive than the current provisions, which is puzzling and must be reconsidered. Given the large increase in temporary, casual and part-time work arrangements in BC's labour market, the ESA needs to ensure these workers are also able to access the same basic workplace rights and protections as workers in more stable, permanent, full-time jobs enjoy.

3. IMPROVE THE WORKING CONDITIONS OF FARMWORKERS

As documented in CCPA-BC's 2008 report *Cultivating Farmworker Rights*, farmworkers "are at the mercy of a complex, confusing and controlling system that exploits, threatens and silences them while it places their lives in danger and excludes them from a range of employment standards." Further, as our 2015 report *Citizenship and Precarious Labour in Canadian Agriculture* concludes, "farmworkers' fear of losing hours or jeopardizing their employment leads them to accept unsafe work or transportation, work long hours, work while ill or injured and, in the case of migrants, acquiesce to poor housing. Meanwhile, regulations and enforcement for this sector are very weak."

Subsequent to the reductions in employment standards for farmworkers in the early 2000s, employers have hired thousands of temporary foreign workers. While in 2003 almost all BC agricultural workers were South Asian immigrants as of 2012 half were Mexican migrants employed under the Seasonal Agricultural Workers' Program.¹⁵ Migrant workers are even more vulnerable to exploitation because of their employer-specific work permits, which essentially give employers the power to deport them.

In addition to the recommendations already made above for targeted proactive enforcement in the agricultural sector and reintroducing the entitlements to statutory holidays, annual vacation, hours of work and overtime pay for farmworkers, BC employment standards must be strengthened as follows:

23. Mandate that workplace rights are posted in the workplaces of all farmworkers in appropriate languages, including the native language of all migrant farmworkers employed under the Seasonal Agricultural Workers' Program.

¹⁵ Otero, Gerardo and Kerry Preibish, 2015, *Citizenship and Precarious Labour in Canadian Agriculture*, CCPA-BC. <https://www.policyalternatives.ca/publications/reports/citizenship-and-precarious-labour-canadian-agriculture>

24. Establish an independent review of the ESA in relation to farmworkers, including representation from workers and their advocates. The review would make recommendations for improving working conditions of farmworkers and develop coordinating mechanisms with other agencies that oversee migrant agricultural programs to fill the jurisdictional void that exists in enforcing the rights of migrant workers. It would include a review of the farm labour contracting system, notorious for its violations of employment standards, safety regulations and for shoddy record-keeping practices, which make it virtually impossible for workers to seek redress when their rights are violated.

4. IMPROVE THE WORKING CONDITIONS OF CAREGIVERS IN PRIVATE RESIDENCES

The work of caregiving for children, elders or people with disabilities in private residences is largely invisible and traditionally undervalued. The majority of caregivers are women, often immigrant or migrant women of colour or members of disadvantage communities. This combination of factors makes caregivers in private residences particularly vulnerable to discrimination and exploitation.

Researchers have identified a number of gaps in the BC ESA with respect to protecting caregivers in private residences.¹⁶ For example, as the BC Law Institute Consultation Report notes there is significant overlap between the five current classifications for caregiver jobs in the ESA. This creates the potential for confusion and misclassification and makes it more difficult for employers (typically private individuals) to understand their responsibilities and ensure they are in compliance with the law. More concerningly, this means that workers who perform nearly identical work are entitled to different minimum workplace rights under the law, which is clearly unjust. We recommend that the BC government:

25. Reform the ESA to ensure caregivers working in private residences have access to minimum workplace rights and protections similar to those enjoyed by other BC workers, including hours of work, overtime and on-call compensation, and that these rights are meaningfully enforced.
26. Change the definition of “domestic” to remove the requirement for the worker to reside in the employer’s residence (BC Law Institute recommendation 55).

The latter is necessary to harmonize the ESA with recent changes in the federal legislation governing the employment of migrant workers in private residences.

¹⁶ Drolet, Natalie and Theresa Etmanski, 2015, “Caregivers and Labour Rights in British Columbia: Barriers to Decent Work”, paper prepared for the Conference on Temporary Migrant Workers, Simon Fraser University by the West Coast Domestic Workers’ Association. <http://mwcbc.ca/downloads/CaregiversandLabourRightsinBC-BarrierstoDecentWork.pdf>

5. ADDRESS THE SPECIFIC CHALLENGES FACED BY TEMPORARY FOREIGN WORKERS

27. Introduce a new regulatory scheme for all employers of migrant workers as is done in Saskatchewan, Manitoba, Nova Scotia and Ontario. This would acknowledge and address the specific vulnerabilities that workers without citizenship status experience in the workplace.
28. Expedite the investigation of complaints by temporary foreign workers to address potential reprisals and unjust dismissal that would force the worker to leave Canada before their complaint is handled.

6. STRENGTHEN PROTECTIONS FOR TEMPORARY AGENCY WORKERS

Temporary agency workers are engaged in a triangular employment relationship where they are recruited by the employment agency and offered a temporary assignment in the client firm's workplace, which workers may accept or decline. The employment agency is the employer of record even though the client firm supervises the worker. Our 2014 report *Precarious: Temporary Agency Work in British Columbia* documented that temporary agency workers are some of the most vulnerable and precariously employed workers because of the limited duration of employment, high risk of termination, lack of control over working conditions, unequal treatment under the law, and typically low incomes. It also found evidence of a large number of employment agencies in the Lower Mainland operating without being licensed in violation of the ESA.

The research indicates that reform is needed to adequately regulate temporary employment agencies and improve the economic security of their workers. Priority recommendations include:

29. Increase penalties for temporary employment agencies operating without a license and introduce penalties for client firms contracting with unlicensed agencies, similar to existing penalties for clients contracting with unlicensed farm labour contractors.
30. Require temporary employment agencies to provide new employees with information about the workplace rights and responsibilities of employment agencies, client firms and workers under the ESA, as well as detailed information about the temporary employment agency that is their employer.
31. Improve termination and severance pay provisions for temporary employment agency workers, as recommended by the Ontario Changing Workplaces Review. The current practice of exempting temporary agency workers from these basic protections under the ESA places a high degree of income insecurity on workers and allows employers to use temporary agency workers to avoid minimum workplace rights that direct employees have under the ESA.

32. Prohibit clauses that restrict temporary agency workers' ability to move to direct employment, including "buy-out clauses" in contracts between employment agencies and client firms that impose a fee on client firms that wish to offer direct employment to temporary employment agency workers.
33. Extend ESA protection against employer reprisal to client firms, as is the case in Ontario.

7. MANDATE WORKER CONTROL OF TIPS AND GRATUITIES

34. Make tips and gratuities the property of the employee who receives it and make tip pooling voluntary for employees and free of employer control.

The BC Law Institute recommends following the Ontario legislation in this regard but there are concerns that the Ontario model does not go far enough in ensuring no employer control over tip pooling. The tip-pooling provisions in the employment standards legislation in Newfoundland and Labrador and Quebec stand out as models that better protect workers who receive tips and gratuities and should be adopted in BC.

Strengthen the basic workplace standards for everyone

1. INTRODUCE PAID SICK TIME AND PAID DOMESTIC VIOLENCE LEAVE

Currently, the BC ESA does not guarantee workers a right to sick leave, paid or unpaid. This omission should be immediately remedied. Paid sick time benefits not only workers who fall ill but the workplace in general by reducing the risk of employees coming to work while ill and spreading illness to their colleagues, clients and the public. Further, the Canadian Medical Association has concluded that requiring sick notes for short-term illness "represents an inefficient use of the scarce health care resources".¹⁷

35. Employees should accrue a minimum of one hour paid sick leave for every 35 hours worked. Unused paid sick leave may be carried over for use in the year after they were accrued, up to at least 52 hours as recommended by the BC Employment Standards Coalition.
36. Employers should be prohibited from requiring evidence of short-term absences for personal illness and should be obligated to pay for the doctor's note if one is required for a longer-term illness.
37. Introduce new special leave for employees experiencing domestic or sexual violence to access safety and any support services needed. Both Manitoba and Ontario

¹⁷ Canadian Medical Association, 2017, *CMA Policy: Third Party Forms (Update 2017)*.

provide five days paid leave and additional unpaid leave of up to 17 weeks and 15 weeks, respectively.

Combining personal sick leave with family responsibility leave, as recommended by the BC Law Institute Consultation Report, would unfairly penalize employees with dependents, particularly women who continue to be responsible for the majority of unpaid family caregiving work in Canada. Workers with dependents should have the same right to time off for personal illness as enjoyed by workers without dependents or unpaid caregiving responsibilities.

The BC Law Institute majority recommendation for a disincentive to abuse sick leave is without precedent for any other special leave entitlement and should be rejected, as outlined by minority recommendation 42a.

2. ENABLE WORKERS TO BALANCE WORK AND LIFE

38. Require a minimum of 24 hours notice of work schedules and changes in them to allow workers to plan their home lives or other employment, meet their family obligations and participate in their communities.

39. Impose a minimum shift time and minimum call-out pay of four hours so workers can arrange child care and transportation without losing money by reporting to work. The current minimum shift length of two hours is inadequate, particularly when workers must commute long distances to get to the workplace.

40. Introduce a right to refuse overtime except in cases of emergency.

Setting limits on paid work's ability to encroach on the worker's personal life would particularly benefit women who continue to bear a disproportionate share of caregiving responsibility in the family. Employment standards that encourage a culture of overtime work and/or long working hours will necessarily make it more difficult for women to advance in their careers or even to retain jobs at the same time as meeting their family obligations.

41. Enhance job security for workers by eliminating the three-month eligibility requirement for notice of termination or pay in lieu of notice and implementing unjust dismissal protections similar to those in Nova Scotia, Quebec and under federal labour standards (in line with BC Law Institute minority recommendation 4a).

42. Give workers a right (after a year of service) to request an increase or decrease in hours of work, to be given a more flexible schedule, or to alter the location of work, putting the onus on the employer to provide written reasons if the request is denied.

43. Harmonize special leave entitlements with the federal *Employment Insurance Act* so that the appropriate unpaid leave is granted for the range of circumstances in which special employment benefits would normally apply. (BC Law Institute Minority Recommendation 39a).

44. Increase the annual paid vacation entitlement to four weeks after ten years of service (BC Law Institute minority recommendation 35a).

In addition, we agree with the BC Law Institute that the ESA definition of “immediate family” is in need of modernization. We encourage government to adopt a definition that reflects the diversity of families in BC today, in particular the types of close-knit family-like relationships common in the LGBTQ2S community, the strong mutual support networks in migrant worker communities, traditional Indigenous kinship networks and the types of family relationships formed in the foster care system.

Because the special leaves provided under the ESA are non-discretionary, that is, workers do not choose when they get sick or when their family members need care or pass away, there should be no qualifying period for unpaid special leaves as per BC Law Institute minority recommendation 43c.

3. REQUIRE EMPLOYERS TO PROVIDE WRITTEN NOTICE SETTING OUT KEY TERMS AND CONDITIONS OF EMPLOYMENT

45. Employers should be required to provide all new employees with basic written notice, including information on pay, hours of work, a general description of the work to be performed, the duration of the contract and any applicable leaves and employment-sponsored benefits. As recommended in the Arthurs Report, this notice should be updated any time the terms and conditions of employment change. Temporary employment agency employees should also be provided with written notice about each assignment, including the same basic information about the terms and conditions of the new assignment.

Having this information will provide clarity to workers about their employment and enable them to enforce their workplace rights should they experience an ESA violation.

4. EXTEND THE LIMITATION PERIOD FOR WAGE RECOVERY AND FILING A COMPLAINT

To better protect workers who may not have adequate knowledge of their workplace rights at the time of employment, and those who may be unable to file a complaint within the shorter time frame due to illness, disability, immigration status or other reasons, we recommend:

46. Extend the retroactive liability for wages required to be paid by an employer from the current six months to three years as recommended in the Arthurs Report on Federal Labour Standards.¹⁸

47. Allow workers to file a complaint about any ESA violation for up to two years after termination of employment.

The current six-month limitation period for complaints is too short and puts workers at a disadvantage compared to other private litigants who have a two-year limitation period for general civil claims. The problem is particularly acute for workers whose rights are violated before the start of the employment relationship (under the sections related to misrepresentation during hiring, requiring a payment from job seekers to find employment, etc. For those violations, the current limitation period is six months from the date of the contravention not from the end of employment and many workers affected, particularly those who are employed under the temporary foreign worker program, do not have a realistic opportunity to file a complaint within that time frame.

The BC Law Institute minority recommendation 65a) would extend the limitation period to two years of the date of the contravention under the sections related to misrepresentation in hiring. This is a step in the right direction but we believe it would be fairer for workers – and simpler to administer – if the limitation period for all ESA violations is extended to two years from the termination of employment. Such an extension would provide workers similar rights to seek justice and enforce their legal rights as those granted to other individuals filing general civil claims.

5. ESTABLISH A PERMANENT COMMISSION TO ADVISE ON SETTING THE MINIMUM WAGE

BC has a history of long periods of minimum wage freezes during which the real value of the minimum wage is eroded over time. To end this practice, we recommend:

48. Establish a permanent commission to examine issues related to wages in BC through research and public consultation, and to advise government on appropriate increases of the minimum wage as recommended in the Fair Wages Commission's first report. The Commission must be resourced to undertake research and consult with the public, including with workers earning low wages and their advocates.

The BC Law Institute Project Committee was divided on the question of how the minimum wage should be set. The majority recommended a combination of regular indexation (without specifying how frequently or to what indicator or indicators) and residual government discretion to set the minimum wage at a different rate. As the Consultation

¹⁸ Arthurs, Harry W., 2006, *Fairness At Work: Federal Labour Standards for the 21st Century*, Government of Canada. <http://publications.gc.ca/site/eng/324676/publication.html>

Paper points out, the most common method of indexing the minimum wage in Canada is to inflation as measured by the consumer price index (CPI). However, we have found such indexation to be problematic due to CPI being held down by falling prices for some non-essentials (such as electronics) while the costs of core essentials that families cannot avoid – rent, electricity, child care and food – have been increasing by two-to-four times the rate of inflation since the mid 2000s.¹⁹

6. MAKE IT EASIER TO APPEAL DECISIONS BY THE EMPLOYMENT STANDARDS TRIBUNAL

49. Expand the current narrow grounds for appeal.

Conclusion

All BC workers deserve certain basic workplace rights and protections. The basic rights enshrined under the ESA are particularly important for vulnerable workers such as new immigrants, young workers, low-wage workers, women and workers of colour – all of whom are less likely to be represented by a union and are less able to secure workplace conditions better than the minimum requirements.

However, BC's ESA has not kept up with changes in the labour market, and in particular, with advances in digital technology that have enabled new structures of organizing work. This has opened the door to business models designed to make money by exploiting gaps in the existing legislation and its lax enforcement, models that reduce operating costs by transferring much of the business risk to a low-paid, casual and increasingly precarious workforce.

It is time to redesign BC's workplace protections to fit the new job market realities. The recommendations outlined in this submission will establish a basic standard of workplace rights and protections for all workers in BC and ensure that these rights are meaningfully enforced. We hope they prove useful to your deliberations.

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¹⁹ For more detail on recommendations for the setting of BC's minimum wage, see Klein, Seth and Iglia Ivanova, 2017, *Charting a Path to \$15/Hour for all Workers – and the Road Beyond: CCPA-BC Submission to the BC Fair Wages Commission*. <https://www.policyalternatives.ca/publications/reports/charting-path-15hour-all-workers%E2%80%94and-road-beyond>