



**Modernizing Part III of the
Canada Labour Code**

**Submission to the
Federal Labour Standards Review**

**Workers Action Centre
Employment Standards Work Group
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BACKGROUND

Employment Standards Work Group

The Employment Standards Work Group (ESWG) is a network of more than thirty community legal clinics and organizations that work with non-unionised low wage and precarious workers in Toronto. Members of the ESWG serve more than 25,000 workers in the Toronto area every year. Our member groups provide assistance and legal representation concerning employment standards, employment insurance, human rights and occupational health and safety cases. In addition, we work with communities in low wage and precarious work to improve labour standards.

Workers Action Centre¹

The Workers' Action Centre is a worker-based organization committed to improving the lives and working conditions of people in low-wage and unstable employment. We work with thousands of workers, predominantly recent immigrants, workers of colour, women, and workers in precarious jobs that face problems at work. We want to make sure that workers have a voice at work and are treated with dignity and fairness. The Workers Action Centre provides information about workplace rights, strategies to enforce those rights and participates in campaigns to improve wages and working conditions in workplaces and in labour legislation.

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¹ Previously Toronto Organising for Fair Employment (TOFFE) and the Workers Information Centre (WIC).

1. INTRODUCTION

Federal Labour Standards were established in 1965 to protect workers like Zainab who have little power to bargain in the workplace. The federal Labour Code is supposed to set a floor of employment standards that reflect society's norms. However, over the past 30 years we have witnessed a deregulation of our labour market and resulting in no real protection for workers like Zainab.

Companies have sought new strategies to reduce the costs and legal responsibility of the employment relationship by shifting those costs to subcontractors and workers. We have seen a massive increase in the contracting out of jobs and reliance on non-standard forms of work, making jobs more unstable and precarious.

Governments have responded to employers' pressure to "deregulate" the labour market, as the Law Commission of Canada says, both actively and passively.² For example, active deregulation has occurred by lowering the floor of standards as Ontario did to its employment standards in 2000 by allowing employers to average overtime hours to reduce overtime pay. More passive forms of deregulation have developed in a number of ways. Employment laws do not reflect changes in the economy and organization of work. For example, minimum wages are now 21 percent below mid-1970's levels in real wages, leaving one in four Ontario employees working for wages below the poverty line.³ Labour laws do not adequately address many of the new ways that employers are organizing work so many workers find themselves with little or no labour law protection. Labour standards are not adequately

Zainab

Zainab was trained by a Roger's employee to sell high-speed internet and cable services door-to-door. She and co-workers were given ID cards with the Rogers logo. The sub-contractor that hired Zainab called her 'self-employed' and told her she would have to wait three weeks for her first paycheck. After a month, Zainab figured she was owed \$1,500. But she didn't get paid at all. When she and 14 co-workers confronted the sub-contractor, they were told that Rogers still hadn't paid the sub-contractor so he couldn't pay the workers. When Zainab and others demanded their wages they were given \$20 for the month.

Zainab and co-workers went to Rogers Cable, demanding their wages for selling the company's products. They were turned away by Rogers who claimed they had no responsibility. The small sub-contractor claimed no responsibility because Rogers would not pay them for most of the sales.

² Law Commission of Canada, **Is Work Working? Work Laws that Do a Better Job** Discussion Paper, December 2004 p. 34.

³ 24.5% of Ontario workers earned \$10 or less. Statistics Canada, Income Statistics Division, Survey of Labour and Income Dynamics, Custom Table R1653YC-1, 1999.

funded and enforced so there is no real enforcement of a basic floor of employment rights in Ontario.

Workers are not just left to without protection from substandard conditions. There are significant costs to deregulation -- to workers, families and communities, governments and businesses.

Workers who can least afford it pay the highest cost. Most of the people that we work with earn wages below the poverty line -- less than \$10 an hour. Consequently, workers are forced to adapt to poverty wages through a variety of strategies including working at two or three jobs and working 60 to 70 hours a week. Multiple jobs put a strain on families.

The people we work with are forced to put up with employer violations of basic rights to wages, vacation pay, overtime pay or minimum wage. Employment Standards are not enforced in our workplaces. So workers absorb the costs of these unpaid wages. If workers ask for their rights they are fired or forced to quit. Again, workers absorb the economic and health costs of job loss.

Many workers are deprived of employment rights, benefits and protection because their work arrangements do not conform to the standard employment model underlying labour standards. It is workers who can least afford it that are bearing more of the costs of employment and risks of doing business -- without any share in the rewards of business.

Society is also picking up the costs of this deregulation. Income insecurity and excessive hours of work have both been associated with higher health risks, which in turn increases pressure on health services.⁴ Children and, as a consequence society, suffers when parents are working long hours outside of the home. Tax benefits to poverty-wage workers subsidizes low wage employers and employers with precarious jobs who are not paying the true costs of labour.⁵ People forced out of substandard jobs or between unstable employment are forced to access social assistance and employment insurance which costs society.

⁴ Armstrong, P and K. Laxer, "Precarious Work, Privatization, and the Health Care Industry: The Case of Ancillary Workers" and K. Lippel "Precarious Employment and Occupational Health and Safety Regulation in Quebec" in Leah Vosko, ed., Precarious Employment: Understanding Labour Market Insecurity in Canada Montreal and Kingston: McGill-Queen's University Press, 2005.

⁵ For example, the National Child Benefit Supplement and Canadian Child Tax Benefit

The failure to enforce a floor of standards means that there is no level playing field for employers. That means that some employers are undercut by employers with substandard working conditions. Individual companies and our economy as a whole lose the productive potential of workers when wages are low and working conditions are bad.

The federal review of Part III of the Labour Code is critically important in the context of deregulation to improve conditions for workers, our communities and our economy. Our submission will propose changes to existing provisions and practices and propose new provisions. The Commission has the opportunity to pave the way for not only for federally regulated workers but to forge a labour standards regime that can be a model for provinces as well.

2. GOALS OF EMPLOYMENT STANDARDS

The main purpose of federal Labour Code III must be an inclusive employment standards regime that provides an enforced minimum floor of labour rights and standards above the poverty line.

There is a fundamental imbalance of power between workers and employers. All the people that we work with are forced to put up with employers' violations of basic rights while they are on the job. If they ask for their rights they risk being fired or forced to quit. Minimum federal labour standards must redress this imbalance by protecting those workers whose social and economic position makes them vulnerable to substandard conditions.

At the same time, we need a minimum floor of rights for *all* workers. Work is a fundamental part of people's lives not only for income security but also for health and self esteem as well.⁶ It is not only people in precarious working conditions that face violations. We have worked with full time permanent workers forced to work excessive overtime with no overtime pay who face harassment at work and are fired for trying to enforce rights at work. An enforced floor of minimum standards creates a level playing field for employers, protecting employers in compliance from those practicing substandard terms of employment. This floor of rights is essential for unionized workplaces as well because minimum standards provide basic entitlements where collective agreements are silent on the issue and provide a floor from which to negotiate

⁶ Sengenberger, W., 1994, "International Labour Standards in a Globalized Economy: The Issues" in W. Sengenberger and D. Campbell, eds, *International Labour Standards and Economic Interdependence*, Geneva: ILO, cited in J Fudge et al, "The Legal Concept of Employment: Marginalizing Workers" Report for the Law Commission of Canada, October 25, 2002.

higher benefits. But federal labour standards must remain the starting point without exception.

There must be no contracting out of standards. Ontario's experience of contracting out of standards in the guise of flexibility on hours of work and overtime averaging has resulted in even more power for employers to lower the floor of rights.

Federal labour standards must be inclusive. By that we mean that the Labour Code must include people who sell their capacity to work, people who are paid to work or supply services and the employers who are responsible for that work, or contracting that work to be done. Many of the people that we work with are deprived of employment rights, benefits and protection because the way that employers are organizing work does not conform to the standard employment model of the postwar period. With 37 percent of work being organized by employers along more precarious forms of part-time, temporary, own-account/self-employment and multiple jobs, labour standards are not designed to address these changing forms of work. Over the past 30 years, employers have been changing the way they do business to shift the costs and liability of employment onto others, primarily small sub-contractors and individuals. Workers are unable to seek redress from the parties that are actually making the decisions about their conditions of work.

The principle of universality must guide the scope of the Canada Labour Code.

The labour code provides basic minimum standards like making a minimum wage, hours of work and overtime, vacation and public holidays -- these very minimal standards should apply to all who work.

Equality must also be a goal of federal labour standards. This means equal regardless of the forms of work.⁷ We are increasingly seeing workers doing the same work receiving very different access to work-related benefits and protections. For example a person employed through a temporary help agency, such as a worker in a federally-regulated telecommunications firm or a call centre worker with a big bank, will do exactly the same work as an employee of the client company⁸. Yet the temporary worker will work for lower wages, no access to public holiday pay, no employer-sponsored health or pension benefits, no paid sick days or real job protection when sick, no real right to refuse overtime, no real right to maternity and parental leaves, no real right to take vacation time. This is exacerbated for federal workers whose employers attempt to treat them as though they are part of the provincial jurisdiction through subcontracting arrangements.

⁷ Sengenberger, W., *ibid*

⁸ Defined as the company who pays a temporary employment agency to supply workers.

Surely our Labour Standards should seek to treat individuals who are in substantially the same position equally in their entitlement to work-related benefits and protections.

3. EFFECTIVE ENFORCEMENT OF THE CANADIAN LABOUR CODE

We urge the Commission reviewing Part III of the Labour code to prioritize improving enforcement. As former Ontario Labour Minister Bentley correctly states, "(R)ights without remedies will not be rights for long. Remedies that are not used are not remedies at all ... a more effective approach to ESA enforcement is long overdue."⁹ While Minister Bentley was referring to the need to improve enforcement of Ontario's employment standards, the same can be said about enforcement of federal labour standards. There is little point in improving standards if these standards are not enforced in our workplaces.

Federal labour standards are supposed to provide a basic floor of rights for all workers and a level playing field for employers. The pressures for deregulation have resulted in under-funding of labour standards enforcement and a shift of resources from proactive inspections and enforcement to a program relying on voluntary employer compliance. The results are widespread violations of basic employment rights. Federal evaluations of the program found only 25 percent of employers were following the law; the other 75 percent were in partial or widespread non-compliance with Part III provisions.¹⁰ That means that a majority of the workers in the 15,000 federally regulated companies face violations of their right to wages and other entitlements.

The Canada Labour Code operates under a "Compliance Policy" which has abandoned proactive inspections to detect violations and prosecutions of employers who break the law. Federal review of the program notes that workplace interventions favour harmonious conflict-resolution and voluntary compliance. Fines and prosecutions are used as a last resort.¹¹ So what does this mean for workers?

With no active enforcement of the code in workplaces and the unequal power between workers and employers, workers can do little to enforce their rights while on the job. Workers are forced to put up with substandard conditions or face reprisals if they seek their rights while they are still on the job.

⁹ The Honourable Chris Bentley, Statement to the Legislature Regarding 60-Hour Work Week, Queen's Park, April 26, 2004

¹⁰ These findings are based on a survey of employers to determine rates of compliance. Human Resources Development Canada, "Evaluation of Federal Labour Standards (Phase I) Final Report, August, 1997 p. 41.

¹¹ Ibid. p. 4

So that leaves workers fighting for their rights only *after* they have left the job. And very few workers do that. Even with a conservative estimate of one in three Ontario employers in violation of provincial employment standards -- that means over 100,000 employers are breaking the law. Yet only 15,000 workers pursue claims at the Ministry of Labour. The reality is, most people do not try to enforce their rights even after they have left the job.

On the federal level, roughly 5,000 workers make claims for violations out of 1.35 million federally regulated workers -- that's about .004 percent. Given the high rates of violation, many workers whose rights have been violated are not coming forward. This is due to a number of reasons:

- Disaffection with the process -- workers see how their rights are not protected in the workplace so there is little hope that their rights will be protected after they leave the job.
- Language and other barriers -- for people whose language is not English or French, there is no interpretation services provided. The lack of effective protections for undocumented workers means that most will never pursue a claim against employers in violation of the law.
- Labour market position and social location -- these factors affect what workers know of the law, information available to them, and their ability to benefit from their rights. For example, workers misclassified as self-employed may not know they can file a claim.
- Bureaucratic and legal claims process excludes many -- the whole claims process is driven by the former employee and can be quite a lengthy process. While employers have no difficulty securing legal support, workers do. Only a very small fraction of community legal clinics provide representation for employment standards violations. Legal Aid does not provide certificates for employment standards. Low wage workers cannot afford private bar lawyers. So workers are left trying to represent themselves. Barriers to employment insurance result in many people moving from one low wage precarious job to another. Taking time off work to pursue claims often results in job loss or reprisals in the new job.

So the small percentage of workers that do pursue claims have to undertake a lengthy process on their own only to get the wages that they were legally entitled to in the first place. And that is only if the employer voluntarily agrees to pay what it has been ordered to pay -- the government's track record on collecting unpaid wages is abysmal. And then,

the order against the employer is only for the former worker -- the employer is rarely ordered to start following the law for its other employees -- so the violations continue.

Employers on the other hand have little to fear in this deregulated labour market. There is almost no risk that they will be caught in violation since there are very few proactive inspections and very few workers file claims. There is no cost to being caught in violation on the rare occasions that employers are caught. Nor are there meaningful protections for workers who complain. More often than not, the push to settle claims means that employers can often pay less than the legal minimums during the claims process. Employers found guilty of breaking the law don't face fines, penalties or prosecutions.

So there is little risk of being found in violation of the law and there is no cost to breaking federal labour standards.

It is incumbent on the federal government not just to set a framework of standards but it also must ensure that the law is enforced. We need an effective model of enforcement not only for federally regulated workers but to set a new standard that can be adopted by provinces as well. No doubt employers will seek to get rid of this (minimal) "command and control" model of enforcement arguing for 'internal responsibility' on a firm basis and voluntary compliance. In practice, voluntary employer compliance is what we have had for years and it is not working. Employers will not comply if there is no cost or real risk of detection. Any move to shift responsibility for enforcing standards to workplace-based systems or internal responsibility systems such as health and safety is bound to fail. The fundamental power imbalance demands that the government intervene in workplaces and labour markets to regulate fair standards. We need a variety of enforcement strategies that together work to: educate; provide a real risk of being detected in violation; enforce standards in the workplace; provide protection against reprisals; and, that assigns a real cost to employers in violation.

Fundamentally we need to bring government enforcement of standards back into the workplace. Workers, particularly those in low wage and precarious employment, need their basic rights while they are still in their jobs, not after employers have forced them out by contravening the Code. The recommendations below are a move in that direction.

3 (a) Workplace Education

Improving education about rights to employees and responsibilities to employers is often the first line response to concerns about widespread violations. Human Resources Skills Development Canada (HRSDC) evaluations confirm that ignorance, confusion and misinformation are responsible for some employer violations. While we agree that there

is a need for improved education, we caution that it is not the panacea for improving employer compliance. As other jurisdictions demonstrate¹², where there is a real risk of being found in violation and a cost to that violation, employers take steps to learn about legal responsibilities. At the same time, workers may not know specifically what rights are being violated by employers but they do know when they are being abused and that there are power relations in the workplace preventing them from doing anything about it. In addition, HRSDC evaluation of employer compliance shows that there is a high rate of repeat violators.¹³ Any education program must account for these realities. We would also recommend the following:

- Provide information in clear language and in workers' first languages. Canada is a country of First Nations and immigrants -- many recent immigrants, particularly in low wage and precarious work do not speak English or French as a first language. The Ontario Ministry of Labour is moving forward in this area, providing summary pamphlets in 21 languages.
- Information must be presented that addresses the power imbalances in the workplace. Workers need to know not only about protection against unjust dismissal and anti-reprisals protections, but that the labour program will actually protect them from reprisals.
- Information about discrete legal rights may fail to address the realities of changing employer practices. Workers need to know about new employer practices such as the misclassification of employees as independent contractors, which is rampant in the trucking industry for example. Dominant problems faced by workers and emerging employer practices should be mapped in order to develop educational materials that address the way in which violations are taking place.
- Deliver education programs in workplaces where workers and employers need it most. There should be mandatory posting of labour standards in all federally regulated workplaces, in the dominant languages of the workers. Materials summarizing standards, common problems and how complaints can be filed should be distributed to all workers on a regular basis, starting from the date of hire.
- Funds should be made available to community and worker organizations to promote greater awareness of standards and how to enforce those standards.

¹² We would argue that employers find out their obligations where there are costs -- consider the much higher rates of compliance for remittances to Revenue Canada, or health and safety due to high penalties and workers compensation premiums.

¹³ Human Resources Development Canada, "Evaluation of Federal Labour Standards (Phase I) Final Report, August, 1997 p. 43.

- Industry organizations should promote greater awareness of employer responsibilities.
- The federal government should develop strategic plans for education based on mapping of high risk sectors for violation and previous complaints of violation.
- The labour program should integrate employee and employer education into an expanded program of proactive inspections and audits. The government is in a unique position of having the authority to enter employers' premises. This opportunity should be used to target educational efforts (on-site workshops for workers about rights) in companies known to be in violation.

3 (b) Proactive Inspections

To fulfill its mandate, the Labour Program must protect the rights of currently employed workers who face violations and cannot, for many reasons, file claims. Failure to do so ensures that workers must bear the financial, emotional and health costs of substandard conditions. The Code provides the legislative authority to conduct proactive inspections and issue orders against employers who break the law.

In the case of Ontario, proactive inspections uncover violations in 40 to 90 percent of inspections, depending on the sectors inspected.¹⁴ Such high rates of violation demonstrate not only the need for inspections but also their effectiveness in enforcement.

A short and long term plan to increase proactive inspections should include:

- Mapping of labour market practices (including previous cases of employer violations, new forms of work organization, concentrations of young workers, recent immigrants, women and workers of colour, and other indices of high rates of employer violations) to develop a strategic plan for inspections. Our organizations would welcome the opportunity to collaborate on this plan, given our first hand experience with workers in precarious and low wage work.
- Establish year by year targets for inspection rates that would include sectoral targets (for example,, sectors with high rates of violation such as trucking) and overall targets. On the latter, we would suggest a target of 10 percent of federally regulated employers. Currently the Ontario Health and Safety Branch conducts over 35,000 health and safety inspections -- that is 10 percent of Ontario employers.¹⁵

¹⁴ Office of the Provincial Auditor of Ontario, 2004 Annual Report, p 240.

¹⁵ Health and Safety Statistics: Summary, Ontario Ministry of Labour website www.gov.on.ca/LAB/english/hs/stats/summary.html

- Post Labour Affairs Officer reports and all orders arising out of inspection in the workplaces.
- Evaluate the effectiveness of inspection process for employers and employees in terms of exposing full range of violations, non-reprisals against employees, due process for appeals of orders by employers and employees and overall effectiveness in improving compliance.
- Issue orders where violations found (rather than request voluntary compliance).
- Where violations have been substantiated, require mandatory follow-up audit/investigation to ensure compliance to reduce high rate of repeat offenders.
- Investigate a workplace for violations when a worker makes an anonymous complaint, just as the Ontario Ministry of Labour does in the Health and Safety regime.
- Track outcomes, evaluate costs and changes in compliance.

3 (c) Extend Investigation of Claims

When an investigation of an individual, usually former employee, finds a violation against the Code, the investigation is not extended to check for violations against other employees of that employer. So the current process allows employers found guilty of breaking the law to continue violating the law for current employees. This sends a message to workers that nothing can be done while you are on the job. Moreover, it gives employers confidence to continue breaking the law, contributing to the high rate of repeat offenders noted above.

Beautiful South / Swag

Marisa sewed clothes for 8 months only to be owed over \$6,000 in wages by November 2002. She filed a complaint at the Ministry of Labour and the employer was ordered to pay the wages in March 2003. But the order was never enforced. Nor did the Ministry go in and audit the company to find all the other workers that were owed wages. Instead, the employer continued to hire workers and not pay them.

One by one, women have been coming forward from this employer making complaints about unpaid wages. We are now working five other workers who were also owed wages. Now we have orders for over \$35,000 in unpaid wages. The orders have not been enforced. The company still has not been audited to find out how many other workers are owed wages. The company has never been penalized or prosecuted. The company is still open and doing business.

We need to shift the locus of claims investigation from individual former employees to investigating employer violations for all employees. Only in this way will we begin to enforce a basic floor of rights in our workplaces.

- The scope of claims investigation must be extended to cover all employees of the same employer. This was recommended by the Provincial Auditor to the Ontario Ministry of Labour and should be adopted by the Labour Program. This effective and efficient means of enforcement would reduce duplication of officers processing individual claims against the same employer, often year after year.

3(d) Tougher Enforcement Measures used in investigations

In our experience, voluntary compliance and settlements during the claims process is bad for workers and does not improve enforcement and compliance. In Ontario, 80 percent of claims are settled during the claims process, which means the employer and employee "agree" to a sum of money to cover the employment violations. As discussed above, the employer often has legal representation in these claims process and the employee does not. In our experience, workers often settle for less than they were statutorily owed. This is because of the long drawn-out process to get wages and the poor track record of collecting orders to pay when they are not voluntarily paid. Further, workers lose any right to appeal because no order is issued.

Employers not only benefit from 'voluntary compliance' by often paying less than they should, but because it keeps their violation off the enforcement track. In Ontario, fines of \$250 to \$1,000 per violation and the 10 percent administrative fee are only issued on orders. So settlement avoids these. Further, the provincial government only considers prosecuting employers when they fail to pay Orders and are repeat offenders as tracked by previous orders to pay. In short, it pays employers to settle out and avoid Orders to Pay. They often pay less than they should have. They avoid tracking by the Ministry of Labour. They avoid administrative fees and potential fines, penalties and prosecution.

For bureaucracies with limited resources, 'voluntary compliance' and settlement may appear cost effective but scratch the surface and these practices expose huge costs to workers who lose wages. Moreover this practice makes the government complicit in contracting out of basic minimum standards and sends the message to employers, "don't worry if you get caught, it won't cost you", reducing the incentive to comply with the act. This creates more claims in the future, not less.

- There should be a mandatory practice of issuing Orders when violations are substantiated.
- Officers need wider powers to make basic determinations during claims (for e.g., under the current rules, whether an employer/employee relationship exists). These decisions are unnecessarily referred to adjudicators, causing long delays.

3 (e) There must be a cost for breaking the law

There has to be a cost to breaking the law, otherwise there is no incentive to comply with the Code. Officers can not assign fines to employers. After the department has found an employer in violation of the law, it must then take the employer to court to levy a maximum fine of \$5,000. Not surprisingly, this costly and time consuming process is not used. We need an effective system of fines and penalties for employers who contravene the Code.

Fines

- We need a system of fines for employers found in violation of the Code. The amount of the fine has to be substantial enough to have a deterrence effect on employers. We recommend \$500 per violation per employee for first violation; \$1,000 per employee per violation for second offence; escalating to \$5,000 for third offence.
- All employers found in violation must pay the fine, regardless of whether the employer agrees to pay what is owed and/or the parties have reached a "settlement".
- Officers must have the direct power to levy the fines on employers in violation.
- All employers found in violation must be kept on file to facilitate prosecution.¹⁶

Penalties

Employers that break the law have to be held accountable. An effective prosecutions policy and practice can not only make employers and directors of corporations take responsibility for their actions but can serve as a strong incentive to promote employer compliance. The Ontario Ministry of Labour announced improved enforcement including prosecutions in April 2004 and initiated 226 prosecutions in 2004 (only 18 prosecutions in the previous four years). Decisions on these proceedings are just starting to come down. For example, one employer failed to pay 14 workers about \$74,000 in wages. The company was fined \$142,000; one director was personally fined \$17,000 and jailed for 60 days, another director was fined \$11,100. This and other decisions begin to tell Ontario employers that there are costs to breaking the law.

- Make prosecutions policy simple and transparent. Each repeat violation or non-payment of orders must be prosecuted.

¹⁶ Ontario's Ministry of Labour still does not have an integrated computer system so that an officer can not fully check to see if there have been previous claims and orders against employers.

- Prosecution should involve fining individuals up to \$50,000 or imprisonment of up to 12 months or both and corporations up to \$100,000 for first offences. For subsequent convictions, increase fines up to \$250,000 for individuals and \$500,000 for corporations as Ontario has done.
- Publicize all convictions as an incentive to increase compliance.

3 (f) Orders against employers must be enforced.

Workers in Ontario face extreme difficulty getting employers to comply with government orders unless employers voluntarily agree to do so. For example, half a billion dollars in wages that the government ordered employers to pay between 1990 and 2003 went unpaid -- that is 71 percent of wages ordered to pay went unpaid.¹⁷

- Integrate payment of orders into investigations and claims process. In Ontario's experience, orders arising in proactive inspections have higher rates of payment, presumably because the Officer is in the workplace. Requiring payment of orders in the context of increased proactive inspections and extended investigations should improve collection rates.
- Develop clear steps and timelines for Officers to collect orders in default.
- The collection strategy should include a combination of in-house collection using third-party orders against banks, debtors to employers, directors and writs of seizure.
- Where collection strategy fails, prosecution **must** take place.
- Ontario's private collection agency has an effectiveness rate of 12.4 percent, much less than the Ontario Employment Standards Branch's own rates of collection. The federal government must not consider privatizing collection to private collection companies.

3 (g) Wage Earner Protection Program - Bill C-55

The federal government introduced Bill C-55 in June, 2005 to change bankruptcy rules to improve workers chances of getting their wages and to provide workers with a guaranteed payment of wages when a company goes bankrupt. For too long, workers have been at the bottom of the list of creditors, ensuring that wages, severance and other entitlements are never received from bankrupt companies. We are encouraged to see that Bill C-55 begins to address this pressing need, however, amendments are needed if this Act is to really help workers.

¹⁷ Compiled from Employment Standards Branch, Fiscal Year Reports, 1989-90 to 2002-03, Ontario Ministry of Labour

Actual bankruptcies make up a small percentage of employers who do not pay their legal responsibilities to workers. In Ontario, two percent of companies found in violation of employment standards filed bankruptcy in 2003, yet 25 percent of orders against companies in violations went unpaid. And this 25 percent makes up the biggest amount of wages owing -- over 70 percent of money the Ministry orders employers to pay.¹⁸ The reality is many small employers simply close the door of a business in trouble, walk away from orders to pay and money owing to workers, only to start up a new business under a new name. The practice of sub-contracting and outsourcing by large companies gives rise to greater competition and hence precariousness and insolvency among small contractors.

Bill C-55 only provides for a maximum recovery of \$3,000 in unpaid wages and vacation pay to cover earnings in the 6 months prior to bankruptcy. Severance and termination pay is not included in the proposed changes. In our experience, some companies use bankruptcy to bypass their employment standards obligations for severance and termination. Companies shut the doors, file bankruptcy and reopen, doing the same business, same location, same customers, often the same employees, but with a new name and corporate identity. Overly narrow interpretations of successor employers leaves many workers without recourse and tens of thousands of dollars of the severance pay they are owed.

Further the \$3,000 maximum may be sufficient to cover workers who are owed the last few weeks pay in a straight bankruptcy case. But many employers use bankruptcy as a last resort, instead turning to employees to forgo wages in order to get through tough times. We are working with one person who worked 6 years for a company and this dedicated employee went months without pay, on broken promises -- she was owed just over \$10,000 when her boss fired her for being 10 minutes late. Employers start cutting corners before the 6 month cap for wages owing considered in Bill C-55.

On December 19th, workers in an auto parts factory were told that their employment would be terminated that day. No prior notice was given to the over 140 workers and no termination and severance pay. Most of the workers are immigrants who had worked at this plant for 15 to 20 years. Many of them are in their late 50s.

The company reopened after Christmas in the same location, by the same owners to make the same products -- only the name of the company was slightly changed. Many of the younger workers continued working in the factory for \$5 less an hour.

Owners filed for bankruptcy to avoid paying workers close to \$1 million dollars in severance that is owing.

¹⁸ Employment Practices Branch, 2002-03 Fiscal Year Report, Ontario Ministry of Labour.

We recommend the following amendments to Bill C-55:

- The wage protection plan should be paid for by employers, similar to the Workplace Safety and Insurance system, not through general revenues. Employers, not taxpayers, should share the costs of restructuring since it is employers (particularly up the chain of production) who make decisions shaping insolvency, including pitting contracting companies against one another. By shifting the responsibility for wages back to employers, an employer-paid wage protection plan would encourage restructuring of viable companies. The sharing of costs and liabilities of bankruptcy should be among employers not workers.
- There should be no cap on wages recovered under a protection program. Industry Canada predicts that the cap of \$3,000 would capture 97 percent of workers in a bankruptcy situation. Therefore removing the cap for that additional 3 percent will provide universal protection and ensure all earned wages are recovered.
- The 6 month cap on determining wages owed should be extended to 1 year to improve workers ability to recover wages.
- Bill C-55 must include all basic labour standard entitlements, in particular severance and termination pay. This would be the most effective way to address employers who use bankruptcy as a way to discharge their legal responsibilities to pay severance and termination.

3 (h) Improving workers' capacity to enforce rights

Steps are needed to assist workers who face employer violations to enforce their rights while they are on the job. And for those workers that have been forced out of the job, assistance is required to pursue claims.

Anti-reprisals:

- Workers need strong protection against employers who penalize them for trying to assert their statutory rights while they are still on the job. Ontario's Employment Standards Act (ESA) anti-reprisals provisions (s. 74) provides a good start for anti-reprisals. It says that employers cannot intimidate, dismiss, penalize or threaten workers who ask about their rights, ask the employer to comply with the Act, file a claim or participate in any investigations. There is a reverse onus on the employer to disprove reprisals. If found guilty of reprisals, an employer can be ordered to reinstate and/or compensate the worker for losses.
- There needs to be an expedited investigation process for reprisals and interim reinstatement, if requested by the worker, pending ruling on cases of dismissal

due to reprisals. This would reduce the penalizing impact of reprisals on the worker and workplace.

- The reality is that most workers do not have confidence in the province's anti-reprisals provisions and it is rarely used since it came in to force in 2001. There needs to be aggressive education and outreach to inform employers and employees about anti-reprisals. Information about anti-reprisals cases should be publicized in the media, government websites and in educational materials. Workers will need to know that these protections can work before they will trust them.

Unjust Dismissal

Our experience with anti-reprisals protections for people taking maternity and parental leave shows us that employers disguise reprisals to avoid liability. As a result, workers still need stronger protection from unjust dismissal to support their efforts to enforce their rights on the job. The Labour Code's unjust dismissal provisions need to be strengthened to:

- Ensure that protection against unjust dismissal is available to all workers, regardless of how long they have worked for the employer -- repeal one year requirement.
- There needs to be an expedited investigation process for unjust dismissal and interim reinstatement, if requested by the worker, pending ruling on cases of dismissal.

Anonymous Complaints and Third Party Complaints

- Workers must be able to make anonymous complaints of Labour Code violations that will result in a proactive inspection of the employer. This is essential to enable workers in vulnerable positions to bring employers into compliance with the law without having to leave the job.
- Third party complaints should be pursued from non-profit organizations representing workers. Provide funding to support such organizations.

Improve Accessibility to information and claims process

- The "Service Canada" model may not be appropriate for the proper enforcement of the Canada Labour Code. Our experience with generalized government access centres and call centres that use non-specialists suggests that both employers and workers are often given incorrect information and conflicting advice. Often this is either one more hoop to jump through or a door that closes inappropriately on

a worker with a valid claim. Employers and workers need to deal with staff that knows the Code, policies and practices.

- Supportive services must be provided to people who do not speak English and French so that they too can make claims for their statutory rights.
- Recommend funding and support to increase community legal services for employment violations.
- Non-unionized workers who file a complaint under Part III should be provided with free legal representation, as is the case in Quebec.

3 (i) Substantial increase in staffing

Deregulation has ensured significant and persistent under-funding of labour standards enforcement. This has also taken place in Ontario. Both the Health and Safety and Employment Standards branches began at the same time with the same budget and staff. But because employers bear costs from injuries in the workplace -- both from workers compensation premiums and health and safety fines and prosecutions -- the Health and Safety Branch's budget and staff are now three times the size of the Employment standards budget and staffing.

- To improve enforcement and compliance more resources and staffing will be required.
- Money from fines and prosecutions should be dedicated to increasing enforcement measures.

3 (j) Measuring Compliance

A plan of strategic proactive inspections of 10 percent of workplaces, as recommended above to improve detection of violations, would also allow the government to begin tracking compliance and evaluate enforcement strategies over time. Surveys of employees and employers can also provide useful information about compliance. Governments must move away from evaluating employment standards programs on the basis of claims processing and voluntary settlements.

4. NEW INSTITUTIONAL MECHANISMS

Workers face significant barriers accessing their statutory rights while on the job and after they are forced out of substandard workplaces as discussed above. One strategy to

improve access to justice is to empower new labour organizations (non-profit community-based organizations and sector-based worker associations) to advocate and represent workers to employers and the employment standards regimes as recommended by the Canadian Labour Congress. These organizations could provide third-party complaints and assist the government in identifying problem employers and industries. Resources would be necessary to fund these initiatives.

In addition, community legal clinics are overburdened and most clinics do not provide representation on employment standard issues. Nor does the Ontario Legal Aid plan provide legal aid certificates on these matters. Additional resources are required to enable access to representation on Labour Code issues.

As the Canadian Auto Workers point out in its submission to the Commission, unions play an important role in both improving wages and working conditions and labour regulation. There is an important interplay between collective bargaining of working conditions and legislated standards. Unionized workers have led the way in improving conditions at the bargaining table -- for example, hours of work and maternity leaves, that have then been adopted as minimum standards. At the same time, public campaigns led to change in the law for parental leave that have enabled unionized workers to benefit. Unions play an important role in shaping good public policy. But policy makers cannot rely on collective bargaining in unionized workplaces to pull up standards in non-unionized workplaces.

5. PRECARIOUS WORK AND NEW EMPLOYER PRACTICES

Many workers are deprived of employment rights, benefits and protection because their work arrangements do not conform to the standard employment model underlying labour standards, policies and practices. Precarious employment encompasses “forms of work involving limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health. It is shaped by employment status (i.e., self-employment or wage work), form of employment (i.e., temporary or permanent, part-time or full-time), and dimensions of labour market insecurity as well as social context (such as occupation, industry, and geography), and social location (the interaction between social relations, such as gender, race, and disability, and political and economic conditions”¹⁹. Who is pushed into precarious work is shaped by dominant forces in our society such as racism and sexism. So, it is women, recent immigrants and people of colour that are pushed into more precarious forms of work. See Suba's experience for example.

¹⁹ Vosko, 2005 p 1

Unpaid wages, less than minimum wage, misclassified as independent contractors, no access to employment benefits, job insecurity, and little protection against abuses of legal rights -- the stories of Zainab, Sadiq and Frank reflect the growing reality for workers.²⁰

Suba, a 29-year-old teacher, has been in Canada for just over one year. In Sri Lanka, she taught math and art. But, in Canada, she has had to take whatever job she can find. Usually she is told she needs Canadian experience. "Life felt impossible here and I thought I would never find a job," says Suba... She signed up with a temp agency that sent her to work in an auto parts factory. "I had to carry very heavy parts. It was hard work. Most workers only got \$5 an hour. Not even the minimum wage. I talked to the permanent workers at the factory and they were paid \$13 an hour."

Increased competition on a global basis, privatization of government services, and deregulation of labour markets have enabled employers to seek out new practices to depress wages and working conditions and restructure employment relationships to make jobs more unstable and precarious.

Sadiq

For nine months, Sadiq signed people up for bank and retail credit cards. He was hired by an employer who was on contract with many major banks to market credit cards. Sadiq was told he was an independent contractor, even though, legally he was an employee. His boss told him where to and when to market the credit cards and paid him on straight commission. According to Sadiq, his pay averaged out to \$4.41 per hour. One month it dropped to 63 cents an hour.

These forces intersect with racism and sexism in the labour market, which pulls women, recent immigrants and workers of colour into precarious work. For example,

"Frank¹"

Frank drove a load of margarine from Toronto to California in the middle of summer with the refrigeration unit on the fritz. Once in California, he loaded up with carrots and lettuce for the return trip to Toronto. He had to rig up a system to close the driver side door all the way down to California and back because the door would not stay shut. After complaining about health and safety risks and requesting repairs to the truck, he was not paid for the work driving to and from California. Truck drivers are told they are 'independent contractors' and so the client company didn't want to hear from him when he tried to get his wages. He didn't file a claim for his unpaid wages because he was told it wouldn't do any good. Finally he pushed his employer enough that he got half his wages.

²⁰ For a recent study of this phenomenon, see C. Cranford, J. Fudge, E. Tucker and L. Vosko, *Self-Employed Workers Organize: Law, Policy and Unions* (Montreal and Kingston: McGill-Queen's University Press, 2005).

immigrant men (25 percent) and immigrant women (14 percent) have much higher rates of self-employment than Canadian-born men (10 percent) and women (8 percent) do.²¹ The average income for self-employed male workers of colour was just under \$20,000 in 2000 while women of colour self-employed workers earned an average of under \$16,000.²²

5 (a) Universality

Like the workers we talked about above, people are being excluded from basic rights under our labour standards. Exclusion goes beyond workers such as self-employed and indirect workers. Increasingly workers are labouring in new ways that are not covered by the Code. Take, for example, the case of newspaper carriers.

These workers' reduced bargaining power means that they are being forced to pay some of the costs of doing business, without any gains. The carriers are employees, making all independent contractor agreements and franchise agreements null and void and all the costs associated with delivery are being illegally set off against their wages. Unfortunately, most carriers do not know this and accept the employer's misclassification. Also, when workers do try to pursue their

rights and present the increasingly complicated employment relationships they face many barriers. Adjudicators can make different decisions based on very similar facts. For example, we recently had a case of two temp agency workers, doing the same work for the same client company through the same temp agency. Neither temp worker received public holiday pay. The temp workers filed employment standards claims against their former employer. They had two different employment standards officers and they got two different decisions - one got public holiday pay and one did not. We need a clear,

Major newspapers used to employ people to deliver newspapers. Now most have contracted out delivery to subcontractors who, in turn, hire carriers increasingly as (misclassified) independent contractors or even franchise owners (the paper route is the 'business') to deliver the papers. Workers pick up papers at 3:30 am, bundle the papers and deliver by 6:30 am. Most of these workers then go to their day jobs.

Due to the weak position of carriers, more and more costs of doing business are being passed on to the workers. Carriers must purchase elastics and paper bags to bundle papers, pay for gas and car maintenance for delivery and absorb lost time waiting for delivery trucks that are often late. In once case, carriers got paid 19 cents to deliver a weekday paper, yet if that same paper is a Company promotional (free) paper they only get 5 cents. In the case of franchise "owners", carriers are paying a 2% commission for the "right" to deliver papers on their route. After costs these workers are making an average of \$5 an hour.

²¹ N. Zukewich and L. Vosko, in "Precarious by Choice? Gender and Self-Employment" in Vosko, 2005 op cite

²² Law Commission of Canada Is Work Working? Work Laws that Do a Better Job, 2004

expansive scope for the Labour Code which will make it difficult for employers to try and bypass the law through new forms of work organization.

We believe that the scope of the Labour Code must be extended to include precarious forms of employment. But in doing so, the federal government must start from the principle of inclusiveness, seeking universal coverage for its most basic labour standards. This is necessary to improve the regulatory effectiveness of our changing labour markets. Simply expanding the legal definition of employee to include current indirect employees or self-employed may exclude the way employers will organize work tomorrow.²³ The starting point should be that all workers are entitled to the maximum protections and benefits of the law. Sections of the code could then be tailored for particular groups of workers; for example, Ontario's employment standards set out specific conditions for the unique conditions of homeworkers.

New definition of Worker

As a first step toward the goal of universality, the definition of employee must be broadened. We recommend looking to Ontario's Health and Safety Act, which defines a worker as "**a person who is paid to perform work or supply services.**"

This amendment would be a big step towards ending discrimination based on employment status and would work with the proposed new definition of employer below in 6(c).

No contracting out of minimum labour standards

There must be no contracting out of standards in unionized and/or non-unionized workplaces. Contracting out of standards under the guise of flexibility has resulted in even more power for employers to lower the floor of rights. Take Ontario's experience with the ESA 2000 introduction of employer-employee agreements to lower standards such overtime averaging and hours of work.

Workers have no real power to refuse to sign agreements. In Ontario, employers have used these provisions as a way of getting more work at less pay, effectively eroding the floor of rights.

Migrant Farm Workers

The federal government oversees a guest worker program that brings 18,000 Mexican and Caribbean farm workers to Canada each year. People work long days, 7 days a week

²³ Bernstein, S. et al "Precarious Employment and the Law's Flaws: Identifying Regulatory Failure and Securing effective Protection for Workers" in Vosko, op cite.

at low wages and no overtime premium pay. Like the Chinese men who built the Canadian National Railway a century ago, migrant farm workers are barred from bringing their wives and children to this country while they work for up to 10 months a year, year after year.

The terms and conditions of the contract are negotiated by the federal government with the Mexican and Caribbean countries and with the contracting farmers. Yet these workers must rely on provincial employment standards to deal with workplace problems. This makes no sense. Migrant farm workers should be deemed federally regulated employees. The federal government is in the best position to regulate labour standards. It can ensure compliance with labour standards when contracts are negotiated with labour producing countries and farms. The federal government is in the position to only allow farms in full compliance to participate in the Seasonal Agricultural Worker program to access migrant farm workers.

Live-in Caregivers

The federal government also oversees the Live-in Caregiver Program for domestic workers in Canada. Like the migrant farm workers, domestic workers cannot bring family members to Canada while they are part of the program. Workers are required to live in their employer's homes. While a federally regulated program, the estimated 5,000 domestic workers across the country rely on provincial employment standards. This leads to a patchwork of rights and workplace conditions. Some domestic workers face excessive hours of work with little or no paid overtime, illegal charges against wages and restrictions on their movements among other things.

Domestic workers under the Live-in Caregiver Program should be regulated under the federal Labour Code. Not only will this help standardize conditions for these workers, but it can improve enforcement of basic standards. Employers seek federal approval to hire workers under this program. This provides an excellent tool for labour code enforcement and compliance. The Live-in Caregiver Program must be based on the human rights conventions that Canada signs on to and our human rights principles. As such, the Commission should urge improvements to the Live-in Caregiver Program to grant permanent status to caregivers, remove the requirement for caregivers to live in the employer's residence and grant social and health benefits to caregivers.

Workers without regularized status

There are a variety of factors that leave significant numbers of people working without legal status to work (e.g., lack of information about work permit renewal). Some industries, such as transport and construction, are highly reliant on undocumented workers. It is common knowledge among workers and employers that a history of work,

albeit without status, improves immigration applications because it shows a solid work history with no reliance on social programs. Even though undocumented workers have the legal right to labour standards, in practice these workers will not pursue claims because of fears of migration status. Employers know this and, in some sectors, offer jobs at \$5 to \$7 per hour cash. To begin to address the institutional barriers to undocumented workers, we need a clear policy statement from the federal government that undocumented workers have the same labour code rights as other workers. In addition, workers need assurances that identities will be protected and not passed to other federal departments.

No exemptions

Exemptions from the Code create a patchwork of rights and entitlements from basic, minimal standards. Some occupations are excluded from some provisions. For example, some professionals and managers are excluded from hours of work and overtime protections, resulting in excessive overtime with not right to refuse. There is no reason to exempt any but the most senior management levels from provisions of the Code.

5 (b) Equality

The Labour Code does not acknowledge the differences in employment conditions between contract, permanent full time, part time, temp agency work, own-account work. Employers have taken advantage of this. Workers labour side by side doing exactly the same work but with huge inequalities in pay, benefits and security. For example, a temp agency worker can work for months, sometimes years, beside permanent or 'core' workers. The temp agency worker will get \$8 an hour, have no paid sick days, no health benefits, no notice of termination or public holiday pay. While the co-worker doing the same job has a wage of \$15 an hour, paid public holidays, paid sick days, and some health benefits. The only parties benefiting here are the client companies and the temp agency. The temp worker does not benefit by substandard conditions and the core worker's job security is threatened by the use of temp workers.

The Labour Code should mandate equality among employment forms and take away the cost incentive to precarious work forms. This would shift the costs of flexibility on to employers who benefit and off of workers who can least afford it and who pay the costs of employer flexibility. Society does not need more income and work insecurity in building an effective and efficient economy.

Equal Pay for Precarious Work

The principle of equal pay for work of equal value should be extended to those who are being paid a lower rate simply by virtue of employment

status and/or form of employment (i.e., part time, casual, temporary agency worker, contract work etc).

The Code has a role in establishing an institutional framework for equality among workers doing comparable work. The government should not enable employers to impose inferior conditions on workers, primarily women, workers of colour, immigrant workers and young workers, simply because of the form of employment or employment status.

Equal Benefits for Precarious Work

Society needs universally available public statutory rights and entitlements, regardless of paid or unpaid work status, to provide income security in retirement and coverage for prescription drugs, dental care and other basic health care needs. But until that time, employers should no longer be able to discriminate by only providing benefits to some workers and not to others because of employment status.

Employer-provided benefits must be provided to all workers (from full-time permanent to part-time and/or temporary workers, agency, contract, seasonal etc). Full and equal benefits are the priority since prorated benefits do not amount to equivalent conditions. Nor do they amount to minimum standards. Qualifying requirements must be low and in those cases where workers do not meet basic qualifying conditions for benefit plans then the company must pay a pro-rata amount equivalent to the employer's contribution to benefit plans.

5 (c) Employer Liability

A century ago, labour subcontracting was known as the 'sweating system'. Today again, employers are using subcontracting as a key strategy to reduce labour costs, increase profits and shift liabilities down the chain of the 'sweating system' of production.

This growth of contracting out of work to individuals and third parties, such as temporary employment agencies or labour contractors, has created employment relationships not envisioned in the Code. Zainab's and Sadiq's experiences highlight how federally regulated employers have converted formerly permanent full time jobs into nominally independent contractor positions, changing the apparent legal location of the worker despite no real change in the work performed and the company's control over that work. The Code has to address the new realities of people doing federally regulated work within triangular employment relationships. To fail to do so would leave countless workers like Zainab and Sadiq in a legal limbo, unable to exercise their basic rights from

the company that controls their labour conditions. Employers should be held at least jointly responsible and liable for the employment conditions of indirect employees.

- We recommend that people doing federally regulated work should fall within the scope of the federal Labour Code (even if hired through an intermediary such as a sub contractor of temporary employment agency).

We propose two other changes to the Labour Code. First we propose adding a provision to make companies that use subcontractors as well as subcontractors themselves liable for treating workers according to the law. This reflects Québec's *Act Respecting Labour Standards*, which makes companies that engage subcontractors jointly liable for monetary obligations. Second, we propose adding "dependent employer" to the definition of employer to ensure joint and several liability for minimum standards is imposed throughout the subcontracting chain.

Joint and Several Liability

- Employers who enter into contracts with subcontractors, either directly or through an intermediary, must be liable both separately and together for money owed under the Labour Code III and its regulations.

Dependent Employers

- Dependent employers are individuals and entities that are functionally dependent on another individual or entity.

5 (d) Temp Agency Workers

Working through a temporary employment agency is a particularly vulnerable form of precarious work. Firms used to hire workers from temp agencies to replace permanent employees who were ill or on leave. But now companies are using temp workers to permanently replace workers in manufacturing, warehouses, call centres, offices, construction sites -- every part of our economy. In the past 10 years the number of temp agencies in Ontario has grown dramatically, and today there are more than 500 temp agencies in Toronto alone. Temp work has become a key strategy in corporate restructuring.

In 2003, temp agency workers earned an average of 40 percent less than their permanent counterparts did. That is a much larger gap than that of contract workers who earned 8 percent less and seasonal workers where the gap was 28 percent. These gaps persist even when number of hours worked and family situation are taken into account.²⁴ Only 8

²⁴ D. Galarneau, *Perspectives*, January 2005, Vol. 6 no. 1

percent of temp workers, versus 64 percent of permanent workers reported having extended health coverage in 1995.²⁵

Discrimination is a key feature of temp work. Many temp workers are recent immigrants who find that the only work they can get is with a temp agency. They are steered into temp work, being told by employers and employment councilors that they need Canadian experience to get a job. But many workers find that the agency prevents client companies from hiring them when positions become open. Some temp agencies require companies to sign contracts preventing them from hiring any worker that is or has been registered with the temp agency. Client companies and agencies don't provide employment references. So immigrant workers are trapped in the cycle of low wage, insecure temp work.

Pratheepa is 22, and like many young people she had a difficult time finding work. "Eventually," she explains, "I went to a temp agency and was sent to a job at a cookie factory. I worked the night shift, from midnight to 7 a.m., and earned minimum wage. I needed the work but I would always be threatened that if I didn't work hard enough, the work would run out; that the temp agency wouldn't have any more shifts for me. I worked very hard and felt like I was treated like a slave. I had to pack and move boxes at a very fast pace." Her whole family, including her father, mother, siblings and uncles, all do similar work. They're all sent to factory jobs as general labour by temp agencies. "In Sri Lanka, my father worked as an administrator and my mother worked at home", says Pratheepa. "I feel worried about their health and safety." She has good reason to worry. Ontario's Workplace Safety and Insurance Board reports that industrial temp agency workers have the highest rates of on-the-job injuries. "My uncle's hand was recently caught in a machine at work and he was fired. His hand was damaged and now he is fired. After the accident, the agency just never called him back."

Working for a temp agency means a worker has two employers -- the agency and the client company. In some areas they have separate responsibilities, in others they overlap. That makes it more difficult for workers to enforce rights. That is why we are proposing the following recommendations for temp work:

New section for temporary employment agencies

Add a new section to Labour Code that will make provisions for workers engaged by temporary agencies. This section will explicitly eliminate abuses prevalent among this group. (All other relevant parts of the Code would pertain to these workers as well).

²⁵ Leah Vosko, *Temporary Work: The Gendered Rise of a precarious Employment Relationship*, Toronto: University of Toronto Press, 2000 p 170

Agency workers placed in federally regulated industries, be they subcontractors or parent-firms, must fall within federal jurisdiction for the Labour Code

No Fees or illegal deductions from wages

The agency should not charge a direct or indirect fee for applying for work at a temp agency and/or for placing a worker in any assignment. Nor shall the agency set off any costs against wages not specified in the Code.

Since the Ontario Government repealed the Employment Agencies Act in 2001, employment agencies are no longer regulated. We have witnessed an upsurge in unscrupulous practices. Now many firms are charging a fee to register for work assignments; others are charging workers' a 'fee' equivalent to the first two weeks of work for placement in an assignment. Other agencies try and get money out of workers through illegal deductions from wages. For example, one agency we know of charges workers \$30 if they are late for pick up at the designated subway stop (even though a work assignment is not assured) and \$15 if they are late.

Publicize Mark-ups charged to Client Companies

All temp agency workers are burdened with an invisible fee in the markup between the hourly or weekly wage they receive and the hourly or weekly amount the client pays the agency. This mark-up - the difference between temp workers hourly wage and the hourly fee charged to client company -- is unregulated. Some workers have reported mark ups of 100 percent -- for example the client company pays the temp agency \$20 per hour but the temp worker only gets \$10 per hour. Employers, companies and temp workers need to know what the mark up is. All mark ups should be publicized.

Access to Jobs

The agency and client company shall not limit a worker's access to direct employment in the client firm, or in a group or industry serviced by the agency. This would include prohibitions such as anti-competition clauses barring workers from seeking employment with client firms and 'buy-out fees' charged to client companies.

Access Denied

Tim applied for a job with a big company only to be told that he couldn't be hired. The reason? Tim had worked for a temp agency two years prior that the company was currently using. Even though Tim had never had a placement at the company, the anti-competition clause with the temp agency precluded the company from hiring him.

Equal Pay

The temp agency must pay wages, statutory holiday and other pay at rates equivalent to those paid to employees in comparable jobs in the client company.

To the degree that benefits that the client company offers to its employees are not available to the worker on assignment, the agency must pay its workers an amount equivalent to the client company's contribution to benefit plans. Workers shall not be required to work a minimum number of hours to receive this benefit.

Prearity Pay

At the end of each pay period, the agency should pay the worker an additional four percent of the wages the worker has earned during that pay period. Prearity pay recognizes the costs born by the temporary employee to provide flexible labour for employers. In France for example, temporary workers get 10 percent of wages earned if they are not hired into a permanent position with the client company.

Time worked to be included.

When a temp agency worker is hired by the client company at the end of the employee's assignment, the duration of the contract of assignment shall be considered for purpose of probationary period and shall be recognized in calculating the length of continuous service.

Signed Contract and Copy

The agency must record the conditions of work in a contract that names the client firm(s) for each assignment. This contract shall be signed by the worker and the agency, and is separate from the registration contract. The agency must provide the worker with a copy of this contract at the time of signing.

In our experience, most temp agencies do not provide workers with copies of the contracts that they sign upon registration and little information is provided to workers about the client company on each assignment.

Joint Liability

The temp agency and client firm or firms are jointly liable for wages and other obligations under this law, and also jointly liable for employer-sponsored benefits outlined in any contract.

5 (e) Regularizing Work

Society's well-being depends on our ability to support the human potential for productive work. To sustain that, we need to look at ways to regularize working arrangements so that the costs of flexibility for employers and insecurity for workers are borne by the party that benefits – namely, employers. The following recommendations provide some steps toward regularizing employment:

- Employers should be required to offer available hours of work to part-time workers before new workers performing similar work are hired.
- Provide advance notice of hours and minimum shift hours to part-time workers.
- Provide just cause protection to contract workers if, at the end of a contract, a newly hired worker or another contract worker is doing the work previously done by the contract worker.
- Consider limits on renewal of contracts such that seniority translates into permanent job status.

6. A FEDERAL MINIMUM WAGE

The Canadian economy has grown over the past twenty years. Yet the rewards and costs of that growth are unequally distributed. Not only have median wages stagnated but also the share of low wage jobs, those earning less than \$10 an hour, has stayed about the same between 1980 and 2000. The top one percent of earners, on the other hand, have enjoyed a 113 percent increase from \$156,757 to \$333,382 during that same period.²⁶

Low paid work is a large part of our economy -- 25 percent of people in Ontario earn wages below the poverty line.²⁷ This too is unequally distributed. Almost one-third of women and people of colour are low paid, while the number jumps to 38 percent for women of colour.²⁸ Young workers and people entering the workforce also face lower wages.

Provincially regulated minimum wages have institutionalized low wages and failed to keep up with inflation. Indeed they have fallen 21 percent below their peak levels of the mid-1970s. A full-time worker in Ontario earning the minimum wages falls short of the

²⁶HRSDC, "Hourly Minimum Wages in Canada for Adult workers since 1965, and Saez and Vaell, "Evolutions of High Incomes in Canada, 1920 - 2000, National Bureau of Economic Research Working Paper, 2003

²⁷ 24.5% of Ontario workers earned \$10 or less in 1999. Statistics Canada, Income Statistics Division, Survey of Labour and Income Dynamics, Custom Table R16253YC-1, 1999.

²⁸ Ibid.

poverty line by 33 percent if she lives in Toronto. The situation is not much better for people living in small towns -- there a full time minimum wage worker would earn 15 percent below the poverty line.

As the Income Security Advocacy Centre discusses,²⁹ sole-support parents fair even worse. A single mother of two working full time at minimum wage is 56 percent below the poverty line if she lives in Toronto. Even after her Canada Child Tax Benefit and National Child Benefit Supplement are factored in, her family is still 38 percent below the poverty line.

Minimum wages in Canada are low by international standards. A report by the UK's Low Pay Commission places Canada 9th out of 13 OECD countries, just above the U.S., Portugal, Spain and Greece.

The federal government should reintroduce a federal minimum wage of \$10 per hour and index this to inflation³⁰. The new federal minimum wage should be applied to all federal contractors, and provinces should be encouraged to match the federal minimum wage.

As a policy objective, we recommend that the commission adopt the principle that the minimum wage rate should bring workers up to roughly the level at which a person working full-time, full-year would earn enough to escape poverty in a larger city. A \$10 minimum wage would still fall short of the current poverty line by 11 percent for workers in Toronto, but would reach the poverty line for smaller communities. While not a complete answer to poverty, it is an important strategy in combination with the other recommendations in this submission for improving access to employment protections and benefits.

The rationale for \$10 an hour minimum wage is that this is roughly the level at which a person working full-time, full-year, earns enough to near the Statistics Canada Low Income Cut off for a person living in a large city. We support indexing to inflation to maintain the policy objective that minimum wages should raise workers out of poverty. Failure to keep the Ontario minimum wage increasing with the rate of inflation has resulted in an effective 21 percent cut in minimum wages when inflation is taken into consideration. We caution against indexing minimum wages to the growth in the average hourly wage because minimum wages that do not increase with inflation can provide a

²⁹ Income Security Advocacy Centre, Submission to the Federal Labour Standards Review Commission, September 2005

³⁰ we would suggest the Consumer Price Index as an indexing device.

drag on wages above minimum wage -- as evidenced by the stagnation of median wages over the past 20 years.

Analysis shows that establishing minimum wage rates as we have proposed here will not have a negative impact on jobs. Nor will they disproportionately hit small family businesses. In 2000, 71 percent of low wages jobs were in businesses with more than 20 employees; 40 percent were in businesses with over 500 employees.³¹ But a higher minimum wage will help reduce the costs of government income support programs. It can help raise productivity among workers and encourage employers to invest more skills development among its employees. It also shifts some of the costs from government, social services, families and workers themselves who have born the costs of employers who pay below poverty level wages back on to employers to pay the truer costs of labour.

Just as we believe that minimum wage laws should no longer be used to subsidize employers paying less than poverty level wages, we also disagree strongly with wage subsidy proposals to supplement below poverty level wages. Business and some policy bodies have recently recommended that we expand income supplements to alleviate poverty. Income supplements are basically additional annual tax credits to low income people. Canada already has the Canada National Child Benefit Supplement and Canada Child Tax Benefit. Income supplements are being proposed as an alternative to raising minimum wages or as a complement to smaller increases in the minimum wage.

Income supplements are not the answer to poverty wages. These measures allow employers to shift the costs of labour onto taxpayers (but none of its profits). Supplements can lead to lowering market wages and become a force in maintaining a low wage economy. While income supplements can increase the incomes of people in low wage work, increasing the minimum wages is a more direct and effective way of raising income.

7. UPDATING OTHER STANDARDS

Many other provisions of Part III date back over 40 years to 1965. It is time that these basic standards on hours of work, vacations, leaves and termination be updated.

³¹ Statistics Canada 2000 Labour Force Survey; cited in Income Security Advocacy Centre Submission to the Federal Labour Standards Review Commission.

7 (a) Hours of work and Overtime

Some people are working very long hours, while other people do not have enough hours of work to support themselves and their families at a decent standard of living. Research shows that the redistribution of work hours is central to addressing the unequal distribution of earnings.³² As a society we need to commit to an hours of work and overtime policy that reduces excessive overtime and inequalities and that supports job development.

Overtime has been increasing over the past 15 years. The overtime worked by hourly paid workers has risen by more than 33 percent since 1983. For those in manufacturing, overtime has increased by more than a half over the same period. In some industries, overtime is on the increase while the number of permanent jobs has stagnated or declined.³³ About one-half of all overtime work is unpaid.

Regularizing long hours is a serious social issue. In their national survey, Higgins and Duxbury found that 58 percent of workers reported high levels of work-family stress in 2000 compared with 47 percent in 1991.³⁴ Long hours of work are damaging people's health. The National Population Health Survey indicated that switching from a standard work week, that is 35 to 40 hours, to a longer week, of 41 or more hours, increases the risk of certain negative impacts on health.³⁵

Effective Enforcement

While the federal Labour Code provides for a maximum work week of 48 hours, with overtime paid after 8 hours per day and 40 hours per week, these standards are largely ignored and not enforced. Workers need the real power to refuse demands for overtime in excess of 40 hours, except in emergency situations. **That is why our recommendations for effective enforcement and compliance are essential to improving hours of work protection for workers. More than that, however, we need a clear social policy commitment to reduce excessive overtime, redistribute working time and for effective job development.**

Overtime Averaging

Overtime averaging must be revoked. This provision merely allows employers to get more work for less pay. Unpaid overtime premium pay is already one of the biggest areas of employer violations. Averaging gives employers huge control over scheduling with

³² Dushesne, D., Working Overtime in Today's Labour Market, *Perspectives on Labour and Income* 9 (1997)

³³ Julie White, "A New Look at Shorter Hours of Work in the Communications, Energy and Paperworkers Union, Just Labour Vol. 1 (2002) pp 41-49

³⁴ Christopher Higgins and Linda Duxbury, National Work-Life Conflict Study, Human Resources Development Canada, 2001

³⁵ Statistics Canada, National Population Health Survey, 1999.

harsh consequences for workers, especially people with families. By reducing employers' overtime costs, averaging encourages excessive overtime, not job stability, healthy communities and job creation. The focus has to be on improving enforcement rather than lowering the floor of rights under the guise of flexibility.

Time off in Lieu

Employees should also have the right to take overtime in the form of paid time off in lieu (1.5 hours off for each overtime hour worked).

Permits

Permits for overtime in excess of 48 hours per week must be reviewed. Permits should only be given in exceptional circumstances and be conditional on demonstrated efforts to recall employees on layoff and /or offer hours to part time employees and the hiring of new employees. In many cases, scheduled overtime is a result of poor planning rather than genuine need for overtime. Annual caps must be set on overtime hours allowed by permits of no greater than 100 hours per employee. Annual permits must set a weekly cap or quarterly cap to avoid unhealthy overtime in busy periods. Workers must retain the right to refuse overtime under a permit each and every day. This is particularly important for women and workers with families. Names of companies with excessive overtime permits and duration of permits should be publicized.

Breaks

The Code does not provide for breaks over the work day. Most employers provide two paid 'coffee' breaks during the day. But to protect workers with unscrupulous employers, this practice needs to be enacted. Further, a half-hour meal break after five hours of work needs to be clearly articulated in the Code.

Scheduling

The code requires workers to be paid a minimum of three hours when called in to work whether they work the whole time or not, but allows for scheduling shifts less than three hours. The Code should be amended to specify a minimum three hours for shifts, scheduled or on call-in. With increasing inequities of earnings being rooted in fewer hours of paid work, the Code should set limitations on shifting the burden of flexibility on to workers. Workers are the ones who bear additional commuting and other fixed costs when working scheduled shifts of one or two hours.

Advance Posting of Shifts

The Code should be amended to require that work schedules be made available to workers well in advance (two weeks). This is necessary for part-time, temporary and workers with irregular shifts and parents trying to juggle childcare. Many workers are

forced to hold two or three jobs to get by on and advance scheduling is critical to reduce stress and job loss.

7 (b) Vacations and Paid Holidays

Paid vacations and holidays are important to balancing work, family life, community involvement and providing workers with rest and renewal. The Code only provides paid vacations of two weeks after one year and three weeks after six years and nine paid public holidays. These provisions pale in comparison with many European countries, which average more than five weeks annual paid vacation. None have less than four weeks vacation. In Canada, only Saskatchewan entitles workers to four weeks vacation -- but that is after 10 years.

The Code should be updated to provide three weeks vacation after one year of service and four weeks vacation not more than five years. As in Ontario, the Code should protect vacation entitlements for workers on leaves.

A tenth general paid holiday should be added. As the Canadian Labour Congress suggests, consideration should be given to accommodate the needs of different cultural communities, allowing workers to take a tenth day as a public holiday.

7 (c) Leaves

Our labour laws still assume that 'someone' else is going to pick up the pieces of our frayed social safety net. In most families, all the adults are working. Inadequate and expensive childcare and limited elder care leaves many families constantly scrambling to meet basic needs. The Commission needs to address how to update leave policies to help balance work and family demands and enable flexibility for workers to meet those demands.

Enforcement

While the Code's maternity and parental leave provisions provide job protected leave to parents for up to 52 weeks, the reality is that many workers are fired or penalized when they try to return to work. Enforcement of this provision is still a major problem that not only targets women, who still are the majority of workers utilizing this leave provision, but it works as a disincentives to the other parent to consider taking such leaves. Enforcement measures as outlined above are essential to improving real access to parental leaves.

Emergency Leave

The Code does not have leaves for family or personal reasons as some provinces have adopted. All workers should have the right to take up to 10 paid days per year to deal

with personal and family responsibilities, including disruptions to child and elder care arrangements, dealing with family illness, domestic emergencies and medical appointments. This provision should be available to all workers, regardless of firm size or form of employment.

Paid Sick Days

The Code only provides for job protection without pay for a period of illness. It should provide for up to five days of paid sick leave. This is a key issue for people in precarious work. Most of the people we work with have no paid sick days. With wages so low, people are forced to go to work when extremely ill. This is not good for the health of the worker or the public. Temp workers in particular report that calling in sick is a sure way to lose your assignment. Client companies fire the temp worker and ask for a replacement. But it is not just the assignment; temp workers have reported not getting any more work with an agency after calling in sick. Many companies already provide employees with paid sick days; enacting paid sick days would provide basic protection for workers who need it most.

Compassionate Care Leave

Currently compassionate leave only provides for up to eight weeks job protected leave and is unduly restrictive to palliative care of a close relative. The requirement that there be a "significant risk of death" within 26 weeks should be eliminated. Workers cannot meet this requirement as many doctors refuse to give such a prognosis. This definition needs to be expanded to capture a more realistic range of illness and care requirements and be expanded to 12 weeks.

7 (d) Job Security measures and Severance Pay

In cases of termination, the Code provides for a minimum of two weeks notice of dismissal or pay in lieu of notice. This provision is predicated on the notion that workers only require two weeks to find other employment. Not that this was ever the case, but it certainly is not the reality now. People in precarious work routinely experience layoffs due to restructuring and economic downturns. Regardless of how many workers are being terminated, workers require longer notice of termination. At the very least, increase the notice of requirements to start at a two week minimum and then increase the notification requirement, as Ontario and B.C. have done, a week per year of service up to eight years.

Temporary agency workers have no right in practice to notice of termination. These workers should be entitled to the same notification rights as other workers or be provided with a contract specifying term of assignment.

Severance not only recognizes an employee's service with an employer but it also recognizes that a worker will lose benefits and service entitlements that will not be duplicated when a worker gets a new job. Severance also promotes job security, adding an incentive to employers to maintain jobs. Federal severance pay should provide one week's severance pay for every year of service and should be provided regardless of firm size. Further, pension and retirement benefits should not be used to offset severance pay that is owing to an employee.

Protections against unjust dismissal and reprisals have been addressed above in the enforcement section.

8. ANTI-RACISM AND HUMAN RIGHTS

Canada is becoming a much more diverse society. But workers of colour, recent immigrants and women workers are not faring well. Indeed the labour market is segmented along race and gender lines. Women, immigrants and workers of colour are over-represented in jobs that are low paying and more precarious (like temp work, labourers, etc) and under-represented in better paying more secure jobs even when education and skills are held constant.³⁶ Immigrants and workers of colour experience higher rates of unemployment, being pushed from job to job. Racism and sexism are key forces pushing these groups of workers into low wage and precarious work. We must confront racism and sexism in our labour market policies and regulation.

Raising the general level of employment rights and enforcement will help promote equality and inclusion. But we need to take discrimination and harassment head on. As the Canadian Labour Congress suggested, the Commission should prioritize examining the relationship between human rights legislation and employment standards in order to ensure that human rights are, at a minimum reflected in employment standards. Address gaps in Canadian human rights legislation through improvements to Part III. In addition, people who are harassed need the protection of a speedy and objective process for complaint and investigation.

Psychological Harassment

Our society should value a person's right to dignity, respect and integrity. But our workplace laws do not protect us from psychological harassment, with the exception of Quebec. Many of the people we work with suffer from psychological harassment by

³⁶ C. Teelucksingh and G.E. Galabuzi, "Working Precariously: The impact of race and immigrants status on employment opportunities and outcomes in Canada" Canadian Race Relations Foundation, May 2005

management and co-workers. The Code should follow the Quebec model. Quebec requires employers to establish formal procedures to deal with psychological harassment in the workplace. Harassment includes:

"any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, action so gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment."³⁷

Employers are also required to create a work environment free from psychological harassment and take reasonable actions to prevent it and stop it when the employer becomes aware of any problems.

9. CONCLUSION

A comprehensive review of the Canada Labour Code is necessary to modernize the Code and address the realities of our labour market. The Code must be expanded to include new forms of work and the growth in precarious work. Liability under the Code must rest with the parties responsible; the Code must address the rise of sub-contracting and shifting of the costs and liabilities of the employment relationship from employers to workers. Enforcement must be improved to effectively create a floor of standards for all workers, but in particular, it must protect those workers in low wage and precarious work. The Federal Labour Standards Review Commission has an important role in not only addressing these issues for federally regulated workplaces, but it should view the federal Labour Code regime as an important model for labour standards across the country.

³⁷ La Loi sur les normes du travail RSQ 2002, c. 80, s. 47

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