

**Workers' Stories of Exploitation & Abuse:  
Why BC Employment Standards Need to  
Change**  
***SUMMARY REPORT***

**BC Employment Standards Coalition**  
May 2017

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This Summary Report provides an overview of *Workers’ Stories of Exploitation & Abuse: Why BC Employment Standards Need to Change*, a forthcoming report produced and published by the BC Employment Standards Coalition. The Coalition brings together organizations, advocates and workers in a campaign for employment standards legislation that provides decent wages, working conditions, respect and dignity for all workers in the province of British Columbia.

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## Introduction

*Carol is single mother with three children, she receives no child support for two of them. She holds three jobs: a part-time early shift ending at 10 am at Tim Horton's; a full-time afternoon shift from 11:30 am to 7:30 pm at a care facility; and, a part-time Saturday & Sunday 11:30 am to 8:00 pm shift at a family restaurant.*

*Her main complaints are against Tim Horton's where she has worked for six years. They do not pay for all the hours that she works. Initially her shift started at 6 am, then four or five years ago they required her to start earlier but they do not pay her for the first 65 minutes of her shift. She needs to be at work at 3:40 am every day in order to perform all of the duties that were added to her duty list, but they only start paying her at 4:45 am. A second complaint is that when Tim Horton's had temporary foreign workers (TFWs) they were paying the TFWs more than they were paying her for the same work. A third issue involves workplace safety, the counters are too high causing arm pain, and there is no protection from burns from the panini grill where protective pads are needed.*

Carol's employment situation is becoming all too common for people working for low wages in part-time, temporary, or contract jobs without employment benefits or workplace protection. Like Carol, many are juggling two or three jobs to get by and support their families. But it would not have to be this way if the province's labour laws were designed to provide minimum standards for decent wages and working conditions consistent with the International Labour Organization's fundamental principles of "decent" work. Currently the BC *Employment Standards Act and Regulation*, and government's enforcement of those minimum standards, does not ensure decent work for all workers in the province.

The principle of decent work was articulated by Professor Harry Arthurs in his 2006 federal government report *Fairness at Work*:

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent". No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.<sup>1</sup>

Changes in labour market regulation and practices over the past twenty years have realigned the distribution of risks, costs, benefits, and power between employers and employees. Employers' goals of flexibility have become paramount in shaping the employment relationship, a trend that is reinforced by current employment law.

The British Columbia *Employment Standards Act* ("the Act" or "the ESA") is supposed to provide all workers with the same basic minimum workplace rights and protections, including minimum wages, regulated hours of work and overtime, statutory holidays and vacations with pay, leaves

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<sup>1</sup>Harry W. Arthurs (2006), *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century*. Federal Labour Standards Review. Ottawa: Human Resources and Skills Development Canada, p. x.

of absence, termination of employment rights, etc. Over 80 percent of workers in the private sector in BC have no other employment rights than those provided in the *Employment Standards Act*.

Numerous submissions by diverse organizations have been made to the BC provincial government in recent years calling for improvement and expansion of the *Employment Standards Act* and its enforcement. Such organizations have included anti-poverty, child welfare, union, migrant worker, community legal services and employment law advocacy groups, and the Canadian Centre for Policy Alternatives. However, these submissions appear to have fallen on deaf ears as the government has stated it has no intention of changing employment standards for the foreseeable future.

### The British Columbia Law Institute Review

Although the British Columbia Law Institute, a not-for-profit law reform agency, is conducting a review of the *Employment Standards Act*, regrettably there are fundamental shortcomings in the Institute's review process as the project does not include a public hearing process that would enable workers to present their views and employment abuse stories that identify the real need for employment standards improvements. In addition, the public input response to their consultation paper expected later in 2017 will be limited to written submissions.

### Workers' Story Forums – How We Gathered Stories of Exploitation & Abuse

The BC Employment Standards Coalition therefore undertook in late 2016 a modest project of collecting workers' bad job stories by holding of a series of open workers' story forums at different locations in Metro Vancouver and Victoria. At these forums, workers were invited to be interviewed about their negative employment experiences, and in particular about wage theft and other employment standards violations, the inadequacies of the current enforcement regime, and areas where the *Act* does not provide the kinds of rights and protections needed by the precariously employed. Over 145 workers stories were collected from these and other sources.

Workers who attended our workers' story forums, or who contacted us by phone, email or social media, wanted their stories heard, so that changes can be made. The Coalition's forthcoming report ***Workers' Stories of Exploitation & Abuse: Why BC Employment Standards Need to Change*** gives voice to those workers by referencing their stories in support of the *Employment Standards Act* changes being advanced by the BC Employment Standards Coalition.

The Coalition's objective in producing this report is to bring to public view the inadequacies of the current minimum standards of employment in BC, and to persuade both the BC Law Institute and the next provincial government of the need to significantly reform and modernize

the *Employment Standards Act* and the system of enforcement so that all workers in BC are guaranteed decent working conditions.

Unless workers requested that their identity and/or employer be revealed, the Employment Standards Coalition has taken great care to protect the identities of these workers and, if their stories have been used, they have been given pseudonyms.

## Summary of What We Heard

The BC Employment Standards Coalition collected over 145 stories of exploitation and abuse in the workplace—and often violations of the BC *Employment Standards Act* and *Regulations*. Workers’ stories were coded and grouped by the Coalition based on the issues workers experienced. There were approximately 254 incidents of exploitation or abuse from the workers interviewed which are summarized in the table below.

Category	No. of incidents
<b>1. Wage Theft</b> <i>Included in category:</i> <ul style="list-style-type: none"> <li>- improper termination or no severance pay</li> <li>- non-payment or incorrect payment of overtime prem.</li> <li>- improper vacation pay</li> <li>- required to work through unpaid lunch break</li> <li>- Improper or no pay</li> <li>- Improper deductions from pay</li> <li>- improper handling of tips (tip Theft) or no worker control of</li> <li>- monthly instead of semi-monthly pay days</li> <li>- illegal recruitment fees</li> <li>- not paid for all part-time hours worked</li> <li>- no on-call pay</li> <li>- pay cut due to performance</li> <li>- not paid for travel time</li> <li>- not paid while training/job shadowing</li> <li>- improper withholding of commission earnings</li> </ul>	<b>89 (35 per cent)</b>
<b>2. Abusive, Unhealthy Workplace</b> <i>Included in category:</i> <ul style="list-style-type: none"> <li>- verbal abuse</li> <li>- harassment, including sexual harassment or assault</li> <li>- psychological abuse</li> <li>- acrimonious environment</li> <li>- discrimination</li> </ul>	<b>71 (28 per cent)</b>
<b>3. Scheduling/Workload</b> <i>Included in category:</i> <ul style="list-style-type: none"> <li>- compulsory overtime</li> <li>- unreasonable schedules</li> <li>- frequent short notice schedule changes</li> <li>- unreasonable deadlines</li> </ul>	<b>53 (21 per cent)</b>

- work load issues
- excessive long hours of work
- reduced hours of work
- difficulty obtaining personal leave
- Inadequate breaks
- no accommodation for family responsibilities
- no accommodation for return to work light duties

**4. Exclusions from ESA** **18 (7 per cent)**

*Included in category:*

- exclusions from hours of work, overtime & statutory holiday provisions

**5. Employment Standards Branch Complaint Handling** **16 (6 per cent)**

*Included in category:*

- unhelpful
- undue pressure to settle through mediation
- lack of translation services
- fear of retribution
- fear of retaliation
- lack of convenient access
- adjudication hearings by phone
- self-help kit form problems
- unsupportive officers
- refusal to investigate 3<sup>rd</sup> party complaints

**6. Abuse of Temporary Foreign Workers** **7 (3 per cent)**

*Included in category:*

- various forms of abuse

## Decent Hours, Decent Work

The *Employment Standards Act (ESA)* gives employers substantial control over hours of work and scheduling. Some people work too many hours and some workers have too few.

Violations of overtime and hours of work standards were prominent in the stories received. Workers also complained of the confusing myriad of industry and occupational exclusions and special rules for hours of work and overtime, and that there is no ceiling on maximum hours of work.

Similarly, there is no real floor on hours of work either. There are no minimum hours per day. Employers can, and do, schedule workers for one or two hour shifts. Nor does the ESA require employers to guarantee minimum hours of work in a week either.

For many service workers, the employer expects workers to be available for 5 days a week but will only schedule them for 2 or 3 days. There is no ESA requirement to provide work schedules. Prior to changes to the ESA in 2002 employers were required to display hours-of-work notices in each workplace where they can be read by all employees. The ESA also required a 24-hour notice of a change in shift unless as a result of the change the employee was paid overtime wages or a shift extended before it ended.

The expectation that workers will be available for erratic shifts creates underemployment as workers are prevented from taking other work due to scheduling conflicts. Workers bear the costs of unpredictable hours through underemployment, having to finance employers' "just-in-time" scheduling by carrying debt through weeks of insufficient hours or relying on friends or family for financial support.

## Recommendations

- There be no overtime, hours of work exclusions or special rules. All workers should be covered by the same minimum standards.
- The overtime averaging provisions of the ESA should be repealed.
- All overtime work should be voluntary, except in emergency situations, as in the Manitoba legislation: "An employer's management rights do not include an implied right to require an employee to work overtime."
- Employers should be required to offer available hours of work to those working less than full time before new workers performing similar work are hired.
- Employers should be required to post work schedules two weeks in advance, such schedules to include when work begins, ends, shifts, and meal breaks).
- Employees should receive the equivalent of one hour's pay if the schedule is changed with less than a week's notice, and four hour's pay for scheduling changes with less than 24 hours' notice.

- Workers must be able to ask employers to change schedules without penalty (i.e., protection from reprisals).
- The ESA should provide for a family friendly scheduling provision so that in the event of a planned shift schedule change, employees affected by such change must give their formal consent to the change before it can be instituted. Such affected employees will not unreasonably withhold consent but in any case family responsibilities will constitute a valid reason for withholding consent to a shift schedule change.
- Restore the pre-2002 provision that the minimum number of hours of pay to an employee required to report for work is 4 hours if work has started, and 2 hours if work has not started.

## Where's the floor? Exclusions Create Gaps in the Floor of Rights

**Pat** works as a live-in home support worker in the home of a totally disabled person who is provided with 24 hour home support by an agency under contract with the government. The agency is the employer and the disabled person interviews and selects the worker to be employed by the agency. Pat works 20 hour shifts but is only paid for 16 hours. She is paid for 44 hours per week at \$15 per hour. Six people were employed by the agency to provide 24 hour in home care, seven days a week.

She had asked her employer why she was not being paid overtime for working more than 40 hours per week. She was told that she was excluded from the overtime provisions of the ESA. She checked with the ESB and discovered that live-in home support works are excluded from the hours of work and overtime provisions of the ESA under Regulation 34(q). She also discovered that “domestic workers” who reside in the employer’s residence are not excluded.

**Brian** is a database/web/software developer working for a small geotechnical engineering consulting company. He does not receive overtime pay. He is paid 40 hours per week but not paid for overtime, neither 1.5 or 2 times, even though sometimes he works Sat/Sun, and during the week often works an additional 30 minutes to one hour per day. The company does not pay overtime pay because of the “high technology company” exclusion provisions of the Employment Standards Regulation.

The *Employment Standards Act* is legislation designed to provide basic minimum terms and conditions of work that are applicable to all employers and employees. Variances, exceptions and exclusions are inconsistent with this principle of universality. However, the BC *Employment Standards Act* and *Regulation* are replete with a myriad of exceptions, exclusions and special rules that permit some employers to avoid paying minimum wage, vacation pay, public holiday pay, overtime pay, and severance pay.

A significant proportion (12 per cent) of the workers’ stories collected during our forums complained of the discriminatory and exploitative nature of their exclusion from rights contained in the *Act*. Complaints were received from farm workers, home support workers, retail sales clerks receiving commission income, computer programmers employed by geotechnical engineers, and artists employed in the visual effects and digital animation film industries. Especially egregious is their exclusion from the hours of work and overtime, and the statutory holiday provisions of the *Act*.

As noted in the recent interim report of the Ontario government’s Changing Workplaces Review Special Advisors “Unwarranted or out-dated exemptions may have unintended adverse impact on employees in today’s workplaces. The concern is that many employees may be denied the protections under the ESA that are essential for them to be treated with minimum fairness and decency.”

There needs to be a universal approach to coverage under the *Employment Standards Act*, which effectively provides basic minimum standards for all workers. The starting point should

be that all workers, regardless of type of work or industry, are entitled to minimum employment standards.

### Recommendation

- There be no exclusions from provisions in the ESA, and no special rules.

## Temporary Agency Employment

The broad category of “temporary employment”—including contract, seasonal, casual and temp agency work—has been on the rise in BC. Between 2004 and 2013, permanent employment accounted for 76 per cent of new BC jobs and temporary employment accounted for 24 per cent. In the years following BC’s recession (2009–2013), 60 per cent of BC jobs created were permanent and 40 per cent were temporary.<sup>2</sup>

More specifically, *temporary agency work* refers to workers engaged in a triangular employment relationship, where they are recruited by an employment agency and offered a temporary assignment in the client firm’s workplace, which workers may accept or decline. The employment agency is the employer of record. Temporary agency workers are separate and distinct from temporary foreign workers.<sup>3</sup> The employment services industry, a proxy measure of temporary agency work, is growing. In BC, the industry grew from 8,848 jobs in 2004 to 19,580 by 2013; operating revenues increased from \$355 million in 2004 to \$675 million in 2012.<sup>4</sup>

A Canadian Centre for Policy Alternatives (CCPA-BC) report found that temporary agency work is a type of precarious employment, based on qualitative and statistical evidence of the following: limited duration and high risk of termination; workers’ lack of control over working conditions and the amount and pace of work; lack of protection, particularly through the Employment Standards Act (ESA); low incomes; and debt burden associated with temporary agency work. The research report also uncovered a number of violations of the Employment Standards Act, including approximately two-thirds of Lower Mainland employment agencies operating without a license from the Employment Standards Branch—one of the few legislated standards for employment agencies in BC.

The following stories provide additional evidence to illustrate how temporary agency work is a form of precarious employment and the urgent need for progressive policy solutions to improve the economic security of temporary agency workers and address the persistent employment standards violations associated with this type of precarious employment relationship.

### Michael’s story: from temp agency worker to overseeing illegal practices in the temporary employment industry

On a temp assignment with a logistics company, employed by a large multi-national temp agency, he was denied vacation after 27 months on the job, fired when he tried to take

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<sup>2</sup>Andrew Longhurst (2014), *Precarious: Temporary Agency Work in BC*, Vancouver: Canadian Centre for Policy Alternatives—BC Office, p. 6. Available at:

[https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2014/07/ccpa-bc\\_precariousTempWork\\_fullReport.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2014/07/ccpa-bc_precariousTempWork_fullReport.pdf).

<sup>3</sup>Ibid., p. 10.

<sup>4</sup>Ibid., p. 6.

vacation and was not paid statutory holiday pay. He complained and attempted to use the self-help kit and the temp agency retaliated by terminating his employment.

Mediation through the Employment Standards Branch took six months. The temp agency claimed that the work assigned had ended, suggesting that his claim was invalid. Ultimately, the temp agency agreed to pay liability due to the length of service and another two weeks of pay. Michael did not find this sufficient, but the ESB mediator believed that he should accept the offer. Michael had to fight for the file to proceed to the adjudication stage, in which the ESB would make a decision on the matter. Michael was told by the ESB that it could not proceed because he had not settled during mediation. Under BC's current employment standards regime, there is pressure placed on complainants to settle in mediation rather than having the complaint resolved through adjudication.

Based on the current Employment Standards Act, the ESB only considered the temp agency as the employer of record, meaning that the client firm who oversees the day-to-day work of the temp agency worker (and part of the triangular employment relationship) is not held liable or responsible under the Employment Standards Act. However, Michael had written evidence that the third-party client firm (the physical worksite), would have him replaced if he attempted to take his statutory vacation entitlement under section 57 of the Act.

Michael noted that he was instructed to remove evidence from his submission of evidence to the Employment Standards Branch for adjudication. In the ESB's determination, it found that the temp agency had not violated section 57 of the Act by denying Michael his statutory vacation time. However, this determination was overturned on appeal to the BC Employment Standards Tribunal.

The temp agency had promised permanent employment if the client firm wanted Michael as a permanent employee. The client firm expressed interest multiple times—at six months, one year and after 27 months of Michael working on assignment for the same client firm. The temp agency had a three-month "buy-out" clause provision that would require the client firm to pay the temp agency if they wanted to hire the worker directly as an employee. Yet, Michael was not made permanent employee with the client firm even though the client firm had expressed interest after the buy-out clause provision had expired.

Instead, the temp agency chose to fire Michael in order to continue benefiting financially from its relationship with the client firm: the temp agency preferred to keep a good worker on its own payroll rather than 'losing' this worker if they transitioned into direct, permanent employment.

Michael was frustrated when he found that he was not allowed to file a complaint based on a violation of section 4 the Employment Standards Regulation because it only relates to the licensing of a temporary employment agency, and the Employment Standards Branch interprets this to mean that workers cannot use this section of the Regulation as grounds for a complaint.

In addition to experience as a temporary agency worker, Michael oversaw administration of scheduling for a temporary employment agency for five years. During his time at the temp

agency, about 900 workers passed through the agency's payroll. Michael was responsible for the payroll hours and was instructed by the temp agency – his employer – to 'doctor' the hours recorded to reduce the hours. In order to prevent workers from accumulating overtime, the employer would layoff employees. Michael attempted to file a complaint as a whistleblower with the Employment Standards Branch, but because he was not an affected employee, he was instructed that he could not file a complaint.

#### Sam's story: wage theft as temporary agency worker in hotel industry

Sam's experienced wage theft with a temporary employment agency. He responded to an employment ad for an assignment in the hotel industry. After working the four-hour shift, he never received further offers of employment from the temp agency nor was he paid for the four-hour shift he worked. He has pursued a complaint with the Employment Standards Branch by first using the self-help kit. His complaint has not been resolved and the wages owed to him are outstanding.

#### Recommendations

Based on these temporary agency workers' stories of economic insecurity and employment standards violations, the BC government should adopt the comprehensive recommendations from the 2014 Canadian Centre for Policy Alternatives Report that echoes research evidence and recommendations from the Toronto Workers' Action Centre's 2015 report *Still Working on the Edge*.<sup>5</sup>

- Strengthen enforcement of the Employment Standards Act. Restore the enforcement capacity of the Employment Standards Branch and conduct regular audits of employment agencies;
- Ensure employment agency licensing compliance. Impose higher penalties on both unlicensed employment agencies and client firms that use unlicensed agencies;
- Eliminate the "self-help" kit and dispute resolution process, and ensure that workers who believe their workplace rights have been violated have the ability to complain directly to the Employment Standards Branch;
- Modernize the Employment Standards Act to adequately regulate employment agencies and the triangular employment relationship;
- Adopt the principle of equal treatment. The ESA should ensure equal treatment for temporary agency workers performing work comparable to that of permanent workers, including pay, statutory and employer-sponsored benefits and working conditions;
- Require that all temporary agency workers be provided with written information about their employment rights; detailed information about the employment agency with which they are registered; and, for each assignment, a signed information document outlining the pay, hours, assignment duration and working conditions being offered;

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<sup>5</sup>Mary Gellatly (2015), *Still Working on the Edge: Building Decent Jobs from the Ground Up*, Toronto: Workers' Action Centre. Available at: [http://www.workersactioncentre.org/wp-content/uploads/dlm\\_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf](http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf).

- Provide certainty in the length of temporary agency assignments by requiring employment agencies to offer a new assignment at the same pay rate or compensation for lost pay if an assignment prematurely ends;
- Encourage transition to permanent employment by prohibiting “buy-out clauses” that impose a fee on client firms that wish to offer direct employment to temporary agency workers, and prohibit clauses that restrict such mobility; and,
- Increase the minimum wage to reduce the economic hardship associated with temporary agency work.<sup>6</sup>

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<sup>6</sup>Ibid., pp. 7-8.

## Employer Misclassification of Workers

Misclassification of workers occurs when an employer classifies a worker as an independent contractor (e.g. self-employed) when they should actually be classified as an employee under the Employment Standards Act.

Employees are defined under the Act, and the legal test often depends on how much control and direction the worker is subject to by the business, as well as the workers' independence, use of the firm's equipment, degree of financial risk and opportunity for profit.<sup>7</sup> Even if the worker agrees to be an independent contractor, it does not automatically mean they are independent contractors under law.

Importantly, as the Toronto Workers' Action Centre states:

Employers cannot legally get out of their statutory obligations by misclassifying workers as "independent contractors." But the label has an effect Workers often have no choice but to accept what employers tell them ... Practices such as misclassification have become increasingly commonplace, which means that officials within regulatory regimes begin accepting the employer's assertions without looking at the substantive employment relationship.<sup>8</sup>

Why do employers misclassify workers? As the Workers' Action Centre notes, "[e]mployers misclassify to save on payroll, avoid complying with the Employment Standards Act and other labour laws, and to shift liability risks on to workers."<sup>9</sup>

### Sarah: misclassification in the applied sciences

While working towards her graduate degree in the applied sciences, Sarah is working for a small firm that requires their small staff who work out the company office to invoice the company for their regular hours of work and remit GST and income tax. The firm pays WCB premiums for all employees but not does remit CPP or EI premiums or deduct income tax as required by employers. Sarah works 20-30 hours per week in the company office, and 40-50 hours per week during the summer when conducting field work. The company owner has told all the staff that they are self-employed, yet the owner refers to them in front of clients as "employees".

Sarah and the other staff consider themselves employees since they work out of the company office and use the company's tools and equipment to perform the work as assigned by the company. She does not receive vacation pay or statutory holiday entitlements and believes she has been misclassified as an independent contractor. Another employee who became

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<sup>7</sup>Canada Revenue Agency (n.d.), *Employee or Self-Employed?* Available at: <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-16e.pdf>; Employment Standards Branch (2016), *Employee or Independent Contractor*, Factsheet. Available at: [http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/employment-standards-workplace-safety/employment-standards/factsheets-pdfs/pdfs/employee\\_or\\_contractor.pdf](http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/employment-standards-workplace-safety/employment-standards/factsheets-pdfs/pdfs/employee_or_contractor.pdf).

<sup>8</sup>Mary Gellatly (2015), *Still Working on the Edge: Building Decent Jobs from the Ground Up*, Toronto: Workers' Action Centre, p. 18. Available at: [http://www.workersactioncentre.org/wp-content/uploads/dlm\\_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf](http://www.workersactioncentre.org/wp-content/uploads/dlm_uploads/2015/03/StillWorkingOnTheEdge-WorkersActionCentre.pdf).

<sup>9</sup>Ibid.

pregnant did not receive paid leave. As a foreign student in Canada, working on a student visa, she fears reprisal from the company or even deportation for making a complaint.

### Malik: misclassification in the construction industry

Malik was misclassified as an independent contractor by a company in the construction industry. The company supplied workers with all the tools, equipment and materials. Malik and the other workers worked solely for the company. The company paid WCB premiums but did not remit CPP or EI premiums or deduct income tax as required, yet Malik and the others were paid by direct deposit by the construction company.

In addition to misclassification as an independent contractor, Malik was terminated without proper notice or pay in lieu of notice and was frustrated to learn that construction workers are treated as second-class workers under the Employment Standards Act because they are excluded from the employment termination protections afforded to other workers.

As the 2014 Canadian Centre for Policy Alternatives report notes, changes to funding cuts and changes to the Employment Standards Branch have left it ill-equipped to protect vulnerable workers and adequately enforce legislation and deal with the realities of today's increasingly precarious labour market.

The bottom line should be that employers cannot avoid their statutory obligations by misclassifying workers as independent contractors when they are actually employees. As the CCPA report concludes, "[i]t is inappropriate to expect vulnerable workers in insecure positions to advocate for themselves."<sup>10</sup>

### Recommendations

In order to ensure that employees are not misclassified, the BC government needs to:

- Strengthen enforcement of the Employment Standards Act;
- Restore the enforcement capacity of the Employment Standards Branch;
- Eliminate the "self-help" kit and dispute resolution process; and
- Ensure that workers who believe their workplace rights have been violated have the ability to complain directly to the Employment Standards Branch.

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<sup>10</sup>ibid., p. 7.

## Wage Theft

Wage theft occurs when employers fail to pay workers for hours of work. Stories of wage theft ranged from simple non-payment of wages to many examples of employers coercing workers into unpaid overtime with threat of discipline. These stories involved violations of almost every aspect of employee compensation rights contained within the Act including:

- Hours worked without pay;
- Improper or no termination/severance pay;
- Non-payment or incorrect payment of overtime wages;
- Improper vacation pay;
- Improper deductions from pay;
- Improper handling of tips, arbitrary tip pooling not controlled by workers, tip sharing with managers or to pay for dine & dash or breakage;
- Non-payment of travel time;
- No pay while training or job shadowing;
- Withholding of commission earnings;
- Improper recording and payroll reporting of commission earnings; and
- Monthly instead of semi-monthly pay days.

We received a total of 89 stories that involved some form of wage theft – the most common type of complaint.

Enforcement of the *Act* through adequate active investigation of workplaces and an accessible, worker-friendly complaint process by the Branch would address the majority of these complaints. See recommendations in the section: Complaints & Enforcement.

Many of these were stories where employers leveraged their power over workers to discourage their employees from seeking their full pay. This was especially the case where workers were marginalized by gender, race, ethnicity, poverty, or dis/ability.

We heard that workplaces where employees were demeaned and discriminated against were often also sites of wage theft because of employer abuse of power.

## Psychological Harassment & Workplace Bullying

*"[The manager] yells and swears at the top of his lungs to his sales staff... He humiliated a woman the second week I was there [by yelling] at her in front of all the staff." –Barb, administrative assistant & purchasing clerk*

*"When [I became] pregnant, a supervisor in charge complained [I] was using the bathroom too much." –Annie, retail sales clerk*

*"In the past decade, I have been sexually assaulted multiple times and told I need to 'suck it up' with a smile on my face because it's the nature of the business, and [because] I need to make those tips in order to put food on the table every month." –Pilar, restaurant server & bartender*

The current BC *Employment Standards Act* does not contain a provision that addresses bullying and harassment. This needs to change.

Among the workers we spoke with and the stories received, 71 of them reported incidents of bullying, harassment, verbal abuse, discrimination, and/or incivility (some cited multiple incidents of such treatment, and sometimes by more than one employer). These negative and/or aggressive situations ranged from sexual and physical assault to yelling and gossip, contributing to an overall unhealthy work environment. Too often, the worker had to leave their workplace or seek medical intervention (sometimes, they were fired for voicing their concerns).

*"I'm 25 [and] I have truly given up on the labour market in this province. It is not worth the strain on my mental health and if this is what the future holds for my generation I would rather be dead." –Pilar, restaurant server & bartender*

### Recommendation

We recommend that the BC *Employment Standards Act* include language that addresses bullying and psychological harassment, similar to the Quebec *Act Respecting Labour Standards*. The Quebec Act states that every employee has a right to a work environment free from psychological harassment. Psychological harassment means any vexatious behaviour in the form of repeated or unwanted conduct, verbal comments, actions or gestures that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for an employee.

Inclusion of such language can help protect workers from the lasting and devastating effects of hostile or unwanted behaviours. Not only bullying and harassment strain on the healthcare system, it can profoundly affect an individual's ability to find and retain work elsewhere.

## Termination of Employment & Just Cause

***Travis** was fired from his restaurant job via e-mail. He had not been written up for discipline. The employer sent him a letter citing multiple customer complaints, but the employer never communicated them to him. The employer did not terminate him for just cause and did not give notice of termination, therefore the employer owes him one week's pay.*

***Lolita** is a domestic worker/live-in caregiver. She became so stressed from having to work from 7 in the morning to 4 in the afternoon, 6 days every week, with no breaks or vacations that she ended up in hospital. When the hospital doctor said that she could go home her employer said she could not, and fired her. She had nowhere to go and had to ask friends if she could stay with them.*

***Theo** was a millworker working for a Tri-Cities company. When he found out that the company was not paying overtime pay correctly he approached his boss about how no one was being paid overtime pay but were receiving a bonus in their pay cheques instead. The boss became angry and told Theo that he did not need to work for the company anymore – that he was fired.*

***Tina** had worked for a property management company for 8 years. She became sick with a serious throat infection. She took one week of sick leave, then had to take more sick leave. When she returned to work she was terminated. She was told her position no longer existed through restructuring. There had been no warning. The employer said she would receive 2 months' severance pay but it would be paid over the next 2 months as if she were still employed.*

Among the workers we spoke with and the stories received, 26 complained of improper or unjustified termination or no severance pay. In BC, an employer has the legal right to terminate an employee. The *Employment Standards Act* requires an employer to give the employee written notice, compensation in lieu of notice, or a combination of the two. However, entitlement to written notice of compensation in lieu of notice only begins after 3 consecutive months of employment.

Compensation in lieu of notice is sometimes called severance pay. The maximum compensation in lieu of notice is 8 weeks' pay for 8 years of service. Compensation in lieu of notice plus any unpaid wages must be paid within 48 hours after the last day a terminated employee works.

An employer does not have to give written notice or compensation for length of service to an employee who is terminated for "just cause". Workers can pursue protection from unjust dismissal through common law; however, this access to justice is typically only for higher income workers. Moderate and low income workers cannot afford the legal representation that is necessary in order to sue their employers for wrongful dismissal.

In Nova Scotia and Quebec, and for workers under federal labour standards legislation, there are unjust dismissal protections that allow employees to contest their termination and provide for a possible reinstatement by an independent arbitrator where no cause is found to exist. The intent of these statutory unjust dismissal protections is to prevent arbitrary and unfair terminations, to enhance job security, to avoid negative impacts on an employee who has been

summarily dismissed, and provide remedies that include the possibility of reinstatement, a remedial authority not available through the courts in a wrongful dismissal suit.

### Recommendations

The BC Employment Standards Coalition calls for improvements to the termination provisions of the *Employment Standards Act* as follows:

- Eliminate the 3-month eligibility requirement for termination notice or pay in lieu of notice.
- Require employers to provide notice of termination, or pay in lieu of notice, based on the total length of employment, including seasonal employees who have recurring periods of layoff beyond the 13-week layoff period.
- Require employers to have “just cause” for terminating and employee’s employment to protect workers from unjust dismissal.
- Implement an expedited adjudication process for workers who have been unjustly dismissed.

## Child Labour Standards in Urgent Need of Improvement

***Justin** was 12 when he started a job at an auto salvage company. On his first day, he was stacking car batteries and battery acid spilled on him, soaking through his clothes and burning his chest. He received no medical treatment on the work site and was told to keep working. He still has scars on his chest from the acid burns.*

***Cara** has permanent disabilities in her back and wrists from working with animals when she was 13. She was blamed for her injuries by her employer and was fired. When her mother complained to the employer, she was paid some compensation for the injuries, but Cara did not get her job back and an injury report was never filed. She still has immobilizing pain four years later and avoids using one of her hands.*

***Cory** was 13 when he started working doing construction cleanup for up to 35 hours per week. Though the law requires an employer to obtain a letter of permission from a parent before hiring someone under 15, he wasn't asked for one. He was promised a video game as payment — he never received it. On one occasion he fell through scaffolding and landed one story below. His boss offered him a beer. He was in pain for about a week. No WorkSafeBC accident report was made.*

These and many other stories have been gathered through research conducted by First Call, the BC Child and Youth Advocacy Coalition, in their monitoring of the issue of employment standards for children since the *Employment Standards Act* was changed in 2003.

In 2003 the BC government passed Bill 37 which amended the *Employment Standards Act* to effectively lower the province's work-start age from 15 to 12 by eliminating the requirement that an employer obtain a permit from the Employment Standards Branch before hiring a 12- to 14-year old. After this change, instead of having an Employment Standards officer determine the suitability of a workplace for a 12- to 14-year old, all that is required is a letter of permission from a parent to the employer, and government rarely checks to see if employers have these letters on file.

Even when a letter of permission is signed, the implicit notion that a parent is responsible for assessing the safety of a workplace is both false and dangerous. It is also contrary to section 115 of the *Workers Compensation Act* which clearly states that every *employer* must ensure the health and safety of the workers on their sites.

According to First Call, both the research data and the stories of young workers they collected make it abundantly clear that the deregulation of child labour in BC has resulted in hundreds of workplace injuries, some disabling for life, numerous instances of unchecked exploitation by unscrupulous employers, as well as negative impacts on many young people's education due to over work.

Data from WorkSafeBC shows that there has been a dramatic increase in annual payments for accepted disability claims related to children ages 12 to 14 injured on the job since Bill 37 was

passed. Between 2004 and 2012, nine young people were designated “long-term disabled” as a result of a work-related injury sustained when they were under the age of 15 years. Overall in this time period, WorkSafeBC paid over \$1.1 million in disability claims for 179 children injured on the job.

It is safe to say that had the law not been changed to allow children as young as 12 to work in virtually every occupation, at almost all tasks and at all times of day, these terrible accidents would likely not have occurred. Before 2003, their employment would not have been legal.

Canada has recently ratified the International Labour Organization Minimum Age Convention (Convention 138), which specifies that the minimum age “shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.” We have until June 2017 until it takes legal effect.

Despite this new federal commitment and the research evidence on the negative impacts of BC’s inadequate child labour standards, public statements and correspondence from the current and past BC Liberal government officials since 2003 have reinforced that they are not interested in reviewing the province’s child labour policy.

### Recommendations

- Establish a minimum work-start age of 16 in compliance with the ILO Convention 138.
- Impose restrictions on the occupations, tasks, and times of day that children can work.
- Increase Employment Standards Branch inspections of worksites where children are most likely to be working, including random inspections.
- Establish a child labour advisory group that includes a broad representation of child and youth advocates, including young people with recent work experience in the higher injury occupations.
- Track the employment of children through on-going data collection.
- Require WorkSafeBC to publish the same detailed injury claims reports on 12- to 14-year-olds as are currently produced for young workers (ages 15 - 24).

## Farm Workers

*Rajpal has worked for the same Indo-Canadian farm labour contractor since she came to Canada. She has picked berries on farms and graded, washed and packed vegetables in a cannery. She lives with her multi-generational family in a basement suite.*

*On a typical day during the picking season, Rajpal wakes up at 4 a.m. and cooks lunches for family members and then gets ready for the farm labour contractor to pick her up. The contractor arranges where, when, and how long she will work. Depending on the crops, she works on farms in Pitt Meadows, Ladner or Cloverdale. During the agricultural season, she works 8 to 10 hour days and usually 12 hour days when picking berries. According to Rajpal, the conditions at some farms are bad: the washrooms are not clean; workers are not told about the pesticides that are used; lunchroom or shed facilities are not provided. As well, farmers do not provide rain gear. Sometimes supervisors are difficult to work for, not allowing workers to talk to one another, or not allowing them to eat lunch until three o'clock in the afternoon.*

BC farm workers are a particularly vulnerable group of low-wage workers.

For too long, farm workers in BC, most of whom are either recent immigrants or temporary foreign workers, have been the victims of discriminatory government policies and practices making them among the most low paid, vulnerable and abused workers in the province.

Most farm workers are either South Asian immigrants or temporary foreign workers. For most either English is not their first language or they have little or no English. Their options for finding alternative employment are few, or virtually zero for temporary foreign workers, and they have little power to challenge their poor working conditions.

Already low paid, precariously employed and highly exploited, farm workers have suffered further over the past decade and a half, as the BC government bowed to the greed and political pressure of a powerful agricultural employers' lobby, and stripped from farm workers the entitlement to such basic rights and benefits as overtime pay, statutory holidays with pay, annual vacations with pay, and hours of work restrictions.

The government has also excluded many farm workers from the right to receive the hourly minimum wage and arbitrarily established instead minimum piece work rates for the harvesting of fruits, berries, vegetables and flowers that do not provide an hourly equivalent pay to the general minimum wage. In addition, those farm workers who are only entitled to a minimum piece work rate, and not an hourly minimum wage, had their wage rates reduced by 3.9% in 2003, had their wage rates frozen from 2003 to 2011, and had their wage rates frozen again from 2012 to 2015. As a result, the minimum piece work rates for farm workers have increased by only 11.6% since 2001, compared to the general hourly minimum wage increase of 35.6% over the same 15 year period for most other workers.

*A Richmond, B.C., blueberry farmer who has twice been cited for withholding farm workers' pay is under investigation again, CBC News has learned.*

**Denmar Smith**, of Jamaica, came to B.C. under Canada's temporary foreign worker program. Smith, 32, said he was drawn by the promise of minimum wage as a blueberry picker, which is more than he could earn for his family as a stone mason back home. The program promised that his employer, KNN, would pay his return trip to Jamaica. Smith is now \$800 out of pocket in unpaid wages and his airfare.

**Denmar** said that when he complained, he was told he could be deported – never to work in Canada or the U.S. again. “If we ask for our pay, they keep it longer,” he said.

Fellow Jamaican **Olando Miford** also worked at KNN and said he, too, is owed about \$800. Milford also claimed that he was bullied and belittled. “They treat us worse than dogs, actually,” Milford said. “It seems like I come in slavery.”

Their allegations are just the latest against KNN Blueberries and Nijjer, which have faced a total of 33 complaints in the past nine years, most for a failure to keep records. They also have been penalized seven times and last year were fined \$13,000 for violations.

–**CBC News**, July 19, 2012

This system of government sanctioned abuse and exploitation of some of our most vulnerable workers must come to an end through the adoption of a new program of comprehensive labour rights in BC based on reasonable standards to ensure decent work in conformance with international labour conventions.

## Recommendations

- Restore the right to regulated hours of work and overtime pay, statutory holidays with pay, and annual vacations with pay.
- Eliminate minimum piece work rates for the hand harvesting of fruits, berries, vegetables and flowers so that all farm workers receive at least the general hourly minimum wage.
- Restore the requirement that farm owners retain records of wages paid to employees of farm labour contractors on their properties, and restore farm owners' liability for workers' unpaid wages.
- Strengthen inspection of farm sites and restore proactive monitoring teams such as the Agricultural Compliance Team so that enforcement of employment standards on farms is comprehensive and continuous.
- Conduct an independent review of the farm labour contracting system with direction to consider establishing a new not-for-profit hiring hall model for all farm workers – immigrant and temporary migrant.
- Establish independent, local agricultural human resources centres.
- Adopt comprehensive regulations for migrant worker housing provided by farm operators.
- Renegotiate provincial-federal agreements relating to the temporary foreign worker program: 1) to permit migrant farm workers to freely change employers and apply for permanent residency, 2) to ensure their employment contracts are actively enforced by federal and/or provincial authorities, and 3) to require the registration of all employers

of temporary foreign workers with the Employment Standards Branch. *[see section on Migrant Workers for more comprehensive proposals]*

- Vigorously enforce health and safety regulations.
- Reform the BC Medical Insurance plan so that migrant workers can receive coverage upon commencement of work in BC.
- Provide funding for community agencies to provide farm worker rights education and advocacy.

## Migrant Workers

In BC, temporary foreign workers can be found in a range of occupations, including caring for children and the elderly, trucking, agriculture, health care, trades and construction, tree planting, mining, fast food and hospitality. The most recent statistics show that by the end of 2014, 21,755 Temporary Foreign Workers held work permits for jobs in BC.

The stories reported by migrant worker advocacy organizations in BC document how temporary migrant workers, particularly those in low-wage positions, are vulnerable to abuses by employers and recruiters. They have limited labour market mobility and differential access to settlement services, and pay into but are ineligible for benefits such as employment insurance. Some face unsafe work conditions and threats of deportation. Their temporary status, which is predicated on employment, is the source of much vulnerability.

The combination of high debt, low pay, precarious and temporary residency status, and tied work permits make migrant worker vulnerable to exploitation and abuse by employer and recruiters. TFWs fear the very real repercussions of being fired and deported if they assert their rights or complain about poor treatment or work conditions. A TFW working in the Lower Mainland in the Seasonal Agricultural Worker Program voiced this concern:

[W]e are mute because the temporary foreign workers programs are taking our voices away ... We accept insult, discrimination and everything without saying a word. If we do, the next year we won't be back to work in Canada.<sup>11</sup>

Manitoba has been a national leader in ensuring the protection of migrant workers and allowing them paths to permanency. Manitoba's Worker Recruitment and Protection Act, the first of its kind in Canada, is aimed at decreasing recruitment-related fraud and abuse through increased proactive enforcement. Similar special employment standards legislation has since been enacted in Saskatchewan, Nova Scotia and Ontario.

Despite the BC government's statements that TFWs have the same rights and protections as other workers in BC, and therefore there is no need for other legislation, the reality is that those rights and protections are only on paper as TFWs are not able to exercise those rights in practice. TFWs working in low wage, low skilled jobs in BC are a uniquely vulnerable workforce. They come to Canada to escape chronic unemployment and poverty in their home countries to support their families, their contracts tie them to one employer.

The Employment Standards Branch's complaint-driven model of enforcement is detrimental to the rights of TFWs. There is an urgent need for proactive enforcement of labour standards and investigations of workplaces that employ TFWs in order to protect this vulnerable group's rights and create a disincentive for employers to violate labour standards.

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<sup>11</sup> Quoted in *Backgrounder: Ending exploitation of migrant workers by recruiters and employers in BC*, Rising Up Against Unjust Recruitment Coalition, December 16, 2016.

The establishment of a mandatory registry of employers in BC is critical to promote accountability on the part of employers. In Saskatchewan, Manitoba and Nova Scotia, for example, employers are required to register with the province, and keep records such as employment contracts and recruiter information. Stronger protections are also urgently needed for TFWs in the recruitment process. TFWs typically pay exorbitant, illegal fees to recruiters for a job in BC with the result that they are indebted upon entry to Canada. They face barriers in BC when trying to recuperate these fees, including the 6-month limitation period for filing complaints with the Employment Standards Branch. This contrasts with the 2-year limitation period in Ontario, for example.

In the recent report of the federal Standing Committee on Human Resources, Skills, and Social Development and the Status of Persons with Disabilities (HUMA) on the Temporary Foreign Worker Program, the Committee “[acknowledged] that employer-specific work permits can place migrant workers in a vulnerable position with negative implications for their physical and mental well-being.” The Committee recommended a movement away from a complaint-driven model and toward “ensuring, through on-site inspections, that labour laws and regulations are properly enforced where migrant workers operate.” Finally, the Committee recognized the need for migrant workers to be informed of their rights, as well as “information on their wages, benefits, accommodations and working conditions.”

### Recommendation

- The BC government should immediately take steps to implement the recommendations of the HUMA with regard to workers in BC in the Temporary Foreign Worker Program. Specifically, the government should enact legislation to increase the rights and protections of TFWs, following the models of Saskatchewan, Manitoba, Nova Scotia and Ontario. In particular they should have the right to recover unpaid wages going back 3 years.

## Raise the Floor

### Minimum Wage

Many BC workers are struggling to get by. More and more decent jobs are being replaced by low-wage work. The fastest growing jobs are in the service sector where wages are the lowest.

Low wages cut across all the dimensions of precarious work. A comprehensive approach to addressing precarious work must include improvements to the minimum wage.

Section 16(1) of the *Employment Standards Act* simply states that “An employer must pay an employee at least the minimum wage as prescribed in the regulations.”

Section 15 of the *Employment Standards Regulation* currently states that the general minimum wage is \$10.85 per hour. However, there are separate minimum daily wage regulations for Home Support Workers and Live-in Camp Leaders, minimum monthly wage regulations for Resident Caretakers, minimum piece rate regulations for Farm Workers who hand harvest berry, fruit or vegetable crops, and a \$1.25 per hour lower minimum hourly wage for Liquor Servers in Sections 16, 17, and 18. There are 120,400 working people in BC earning only the minimum wage.

The lower minimum hourly wage regulation for Liquor Servers was first introduced on May 1, 2011. Its introduction represents, in effect, an unprecedented wage subsidy to restaurant and bar owners. In addition, research has demonstrated that the Liquor Server Minimum Wage reinforces sexism because of the dependence these predominantly women workers have on customers for tips, leaving them vulnerable to enduring sexual harassment and sexualized customer behaviour.

Historically all of these separate minimum wage rates have been increased by the same amount as the general hourly minimum wage, the exception being the hand harvester piece rates that were frozen from May 2011 to September 2015.

Currently 6 provinces have a higher hourly minimum wage than BC, and although the BC minimum wage will rise to at least \$11.25 on September 15, 2017, the Alberta minimum wage will rise to \$13.60 on October 1, 2017, and further to \$15.00 on October 1, 2018. BC's minimum wage is not only out of step with that of neighbouring Alberta, it is also out of step with the Washington State cities of Seattle and Seatac where a \$15 minimum wage came into effect January 1, 2017 (for small employers the implementation date is January 2018).

### Recommendations

- Effective immediately the minimum hourly wage be increased to \$15 per hour, and that thereafter, either in the *Act* or the *Regulations*, an independent Minimum Wage Review Commission or Panel be established with the responsibility and authority to review and

order on an annual basis what the minimum hourly, weekly and monthly wage rates shall be in the Regulation. In determining what the minimum wages shall be ordered such a commission or panel shall be guided by such factors as average and median weekly and hourly earnings in the province, average provincial gross domestic product per capita, the provincial cost of living, living wages across the province, and the Low Income Cutoff for an adult and child in major metropolitan areas.

- Section 18.1 of the Regulation establishing a lower minimum hourly wage for Liquor Servers be abolished so that all servers are covered by the general minimum hourly wage regulation.
- Section 18 of the Regulation establishing minimum piece rates for the harvesting of certain berry, fruit and vegetable crops be abolished so that all farm workers are covered by the general hourly minimum wage regulation.
- In addition the regulation could state that in the event that an employer chooses to pay incentive piece rates for certain products at certain times of the year, the rule should be (as in Ontario and under Temporary Foreign Worker programs) that such rates must be set at a level so that with reasonable effort farm workers can earn at least the minimum hourly wage for all hours worked.

### Tips or Gratuities

The only reference to employee gratuities in the Employment Standards Act is under Part 3 – Wages, Special Clothing and Records in Section 21 regarding deductions not permitted from employee's wages:

*(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

*(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this act applies to the recovery of those wages.*

Therefore what is missing from the Act is a section dealing specifically with an employee's exclusive right to retain all tips or gratuities received for services rendered during the course of employment.

### Recommendation

The ESA contain a new section under Part 3 copied from the Newfoundland & Labrador Labour Standards Act, as follows:

#### **Tips or Gratuities**

*(1) Tips or gratuities are the property of the employee to whom or for whom they are given.*

*(2) An employee shall not be required to share a tip with an employer, a manager or supervisor of the employer or an employer's representative.*

*(3) Where a surcharge or other charge is paid instead of a tip or gratuity, the amount paid shall be considered a tip or gratuity for the purpose of subsection (1).*

*(4) Where a surcharge or other charge is paid instead of a tip or gratuity, or where the amount of the tip or gratuity is itemized on the record of a credit card or debit card payment, the employer may deduct an amount required to be deducted from income by an Act of the province or of Canada from the amount due the employee.*

## Statutory Holidays

### ESA Section 1 – Definition of Statutory Holiday

Ten Statutory Holidays are listed in the ESA:

New Year's Day  
Family Day  
Good Friday  
Victoria Day  
Canada Day  
British Columbia Day  
Labour Day  
Thanksgiving Day  
Remembrance Day  
Christmas Day

Other statutory holidays federally and/or provincially are:

Easter Monday  
National Aboriginal Day (Northwest Territories)  
Boxing Day

### Recommendation

- The above three public holidays be added to the definition of Statutory Holiday in the BC ESA so that there will be 13 in total.

### Section 44 – Entitlement to Statutory Holiday

In order to be entitled to statutory holiday pay an employee must have been employed by an employer for 30 calendar days, and worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday.

Under the Labour Standards Act of Saskatchewan (Part VI, Sections 38, 39 & 40) there is no qualifying period of employment with an employer for employees to be entitled to statutory holiday pay.

#### Recommendation

- Delete Section 44 from the BC ESA so that every employee is entitled to statutory holiday pay.

### **Section 45 – Statutory Holiday Pay**

Currently the calculation of pay for a day off work on a statutory holiday, or for a day off instead of statutory holiday, is based on the Section 44 restriction of entitlement.

#### Recommendation

Replace Section 45(1) with the following from Section 39(1) of the Saskatchewan Act:

*The minimum sum of money to be paid for a statutory holiday or for another day designated for observance of the statutory holiday by an employer to any employee who does not work on that day shall be:*

*(a) where the employer pays to the employee the employee's regular wages for the that includes that day, is equal to those wages;*

*(b) in any other case, is the amount A calculated in accordance with the following formula:*

$$A=W/20$$

*where W is the total of the wages earned by the employee during the four weeks immediately preceding the statutory holiday, exclusion of overtime.*

Amend Section 45(2) so as to be consistent with deletion of Section 44 and replacement Section 45(1), as follows:

*The statutory holiday pay provided for under subsection (1) applies whether or not the statutory holiday falls on the employee's regularly scheduled day off.*

### **Repealed Sections 47 & 49**

Up until the 2002 amendments Section 47 required that if a statutory holiday falls on a non working day for an employee the employer must give the employee a work day off with pay.

#### Recommendation

- Old Section 47 provisions be re-written into the Act.

Up until the 2002 amendments Section 49 required that the standards for employees covered by a collective agreement must meet or exceed the statutory holiday provisions of the Act.

#### Recommendation

- Old Section 49 provisions be re-written into the Act.

#### Paid Sick Leave

The BC *Employment Standards Act* contains no provision for the right of an employee to sick leave (unpaid or paid). Section 52 – Family Responsibility Leave - contains a provision for up to 5 days of unpaid leave during each year to meet family responsibilities. Section 52.1 – Compassionate Care Leave – contains provisions for up to 8 weeks of unpaid leave to provide care or support to a family member if a doctor or nurse practitioner issues a certificate stating that family member has a serious medical condition with a significant risk of death within 26 weeks.

According to the Toronto Workers' Action Centre submission to the Ontario Government's *Changing Workplaces Review*, Canada and the US are almost alone among the developed countries of the world in not having national policies requiring employers to provide paid sick days. At least 145 countries provide paid sick leave for short or long-term illness. According to their research many high-income economies require employers to provide paid sick days upwards of ten days. In the US this is changing with four states and 15 cities having recently adopted guaranteed paid sick days, the most recent being Washington State with the majority of its voters supporting Initiative 1433 which includes an amendment to the State's Fair Labour Standards Act to require every employer to provide up to 40 hours of paid sick leave per year.

#### Recommendations

- All employees shall accrue a minimum of one hour of paid sick time for every 35 hours worked. Employees will not accrue more than 52 hours of paid sick time in a calendar year, unless the employer selects a higher limit. For a full-time 35-hour per week employee, this works out to approximately seven paid sick days per year. Up to 52 hours of unused paid sick leave may be carried over for use in the year following the year of accrual.
- In addition, employers shall be prohibited from requiring evidence of such absences, And an employer must not because of an employee's sick leave terminate the employee or change a condition of employment without the employee's written consent.

## Complaints & Enforcement

***Bianca** was a manager in the kitchen operated by Compass Canada at Hudson's Bay. Her employer was not paying for all hours worked including overtime pay. She raised the issue many times with her employer but was told not to worry, she would be looked after. She finally quit and filed an Employment Standards complaint. She was required to participate in mediation that was conducted by phone with the Employment Standards Officer in the office of the employer.*

*The employer kept giving low ball offers to try to get her to settle. When she did not accept the offers the ES Officer told her she should settle and stop wasting everyone's time. She refused to settle so a hearing was scheduled.*

*The first hearing date the employer did not show. At the second hearing the employer did not bring the paperwork they had been asked to bring.*

*The ES Officer treated the complainant with disrespect and turned his back on her. When the Officer talked to the employer while the complainant was in the room the Officer referred to her as "she" and "her", never using her name. The Officer got into arguments with the complainant. She finally was pressured into settling for less than what was owed to her. It took months to reach this settlement. Said Bianca, "After the hearing I went outside and cried. I was so intimidated and furious and disappointed with how I was treated."*

*Her advice to other workers: "I would tell people not to bother filing an Employment Standards complaint unless they had a lawyer. They will just end up frustrated and even more angry. The system is not made for solving violations. The self-help kit is designed to intimidate people from filing a complaint and is complicated to understand."*

Some of the most significant changes made to the *Employment Standards Act* since 2001 have been with respect to the rights of employees to file complaints of employer violations, and how complaints and investigations are handled by the Director of the Employment Standards Branch and his/her staff in enforcing the *Act*.

Previously the Director was required to "investigate" every complaint received. After the changes the Director was no longer required to investigate every complaint, only to "accept and review" complaints. But a complaint does not have to be accepted or reviewed if "the employee has not taken the requisite steps specified by the Director in order to facilitate resolution or investigation of the complaint."

These changes established the legal framework for the Employment Standards Branch to adopt inadequate administrative policies and procedures, which include:

- the requirement that complaining employees first confront their employer with their complaint, with the aid of a "Self Help Kit", before being permitted to file a written complaint with the Branch;

- the replacement of active “investigation” of complaints by Employment Standards Officer with a new “mediation” process to try to obtain a new form of “settlement agreement”;
- a new “adjudication” role for Officers in the event that a “settlement agreement” cannot be reached, where Officers convene formal hearings – most often by telephone conference – to receive the evidence of both parties to the complaint, and then issue written decisions; and
- the abandonment of proactive enforcement through individual employer and sectoral audits and unannounced inspections.

It has become abundantly clear from the stories received from workers and workers advocates that the required “Self Help Kit” first step in the filing of a complaint is a deterrent to many employees initiating legitimate complaints of violations of the *Act*.

Although prior to the changes 15 years ago the resolution of disputes between employers and employees had often been through a settlement informally mediated by Branch Officers, Officers were cautious in the use of mediated settlements because of their potential to become a means to undermine the *Act*, since most employees acted on their own without counsel or representation, whereas employers were often accompanied by legal counsel and exerted their greater power. And although not clearly defined, the current “settlement agreements” resulting from the more formalized “mediation” process are given special status in the *Act*. Once signed by the complaining employees and their employers, settlement agreements take the place of a Director’s determination, so that if an employer does not comply with the settlement agreement the affected employee cannot then ask the Branch to issue a violation determination to force compliance with the *Act* in full. It is only the settlement agreement that is enforceable in the court.

Because of imbalance in the power relationship between employees and their employers the post 2001 administrative changes to enforcement outlined above have effectively placed employees in a more vulnerable position, so that they receive less protection than was previously the case.

Without proactive enforcement and adequate staff resources to provide effective enforcement employment standards are, for all practical purposes, meaningless. Radical reductions in staffing resources since 2001 have had a significant impact on the ability of the ES Branch to effectively administer and enforce the minimum requirements of the *Act*.

Even when workers advocates have requested that the Director investigate and audit an employer known to be systematically violating the *Act*, the Director has refused to do so.

Since 2000/2001 the number of Branch offices has been reduced from 17 to 9 (a 47 per cent reduction), and the total number of Branch staff has been reduced from 148 to 74 (a 50 per cent reduction). At the same time total employment in BC has increased by 23 per cent, and the number of establishments with employees has increase by 25 per cent. Therefore there are

significantly fewer enforcement staff to enforce employment standards for a significantly larger work force.

According to stories received from workers and workers advocates, workers who have submitted ESA complaints and been through the process of mediation and adjudication have found the experience difficult, intimidating, unfair, and often disrespectful or even abusive such that they are extremely reluctant to ever go through the process again. For those with little or no English there is no translation service provided for participation in mediation and adjudication hearing procedures.

## Recommendations

- Implement a deterrence model of enforcement that compels employers to comply with the ESA.
- Implement a proactive system of enforcement to increase compliance through the use of multi-authority Compliance Teams in abusive employment sectors such as agriculture, construction, personal services, hospitality, retail, restaurant, agency employment, couriers, etc., and conduct sector and geographic audits of employers.
- Increase staffing to the dedicated enforcement team in order implement proactive inspections.
- Restore offices in remote areas & relocate the Lower Mainland Office to a central location near public transit.
- Strategically target emerging employer practices such as misclassification of employees as independent contractors or failure to pay overtime for proactive sectoral inspection blitzes.
- Hold companies in low-wage sectors responsible under a duty based regime for subcontractors' violations of ESA wages and working conditions.
- Create a reverse onus so that employers have to disprove a complaint against them, rather than workers having to prove that a violation occurred.
- Establish Workers Advisory Offices and provide legal assistance to workers to make employment standards claims.
- Eliminate the Self Help Kit process that requires workers to first attempt to enforce their rights with their employer before they are allowed to submit a complaint.
- Fund interpreters for the claims and adjudication process to ensure access for employees and employers who do not speak English.
- Eliminate the forced/compulsory mediation process so that participation in mediation is voluntary.
- Change the Section 78(4) provisions on the supremacy of mediated settlement agreements so that the failure of an employer to comply with the terms of a settlement agreement results in the Director issuing a violation determination to force compliance with the *Act* in full.
- As a matter of course have the Branch publicize on the Branch website the names of all employers found in violation of the ESA.
- Establish a formal anonymous and third party complaint system.

- Provide funding to non-profit advocacy organizations which regularly provide information and support to workers who require assistance in filing ESA complaints.

## Conclusion

As stated in the introduction the BC Employment Standards Coalition's objective in producing the Coalition's forthcoming report ***Workers' Stories of Exploitation & Abuse: Why BC Employment Standards Need to Change*** is to give voice to those workers who have shared their bad jobs stories with us by referencing their stories in support of the *Employment Standards Act* changes called for in the report. The purpose of this report is to bring the inadequacies of the current minimum standards of employment in BC into public view, and to persuade both the BC Law Institute and the next provincial government of the need for significant reforms to the *Employment Standards Act* and the system of employment standards enforcement so that all workers in BC are guaranteed decent working conditions.