



## **Submission to Minister of Labour Harry Bains for Immediate Action on Employment Standards Reform**

### **Introduction**

This submission is on behalf of the BC Employment Standards Coalition. The Coalition has been in existence since 2011 and brings together organizations, advocates and workers in a campaign for employment standards legislation that provides decent wages and working conditions, and respect and dignity for all workers in the province of British Columbia.

This is the fourth submission our Coalition has made to you within the past year calling for immediate action to institute employment standards reforms with respect to the complaints, investigations and enforcement operations of the Employment Standards Branch, changes to the *Employment Standards Regulation*, and changes to the *Employment Standards Act*. We are concerned that, with exception to some of our submissions made to the Fair Wages Commission, none of the recommendations we have made directly to you have been acted upon.

This submission is made to not only reiterate and re-emphasize the need for immediate action on a number of key and pressing employment standards reforms, but to also respond in part to the recommendations of the British Columbia Law Institute (BCLI), as contained in its June 18, 2018 *Consultation Paper on the Employment Standards Act*.

With respect to the BCLI project and consultation paper we have been critical of this exercise and are concerned that you will not be taking any substantive action on employment standards reform until after the BCLI has published its final report and recommendations toward the end of this year. It is our submission that action to reform and improve the employment standards regime needs to begin as soon as possible, without waiting on the BCLI final report.

Our Coalition has been critical of the BCLI ESA review from its inception because it did not include a public hearing process similar to the Thompson Commission ESA review of 1993 – 1994, the Ontario Changing Workplaces Review of 2015 – 2017, and the BC Fair Wages Commission Review of 2017 that would enable workers to present their views and employment abuse stories that identify the need for employment standards improvements, and that it did not have the resources necessary to commission independent research relevant to BC. Additionally, the Consultation Paper is not written in plain language that can easily be understood by workers, and the public input response to the Consultation Paper is limited to written submissions with a

short deadline of two months in the middle of the summer. It is unrealistic to expect that volunteer organizations and interested individuals have the ability to respond to a detailed 450 page report containing 78 recommendations within these two months.

Although the BCLI Consultation Paper contains a number of positive recommendations for ESA change the overwhelming majority of the recommendations reflect a strong employer and legalistic bias on the BCLI's ESA Review Project Committee that would not substantially improve the basic employment rights of workers. This prevailing attitude and approach to the ESA indicates that direct responses to the BCLI's preliminary recommendations that call for more substantive improvements to the *Act* and *Regulation* will not receive favourable consideration by a majority on the BCLI Project Committee. It is important to note that the BCLI has been in possession of the BCESC's *Workers' Stories of Exploitation and Abuse* report since it was published in June 2017<sup>1</sup>, and has given very little credit to it.

## **Priorities for Employment Standards Change**

The BC Employment Standards Coalition's priorities for recommended employment standards regime change are dealt with under the following headings:

- Complaints, Investigations & Enforcement – the ESA and Employment Standards Branch administrative policies & practices.
- Changes to the *Employment Standards Regulation*.
- Changes to the *Employment Standards Act*.

### **1. Complaints, Investigations & Enforcement:**

The Employment Standards Branch has the statutory responsibility of enforcing the employment rights of workers as contained in the *Employment Standards Act* and the *Employment Standards Regulation*.

Over the 16 years of Liberal government administration, the Employment Standards Branch failed spectacularly to effectively carry out its responsibilities. This failure is manifest in the closure of 8 regional offices throughout the province, a significant 51% reduction in enforcement staff, the creation of significant administrative barriers to the filing of complaints by workers, especially the requirement to complete a “self-help” step before a complaint is accepted, and the absence of pro-active investigation and enforcement activities.<sup>2</sup>

While changes to the *Act* require approval from the Legislature, changes to the *Regulation* and to administration of the *Act* by the Employment Standards Branch only require the approval of Cabinet or direction from the Minister of Labour. As the current model for complaints, investigations and enforcement are set out by regulation and internal policy at the ESB, the

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<sup>1</sup> Andrew Longhurst & David Fairey, *Worker's Stories of Exploitation and Abuse: Why BC employment standards need to change* (Vancouver: BC Employment Standards Coalition, 2017).

<sup>2</sup>David Fairey, *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards* (Vancouver: Canadian Centre for Policy Alternatives, 2005) at 53, Table 2.

Minister of Labour is in a position to enact swifter change in this regard. The following pages identify and explain numerous recommendations that the Minister could act upon without delay to improve access to justice for workers under the ESA.

Violations of workplace rights under the ESA have been recently documented by the BC Employment Standards Coalition in our 2017 report, *Workers' Stories of Exploitation and Abuse: Why BC Employment Standards Needs to Change*.<sup>3</sup> A total of 245 incidents were recorded, including: wage theft (not being properly or fully paid according to the provisions of the ESA) (89 incidents); verbal abuse and harassment (71 incidents); and, violations related to scheduling shifts, workload hours, leaves and breaks (53 incidents).<sup>4</sup> In addition, the report documents a number of reports of barriers and negative experiences with the Employment Standards Branch complaints handling (16 incidents).<sup>5</sup>

As precarious employment grows in BC, there is more need than ever for proactive and effective enforcement. Largely an administrative issue, this will require a major increase in funding for the Employment Standards Branch to compensate for the decimating budget and staff cuts implemented by the Liberal government since 2001. The BCLI report highlights the conspicuous decline in complaints following the introduction of the self-help kit, and acknowledges research in Ontario indicating that fear of employer reprisals discourage the use of these kits.

A growing body of research supports this claim, suggesting that relying on individuals to make complaints to employers first (prior to then filling out a relatively complex form) is problematic because it acts as a deterrent to potential claimants and creates access to justice issues.<sup>6</sup> The Poverty and Employment Precarity in Southern Ontario (PEPSO) research project found that 31% of precariously employed workers reported that their employment would likely be negatively impacted if they voiced concerns about employment standards or health safety.<sup>7</sup> Even after reforms in Ontario, recently available data from the Ontario Ministry of Labour's Employment Standards Information System suggests that the focus on compliance through self-help and settlements continues to be ineffective, especially for workers who commonly experience wage theft.<sup>8</sup>

A fear of employer reprisals is particularly acute in precarious sectors, such as food services, retails and other low-wage industries, and for temporary migrant workers in, especially, the

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<sup>3</sup> Longhurst & David Fairey, *supra*.

<sup>4</sup> *Ibid* at 11-12.

<sup>5</sup> *Ibid*.

<sup>6</sup> Leah F Vosko & Mark Thomas, "Confronting the Employment Standard Enforcement Gap: Exploring the Potential for Union Engagement with Employment Law in Ontario, Canada" (2014) 56:5 *J Industrial Relations* 631; Stephanie Bernstein et al, "Precarious Employment and the Law's Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers" in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queens University Press, 2006) 203; John Grundy et al, "Enforcement of Ontario's Employment Standards Act: The Impact of Reforms" (2017) 43:3 *Canadian Public Policy* 190.

<sup>7</sup> Wayne Lewchuk, "The Precarity Penalty: How Insecure Employment Disadvantages Workers and Their Families" (2016) 27 *Alternate Routes: A Journal of Critical Social Research* 87.

<sup>8</sup> Leah F Vosko, "The Compliance Model Of Employment Standards Enforcement: An Evidence-Based Assessment Of Its Efficacy In Instances Of Wage Theft" (2017) 48 *Industrial Relations* 256; Grundy et al, *supra* note 5.

agriculture industry.<sup>9</sup> Workers in these industries face risks of job loss and other job-related consequences for voicing a complaint or attempting to assert their rights in the workplaces.<sup>10</sup> As workers in low-wage and precarious jobs tend to have high job dependency, the consequences of job and income loss are significant, and thus present a strong disincentive to approach an employer as the current ESB system requires through the self-help kit. For migrant workers, the fear of job loss is often further linked to a fear of effective deportation, given that for SAWP workers, in particular, their immigration and work status are contingent and linked together.<sup>11</sup>

Changes to the ESA in 2001 removed the requirement for the director to investigate each complaint, now requiring the director to only “accept and review” each complaint received, and only where the requisite steps (including attempted resolution through the self-help kit) have been undertaken by the employee.<sup>12</sup> This means that, in most cases, where a worker cannot demonstrate that they have attempted to resolve the complaint through use of the self-help kit, they may be precluded from filing their complaint with the ESB. This acts as a deterrent and barrier for many workers to file a complaint with the ESB, thus allowing many ESA violations to remain unresolved.

The BCLI interim report acknowledges this issue and recommends removal of the self-help kit requirement as part of the ESB complaints process.

“The Project Committee is unanimously of the view that the mandatory use of the self-help kit as a prerequisite to initiating the complaint process is a barrier to access to the ESA process and an impediment to the effective enforcement of minimum standards under the ESA. The requirement ignores the intrinsic imbalance of power between employer and employee, and the tenor of available evidence is that it discourages employees from seeking redress for contraventions. An informational self-help kit is not a bad thing in itself, but employees should

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<sup>9</sup>David Fairey et al, *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC* (Vancouver: Canadian Centre for Policy Alternatives, 2008) at 8; Devyn Cousineau, “At Risk: The Unique Challenges Faced by Migrant Workers in Canada” (Vancouver: Continuing Legal Education Society of British Columbia, 2014); Bethany Hastie, “The Inaccessibility of Justice for Migrant Workers: A Capabilities-Based Perspective” (2017) 34:2 Windsor Yearbook of Access to Justice 20.

<sup>10</sup>Andrea M Noack, Leah F Vosko & John Grundy, “Measuring Employment Standards Violations, Evasion and Erosion – Using a Telephone Survey” (2015) 70:1 Industrial Relations 86; Leah F Vosko et al, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada* (Toronto: Law Commission of Ontario, 2012); Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012); Kevin Banks, “Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness” prepared for the Ontario Ministry of Labour, 10/2015; Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau, QC: Government of Canada, 2006); Leah F Vosko, “‘Rights without Remedies’: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs” (2013) 50 Osgoode Hall LJ 845.

<sup>11</sup>House of Commons, Standing Committee on Citizenship and Immigration, “Temporary Foreign Workers and Non-Status Workers” (May 2009) (Chair: David Tilson); Tanya Basok, “Post-national Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada” (2004) 8:1 Citizenship Studies 47; Leigh Binford, “From Fields of Power to Fields of Sweat: the Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada” (2009) 30:3 Third World Q 503; Bethany Hastie, “The Inaccessibility of Justice for Migrant Workers: A Capabilities-Based Perspective” (2017) 34:2 Windsor Yearbook of Access to Justice 20.

<sup>12</sup>Longhurst & Fairey, *supra* note 2 at 51.

not be forced to confront the employer before gaining access to the complaint process.”<sup>13</sup>

The BC Employment Standards Coalition strongly supports this recommendation.

The BCLI report acknowledges the problematic focus on complaints-based enforcement, and further acknowledges the results of proactive enforcement in Ontario, which revealed high levels of non-compliance by employers. However, it fails to recommend specific changes to enhance proactive investigation and enforcement measures, rather suggesting that the Director retain authority and discretion to choose how to best monitor and enforce compliance with the ESA.<sup>14</sup> This is a disappointing outcome as holistic reforms to the complaints, investigations and enforcement process, in addition to the removal of the self-help kit requirement, is necessary to give meaningful effect to the substantive rights and obligations contained in the ESA.<sup>15</sup>

The recent review and reform to employment standards in Ontario can serve as a useful basis for broader reform recommendations. In the past Ontario has had an under-resourced employment standards complaints based enforcement regime similar to that of BC. The recent *Changing Workplaces Review* of employment standards in Ontario focused on the inadequacies of this enforcement model.<sup>16</sup> The review emphasized a need to focus on workplace rights as a framework, on the ethical decent treatment of workers, and on the importance of precariousness as an organizing concept in considering those who should be the focus of regulatory protections.

In their May 2017 final report, the review’s Special Advisors made strong recommendations regarding employment standards and the need for a "strategic enforcement" regime designed to address non-compliance at a systematic level and not only on the basis of complaints. Specific recommendations include: integrating proactive enforcement strategies such as ongoing inspections targeted towards particular sectors and that bear the highest risks of non-compliance; wider coordinated enforcement “sweeps”; greater data collection; expanding investigations where more employees than a complainant may be affected; and, targeting top employers who have a reputation to uphold as well as influence industry/franchisee standards.<sup>17</sup> Following receipt of this report the Ontario government took immediate steps to employ 175 more enforcement staff to improve education, claims processing and enforcement. Similar action is required in BC.

In addition to proactive enforcement and investigation measures, aspects of the investigations and hearing processes at the ESB are considered in the BCLI report, and the BC Employment Standards Coalition supports several recommendations made in respect of those topics. First, the report acknowledged the inherent conflict associated with the director holding dual roles in respect of investigation and adjudication, and recommend ensuring that different delegates

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<sup>13</sup>At 262.

<sup>14</sup>At 259-260.

<sup>15</sup> For reports in the Ontario context, see: Kevin Banks, “Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness” prepared for the Ontario Ministry of Labour, 10/2015; Leah F Vosko et al, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada* (Toronto: Law Commission of Ontario, 2012).

<sup>16</sup>C Michael Mitchell & The Honourable John C Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights* (Ontario: Ontario Ministry of Labour, 2017). See also, Banks, *supra* note 14.

<sup>17</sup>*Ibid* at 70-71. See also, Vosko, *supra* note 14.

should be responsible for investigation and determination in individual cases.<sup>18</sup> This, coupled with a number of recommendations regarding providing a written report and opportunity for parties subject to an investigation to respond to that report,<sup>19</sup> all assist in enhancing the procedural fairness associated with the complaints, investigations and hearings processes at the ESB.

Second, the BCLI report recommends retaining the ability for 3<sup>rd</sup> party complaints to be filed, as this enhances access to justice for, especially, vulnerable and precarious employees.<sup>20</sup> The committee was divided on whether written authorization of the affected employee should be required for a 3<sup>rd</sup> party complaint, with a minority of members supporting the position that the Director should have discretion to dispense with this requirement. The BC Employment Standards Coalition strongly supports this position, as it expands opportunities to identifying, investigating and addressing ESA violations, and thus supporting workers' rights.

Finally, another element of an effective deterrence regime is the liability that employers should face with respect to the time limit of the unpaid wages they may be required to pay if found in violation of the *Act*. The BCLI report discusses limitation periods for filing a complaint and for the recovery of unpaid wages.<sup>21</sup> Workers currently have six months to file a complaint with the ESB.<sup>22</sup> This timeframe is unfair to workers who may not have complete or accurate knowledge of their statutory rights, and is particularly prejudicial to temporary foreign workers, as discussed in the report. The BCLI review committee did not reach a consensus on this topic.<sup>23</sup> The BC Employment Standards Coalition advocates for extending the limitation period for filing a complaint at the ESB to two years for all individuals subject to the ESA. The two-year limitation period corresponds with the limitation period for general civil claims, giving workers equal access to legal remedies as other private litigants. A shorter limitation period would place workers at a disadvantage compared to private litigants, disabling them from enforcing their legal rights in the workplace in a manner equal to the enforcement of other legal rights. Extending the limitation period for filing claims to two years is further supported by CUPE and other submissions made to the BCLI during the ESA reform project consultations. Extending the limitation period enhances access to the complaints and hearing process, and better accommodates workers who may find themselves unable to file a complaint within the shorter time frame, due to a lack of or misinformation, illness or disability, urgent issues related to work, housing or immigration status, or other reasons. In particular, extending the limitation period will benefit migrant workers who may otherwise be barred from seeking legal remedy and recovery for work-related rights violations, especially where a worker has been charged recruitment fees.

In addition workers may only make a claim for unpaid wages covering 6 months before the date of complaint or termination of employment. Until 2002 the wage recovery period was 2 years. The BC Employment Standards Coalition advocates for extending the wage recovery period to 3 years as, here again, the 6 month time frame is unfair to workers who are unaware of their rights

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<sup>18</sup>At 267-269.

<sup>19</sup>*Ibid.*

<sup>20</sup>At 269-270.

<sup>21</sup>At 270-272 & 275-280.

<sup>22</sup> This limitation period runs from the date of the occurrence if the worker is still employed by the employer, or from the date of termination if the worker is no longer employed by the employer.

<sup>23</sup>At 272.

or who have been in a precarious employment relationship for an extended period of time, such as for temporary foreign workers.<sup>24</sup> On this issue the BCLI review committee could also not reach a consensus, the majority not wanting to change the time period and the minority supporting an extension to 12 months.<sup>25</sup>

In support of the 3 year wage recovery period advocated by our Coalition, we refer to the 2006 Federal Labour Standards review report of Professor Harry Arthurs in which he recommended that the period for collection of unpaid wages should be 36 months, which corresponded to the Labour Standards Code requirement for employers to maintain payroll records for up to 3 years.<sup>26</sup> Under the ESA Section 28 (regarding payroll records) the only requirement is for an employer to keep payroll records for 2 years after an employee terminates (prior to 2001 it was 5 years), and in the case of Farm Labour Contractors payroll records must be kept for 5 years. Therefore our recommendation to extend the wage recovery period to 3 years is not inconsistent with the payroll record keeping requirements of the ESA.

### ***Penalties for Violations***

As stated by the Ontario *Changing Workplaces Review* report regarding employment standards “Enforcement mechanisms that encourage compliance, deter non-compliance and provide appropriate and expeditious restitution to employees whose ESA rights have been violated are an essential part of an effective compliance strategy.”<sup>27</sup> A significant element of non-compliance deterrence is the monetary penalty employers can expect to receive if they are found to have contravened the *Act*.

Under the BC *Employment Standards Regulation* penalties are \$500 for the first contravention, \$2,500 for the second contravention of the same provision within 3 years of the first contravention, and \$10,000 for contravention of the same provision within another 3 years of the second contravention.

A problem with these administrative penalty provisions is that if more than one employee is affected by a contravention there is no increase in the penalty. In other provinces the penalty is multiplied by the number of employees affected by the contravention.

Another problem is that there is no increase in the penalty for a second or third violation if the employer contravenes a different section of the *Act* within 3 years of the first contravention. In addition, the penalties for contraventions have not increased since 2001, whereas the rate of inflation in BC since 2001 has increased by 27%.

Changes need to be made in the *Regulation* so that penalties for contravention of the *Act* increase in proportion to the number of employees affected, penalties increase each time any provision of the *Act* is violated, and the amount of the penalties increased by at least the rate of inflation increase since 2001.

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<sup>24</sup>Longhurst & Fairey, *supra* note 2 at 25-27

<sup>25</sup>At 280.

<sup>26</sup>Arthurs, *supra* note 9 at 289.

<sup>27</sup>*Changing Workplaces Review*, *supra* note 15 at 123.

Employment Standards Officers as a matter of course are currently required to attempt to get complainant employees and their employers to reach a mediated settlement of the complaint before conducting an investigation and scheduling a formal adjudication hearing to decide the issue. However, complainant workers are frequently pressured into settling at the mediation stage.

When a settlement for unpaid wages is reached in mediation on the basis of the employer agreeing to pay wages owed because of a violation of the ESA, there is no administrative penalty for such violation. This needs to change as it does not sufficiently deter employers from violating the *Act*. Therefore there needs to be a stronger disincentive for employers to violate the *Act* through the Employment Standards Branch issuing some form of reduced administrative monetary penalty against an employer who has admitted a violation by agreeing to pay wages owed to a worker, or to rectify an illegal practice.

Use of penalties and monetary fines as a deterrence-based strategy for enforcement under the ESA should also be based on a model of strict enforcement. Research regarding the government's use of fines in Ontario as a deterrence-based enforcement strategy has found that the use of ticketing remains very low. A recent study determined that less than 1 in 10 detected and recorded violations are, in fact, ticketed.<sup>28</sup> Rather, most employers are asked to correct the violation. This has created doubt about whether deterrence-based strategies will be effective at a general level. However, the use of ticketing as a specific deterrence strategy has proven somewhat effective, with re-inspections yielding a reduced violation rate. The BC government should enhance its use of fines and penalties for employers, and adopt a stronger, strict enforcement model to better ensure that deterrence objectives are effective.

## **2. Changes to the Employment Standards Regulation:**

While changes to the *Employment Standards Act* require presentation and approval from the Legislature, changes to the *Employment Standards Regulation* and to administration of the *Act* by the Employment Standards Branch only require the approval of Cabinet or direction from the Minister of Labour, and therefore can be acted on without unnecessary delay.

In our June 2017 report *Workers' Stories of Exploitation & Abuse, Why BC Employment Standards Need to Change*, presented to you one year ago, we highlighted a number of immediate changes necessary to the *Regulation*, as follows:

### **a) Employment Agency Licensing**

Neither the *Act* or *Regulation* contain any provision to regulate how employment agencies must conduct themselves or treat their employees except that they must be licensed by the Employment Standards Branch, pay a \$100 fee, and keep employee records for 2 years. This is in contrast to the detailed duties and responsibilities contained in the *Regulation* for farm labour contractors.

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<sup>28</sup>Stephanie Casey et al, "Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada?" (2018) 29:2 *The Economic and Labour Relations Review* 228 at 244-245.

Recent research focused on temporary agency work in BC found that the employment services industry has been growing steadily for more than a decade, and that 40 percent of jobs created were temporary.<sup>29</sup> Both the CCPA report and the Ontario Changing Workplaces Special Advisors in their final report (p 198) found that the triangular relationship between the employee, the agency and the client, and the temporary nature of the employment, results in temporary help agency employees being among the most vulnerable and precariously employed of all workers requiring them to have special rights and protections. The CCPA research found that approximately two-thirds of Lower Mainland employment agencies were operating without a license.

Among the recommendations for *Regulation* change in our *Workers' Stories of Exploitation & Abuse* report relating to employment agencies are the following priorities:

- Impose higher penalties on both unlicensed employment agencies and client firms that use unlicensed agencies;
- 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;
- 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,
- Implement the recommendations of the Changing Workplaces Review Special Advisors to the government of Ontario that temporary employment agencies be required to provide to their assignment workers notice with respect to the end of their assignment with a client, whether the termination was caused by the agency or the client, in an amount equivalent to the notice required under the ESA. If notice is not given, unless the employee is referred to work for other clients of the agency, termination pay is payable by the agency for the number of days equal to the amount of notice, which amount must be paid within 48 hours following the end of the assignment.<sup>30</sup>

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<sup>29</sup> Andrew Longhurst, *Precarious: Temporary Agency Work in BC*, (Canadian Centre for Policy Alternatives – BC, 2014).

<sup>30</sup> See C. Michael Mitchell and John C. Murray (May 2017), *The Changing Workplaces Review: An Agenda for Workplace Rights, Final Report*, p. 326.

Some of these recommendations are consistent with those made by Professor Harry Arthurs in his 2006 Federal Labour Standards Review Report.<sup>31</sup>

A major omission in the BCLI Consultation Paper is the absence of any discussion or recommendation for the licensing and regulation of employment agencies.

### **b) Minimum Wage Setting**

At pages 44 and 45 of our *Workers' Stories of Exploitation & Abuse* report we noted that minimum wage legislation is an important policy tool for the provincial government to use in addressing poverty and income inequality. In the past BC minimum wages have been set irregularly by provincial cabinet in an outmoded ad hoc manner through discretionary fiat without the benefit of independent research or public consultation. We recommended that the government establish an independent commission or panel to annually review the minimum hourly, weekly and monthly wage rates established by the *Regulation*.

Subsequently, in the 2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democratic Caucus, your government undertook to “Immediately establish an at-arms-length Fair Wages Commission that will be tasked with establishing a pathway to a minimum wage of at least \$15 per hour and overseeing regular rate reviews.” Consistent with this undertaking your Ministry appointed an independent impartial Fair Wages Commission (FWC) on September 29, 2017. In addition to directing the FWC to recommend on transition to a \$15 per hour general minimum wage in a series of increases, the FWC was directed to make recommendations on other minimum wage rates under the *Employment Standards Regulation*, and to provide recommendations related to regular rate reviews once the \$15/hour minimum wage is achieved, including the Commission’s role in overseeing regular rate reviews.

In its first report of January 2018 the FWC recommended that your Ministry “Establish a permanent commission with staff to examine issues related to low-wages in BC and to give advice on increases to the minimum wage.”<sup>32</sup> (see page 33 of *The Transition to a \$15 Minimum Wage and Subsequent Increases*, BC Fair Wages Commission First Report, January 2018). Our Coalition fully supports this recommendation and is anxious to learn that your government will soon act on this recommendation.

A major omission in the BCLI Consultation Paper (pp 111-122) is its failure to address and recommend adoption of the recommendation of the FWC that the process for regular annual review and advice to the government on minimum wages should be through the research and public consultations of a permanent Fair Wages Commission.

### **c) Farm Worker Piece Rates**

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<sup>31</sup> Arthurs, *supra*, pp 233-237.

<sup>32</sup> Marjorie Griffin Cohen, Ivan Limpwright & Ken Peacock, *The Transition to a \$15 Minimum Wage and Subsequent Increases*, BC Fair Wages Commission Report and Recommendation to the Minister of Labour, January 2018, p 33.

For decades farm worker organizations, worker advocacy groups, and farm work researchers have called for the abolition of Section 18 of the *Regulation* so that all farm workers are entitled to receive at least the general hourly minimum wage, irrespective of whether the farm operators and farm labour contractors who employ seasonal farm workers to harvest fruits, berries, vegetables and flowers want to incentivize their workers through the payment of production bonuses or piece rates <sup>33</sup>(see our *Workers' Stories of Exploitation & Abuse* report, pp 34-37).

After thoroughly canvassing the public and commissioning independent research on this issue the FWC's second report of March 2018 on alternative minimum wages recommended as follows with respect to piece-rate farm workers:

- *The FWC recognizes the significance of piece rates as an incentive system and recommends that it be maintained, but not in the way it currently operates. The [hourly] minimum wage should be a floor and piece rates should be available as an incentive.*
  - *The FWC recommends a phase in of the general minimum wage to give employers time to adjust:*
    - *15% increase to all piece rates on June 1, 2018; and*
    - *Institute the general minimum wage on June 1, 2019.*
- *The FWC recommends that all farm workers receive at least the general minimum wage by June 1, 2019. This means if worker do not receive the equivalent of the general minimum wage for picking at piece rates their remuneration will be increased to equal the general minimum wage.*
- *The FWC recommends that in the future, once the general minimum wage is fully implemented, piece rates as an incentive be reviewed by a permanent FWC, in consultation with industry and workers. This would be to determine whether it should be government or employers who should set the piece rates that are used as an incentive system above the general minimum wage.*

These recommendations of the FWC reflect well their public consultations with agriculture industry representatives, farm workers and farm worker advocates, comprehensive research conducted by Prof. Mark Thompson, and a balanced approach to a resolution of the issue – an issue that has been festering for decades in the farm working industry. And it is evident that farm owners and operators did not provide to the FWC a compelling case for the retention of minimum piece rates for hand harvesters.

Our experience and the research of members of our Coalition over the past decade has found that farm workers are among the most vulnerable, low paid and exploited workers in BC, and that

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<sup>33</sup> Longhurst & Fairey, *supra*, pp 34-37.

their lesser rights and protections under the *Employment Standards Act* creates a second class status in the labour market that is discriminatory and unethical.

Use of the piece rate system is rife with abuse, difficult for workers to enforce, and a serious administrative challenge for the Employment Standards Branch to investigate and enforce. Our own research into violations of the ESA by farm labour contractors over a 10-year period found that a significant proportion of all FLC violations involved failure to keep payroll records, the destruction of picking cards, and the failure to keep hand harvesting records. In half of those years payroll violations represented 40% or more of all FLC violations.

We submit that your decision of April 19<sup>th</sup> that there would be no increase in the regulated minimum piece rates for farm workers in 2018, that piece rates would not be increased by 11.5% until January 1, 2019, and that there would be further study of minimum piece rates was in error and an insult to the FWC as it does not correspond with the recommendations of the Fair Wage Commission in its March 2018 report.

Your government made an election commitment to improve fairness for all workers and to update employment standards to reflect the changing nature of the workplace and ensure they are applied evenly and enforced. With respect the decision not to update and evenly apply the ESA with respect to the minimum wage for all farm workers is not consistent with this commitment.

We agree with the analysis of the BCLI Consultation Paper (pp 126-134) with respect to the agricultural piece rates (i.e. *Regulation* Section 18 farm worker minimum piece rates), and the conclusion that "... the piece rate scheme undermines the policy underlying the general minimum wage to the extent that it does not allow some to earn the equivalent of that wage."

We also agree with the BCLI Consultation Paper recommendation 31(a) that:

*The ESA should be amended to require that workers who may be paid on a piece rate basis must receive at least the equivalent of the general minimum wage.*

This recommendation is consistent with the recommendations of the FWC with respect to the farm worker piece scheme.

However, we do not agree with the BCLI Consultation Paper recommendation 31(b) to the effect that implementation of recommendation 31(a) not be implemented until an expert committee has reported on appropriate measures for implantation. This is inconsistent with the recommendations of the FWC.

#### **d) Variances and Exclusions**

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. According to the Employment Standards Branch most variances from the *Act* relate to the hours of work and overtime provisions.

While exclusions are referenced in the *Act* or *Regulation* variances are not published or accessible on the ESB website. Variances are initially approved for 2 years and can be repeatedly renewed for up to 5 years. While 50 percent of employees must support an employer's application for a variance, affected employees are not consulted on the introduction or continuation of an exclusion. Most exclusions have been in existence for many years and never been publicly reviewed. Exclusions are particularly impactful on precariously employed workers.

In reviewing similar employment standards exclusions in Ontario the Ontario Changing Workplaces Review Special Advisors concluded that "... the lack of any process for conducting reviews of existing exemptions, or for the consideration of new regulations and exemptions, has resulted in a structural and procedural vacuum where there is no transparency." This applies equally to the BC ESA exclusions.

A classic example of the secretive and undemocratic way in which exclusions to the BC ESA have been made in the past is the exclusion of Major Junior Hockey Players. Through an Order-in-Council – without any public consultation or legislative debate – the previous Liberal government in 2016 excluded, in Section 37.16 of the *Regulation*, Major Junior Hockey Players from all provisions of the ESA based purely on the demands of the Canadian and Western Hockey League team owners. When subsequently investigated, FOI documents showed that very little information was provided by the CHL, significant revenue information was withheld, no meaningful investigations were undertaken, no analysis of the impact conducted, and no alternative points of view requested. This Order bypassed any public scrutiny and transparency and was vehemently opposed by the NDP Labour Critic of the day, Shane Simpson.

In our *Workers' Stories of Exploitation and Abuse* (pp 15- 17) we reported that a significant proportion (12 per cent) of the workers' stories collected during our forums in 2016 and 2017 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*.

The largest group of workers to complain of their exclusion from the hours of work and overtime and the statutory holiday provisions were those that have been improperly classified as "high technology professionals".

We endorse those submissions made to the Ontario Changing Workplaces Review Special Advisors in which it was argued that the cost of exemptions is borne not only by employees not covered by the *Act* who suffer lost income and insufficient time off, but also that there is a social cost to health and safety resulting from excessive overtime and long hours of work.

As noted in the 2016 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. As stated by the Ontario Changing Workplaces Review Special Advisors in their interim report, exemptions from the *Act* are inconsistent with the principle of universality – which is that minimum terms and conditions set out in the *Act* should be applicable to all employees.

A significant exclusion from the BC *Act* was made in 2002 when workers covered by a union collective agreement were completely excluded from its core provisions., reversing a recommendation for inclusion made by ESA review Commissioner Mark Thompson in 1993. As acknowledged in the BCLI Consultation Paper (p 40), this exclusion distinguishes the BC ESA from that of all other provinces and territories. However, without reference to the only significant research conducted on the serious negative impact of this exclusion<sup>34</sup> the BCLI project committee (p 41) has neglectfully made no recommendation on unionized worker exclusion. There is no principled basis to exclude unionized workers from the minimum protections of Act. All workers should be treated fairly under the law, and entitled to the same basic protections.

In addition, we are critical of the fact that the BCLI Consultation Paper has made no substantive recommendations on exclusions generally except that ‘principles should be developed to govern future applications for exclusions’ and ‘existing exclusions should undergo a systematic review’.

#### **e) Conditions of Employment for Children**

Provisions regulating the employment of children are in Section 9 of the *Act* and Section 45 of the *Regulation*. While Section 9 sets the minimum age which children can be employed - under age 12 with the permission of the Director of Employment Standards, and under age 15 with a parent or guardian’s written consent – Section 45 of the *Regulation* specifies the conditions under which children may be employed.

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.

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<sup>34</sup> See David Fairey and Simone McCallum, *Negotiating Without a Floor, Unionized Worker Exclusion from BC Employment Standards*, (Canadian Centre for Policy Alternative – BC, July, 2007).

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, the BC Child and Youth Coalition, 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.

As stated in the BCLI Consultation Paper (pp 203-216): "British Columbia's legislation and regulation dealing with the employment of children diverge in important respects from Canadian and international norms with regard to the minimum age for employment and the forms of work which children may be employed."

The BC Employment Standards Coalition fully supports the submission of First Call and its recommendations that:

- The minimum age for formal employment of children be 16 (with exceptions for light work), consistent with the Canadian Government's ratification of ILO Convention 138 on the minimum age for employment, and Canada's commitment to 16 years of age and prohibition of hazardous work for those under the age of 18.
- A permit from the Director of Employment Standards be required for the employment of children under age 16.
- Prohibit the employment of children under the age of 12 with the exception of the entertainment industry and its current permit system.
- With respect to the employment of children and adolescents 12 to 15 years the government:
  - Develop lists of acceptable 'light work' including tasks and work places that do not threaten the health and safety, or hinder the education of children (12-13), younger adolescents (14-15), and older adolescents (16-17).
  - Place limits on the time-of-day for work, appropriate to age groups (e.g. prohibit late night and over-night work).
  - Place limits on the length of work time on a daily and weekly basis appropriate to age groups (e.g. no more than 4 hours per day on a school day for children).
- Ensure hazardous tasks and worksites are entirely off-limits to workers aged 16 – 17.
- Mandate adequately resourced, government-led enforcement to ensure employer compliance and inform government's policy monitoring.

We note that while the BCLI Project Committee agreed that the employment of children under 16 in industries or occupations prescribed by regulation as being likely to be injurious to their

health, safety, or morals should be prohibited, they could not once again, on this critical issue, reach consensus on guidelines for the development of those regulations or the mechanism for government oversight such as those recommended by First Call as a result of years of research on the subject.

### **3. Other Priority Changes to the Employment Standards Act:**

#### **a) Domestics and other Caregivers**

We agree with the August 31, 2018 submission of the Migrant Workers Centre that care work in BC is under-regulated and subject to a number of important and inconsistent exclusions.<sup>35</sup> The *Act* and *Regulation* contain five different classifications of caregiver that are subject to different benefits, protections and exclusions:

- Domestics
- Sitters
- Residential Care Workers
- Night Attendants
- Live-in Home Support Workers

Under Section 1 of the *Act* a “domestic” is defined as a person employed at a private residence to provide cooking, cleaning, child care or other services, and resides at the employer’s private residence. Under Section 14 domestic workers must be provided with a written employment contract, and under Section 15 of the *Act* and Section 13 of the *Regulation* if living in the residence of their employer their employer must register them with the Employment Standards Branch. In addition, under Section 14 of the *Regulation*, domestic workers cannot be charged more than \$325 per month for room and board.

Migrant workers brought to Canada and employed under the previous Live-in Caregiver Program, now replaced by the Temporary Foreign Program, were required to reside in the residence of their employer, and therefore fell within the definition of “domestic”. However, Caregivers who are migrant workers are no longer required to reside with their employers under the new Temporary Foreign Worker Program for Caregivers. Consequently they have lost the rights and protections that they had as “domestic” workers under the ESA thereby increasing their vulnerability and the potential for exploitation.

Sitters also include caregivers who are both migrant workers under the Temporary Foreign Worker program, and permanent residents, they are caregivers who do not live in the residence where they are employed. However, they are fully excluded from the *Act*.

Residential Care Workers, Night Attendants and Live-in Home Support Workers are excluded from Part 4 of the *Act* concerning hours of work and overtime.

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<sup>35</sup>Migrant Workers Centre, *A Submission by the Migrant Workers Centre to Minister of Labour Harry Bains*, August 31, 2018.

The five above classifications of care worker job in the *Act* and *Regulation* therefore confer different minimum employment standards for workers who essentially perform the same work. We agree with the Migrant Workers Centre submission<sup>36</sup> that all caregivers should receive equal treatment under the *Act* regardless of whom they provide care for, in what type of household they provide care, whether they work during the day or night, how many hours a day they work, and whether the government or a private individual pays their wages.

We endorse the recommendation of the Migrant Workers Centre that the BC government must make changes to the Employment Standards Act to ensure that all caregivers enjoy the minimum employment benefits and protections as do other workers generally, and that all exclusions be eliminated.

### ***Work in Residences***

Under Section 85 the Employment Standards Branch may not conduct an enforcement inspection of a residence where an employee works without the consent of the occupant. As stated in the submission of the Migrant Workers Centre as the location of employment for many domestics and other caregivers is in private households, this section of the *Act* reveals a significant gap in the application and enforcement of employment standards to this type of care work. Abusive employers may be reticent to consent to a Branch inspection, rendering Section 85 futile for caregivers. This prevents proactive enforcement of workplaces that are in private residences.

We agree with the August 31, 2018 submission recommendation of the Migrant Workers Centre that the BC government must ensure that all caregivers are subject to the same measures for inspection and enforcement as workers generally, and therefore recommend that Section 85(2) of the *Act* be eliminated.

### **b) Dependent Contractors and Misclassification**

Many workers are denied basic employment rights because of their status as “contractors”. The BCLI interim report (pp. 26 – 32) correctly identifies the issue of “dependent contractors” and the issue of misclassification as in need of attention. Employers increasingly hire contractors to save on payroll, avoid complying with the *Act*, and to shift liability risks on to workers. This is happening with increasing frequency in sectors that have been traditionally places of regular employment, including post-secondary, health care, and in the non-profit sector. The consequence to workers is increased employment precarity, and an absence of employment rights.

As noted in the BCLI report (p.29), the Special Advisors to the changing Workplace Review in Ontario made a recommendation identical to the Thompson Commission, namely that employment standards legislation should treat dependent contractors as employees. The reform bill subsequently passed by the Ontario Legislative Assembly contains an amendment to the ESA expressly prohibiting the treatment of employees as non-employees, and places the burden of proof that a person is not an employee on the employer. We support this approach.

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<sup>36</sup> *Ibid.*

In our view, the key problem is lack of enforcement of the classification provisions of the *Act*. In order to ensure that employees are not misclassified, the BC government needs to strengthen enforcement of the *Act* and restore the enforcement capacity of the Employment Standards Branch. This includes eliminating the mandatory “self-help” complaints and compulsory mediation dispute resolution process. It also includes proactive enforcement focusing on industries and sectors where misclassification is known to be prevalent, coupled with a campaign of public education to raise awareness of the issue and better training for employment standards officers, as is suggested by the Law Commission of Ontario.

As recommended in the 1994 Thompson Commission report<sup>37</sup> it is also our recommendation that dependent contractors as a term used in the *Labour Relations Code* be included in the definition of “employee” in the *Act*, and that the *Act* should also contain a provision expressly prohibiting the treatment of employees as non-employees, and places the burden of proof that a person is not an employee on the employer, as contained in the Ontario ESA.

### **c) Migrant Worker/Temporary Foreign Worker Rights & Protections**

Based on extensive academic research, and the experience and stories of migrant worker advocates and migrant workers which indicate the dire need for special legislation to provide protections and rights for migrant workers, in our *Workers’ Stories of Exploitation and Abuse* (p 41) we recommend that the BC government should immediately take steps to implement the recommendations of the federal Standing Committee on Human Resources, Skills, and Social Development and the Status of Persons with Disabilities (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 at least 3 years.

In addition the BC Employment Standards Coalition fully supports and endorses the August 31, 2018 submission of the Migrant Workers’ Centre in their call for, and provision of, a Foreign Worker Recruitment and Protection Act which lays out the necessary preventative and enforcement measures to curb exploitation of migrant workers.<sup>38</sup>

The BCLI Consultation Paper (pp 203, & 216-239) acknowledges migrant workers as a vulnerable class of workers, with numerous sources of vulnerability, requiring a special level of protection and rights. However, the Project Committee failed to reach a consensus on whether BC should follow the example of Manitoba, Saskatchewan and Nova Scotia by introducing a regulation scheme for all employers of migrant workers. This constitutes a major shortcoming of the BCLI project.

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<sup>37</sup> Mark Thompson, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia* (Victoria, Ministry of Skills, Training and Labour, 1994), at p. 33.

<sup>38</sup> *Supra*.

In addition, the BCLI Project Committee failed to reach consensus on the merits of special protection against termination without cause for migrant workers, as recommended by the Ontario Changing Workplaces Review Special Advisors.

#### **d) Tips and Gratuities**

Among the many workers' stories of "wage theft" received and reported on in our *Workers' Stories of Exploitation and Abuse* (pp 11 & 45-46) was the complaint of improper handling of tips by employers or the lack of worker control of tip distribution.

The *Act* does not define "tip" or "gratuity"<sup>39</sup>, and the only reference to gratuity in the *Act* is the Section 2(3) prohibition against an employer requiring an employee to pay any of the employer's business costs out of an employee's gratuities whereupon the gratuities are deemed to be wages. Therefore in our *Workers' Stories of Exploitation and Abuse* we have called for the regulation of tips and gratuities in a manner similar to that of the Newfoundland and Labrador *Labour Standards Act*, the Quebec labour standards act, and the Ontario *Employment Standards Act*. Of those three pieces of legislation our preference is for the wording in the Newfoundland and Labrador act as it clearly states that tips or gratuities are the property of the employee who receives it, and therefore enables employees to voluntarily participate in tip pooling:

- (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.*

We agree with the analysis and conclusion of the BCLI Consultation Paper (pp 96-100) on this issue that some legislative protection of employees' proprietary rights in tips and gratuities and regulation of tip pooling is long overdue. However, we prefer the Newfoundland and Labrador legislation over the Ontario legislation (recommended by BCLI), but with some additional wording for the regulation of tip pooling to ensure that it is under employee control, such as the wording in Section 50 of the Quebec act respecting labour standards, as follows:

*The employer may not impose an arrangement to share gratuities or a tip-sharing arrangement. Nor may the employer intervene, in any manner whatsoever, in the establishment of an arrangement to share gratuities or a tip-sharing arrangement. Such an arrangement must result solely from the free and voluntary consent of the employees entitled to gratuities or tips.*

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<sup>39</sup> In dictionaries a "gratuity" is the same as a "tip".

## **e) Hours of Work & Overtime**

Substantive regressive changes were made to the ESA by the Liberal government in 2002 with respect to the hours of work and overtime provisions of the *Act*. It is now time to reverse those changes and provide more rights and protections corresponding to significant changes in the world of work over the past two decades.

### ***ESA Section 1 – Definitions***

Subsection (2) states that: *An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee’s residence.*

We recommend that this subsection be amended to read as follows:

*An employee is deemed to be at work while on call at a location designated by the employer.*

This revision deletes the exclusion of Live-in Caregivers from the standard “at work” definition, and more broadly means that if an employee is not free to do anything for his or her self because their employer restricts their activity, then employees in such circumstances are defined to be “at work”.

### ***Previous Section 31 – Hours of Work Notices***

The whole of this section was repealed in 2002. It required that employers must display hours-of-work notices in each workplace where they can be read by all employees. It also required a 24 hour notice of a change in shift unless as a result of the change the employee will be paid overtime wages or the shift is extended before it ends.

Current scheduling provisions in the *Act* make it challenging for employees to balance personal, family and community needs with paid employment. Employers should be required to post work schedules two weeks in advance, including work and shift start and end times, and meal breaks scheduled during the work period.

We recommend that the pre 2002 section language be restored except that the minimum notice period be two weeks unless there is an emergency circumstance, in which case the minimum notice period is 24 hours, and notices must also be written in the first languages of those employees where a significant number in the workplace do not have English as their first language.

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, regardless of the circumstances. Furthermore, employees must be able to ask employers to change schedules without penalty or fear of reprisal.

We support the recommendation that the *Act* be amended to require that if an employee is required to report for work, and the employee is scheduled to work more than four hours on the

day, the employee must receive a minimum of four hours' pay if work starts, and a minimum of two hours' pay if it does not.

### ***Family Friendly Work Scheduling:***

We recommend that a new provision be added to this section of the Act to accommodate workers who have family responsibilities that make it difficult for them to adapt to work schedule changes, as follows:

*If 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.*

### ***Section 32 - Meal Breaks***

A number of worker's stories received during our Workers' Stories Forums told of not being provided with adequate meal and refreshment breaks during their shifts, or that they are frequently required to work through their meal break without pay. Failure to provide meal breaks constitutes another form of wage theft because Section 32 of the ESA requires that an employer must provide its employees with a 30 minute unpaid meal break after 5 hours of work. However, there is no provision for employees to be given a paid "coffee breaks" in the middle of each half shift – a benefit most unionized workers enjoy.

It is our recommendation that the title of Section 32 of the Act be changed to **Meal and Refreshment Breaks**, and that there be two additions to this section as follows:

*An employer who requires an employee to work or to be available for work during a meal break shall pay the employee double the regular wage for the ½ hour meal break worked.*

*An employer must ensure that no employee works more than 7 hours in any shift, exclusive of a meal break, without two paid rest breaks of 15 minutes each (one rest break per half shift).*

Two paid refreshment breaks plus an unpaid half-hour lunch break is a reasonable response to workers' needs for breaks to refresh themselves and to conduct safe and productive work.

We note that there are no comparable recommendations for improvement to this section of the Act in the BCLI interim report.

### ***Section 34 – Minimum Daily Hours***

This section was changed in 2002 so that the minimum number of hours of pay to an employee required to report for work was reduced from 4 hours to 2 hours, whether or not the employee starts work (previously it was 4 hours pay if work had been started and 2 hours if work had not been started). And a minimum of 4 hours of pay was only preserved if the employee was

previously scheduled to work for more than 8 hours. Also repealed was the requirement of a minimum of 2 hours of pay to school students reporting for work on a school day.

We recommend that the pre 2002 provisions be restored in full.

### ***New Section: Minimum Weekly Hours – Temporary Foreign Workers***

Currently migrant employees working in BC under temporary foreign worker programs have no guarantees that for the time that they are bound to work under contract for a designated employer for a period of months or years they will be paid for a minimum number of hours per week. Under this arrangement, employers of temporary foreign workers have the right to provide their workers fewer hours of work than their contract requires or to pay them for fewer hours than specified in the contract.

We therefore recommend the following new provision:

*If an employee is working for a designated employer under a federal temporary foreign worker program the minimum number of paid hours of work per week of employment of the employee, regardless of the number of hours or days actually worked in any one week, shall be the greater of number of hours per week of work specified in the employer/employee contract or 35 hours.*

### ***Section 35 – Maximum Hours of Work***

This section was partially replaced/re-written in 2002 from overtime wages required to be paid after 8 hours per day or 40 hours per week, or if working a flexible work schedule covered by a collective agreement an average of over 8 hours per day or 40 hours per week to these provisions not being applicable if an employee is working under a new Section 37 individual Hours Averaging Agreement.

We recommend that all pre 2002 provisions under this section be restored, except that the section be prefaced with the Canada Labour Code Sections 169 and 171 language that:

*a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; b) no employer shall cause or permit an employee to work longer hours than eight hours in a day or forty hours in any week; and c) an employee may be employed in excess of the standard hours of work but, subject to [restored] Sections 37 and 38 [Flexible Work Schedules], the total hours that may be worked by an employee in any week shall not exceed forty eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in an occupation or industry.*

In the alternative, establish a new higher standard based on 7 hours per day and 35 hours per week, where the above language becomes:

*a) the standard hours of work of an employee shall not exceed seven hours in a day and thirty five hours in a week; b) no employer shall cause or permit an employee to work longer hours*

than seven hours in a day or thirty five hours in any week; and c) an employee may be employed in excess of the standard hours of work but, subject to [restored] Sections 37 and 38 [Flexible Work Schedules], the total hours that may be worked by an employee in any week shall not exceed forty four hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in an occupation or industry.

### ***Voluntary Overtime – New Provision***

We appreciate the BCLI Project Committee’s acknowledgement of our recommendation that employees have an unqualified right to refuse more than four hours of overtime in a week, other than in emergency situations. However, the Project Committee’s recommendation of amending the *Act* to include limited rights to refuse overtime, based on the Arthurs Report, still denies the employee the voluntary right to refuse overtime. Employees should not face penalty or fear of reprisal for refusing overtime.

Our recommendation is to add a new section/subsection titled **Voluntary Overtime** (adapted from Saskatchewan Labour Standards Act, Section 12) as follows:

- (1) Notwithstanding any other provision of this Act, no employer shall, without the consent of the employee, require an employee to work or to be at his disposal for more than 44 hours in any week, except in the case of emergency circumstances.*
- (2) Where an employee refuses to work or to be at the disposal of an employer contrary to the employer’s requirement under subsection (1) and where no emergency circumstances exist, no disciplinary action shall be taken against the employee by the employer.*
- (3) In any prosecution alleging a violation of this section, the onus shall be upon the employer to prove that an emergency existed or that the employee was discriminated against for good and sufficient reason.*
- (4) For the purposes of subsections (1) and (2), “emergency circumstances” means any sudden or unusual occurrence or condition that could not, by the exercise of reasonable judgment, have been foreseen by the employer.*

### ***Section 36 – Hours Free From Work***

This section (subsection (1)(b)) was amended in 2002 from double time pay required to be paid if an employee is required to work during the per weekly 32 hour **free from work** period to 1½ times regular pay for such work.

We recommend that the pre 2002 double time pay provisions be restored.

### ***Breaks Between Periods of Work (Split Shifts) - New Section***

We recommend the following new section adapted from Saskatchewan Labour Standards Act, section 13.2:

- (1) No employer shall require an employee to work or to be at the disposal of the employer for periods that are scheduled so that the employee does not have a period of*

*eight consecutive hours of rest in any 24 hours, except in emergency circumstances within the meaning of [the Voluntary Overtime section above].*

*(2) No employer shall take disciplinary action against an employee who refuses to work or to be at the disposal of the employer according to a schedule that does not allow the employee to have a period of eight consecutive hours of rest in a period of 24 hours where no emergency circumstances exist.*

*(3) Payment of wages at an overtime pay rate by an employer does not constitute a defence to a charge alleging contravention of this section.*

### ***Section 37 – Agreements to Average Hours of Work (previously Flexible Work Schedules for Groups of Employees Not Covered by a Collective Agreement)***

The section Flexible Work Schedules for Groups of Employees Not Covered by a Collective Agreement was repealed and replaced in 2002 by a new Hours Averaging Agreements provision. Under the new provision employers are permitted to enter into hours averaging agreements with individual employees without ESB oversight for periods of 1, 2, 3 or 4 weeks to determine overtime pay eligibility. In addition these agreements are not registered with the ESB and are not subject to the approval of 65% of all employees in the workplace as was the case under the previous Section 37 provisions.

We disagree with the BCLI Project Committee’s recommendation that the *Act* continue to have a provision on averaging of working hours. The overtime averaging provisions currently in the *Act* should be repealed.

We recommend that the pre 2002 flexible work schedules provisions of the ESA be restored, except that to obtain the approval of at least 65% of all employees to such a flexible schedule under subsection (c) a secret ballot vote of such employees be supervised by the Director of the Employment Standards Branch or designate.

### ***Section 40 – Overtime Wages for Employees Not Under an Averaging Agreement (previously Overtime Wages for Employees Not on Flexible Work Schedules)***

This section heading was changed in 2002 to Overtime Wages for Employees Not Under an Averaging Agreement and the provisions/rights substantially reduced. It had been titled Overtime Wages for Employees Not on Flexible Work Schedules. The requirement to pay double time wages for work over 11 hours per day was changed to double for work over 12 hours per day; the requirement to pay double time for work over 48 hours per week was repealed and not replaced; and the requirement that maximum hours of work at regular pay are reduced by 8 hours for each statutory holiday in the week and if a statutory holiday is worked such hours are not counted when calculating overtime pay was repealed and replaced with the requirement to include the hours worked on a statutory holiday in the count of regular hours worked when calculating weekly overtime hours to be paid at overtime rates.

This section continues to require the payment of 1½ times the regular wage for work over 8 hours per day and/or over 40 hours per week.

We recommend that the pre 2002 overtime wages provisions be restored. In addition that this section provide that for employees who are regularly scheduled to work 7 or more hours and up

to 8 hours each day and/or 35 or more hours and up to 40 hours each week, that overtime wages of 1½ times the regular wage will be paid for all hours worked in excess of those regularly scheduled.

#### ***Section 41 – Overtime Wages for Employees on a Flexible Work Schedule***

This section was repealed in 2002.

We recommend that the pre 2002 provisions be restored (consistent with the restoration of Sections 37 and 38).

#### ***Section 42 – Banking of Overtime Wages***

Subsections (4) and (6), requiring the pay out of banked overtime wages within 6 months after the overtime wages are earned, were repealed in 2003.

We recommend that the pre 2003 provisions be restored.

#### ***Section 43 – Standards for those Covered by a Collective Agreement***

This section was repealed in 2002. It required that the hours of work, overtime and special clothing provisions of a collective agreement, when taken together, must meet or exceed the requirements of the Act, and if not the provisions of the Act are deemed to form part of the collective agreement, with the grievance procedure applying for the resolution of any dispute about the application or interpretation of those requirements.

We recommend that the pre 2002 provisions be restored.

There should be no overtime, hours of work exclusions or special rules. All workers should be covered by the same minimum standards.

Finally, regarding hours of work, we recommend that employers be required to offer available hours of work to those working less than full time before new workers performing similar tasks are hired.

#### **f) Statutory Holidays**

The ten Statutory Holidays listed in Section 1 of the ESA are as follows:

- 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  
Boxing Day  
National Aboriginal Day/National Day of Truth and Reconciliation

Many collective agreements in the province include East Monday and Boxing Day as paid holidays, as do many employers who are not under a collective agreement. Therefore it is timely to add Easter Monday and Boxing Day as statutory holidays.

National Aboriginal Day was declared to be on June 21st by the Governor General for Canada in 1996 as a day to recognize and celebrate the cultures and contributions of the First Nations, Inuit and Metis Indigenous peoples of Canada. Since that declaration the Northwest Territories has made it a statutory holiday. Recently the federal government has been in consultation with Indigenous groups preparatory to declaring a national statutory holiday to mark the painful legacy of Canada's Indian residential schools. The main issue to be settled is the day to be set for the National Day for Truth and Reconciliation – whether the current National Aboriginal Day of June 21<sup>st</sup> or Orange Shirt Day, September 30<sup>th</sup>.<sup>40</sup>

We therefore recommend that the BC Government commit to declaring the National Day for Truth and Reconciliation a statutory holiday under the ESA at such time as the federal government sets the date for such a day.

We note that the BCLI Project Committee makes no recommendation for improvement in the number of statutory holidays with pay that the ESA should provide for.

### ***Entitlement to Statutory Holidays***

Under Section 44 entitlement to statutory holidays requires an employee to have been employed by the employer for at least 30 days before the statutory holiday, and had worked or earned wages for 15 of those 30 days. The 15 days worked provision did not exist prior to 2002 and was one of the regressive changes made to the statutory holiday provisions by the previous Liberal government in 2002. These added restrictions prevent many part-time, casual and precariously employed workers from receiving the benefit of statutory holidays with pay, and therefore should be eliminated.

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

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<sup>40</sup> See The Globe and Mail report of August 15, 2018:

<https://www.theglobeandmail.com/politics/article-ottawa-negotiating-to-create-new-statutory-holiday-marking-brutal/>

holiday pay. We therefore recommend that the BC government follow the lead of Saskatchewan and remove the qualification requirement for entitlement to statutory holidays so that every employee in the province, regardless of their employment status, hours of work and length of employment with an employer, is entitled to a statutory holiday.

Other regressive change made to the former Liberal government in 2002 was the repeal of Sections 47 and 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. And 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. We therefore recommend that the previous Sections 47 and 49 be restored in the *Act*.

The BCLI Project Committee (p 110) reached a tentative consensus on an eligibility rule for statutory holiday pay requiring, first that an employee have worked or earned wages on 16 of the 60 days preceding a statutory holiday, and second, the employee must have worked on his or her last scheduled working day before the statutory holiday and the first scheduled working day after the statutory holiday. We view this recommendation as being even more restrictive in some respects than the current entitlement provisions and therefore more regressive and unsupportable. It clearly discriminates again part time, casual, temporary and temporary agency employees.

#### **g) Leaves & Paid Sick Leave:**

##### ***Paid Sick Leave***

The ESA contains no provision for the right of an employee to sick leave (paid or unpaid). It is therefore time for the BC government to provide workers with paid sick leave. While most jurisdictions in Canada aren't there yet, compared to jurisdictions with similar socio-economic status, we are far behind. At least 145 countries provide paid sick leave for short or long-term illness. Many high-income economies require employers to provide paid sick days upwards of ten days. In the US there is a trend towards paid sick time - 10 states have now adopted guaranteed paid sick days,<sup>41</sup> including our neighbours on the West Coast – Washington, Oregon and California. Washington state ensures employees to accrue at least 1 hour for every 40 hours worked to a maximum of 40 hours<sup>42</sup>, California and Oregon ensure that employees accrue at least one hour for every 30 hours to a maximum of 24 hours in California<sup>43</sup> and 40 hours in Oregon<sup>44</sup> (this is unpaid if the employer has less than 10 employees). Furthermore, in California and Washington unused sick time can be carried over to the following year up to 24 hours and up to 40 hours respectively.

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<sup>41</sup> <http://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>

<sup>43</sup> <https://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/VacaySick/PaidSickLeave.asp>

<sup>44</sup> <https://www.oregon.gov/BOLI/WHD/OST/Pages/index.aspx>

Providing a modest amount of paid sick time is fair and the right thing to do in a wealthy society like ours. Paid sick days encourage employees to take the time they need to get better, instead of coming to work sick which risks infecting others and decreases overall productivity.<sup>45</sup>

In our *Workers' Stories of Exploitation and Abuse* report we made the following recommendations for the provision of paid sick leave in the *Act*:

- 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.

As recommended, employers should not require sick notes as long as the absence is less than 52 hours. The hassle and cost of acquiring a sick note may in itself be an incentive for an employee to attend work sick. Furthermore, as stated by the Canadian Medical Association<sup>46</sup>, requiring sick notes is a misuse of the scarce resources and time of physicians in our health care system.

Once again on this important issue the BCLI Project Committee failed to reach a consensus, its Consultation Paper references three minority proposals, only one of which recommended 10 paid sick days per year.

### ***Sick Leave should not be combined with Family Responsibility Leave***

We strongly reject the BCLI Project Committee's majority recommendation of combining sick leave and family responsibility leave. This change would unfairly penalize workers with dependents, thus disproportionately affecting women. Workers without family responsibilities would have 7 days (under the BCLI's proposal) to take for their own illness, while workers with family responsibilities would have to carve out time to take care of their own illness while also tending to the needs of their families. This proposed change would perpetuate the burden on female workers, particularly mothers, of juggling family responsibilities and work, and would tend to reduce the participation of mothers in the workforce since they would be subject to termination if they were unable to take care of all family responsibilities, plus their own illnesses, in the allotted 7 days per year.

The BCLI Project Committee's recommendation regarding disincentives to abuse sick leave is highly inappropriate. There is no other provision of the ESA aimed at penalizing employees,

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<sup>45</sup> Drago & Miller (2010) Sick at Work: Infected Employees in the Workplace During the H1N1 Pandemic <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B284.pdf>

<sup>46</sup> <https://www.theglobeandmail.com/opinion/the-real-sickness-of-medical-notes/article35350781/>

because that is not the purpose of the ESA. Disciplining employee misconduct is simply not the role of the government. It is the role of employers. Employers already have unfettered ability to reasonably discipline employees for misconduct and it is wholly inappropriate for the government, through the ESA, to step in and usurp that role. Not only is this unfair to employees, it restricts the discretion that employers have to decide what discipline they feel is appropriate in particular circumstances. If an employer feels that mitigating circumstances exist such that an employee's abuse of sick leave does not warrant significant consequences, there is no justification for forcing that employer to impose a draconian penalty as the BCLI committee recommends.

### ***Modernizing the definition of "family"***

Our Coalition supports the BCLI Project Committee's recommendation to amend the definition of immediate family, but we say their proposal does not go far enough. The current and proposed definitions of immediate family prioritize traditional nuclear families above all else. They do not recognize the diverse and flexible family relationships that British Columbians experience today.

Definitions of family that only include blood and marriage relationships exclude the "chosen family" relationships that are crucial to the LGBTQ community, many members of which are estranged from their families of origin due to discrimination and hatred. The current and proposed definitions also negatively affect migrant workers, whose blood- and marriage-based relatives are not permitted to travel to Canada with them. Migrant workers depend on each other, on extended kinship networks, and on religious and ethnic community members for support during medical and other crises, and generally not on "immediate family" under the current or proposed definitions.

The current and proposed definitions also discriminate against Indigenous people, who have meaningful kinship networks and familial relationships that do not align with the colonizer's officially sanctioned definition of family.

These definitions also discriminate against workers who grew up in foster care, who are disproportionately Indigenous. Kids in care develop supportive, familial relationships with foster parents even as they come and go from those foster parents' homes. Kids in care develop sibling-type relationships with their peers. Community mentors may also become significant people in their lives, akin to family members.

The definition of "immediate family" must be replaced with language that respects and protects these diverse relationships and that achieves the objective of this provision, which is to allow workers to take time that is necessary to provide support to the important people in their lives, people who rely on them. It must be replaced with language that honours the chosen families of LGBTQ people and the strong bonds of mutual support in migrant worker communities as well as the traditional and evolving kinship networks in Indigenous communities, and that makes room for the family relationships that develop in our foster care system.

Our Coalition recommends that the definition of "immediate family" be replaced with "a person in a close, family-like relationship with an employee".

### ***Qualifying period***

Our Coalition strongly opposes the introduction of any qualifying period to become eligible for leaves under the ESA. Workers do not decide when they will get sick, or when their family will need them. Particularly in the context of the expansion of precarious and temporary employment, it is fundamentally unfair that workers would only have access to these leaves if they are lucky enough to have stable employment that allows them to meet the waiting period.

The only argument that the BCLI committee has in favour of introducing waiting periods is that other jurisdictions have waiting periods. Employment standards is not a race to the bottom. We look to other jurisdictions for examples of what is possible for workers to achieve, not how low we can go in diminishing workers' entitlements. Other jurisdictions can look to BC as a successful example of allowing access to leaves without causing disruption to the labour market or employers' ability to operate.

### ***Domestic Violence leave***

The BC government should also include in the *Act* a provision for paid domestic violence leave, this was not considered by the BCLI review. Manitoba and Ontario both have 5 days paid leave, plus additional unpaid leave, for survivors of domestic violence to get help and find safety, and New Brunswick has just announced the introduction of a similar provision. Federally regulated employees receive 10 days leave, unpaid. Employees can take additional unpaid time if needed up to 17 weeks in Manitoba, and 15 weeks in Ontario.<sup>47</sup>

These leaves, especially if they are paid, allow women the time and space they need to escape violence.

### **h) Annual Vacation**

The ESA (Sections 57 & 58) provides that an employer must give an employee an annual vacation of at least 2 weeks after 12 consecutive months of employment, or at least 3 weeks after 5 consecutive years of employment, and that after 5 days of employment vacation pay must accrue at the rate of 4% of total wages for the first 5 years of employment and at the rate of 6% after 5 years of employment. These vacation with pay entitlements under the *Act* have not changed for over 30 years, therefore improvements are long overdue.

However, for many low-wage workers in precarious positions either they are unable to take a vacation unless it is unpaid or two weeks of annual paid vacation is all that they will ever see in their working life.

Most major industrialized countries – Sweden, Germany, the United Kingdom, and others – all have legislation giving workers at least four weeks of paid vacation. The International Labour Organization recommends that the period of paid vacation should not be less than three weeks.

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<sup>47</sup> <https://www.benefitscanada.com/news/what-do-canadian-provinces-offer-around-domestic-violence-leave-107713>

Saskatchewan provides three weeks of paid vacation after one year of service, and four weeks after nine years. European countries average more than five weeks of annual paid vacation.

Here again the BCLI Project Committee report makes no recommendation for improvement in paid vacation entitlement.

It is our recommendation there be an increase in paid vacation entitlement to three weeks per year for the first five years, and to four weeks after five years of employment.

### **i) Termination of Employment**

As stated by Professor Harry Arthurs in his 2006 Federal Labour Standards Review Report,<sup>48</sup> rules for the termination of a worker's employment are critical to employment standards legislation because: "... a job is often a worker's most important asset, the source of his or her personal and family security, and a defining attribute of social status and self-image. To lay down the substantive and procedural rules for termination is to establish the social and economic worth of that asset."

Professor Arthurs also noted that if employers could fire employees without fear of legal repercussions, they could effectively override employment contracts and the rights granted by legislation.

In this context the BC ESA provisions regarding termination of employment are inadequate and out of date.

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.

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.

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<sup>48</sup>Arthurs, *supra*, pp 170-187.

In addition, in the recent case of *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, the Court determined that non-unionized employees under federal jurisdiction cannot be dismissed from their employment without just cause. This decision provides a foundation for broader reconsideration of dismissal provisions in provincial jurisdictions.

In our *Workers' Stories of Exploitation and Abuse* (pp 30-31) we recommended the following improvements to the termination provisions of the *Employment Standards Act* :

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

We recommend the adoption of the above proposals set out in the *Workers' Stories of Exploitation and Abuse* report. Specifically, we recommend that the ability of employers to terminate employees without cause be eliminated, following *Wilson*. “Just cause” will continue to include dismissal due to employee misconduct, as well as due to lay-off: where there is a lack of work or discontinuance of a function / job role. In the latter case of a lay-off, an employer should be required to provide notice of termination or pay in lieu of notice in line with the above recommendations.

The BCLI Project Committee could not reach a consensus on any substantive changes to the terminations provisions of the *Act*, especially with respect to whether the *Act* should provide for adjudication of complaints against wrongful dismissal, and whether the Section 65(1)(e) provision excluding construction workers from the termination provisions of the *Act* should be eliminated. It is apparent that the majority on the BCLI Project Committee hold distinctly employer biased views on these issues and do not support progressive change.

We agree with the minority on the BCLI Project Committee that the *Act* should be updated and modernized to address wrongful dismissal and provide an administrative adjudication process for wrongful dismissal claims, and that the exclusion of construction workers from the termination provisions be repealed. In addition there should be an expedited adjudication process available to temporary foreign workers who have been wrongfully dismissed.

## **j) Employment Contracts/Written Terms of Employment**

Most workers are unaware of their rights under the ESA. In addition most workers do not receive in writing the terms of their employment when they are hired, terms that are consistent with the ESA. The ESA does not require that a contract of employment be in writing unless the employee

is hired as a “domestic”. Under these circumstances workers are vulnerable to exploitation and abuse, and violations of their rights go undetected.

In our *Workers’ Stories of Exploitation and Abuse* (p 14) we called for a provision in the *Act* that would require all workers to receive a written contract (or written terms) of employment on the first day of employment setting out their duties, rates of pay, hours of work, statutory holidays with pay, annual vacations and other terms of employment that are at least equal to those contained in the ESA.

Such a requirement is not without precedent in Canada. Under Section 2.1 of the Newfoundland and Labrador *Employment Standards Act* an employer is required to provide every employee with a statement in writing of the terms and conditions of their employment.

Professor Harry Arthurs, in his 2006 Federal Labour Standards Review Report,<sup>49</sup> recommended that regulations be enacted “... requiring employers to provide employees with a written notice setting out their rates of pay, hours of work general holidays, annual vacations and conditions of work. The written notice should be provided at the time of hiring, and updated each time material changes occur or at periodic intervals.” He also recommended that: “To help employers to comply with the requirement to provide employees with a written notice of employment terms, the Labour Program should provide a standard or sample form that can be used or adapted to meet the employers’ individual requirements.” We agree with this recommendation.

On the issue of whether written notices of employment should be considered contracts of employment his recommendation was that they should not, but they should be “treated as *prima facie* evidence of the agreement between parties.” In addition, he recommended that if an employer failed to provide initially, or cannot produce a copy of, the written notice of the terms of employment, the employee’s recollection of the terms be presumed to be accurate unless the employer can adduce persuasive evidence to the contrary.

On this issue once again the BCLI Project Committee could not reach a consensus, with the minority recommending that the ESA should require a basic written employment agreement for all workers setting out essential terms, i.e. the duties of the position, hours of work, and the wage.

We recommend that all employers be required to either enter into a written employment contract with workers or provide workers with an information sheet that includes space to fill in basic employment conditions, such as the set wage, hours of work, etc.

Employers can and do use employment contracts to limit the rights of workers. This is a significant concern, and we recommend that the ESA be revised to prohibit the ability of employers to limit workers’ common law employment rights through employment contracts. In particular, we recommend that the ESA be revised to prohibit the ability of employers to limit compensation or severance pay under the termination provisions of the *Act*.

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<sup>49</sup> *Ibid*, pp 81-83.

## **k) Jurisdiction and Legal Complaints**

Workers face difficulty in enforcing their rights under the ESA, and in accessing venues for legal remedy and redress. This has been widely acknowledged, including in the BCLI report.

The current legal framework limits workers' ability to enforce their rights and seek legal remedies through the ESB where those complaints arise from the provisions of the ESA. This means that workers cannot pursue such claims in provincial court or through other legal bodies. Yet, workers often have complaints arising from an employment context or incident that involve both statutory and common law issues. Requiring workers to pursue independent actions for claims at the ESB and, most often, provincial court, where these claims arise from the same employment situation, creates significant access to justice issues, as these are lengthy and costly endeavours for workers.

We recommend that the ESA be reformed to allow workers to pursue claims arising under the ESA in provincial court or through other legal bodies where the worker also has a claim that falls within the jurisdiction of the court or body arising from the same employment situation or incident. Enabling joint jurisdiction in these circumstances will create greater access to justice for workers to enforce their workplace rights and seek legal remedies when those rights have been violated.

In addition to the above recommendation on joint jurisdiction, we recommend that the ESA be reformed to allow for group complaints in a manner similar to that existing under the BC *Human Rights Code*. Many ESB violations affecting one worker, such as in relation to wage theft, will often be affecting multiple workers at a single worksite or working for the same employer. Requiring each employee to make individual complaints is burdensome on both the workers and ESB resources. Allowing group complaints where the employees all work for the same employer or at the same work site, and where the complaints are based on the same provisions of the ESA, will create a more efficient and effective investigation and adjudication process at the ESB.

## **Conclusion**

We have provided you in detail our recommendations for immediate ESA reform that are consistent with your government's 2017 Confidence and Supply Agreement commitment to "Improve fairness for workers, ensure balance in workplaces, and improve measures to protect the safety of workers at work ...", and your Ministry's mandate letter priority to "Update employment standards to reflect the changing nature of workplaces and ensure they are applied evenly and enforced."

We have been, and continue to be, critical of the BCLI ESA review project for the reasons stated in this submission. With but a few exceptions, the BCLI Consultation Paper has not recommended any substantive changes to the ESA that reverses the regressive reforms of the previous Liberal government, address the rapidly changing nature of work and work organization in the new "gig economy", or that provides improvements to the basic employment benefits for unrepresented workers. This is inconsistent with your party's election and Confidence and Supply Agreement commitments, and your ministerial mandate.