BCESC

BC EMPLOYMENT STANDARDS COALITION

Critique of BC Law Institute Report on the Employment Standards Act

Introduction

On December 10, 2018 the BC Law Institute (BCLI) published the final report of its Employment Standards Act Reform Project Committee. BCLI commenced a review of the ESA on its own initiative in 2014, and initially without provincial government participation. Subsequently some funding was received from the provincial government and the Reform Committee meetings were attended by the government's Director of Labour Policy and Legislation as an observer and liaison. The 13 member ESA Reform Project Committee was made up of seven employer side lawyers and representatives, five labour side lawyers and representatives/advocates, one academic from UBC Law School, and a BCLI Board Member who is a commercial mediator and arbitrator and former judge.

The Minister of Labour Harry Bains has delayed making any substantive changes to the ESA, the Regulation, or the administration of the Employment Standards Branch until completion of the BCLI Reform Project Review.

On June 18, 2018 the BCLI published a *Consultation Paper on the Employment Standards Act* resulting from the Reform Project Committee's ESA review and invited interested party response to its preliminary recommendations covering 78 ESA reform topics, with an August 31st deadline for response.

The BC Employment Standards Coalition decided not to respond to the BCLI *Consultation Paper* directly but to make reference to it in a comprehensive September 1, 2018 submission to the Minister of Labour urging immediate action on ESA reform without waiting for the BCLI final report. The BCLI was copied on this submission.

The BC Employment Standards 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, BCLI's June 2018 *Consultation Paper* was not written in

plain language that could easily be understood by workers, and the public input response to the *Consultation Paper* was limited to written submissions with a short deadline of two months in the middle of the summer. It was therefore unrealistic to expect that volunteer organizations and interested individuals had the ability to respond to a detailed 450 page report containing 78 recommendations within the two months allowed.

Although the BCLI *Consultation Paper* contained 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 Reform Project Committee that would not substantially improve the basic employment rights of workers. This prevailing attitude and approach to the ESA indicated that direct responses to the BCLI's preliminary recommendations that call for more substantive improvements to the *Act* and *Regulation* would not receive favourable consideration by a majority on the BCLI Project Committee.

Having reviewed the BCLI's final report of December 2018 our earlier assessment that responses to the BCLI *Consultation Paper* calling for more substantive improvements to the *Act* and *Regulation* would not receive favourable consideration by a majority on the BCLI Project Committee has proven to be accurate.

The BCLI Final Report

The BCLI report's recommendations reflect either a consensus decision of the Project Committee, a majority recommendation, and/or a minority recommendation. Most if not all of the majority recommendations are for negative/regressive changes to the *Act* or *Regulation* unfavourable to workers, while most of the minority recommendations are for positive/progressive changes.

Recommendations in the BCLI *Consultation Paper* that addressed the rights and needs of Temporary Foreign Workers have been removed from the final report because in November 2018 the new *Temporary Foreign Worker Protection Act* was assented to in the BC legislature.

A careful review of the BCLI report's recommendations covering 71 ESA reform topics has revealed that only 20 of the recommendations provide for positive/progressive improvements to the *Act* or *Regulation,* or how they are administered.

Some of the strongest, most positive observations and recommendations in the report relate to enforcement of the *Act* to address the failure of the Employment Standards Branch to proactively and effectively enforce employment standards under the legislative and administrative changes introduced by the Liberal government in 2002. The report recognizes what numerous studies have concluded that "reactive, complaints based enforcement focused on resolving individual disputes does little to correct widespread patterns of non-compliance". The report's recommendations for change call for: 1) an end to the requirement that complainants must go through the "self-help" process before their complaints will be received, reviewed, investigated, mediated or adjudicated by the Employment Standards Branch (ESB); 2) restoration of the pre 2002 language in Section 76 of the *Act* requiring the Director of Employment Standards to investigate every complaint received; 3) a requirement that the investigating officer of the ESB

summarize the findings of an investigation into a complaint in a report to the Director and that copies of the investigation report be given to the employer and the complainant, and given the opportunity to respond and be considered in making a determination; 4) a determination decision be made by the Director or delegate other than the investigating officer; and 5) the *Act* clearly permit a complaint to be filed on behalf of another person (i.e. a third person complaint).

Positive/progressive recommendations have also been made with respect to wages and wage payments, including: 1) a new provision governing the ownership and distribution of tips and gratuities, the same as in the Ontario ESA; and 2) hand harvesting farm workers paid under a piece rate system should receive at least the equivalent of the general hourly minimum wage.

With respect to the licensing of Farm Labour Contractors, the report recommends that the required payment of security deposits be based on a new formula to increase the amount of the security for initial licence applicants, with the annual amount declining over time if there have been no violations of the *Act.* It is also recommends that the Director be permitted to prohibit a FLC whose licence has been cancelled for non compliance from re-applying for a licence.

Minor improvements have been recommended for the family responsibility unpaid leave provisions of the *Act.* It is recommended by the majority that the definition of "immediate family" be expanded to include a parent or a child of an employee's spouse, and that the current 5 days unpaid family responsibility leave be replaced with up to 7 days unpaid personal sickness or injury, or family responsibility leave.

Improvements are also recommended by the Project Committee with respect to restrictions on the employment of children so that the employment of children under age 16 in industries or occupations injurious to health, safety, or morals would be prohibited, that the employment of children below age 14 would require a permit from the Director of Employment Standards (a minority want this age to be 15), and that the employment of children age 14 and 15 in artistic work, light work or other permitted work would only require parental consent.

A number of positive/progressive recommendations have also been made by a minority on the BCLI Project Committee.

With respect to the Termination of Employment provisions the minority recommend that the *Act* address wrongful dismissal complaints and provide for an administrative adjudication process.

With respect to Hours of Work the minority recommend that the scheduling of hours of work other than the standard 8 hours per day and 40 hours per week should require employee consent by means of an agreed hours averaging agreement, that the averaging period should be less than 8 weeks, and that hours of work notices should be provided 48 hours in advance of schedule change instead of the current 24 hours. [Note: BCESC has called for 2 weeks notice of work schedule change]

With respect to the Farm Labour Contractor provisions and the liability for unpaid farm worker wages the minority have recommended repeal of Section 30(2) (producer excluded from

liability) so that producers/farm operators are also liable for the unpaid wages of farm workers employed by Farm Labour Contractors.

Regarding the annual vacation provisions the minority recommend adding the right to 4 weeks of vacation pay after 10 years of service.

With respect to the unpaid family responsibility leave provisions the minority recommend further expansion of the definition of "immediate family" to include a grandparent and the uncle or aunt of an employee's spouse.

With respect to the unpaid compassionate care leave provisions the minority recommend that the *Act's* non discretionary leave provisions under Part 6 be harmonized with the range of circumstances in which special Employment Insurance benefits are payable for the care of a critically ill family member.

Also with respect to sickness and family responsibility leaves the minority recommend that the 5 days of unpaid family responsibility leave provision be replaced with a new provision providing for up to 10 days unpaid leave for family responsibility and paid leave for personal illness or injury at the employee's regular wage.

With respect the *Act's* coverage of workers employed in private residences and the exclusion of "sitters", a minority recommend that the definition of "sitter" be amended to be a person employed solely to attend to a child or adult for not more than 15 hours per week.

Regarding the liability of company directors or officers for unpaid wages, a minority recommend elimination of the liability exception for directors and officers if the company is insolvent or in bankruptcy proceedings and to restore the pre 2002 liability language in the *Act*.

Negative/Regressive Recommendations

The BCLI report contains a significant number of major negative/regressive ESA change recommendations from a majority on the Project Committee. These include the following recommendations:

- No change in overtime premium provisions to return to the pre 2002 provision of double time after 11 hours worked per day and 48 hours worked per week.
- That the number of hours worked under an hours averaging agreement not exceed 12 hours per day unless overtime is paid for work in excess of 12 hours.
- That eligibility for statutory holiday pay be changed to require an employee to have worked or earned wages on 16 of the 60 days preceding the statutory holiday including the last day before the statutory holiday and the first day after the holiday, and that a day on which the employee is absent because of illness or has permission to be absent is not counted as a scheduled working day for the purposes of earning statutory holiday pay.
- That the minimum wage setting provision in the *Act* contain an indexing formula, or that the rate be set by the Lieutenant Governor in Council, completely ignoring the recommendation of the Fair Wages Commission that a permanent Minimum Wage

Commission be established to conduct research and advise the government on minimum wage increases.

- That implementation of the minimum hourly wage for hand harvesting farm workers be suspended until an expert committee has reported on how to implement the hourly minimum wage for these workers, completely ignoring the recommendation of the Fair Wages Commission that piece rate paid farm workers be covered by the minimum hourly wage effective June 1, 2019.
- That there be no improvements to the annual vacation provisions.
- That there be no new discretionary leave entitlements.
- That there be no paid sick leave provision.
- That only employees with 3 months continuous employment be eligible for any form of statutory leave other than annual vacation or jury duty or reservist leave.
- That there be no change to the exclusion of construction workers from the termination and severance pay provisions of the *Act*.
- That third party complaints only be permitted with the written authorization of the person who is the subject of a complaint.
- That there be no change to the 6 month limit (from date of complaint or termination) of unpaid wages required to be paid when an employer is found to have violated the *Act*.
- That there be no change to the company directors and officers exclusion from liability for unpaid wages as contained in Section 96(2).

Significant Omissions

The BCLI report failed to address or make recommendations on a number of significant progressive changes to the *Act* and *Regulation* called for by the BC Employment Standards Coalition and other worker advocacy organizations so as to modernize the employment standards regime. These called for changes include:

- An end to the numerous exclusions for industries and occupations, especially those covering workers in low wage occupations and with precarious employment status, and workers covered by a union agreement. [Note: The report only recommended that existing exclusions undergo review and that principles be developed to govern future applications for exclusion.]
- Administrative procedures to enhance pro-active investigation and enforcement measures so as to give meaningful effect to the substantive rights and obligations in the *Act*.
- Mandatory posting of the *Employment Standards Act* and *Regulation* in all work places.
- Extension of the limitation period for filing a complaint from 6 months to 2 years.
- An administrative penalty provision to provide that if more than one employee is affected by a contravention the penalty is multiplied by the number of employees affected by the contravention.
- Determination decisions to be collected and made publicly available through the Employment Standards Branch website, as is the case for Residential Tenancy Branch decisions.
- Adopt statutory timelines for complaint resolution to ensure that complaints are resolved in a timely manner.

- Provide for escalating penalties for employers who fail to surrender documents as ordered by the Employment Standards Branch.
- An increase in the penalty for a second and third violation if such violations are within 3 years of the first contravention and any other provision of the *Act* is contravened, and increase the schedule of penalties by the rate of inflation increase since 2001.
- Provide powers to the Director of the Employment Standards Branch to enable the prosecution of employers who are found guilty of serious or repeated contraventions of the *Act*.
- Regulate the conduct of Licensed Employment Agencies similar to the way in which Licensed Farm Labour Contractors are regulated.
- Adopt the principle of equal treatment and equal pay. The ESA should ensure equal treatment for temporary agency workers performing work comparable to that of permanent workers, including equal 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.

As recommended by First Call completely replace the child employment protection provisions in the *Act* with the following:

- 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.

The BCLI report makes only passing reference to the profound transformations that technological advances have made in the workplace, 'leading to decentralization, the emergence of telecommuting, and the "gig economy", in which widely dispersed workforces interact with their employers or nominal employers only through an electronic platform." However, the report makes no attempt to consider how these changes are affecting workers nor makes any recommendations to address these changes.

Advances in digital technology are disrupting the traditional employer-employee relationship in a way that the *Employment Standards Act* is not designed to handle. For many workers their work is now organized differently than in previous decades and because of this a growing number of workers are not covered by the *Act*, and therefore excluded from basic workplace rights and protections. This problem is particularly significant for workers in the gig economy – a business model that uses online platforms to match buyers with people selling services. While the technology connecting workers with clients is new, the actual work they do is not and typically consists of short, one-off tasks such as driving, home cleaning and food delivery to be performed on demand. The owners of these platforms derive much of their profit by exploiting gaps in the *Employment Standards Act* and its enforcement by classifying workers who sell their labour through these platforms as "independent contractors" and not as employees, thereby avoiding the responsibilities (and costs) of more traditional employment relationships.

Gig economy workers are part of a growing army of people in atypical employment arrangements with a lack of security, including not knowing their work schedules in advance, being frequently on-call for work, under short-terms contracts, and having variable weekly income and few, if any, benefits.

As recommended by the Canadian Centre for Policy Alternatives – BC, to address this significant gap in the *Act,* the *Act* should include "dependent contractors" in the definition of "employee", the same as in the *Labour Relations Code,* and put the onus on the employer to prove that a worker is an independent contractor, not an employee (or not a "dependent contractor"), and make misclassification of employees as independent contractors a priority enforcement issue. This will begin to address a major deficiency in the *Act* in not extending

minimum workplace rights and protections to workers in the "gig economy". In addition the Ministry of Labour should also commission independent research, including consultations with gig economy workers and their advocates, to develop appropriate recommendations for a regulatory framework that will guarantee basic workplace rights for all workers in the new economy.

Other important changes called for by the BC Employment Standards Coalition and other organizations but omitted in the BCLI report include:

- Eliminating exclusions and providing equal treatment under the *Act* to all types of care workers regardless of whether they are classified as Domestics, Sitters, Residential Care Workers, Night Attendants, or Live-in Home Support Workers.
- Dependent Contractors be included in the definition of "employee", the same as in the *Labour Relations Code*.
- The *Act* contain provision for a 15 minute paid rest/refreshment break each half shift in a 7 hour or 8 hour work day.
- A new provision provide that 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.
- Restore the pre 2002 double time pay provision for when an employee is required to work during the per weekly 32 hour free from work period specified in the *Act*.
- The number of Statutory Holidays with pay be increased from 10 to 13 with the addition of Easter Monday, Boxing Day, and National Aboriginal Day.
- There be no qualifying period of employment with an employer for employees to be entitled to statutory holiday pay. [Note: The Government of Canada recently announced amendments to the *Canada Labour Code* that will eliminate minimum length of service requirements for holiday pay, sick leave, maternity leave, parental leave, leave related to critical illness and leave related to death or disappearance of a child.]
- Provision for paid sick leave. The BC Employment Standards Coalition has called for the accrual of up to 52 hours (approx. 7 work days) of paid sick leave per year, with the benefit accruing at the rate of one hour for every 35 hours worked.
- With respect to Family Responsibility Leave the definition of "immediate family" be replaced with "a person in a close, family-like relationship with an employee".
- The *Act* include a provision for paid domestic violence leave.
- The *Act* include a provision requiring all employees receive from their employer 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.

With respect to the Termination and Severance Pay provisions of the *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.

DBF/
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