

BC EMPLOYMENT STANDARDS COALITION

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The BCESC acknowledges that we are located on the traditional and unceded territory of Coast Salish peoples including xʷməθkʷəy̓əm (Musqueam), səłílwətaʔ (Tsleil-Waututh), Skwxwú7mesh (Squamish) territories

September 29, 2021

Submission to the Select Standing Committee on Finance and Government Services regarding the British Columbia Budget 2022 Consultation

The BC Employment Standards Coalition campaigns for decent wages, working conditions, and respect and dignity in the workplace. The coalition is comprised of individual members, representatives from worker and community legal advocacy organizations, public policy researchers, labour lawyers, and volunteer advocates.

Summary

The BCESC is calling for an increase of \$14 million dollars to be allocated to the Employment Standards Branch (the Branch). These resources should go toward hiring more staff to address the backlogged complaints and increasing number of complaints, the expansion of its enforcement activities to include proactive investigations, the opening of more regional offices, extending office hours, and provide the resources for the ESB to accomplish the stated goals and objectives of the current provincial Ministry of Labour (MoL).

Further rationale behind this call is as follows: the Branch is still recovering from the tremendous blows to the Branch experienced under the provincial Liberal party's leadership between 2001 – 2017; the number of employees and employers has increased by approximately 30% since 2001, warranting a correlating increase in budget; the New Democratic Party's (NDP) MoL has committed to addressing workers' issues and bolstering the current complaints mechanisms in their 2021/2022 – 2023/2024 Service Plan; there is evidence of major shortcomings at the Branch, such as complaints left unresolved for years, investigations not conducted thoroughly, and a lack of proactive investigations. Additionally, it is understood that the number of complaints to the Branch has increased substantially over the previous years due to the expansion of rights and benefits under the *Act*, and reports from the MoL that the number of complaints doubled after the removal of the self-help kit complaints process.

BCESC Budget 2022 Recommendations

- The current 2021/2022 budget for the ESB sits at \$14 million. The BCSEC recommends that there be an increase of 14 million dollars to the Branch for the purpose of increasing

staff, opening more regional offices, extending office hours, and bolstering the Branch's enforcement activities, in particular, proactive investigations.

Rationale

1. Relevant history

(i) A deterioration of effectiveness

The Branch has failed to effectively carry out its responsibilities under the *Act*, especially over the previous two decades. Beginning in 2001, there was a 57% reduction in budget over the next ten years, the closure of 8 regional offices, a significant 51% reduction in enforcement staff, and the creation of significant administrative barriers related to the filing of complaints by workers, especially the requirement that employee complete a 'self-help' step before a complaint is accepted. These Branch resource cuts and administrative barriers resulted in a 61% decline (from 12,485 to 4,839) in *Employment Standards Act* complaints within the timeframe of 3 years and ended pro-active investigation and enforcement activities, which continues to be present. During this timeframe, millions of dollars of wages determined to be owed to workers went uncollected because the ESA was not adequately enforced. Between 2013 and 2017, it was estimated that the Branch failed to collect \$14.9 million in stolen wages and out of 2109 determinations filed in court, only succeeded in collecting wages in 662 of those cases.

There was a significant 49.1% increase in the Branch budget in 2019/2020 that partially made up for the years of cuts and neglect at the Branch between 2001 and 2017. Prior to 2018, there had been no Branch budget increase for at least 7 years, even though between 2001 and 2017, the number of establishments with employees had increased by 25% and the number of people employed in the province had increased by 23%. Over the past two budget cycles, the average annual increases in the Branch budget has dropped to 3.7%, which hardly covered staff salary increases. The current number of staff at the Branch has increased to 158 over the previous 3 years. However, many of the recent additions fulfill roles in administrative support and backend staff, as opposed to frontline investigational staff or staff focused on administration and enforcement of the new Temporary Foreign Worker Protection Action that came into force on December 15 2020.

(ii) Increase in Employees and Employers between 2001 and 2020: A Comparison

Between 2001 and 2020, the number of establishments with employees increased by 31% and the total number of people employed by those establishments increased by 30%. This was despite a 6.6% decline in employment in 2020 during the COVID-19 pandemic. Given these numbers, it is reasonable to expect a corresponding 31% increase to the Branch budget. In order to restore Branch staff resources to a level corresponding to its enforcement capacity in 2000 (162), plus a 31% increase based on the increase in employment establishments (i.e. 59 more staff), the Branch budget needs to increase by at least \$11 million. Only an increase of this magnitude would enable the Branch to begin a vigorous program of proactive investigation and enforcement.

As shown in the accompanying Branch historical statistics table, when the Branch had more staff and offices in 2000/01 and 2001/02 the number of complaints was 11,000 or 12,500, indicating that with only 7,408 complaints received in 2020/21 and fewer Branch offices there is still a

significant element of complaints suppression in the system. Complaint suppression involves a number of factors including employee fear and intimidation, language barriers, in-person access to Branch staff and offices, inconvenient hours of operation, and failure to perform complete payroll audits when there is evidence of systemic employer violations, undue delay in responding to complaints, and investigating officer bias, incompetence or hostility. Complaint suppression can also be a major problem among temporary foreign workers. Major barriers may exist, such as language or cultural barriers, access to assistance, abject discrimination, and sometimes, mental issues (such as depression due to isolation), that might prevent a migrant worker from submitting a complaint in the first place. The fear of reprisal or deportation is often cited as a major concern among migrant workers related to coming forward with a complaint.

(iii) Expanded Rights under the Act

As acknowledged by the Ministry of Labour's 2020/21 Annual Service Plan Report expanded rights under the *Act* since 2017, plus COVID-19 impacts, have increased demands on Branch staff.

The expanded workers' rights and benefits instituted under the *Act* since 2017 include elimination of the lower liquor server minimum wage, elimination of the alternative minimum wage for Live-In-Home Support Workers, extending unpaid job-protected pregnancy leave before the delivery date from 11 to 13 weeks, extending the right to unpaid job-protected parental leave, extending the right to unpaid job-protected compassionate leave, establishing a new right of up to 104 weeks of unpaid job-protected for parents grieving the death of a child, establishing a new right of up to 52 weeks of unpaid job-protected leave to parents whose child has gone missing as a result of a crime, the provision of up to 5 days of job protected paid leave for employees who face domestic or sexual violence or are parents of a child impacted by this kind of violence, establishing stronger child employment protections and new rules for the protection of young workers, and for job-protected unpaid leave for workers to care for a critical ill child and to care for an adult, the regulation of tips and gratuities, and extending the recovery period for which workers can recover owed wages from their employer from 6 to 12 months. Added to these increased rights and benefits under the *Act* is the recent new permanent employer paid sick leave provision to come into effect on January 1st, 2022. These new rights under the *Act* indicate that the Branch doesn't have the staff and budget needed to respond to the changes that have inevitably generated an increased volume of complaints.

2. Government Commitments

The B.C. MoL has made commitments to improve the situation for workers' welfare in the province. As outlined in the 2021/2022 – 2023/2024 Service Plan, the Ministry has committed to 'put people first', bolster the complaints mechanism, and develop a precarious work strategy that addresses the situation of gig workers.

2.1 The first goal of the Ministry of Labour's service plan is to create and enforce: "strong and fair labour laws and standards that respond to the rise of the gig economy and increased precarious work; support inclusive, sustainable and innovative economy; protects vulnerable workers and ensures world-class worker health and safety", with a stated objective to "update

and modernize B.C. Labour Laws”. There are 5 ‘strategies’ that are outlined within this Goal and 2 are notable for this submission:

- Continue a collaborative approach in working with representatives of workers and employers to address the impacts of the COVID-19 pandemic on people and businesses.
- Create new consultative mechanisms to engage employer and worker representatives in consideration of any changes proposed to workplace legislation to ensure the widest possible support.

2.2 The MoL’s second goal is to “ensure that labour laws are communicated and enforced through effective, client centered service delivery”. A stated objective within this goal is to “continue to implement new and updated Ministry processes to improve service delivery”. There are 5 strategies listed here, 2 of which are particularly relevant to this submission:

- Maintain a proactive enforcement unit within the Employment Standards Branch that will focus on industries and sectors with high complaint volumes.
- Prioritize the processing of complaint files to improve service delivery for workers and employers.

In order to meet any of these Ministry objectives, a budget increase will be needed, primarily for the Branch’s ability to expand its enforcement activities to include proactive investigations. Additionally, the development of a precarious work strategy that includes the development of employment standards targeted to precarious and gig workers will undoubtedly put additional strains on the under-resourced Employment Standards Branch. It will be impossible for the ESB to meet these objectives without a budget increase, considering the enormous pressure that the Branch is already under.

The Director of Employment Standards will not be able to carry out her/his statutory mandate of ensuring that all employees receive the minimum employment standards to which they are entitled by only responding to the complaints of individual employees, as is currently the practice. The Director needs the resources and the commitment to undertake a comprehensive program of proactive workplace investigation so that the unfairness of bringing into compliance some but not all employees in a sector, in a community, is avoided.

Proof of the effectiveness of such an aggressive program of proactive investigation was the success of the Branch’s multi-agency Agricultural Compliance Team in the 1990’s in bringing the agricultural industry into compliance.

As part of an aggressive proactive investigation program the ESB needs to also respond to individual worker complaints by auditing the payroll records for all employees in a business for all ESA entitlements to ensure that there are no systematic employer violations of the *Act*.

3. Employment Standards Branch Complaints Handling Performance

It is understood that there are a great number of ESA violation complaints involving significant amounts of unpaid wages, improper terminations, and misclassification of employees as independent contractors that have not been acted upon for years. According to the Ministry of

Labour's service plan, the proportion of complaints resolved within 180 days (6 months) declined from 92% in 2018/2019 to 47% in 2020/2021, indicating that last year, 57% of complaints took more than 6 months to resolve; this is the worst performance in 11 years. The accompanying Branch data table shows 2017/2018 the percentage of complaints resolved has declined from 81% to 67%.

Those many complaints that the Branch has been unable to resolve expeditiously means that the rights of many workers have been denied by the inactivity of the Branch because it is widely recognized that "justice delayed is justice denied." "Justice delayed is justice denied" is a well known legal maxim. It means that if legal redress or equitable relief to an injured party is available, but is not forthcoming in a timely fashion, it is effectively the same as having no remedy at all.

4. Workers' ESB Complaint Handling Stories

In the following we provide examples of some of the stories of the failures and inadequacies of Employment Standards Branch operations and practices that members of our Coalition have experienced or been made aware of:

Untimeliness

1. After waiting almost 6 months, a Branch Officer started an investigation and almost immediately decided they needed to pass on the investigation to another Branch Officer due to the amount of the claim. The complainant and their advocate did not hear from the Branch again for another 6 months despite repeated attempts by their advocate to contact the Branch and get an update. The complainant had become homeless after losing their employment (housing was provided by the employer) and could not afford to secure new housing for a number of months as a result of not receiving their unpaid wages in a timely manner.
2. An investigation by the Branch took 2 years and 4 months to complete and issue a Determination. During this time, the Branch Officer conducting the investigation would repeatedly stop communication and not respond to emails or phone calls from the complainant's legal representation for periods of over 3 months at a time. As a result of these delays, the complainant waited over 3 years from the time they filed their complaint to the time they received their unpaid wages.
3. In the Spring of 2018, two separate adjudications took place but the third-party representative (Migrant Worker Center, MWC) was not contacted in either case and provided with determinations. MWC followed up on several occasions to request further information. Eventually, after writing to the relevant case manager, MWC was told that the delay was because the Branch Officer was extremely busy. However, shortly after this reply, the determinations were finally issued, more than 3 years after the adjudications.
4. An advocate filed a complaint on behalf of a worker and did not hear back for more than one year. The advocate contacted the Director of the ESB to follow-up on the case and was informed that the Branch had closed the file. The advocate was told that the Branch had tried to reach out several times to the worker and advocate to discuss the case but didn't

receive any response from either party. The Branch did not provide any details on the date of case closure, nor the dates the Branch attempted to contact the worker and/or the advocate related to the case. The advocate's organization (Worker Solidarity Network) is not aware of any attempts from the Branch to reach out to them regarding the file. The worker was unable to recover their owed wages and gratuities and unable to make an appeal because too much time had passed.

5. In 2018, there was a case involving 185 temporary foreign workers from Guatemala employed by the Golden Eagle Blueberry Farm in Pitt Meadows. The workers hadn't been given the hours they had been promised and, in some cases, the agreed upon duration of employment (6 months) was not honoured. They experienced substandard and intolerable housing conditions, and in some cases, experienced bullying and sexual harassment, apart from other grievous complaints. There were a number of problems with the investigation. First, the Branch officer dismissed the majority of the complaints and the case focused almost exclusively on the unmet promise of 40 hours of work. Second, there were problems associated with the handling of important documentation. The Branch Officer required the employer to provide payroll records and perform a "self-audit" with respect to the matter of unpaid wages. However, the Officer never gave the complainants, through their agents, Dignidad, and the BC Federation of Labour, an opportunity to review these records for accuracy. This was later deemed a 'breach of natural justice'. These are just two examples of the mishandling of this case at the Branch.

An investigation by the Branch found that 174 employees were determined to be owed wages adding up to a total of \$131,631.00. The final penalty given to the employer was \$134,237.00, after a \$500.00 administrative penalty was given and interest was calculated.

The unpaid wage complaints of 52 of the complainants are still unresolved after three years.

6. A worker from Guatemala, through the Temporary Foreign Workers Program (TFWP), was employed with GForm Enterprises, a construction company, between November 2018 and October 2019. The complainant was not paid for the number of hours worked in regular and overtime hours, and was not paid an agreed upon vacation time. A determination from the Branch in April 2021 found the employer owed the complainant \$38,229.06.

This complainant has yet to receive this amount.

Inappropriate Advice

7. During the initial stages of an investigation, a Branch Officer repeatedly advised the complainant and their advocate that the complainant should settle for an amount much lower than the complaint amount because the employer's payroll record was more credible evidence than the complainant's record of their hours. This was despite the fact that no one (including the Officer) had seen the employer's payroll records and the complainant had provided copies of their timesheets. When questioned, the Officer justified making this recommendation stating that the employer had read the records over the phone to her. The third-party representative asked the Officer multiple times to provide a copy of the employer's payroll record, which she refused each time and instead would pressure the

client to accept a low settlement offer. It seemed the Officer gave little importance to ensuring the employer was compliant with the Act and instead wanted to arrange early resolution by any means possible.

8. A Branch Officer contacted a complainant without contacting their authorized representative. During that conversation, the complainant reported that the Branch Officer stated he wanted to settle the complaint and advised that they withdraw their Human Rights Tribunal complaint against the same employer to make the facilitation of settlement easier.
9. In an investigation, the Branch Officer quickly came to the conclusion that the complainant was fired with just cause and advised the complainant to withdraw their complaint rather than conducting a proper investigation and issuing a Determination explaining the reasons he had come to that conclusion. If the complainant did not have legal representation, they would have withdrawn their complaint based on the Officer's advice despite being entitled to (and eventually being awarded) compensation in lieu of notice.
10. A Branch Officer determined certain claims were not supported because the complainant had not "unequivocally proven" her claims. The advocate, in this case, asserts that this is the wrong standard of proof and is even higher than that which is used in criminal law.
11. A Worker Solidarity Network (WSN) staff served as an advocate for a worker in the process of submitting a complaint to the ESB related to unpaid compensation. The Branch Officer didn't want to communicate with the WSN, insisted on contacting the worker directly, and told the worker that he didn't like working with third parties, referring to the WSN advocate; during the process, it was stated he often had a rude and condescending tone. This approach is problematic, in part, because often, workers ask the WSN to be the main point of contact with both the Branch and employers due to existing power dynamics, stressful situations, and occasionally, traumatizing events related to the complaint, making it very difficult for workers to go through the process independently.

During the process, the Branch Officer tried to convince the worker to close their file because he didn't think they were entitled to compensation, creating a biased opinion during the investigation. At times, the Officer was uncooperative during the investigative process. The WSN advocate sent relevant documentation (such as pay stubs) to the Officer, who sent them back stating he didn't know what to do with the documents, asked for them to be re-ordered, and refused to perform the necessary calculations, obliging the WSN advocate to do so. He also implied that it was only the employee's responsibility to provide documentation, despite the fact that employers must keep payroll and employment records. Finally, there were abject errors in the Officer's assessments. He said he didn't see any overtime in the evidence that the employer provided when in fact, there was substantial overtime in the employer's evidence. He also allowed the employer to put money in a trust while preparing to close the file, even though the amount was less than what the worker was entitled to. The WSN advocate asserted that the Officer used 'Prescribed Circumstances' to his advantage in this case.

Conclusion

We have made similar submissions in 2017, 2018 and 2020 because of the failures and inabilities of the Employment Standards Branch to carry out its mandate due to significantly reduced and inadequate staffing and worker accessibility, so we strongly urge that this resource deficiency be addressed in the 2022/23 provincial budget.

We submit that only a significant increase in the Employment Standards Branch budget can begin to address the challenges described above. If the Branch budget of \$18 million in 2001/02 had been increased by just the rate of increase in inflation alone over the past 20 years, as measured by the Consumer Price Index for BC (a 39.9% increase), the Branch budget would now be \$25 million, i.e. \$11 million more than it is now. Therefore, in order to also expand the scope, quality and accessibility of Branch operations the Branch budget for 2022/23 needs to be increased by at least \$14 million.

Endorsements:

The following organizations and individuals have endorsed this submission:

Vancouver & District Labour Council

Committee for Domestic Workers & Caregivers Rights

Together Against Poverty Society

Dignidad Migrante Society

Dr. Anelyse Weiler, Assistant Professor of Sociology, University of Victoria

Professor Emeritus Mark Thompson, University of British Columbia Sauder School of Business
(1993-94 Employment Standards Review Commissioner)

Worker Solidarity Network

BC Federation of Labour

EMPLOYMENT STANDARDS BRANCH BUDGETS & COMPLAINTS PERFORMANCE HISTORY

BUDGET YEAR	ANNUAL BUDGET*	PERCENT CHANGE	COMPLAINTS**		PERCENT RESOLVED	COMPLAINTS PERFORMANCE***	UNPAID WAGE RECOVERIES**
			RECEIVED	RESOLVED			
2000/01	\$17,900,000		12,485				
2001/02	\$18,000,000		11,001				
2002/03	N.A.		6,488				
2003/04	N.A.		4,839				
2010/11	N.A.					78%	
2011/12	\$7,833,000						
2012/13	\$7,833,000	0.0%					
2013/14	\$7,833,000	0.0%					
2014/15	\$7,833,000	0.0%					
2015/16	\$7,858,000	0.3%				82%	
2016/17	\$7,855,000	0.0%				86.5%	
2017/18	\$7,911,000	0.7%	5,063	4,091	81%	>79%	\$7,655,436.34
2018/19	\$8,745,000	10.5%	4,958	4,308	87%	92%	\$7,082,233.11
2019/20	\$13,041,000	49.1%	7,294	4,651	64%	73%	\$10,303,479.17
2020/21	\$13,882,000	6.4%	7,403	4,948	67%	47%	\$10,742,185.01
2021/22	\$14,010,000	0.9%					

Sources:

* BC Government Budget Estimates

** Employment Standards Branch Data

*** BC Ministry of Labour Annual Service Plans (Percentage of complaints resolved within 180 days)