JUSTICE DENIED

THE SYSTEMIC FAILURE TO ENFORCE BC EMPLOYMENT STANDARDS

BC Employment Standards Coalition

FEBRUARY 2022

BCESC

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This is a report that documents the failures of the BC Employment Standards Branch, an agency of the BC Ministry of Labour, to effectively and efficiently enforce the *Employment Standards Act*, so as to ensure fairness and decency in BC's workplaces. The findings and recommendations are based on a historical review of the activities of the Employment Standards Branch; Ministry of Labour reports, staffing resources, and budgets; employment standards review reports; Employment Standards Tribunal decisions; and case files from workers' organizations. Based on this report's findings, the BC Employment Standards Coalition urges the Government of BC to adopt the recommendations contained in this report and improve the working lives of British Columbians who are the victims of wage theft and the denial of legislated rights.

The BC Employment Standards Coalition brings together organizations, advocates, and workers in a campaign for employment standards legislation that provides decent wages, working conditions, respect, and dignity for all workers in the province of British Columbia.

ACKNOWLEDGEMENTS

This report is the collective effort of members, workers advocates, and volunteers of the BC Employment Standards Coalition. This report would not have been possible without the sharing of the Employment Standards Branch complaint filing experiences, case files, and reports of workers advocacy groups, such as Migrant Workers Centre, the Worker Solidarity Network, Together Against Poverty Society, and Dignidad Migrante Society.

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Copy Editor: Sarah MacKinnon
Design: Paula Grasdal

BCESC
BC EMPLOYMENT STANDARDS COALITION

BC EMPLOYMENT STANDARDS COALITION
4778 Fernglen Place, Burnaby, BC V5G 3W1
Phone: 604-430-6036 | Fax: 604-435-6024
Email: david@labourconsultingservices.com
www.bcemploymentstandardscoalition.com

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Introduction

The Employment Standards Act is about ensuring that employees in the province enjoy basic standards of pay and conditions of employment in their workplaces.

This report exposes the failures of the BC Employment Standards Branch (the "Branch") to effectively and efficiently enforce the *Employment Standards Act* (the "Act" or "ESA"). Because of this failure, thousands of BC workers are being denied their rights under the law. This report tells the story of:

- Lengthy delays in the resolution of complaints.
- A continued primary focus on the administration of a complaints-based system.
- The failure of the Branch to proactively investigate employers, industries, and sectors with a history of *Employment Standards Act* violations.
- The barriers to employees in having their complaints addressed.
- The suppression of complaints.
- Employer bias in Branch practices and procedures.
- Procedural unfairness in complaint investigation and adjudication.
- The inadequacy of Branch budgets and staff resources to provide effective enforcement of the Act.

The Employment Standards Act is about ensuring that employees in the province enjoy basic standards of pay and conditions of employment in their workplaces. It is part of a broader system of labour standards that govern the conditions in which people do paid work. "Employment Standards" deal with issues such as minimum wage, minimum and maximum hours of work, overtime pay, parental leave, paid sick leave, vacations with pay, and statutory holidays with pay. Employment standards establish a minimum floor below which employers cannot go and provide a starting point for negotiations for improved working conditions when employees with a union negotiate a collective agreement. They also establish a fair playing field for employers, reducing unfair competition. Over 80% of workers in the private sector in BC have no other employment rights relating to wages, benefits, and other basic working conditions than those provided in the *Employment Standards Act*.

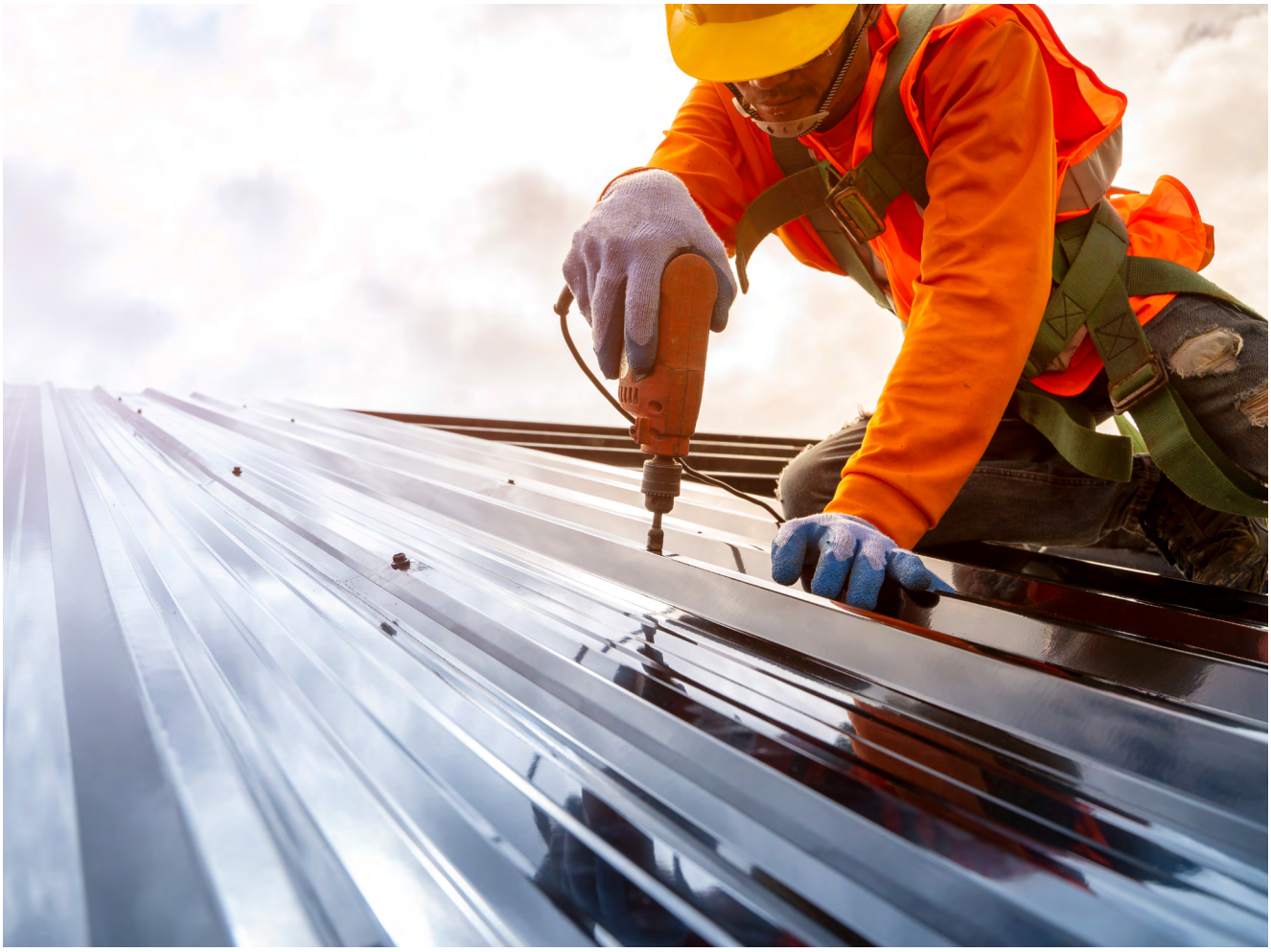
The failed Liberal government ESA enforcement legacy continues

Prior to 2001, an integral aspect of Employment Standards Branch operations was the successful proactive investigation of industries and sectors with a history of ESA violations. Following the election of the BC Liberal Party to government in 2001, substantial changes were made to the ESA and the practices and procedures of the Employment Standards Branch, which diminished and undermined the rights of workers and their access to employment justice. In addition to substantially reducing workers' rights under the Act, beginning in 2001, the Liberal government reduced the Branch budget by 57% over the next 10 years, closed 8 regional offices, reduced enforcement staff by 51%, and created significant administrative barriers to the filing of complaints by workers, especially the requirement that employees complete a "self-help" step before a complaint is accepted. As a consequence, proactive investigations were terminated, and the number of employee complaints received by the Branch declined from 14,495 in 1997/98 to 4,839 in 2003/04—a decline of 67%.

In 2001, substantial changes were made to the ESA and the practices and procedures of the Employment Standards Branch, which diminished and undermined the rights of workers.

In 2014—toward the end of the 16 years of Liberal government—the British Columbia Law Institute (BCLI) initiated an independent review of the ESA. In explaining the need for such a review, the BCLI noted that it had been more than 20 years since the last independent review of employment standards in British Columbia, namely the one carried out by the Thompson Commission in 1993/94.[1] It noted that in the two decades since the Thompson Report, patterns of work and the nature of the workplace had evolved along the trend lines that Thompson had described. Full-time permanent employment with substantial job security had continued to decline and be replaced by increasing levels of insecure, temporary, and part-time work. Demands for greater flexibility in working arrangements had

1 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).



The influence of digitalization in the workplace had been profound, leading to decentralization, the emergence of telecommuting, and the "gig economy".

intensified, from employers and workers alike. Controversy surrounding the socioeconomic effects of these trends had also grown. The influence of digitalization in the workplace had been profound, 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. The BCLI observed that the workplace could no longer be thought of in terms of a static physical environment, that it is now a far more fluid and less easily definable concept, and that it was time to take another critical look at the ESA.

In its December 2018 report, the BCLI recommended reforms to employee rights in the Act and addressed the need for ESA enforcement and procedural reforms.[2] From its research, it found that numerous studies have concluded that reactive, complaints-based enforcement focused on resolving individual disputes does little to correct widespread, long-term patterns of non-compliance. It found that complaints-based enforcement alone would not reveal a complete picture of the areas in which contraventions were most prevalent.

The BCLI report noted that a similar ESA review in Ontario by Special Advisors to the Changing Workplaces Review had made strong recommendations in favour of the

2 Members of the *Employment Standards Act* Reform Project Committee, *Report on The Employment Standards Act* (Vancouver, British Columbia Law Institute, December 2018), pages 237 – 254.

retention and expansion of proactive enforcement. The Ontario Special Advisors concluded that concentrating resources on the complaints-driven process interferes with enforcing standards on a broader level. In their view, the growth of precarious employment further diminished the effectiveness of a complaints-based enforcement strategy, because the large portion of the workforce with minimal job security would not be motivated to assert its rights by invoking the complaints process. The Special Advisors recommended that the Ontario government change back to a proactive, law-enforcement model, as opposed to one primarily operating a dispute resolution service, considering that this was essential to creating a "culture of compliance."

The BCLI Project Committee report stated it believed that "… a robust capacity to conduct investigations, including inspections and compliance audits on a workplace or sectoral basis, is essential to the ability of the Employment Standards Branch to enforce the minimum standards under the ESA. In the interests of proper enforcement of the ESA, the Director must retain authority to carry out investigations that are not necessarily linked to individual complaints, and have the resources necessary for its judicious and effective use."

Serious deficiencies remain in the operation of the Employment Standards Branch.

The BCLI Project Committee reported that it was "… encouraged in this view by the strong support expressed for it by employers and employees alike in the response to the [BCLI] consultation paper." And that major business organizations also supported a robust investigative capacity. It reported that one important industry association referred to the retrenchment of investigative activity on the part of the Branch in recent years as having had a negative effect on its industry by allowing non-compliant operators to gain an unfair competitive advantage over compliant ones.

The BCLI Project Committee then recommended that, "The ESA should continue to confer authority on the Director [of the Branch] to carry out investigations to ensure compliance with the Act, whether or not a complaint of a contravention has been made."[3]

However, despite the change in government in 2017, the Employment Standards Branch continues to take a reactive rather than an aggressive, proactive approach to enforcement of the Act as recommended by the BCLI.

THE MINISTER OF LABOUR'S MANDATES AND ESB SERVICE PLAN OBJECTIVES — 2017 TO 2021

The Employment Standards Branch is the administrative agency within the Ministry of Labour responsible for administering and enforcing the ESA. The current NDP government, since first being elected in BC in the spring of 2017, has made a number of substantive changes to the *Employment Standards Act*, eliminated the "Self-Help Kit" barrier to the filing of ESA violation complaints, established the Temporary Foreign Worker Protection Act and the temporary foreign worker employers registry, and hired more staff to handle complaints. Despite these changes, serious deficiencies remain in the operation of the Branch. The

3 Ibid, page 254.

Ministry has made commitments over the past five years to establish a modern employment standards system that is applied fairly and is actively enforced, and to make changes to Branch operations so as to increase and/or improve enforcement practices. These commitments have not been followed up with sufficient action and financial resources to make the Branch a modern, effective ESA enforcement agency.

EMPLOYMENT STANDARDS BRANCH HISTORY

(i) A deterioration of effectiveness

The Branch has failed to effectively carry out its responsibilities under the Act, especially over the past two decades. Beginning in 2001, there was a 57% reduction in budget over the next 10 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 employees 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 proactive investigation and enforcement activities, and this continues to the 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 that out of 2,109 determinations filed in court, only succeeded in collecting wages in 662 of those cases.

Millions of dollars of wages determined to be owed to workers went uncollected because the ESA was not adequately enforced.

There was a significant 49.1% increase in the Branch budget in 2019/2020, which partially made up for the years of cuts and neglect 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 increase 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 are administrative support and backend staff, as opposed to frontline investigational staff or staff focused on the administration and enforcement of the *Temporary Foreign Worker Protection Act* that came into effect December 15, 2020.

(ii) Increase in employees and employers between 2001 and 2020: a comparison

Between 2001 and 2020, the number of business 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 double, and therefore be increased by at least $14 million. Only an increase of this magnitude would enable the Branch to begin a vigorous program of proactive investigation and enforcement. Incredibly and

disappointingly the provincial government's budget estimates for the next 3 years (2022 – 2024) indicate that there will be no increase in the Ministry of Labour and Branch budgets.

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 complaint 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, 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. Large 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.

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(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.
- Changes to definitions of caregivers.
- 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 leave 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 the result of a crime.
- Providing up to 5 days of paid job-protected 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.
- Providing unpaid job-protected leave for workers to care for a critically ill child or to care for an adult.
- Regulating tips and gratuities.
- Extending the recovery period for which workers can recover owed wages from their employer from 6 to 12 months.

Newly added to these increased rights and benefits under the Act is the provision of 5 permanent employer-paid sick-leave days, which came into effect January 1, 2022. The Branch does not have the staff and budget needed to respond to the inevitably increased volume of complaints due to these expanded rights under the *Act*.

GOVERNMENT COMMITMENTS

The BC Ministry of Labour 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.

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 an inclusive, sustainable, and innovative economy; protect vulnerable workers; and ensure world-class worker health and safety," with a stated objective to "update and modernize BC Labour Laws." There are 5 strategies that are outlined within this goal and two are notable in the context of this report:

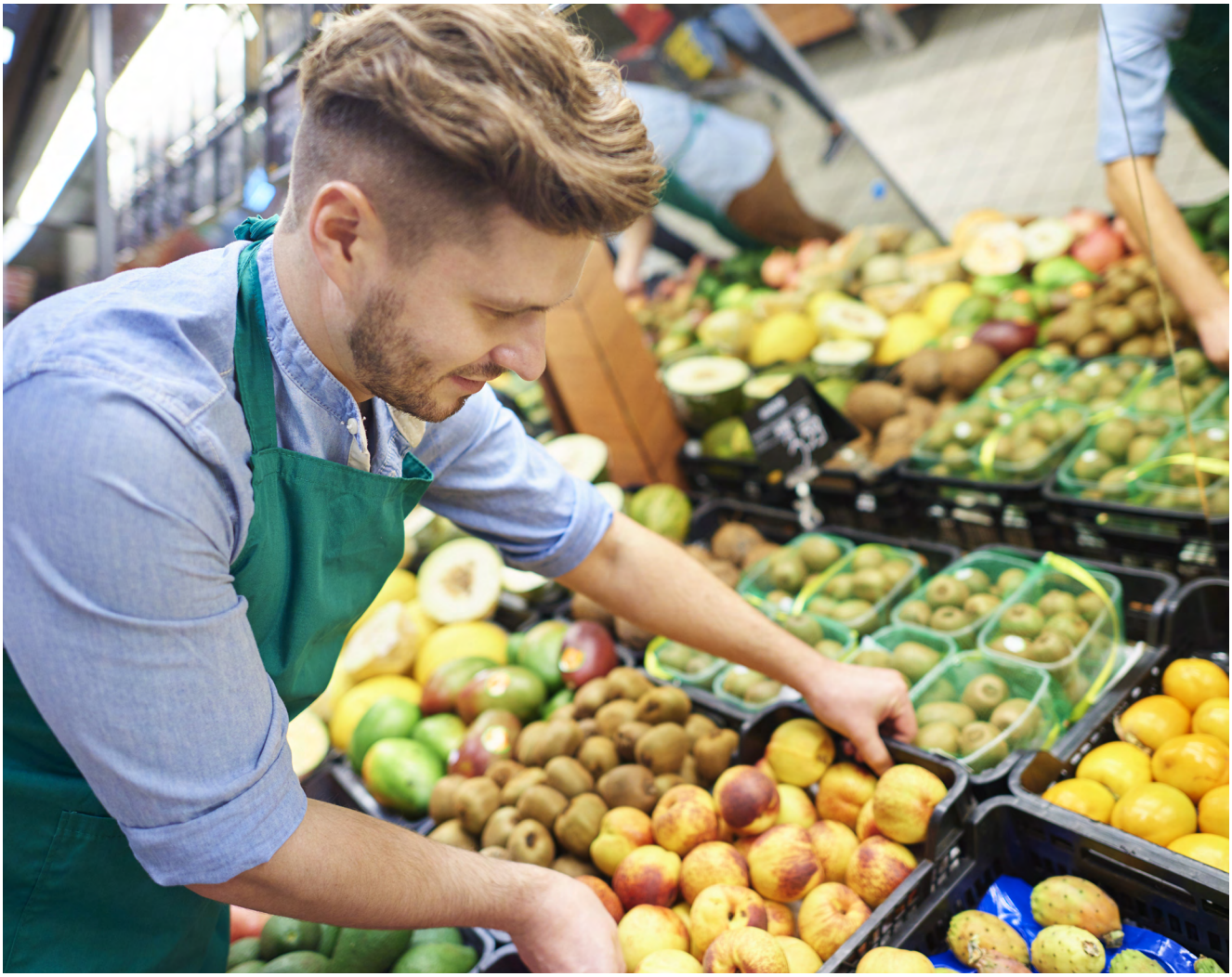
The Ministry has committed to "put people first," bolster the complaints mechanism, and develop a precarious-work strategy that addresses the situation of gig workers.

- 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.

The Ministry of Labour'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, two of which are particularly relevant to this report:

- 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 to allow the Branch 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 already under-resourced Employment Standards Branch.



The Director of Employment Standards is not able to carry out their statutory mandate of ensuring that all employees receive the minimum employment standards to which they are entitled by only the current practice of responding to the complaints of individual employees. The Director needs the resources and the commitment to undertake a comprehensive program of proactive workplace investigation, to avoid the unfairness of bringing some but not all employers into compliance in a sector or community.

Proof of the effectiveness of such an aggressive program of proactive investigation can be found in the success of the Branch's 1990s multi-agency Agricultural Compliance Team that brought the agricultural industry into compliance. However, that proactive enforcement program was ended in 2001.

As part of this type of program, the ESB also needs to 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*.

The Director of Employment Standards needs the resources and the commitment to undertake a comprehensive program of proactive workplace investigation

EMPLOYMENT STANDARDS BRANCH COMPLAINTS HANDLING PERFORMANCE

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 in 2020, 57% of complaints took more than 6 months to resolve; this is the worst performance in 11 years. Complaints data provided by the Branch reveal that in 2017/2018 the percentage of complaints resolved declined from 81% to 67%.

The many complaints that the Branch has been unable to resolve expeditiously mean that the rights of many workers have been denied—it is a widely recognized legal maxim that "justice delayed is justice denied." 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.

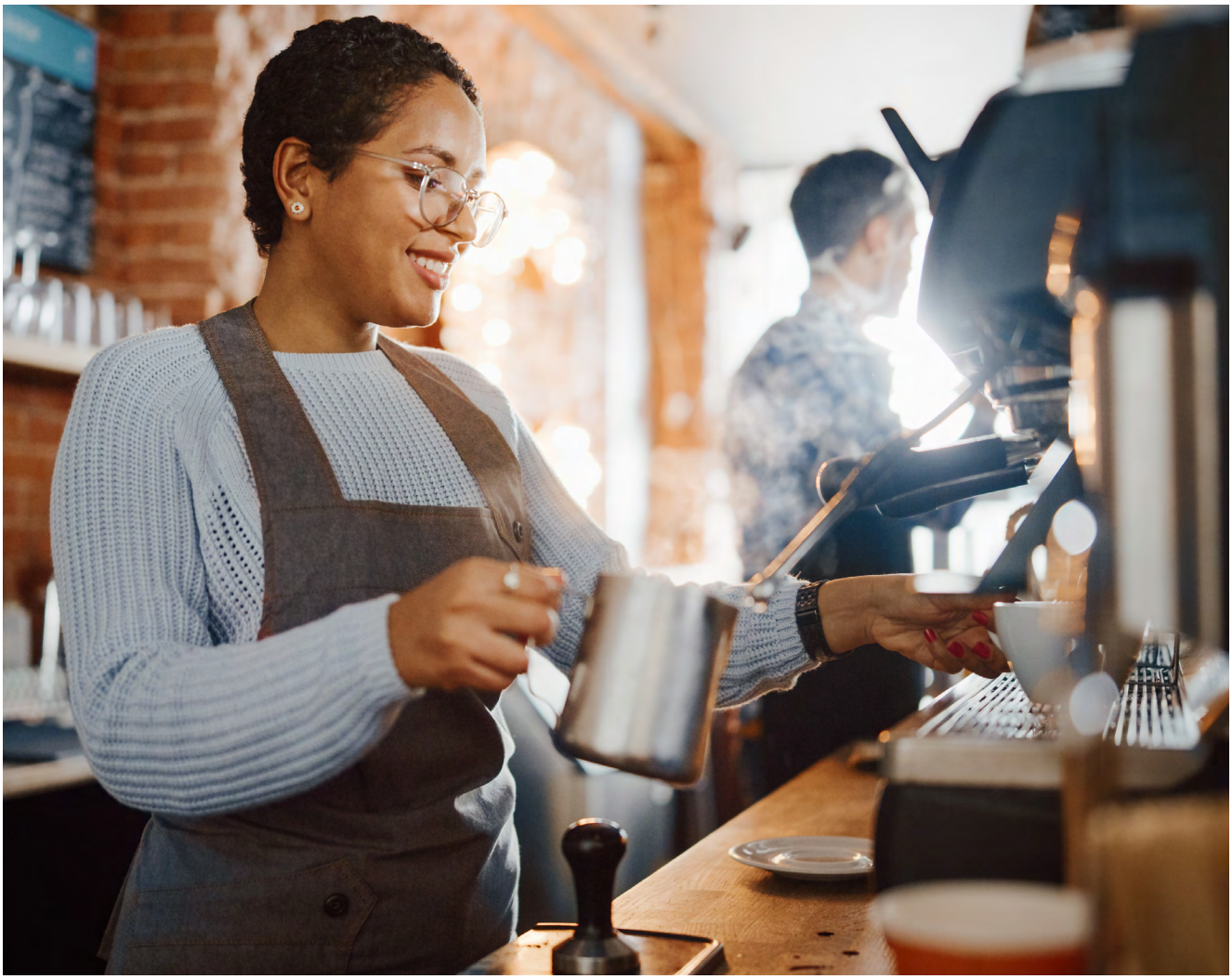
WORKERS' ESB COMPLAINT HANDLING STORIES

In the following section, 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.

Justice Denied by the Untimeliness of Complaint Handling

The many complaints that the Branch has been unable to resolve expeditiously mean that the rights of many workers have been denied — it is a widely recognized legal maxim that "justice delayed is justice denied."

1. After waiting almost 6 months, a Branch Officer started an investigation and almost immediately decided they needed to pass the investigation on 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 unhoused 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 relating to complaints on behalf of two temporary foreign workers, but the third-party representative (Migrant Workers Centre, 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. In the Employment Standards Tribunal appeals decisions of these Determinations, the Tribunal stated that:

> *There is no question that a three-year delay from the date of the hearing to the date of the issuance of the Determination was inordinate given the purposes of the ESA, one of which is to provide for fair and efficient procedures for resolving disputes (section 2(d)).*
>
> *I find that the significant delay in issuing the Determination caused serious prejudice to the Employee given his circumstances. Although the Employee speaks, reads and writes English, he was clearly a vulnerable employee. As a temporary foreign worker, his position in Canada was precarious (see the Temporary Foreign Worker Protection Act, SBC 2018, c. 45). He was unfamiliar with his rights and obligations. The fees charged to the Employee by Mr. Chand were significant in light of his background.*
>
> *In my view, the delay, and the fact that it was issued only after several requests by agencies on the Employee's behalf, bring the administration of the Employment Standards regime into disrepute.*

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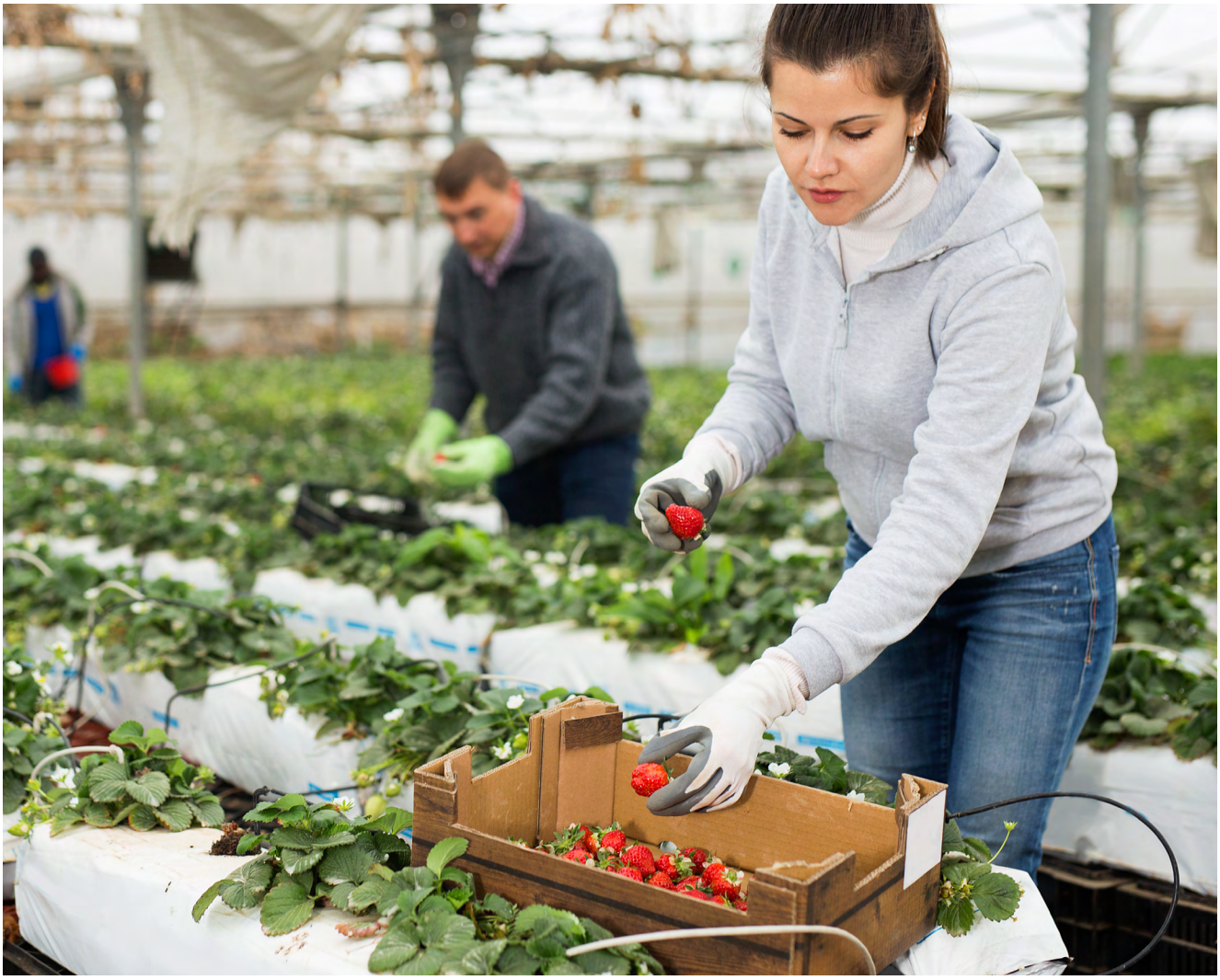

The worker was unable to recover their owed wages and gratuities and was beyond the stated deadline for filing an appeal.

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 did not 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 (the 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 was beyond the stated deadline for filing an appeal.

5. In 2018, there was a case involving 185 temporary foreign workers from Guatemala employed by a large blueberry farm in Pitt Meadows. The workers had not been given the hours they had been promised under contract and, in some cases, the agreed upon duration of employment (6 months) was not honoured. 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 per week. 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 Migrante, and the BC Federation of Labour, an opportunity to review these records for accuracy. This was later deemed a "breach of natural justice" by the Employment Standards Tribunal. These are just two examples of the mishandling of this case at the Branch.

Ultimately 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 awarded and interest was calculated.

The unpaid wage claims of another 52 of the complainants were also not properly addressed by the Branch until, after a second investigation, it determined in a December 24, 2021, decision that they were owed over $15,000 in unpaid wages — a decision that it took over three years to reach.

Ultimately an investigation by the Branch found that 174 employees were determined to be owed wages adding up to a total of $131,631.00.

6. A worker from Guatemala, through the Temporary Foreign Worker Program (TFWP), was employed with 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. Following an ESA complaint in September 2019 assisted by the worker's advocate, Dignidad Migrante, an investigation Determination from the Branch in April 2021 found the employer owed the complainant $38,229.06. However, the employer unsuccessfully appealed this Determination and so it was not until the Employment Standards Tribunal appeal decision in November 2021 that the worker became eligible to receive these unpaid wages — two years and two months after the date of their complaint. The main cause of the delay in this case being the 19 months it took for the Branch to issue a decision.

   This complainant has yet to receive this unpaid wage amount.

7. In September 2020, an advocate, acting on behalf of a dental hygienist, submitted an ESA complaint claiming $1,632 in unpaid wages for the period January 2019 to March 2020. It is alleged that during that period the dental hygienist had been required to report for work 15 minutes before the start of the first scheduled patient appointment every day in order to perform set-up duties. However, she had not been paid for this 15-minute set-up period at the start of every shift. But because of a limitation on the amount of unpaid wages that can be claimed the employer may only be liable for 12 months of these unpaid wages. It is alleged that other dental hygienists employed by the same clinic had been treated the same way.

   The dental hygienist had been employed, in a part-time position, at a Surrey dental clinic for 3½ years before being permanently laid off due to COVID in June 2020.

   As of February 2022, 17 months after the filing of this ESA complaint, while the Branch has acknowledged receipt of the complaint, it has not appointed an Officer to investigate the complaint, nor made any contact with the complainant.

It appears that the Branch is at least 18 months behind in responding to complaints. These lengthy delays constitute an unacceptable denial of justice. Section 2(d) of the Act states that one of its purposes is "to provide fair and **efficient** procedures for resolving disputes". Therefore, unjustifiable and significant delays in the processing of complaints, directly violates the Act. As noted above in the quoted Tribunal decision, delays can cause employee's "significant prejudice" and can "bring the administration of the Employment Standards regime into disrepute".

Inappropriate Branch Advice

8. 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 the Officer. The third-party representative asked the Officer multiple times to provide a copy of the employer's payroll record, which the Officer 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.
9. A Branch Officer contacted a complainant without contacting their authorized representative. During that conversation, the complainant reported that the Branch Officer stated they wanted to settle the complaint and advised that the complainant withdraw their Human Rights Tribunal complaint against the same employer to make the facilitation of settlement easier.
10. 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 they 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.
11. A Branch Officer determined certain claims were not supported because the complainant had not "unequivocally proven" their 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.
12. A staff member of the Worker Solidarity Network (WSN) served as an advocate for a worker in the process of submitting a complaint to the ESB related to unpaid compensation. The Branch Officer did not want to communicate with the WSN, insisted on contacting the worker directly, and told the worker that they did not like working with third parties, referring to the WSN advocate; during the process, it was stated the Officer 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

The Act states that one of its purposes is "to provide fair and **efficient** procedures for resolving disputes". Therefore, unjustifiable and significant delays in the processing of complaints, directly violates the Act.

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 the Officer did not 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 they did not 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. The Officer 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. The Officer said they did not see any overtime in the evidence that the employer provided when in fact, there was substantial overtime in the employer's evidence. The Officer 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 their advantage in this case, even though there is no such provision in the Act.

The Branch Officer tried to convince the worker to close their file because the Officer did not think they were entitled to compensation, creating a biased opinion during the investigation.

It is fundamental to the duty of procedural fairness that administrative decision makers engage in fair and impartial decision-making. Reaching a judgment before

considering all evidence, prejudicial attitudes, and other factors may indicate actual or perceived bias, both of which place the duty of procedural fairness in relation to fair and impartial decision-making in jeopardy. Several of the examples noted in this section could be interpreted as giving rise to perceived bias in favour of employers, and to related concerns regarding the fairness and impartiality of the administrative decision-making by ESB officers. For example, a default assumption that employer evidence will be more credible in a payroll or other employment dispute, could be seen as raising a perception of bias in the decision-making process that unfairly discounts the complainant's own records and casts doubt on the impartiality of the process. Relatedly, examples that illustrate Officers' apparent preferences to settle complaints early, rather than robustly investigating complaints, may give rise to concerns about early or rushed judgment, another form of perceived bias. Some examples above suggest prejudicial attitudes held by some ESB Officers, a clear form of perceived bias that may place the duty to engage in fair and impartial decision-making in question.

It is fundamental to the duty of procedural fairness that administrative decision makers engage in fair and impartial decision-making.

Additionally, procedural fairness can be called into question where claimants are denied oral hearings in cases involving disputed facts, complex issues and evidence, or where there is a need for Officers to test evidence or decide credibility issues. The requirements of procedural fairness are case-specific and do not always include conducting an oral hearing; however, in some cases, an oral hearing may be necessary as part of a fair process. The newly-enacted section 77.1 of the ESA[4] provides that the Director is not required to give an oral hearing to any person the Director investigates. This represents a drastic departure from the previous practice whereby the Director would almost invariably hold an oral hearing unless a settlement between the parties was reached. We've observed that since section 77.1 was enacted (both prior to and since it coming into force), the Director has invariably proceeded to resolve complaints by investigation, even in cases involving disputed facts, and complex legal issues and evidence. In one case involving a temporary foreign worker, for example, the Officer made findings without conducting a credibility assessment of the evidence. In this case, actual or perceived bias on the part of the Officer was exacerbated by the failure to conduct an oral hearing. With an oral hearing, there would have been greater confidence that a credibility assessment had been properly conducted and that the facts on which the decision was based were accurate. Oral hearings lessen the risk that Officers will decide cases on the basis of a mistake as to the facts and/or the law, or on assumptions which favour one party over the other. Finally, in some cases, proceeding by way of investigation rather than by oral hearing fails to pay due respect to the workers whose rights are significantly affected by decisions taken by the ESB.

Branch handling of the above-cited cases are a reflection of the inadequacies of staff training, staffing resources, and Branch budgets.

Misclassification of Workers as Independent Contractors not Being Pursued

13. One of the most egregious examples of the failure of the Branch to enforce the ESA is its failure to re-introduce proactive investigation of employers and industries where there is a common practice of misclassifying workers as independent contractors, thereby avoiding the ESA requirement to

4 This section was enacted by 2019-27-26, effective August 15, 2021 (BC reg 215/2021).

treat them as employees and provide them with all the minimum rights and benefits of the Act. Treating workers as independent contractors also undermines other statutory employer obligations, such as Workers Compensation insurance coverage, Canada Pension Plan contributions, Employment Insurance contributions, and income tax remittances.

The Law Commission of Ontario (LCO) recognized the problem of misclassification and has expressed the opinion that part of the solution is greater use of proactive enforcement:[5]

> *In the LCO's view, the most straightforward approach would be to target the actual issue, the practice of misclassifying employees, through improved enforcement procedures, policy development, ESO training and public awareness. This would protect the most vulnerable without negatively impacting those who benefit from self-employment. The advantages of compliance and enforcement practices such as proactive inspections and expanded investigations outlined earlier are equally applicable to the situation of identifying cases of misclassification. The most effective enforcement activities would be those directed at industries known to be at high-risk for practices of misclassification such as trucking, cleaning and catering, as well as identification and proactive monitoring of industries populated by workers known to be disproportionately affected.*

Prior to 2001, the Branch undertook numerous proactive investigations of employers that misclassified their workers as independent contractors, which led to thousands of workers being properly classified as employees with all the rights of the Act. In many instances these Branch investigations were requested by employers who properly classified their workers as employees but were having difficulty competing with other employers in the same industry or sector that were not. Examples of these proactive misclassification investigations involved newspaper delivery personnel employed by newspapers, bicycle couriers, pizza delivery drivers, home-based garment workers, janitors, painters, drywallers, and rebar installers in construction.

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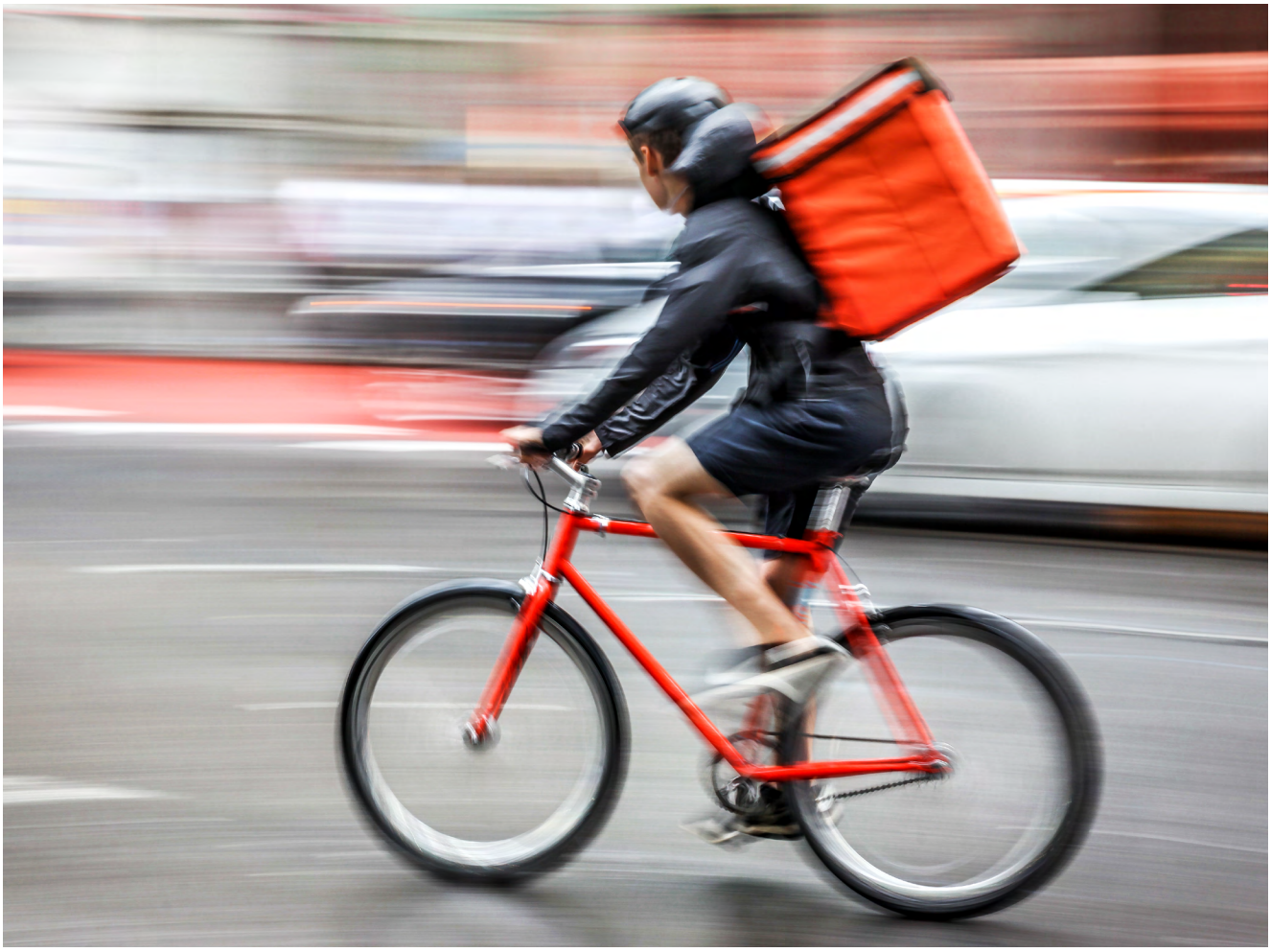
This proactive investigation policy was ended in 2001 and has not been restored since the change of government in 2017. Consequently, there are many employers breaking the law by misclassifying their employees as independent contractors, so as to obtain a significant economic advantage over competitors who are operating in accordance with employment law. And they are doing so with the knowledge that the Branch is not proactively enforcing the law.

There are examples of this in service sectors, where health authorities are contracting with companies to provide publicly subsidized and funded home care services where many of them are misclassifying their home care staff. An example of the latter is a seniors care provider on Vancouver Island that has been the subject of a third-party complaint in 2020. The third-party complainant was another home care service provider that treats its home care staff as employees and has to compete unfairly with a seniors home care provider that treats its staff as independent contractors. In this clear case of misclassification, the Branch has not, when presented with clear evidence of violation of the Act, undertaken a rigorous investigation of employee misclassification in this industry.

5 Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: Law Commission of Ontario, 2012), 94.



The proliferation of mobile app-based platform economy employers have yet to be investigated by the Employment Standards Branch.

There are many more examples in the "gig economy" where the proliferation of mobile app-based platform economy employers have yet to be investigated by the Employment Standards Branch. In contrast, there have been many successful challenges to the independent contractor misclassification of gig workers in other jurisdictions in Canada, such Ontario (Labour Relations Board decision re Foodora), and in other countries, such as California (Superior Court decision re Uber, Lyft, and DoorDash sponsored Proposition 22 being unconstitutional), Massachusetts (State lawsuit against Uber, Lyft, and Instacart), the United Kingdom (Supreme Court decision re Uber), Australia (Fair Wage Commission decision re Deliveroo), and the European Union where the European Commission has reported that there have been more than 100 local court decisions relating to gig worker employment status. Therefore, an investigation of the misclassification of workers in this sector in BC is long overdue.

Legislature's select standing committee budget recommendations

Two recent annual reports to the Legislative Assembly by the Legislature's Select Standing Committee on Finance and Government Services called for a significant increase in funding to the Branch. This was following their public consultations with respect to the Provincial Budget, and in response to many submissions on the inadequacy of the Ministry of Labour's annual budgets for the Employment Standards Branch. This recommendation was contained in both the November 2017[6] and November 2021[7] reports of the Select Standing Committee. In addition, their November 2021 report recommended with respect to Employment Standards that the Branch, "Expedite the enforcement of labour protections for gig workers." Incredibly the provincial government's new budget for 2022/23 has not responded to this recommendation and projects no increase in the Ministry of Labour budget for the next 3 years, signaling a growing labour law enforcement crisis for the forseeable future.

6 See Select Standing Committee on Finance and Government Services, *Report on the Budget 2018 Consultation,* Recommendation #41, November 15, 2017. https://www.leg.bc.ca/content/CommitteeDocuments/41st-parliament/2nd-session/FGS/Budget2018Consultation/FGS_2017-11-15_Budget2018Consultation_Report.pdf

7 See Select Standing Committee on Finance and Government Services, *Report on the Budget 2022 Consultation,* Recommendation #135, November 15, 2021. https://www.leg.bc.ca/content/CommitteeDocuments/42nd-parliament/2nd-session/fgs/budget-consultation/42-2-2_FGS-Report_Budget-2022-Consultation.pdf

Conclusion

The policies, procedures, and practices of the Employment Standards Branch need to change so that it can become an easily accessible, efficient, and effective enforcement agency.

Clearly the policies, procedures, and practices of the Employment Standards Branch need to change so that it can become an easily accessible, efficient, and effective enforcement agency that acts in the interests of ensuring that all workers in BC have their employment rights respected under the ESA.

In addition, the Branch requires the adequately trained staff and financial resources to carry out this mandate. This will require a significant increase in the Branch budget.

In order to make a fundamental change in the way in which the Employment Standards Branch operates, the following actions are required by the provincial government and the Ministry of Labour:

- Increase Employment Standards Branch annual funding by at least $14 million.
- Reinstate proactive investigations into problem industries and sectors, like agriculture; construction; hospitality; restaurant/food services; caregiving, including in-home care, long-term care homes, and daycares; food processing; building maintenance services; and retail.
- Proactively investigate and address the widespread misclassification of workers as independent contractors, such as in the gig economy.
- Collect and disburse all monies found to be owed to workers.
- Shorten wait times to ensure complaints are acted upon and investigated within 90 days of the receipt of the complaint.
- Ensure for procedural fairness in the handling of complaints by clearly setting out and making publicly available expected timelines for each step in the complaints process, increasing communication between the ESB and complainants during the process, and providing specific training to employment standards Officers regarding their duties as administrative decision makers.
- Increase the monetary value of penalties and award a penalty for each violation that impacts every employee of an employer to deter employers from repeat offenses and to create an environment of compliance.

BCESC

BC EMPLOYMENT STANDARDS COALITION

BC EMPLOYMENT STANDARDS COALITION
4778 Fernglen Place, Burnaby, BC V5G 3W1
Phone: 604-430-6036 | Fax: 604-435-6024
Email: david@labourconsultingservices.com
www.bcemploymentstandardscoalition.com