August 31, 2018

BC Law Institute (BCLI)
Employment Standards Act
Reform Project Committee
1822 E. Mall
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By email: bcli@bcli.org

Subject: BCFED Response to BCLI Consultation Paper on the *Employment Standards Act*

The BC Federation of Labour welcomes the opportunity to respond to the BC Law Institute's Consultation Paper on the *Employment Standards Act*. It is our long-held and frequently stated view BC's *Employment Standards Act*, its regulations and its enforcement, are in need of improvement and modernizing.

Background

In 2001, the BC Liberal government made major changes to employment standards in BC that have significantly lowered the minimum protections for workers. The minimum wage was frozen for a decade at $8 an hour, a $6 an hour "training wage" was introduced, and the minimum working age was reduced to 12 years old, a violation of the International Child Labour Convention.

It took 10 years for the BC Liberals to increase the minimum wage and at many times since 2001, our minimum wage has been the lowest in Canada. While the $6 training wage has been eliminated, BC still has a three-tier minimum wage with servers still earning less than minimum wage and farm worker being paid a piece rate.

Enforcement of minimum working conditions was also significantly slashed in 2001. Staffing levels of the Employment Standards Branch (ESB) were severely reduced to just 70 ESB officers to cover about one million workers. Instead of effective, third-party enforcement, workers were told to download a "self-help kit' from the web to lodge their complaint. Random worksite

inspections by ESB officers were eliminated. As a result, the few rights afforded to workers are nearly impossible to enforce.

The current *Employment Standards Act* (ESA) fails to provide the growing body of vulnerable and precariously employed workers with necessary rights and protections and contributes to precarious employment conditions.

The BCLI paper represents a substantial review of the current *Act.* It contains many recommendations and reflects areas of consensus and of dissent amongst the members of the Project Committee. We remain concerned that, while comprehensive, this review should not drive the process for employment standards reform in BC.

The BCLI review has taken four years to produce its initial report. During this time, two major Canadian provinces (Alberta and Ontario) completed policy and legislative processes that resulted in significant modernization of their employment standards laws and regulatory regimes. These processes involved public engagement with employers, unions, workers' organizations, and workers themselves. These processes shed considerable light on not just the interpretation of the existing legislation, but other issues that could and should be contemplated in employment law and the role of the provincial bodies that proactively enforce this law.

Labour Minister Bains' mandate letter of July 17, 2018 contains the mandate to "update employment standards to reflect the changing nature of workplaces and ensure they are applied evenly and enforced." We urge Minister Bains to act quickly and comprehensively on implementing reforms to the *Act,* and the ESB, without waiting for the BCLI process to be completed.

Recommendations

As a member organization of the BC Employment Standards Coalition (BCESC), the BCFED endorses the Coalition's "Submission to Minister of Labour Harry Bains for Immediate Action on Employment Standards Reform."[1] This submission contains many recommendations for improvements to the *Act*, its regulations and its enforcement regime. It is substantiated by the stories and surveyed information of hundreds of workers who have born the personal cost of the weaknesses of our current system, as documented in the BCESC's 2017 report.[2] As we were party to the drafting of the BCESC submission, many of the items in our submission below are also contained in the BCESC submission.

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[1] BC Employment Standards Coalition. "Submission to Minister of Labour Harry Bains for Immediate Action on Employment Standards Reform", September 2, 2018. Retrieved from http://bit.ly/bcesc

[2] Andrew Longhurst & David Fairey. *Workers' Stories of Exploitation and Abuse: Why BC employment standards need to change* (Vancouver: BC Employment Standards Coalition, 2017).

We also endorse the submissions made by First Call BC Child and Youth Advocacy Coalition on a Child Employment Standards Framework,[3] and by Migrant Workers Centre regarding the protections for caregivers and domestic workers.[4]

Our Federation has been consistent in our vision for an improved Employment Standards system in BC. The core elements of our vision are:

- Increase the minimum wage to reach $15 per hour by January 2019
- Eliminate all exemptions to minimum wage laws
- Make the Fair Wages Commission a permanent body to oversee the transition to a living wage and provide ongoing monitoring of wage levels and employment standards in BC
- Eliminate the self-help kit and ensure protection and recourse for workers whose rights have been violated
- Increase funding for the enforcement of the *Act* including conducting proactive investigations and enforcement
- Increase and expand the penalties for employers who break the law
- Improve the definition of an employee to ensure that employers cannot use independent contractors to skirt responsibility for meeting the minimum standards of the *Employment Standards Act*
- Improve basic protections and benefits to workers, such as paid sick leave
- Improve the conditions of employment for children, including increasing the minimum work age from 12 to 16 years old
- In the long-term, carry out a comprehensive review of the ESA and precarious work

The BCLI report contains 78 recommendations covering a range of areas within our current Employment Standards system. There are some areas that the BCLI report does not cover, however. Therefore, we highlight the following areas which we feel warrant additional mention from us:

1. Exclusions / Exemptions
2. Complaints and Enforcement
3. Wages and wage setting
4. Hours of work and shifts
5. Leaves and Paid Sick Leave
6. Domestic violence / Intimate partner violence
7. Employee classifications
8. Child and youth employment
9. Termination

[3] First Call BC. "B.C. Child and Youth Employment Standards Policy Recommendations", August 31, 2018. Retrieved from https://firstcallbc.org/publications/calls-for-employment-standards-that-protect-children-from-exploitation-and-injury/

[4] Migrant Workers Centre. "A Submission by the Migrant Workers Centre to Minister of Labour Harry Bains." August 31, 2018.

1. Exclusions / Exemptions

We are disappointed that the BCLI report has made no substantive recommendations on exemptions generally except that 'principles should be developed to govern future applications for exclusions' and 'existing exclusions should undergo a systematic review.'

We believe the *Act* is legislation designed to provide basic minimum terms and conditions of work that are applicable to all employers and employees. The multitude of exemptions, exclusions, variances, and special rules that permit some employers to opt out of key provisions such as paying minimum wage, vacation pay, public holiday pay, overtime pay and severance pay, undermines the universality that the *Act* is intended to provide. We believe there should be no exemptions.

There are some key exemptions that should be reversed:

- Restore ESA coverage of core provisions for workers covered by a union collective agreement. There is no principled basis to exclude unionized workers from the minimum protections of the *Act,* as was done in 2002. This exclusion distinguishes the BC ESA from that of all other provinces and territories. This exclusion has enabled some organizations defined as unions under the BC Labour Code to negotiate provisions that are below the legislated minimum standards in the ESA.
- Reverse all exemptions and exclusions to farm labour implemented in 2002 and 2003, especially the grower's liability for unpaid wages, entitlement to statutory holiday pay and annual vacation pay, minimum hours paid while transported to work, and hours of work and overtime provisions.
- Restore hours of work, overtime, and statutory holiday provisions to "high technology professionals"

2. Complaints and Enforcement

We strongly support the recommendation (#59) that "the mandatory use of the self-help kit as a prerequisite to initiating the complaint process is a barrier to access to the ESA process and an impediment to the effective enforcement of minimum standards under the ESA. The requirement ignores the intrinsic imbalance of power between employer and employee, and the tenor of available evidence is that it discourages employees from seeking redress for contraventions. An informational self-help kit is not a bad thing in itself, but employees should not be forced to confront the employer before gaining access to the complaint process."[5]

[5] BC Law Institute report, p. 262.

Further, we support the recommendation (#64) that third-party complaints be able to be filed, as this enhances justice especially for vulnerable and precarious employees.

We also support extending the limitation period for filing a complaint at the ESB to two years (#65a). This two-year limitation period corresponds with the limitation period for general civil claims, giving workers equal access to legal remedies as other private litigants.

We support a three-year wage recovery period. The current six-month time frame is unfair to workers who were unaware of their rights or who have been in a precarious employment relationship for an extended period of time, such as for temporary foreign workers. We note that until 2002, the wage recovery period was 2 years. We support having a wage recovery period consistent with payroll record keeping requirements of the *Act.*

Fundamentally, we need funding and resources restored to the Employment Standards Branch to proactively enforce basic workplace standards. In particular, we suggest BC follow the recommendation of the Ontario Special Advisors' report which recommended a "strategic enforcement" regime designed to address non-compliance at a systematic level and not only on the basis of complaints. This would include: integrating proactive enforcement strategies such as ongoing inspections targeted towards particular sectors and that bear the highest risks of non-compliance; wider coordinated enforcement 'sweeps'; greater data collection; expanding investigations where more employees than a complainant may be affected; and, targeting top employers who have a reputation to uphold as well as influence industry / franchise standards.[6]

3. Wages and Wage Setting

We disagree with recommendation #30 on the mechanism for setting minimum wages. Since the BCLI project commenced, government has announced the establishment of the Fair Wage Commission. We support the recommendation of the Fair Wage Commission that the process for regular annual review and advice to the government on minimum wages should be through the research and public consultations of a permanent Fair Wages Commission.

We agree with the BCLI recommendation (#31a) that the ESA should be amended to require that workers who may be paid on a piece rate basis must receive at least the equivalent of the general minimum wage.

[6] C Michael Mitchell and The Honorable John C Murray. *The Changing Workplaces Review: An Agenda for Workplace Rights* (Ontario: Ontario Ministry of Labour, 2017).

We support the research and analysis in the BC Employment Standards Coalition around Farm Worker Piece Rates,[7] and agree that "all farm workers are entitled to receive at least the general hourly minimum wage, irrespective of whether the farm operators and farm labour contractors who employ seasonal farm workers to harvest fruits, berries, vegetables and flowers want to incentivize their workers through the payment of production bonuses or piece rates."[8]

We agree with the BCLI report that some legislative protection of employees' rights in tips and gratuities and regulation of tip pooling is long overdue. The *Act* does not define "tip" or "gratuity"; however, in many workplaces the income from tips is expected so that those workers earn closer to a living wage. However, irregularities and improprieties around how workers receive those tips often results in "wage theft." We support legislation that confirms the regulation of tip pooling to ensure it is under employee control, such as in Newfoundland and Labrador, or Quebec.

4. Hours of Work and Shifts

The BC Liberal government made major regressive changes to the Hours of Work & Overtime provisions of the *Act* in 2002. It is time to reverse those changes and provide more rights and protections which correspond to significant changes in the world of work over the past two decades.

The areas we feel need to be changed are:

- Restore previous Section 31 (Hours of Work Notices), which required that employers must display hours-of-work notices in each workplace where they can be read by all employees, and required a 24 hour notice of a change in shift unless as a result of the change, the employee will be paid overtime wages or the shift is extended before it ends.
- Restore previous Section 34 (Minimum Daily Hours) to pre-2002 provisions, which required the minimum number of four hours of pay to an employee required to report for work if work had been started and 2 hours if work had not been started (reduced to 2 hours in 2002)
- Restore previous Section 35 (Maximum Hours of Work) requiring overtime wages to be paid after 8 hours per day or 40 hours per week (changed to exclude workers in a new individual "Hours Averaging Agreement") and support the recommendation of the BCESC that a new higher standard based on 7 hours per day and 35 hours per week be adopted
- Implement voluntary right to refuse overtime
- Restore previous Section 36 (Hours Free from Work) requiring double time pay to be paid if an employee is required to work during the weekly 32 hour free from work period (reduced to 1.5 times regular pay in 2002)

[7] BC Employment Standards Coalition, pp. 10-12.
[8] p. 11.

- Restore pre-2002 flexible work schedule provisions and repeal current overtime averaging provisions (Section 37).

5. Leaves and Paid Sick Leave

a) Vacation and Stat Holiday

The vacation with pay entitlements under the *Act* have not changed for over 30 years, with our ESA providing 2 weeks paid vacation after 12 consecutive months of employment, or 3 weeks after 5 consecutive weeks of employment. We are disappointed that the BCLI report does not make any recommendation for improvement in paid vacation entitlement. The International Labour Organization recommends that the period of paid vacation should not be less than three weeks. Saskatchewan provides three weeks of paid vacation after one year of service, and four weeks after nine years. European countries average more than five weeks of annual paid vacation.

We recommend an increase in paid vacation entitlement to three weeks per year for the first five years, and four weeks after five years of employment.

We also support including in the ESA the other statutory holidays federally and/ or provincially, namely:

Easter Monday
Boxing Day
National Aboriginal Day / National Day of Truth and Reconciliation (currently contemplated by federal government)

b) Paid Sick Leave

The ESA contains no provision for the right of an employee to sick leave (paid or unpaid). It is time for the BC government to provide workers with paid sick leave. Paid sick days encourage employees to take the time they need to get better, instead of coming to work sick which risks infecting others and decreases overall productivity.

The BC Employment Standards Coalition submission highlights what other jurisdictions provide for sick leave.[9] BCFED supports paid sick leave of seven (7) days per year. We note that the BCLI committee failed to reach a consensus on the issue of sick leave.

We strongly disagree with the BCLI's recommendation (#40) of combining sick leave and family responsibility leave. This would penalize workers with dependents, who

[9] BC Employment Standards Coalition, pp. 27-28.

are disproportionately women. Workers without family responsibilities would have days to take for their own illness, while workers with family responsibilities (typically women) would have to carve out time to take care of their own illness while also caring for their families within the same (limited) time. If sick leave and family responsibility leave were to be combined, it would perpetuate the burden on female workers, particularly mothers, of juggling family responsibility and work.

We oppose the introduction of any qualifying period to become eligible for leaves under the ESA.

We support the BCLI recommendation to amend the definition of immediate family (#37) but we think the recommendation does not go far enough to capture the reality of BC's families. The current and proposed definitions of immediate family prioritize traditional nuclear families above all; they do not recognize the diverse and flexible family relationships that workers in BC experience today. The BCESC submission highlights examples of families that would not meet the definition under the *Act*[10] and recommends that the definition of "immediate family" be replaced with" a person in a close, family-like relationship with an employee."

6. Domestic Violence / Intimate Partner Violence Leave

The BCLI committee has not considered the introduction of paid leave for domestic or intimate partner violence. This is surprising, considering the recent public and media attention on the issues of sexual and domestic violence in the workplace.

BCFED calls on the government to introduce paid leave for survivors of domestic or intimate partner violence to deal with the consequences of this violence.

Other jurisdictions in Canada are leading the way on these leaves. Manitoba and Ontario provide 5 days' paid leave, plus additional unpaid leave, for survivors of domestic violence to get help and find safety, and New Brunswick has just announced the introduction of a similar provision. Federally regulated employees receive 10 days' leave, unpaid.

These leaves, especially if they are paid, allow women the time and space they need to escape violence. Paid domestic violence leave would promote women's equality in the workplace.

7. Employee Classifications

The BC government must make changes to the *Act* to ensure that all caregivers enjoy the minimum employment benefits and protections as do other workers generally.

[10] BC Employment Standards Coalition, p. 29.

Currently, the *Act* and regulation contain five different classifications of caregiver that are subject to different benefits, protections and exclusions:

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

We agree with the Migrant Workers Centre that all caregivers should receive equal treatment under the *Act* regardless of whom they provide care for, in what type of household they provide care, whether they work during the day or night, how many hours a day they work, and whether the government or a private individual pays their wages.

We also draw attention to the issue of the misclassification of workers as "independent contractors". Many workers are denied basic employment rights because of their status as "contractors". Employers increasingly hire contractors to save on payroll, avoid complying with the *Act*, and to shift liability risks on to workers. We note that this is happening with increasing frequency in sectors that have been traditionally places of regular employment. The consequence to workers is increased employment precarity, and an absence of employment rights.

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

It is also our recommendation that the *Act* contain a provision expressly prohibiting the treatment of employees as non-employees, and places the burden of proof that a person is <u>not</u> an employee on the employer, as contained in the Ontario ESA.

8. Child and Youth Employment

A particularly troubling and embarrassing aspect of our current *Act* is the weak protection afforded some of our most vulnerable citizens, namely children and youth.

We fully support the submission of First Call and its recommendations as follows:

- The minimum age for formal employment of children be 16 (with exceptions for light work), consistent with the Canadian Government's ratification of ILO Convention 138 on the minimum age for employment, and Canada's

commitment to 16 years of age and prohibition of hazardous work for those under the age of 18.

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

9. Termination

The current termination provisions of the *Act* contribute to the precarity that many workers experience in BC's workplaces. Professor Harry Arthurs wrote in his 2006 Federal Labour Standards Review Report that rules for the termination of a worker's employment are critical to employment standards legislation because "…a job is often a worker's most important asset, the source of his or her personal and family security, and a defining attribute of social status and self-image. To lay down the substantive and procedural rules for termination is to establish the social and economic worth of that asset."[11]

We recommend the following improvements to the termination 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 an 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.

[11] As cited in BC Employment Standards Coalition, p. 31

- Implement an expedited adjudication process for workers who have been unjustly dismissed.

Final Comments

This BCLI report will move the discussion on badly-needed Employment Standards reforms further. It is thoughtful, thorough, and substantiated by Canadian legal consideration and--to the extent available--evidence from our BC system.

But this report does not paint the full picture of the challenges for non-union workers in BC, and the extent to which our Employment Standards system does or does not support them. Many workers do not complain about violations of the *Act* due to lack of information, the self-help kit, poor enforcement, and the ability to be terminated without cause. As a result, statistical information about the extent and severity of violations only captures those who have the courage to come forward.

Rather than rely on a technical review of the *Act,* undertaken by "experts", we urge this government to listen to what people have been saying in communities across BC: that our Employment Standards are weak, promote vulnerability, and contribute to employment precarity that has an impact on families and communities. It's time to level the playing field for working people and move swiftly to making the changes needed to restore confidence amongst British Columbians that BC is indeed a good place to work.

Respectfully submitted,

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