
# SUBMISSION IN RESPONSE TO

# The Changing Workplaces Review: Special Advisors' Interim Report

October 14, 2016

**WORKERS' HEALTH AND SAFETY LEGAL CLINIC**
2000 - 180 Dundas Street West, Box 4
Toronto, Ontario
M5G1Z8

# Table of Contents

# Who We Are

The Toronto Workers' Health and Safety Legal Clinic (now named the Workers' Health and Safety Legal Clinic and referred to herein as the "WHSLC" and "the Clinic") is a community legal clinic funded by Legal Aid Ontario. There are nearly eighty clinics throughout Ontario, however, unlike the neighbourhood clinics that are geared towards a specific local community, we are a "Specialty Clinic". Our mandate is province-wide and we have a very specific purpose – to provide legal advice and representation to non-unionized low wage workers who face health and safety problems at work. For over twenty five years, we have appeared before the Ontario Labour Relations Board on behalf of workers who were fired for raising occupational health and safety concerns. Additionally, we represent workers who are injured on the job with respect to their workers' compensation claims, and workers who have claims under the *Employment Standards Act* ("the *ESA*"). We have found through our experience that often, the employers who breach Ontario's *Occupational Health and Safety Act*[1] are the same employers who breach the *ESA*.[2]

In addition to advocacy, we conduct community education and outreach programs to inform vulnerable workers of their rights and entitlements in the workplace. Where we feel the law is deficient, we engage in law reform initiatives. The Clinic also provides information about health and safety hazards that workers face in their place of employment, and advice about the rights that employees have under the law. Our activities are controlled by a Board of Directors that is composed of volunteers from the community.

The clients that we serve vary in many ways. We have served new Canadians who work in small non-unionized workplaces. We also serve employees who are assigned to larger workplaces through temporary staffing agencies. Additionally, we respond to inquiries from young employees who are not aware of their rights and entitlements. To qualify for our services, clients must meet the legal aid eligibility criteria of being non-unionized and relatively low wage earners. In other words, we represent and seek justice for people who have no resources and no recourse of their own.

---

[1] *Occupational Health and Safety Act*, RSO 1990, c 01.
[2] *Employment Standards Act*, 2000, SO 2000, c 41.

# Introduction

Low wage, non-unionized employees are vulnerable workers because they do not receive adequate protection under the *ESA*.[3] They do not have a union to stand up for their rights, and they do not have the money to retain legal counsel. The Ontario government has launched the Changing Workplace Review to identify potential labour and employment law reforms. From the outset, it is important to note that we fully and unreservedly endorse the recommendations found in the Workers' Action Centre's report titled "Building Decent Jobs from the Ground Up" ("Report"), except where our specific recommendations as found in this submission differ. We encourage those who are reviewing this submission to also review our original Changing Workplaces Review submission for further details about the recommendations that we have put forward.

# History of Employment Standards

Minimum employment standards exist as a result of the underlying development of Canada's labour laws. The *ESA* was the Ontario government's response to the social view that there are groups in the labour market that need protection.[4] Minimum standards are intended to mitigate, to some degree, the inherent unequal bargaining power between employers and workers, and to promote social justice in the workplace. Ontario is an example of a jurisdiction in which the creation of minimum standards was an effort to address the vulnerability of employees in the workforce.[5]

It is useful to look at the evolution of employment standards in Ontario. The first statutes enacted established employment standards for the protection of women and children, who were considered more vulnerable against unreasonable working hours. The *Ontario Factories Act* was introduced in 1884, and set minimums and maximums for both the age of employees and the hours of work allowed for women, girls and boys.[6] The *Minimum Wage Act* was passed in Ontario in 1920 to

[3] *Employment Standards Act*, 2000, SO 2000, c 41.
[4] Paul Malles, *Canadian Labour Standards in Law, Agreement, and Practice* (Ottawa: Economic Council of Canada 1976) at 4.
[5] Mark P Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal: McGill-Queen's University Press 2009) at 6. Thomas is an Associate Professor of Sociology at York University.
[6] Ontario's Work Laws, online: WorkSmartOntario <http://www.worksmartontario.gov.on.ca/scripts/default.asp?contentID=5-1-1-1>. [also see this link for info about the age. Actually, it is this link page 13 for hours of work, and then a prior page for age of children].

regulate the minimum wage for women, and the *Industrial Standards Act* was passed in 1935 to establish maximum hours of work for specific industries.[7]

The changes to Ontario's employment standards that occurred from 1940 to 1968 arose as a result of "war-time social legislation."[8] Working conditions and legislation for additional benefits, such as paid vacations, were central in union demands and this was apparent in collective agreements.[9] Subsequently, there was an increase in the demands for such benefits to be secured by legislation, and Ontario was the first province to legislate these benefits with the creation of the *Hours of Work and Vacations with Pay Act*[10] in 1944. There were other statutes that came into force before the *ESA* was implemented, and "by 1950 the groundwork had been laid for [the establishment of] a comprehensive labour standards system"[11] to replace the existing workplace standards legislation. Starting in the late 1960s, the global economy faced recessions, increased unemployment, and growing inflation.[12] According to the business community, these downturns were due to increased labour costs and labour market inflexibility.[13] While minimum standards served to protect the vulnerable non-unionized workforce, there was a desire from businesses to have more flexible labour standards. Organized labour responded by advocating for improvements to the minimum standards to address the increase in unemployment.[14] As a result, while there were reforms that did provide businesses with a more flexible labour market, workers gained the right to be provided with notice prior to termination in 1972.[15] In 1981, provisions were added to the *ESA* to provide an entitlement to severance pay for those who worked for an employer for at least five years.[16] Today, the *ESA* covers many of the areas of the individual contract of employment including the amount of notice required for the termination of an employee and severance pay.

---

[7] Archived - Setting and Administration of Sectoral Employment Standards, online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research10/page04.shtml>. { also see the http://lawofwork.ca/?p=7245}.
[8] *Supra,* note 4 at 10.
[9] *Ibid* at 11.
[10] *Hours of Work and Vacations with Pay Act,* SO 1944, c 26.
[11] *Ibid*.
[12] *Supra,* note 4 at 72.
[13] *Ibid* at 73.
[14] *Ibid*.
[15] *Supra,* note 3 at 10.
[16] *Supra,* note 4 at 81.

# Issues:

## Chapter 5.2.1 – Definition of Employee

The relationship between employer and employee is rarely equal. The purpose of the employment standards legislation and in fact any work related legislation, is to protect employees. Changes to the relationship such as the rise of independent operators predominantly favours employers. The need for this review is fuelled by the unequal relationship between employer and employee. Misclassification of employees has only served employers. While it is acknowledged that there may be unique individuals with unique skills that have the power to negotiate with employers on equal footing, such examples are rare. Employees need protection. With respect to the proposed options, the only viable option is the proactive one.

### Recommendation – Implement Option 4

We cannot maintain the status quo. Education does not increase or secure a stronger employee-employer relationship. The power imbalance will remain irrespective of the level of education. If anything, workers will be aware that they have no power and that does not serve their purposes.

We therefore endorse proposed option number four. Employers should bear the burden of proving or disproving who is an employee. Further, we agree that regulations must be passed to protect independent contractors who are essentially workers.

## Chapter 5.2.3 – Exemptions, Special Rules and General Process

The minimum standards found in the *ESA* do not apply to every worker in Ontario because there are numerous exemptions which serve to exclude certain types of workers from the minimum standards. Ontario Regulation 285/01 enumerates several exemptions to the *ESA*. For example, employees engaged in mushroom growing are exempt from the provisions relating to Hours of Work and Eating Periods,[17] Overtime Pay,[18] and Public Holidays.[19] Supervisory or managerial employees who

[17] O Reg 285/01, s. 4(3)(a)(i).
[18] O Reg 285/01, s. 8(e)(i).
[19] O Reg 285/01, s. 9(1)(d)(i).

"perform non-supervisory or non-managerial tasks on an irregular or exceptional basis"[20] are excluded from the provisions relating to Hours of Work and Eating Periods,[21] and Overtime Pay.[22] Many of these exemptions were created several years ago and may no longer be necessary or appropriate.

## Recommendation – Abandon the status quo by reducing, limiting, justifying or eliminating each of the exemptions found in the *ESA*

The Interim Report has grouped various types of employees into categories and laid out several options for potential change. While the WHSLC is of the view that exemptions should be created sparingly, the Clinic also understands that there may be extra-ordinary circumstances that necessitate an exception. Accordingly, the WHSLC submits that each exemption should be assessed for the purpose of ascertaining whether the exemption is still needed.

Ultimately, the WHSLC submits that each exemption currently in the *ESA* should be removed, narrowed, or justified. Furthermore, the Ministry of Labour's website should include a written rationale for the continued existence of any exemption that is not repealed. In other words, the WHSLC unequivocally submits that maintaining the status quo for any of the exemptions is unacceptable.

Even the exemptions that were created after 2005 using the Ministry's most recent and updated criteria ought to be reviewed as part of the Changing Workplaces Review. The purpose of the Changing Workplaces Review is to assess Ontario's labour laws, and the WHSLC submits that every aspect of Ontario's labour laws should be considered carefully in this process.

[20] O Reg 285/01, s. 4(1)(b).
[21] O Reg 285/01, s. 4(b).
[22] O Reg 285/01, s. 8(b).

# Chapter 5.3.1 – Hours of Work and Overtime Pay

Employers receive the most benefit from the *ESA* provisions relating to hours of work and overtime. Employers are free to schedule a work day that is longer than eight hours, and are able to have an employee work for more than forty eight hours per week[23] by obtaining an agreement with the employee and permission from the Ministry of Labour.[24] According to the Federal Government's 1994 Advisory Group Report on Working Time and the Distribution of Work (commonly known as the Donner Report), employers benefit from having longer shifts in industries where production occurs around the clock, but employees do not always benefit because some employees like having shorter work weeks while others suffer with the physical demands of longer shifts.[25]

Employers do not have to pay overtime unless more than forty four hours are worked per week.[26] Employers can avoid paying overtime by agreeing with the employee to average the number of hours worked over a period of two or more consecutive weeks, and obtaining permission from the Ministry of Labour to use averaging to avoid overtime.[27] Furthermore, employers can engage in overtime averaging without approval from the Ministry of Labour if an application for averaging is pending and if the employee agrees.[28] While it may seem that having a requirement for the employee to agree is good for workers, the reality is that workers often face pressure when asked to work longer hours and overtime, and are expected to agree to overtime averaging. In short, the current iteration of the *ESA* enables employers to use overtime averaging to get around the obligation to provide overtime pay.

Furthermore, as per the *ESA*'s regulations, many workers are excluded from the entitlement to overtime, including migrant workers who are often subjected to long hours and poor working conditions on farms and in factories. The work is hard and exhausting, and the wages are inadequate because the workers are unable to properly feed themselves and take care of their physical and mental health.

---

[23] *ESA*, s 17(1).
[24] *ESA*, s 17(3).
[25] *Federal Government's 1994 Advisory Group Report on Working Time and the Distribution of Work* (commonly known as the Donner Report), online: <www.informetrica.com/archives/AGWTDW_FinalReport_English.pdf > at page 39.
[26] *ESA*, s 22(1).
[27] *ESA*, s 22(2) and 22.1 (1).
[28] *ESA*, s 22(2.1).

For all workers, the right to refuse overtime is an essential element of maintaining healthy and safe workplaces. Every human being suffers from mental and physical fatigue, and being unable to refuse overtime is problematic because it may put workplace health and safety at risk.

The Interim Report states that employers have submitted that "the requirement for employee consent to work excess hours caused hardship to some employers where employees in key jobs refuse to work excess hours, thus jeopardizing just-in-time production and delivery of goods."[29] The WHSLC respectfully submits that employers are free to hire additional workers directly or use the services of a Temporary Help Agency (THA) to meet their production needs. We further submit that business objectives should not have the effect of eroding minimum standards. Requiring employers to obtain written consent for working excess hours, as it currently exists, is an important part of Ontario's minimum standards regime because it gives the employee the ability to refuse to consent if he or she wishes and avoid being forced, pressured, or coerced into working overtime.

## Recommendation – Abandon the status quo and improve the *ESA*'s overtime provisions

Ultimately, the WHSLC recommends that:

a) For every worker in Ontario, overtime work should be compensated at 1.5 times of the regular wage, after eight hours per day and after forty hours per week;

b) All exemptions and special rules relating to hours of work and overtime should be repealed;

c) The *ESA* provisions that facilitate overtime averaging should be repealed;

d) All workers in Ontario should have the right to refuse overtime, and this right to refuse must continue to be protected by the reprisal provisions in the *ESA*, thereby imposing a burden on the employer to disprove any allegations of reprisal;

e) All existing requirements for written consent by the employee as found in the *ESA* be maintained; and

f) Applications for permits allowing increased hours of work in a given week and for overtime in excess of forty four hours per week must be reviewed and scrutinized, and only approved where necessary and where the employer has demonstrated that alternatives, such as hiring additional staff, is not possible.

[29] Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report at p 193-4 <Online: https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf>.

# Chapter 5.3.3.2 – Paid Vacation

The *ESA* requires that employers give employees at least two weeks of vacation in every year of employment.[30] The employee is to be paid at least four percent of his or her yearly earnings.[31] This amount does not ever change, regardless of how long the employee is employed by the employer. As a result, an employee with five or even ten years of service with an employer may never receive more than two weeks of paid vacation.

## Recommendation – Increase the paid vacation entitlement

The WHSLC submits that two weeks of paid vacation is inadequate and that the *ESA* should be amended to provide workers with at least three weeks of paid vacation time per year. The Clinic further submits that after five years of service with the same employer, workers should be entitled to at least four weeks of paid vacation time per year. While the options laid out in the Interim Report differ from our recommendations, it should be noted that the Clinic submits that maintaining the status quo in regards to paid vacation time is unacceptable and not in the best interests of Ontarians. That said, of the options laid out in the Interim Report, we submit that 'Option 3 - Increase entitlement to 3 weeks for all employees' is the most the acceptable and in the best interest of Ontario's employees.

[30] *ESA*, s 33(1).
[31] *ESA*, s 35.2.

# Chapter 5.3.8.1 – Termination of Employment

Employees in Ontario who are terminated without cause are entitled to a specified notice period or termination pay in lieu of notice, as outlined in the *ESA*. These entitlements exist to provide terminated employees with a minimum level of protection and income to carry them through their search for replacement employment. Minimum standards legislation exists to "provide minimum notice periods for all employees covered by the legislation."[32] Section 57 of the *ESA* outlines the amount of notice that an employee is entitled to, and is based on the amount of time he or she has worked for the employer.[33] This provision gives workers an entitlement to one week of notice for each year of service, to a maximum of eight weeks. While this may seem beneficial for workers because it provides them with an income while searching for replacement employment, the amount of notice is inadequate for a number of reasons.

If an employer wishes to fire a worker immediately, rather than give notice, they can do so as long as they pay the worker for every week of notice they are owed. Essentially this means that, for the cost of eight weeks of wages, an employer can terminate a worker with fifteen or twenty years of tenure whenever they please.[34] Eight weeks of pay is not sufficient time to find a new job after ten, fifteen, or more years of employment. The job market has changed dramatically due to the passage of time, an increase in the number of people looking for work, and the fact that the process of applying for jobs has changed significantly. In addition, the number of part time jobs in Canada has risen much faster than the number of full time jobs.[35] The loss of full time employment after the recession has been relatively permanent. Low wage workers who lose full time employment are often unable to find similar employment and are forced to accept part time employment.[36] Long term workers who have been terminated desperately need additional protection to facilitate their transition into new employment in the new economy. On average, part time workers in Ontario make forty percent less than full time workers.[37] Adequate termination pay can be the difference between having the time to find comparable employment and being forced to accept lower paid, part time work in order to pay next month's rent or buy food.

---

[32] Geoffrey England, *Individual Employment Law*, 2d ed (Toronto: Irwin Law 2008) at 290.
[33] *Ibid* at s 57.
[34] *Wallace v United Grain Growers Ltd,* [1997] 3 SCR 701, 1997 CarswellMan 455, at para 75.
[35] Benjamin Tal, Employment Quality - Trending Down, *Canadian Employment Quality Index* CIBC, March 5, 2015 <http://research.cibcwm.com/economic_public/download/eqi_20150305.pdf>.
[36] As the Ontario ministry of labour notes in "Changing Worker Places Review: Guide for Consultations" nonstandard employment, which includes part-time employment, temporary employment and self-employment has grown twice as fast as standard employment since 1997.
[37] Sara Mojtehedzadeh, "Wild West Scheduling Holds Millions of Ontario Workers Hostage" Toronto Star: May 03 2015 <http://www.thestar.com/news/gta/2015/05/03/outdated-employment-standards-act-holding-millions-of-ontario-workers-hostage.html>.

## Recommendation – Abandon the status quo and increase the amount of termination pay that employees are entitled to

The WHSLC submits that the status quo should not be maintained, but rather abandoned. Therefore we reject Option 1 unequivocally. We further submit that Option 2 through Option 5 ought to be implemented.

Regarding Option 2, we submit that the 8 week cap should be eliminated by amending s. 57 of the *ESA*. Long term employees should be given notice of termination for every year of their employment. We recommend amending s. 57 of the *ESA* to read:

> **The notice of termination under section 54 shall be given to all employees and shall be at least one week for each year of the employee's period of employment.**

This amendment is appropriate because it does not increase the cost of terminating an employee who has worked for eight years or less. Rather, it serves to provide more protection for vulnerable long serving workers. Additionally, it is important to note that this amendment would result in the *ESA*'s minimum standard being far less than the notice that is provided by the courts.

Alternatively, and while noting that the amendment above is the Clinic's primary recommendation for this issue, an amendment of the *ESA*'s termination provisions could be structured to have an upper limit of notice. Given that s. 65(5) of the *ESA* limits an employee's entitlement to severance pay to twenty six weeks, it may be appropriate to amend the notice of the termination provisions to provide the same twenty six week upper limit. This amendment could be implemented by amending s. 57 of the *ESA* to read:

> **For every year of employment an employee has completed, one week of notice under section 54 shall be given prior to the date of termination up to a total of 26 weeks.**

While Options 3, 4 and 5 were not proposed by the WHSLC, we respectfully submit that the implementation of these options, in addition to and not instead of our recommendations regarding termination found herein, is in the best interests of Ontario's workforce.

# Chapter 5.3.8.2 – Severance Pay

While the *ESA* provides some protection by obligating employers to provide severance pay, far too many employers do not meet the criteria set out in the *ESA*. As noted on the Ministry of Labour's website, severance pay "compensates an employee for loss of seniority and the value of firm-specific skills, and recognizes his or her long service."[38] Severance is calculated by multiplying an employee's regular wages for one regular work week by the number of years that the employee has worked with the employer.[39] An employee with fifteen years of tenure is entitled to fifteen working weeks of severance pay. We do acknowledge that the upper limit of twenty six weeks is far better for workers than the upper limit of eight weeks provided by the provisions regarding notice of termination.[40] However, unlike notice of termination, severance pay is only available to workers who have been employed for five or more years by the employer, provided that the employer meets one of the following two conditions outlined in s. 64(1) of the *ESA*:

**(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or**

**(b) the employer has a payroll of $2.5 million or more.[41]**

Low wage, non-unionized employees would benefit the most from severance pay, but often work for employers who fail to meet these conditions. An employer of low wage employees would be able to pay $12.00 an hour to 160 employees working twenty five hours per week, and still not be obligated to pay severance pay to those employed for over five years.[42] Ultimately, in Ontario's increasingly low wage and part time economy, a $2.5 million payroll can be used to hire a significant amount of workers. As Ontario's low wage economy continues to grow, an increasing number of Ontario's employees will be unable to qualify for severance pay. Accordingly, the legislation needs to be amended in accordance with the current working conditions that are faced by Ontario's workers. Such an amendment will make the severance pay provisions consistent with the stated purpose of severance pay.

---

[38] Ontario Ministry of Labour, Termination and Severance, <http://www.labour.gov.on.ca/english/es/tools/esworkbook/termsev.php>.
[39] *Supra,* note 1, s 65(1).
[40] *Supra,* note 1, s 65(5).
[41] *Ibid,* s 64(1).
[42] Calculated at 52 weeks a year per employee.

## Recommendation – Abandon the status quo and increase access to severance pay

We completely reject the maintaining of the status quo. Workers with five years or more of service with an employer should be entitled to severance pay, regardless of the size of their employer. Accordingly, we recommend the adoption and implementation of 'Option 2 - Reduce or eliminate the 50 employee threshold'. Additionally, the payroll requirement of $2.5 million ought to be reduced to $1 million or completely eliminated. It follows that we also recommend the adoption of 'Option 3 - Reduce or eliminate the payroll threshold'.

Furthermore, while the WHSLC did not propose Option 3 and Option 4, we submit that both options are beneficial to Ontario's employees. Accordingly, we support the implementation of these options in addition to and not instead of the specific recommendations that we have made.

Regarding "Option 6 - Clarify whether payroll outside Ontario is included in the calculation of the [severance pay] threshold', we submit that the payroll outside of Ontario should be included in the calculation of the severance pay threshold.

# Chapter 5.3.8.3 – Just Cause (Statutory protection from unjust dismissal/dismissal without cause)

As noted in our original Changing Workplaces Review submission and in the Interim Report, "three Canadian jurisdictions, Nova Scotia, Quebec and the federal jurisdiction have unjust dismissal protection that allows employees to contest their termination and provide for possible reinstatement by an independent arbitrator where no cause is found to exist."[43] The Interim Report correctly notes that the three Canadian jurisdictions that protect worker from unjust dismissal all impose a minimum service requirement before an employee has the protection, ranging from 12 months to 10 years.[44]

The Interim Report also notes that "as a result of a recent Federal Court of Appeal decision (now under appeal at the Supreme Court of Canada), there is a question as to whether the federal *Canada Labour Code* ("*CLC*") does protect against termination where no cause exists."[45] This statement of the law was true during the time at which the Interim Report was drafted. However, following the release of the Interim Report, the Supreme Court of Canada ("SCC") released its decision on *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29. As a result, this statement of law is no longer correct, and accordingly there is no longer a question about whether the federal *CLC* provides protection from unjust dismissal.[46] The SCC overturned the Federal Court of Appeal's decision and decided conclusively that non-unionized federal workers are in fact entitled to protection from unjust dismissal. Canada's highest court has determined that "Parliament intended to expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously matched those held by unionized employees."[47] The SCC's decision in *Wilson* and the provisions of the *CLC* clearly make it clear that non-unionized federal employees are entitled to progressive discipline and various remedies including reinstatement and lost wages.

As a result, the WHSLC respectfully reiterates the position articulated in our original Changing Workplaces Review submission. Specifically, we submit that there the *ESA* is grossly deficient because there is currently no language in the *ESA* granting workers general protection from unjust dismissal. This means that employers can fire employees for any reason. Employers do not even have to have a reason. They can arbitrarily decide who to terminate at any time, and their only

[43] Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report at p 233 <Online: https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf>.
[44] Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report at p 233 <Online: https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf
[45] Mitchell, C. Michael and John C. Murray (2016) Changing Workplaces Review: Special Advisors Interim Report at p 233 <Online: https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf
[46] Wilson v. Atomic Energy of Canada Ltd., 2016 SCC 29
[47] Wilson v. Atomic Energy of Canada Ltd., 2016 SCC 29 at para 44.

obligation is to provide the notice outlined in the *ESA*. Workers are only protected from dismissal when they seek to enforce their rights or make inquiries about their employer's compliance with the *ESA*.[48] This protection exists in the form of provisions that prohibit employer reprisals. For example, under s. 74 of the *ESA*, a worker cannot be dismissed for asking to be paid the proper amount of overtime. However, it is unclear whether s. 74 protects an employee who asks for a wage increase above the minimum wage, additional vacation time, benefits, or a promotion. It is crucial for the *ESA* to provide workers the protection that they require to advocate for better working conditions as well as much needed job security.

Any statute that purports to set minimum standards for working conditions in Ontario should, at the very least, protect workers who ask for compensation or conditions above the minimum. It is unrealistic and unfair to expect low wage workers to retain lawyers and initiate lawsuits in these matters. Furthermore and perhaps more importantly, any statute that purports to set minimum standards for working conditions in Ontario should, at the very least, provide at least some workers with protection from being termination where no cause exists. Ontario does not, and this needs to be rectified.

A statutory prohibition on terminating employees without just cause will protect employees from being arbitrarily dismissed, and in turn provide employees with job security. Increased job security is very important in Ontario's precarious employment economy. Finding a job is now increasingly difficult, and employees would benefit from having protection from being terminated without just cause.

Protection from termination without just cause exists in Nova Scotia. Nova Scotia's *Labour Standards Code* ("*Code*") provides workers in that province with this type of protection.[49] The *Code* stipulates that workers who have been employed with the same employer for at least ten years cannot be terminated, unless the employer has just cause for the termination.[50] That said, there are logical exemptions found in the *Code*, such as situations where there is a shortage of work, where supplies are no longer available, or where the place of employment has been destroyed.[51] While the term 'just cause' is not defined in the *Code*, it is important to note that the use of 'just cause' in Nova Scotia's *Code* has been interpreted by that province's Labour Board to require progressive discipline

[48] *Supra,* note 1, s 74.
[49] *Labour Standards Code*. RS, c 246.
[50] *Labour Standards Code*. RS, c 246, s 71.
[51] *Labour Standards Code*. RS, c 246, s 71 and s 72(3).

and an opportunity to rectify disciplined conduct in situations where serious misconduct is not alleged by the employer.[52]

Furthermore, tribunals have previously held that the *Canada Labour Code* ("*CLC*")[53] provides the same protection to workers in sectors that fall under federal jurisdiction.[54] As noted above, the Supreme Court of Canada has recently confirmed that this is the correct interpretation of the unjust dismissal provisions found in the *CLC*.[55]

Both the *CLC* and Nova Scotia's *Labour Standards Code* contain provisions that enable employees to request an investigation and hearing into the circumstances of their termination, for the purpose of determining whether the termination was done in accordance with the respective legislation. Both statutes provide adjudicators with a wide scope of possible remedies, one of which is reinstatement. In Ontario, employees who believe that their rights under the *ESA* have been violated may file a complaint with the Ministry of Labour.[56] An employment standards officer may be assigned to investigate the complaint.[57] The Employment Standards Officer has the power to determine if wages are owed to an employee and can order the employer to pay to the employee the wages owed.[58] However, the Employment Standards Officer only has the authority to order reinstatement of the employee in specific situations,[59] one of which is reprisal.[60] The *ESA* does not provide for the remedy of reinstatement for employees who are dismissed without cause.

## Recommendation – Amend the *ESA* to prohibit employees from being terminated without just cause

Ontario should amend the *ESA* to provide workers with protection from being terminated without just cause. The Clinic submits that this amendment of the *ESA* should be structured to closely resemble Nova Scotia's *Labour Standards Code*. This amendment would leave room for the legislature to

---

[52] *MacKenzie v Commissionaires Nova Scotia*, 2013 NSLB 5 (CanLII) at para 46-47; Beck v 1528801 Nova Scotia Limited, 2010 NSLST 13 (CanLII) at para 54-55.
[53] *Canada Labour Code*, RSC, c. L-1.
[54] As cited in para 47 of *Wilson (below,* note 29*)*: *Re Roberts and the Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259; *Champagne v. Atomic Energy of Canada Ltd.*, [2012] C.L.A.D. No. 57; *Iron v. Kanaweyimik Child and Family Services Inc.*, [2002] C.L.A.D. No. 517; *Lockwood v. B&D Walter Trucking Ltd.*, [2010] C.L.A.D. No. 172; *Stack Valley Freight Ltd. v. Moore*, [2007] C.L.A.D. No. 191; *Morriston v. Gitanmaax Band*, [2011] C.L.A. No. 23; Innis Christie, *et al*., *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at page 669; David Harris, *Wrongful Dismissal*, loose-leaf (Toronto: Carswell, 1990) at pages 6.7-6.9.
[55] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.
[56] *ESA*, s 96(1)(1).
[57] *ESA*, s 96(1)-(2).
[58] *ESA*, s 103 (1).
[59] *ESA* s 104(1).
[60] *ESA*, s 74.17(1).

carve out specific exceptions to the just cause protection, as was done by Nova Scotia's legislature. That said, any exceptions to the proposed amendment should be carefully considered and implemented sparingly. The exceptions should be reasonable and not result in the negating of the provision's objective of protecting Ontario's workers. Minimum standards legislation must protect as many workers as possible. Disputes surrounding terminations should be heard before an adjudicator, and employees should have access to a variety of remedies including reinstatement, lost wages, and other "make whole" remedies. Additionally, employers should be required to provide written reasons for the termination.

The WHSLC completely rejects 'Option 1 – maintaining the status quo'. We strongly recommend that workers in Ontario be given protection from unjust dismissal after twelve months of service. This would mirror the *CLC* and provide Ontarians with much needed job security. This change would provide meaningful protection to a workforce in which employees work for many different employers over the course of a career. It is no longer common for workers to spend many years with the same employer, and it is therefore prudent to amend the *ESA* in a manner that is consistent with the workplace realities that workers currently face. Accordingly, the Clinic submits that section 54 of the *ESA* should be amended to read:

> **Where the period of employment of an employee with an employer is one year or more, the employer shall not discharge or suspend that employee without just cause unless the position of the employee and its associated duties no longer exist.**

While this change may result in increased complaints, investigations and litigation, it is important to note there already is an existing resolution process that can address disputes regarding just cause. Specifically, there are Employment Standards Officers who can investigate termination without cause claims and render decisions. Those decisions can be appealed to the Ontario Labour Relations Board ("OLRB") by the employer or the employee. In fact, the OLRB already conducts hearings into matters regarding misconduct and termination.

That said, we understand that the Ministry of Labour may determine a period longer than one year is more appropriate. Accordingly, as noted in our original Changing Workplace Review submission, an amendment to provide all Ontarians protection from unjust dismissal after five years of service is the second-most-appropriate way to best serve Ontarians.

The Ministry of Labour's website states that severance pay "compensates an employee for loss of seniority and the value of firm-specific skills, and recognizes his or her long service."[61] Given that the Ministry acknowledges and recognizes the significance of five years of service with the same employer, the Clinic submits that providing employees with protection from termination without just cause upon completion of five years of service is an appropriate option that will prevent an opening of the floodgates and a change in the labour and employment law landscape. This can be accomplished by amending section 54 of the *ESA* to read:

> **Where the period of employment of an employee with an employer is five years or more, the employer shall not discharge or suspend that employee without just cause unless the position of the employee and its associated duties no longer exist.**

Therefore, of the options listed in the Interim Report, the WHSLC submits that 'Option 3 - Provide just cause protection (adjudication) for all employees covered by the ESA' is the best option for Ontario's workers. While we also support in principle 'Option 2 - Implement just cause protection for Temporary Foreign Workers (TFWs) together with an expedited adjudication to hear unjust dismissal cases", we respectfully submit that all workers ought to have protection from unjust dismissal, not only TFWs. 'Option 1 – Maintain the status quo' is simply and completely unacceptable in 2016. Ontario's workers deserve better.

## Chapter 5.3.9 – Temporary Help Agencies

The WHSLC represents workers from a variety of fields. The added difficulty with respect to Temporary Help Agencies is essentially that these workers are essentially treated as disposable. If a client employer has any reason to dislike an employee, they can be replaced very easily. As such in unlawful reprisal applications before the Ontario Labour Relations Board both employers are named as responding parties. Invariably, the client employer does not want someone who complains; in most applications, the agency shields the client employer from the consequences of that decision. In a similar fashion, Temporary Help Agency ("THA") workers are used by client employers for particularly unsafe or difficult jobs to avoid adverse consequences on their premium rates paid to the Workplace Safety and Insurance Board. Re-employment and compensation disputes are left to the agency.

---

[61] Ontario Ministry of Labour, Termination and Severance, <http://www.labour.gov.on.ca/english/es/tools/esworkbook/termsev.php>.

### Recommendation – Implement changes to the *ESA* to prevent THA workers from being treated in a disposable manner

It is our position that these workers should not be treated in such a disposable fashion. If they are doing the same work that other client employees are doing they should be paid the same rate. If but for being agency employees, they participate in the workplace doing the same jobs, following the same schedule, obeying the same instructions from the same supervisor, the client employer should not be rewarded for reducing its payroll. Therefore, we endorse the recommendations that expand client responsibility, require similar pay, limit the use of assignment workers, promote transition to direct employment, and improved termination and severance provisions.

## Chapter 5.4.1 – Greater Right or Benefit

Section 5(1) of the *ESA* exists for a reason: to prevent workers from contracting out of minimum employment standards. Allowing employees and employers to contract out of any part of the *ESA* is a slippery slope. Allowing employees and employers to contract out of any part of the *ESA* will give unscrupulous employers an opportunity to unfairly exploit the inherent power imbalance that exits in an employer-employee relationship. Allowing employees and employers to contract out of any part of the *ESA* is contrary to the rationale for having minimum standards in the first place. Minimum standards exist to provide the basic rights that every worker in Ontario should have.

### Recommendation – Maintain the status quo

We submit that status quo should be maintained. Minimum standards cannot be effective if employers are able to avoid the statutory provisions. Employers should not be permitted to use the fact that they provide more than the minimum for 'hypothetical employment standard A' to form a basis for contracting out of 'hypothetical employment standard B'. A slightly higher wage should not negate the right to overtime pay, personal emergency leave, or any other right and entitlement found in the *ESA*. As noted herein and in the Interim Report, the *ESA* should be applied to as many employees as possible and that departures from, or modifications to the norm should be limited and justifiable. It is therefore obvious that the ability of any employer to contract out of any part of the *ESA*, for whatever reason, will hinder the broadest possible application of Ontario's minimum employment standards.

As already codified in section 5(2) of the *ESA*, employers who provide a greater benefit to an employee than required by the minimum standard are not subject to the minimum standard outlined in the *ESA*. This is a fair approach and should be maintained.

We submit that 'Option Two – Allowing employers and employees to contract out of the *ESA* based on a comparison of all the minimum standards against the full terms and conditions of employment in order to determine whether the employer has met the overall objectives of the Act' – is extremely problematic for several reasons. It is a comparison that will be difficult if not impossible to perform.

Secondly, Option Two may be beneficial to some workers, but not to all workers. Rather than create a system in which winners and losers will ultimately emerge, we submit that the status quo as articulated in section 5(1) of the *ESA* should be maintained to ensure that employers cannot erode the basic rights that Ontario's workers have.

## Chapter 5.4.2 – Written Agreements Between Employers and Employees to Have Alternate Standards Apply

Written agreements between employees and employers that create an alternate employment standard is highly problematic because of the inherent power imbalance that exists between employees and employers. Increasing the ability of employers to solicit such agreements will evidently lead to employees being pressured or forced to enter into such agreements. The WHSLC has represented workers who are required to sign these agreements at time of hire. It is not hard to conclude that in reality, the worker may not have a choice other than entering into the agreement that the employer is seeking the Interim Report does discuss the ESA anti-reprisal provisions however it should be noted that based on our experience workers are often reluctant to complain about an employment standard until they are fired. It is easy to infer that the financial implications of losing one's job may be less severe than unwillingly agreeing to an alternate employment standard.

### Recommendation – Assess the 20 provisions that currently exist with the view of either eliminating or justifying the continued existence of each provision

We submit it is role of the Ministry of Labour to provide employment standards that apply to all workers in a uniform manner and that are not subject to manipulation or exploitation by employers.

We submit that a combination of Option 1 and Option 3 should be adopted. We submits that each of the 20 existing provisions that allow employers and employees to enter into an alternate employment standard should be assessed with the view of either eliminating or justifying the continued existence of each provision. We further submit that removing the ability of employees and employers to enter into an alternate employment standard will ultimately have the positive effect of giving more workers the right to rely on the minimum standards provided in the *ESA*.

## Chapter 5.4.3 – Pay Periods

We have reviewed the submissions put forward by Ministry staff as found in the Interim Report. We agree with the concerns raised by Ministry staff regarding the inefficiencies that surround determining an employee's work week and pay period. We have experienced these problems first hand through the representation of our clients.

### Recommendation – Abandon the status quo and improve efficiency

We support Option 2 based on the premise that the adoption of this option would allow *ESA* claims to be processed faster. The *ESA* process is currently very slow, so we therefore welcome any change that would improve the efficiency of the process and the speed at which a decision rendered.

Furthermore, we oppose Option 3 because it would likely have the effect of making the *ESA* claims process more complex and burdensome for the workers who will become subject to the special rule that currently applies only to the commission automobile sales sector. As discussed herein, minimum standards ought to apply broadly and therefore should not be restricted.

# Chapter 5.5.3 – Creating a Culture of Compliance

Much in the interim report speaks to the Internal Responsibility System ("IRS"). With the greatest of respect, the IRS is a relic of a time where union membership was strong and manufacturing was a greater proportion of the workforce. It is also important to consider that the *Labour Relations Act* and the *Occupational Health and Safety Act* ("*OHSA*") differ from the *ESA*. The *ESA* is a code that one can refer to for specifics how long is a break and how long one can work before overtime is paid, and so on. Such specificity is not found to the same degree in the *OHSA*.

## Recommendation – Reject the notion of an employment standards committee

We must therefore reject the notion of an employment standards committee. Enforcement of standards should not be decided by committee. Enforcement is the security needed by employees and that comes from the Ministry of Labour, not a committee. As well, it is the experience of this Clinic that when workers raise the issue of an Occupational Health & Safety matter and ask to speak to a committee member, these workers are invariably terminated. Similar results are foreseeable. Creating a culture of compliance can only be achieved through frequent proactive inspections and the threat of large penalties that serve to deter non-compliance. Enforcement is the only guarantee that compliance will be achieved.

At the very least, the *ESA* should be amended to require that non-compliant employers pay to the employee interest on the amount ordered to be paid. This will serve as a disincentive to employers and do more to make the worker whole. We also submit that the *ESA* and its regulations should be vigorously enforced, and that employers who ignore or fail to comply with an inspector's order should be actively prosecuted.

In addition, employers who fail to comply with the *ESA* on a repeated basis should be prohibited from participating in procurement competitions administrated by the Ontario government, its Crown Corporations, and the broader public sector (school boards, hospitals, etc.).

## Chapter 5.5.4.1 – Initiating the Claim

As a clinic that deals largely with employment standards complaints post-termination, the need to contact the employer serves only as a delay. In no case has an employer taken the remedial action requested. The relationship between employer and employee is unequal. It will always be unequal.

### Recommendation – Remove the provision requiring employees to contact their employer prior to filing an ESA claim

Confidential or not, employers will know who makes complaints. However, a guarantee of proactive enforcement must fall to the government. We therefore endorse the removal of the provision requiring employees to first contact their employer.

## Chapter 5.5.4.2 – Reprisals

Following the release of the report of the Expert Advisory Panel on Occupational Health and Safety ("the Dean Report"), a conscious decision was made to expedite reprisal cases. However, it is not sufficient to simply have reinstatement and payment of benefits as the *potential* remedies. For such benefits to be derived they must be seen to be used as part of the arsenal within the power of an Employment Standards Officer ("ESO"). We recommend not only that Employment Standards Officers expedite reprisal applications but also that they have the power to order interim reinstatement immediately.

### Recommendation – Have ESA reprisal claims decided as expeditiously as possible and explicitly grant ESOs the power to order interim reinstatement

We endorse the requirement that an ESO decide reprisal claims as expeditiously as possible where there has been termination of employment. The Ontario Labour Relations Board should only be involved after the ESO has made a determination. In this way, if the worker has already returned to the employer, it will be seen to normalize the idea that workers can and will get their jobs back protecting them from reprisals.

## Chapter 5.5.5.2 – Use of Settlements

The Ontario Labour Relations Board's annual statistics demonstrate that most cases settle. As advocates for workers, we note our cases predominantly settle. As advocates, we recognize the strength and weaknesses of our cases. That strength or weakness determines our ability to negotiate. Cases seen as easily successful or relatively straightforward settle for most if not all of the worker's losses. Cases where the information or evidence on file is insufficient do not settle for the same amount. This happens to both represented and self-represented workers. Given that each case is unique, it is not clear that a satisfactory resolution can be reached.

## Chapter 5.5.6 – Applications for Review

With respect to the question of representation, it is worth noting that community legal aid clinics exist throughout the province of Ontario. Unlike the Office of the Worker Advisor, their mandate is wider and allows for multiple issues to be addressed. For example, the worker who is terminated for raising employment standards issue can be denied Employment Insurance ("EI") benefits. Community legal aid clinics can handle both the reprisal application and the EI application.

### Recommendation – Increase resources and funding for organizations that represent employees

The other concern is the anticipated need for balance. When the Dean Report suggested expanding the Office of the Worker Adviser's roles to include unlawful reprisal applications, the Office of the Employer Adviser was granted a similar mandate. As a result, employers gained access to a free service instead of having to pay for counsel. This free service affected negotiation tactics for employees. We therefore recommend that organizations that already exist and advocate for employees on multiple fronts be granted additional funding through existing resources to avoid a negative impact on settlement negotiations.

## Chapter 5.5.7 – Collections

As noted in the Interim Report, employees who have gone through the entire Ministry process may end up with a hollow victory if the employer refuses to comply with the order to pay. This is truly an injustice because an employee's options for collecting payment after a successful *ESA* claim are limited.

### Recommendation – Abandon the status quo and make the collections process one that is efficient, effective and pursuable/enforceable in court

The Ministry of Labour needs to ensure that employers comply with *ESA* Orders to Pay. The WHSLC rejects 'Option 1 – Maintaining the status quo'. To improve the effectiveness of the *ESA*, the WHSLC submits that all of the other options, specifically Option 2 through Option 6, ought to be implemented. The Ministry of Labour and the government of Ontario must close every loophole and resolve every legislative deficiency that allows employers to avoid real consequences for failing to pay an Order to Pay issued by the Ministry. It is currently too easy for an employer to refuse to comply with an Order to Pay.

Additionally, the WHSLC submits that employees who have been successful in the *ESA* claim process ought to be permitted to file and enforce orders as an order of the court.

# Conclusion

The Clinic thanks the Ministry of Labour for launching the consultations on the *ESA*. The Clinic also thanks the Ministry for appointing two esteemed advisors to oversee this consultation. That said, the Ministry's efforts will be pointless unless the consultations actually result in meaningful changes to the rights and entitlements that employees have in Ontario. The *ESA*, in its current form, is inadequate. As noted above and in the other submissions, the *ESA* needs to be improved in a manner that better protects employees.