Report on

The Employment Standards Act

Report on the Employment Standards Act

A Report Prepared for the British Columbia Law Institute by the Members of the Employment Standards Act Reform Project Committee

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Introductory Note

Report on the Employment Standards Act

Today's workplace is markedly different from the workplace of the mid-to-late twentieth century. Digital technology, changes in the composition of the workforce, and competitive pressures resulting from globalization, among other factors, have transformed the working world. Long-term, relatively secure full-time employment has increasingly given way to less secure temporary and part-time employment. New kinds of working relationships strain the boundaries of the traditional categories of "employee" and "independent contractor." There is pressure from employers and employees alike for greater flexibility in patterns of work. These paradigm shifts make the revision and modernization of legislation governing the workplace timely and essential.

BCLI undertook the Employment Standards Act Reform Project because no independent review of employment standards legislation in British Columbia had taken place for two decades, and because BCLI is able to approach the task from a neutral, nonpartisan standpoint. The comprehensive review of the *Employment Standards Act* culminating in this report was carried out by a highly knowledgeable and experienced committee, carefully chosen to represent a balance between employer and employee interests.

This report contains 71 recommendations for reform of the *Employment Standards Act*. Not every recommendation is unanimous, but most are. This fact reflects the strenuous efforts of the Project Committee to reach consensus, despite the contentious nature of the many issues its members had to address. Where a full consensus could not be reached, the report sets out the competing views and explains the rationale for them.

BCLI is grateful to the members of the Employment Standards Act Reform Project Committee for their dedication and perseverance throughout this lengthy project, and commends this report as a catalyst for reform.

Thomas L. Spraggs
Chair,
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December 2018

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The mandate of the Employment Standards Act Reform Project Committee is to assist BCLI in developing recommendations on reform of the *Employment Standards Act*.

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For more information, visit: https://www.bcli.org/project/employment-standards-act-reform-project

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BCLI is also grateful to Harris and Company LLP and Bernard LLP for hosting the meetings of the Project Committee at their offices.

BCLI thanks all individuals and organizations who participated in the consultation that preceded this report via the online survey or by responding to the *Consultation Paper on the Employment Standards Act*, as well as all those who contacted BCLI at other times in the course of the project to offer their views on reform of the Act and provide important information.

BCLI also acknowledges the contribution of its staff. Former executive director Jim Emmerton first proposed the addition of the Employment Standards Act Reform Project to BCLI's program, and the seed funding for the project was secured through his efforts. The present Executive Director, Kathleen Cunningham, succeeded in obtaining additional funding for the project and oversaw its latter stages. Greg Blue, Q.C. was the project manager and was ably assisted by Kevin Zakreski. Carolyn Laws, an independent legal researcher, provided extremely valuable assistance to the project. Cyrille Panadero, another independent researcher, did likewise. Other present and former BCLI staff members who contributed to the project during various periods are: Alexandre Blondin, Sebastian Ennis, Eric Hou, Rachel Kelly, Valerie Le Blanc, Shauna Nicholson, Sergio Ortega, and Elizabeth Pinsent.

Executive Summary

The *Employment Standards Act* ("ESA") sets minimum standards for terms of employment and working conditions in British Columbia, and provides for their enforcement. It regulates most aspects of employment except occupational health and safety and collective bargaining.

Since the last independent review of the ESA by the Thompson Commission more than two decades ago, patterns of work and the nature of the workplace have evolved further along the trend lines that the Commissioner noted. The "standard model" of full-time permanent employment with substantial job security has continued its retreat, replaced by increasing levels of less secure temporary and part-time work. Demands by employers and workers alike for greater flexibility in working arrangements have intensified. Digital technology has profoundly transformed the workplace, leading to decentralization and virtual working environments. The ESA is still closely linked, nevertheless, to the model of long-term employment in a static, physical workplace that prevailed at the beginning of this transformation. It is time to take another critical look at the ESA.

The BCLI Employment Standards Act Reform Project examined the ESA with the aim of enabling it to address present and evolving conditions in British Columbia workplaces, while striking a fair balance between the interests of employers and employees. Contemporaneous initiatives to reform employment legislation in Ontario and Alberta and the federal sector were closely monitored.

At the conclusion of the project, opinion remained divided within the Project Committee on a number of significant matters. This report explains the majority and minority positions where unanimity was not reached.

Chapters 1 and 2

Chapter 1 is a general introduction describing the Employment Standards Reform Project and how it was carried out. Chapter 2 provides an overview of the structure and content of the ESA, and explains the basics of the enforcement process.

Chapter 3 – Scope of the ESA

Chapter 3 examines issues surrounding the scope and application of the ESA. These are considered against a background in which the standard model of full-time

permanent employment is retreating, and being replaced by a continuum of various working arrangements in present-day workplaces.

Employees, contractors, and the issue of misclassification

While the common law distinction between employees and independent contractors is being eroded by semi-autonomous working arrangements, the conclusion reached in Chapter 3 is that the distinction should not be ignored, and an employment relationship should continue to be a prerequisite for coverage under the ESA. It is thought that the ESA should not cover persons actually trading on their own account, even when an element of subordination or dependency is present in their working arrangements. Rather than importing the definition of "dependent contractor" from the *Labour Relations Code* to protect semi-autonomous workers as a distinct class, the Project Committee believes the focus should be on heightened regulatory vigilance against the misclassification of employees as contractors.

Wrongful dismissal claims

Chapter 3 also deals with whether the ESA should provide for administrative adjudication of wrongful dismissal claims, as does the *Canada Labour Code*. While claims based on retaliatory dismissal in contravention of section 83 of the ESA may be the subject of an ESA complaint, wrongful dismissal is otherwise governed by common law in British Columbia and claims based on it are litigated in the civil courts. The majority position in the Project Committee is in favour of retaining the status quo, while a minority of members favour introduction of a general scheme for administrative adjudication of wrongful dismissal claims.

Exclusions from minimum standards of the ESA

The exclusions by regulation of particular categories of employees from all or part of the ESA are bewildering in their number and complexity, and could not be dealt with individually without unreasonably prolonging the project. Nevertheless, the Project Committee examined the matter of exclusions from a policy standpoint and attempted to discern whether any coherent overarching policy underlies the existing ones. Some exclusions are common to all Canadian jurisdictions, but many others are not readily explicable.

The nature of work differs between industries, and employment legislation needs to accommodate this reality. A rigid "one size fits all" approach is unrealistic, but exclusions and variations from the minimum standards of the ESA should be made only on a principled and objective basis. The report recommends that existing exclusions

should undergo a systematic review by government to determine whether their continuance is justifiable under contemporary circumstances, and principles should be developed to govern future applications for exclusion from a minimum standard to ensure that the interests of both employers and employees are fully taken into account.

Vulnerable workers

The Project Committee believes the ESA should continue to provide some special protections for particularly vulnerable classes of employees. Chapter 9 is dedicated to this aspect of the ESA.

The "unionized worker exclusion"

In British Columbia, the core employment standards do not form a mandatory minimum floor for collective bargaining in their entirety. Large and important parts of the ESA are inapplicable to employees covered by a collective agreement if the agreement contains any provision respecting a matter they cover, although the relevant ESA provisions will apply if the collective agreement is entirely silent. This feature of the ESA has come to be known as the "unionized worker exclusion," although it would be more accurate to describe it as a group of exclusions relating to collective agreements.

With one exception, other Canadian jurisdictions allow terms in collective agreements to supersede statutory employment standards only if they are at least as favourable or more favourable to employees than the minimum statutory standards. New Brunswick allows a term of a collective agreement to prevail over a statutory requirement whether the term is more or less favourable to employees, but only if the term declares that it has been agreed to in lieu of the statutory standard.

The "unionized worker exclusion" remains a very controversial feature of the ESA. In its present form under section 3 of the ESA, it is vigorously opposed by labour and equally vigorously defended by business. The Project Committee considered the unionized worker exclusion at length and ultimately remained divided, with the majority favouring the status quo. A minority favoured restoration of the minimum requirements of the ESA as a floor in collective bargaining. The report sets out arguments for the divergent views.

Chapter 4 – The Hiring Process

The general ESA provisions dealing with hiring are summarized in Chapter 4. No change is proposed to them, but the chapter discusses whether employment contracts

should have to be in writing. The Project Committee was divided on this issue, with the majority of members believing this is not a necessary change. The minority view is that the ESA should require a basic written agreement setting out essential terms, e.g. the duties of the position, hours of work, and the wage. Labour organizations that reacted to the consultation paper were also divided on the merits of requiring all employment contracts to be in writing.

Chapter 5 – Hours of Work, Overtime and Flextime

Authorized alternate work patterns

Variations in patterns of working hours are more common in today's workplaces. The 8-hour day / 40- hour week which section 35 of the ESA makes the default standard is still the most common work pattern, but compressed work weeks are sometimes preferred by employees to allow for extra days off, and some employers may find it more efficient to schedule shifts lasting longer than 8 hours. For example, a commonly accepted alternate work pattern is a 10-hour day, 4-day week.

Chapter 5 contains a recommendation that the ESA should authorize one or more alternate standards for hours of work in addition to the 8-hour day, 40-hour week, which could be adopted without having to apply to the Director of Employment Standards for a formal variance. The Project Committee is divided regarding the way in which an alternate work pattern should be introduced in a workplace. The majority view is that an employer should be able to adopt this alternate work pattern as the normal operating pattern for a workplace. (Changing from one statutorily authorized pattern of working hours to another would require a period of notice.)

The minority view is that adoption of a work pattern deviating from the 8-hour day, 40-hour week should require the consent of affected employees by means of an averaging agreement. An additional minority view is that only employees earning above a prescribed salary threshold, e.g. 50 per cent above the general minimum wage, should be able to consent to an alternate pattern of working hours.

Definition of "week"

Currently, national employers must contend with a definition of "week" in the ESA specifying that, for some payroll purposes and not others, "week" can mean only the period from Sunday to Saturday. A recommendation is made to change the definition of "week" to that used in other Canadian jurisdictions, namely a recurring period of 7 consecutive days that may start on any day designated by the employer, provided that a consistent practice is followed once the starting day is fixed. This change would

allow employers with national operations to administer their payroll systems on a uniform basis in each jurisdiction.

Overtime Banking

Section 42 of the ESA allows employees to opt to have overtime hours credited to a "time bank" and take time off with regular pay at a later point at the convenience of the employer, instead of receiving overtime pay. The consultation paper proposed that overtime banking be abolished, but the Project Committee withdrew this recommendation in light of the strong opposition from employers and employees alike.

Hours of work averaging agreements

Chapter 5 contains several recommendations dealing with averaging agreements. The ESA allows agreements to average hours of work over a period up to four weeks for the purposes of calculating overtime. Hours of work averaging allows for variable work schedules without overtime having to be paid for each day on which more than 8 hours are worked, even though working hours may be less than 8 on other days in the pay period. Under an ESA averaging agreement, payment at overtime rates is limited to hours worked in excess of an average of 40 hours per week over the length of the averaging period. (If more than 12 hours are worked on any day during an averaging period, however, the overtime pay rate applies to the excess over 12 hours.)

The averaging provision in the ESA is divisive and controversial in British Columbia even though it is seldom used, because it allows for individual averaging agreements rather than requiring approval of a majority of employees for the introduction of an averaging regime on a workplace-wide basis. Averaging of hours of work is, nevertheless, a feature of employment standards legislation in several provinces and territories and the federally regulated sector. It is a mechanism equally capable of addressing the operational needs of enterprises in which work activity fluctuates and cannot be tied to rigidly fixed working hours, and the needs or desires of employees for flexible work schedules.

The Project Committee concluded that hours of work averaging should continue to have a place in the ESA, but the existing provision (section 37) should be replaced by one providing for a maximum term of up to two years subject to renewal, a maximum averaging period of 8 weeks, and a weekly as well as a daily limit on actual (rather than averaged) working hours. If hours worked exceeded 12 in any one day or 48 in any one week within an averaging period, overtime would be payable in respect of the hours worked in excess of those limits on that day or in that week, irrespective of the daily or weekly average.

The report recommends that the present requirement to set out a work schedule for each day covered by the agreement be repealed, as the very purpose of averaging is to deal with variability in hours of work and it is an obstacle to use of averaging agreements.

Justification for refusing overtime work

Chapter 5 includes a recommendation for a limited right to refuse overtime if the overtime would conflict with significant family-related commitments, scheduled educational commitments, or other employment. An employee could also decline to work more than 12 hours in a day or 48 hours per week, except in an emergency. If an applicable regulation, variance, or averaging agreement provided otherwise, its terms would apply instead of these rules.

The recommendations also call for introduction of a definition of "emergency" in the ESA. It is modelled on a definition in the *Canada Labour* Code, modified in a manner recommended in the 2006 Arthurs Report on federal labour standards.

Minimum daily hours (minimum call-in pay)

Currently an employee who is required to show up for work and is fit to work is entitled to a minimum of two hours' pay for the day, or four hours' pay if the employee was originally scheduled to work more than 8 hours on the day in question.

The recommendation for minimum call-in pay is that if an employee is scheduled to work more than four hours on the day in question and reports for work, the employee should receive a minimum of four hours' pay if work starts, and a minimum of two hours' pay if it does not. If the employee is scheduled to work less than four hours, the minimum call-in pay would be two hours, whether work starts or not.

Flexible work arrangements

Pressure for flexibility in working arrangements comes not only from employers, but also from the employee side.

Flextime contrasts with averaging of hours of work, which typically applies to a group of employees and is usually, though not necessarily, instituted to meet the employer's operational requirements. Flextime arrangements are typically arrangements between an employer and an individual employee to allow the employee to perform

work on an individualized schedule that allows the employee to fulfil other responsibilities and commitments.

Numerous jurisdictions have enacted provisions giving employees a right to request flextime. Typically, these provisions require some qualifying period of employment before an employee may request a flexible work arrangement. The employer must consider the request and respond within a specific timeframe, but may accept or reject the request. In some jurisdictions, the grounds on which a flextime request may be refused are limited. An amendment to the *Canada Labour Code* adding a flextime request provision of this nature is expected to come into force soon.

As flextime request provisions are still a relatively new feature of employment legislation, their effectiveness in serving individual and social objectives is still uncertain. The Project Committee did not reach a consensus regarding the merits of introducing a flextime request provision. Employee dissension over disappointed expectations and/or perceived favouritism is foreseen by some members as a troublesome effect of such a provision in smaller workplaces, especially regarding requests to work from home. There was agreement that if a flextime request provision is added to the ESA, it should extend only to hours and scheduling of work, but not to the location of work.

Validation of arrangements to make up time taken off

Employers often grant requests by employees to take time off on a particular occasion, and to work extra time on another day or series of days in order to make up the time without losing pay. These common arrangements are technically illegal under the ESA unless overtime is paid for any time worked above 8 hours on a single day. The Project Committee saw a need to relax overtime pay requirements somewhat to validate mutually convenient arrangements to make up time taken off. The recommendation would allow an employee to voluntarily work up to three extra hours spread over one or more days in the same pay period without the employer being required to pay an overtime rate for those hours, in order to make up for time which the employee takes off in that pay period.

Clarification of meal break requirements

A provision originally intended to ensure that employers are paid if they are required to work during a meal break is being misinterpreted in some job sectors as giving employers an option of denying meal breaks altogether as long as they pay the employee for the full length of a shift. Chapter 5 includes a recommendation for an amendment to clarify that the requirement to schedule meal breaks is mandatory.

Notification of work schedules and scheduling changes

With the growth of precarious work, adequate notice of work schedules and changes in them has taken on increasing importance. Lack of predictable work schedules and last-minute call-ins lead to hardship and stress, especially for single parents and workers holding more than one job. The ESA does not currently address notification of hours of work or changes in work schedules, although it formerly did.

A majority within the Project Committee favour restoration of a requirement for 24 hours' notice of a change to a shift or work schedule, but with provision for unforeseen circumstances. An employer compelled by unforeseen circumstances to give less than 24 hours' notice would not be in contravention of the ESA, but an employee who received less than 24 hours' notice of a shift or scheduling change would also be justified in not showing up when the change takes effect.

Chapter 6 – Wages and Wage Payment

Wage payment by direct deposit

The ESA retains a requirement to obtain an employee's consent to payment of wages by electronic direct deposit to an account in a financial institution, or authorization under a collective agreement. Maintaining a separate manual payment system for isolated objectors when all other employees are paid by direct deposit is onerous and impractical.

Privacy concerns about disclosing personal banking information to an employer can be met by an employer opening an account for each employee for the sole purpose of depositing wages. Employees not wishing to reveal any personal banking information to the employer could transfer funds from their wage deposit accounts into their personal accounts without any need to provide the employer with information about their personal banking arrangements.

Given the popularity and prevalence of this method of wage payment, a requirement for consent or authorization by a collective agreement is outdated and should be repealed.

Wage assignments

The ESA requires employers to honour certain kinds of wage assignments that are listed in section 22(1). Broadly described, these are ones that are made for purpose of paying union dues, making support payments under a maintenance order, making

charitable or pension plan contributions and paying for insurance premiums, or for medical or dental coverage. Deductions from wages for these purposes and direct payment by the employer are broadly accepted, so no change is recommended with regard to this feature of the ESA except to update the language referring to benefits plan premiums to cover plan providers other than insurance companies.

The ESA also states, however, that an employer *may* honour other wage assignments "to meet a credit obligation." Few employers, if any, would willingly take on the burden of administering an employee's financial affairs. The usefulness of retaining this provision (section 22(4)) declaring that employers are free to honour wage assignments to meet employees' obligations to third parties is doubtful.

The case law is ambiguous with respect to whether "credit obligation" can include a debt owed to the employer. Due to the scope for coercion arising from the employment relationship, the voluntariness of any wage assignment in favour of the employer is always questionable. The Project Committee believes that payment of wages and collection of debts owed to the employer should be kept separate, except when an advance requested by the employee will not be fully earned. For example, vacation pay might be advanced at an employee's request before it has accrued, and the employee might give or receive notice of termination shortly afterwards. It should be permissible for an employer to recover, through a wage assignment, the portion of an advance that will never be earned.

A recommendation is made for an amendment allowing irrevocable assignments of wages for the purpose of repaying advances from the employer. Another is made for the repeal of section 22(4). This would have the effect of limiting the scope for valid wage assignments to the ones that employers are currently required to honour, plus those made for the purpose of repaying advances of wages.

Tips and gratuities

Despite criticism of tipping as a social convention, there is little indication that it will disappear in the foreseeable future. Tips and gratuities are not "wages" under the ESA, but the small amount of legal authority that exists surrounding tips and gratuities indicates that they are beneficially owned by the employees who receive them. If customers pay a service charge in lieu of tips, the employer is considered to hold the funds so collected in trust for the employees. The authorities also indicate, however, that employers are entitled to a significant degree of control over the handling and redistribution of tips and gratuities, if they choose to exert it.

Tip pools for sharing gratuities between "front of house" employees who receive them and other employees who do not receive them are common. Tip pooling is not in itself a contravention of the ESA, even when imposed unilaterally and administered by the employer. Using a tip pool to pay part of the base wages of employees who do not customarily receive tips and gratuities, however, contravenes the ESA because the tip-earning employees are then being made to pay a business cost of the employer.

The administration of tip pools can be complicated and requires a high level of transparency to prevent distrust. Tip pools and employers' policies surrounding them have been fertile sources of labour disputes and complaints. There is, however, an almost complete lack of regulation of tip pooling.

Several provinces have legislation to protect property rights of employees in their tips and gratuities and the integrity of tip pools. The Project Committee believes that some legislative protection of employees' proprietary rights in tips and gratuities and regulation of tip pooling is warranted.

Recent Ontario legislation makes the entitlement of managers and other persons closely identified with the employer to participate in a tip pool conditional on regularly performing work of the same nature as the employees sharing in the pool. Subject to this exception, the employer, its directors, shareholders, and partners are barred from sharing in the pool. The Project Committee leans toward the Ontario model as having flexibility to deal with overlapping roles within the same workplace. Incorporation of similar provisions in the ESA is recommended.

Payment of vacation pay

Hardly any employer pays vacation pay in the manner the ESA treats as the default method, namely in a lump sum a week before an employee's vacation begins. The common practice of adding instalments of vacation pay to regular paycheques actually requires authorization by a collective agreement or a written agreement between an employer and an individual employee. A recommendation calls for legalization of the existing practices of simply paying employees' wages during their vacation (including vacation pay) or of adding vacation pay to each paycheque or direct deposit of wages at all other times. An employer would be able to choose one of the three methods.

Statutory holiday pay

In order to receive statutory holiday pay, an employee currently must have been employed for at least 30 calendar days before the holiday and have worked or earned

wages on 15 of the 30 calendar days, or have worked under an averaging agreement at any time within the 30 calendar days.

British Columbia's eligibility requirements for statutory holiday pay are less stringent than those in some provinces. Statutory holidays are expensive for employers, and in fairness, they should not be required to pay employees for days on which they do not work unless there is a relationship of some permanence with the employee.

An eligibility requirement based on the number of days worked in the immediate lead-up to the holiday nevertheless places part-time employees and workers who do not have a regular schedule at a disadvantage relative to full-time employees.

With non-standard employment growing, the disparity in treatment created by the present eligibility rules will affect an ever-larger portion of the workforce. For this reason, the Project Committee believes the eligibility rules should be changed to allow greater opportunity for part-time workers employed for more than a transitory period to accumulate sufficient working time to qualify for statutory holiday pay.

The recommendation is for a two-part eligibility rule for statutory holiday pay. First, an employee would have to work or earn wages on 16 of the 60 days preceding a statutory holiday in order to be paid regular wages for that holiday. This equates to about two working days per week.

Second, the employee would have to work on his or her last scheduled working day before the statutory holiday in question, and first scheduled working day afterward. This is a rule in effect in more than half of the provinces and territories. It prevents employees from abusing statutory holiday entitlements by claiming holiday pay to cover loss of pay for a day on which the employee deliberately does not report for work.

Days on which the employee was absent due to sickness and other authorized absences would not be counted as scheduled working days for the purpose of the new eligibility rule.

Minimum wage-setting process

This report presents the conclusions about reform of the process for setting the minimum wage that were reached independently by the Project Committee before the formation in 2017 of the Fair Wages Commission. These conclusions are included in the report as a contribution to public debate, as it is not certain at the time of writing that all of the recommendations in the two reports of the Fair Wages Commission will

become official policy. In particular, it is not yet clear whether British Columbia will have a permanent body with an advisory and research capacity as recommended in the first report of the Fair Wages Commission.

Unlike the two reports of the Fair Wages Commission, this report does not touch upon the level of the minimum wage. Instead, it addresses legislative mechanisms for setting the minimum wage. The cross-jurisdictional trend towards automatic indexing of minimum wage rates by reference to recognized economic indicators or a statutory formula is noted. Legislative norms in Canada and the U.S. for setting the minimum wage and relevant international conventions are reviewed, including indexation methods and advisory or wage-setting boards and commissions.

The majority view in the Project Committee is in favour of an indexation model that also preserves Cabinet discretion to set a policy-based rate different from the indexed rate. The ESA would provide a formula for indexation of the minimum wage at regular, fixed intervals, but also require the provincial Cabinet to determine on the occasion of each application of the formula whether to prescribe the rate as indexed or a higher or lower rate.

A minority of committee members who support this model believe that the ESA should also call for the model itself to be reviewed at five-year intervals.

A further minority favours only a legislative requirement for Cabinet review of the minimum wage at two-year intervals, without periodic indexation.

Agricultural piece rates and other special minimum wage provisions

Prior to the creation of the Fair Wages Commission in 2017 and the April 2018 announcements by the Minister of Labour concerning the agricultural piece rate system and other special minimum wage rates, the Project Committee independently reached conclusions regarding the special minimum wage provisions that are fairly similar to those reached later by the Fair Wages Commission in its second report. Although partly overtaken by the governmental announcements in April 2018, the Project Committee's independent conclusions are explained in Chapter 6 for the sake of the record.

Farm labour contractors and wage payment

The ESA now provides that farm producers are jointly and severally liable with labour contractors for the wages of the contractor's employees if they engage an unlicensed contractor. The Thompson Commission recommended that producers be jointly and

severally liable regardless of the labour contractor's licensing status, because of the record of wage abuses in the farm labour sector. This was the position under the ESA between 1995-2002. The pre-1995 position, under which producers had a defence against joint and several liability for wages if they engaged a licensed labour contractor, was restored in 2002 in a contentious amendment.

While recognizing that mandatory licensing has never been a sufficient guarantee of ESA compliance, the Project Committee is divided on the merits of abolishing the licensed contractor defence against full joint and several liability for wages of contractor-supplied labour.

The majority view is that the defence should remain available to producers, but the amount of security that farm labour contractors must provide should be increased. In addition, the majority favour amending the ESA to enable the Director to prevent a contractor whose licence is cancelled for ESA contraventions from re-applying for a licence for a specific period, or permanently.

The minority view is that is the licensed contractor defence should be repealed, so that producers would once again be jointly and severally liable with the labour contractor for wages of workers supplied by the contractor. This approach would place reliance on market forces to eliminate labour contractors who fail to comply with the ESA.

Chapter 7 – Annual Vacation and Special Leaves

Annual vacation

The ESA entitles employees to a minimum annual vacation of two weeks after 12 continuous months of employment, and three weeks after five consecutive years with the same employer. There is no majority consensus in the Project Committee to change these entitlements.

The minority view is that an employee should receive a minimum of three weeks of vacation after 10 consecutive years of employment.

Special leaves

The ESA provides the following unpaid special leave entitlements:

- maternity leave
- parental leave

- family responsibility leave
- compassionate care leave
- reservist leave
- bereavement leave
- leave for jury duty
- disappearance of child as result of crime leave
- death of child leave

The last two forms of special leave are new, having been added by amendments to the ESA made in May 2018. The May 2018 amendments also lengthened maternity, parental, and compassionate care leave to correspond to recent increases in the length of time during which employees on these leaves may receive income replacement benefits under the *Employment Insurance Act* (Canada).

With one prominent exception, the categories of special leaves under the ESA are broadly similar to those found in other Canadian employment standards legislation, although some jurisdictions have additional or overlapping categories. The prominent, and contentious, exception is the lack of any provision in the ESA for unpaid short-term leave for personal illness or injury (sick leave).

Combining sick leave and family responsibility leave

British Columbia and Nunavut are the only Canadian jurisdictions that do not have a legislative requirement for an employee to be given time off when ill or injured. A number of provinces provide for a single allotment of unpaid leave days per year that may be used either for sick leave or to deal with a situation that would now be covered by family emergency leave. As either contingency may arise to cause an employee's absence from work, and the employer is affected the same way in either case, a majority of the Project Committee's members believe it is appropriate to replace the existing family responsibility leave entitlement with this combined form of sick leave and family responsibility leave.

The majority recommends that the present provision (section 52) allowing up to 5 days per year of family responsibility leave should be replaced by one allowing up to 7 days of unpaid leave per calendar year that could be taken because of the employee's own illness or injury, or to attend to the care, health, or education of a child in the employee's care, or the care or health of a member of the employee's immediate family. (Regarding the definition of "immediate family" in the ESA, see below.)

A minority view in the Project committee is that the number of leave days should be fixed at 10 per year. A further minority view also calls for 10 days of combined sick

leave and family responsibility leave, but employees should be paid their regular wage for days on which they are absent due to their own illness or injury. A further minority opposes the introduction of sick leave into the ESA.

Definition of 'immediate family"

The definition of "immediate family" in the ESA circumscribes the range of situations involving familial care needs for which an employee may use family responsibility leave. It is very narrow in comparison to corresponding definitions in the legislation of other provinces, and much narrower than the definition of "family member" derived from federal EI legislation that applies for the purposes of compassionate care leave.

Some submissions made in response to the consultation paper urged that an employee should be able to claim family responsibility leave to meet care needs of anyone in a close relationship to the employee, rather than being restricted to a biological or spousal relationship. While this is rejected as too subjective a criterion on which to base a leave entitlement, the majority of the Project Committee believe some expansion is warranted. Chapter 7 contains a majority recommendation to amend the definition of "immediate family" to apply to a more realistic range of commonly encountered familial caregiving situations and several minority views, including one opposing any change.

Qualifying period of employment for special leave entitlements

Unlike employees in most other provinces and the federally regulated employment sector, those in British Columbia do not have to be employed for a minimum period before becoming eligible for leave entitlements other than annual vacation, such as maternity, parental, or compassionate care leave. Qualifying periods in other Canadian jurisdictions range between 30 days to 12 months. The most common requirement is 90 days or three months' employment. This corresponds to the typical length of a probationary period at the start of a new job.

There is majority support in the Project Committee to require three months' continuous employment for eligibility for any form of leave of absence under the ESA, except annual vacation, jury service, and reservist leave. A qualifying period is justified on the basis of the cost to the employer of covering absences, which includes having to continue paying into benefit plans funded wholly or partly by the employer. In the view of the majority of members, these are costs an employer should not have to absorb unless an employment relationship is one of some significant duration.

There are three minority views regarding qualifying periods for special leave entitlements. One is that three months' continuous employment should only be required for the long-term leaves such as pregnancy, parental, or compassionate care leave. There would be no qualifying period for short leave entitlements, such as bereavement leave or the proposed combined personal illness and family responsibility leave.

A second minority view is that there should be no qualifying period for unpaid special leave entitlements under the ESA, but if an employer provides paid sick leave, the employer should be at liberty to restrict paid leave to employees who have been employed for at least three months.

A third minority view is that there should be no qualifying period of employment for any of the special leaves provided under the ESA.

Proof of entitlement to special leaves

Chapter 7 contains a recommendation for a provision that would codify an employer's right to require an employee to provide reasonable evidence of entitlement to a non-discretionary leave that is requested or taken. This would codify an implicit right that is well-established in case law. It is principally relevant to family responsibility leave, as other forms of non-discretionary leave have specific requirements to justify the leave request, such as the medical certificate that is mandatory to entitle an employee to compassionate care leave.

Chapter 8 – Termination

Little change is recommended to the requirements of the ESA for individual and group termination. Chapter 8 contains a majority recommendation to allow a notice of termination to remain in effect if an employee is allowed to continue working for up to a month after the end of the notice period. A minority position opposing the change is also presented.

Amendments to clarify the effect of termination by the employer after an employee has already given notice are recommended. They coincide with the accepted interpretation of what the ESA implicitly requires in this situation, which is that the employee must be paid the wages the employee would have earned during the portion of the period of notice the employee gave to the employer that has not already elapsed, or the amount payable to the employee if the employee had been terminated by the employer without notice, whichever is less.

An amendment is also recommended to ensure that an employer's obligations to employees affected by a group termination notice may always be met by a combination of notice and termination pay, even if the notice is technically defective.

A minority within the Project Committee favour removing the broad exception from notice requirements that affects construction workers employed on building sites. A majority believe no change is required. Both positions are explained in Chapter 8.

Chapter 9 – Vulnerable Classes of Employees

Vulnerable classes generally

Certain classes of employees are especially vulnerable to exploitation and abuse due to their circumstances and lack of bargaining power in the labour market. Chapter 9 addresses two such classes: children and youth, and workers in private residences. Farm labourers form another prominent vulnerable class, but provisions for their protection are covered in Chapter 6.

Migrant workers form a further vulnerable class, and the consultation paper contained an extensive section dealing with them. After issuance of the consultation paper, however, the *Temporary Foreign Worker Protection Act* was introduced in the Legislative Assembly and was quickly passed. This Act supersedes the Project Committee's earlier conclusions and recommendations regarding additional legislative protection for migrant workers. Accordingly, the material on migrant workers that appeared in the consultation paper is not reproduced in this report.

Employed children and youth

British Columbia's legislation and regulations dealing with employment of children diverge in important respects from Canadian and international norms with regard to the minimum age for employment and the forms of work in which children may be employed. The jobs that 12-to-15-year-olds in British Columbia are permitted to do extend to potentially hazardous forms of work such as construction, from which they are barred in neighbouring provinces and most of North America.

Implementation of the recommendations in Chapter 9 dealing with child employment would re-align British Columbia with Canadian and international standards in this area. Employment of persons under 16 in prescribed industries and occupations likely to be injurious to their health, safety, or morals would be prohibited. (This standard is drawn from international conventions and is widely replicated in the domestic legislation of many jurisdictions.) Authority would be conferred to prescribe

the industries and occupations in which employment of anyone under age 16 would be prohibited.

The special regime currently set out in regulations under the ESA for employment of children in recorded and live entertainment without regulatory permission would be preserved. In other business sectors, a permit from the Director of Employment Standards would be needed in addition to parental consent to employ a child under 14.

A majority recommendation would allow employment of 14- and 15-year-olds in artistic endeavours (including recorded and live entertainment) and forms of "light work" designated by the Director of Employment Standards in a published list. Employment of 14- and 15-year-olds in other settings would require a permit from the Director.

A minority view within the Project Committee is that employment of anyone under 15 should require a permit, other than as allowed by the regulations dealing with recorded and live entertainment.

Workers in private residences

Employees in private residences are largely invisible, despite a requirement resting on their employers to notify the Director of their presence. Many, if not most, of those employed in private homes in British Columbia are temporary foreign workers (TFWs), and are highly dependent on their employers to maintain their immigration status while waiting to be granted permanent residence in Canada. The employer-employee relationship is more personal than in other forms of work, which complicates workplace interactions. For all of these reasons, this employment sector presents special problems in the enforcement of the ESA.

The ESA and its regulations compound the difficulties of applying the Act to employees in private residences workers by providing overlapping definitions that create several categories of workers with varying degrees of protection under the Act, or none. Misclassification can be a source of injustice for employees. It is also a trap for employers, because it can result in significant financial liabilities. Furthermore, the ESA and its regulations have not yet caught up to recent changes in the federal Temporary Foreign Worker Program (TFWP) that affect many employees inside private homes, causing the application of the ESA to TFWs employed in households to be capricious and uneven.

Chapter 9 contains several recommendations to reduce confusion and the danger of misclassification of employees. In particular, the definition of "domestic" should be amended by repealing the requirement to live at the employer's residence. The live-in requirement has been abolished under the caregiver streams of the TFWP because it contributed greatly to the scope for abuse and exploitation of TFWs by increasing their dependency on the employer. TFW caregivers are now permitted to live outside their employers' homes and retain their status, but those who do no longer qualify as "domestics" under the ESA. As a result, they are relegated to the category of "sitter" for purposes of the ESA, which places them outside the protection of the Act altogether.

Amendment of the definition of "sitter" is also necessary to ensure that those working for a living as caregivers in homes are not denied the minimum wage and other benefits of the ESA. The Project Committee accepts the 15-hour per week ceiling originally recommended by the Thompson Commission in order to restrict the term "sitter" to someone who performs casual, non-occupational caregiving. The majority of members, however, believe the 15-hour per week ceiling should be applied in terms of a weekly average over a 4-week period in order to prevent inadvertent contraventions of the ESA when neither party regards an informal babysitting or occasional adult care arrangement as an employment relationship.

Chapter 10 – The Complaint and Enforcement Process

Enforcement of the ESA is primarily complaint-based, although power exists to investigate non-compliance whether or not a complaint has been made. In practice, investigations are seldom conducted without a prior compliant. With few exceptions, the Employment Standards Branch insists as a matter of policy that an employee attempt to resolve a dispute with the employer using its self-help kit before it will accept a complaint.

The Project Committee unanimously concluded that mandatory use of the self-help kit should be discontinued, as it is a barrier to access to the ESA process and an impediment to effective enforcement of the ESA. Making its use mandatory ignores the power imbalance between employer and employee, and available evidence indicates that it discourages employees from seeking redress for contraventions. Employees should not be forced to confront the employer and risk antagonism or retaliation before gaining access to the complaint process.

Once a complaint of a contravention is filed with the Employment Standards Branch, the ESA calls for a process of investigation and a determination by the Director that the Act either has or has not been contravened. In practice, however, the great

majority of complaints are not investigated. Instead, they are referred immediately after intake to what is known as "education-mediation-adjudication," in which emphasis is placed on settlement. If informal contact and mediation do not resolve the complaint, an adjudication hearing is conducted, most commonly by telephone. The Branch treats a decision at an adjudication hearing as equivalent to a determination, but in contrast to the investigation-determination process which is set out in detail in the ESA, the education-mediation-adjudication process actually rests on very flimsy statutory authority.

The procedure currently followed after a complaint of an ESA contravention is received deviates from what the ESA appears to require. In any case, the Project Committee considers the pendulum has swung too far in the direction of dispute resolution and settlement instead of enforcement of the ESA, and a more robust investigative approach needs to be restored. A full range of procedural tools that are adequately supported by statutory authority should be available to the Director to resolve complaints justly and efficiently, but a threshold level of factual investigation should precede a decision-making on procedural streaming. Chapter 10 contains recommendations accordingly.

The investigation-determination procedure that is outlined in the ESA is also not without its defects. Chapter 10 contains several recommendations to introduce features that have come to be considered basic to procedural fairness. The employer and complainant should each receive a copy of an investigation report and be given an opportunity to respond within a specified time before a determination is made. A determination should be made by the Director or a delegate other than the investigator.

Limitation period for filing complaints

The ESA allows complaints relating to most kinds of contraventions to be filed up to six months after termination of employment. While this is within Canadian legislative norms, workers' advocates press for a longer limitation period on grounds of fairness to less sophisticated workers who lack knowledge of their rights, and migrant workers who cannot easily assert them. They question why wage claimants should be treated less favourably than other creditors with debt claims, who have two years within which to sue in the regular civil courts.

The Project Committee did not reach a consensus on changing the limitation period, except in relation to complaints based on the illegal exaction of payments from persons seeking work, as explained below.

Limitation period for complaints based on illegally extracted payments

Section 10 of the ESA prohibits the direct or indirect extraction of a payment from a person seeking work for arranging employment or providing information. Payments so extracted are recoverable as deemed wages. The limitation period for a complaint based on a breach of this section is six months running from the date of the contravention.

The Project Committee accepts that the six-month limitation period applicable to section 10 contraventions is a barrier to recovery of recruiters' fees and other payments illegally exacted from temporary foreign workers seeking to come to Canada, such as the cost of their transportation. This is because the payments are often obtained from the workers a considerable time before they are hired and admitted to Canada. Before they have a realistic opportunity to complain of the section 10 contravention, their right to do so may be time-barred. There was a consensus that the limitation period applicable to section 10 should be altered to allow an adequate opportunity to recover payments illegally exacted from persons seeking work.

A majority of the Project Committee recommends that a complaint based on a contravention of section 10 should have to be delivered within six months from the last day of employment or two years from the date of the contravention, whichever is shorter.

A minority would amend the ESA to provide that a complaint under section 10 must be delivered within two years of the date of the contravention, and would extend this also to contraventions of sections 8 and 11. The latter two sections prohibit, respectively, false statements made in the course of hiring, and payments made by an employment agency or farm labour contractor to a third party for obtaining employment or assistance in placing someone in employment.

Wage recovery period

The maximum amount of wages an employee can recover are those that became payable in the six months preceding the filing of the complaint. This is among the most contentious features of the ESA. Most wage-related complaints are filed only after the termination of employment. The six-month wage recovery period severely disadvantages employees who are shortchanged over long periods of time. Most objectionable is the barrier that it presents to the recovery (as deemed wages) of fees and payments illegally exacted from migrant workers before they are admitted to Canada.

Arguments are mounted in defence of the six-month wage recovery period, however. It lessens the room for evidentiary difficulties of the kind typical of stale claims, and

discourages complainants from allowing a large liability to build up from a payroll error. Lengthening the wage recovery period also has a dramatic practical effect on the need for record retention even if the ESA requirement of retention for two years is left unchanged, because wage claims may include vacation pay earned in prior years.

The Project Committee did not come to agreement on any change to the wage recovery period, except in relation to payments illegally collected from an employee in contravention of section 10. With regard to these payments, the recommendation is that they be recoverable as deemed wages if they were paid not more than two years before the complaint of the section 10 contravention is filed. If the contravention comes to light through an investigation not originating with a complaint, the two years would run from the time when the Director of Employment Standards first informed the employer or other person alleged to have contravened section 10 of the investigation.

There is no majority recommendation to change the wage recovery period in cases other than section 10 contraventions. A minority view is that that the wage recovery period should be extended to 12 months before the earlier of the date of a complaint or the termination of employment. If the determination of a wage contravention flowed from an investigation without a complaint having been filed, the 12 months would run from the date on which the employer was first informed of the investigation.

Administrative penalties

Mandatory penalties ranging from $500 to $10,000 are assessed whenever a contravention of the ESA is determined to have occurred. The replacement of discretionary penalties with a system of mandatory penalties coincided with the shift towards a mediation-adjudication model for enforcement of the ESA. By making a surcharge on non-compliance a certainty, mandatory penalties were intended to encourage voluntary participation in mediated settlements by employers who might otherwise have little reason to do so.

Mandatory penalties can nevertheless operate unfairly when a contravention is inadvertent or results from a misunderstanding of what the ESA and its regulations require, instead of wilful non-compliance. The Project Committee perceived the need for an effective deterrent, but a majority of its members believe that some degree of discretion over administrative penalties should be returned to the Director. The purpose would be to make wilful or negligent non-compliance with ESA requirements the target, rather than indiscriminate penalization of all contraventions regardless of how they arise.

In the view of the majority of members, criteria for the exercise of the discretion to waive an administrative penalty should include having a rational basis for contesting a complaint in good faith, such as an arguable interpretation of a provision or a genuine factual dispute. Other criteria should be developed by the Ministry of Labour through stakeholder consultation, and the body of criteria should be placed in the ESA.

A minority view is that the system of mandatory penalties should be left in place until a broad consensus on the purposes of administrative penalties is reached through a consultative process conducted by the Ministry of Labour.

Although divided on the issue of whether the imposition of administrative penalties should be mandatory or partly discretionary, the Project Committee agreed that the amount of a penalty should depend on the gravity of the contravention as well as on the number of previous contraventions of the same provision, and the report recommends this.

Director's role in appeals to Employment Standards Tribunal

General administrative law principles concerning the standing of statutory decision-makers to be heard in appeals from their own decisions are fairly restrictive. The leading decision on the role of the Director of Employment Standards in appeals to the Employment Standards Tribunal states that the Director must remain a "statutorily neutral party," and avoid crossing the line into advocacy. As respondents to appeals of a determination are often absent or unrepresented, however, the Tribunal has also held that the Director's participation in appeals is essential to providing the Tribunal with a full and balanced picture of the facts and issues in the appeal. As a result, the Director's delegates are allowed considerable latitude in making submissions to the Tribunal, and the Supreme Court of British Columbia has upheld this practice on judicial review.

The unusually broad standing enjoyed by the Director in appeals from determinations is pragmatic, but it creates awkward situations encroaching on the boundaries of advocacy. It would be unrealistic, nevertheless, to restrict it without putting in place other means for defending a determination.

A recommendation urges policymakers to give consideration to adapting the model of workers' and employers' advisers under the workers' compensation scheme to facilitate representation of respondents before the Employment Standards Tribunal when the actual respondent will take no part in the appeal, or will otherwise be unrepresented. This might involve designating an official independent of the

Employment Standards Branch to make submissions in support of a determination, or possibly establishing a roster of part-time "respondents' advocates" who could be engaged to do so as needed. The Director and delegates would then be freed from having to fulfil a role in appeals that detracts from the perception of the Director as an impartial statutory decision-maker.

Chapter 11 – Enforcement Mechanisms Under the ESA

Chapter 11 deals with various mechanisms under the ESA for the collection of amounts payable under a determination. The most important recommendations in the chapter are mentioned below.

Bankruptcy and insolvency exception to liability of directors and officers for unpaid wages

As in most other Canadian jurisdictions, directors and officers of a corporation are personally liable in British Columbia for a limited amount of unpaid wages of employees of the corporation. (Unpaid directors of charities are exempt.) Section 96(2)(b) of the ESA provides a controversial exception that is unique to British Columbia. Directors and officers have no liability for wages if the corporation is bankrupt or the subject of a proceeding under other federal insolvency legislation, or if a bank has taken steps to realize its security on assets of the corporation under section 427 of the *Bank Act*. The exception does not apply to ordinary receiverships governed by provincial law.

The exception is regarded by labour organizations and workers' advocates as extremely prejudicial to wage-earners, as directors and officers are unlikely ever to be pursued for wage recovery in any circumstance other than insolvency of the employer. Withdrawing the protection from employees in that circumstance largely removes the basis for imposing this extraordinary liability on directors and officers for a debt of the corporation.

As would be expected, business and labour perspectives on the bankruptcy exception are sharply divided. It is argued that risk of personal liability for wages discourages prospective directors from accepting board appointments and encourages them to resign early when corporations encounter financial difficulty, thereby increasing the prospect of bankruptcy. Labour voices counter that directors and officers can obtain insurance ("D & O insurance") against statutory liabilities.

It is noted that since the exception was introduced in 2002, changes to the priority scheme in bankruptcy and the introduction of the Wage Earner Protection Program

at the federal level have significantly improved the position of wage claimants in their employer's bankruptcy.

The Project Committee is divided on the subject of the bankruptcy and insolvency exception under section 96(2)(b) of the ESA. A majority favour retention, and a minority favour repeal.

Successor employer provision

Section 97 provides for the continuity of employment relationships when the employer's business changes hands or the legal identity of the employer changes for other reasons. A corresponding provision is found in the *Labour Relations Code* and applies to the continuance of collective agreements, certifications, etc. when the employer's business is transferred. Section 97 of the ESA differs from the corresponding provision in the *Labour Relations Code* and from its counterpart provisions elsewhere in Canada in also referring to a transfer of "a substantial part of the entire assets" of a business as having the same effect on employment as a transfer of the business itself as a going concern to a new owner.

The anomalous reference in section 97 to asset transfers alone triggering employer successorship obligations remained in the current version of the ESA after the same wording was deleted from the *Labour Relations Code* provision. The wording was deleted from the *Labour Relations Code* to harmonize it with other labour legislation across Canada.

In order for section 97 to apply in a meaningful sense to a transaction, employees must move to the new employer as well as assets. In case law under both the ESA and the *Labour Relations Code*, a "business" is interpreted as denoting a combination of physical assets and human activity.

Deleting the words "or a substantial part of the entire assets of a business" in section 97 would assist in the consistent development of case law under two similar successorship provisions of the ESA and the *Labour Relations Code*. They do not add to the protection given by the section to employees who continue to work for the new employer, and they create the appearance of a distinction without a difference. Chapter 11 contains a recommendation for their repeal.

Chapter 12 – Conclusion

Chapter 12 is a general conclusion.

Chapter I. Introduction

A. Overview

The *Employment Standards Act* ("ESA") sets minimum standards for terms of employment and working conditions in British Columbia, and provides for their enforcement.[1] It regulates most aspects of employment relationships except occupational health and safety and collective bargaining, which are covered by other provincial enactments. The Act applies to the majority of employees in the province, although many are excluded from all or various parts of it through numerous exceptions set out in the Act or regulations, or because they work in federally regulated sectors such as banking or the marine industries.

It has 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. Time has demonstrated the truth of the comment by Commissioner Thompson that "The very complexity of the Act and the variety of interests affected by it mean the Legislature will not undertake a general review frequently."[2]

In the two decades since the Thompson Report, patterns of work and the nature of the workplace have evolved along the trend lines that Thompson described. Full-time permanent employment with substantial job security has continued to decline and be replaced by increasing levels of insecure temporary and part-time work. Demands for greater flexibility in working arrangements from employers and workers alike have intensified. Controversy surrounding the socioeconomic effects of these trends has likewise grown. The influence of digitalization in the workplace has 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 workplace can no longer be thought of in terms of a static physical environment. It is now a far more fluid and less easily definable concept.

The ESA remains closely tied nevertheless to the model of the static workplace as it existed before the revolution in digital and communications technology and the

1. R.S.B.C. 1996, c. 113.

2. 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) at 21.

proliferation of non-standard employment. It is time to take another critical look at the ESA.

B. About BCLI and the Employment Standards Act Reform Project

BCLI is an independent, non-partisan society dedicated to improvement of the law. BCLI seeks to achieve law reform through an inclusive, depoliticized process leading to a broadly accepted consensus on desirable change to correct deficiencies in the law.

BCLI began the Employment Standards Act Reform Project in 2014. The project involved a comprehensive review of the ESA with the aim of arriving at a set of reform recommendations to allow the Act to address contemporary and evolving circumstances, while striking a fair balance between the interests of employers and employees.

BCLI sought and obtained broad-based support for the Employment Standards Act Reform Project. The project is co-funded through the generosity of the Law Foundation of British Columbia, the Ministry of Labour (as now renamed), the Coalition of BC Businesses, the British Columbia Government and Service Employees' Union, the Hospital Employees' Union, and the Vancouver and District Labour Council. The British Columbia Federation of Labour provided invaluable assistance in the course of BCLI's efforts to secure funding for the project.

The project was carried out with the assistance of a Project Committee consisting of employment law practitioners and others with extensive knowledge of the content and application of the ESA and its regulations. The members of the Project Committee were carefully chosen to balance employee and employer interests. Their names appear at the front of this report.

BCLI staff provided research, drafting, and logistical support for the work of the Project Committee.

The project was conducted in three phases in keeping with BCLI's practice in large projects:

Research and deliberation. In this phase, the Project Committee conducted a careful review of the ESA and developed tentative recommendations for its reform in the course of 33 meetings.

Consultation phase. In this phase, BCLI published a comprehensive consultation paper and collected comment from stakeholders and the general public on the tentative recommendations and reform of the ESA generally.

Review of responses, finalization of recommendations, and issuance of report. With the benefit of responses to the consultation paper, the Project Committee revised and finalized its recommendations. The third and last phase of the project ends with the publication of this report.

C. Contemporaneous Reform Initiatives in Canada

Major initiatives for reform of employment standards and labour relations legislation took place elsewhere in Canada in the course of this project. The Changing Workplaces Review in Ontario was initiated for many of the same reasons as our project. It was completed in 2017. Numerous recommendations emerging from the review were quickly implemented, although legislation passed under the government subsequently elected in Ontario will reverse many of them.[3]

In Alberta, the *Fair and Family-friendly Workplaces Act*[4] was passed in 2017, making significant changes to employment standards there. Quebec[5] and New Brunswick[6] recently amended their employment standards legislation as well. Plans for significant changes to standards applicable to workers in the federal employment sector were announced in 2017 and 2018, and some have been enacted.[7]

The Project Committee monitored these developments elsewhere in Canada with great interest throughout the project, but steered an independent course in arriving at the recommendations contained in this report.

3. The *Making Ontario Open for Business Act, 2018*, S.O. 2018, c. 14 repeals most of the reforms enacted by the *Fair Workplaces Better Jobs Act,* 2017, S.O. 2017, c. 2. The 2017 Act partly reflected the results of the Changing Workplaces Review, but in some areas exceeded them.

4. S.A. 2017, c. 9.

5. See S.Q. 2018, c. 21.

6. See S.N.B. 2018, c. 14 and S.N.B. 2016, c. 20.

7. See *Building A Strong Middle Class: #Budget2017*, 22 March 2017, online: http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf at 63; Equality + Growth: A Strong Middle Class, online: https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf at 46 and 200. See also S.C. 2017, c. 20, ss. 259-269 and S.C. 2017, c. 33, ss. 195-216, amending the *Canada Labour Code*.

D. The Consultation Paper

BCLI published the *Consultation Paper on the Employment Standards Act* in mid-June 2018. It contained 78 tentative recommendations for reform of the ESA, accompanied by extensive background information and a detailed executive summary. The current text of the Act was included in an appendix. The consultation paper was freely available to the public from the BCLI website, and its release was publicized in the media. An online survey platform was also available to facilitate response by the general public. Users of the survey could indicate their agreement or disagreement with the tentative recommendations and provide free comment.

The consultation paper attracted a substantial response. There were 710 individual and organizational responses via the online survey. Twenty-six written submissions were received in addition to e-mail correspondence on one or more issues covered in the paper. The submissions and comments were carefully considered in the course of revising and finalizing the recommendations in this report.

E. A Word About the Scope of the Project

The focus of the Employment Standards Act Reform Project was the Act itself. BCLI is an organization dedicated to the modernization and improvement of law, and normally does not take positions on the allocation of fiscal resources or matters of public administration.

Accordingly, this report does not directly address the budget of the Employment Standards Branch, nor staffing levels and training of Branch personnel, which are matters of serious concern to critics of the current Act and its administration. Nevertheless, the Project Committee has not held back in this report from recommending legislative changes that its members see as necessary or appropriate for the improvement of the Act and its application merely because those changes may have fiscal or operational implications.

F. Contents and Structure of the Report

The report has 11 chapters and an executive summary. Chapter 1 is a general introduction stating why the Employment Standards Act Reform Project was undertaken and how it was carried out. Chapter 2 entitled "Overview of the Employment Standards Act" contains a brief description of the legislative history of the ESA, its scope and internal structure, and how it is administered. Chapter 3 focuses on the application of the Act, i.e. to whom it applies and what aspects of employment law it covers. Chapter 3 also explains the relationship between the ESA and collective agreements.

Chapters 4 to 8 each deal with a different aspect of employment regulated by the ESA. Chapter 9 deals with special protection for vulnerable classes of employees. Chapter 10 deals with enforcement procedures, while Chapter 11 concerns various statutory mechanisms available to the Director of Employment Standards to collect unpaid wages on behalf of employees. Chapter 12 is a general conclusion.

Recommendations for reform of the Act appear in Chapters 3 to 11 in italics following the portions of text relating to them. They are also listed together at the end of the report. The current version of the ESA appears in an appendix.

Chapter 2. Overview of the Employment Standards Act

A. Origins of the Present Act

The ESA originated in the 1979 British Columbia statute revision as an amalgamation of several Acts that each dealt with a discrete subject related to employment, such as wage payment, annual vacation, statutory holidays, child labour, maternity leave, and the minimum wage.[8] The amalgamated Act in the 1979 statute revision was replaced in 1980 with a new Act that bore a closer resemblance to the present ESA in its structure and content.[9]

The present ESA dates from 1995.[10] It implemented some, but not all, of the recommendations in the report of the Thompson Commission submitted the previous year. A series of amendments to the ESA in 2002-2004 made significant changes, some of which have remained sources of controversy in British Columbia's labour relations climate.

In 2010-2011 the provincial government engaged in consultations on modernization of employment standards with groups and organizations representing employers and employees, and some individual experts.[11] The minimum wage was raised following this process, but the 2010-2011 consultations did not lead to other significant changes to the ESA.

8. R.S.B.C. 1979, c. 107. The separate Acts that were amalgamated in the 1979 were the *Control of Employment of Children Act*, R.S.B.C. 1960, c. 75; *Minimum Wage Act*, R.S.B.C. 1960, c. 230; *Hours of Work Act*, R.S.B.C. 1960, c. 182; *Payment of Wages Act*, S.B.C. 1962, c. 45; *Annual and General Holidays Act*, R.S.B.C. 1960, c. 11; *Master and Servant Act*, R.S.B.C. 1960, c. 234; *Deceived Workmen Act*, R.S.B.C. 1960, c. 96; *Truck Act*, R.S.B.C. 1960, c. 388; *Maternity Protection Act*, 1966, S.B.C. 1966, c. 25.

9. S.B.C. 1980, c. 10.

10. S.B.C. 1995, c. 38.

11. See *Summary Report on Employment Standards Stakeholder Engagement Process* (Victoria: Ministry of Labour, Citizens' Services and Open Government, 2011).

B. Purposes of the ESA

Section 2 of the ESA speaks to the purposes of the Act:

> **2** The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.

Section 2 was included in the 1995 ESA on the recommendation of the Thompson Commission to assist stakeholders to understand the Act and to guide its interpretation.[12] The commissioner's report states that his recommendations were intended to contribute to the achievement of the purposes listed in the section.[13]

The Supreme Court of Canada has described the general purpose of employment standards legislation and the proper approach to its interpretation in these terms:

> The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards … The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers… Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.[14]

12. *Supra*, note 2 at 28.

13. *Ibid.*, at 29.

14. *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986 at 1003, referring to the Ontario *Employment Standards Act*, R.S.O. 1980, c. 137.

The call by the Supreme Court for broad, purposive interpretation of employment standards legislation, rather than a narrow and technical reading, comports generally with the purposes listed in section 2.

C. Internal Organization of the ESA

The ESA has 138 sections in all and is divided into 15 parts, as follows:

Part 1 – Introductory Provisions
Part 2 – Hiring Employees
Part 3 – Wages, Special Clothing and Records
Part 4 – Hours of Work and Overtime
Part 5 – Statutory Holidays
Part 6 – Leaves and Jury Duty
Part 7 – Annual Vacation
Part 8 – Termination of Employment
Part 9 – Variances
Part 10 – Complaints, Investigations and Determinations
Part 11 – Enforcement
Part 12 – Employment Standards Tribunal
Part 13 – Appeals
Part 14 – General Provisions
Part 15 – Transitional and Consequential Provisions

The ESA is self-contained in the sense that the rights it confers may only be enforced through the procedures contained in the Act itself. Contraventions of the ESA in themselves do not give an employee a right to sue the employer in a civil court.[15]

D. Application of the ESA

1. The ESA Applies to "Employees"

(a) Key definitions

Three definitions in the ESA are key to understanding its scope. These are the definitions of "employee," "employer," and "work."

"Employee" and "employer" have the following definitions in the ESA:

15. *Macaraeg v. E Care Contact Centers Ltd.* (2008), 77 B.C.L.R. (4th) 205 (C.A.). If a provision of the ESA is expressly incorporated into a contract of employment, however, the employee may sue in the event of non-compliance by the employer as for a breach of a term of the contract.

"employee" includes

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

(c) a person being trained by an employer for the employer's business,

(d) a person on leave from an employer, and

(e) a person who has a right of recall;

"employer" includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee;[16]

"Work" is defined as follows:

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere; [17]

The ESA definitions of "employee" and "employer" extend to persons who might not have this status under the common law relating to employment.[18] For example, trainees who have not yet been formally hired, and a past employee who remains entitled to unpaid wages, are employees for the purposes of the ESA even though they would not be considered employees at common law. Common law tests for the existence of an employment relationship are still relevant in certain circumstances, particularly in determining whether someone is an employee or an independent contractor. Who is and who is not an employee under the ESA depends principally on the three statutory

16. *Supra,* note 1, s. 1(1) ("employee," "employer").

17. *Ibid.*, s. 1(1) ("work").

18. *Re Project Headstart Marketing Ltd.* (27 April 1998) BCEST #D164/98; *Re McPhee* (19 April 1997) BCEST #D183/97.

definitions above, however. To the extent that common law tests remain relevant, they are subordinate to the statutory definitions.[19]

(b) Basic principles of coverage under the ESA

The ESA applies to all "employees," except those excluded from all or part of the ESA by its own terms or by a regulation.[20]

Numerous court and tribunal decisions have held that the terms "employer" and "employee" in the ESA must be applied broadly, in light of the purposes of the Act, so as to extend to a wide range of circumstances.[21]

(c) Constitutional limitations

The applicability of the ESA is limited to workplaces within provincial legislative jurisdiction. For constitutional reasons, the ESA does not apply to employees of the federal government and those employed in federally regulated sectors, such as banking, aviation, telecommunications, and shipping.

The mere fact that an employee performs some work outside British Columbia does not make the ESA inapplicable, however. The ESA will apply to an employee performing work outside British Columbia if the employment relationship has a sufficient connection with British Columbia and the employer's business or enterprise is not under federal jurisdiction.[22] If there are extraprovincial aspects to the employment in

19. *Re Chahal* (21 November 2014), BCEST #D109/14 at paras. 50-58, aff'd (7 January 2015), BCEST #RD005/15; *Re Canada Rockies International Investment Group Ltd.* (23 December 2014), BCEST #D133/14; *Re Sin* (23 February 1996) BCEST #D015/96.

20. *Supra*, note 1, s. 3(1).

21. See cases cited in notes 14 and 15, *supra*, and *Re Trigg* (6 February 2003) BCEST #D040/03; *Re J.F. Ventures Ltd.* (30 August 2005) BCEST #D131/05, at paras. 37-39. The presence of the word "includes" in these definitions implies that they are not exhaustive: *Fenton v. British Columbia (Forensic Psychiatric Services Commission)* (1991), 56 B.C.L.R. (2d) 170 (C.A.).

22. *British Airways Board v. Workers Compensation Board* (1985), 61 B.C.L.R. 1 at 21 (C.A.), aff'd (1985), 63 B.C.L.R. xxxvi (S.C.C.); *Re Can-Achieve Consultants Ltd.* (30 October 1997) BCEST D463/97; *Re Xinex Networks Inc.* (29 December 1998) BCEST D575/98. In *Re G.A. Borstad Associates Ltd.* (9 December 1996), BCEST D339/96, a researcher working approximately 20 per cent of the time outside British Columbia was able to claim overtime under ESA. Similarly, in *Re Finnie* (13 December 1996) BCEST D363/96 the ESA was held to apply to an employee hired in British Columbia and doing 20 per cent of his work outside the province). Where a seasonal worker began and finished employment in British Columbia and both he and the employer were resident in British Columbia, there was a sufficient connection between the employment and the province for

question, the test of sufficient connection will be met if performance of the employment contract involves a "real presence" in British Columbia.[23]

Relevant factors in determining if there is a real presence in British Columbia are the employee's residence and usual place of employment, whether the employee performs work inside and outside the province, and the degree of connection between the employment in question and other jurisdictions.[24]

If the performance of the employee's contract of employment takes place entirely outside British Columbia, there is insufficient connection with the province and it is immaterial that the employee may have been hired and have undergone some training here.[25]

(d) Non-application to independent contractors

The ESA does not apply to independent contractors, or in other words to persons engaged in business on their own account. Sometimes it is difficult to determine whether an individual is an employee or an independent contractor. The nature of a working arrangement may also evolve over the course of time, so that an arrangement in which an independent contractor is providing services to a customer may eventually transform into an employment relationship.[26]

Whether a worker is an employee or an independent contractor does not turn on any single conclusive test, but on the characteristics of an entire working relationship.[27] The degree of control a putative employer has over a worker is always a factor in determining whether the worker is an employee or an independent contractor.[28] The greater the degree of control over a worker and how the work is performed, the more likely it is that the worker will be found to be an employee. Among other relevant factors in determining employee or independent contractor status is whether the worker uses tools supplied by the putative employer or the worker's own tools, whether the worker hires helpers independently and delegates work to them, the

the ESA to apply, despite the fact that the employee worked in Alberta for most of the season: *Re Selkirk Paving Ltd.* (4 April 2002) BCEST D110/02.

23. *Re Can-Achieve Consultants Ltd.*, *supra*, note 22 at 11.

24. *Re Xinex Networks Inc.*, *supra*, note 22 at 3.

25. *Re Can-Achieve Consultants Ltd.*, *supra*, note 22.

26. *Re Vantage Equipment Co.* (6 December 2005) BCEST #RD187/05 at 4.

27. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983, at para. 46.

28. *Ibid.*, at para. 47.

degree of financial risk assumed by the worker, the degree of responsibility over investment and management the worker has, and whether the worker has the opportunity for profit.[29]

Another relevant factor is whether a worker is free to subdelegate the performance of work to others without the consent of the putative employer. If so, it is an indication that the putative employer does not control how the work is performed, which points away from the existence of an employment relationship and towards independent contractor status.[30]

(e) Exclusion or partial exclusion by regulation

Part 7 of the *Employment Standards Regulation*[31] excludes many classes of employees from the application of the ESA or portions of it. For the most part, the exclusions are in reference to an occupational category or a particular form of work, rather than being based on the nature of the employee's position or salary level. There are some exceptions, such as the exclusion of managers from the general standards relating to hours of work and statutory holidays.[32]

Members of the following professions and other occupational groups are excluded entirely from the ESA when they are carrying on the occupation in question: architects, chartered accountants and articling students (other than honorary members of the Institute of Chartered Accountants), lawyers and articling students, chiropractors, dentists, professional engineers and engineers in training, licensed insurance agents or adjusters, land surveyors and articled pupils, physicians, naturopaths, optometrists, podiatrists, licensed real estate agents, persons licensed under s. 35 of the *Securities Act*,[33] veterinarians, and professional foresters.[34]

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29. *Ibid.* Recently the Supreme Court narrowed the principal indicia of an employment relationship to *control* over the worker and *dependency* of the worker on the putative employer: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, at para. 28. The Supreme Court did so in ruling on the requirements of status as an employee for the purposes of human rights legislation, a context different from that of employment standards, but not totally unrelated.

30. *Re Welch* (19 October 2005) BCEST #D161/05.

31. B.C. Reg. 396/95, as amended. Regulation-making powers are found in s. 127 of the ESA. Specific authority to make exclusionary regulations is contained in s. 127(2)(a) and (b).

32. For example, s. 36 of the regulation provides that Part 5 of the ESA does not apply to managers (as defined in s. 1(1) of the regulation). Part 5 of the ESA deals with statutory holiday pay.

33. R. S.B.C. 1996, c. 418.

34. *Supra*, note 31, s. 31.

Other employees excluded entirely from coverage under the ESA are: secondary school students hired to work at their schools or engaged in a work experience program through their schools, "sitters" caring for children or adults, persons receiving employment insurance benefits or various provincial social assistance benefits or youth employment training, and persons who are engaged in certain job creation, training, or work experience programs.[35]

The ESA is *partially* inapplicable to many categories of employees and forms of work. These partial exclusions are primarily in relation to hours of work and overtime, statutory holiday pay, and the frequency and manner of wage payment. Some categories of employees are excluded from the minimum wage requirement.[36] In some cases the regulation substitutes special standards for a specific category of employee or form of work that differ from the general ones provided in the Act and other parts of the regulation.[37]

The partial exclusions of farm workers and fishers are notable for their breadth. Farm workers are excluded from the hours of work and overtime provisions (Part 4) and statutory holiday pay provisions (Part 5) of the ESA, apart from the general prohibition in section 39 of the ESA on excessive hours of work.[38] Fishers are excluded from Parts 4 (Hours of Work and Overtime) and 5 (Statutory Holidays) as well. The general minimum wage requirement is inapplicable to them, as are Parts 7 (annual vacation) and 8 (vacation pay) of the ESA.

(f) Variances

The ESA provides a means by which its normal effect may be varied with respect to a particular workplace with the concurrence of the employer and a majority of the employees affected. An employer and any employees of that employer may make a joint application to the Director of Employment Standards under section 72 of the ESA to

35. *Ibid.*, s. 32.

36. Section 16 of the ESA, which imposes the general minimum wage requirement, does not apply to fishers and commission salespersons paid entirely or partly by commission who are employed to sell heavy industrial or agricultural equipment and sailing or motor vessels: see ss. 37 and 37.14(2) of the *Employment Standards Regulation*, *supra*, note 31.

37. For example, s. 37.3 of the *Employment Standards Regulation*, *ibid.*, makes ss. 35, 40 and 42(2) of the ESA inapplicable to long haul and short haul truck drivers and substitutes overtime pay requirements for these categories of employees that are different from the general ones. Section 34.2(4) imposes a special overtime pay regime for livestock brand inspectors. Section 37.9 substitutes special hours of work, overtime, statutory holiday pay regimes for silviculture workers, plus a separate entitlement in lieu of vacation pay.

38. *Ibid.* s. 34.1.

vary the effect with respect to them of one or more of the following features of the ESA:

- a period of time specified in the definition of "temporary layoff";[39]
- section 17(1), which specifies paydays;
- section 25 (special clothing);
- section 33 (split shifts);
- section 34 (minimum daily hours);
- section 35 (maximum hours of work);
- section 36 (hours free from work);
- section 40 (overtime);
- a period specified in section 37(1) (number of weeks that may be covered by an agreement for averaging hours of work);
- section 64 (notice and termination pay requirements for group terminations).[40]

The Director is empowered to vary a time period or requirement listed in section 72 if satisfied that a majority of the affected employees are aware of the effect of the proposed variance and approve the application for it, and that the variance is not inconsistent with the purposes of the ESA.[41] In the case of an application to vary the requirements of a group termination, the Director must additionally be satisfied that the proposed variation will facilitate the preservation of the employer's operations, the orderly reduction or closure of the operations, or the short-term employment of employees for special projects.[42] The Director may attach conditions to a variance, specify an expiry date, or restrict the variance to one or more of the employees.[43]

2. ESA Provisions Are Non-Waivable

A basic principle governing the operation of the ESA is that its requirements and those in regulations made under the ESA are minimum requirements that cannot be waived.[44] Agreements to waive requirements of the ESA have no legal effect, with the

39. The period specified in the definition of "temporary layoff" in s. 1(1) is relevant to a determination under s. 63(5) as to whether the layoff has been of sufficient length to result in deemed termination.

40. Section 20 of the *Employment Standards Act Regulation*, *supra*, note 31, specifies that an application for a variance under s. 72(1) of the Act must be in the form of a letter signed by the employer and a majority of the employees who will be affected by the variance.

41. *Supra*, note 1, s. 73(1).

42. *Ibid.,* s. 73(2).

43. *Ibid.*, s. 73(4).

44. *Ibid.*, s. 4.

exception of collective agreements that touch upon matters that are also covered by certain provisions of the ESA.[45]

Hours of work averaging agreements that comply with section 37 of the ESA and variances authorized by the Director of Employment Standards are deemed not to be waivers of ESA requirements.[46]

3. The ESA and Collective Agreements

Collective agreements between employers and trade unions may supersede the application of portions of the ESA.

If a collective agreement contains any provision respecting a matter in the column on the left of the following table adapted from section 3(2) of the ESA, the part or provision of the ESA listed opposite that matter in the column on the right is inapplicable to the employees covered by the collective agreement.[47]

Matter	Part or Provision of ESA Not Applicable
hours of work or overtime	Part 4
statutory holidays	Part 5
annual vacation or vacation pay	Part 7
seniority retention, recall, termination of employment or layoff	section 63

Similarly, if a collective agreement contains any provision respecting a matter set out in one of the following sections of the ESA, that section is inapplicable to employees covered by the collective agreement:

45. *Ibid.* See the text under the heading "3. The ESA and Collective Agreements" below.

46. *Ibid.*, ss. 37(14), 73(1.1).

47. *Supra*, note 1, s. 3(2).

section 17 *[paydays]*;

section 18 (1) *[payment of wages when employer terminates]*;

section 18 (2) *[payment of wages when employee terminates]*;

section 20 *[how wages are paid]*;

section 22 *[assignment of wages]*;

section 23 *[employer's duty to make assigned payments]*;

section 24 *[how an assignment is cancelled]*;

section 25 (1) or (2) *[special clothing]*;

section 26 *[payments by employer to funds, insurers or others]*;

section 27 *[wage statements]*;

section 28 (1) *[content of payroll records]*;

section 28 (2) *[payroll record requirements]*.[48]

The phrase "any provision respecting a matter" in this context has been interpreted to mean that if there is "something of substance" in the collective agreement touching on the matter, the ESA provisions do not apply, even if that means no enforceable standard is applicable to particular employees.[49]

If a collective agreement contains no provision respecting a matter listed in the above tables, the relevant provision or Part is deemed to be incorporated into the collective agreement, except for section 37 concerning hours of work averaging agreements.[50]

Between 1995 and 2002, the ESA allowed "contracting out" of the hours of work, overtime and special clothing provisions by way of a collective agreement, but only if the corresponding terms of the collective agreement, when considered together, met or

48. *Ibid.*, s. 3(4).

49. *Doman Forest Products Ltd. (Nootka Logging) v. IWA, Local 1-85*, [1984] B.C.C.A.A.A. No. 281; *United Steelworkers of America, Local 1-424 v. Canadian Woodworks Ltd.*, [2005] B.C.C.A.A.A. No. 231.

50. *Supra*, note 1, ss. 3(3), (5).

exceeded the requirements of those ESA provisions.[51] This restriction on contracting out of the ESA in a unionized workplace is no longer present. The terms of a collective agreement will govern, regardless of whether they are more or less favourable to employees or as comprehensive as the ESA provisions they supersede.

Collective agreements supersede ESA provisions in another respect. The Parts of the ESA concerning complaints, enforcement, and appeals (Parts 10, 11 and 13) are inapplicable to the enforcement of several provisions of the ESA insofar as employees covered by a collective agreement are concerned. The ESA provisions that unionized workers subject to a collective agreement may not enforce by resorting to Parts 10, 11, and 13 of the ESA are:

- section 9 (child employment);
- section 10 (prohibition on fee for hiring or providing job search information);
- section 16 (minimum wage);
- section 21 (deductions);
- sections 64 and 65 (group terminations and exceptions);
- section 67 (notice of termination);
- section 68 (rules concerning payments on termination);
- all of Part 6 (leaves and jury duty).

Employees covered by a collective agreement are limited to seeking redress through the grievance procedure under their collective agreement in disputes relating to these provisions, or that relate to any portions of the ESA that are deemed to be incorporated in their collective agreement.[52]

4. Non-Application to Claims for Wrongful Dismissal

An employer is entitled to terminate an employee for any reason on reasonable notice. The ESA does not interfere with this common law principle, except that Part 8 of the ESA provides minimum entitlements with respect to notice of termination and payments based on length of service, and allows for reinstatement of an employee in very limited circumstances.

If an employer has terminated an employee without just cause in law, and has not complied with the minimum notice and pay requirements in Part 8, the employee

51. See R.S.B.C. 1996, c. 113 , ss. 43(1), (2) as enacted, prior to repeal by S.B.C. 2002, c. 42, s. 22, eff. 30 May 2002. The "meets or exceeds" formula was recommended in the 1993 Interim Report of the Thompson Commission.

52. *Supra*, note 1, s. 3(7).

could file a complaint with the Director of Employment Standards based on the breach of the ESA. Under such a complaint, the employee is only able to recover the amounts which the ESA requires to be paid on termination, including wages earned and compensation for length of service, plus interest.[53]

Reinstatement may be ordered only if the termination amounted to retaliation prohibited by section 83(1), or is related to a contravention of section 8 concerning misrepresentations made in hiring, or of Part 6 concerning leave entitlements.[54]

Beyond the minimum notice and pay requirements of Part 8 and the theoretical possibility of reinstatement in the circumstances mentioned, the ESA does not provide a remedy for what is known as wrongful (or "unjust") dismissal, namely termination of employment without just cause in law and without reasonable notice.

What will amount to just cause for termination of an employee is governed by common law. Claims made against employers for wrongful dismissal are heard and decided in the civil courts.

In a successful civil action for wrongful dismissal, an employee is compensated by being awarded damages equivalent to what the employee would have earned if the employee had been given reasonable notice in the circumstances. Reasonable notice as determined at common law with respect to the specific circumstances of the employee's case may be considerably longer than the minimum notice periods under the ESA. For this reason, wrongful dismissal actions often result in awards of damages greater than the minimum entitlements on termination under the ESA.

E. Administration and Enforcement of the ESA

1. General

Only a very brief summary of the administration and enforcement provisions of the ESA appears here. Chapter 10 contains a much more detailed description of the procedural and enforcement framework of the Act.

2. Director of Employment Standards

The overall administration of the ESA is in the hands of the Director of Employment Standards ("the Director"), an official in the Ministry of Labour who heads the

53. *Re Stark* (17 December 1996) BCEST #D367/96

54. *Supra*, note 1, s. 79(2).

Employment Standards Branch. The ESA gives the Director numerous duties and powers, any of which may be delegated to another person.[55] In practice, most of the duties and powers of the Director are exercised on a day-to-day basis by delegates serving in the Employment Standards Branch.

3. Employment Standards Branch

Staff in the Employment Standards Branch receive and review complaints of ESA violations, conduct investigations, mediations and hearings, make determinations respecting complaints, and enforce the determinations.

The Branch is headquartered in Victoria. Regional offices of the Branch are located in Richmond (Lower Mainland), Langley (Fraser Valley), Kelowna (Interior), Prince George (Northern), and Victoria (Vancouver Island). There are additional offices in Nanaimo, Nelson, Dawson Creek, and Terrace.

4. Complaints and Enforcement of Standards

Enforcement of the ESA is complaint-based. The Director is empowered to conduct an investigation without a complaint having been made, but this step is unusual.[56] The process is initiated by submission of a written complaint of a contravention to the Employment Standards Branch. A complaint may be filed by an employee, a former employee, or other person.[57]

In most cases, an employee must attempt to resolve a dispute with an employer using a Self-Help Kit created by the Branch before filing a complaint. Mandatory use of the Self-Help Kit is a controversial policy-based requirement. It is not a requirement of the ESA itself, although the ESA allows the Director to decline to accept or to proceed with a complaint if an employee has not taken prescribed steps to resolve a dispute before filing a formal complaint. There are exceptions to mandatory use of the Self-Help Kit as a prerequisite to filing a complaint. The exceptions are listed in Chapter 10.

A complaint by a former employee must be filed within six months after the end of employment.[58] A current employee does not face that time limit, but if the complaint relates to false representations made in hiring, charging a fee from a person seeking

55. *Ibid.*, s. 117(1).

56. *Ibid.*, s. 76(2).

57. *Ibid.*, s. 74(1).

58. *Ibid.*, s. 74(3).

employment, or certain prohibited payments made by an employment agency or farm labour contractor, it must be filed within six months of the date of the alleged contravention.[59]

The maximum amount of unpaid wages that is recoverable under the ESA is limited to wages payable within six months before the date of the complaint, or the termination of employment, whichever is earlier.[60]

After a complaint is received, Part 10 of the ESA calls for a procedure starting with acceptance and review of the complaint, which may be followed by an investigation.[61] The investigation may be followed by efforts directed at settling the matter investigated.[62] The procedure culminates either in a settlement agreement, a determination by the Director or a delegate of the Director that a contravention has occurred, or dismissal of the complaint.[63] This procedure continues to be used in some cases.

In practice, however, the majority of complaints are referred to an "education, mediation and adjudication stream." Under this process, Branch officials attempt initially to resolve a complaint informally by contacting the parties. If this does not resolve the dispute, the complaint is referred to mediation conducted by a Branch official. If mediation is unsuccessful, an adjudication by a delegate of the Director takes place. The decision made in the adjudication is treated like a determination made following an investigation.

If a contravention is found, a monetary administrative penalty is assessed against the employer in addition to any amounts found owing to an employee.[64] The administrative penalty is mandatory. Its amount is set by regulation, and escalates for second and third contraventions of the same provision within a three-year period.[65]

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59. *Ibid.*, s. 74(4).

60. *Ibid.*, s. 80(1)(a). If a determination is made in the course of an investigation that did not originate with a complaint, the maximum amount that an employer may be ordered to pay is equal to the amount of wages payable during the six months before the employer was informed of the investigation: s. 80(1)(b).

61. *Ibid.*, s. 76(1), (2).

62. *Ibid.*, s. 78(1).

63. *Ibid.*, ss. 78, 79(1)-(7), 79(8).

64. *Ibid.*, s. 98(1), (1.1).

65. *Employment Standards Regulation*, *supra*, note 31, s. 29(1).

A determination or dismissal of a complaint may be appealed to the Employment Standards Tribunal, which may confirm, vary, or cancel the determination or refer the matter back to the Director for redetermination.[66] The Employment Standards Tribunal also has the power to reconsider its own decisions.[67] The power of reconsideration is exercised with restraint and only in exceptional cases.

The Director may file a determination, settlement agreement, or Tribunal order in a registry of the British Columbia Supreme Court. It then becomes enforceable like a judgment of the court.[68]

66. *Supra*, note 1, ss. 112(1), 115(1).

67. *Ibid.*, s. 116(1).

68. *Ibid.*, s. 91.

Chapter 3. Scope of the ESA

A. The Changing Nature of Work

As noted in Chapter 2, the ESA extends the meaning of "employee" to bring classes of persons within its scope who would not necessarily be considered employees under common law. In particular, the definition of "employee" in section 1(1) of the ESA includes former employees (even deceased ones) who are still owed unpaid wages. It includes trainees not yet formally hired, people whom an employer allows to perform work normally done by employees without being officially added to an employer's workforce, and persons who have a right to be recalled by an employer ahead of new hires.

An employment relationship, present or past, is still a requirement for the ESA to apply. An employee is integrated into the business or enterprise of the employer in a relationship of control and subordination. Independent contractors, on the other hand, are self-employed persons carrying on business for their own account, whether as individual workers or as employers in their own right.[69]

Today's workplace is often a continuum of working arrangements with full-time employees hired for indefinite terms being at one extreme and independent contractors at the other.[70] Between these extremes, there are working arrangements involving varying degrees of worker autonomy, some of which are within the scope of the ESA, and others may be outside it.

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69. Regarding the distinction between an employee and an independent contractor, the Supreme Court has stated that the central question is always whether the worker is carrying on business for the worker's own account. Other relevant factors are whether the worker supplies his or her own equipment, hires assistants, the degree of responsibility for financial risk and management assumed by the worker, and the opportunity for profit: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*, note 27 at para. 47. In characterizing the test of status as an employee for the purposes of human rights legislation, a context different from that of employment standards but not totally unrelated, the Supreme Court narrowed the principal indicia of an employment relationship to *control* over the worker and *dependency* of the worker on the putative employer, with the extent to which each of these factors illuminate the relationship between the "employer" and worker counting for more than particular factual features of the relationship: see *McCormick v. Fasken Martineau DuMoulin LLP*, *supra*, note 29 at para. 28.

70. *Marbry v. Avrecan International Inc.*, 1999 BCCA 172, 67 B.C.L.R. (3d) 102 at para. 9.

Much of employment and labour relations law, as well as much social and economic policy, has been based on a *standard model* of employment. The standard model consists of full-time work for a single employer for an indefinite period, with various protections or benefits conferred by legislation, or a combination of legislation and a collective agreement.[71] This standard model has become less prevalent throughout the industrialized world in recent decades, while working arrangements that deviate from that model ("non-standard employment") have become increasingly common.

Non-standard employment is usually understood to include part-time work with or without regular hours, temporary or term employment, seasonal work, "casual" or on-call employment without a fixed schedule, work obtained through a temporary help agency, and self-employment as an individual worker (own-account self-employment).[72] Arrangements in which workers are notionally designated as independent contractors, though subjected to operational control like employees, have also proliferated.

The shift away from full-time, permanent employment is marked. Non-standard work represented 56 per cent of employment growth in the OECD countries between 1995 and 2013.[73] It represented a third of total employment in the OECD countries in 2013.[74] In Canada, part-time employment accounted for 68.8 per cent of the increase in overall employment in 2016.[75] As of March 2018, part-time employment

71. Regarding this generic definition of the standard model of employment, see Christoph F. Büchtemann and Sigrid Quack, "Bridges" or "traps"? Non-standard employment in the Federal Republic of Germany" in Gerry and Janine Rodgers, eds., *Precarious jobs in Labour Market Regulation* (Geneva, ILO, 1989) at 109; Judy Fudge, "The New Workplace: surveying the Landscape" (2009) 33 Man. L.J. 131 at 132; OECD: *In It Together: Why Less Inequality Benefits All* (Paris: OECD Publishing, 2015), online: http://dx.doi.org/10.1787/9789264235120-en at 138. The authors of a recent SSHRC-funded study of the urban workforce in the Greater Toronto and Hamilton area similarly defined a "standard employment relationship" for purposes of statistical comparison as being employment with one employer for an indefinite period expected to last more than 12 months, involving at least 30 hours of work per week, with some benefits provided beyond a basic wage: Wayne Lewchuk et al., *The Precarity Penalty* (Toronto and Hamilton: PEPSO Research Group, 2015) at 24.

72. C. Michael Mitchell and John C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights* (Toronto: Ministry of Labour, 2017) at 42.

73. OECD *In It Together: Why Less Inequality Benefits All*, supra, note 71 at 146.

74. *Ibid.*, at 137.

75. Derived from data contained in Statistics Canada. *Labour Force Survey, January 2017*. (10 February 2017), online: http://www.statcan.gc.ca/daily-quotidien/170210/dq170210a-eng.htm. Statistics Canada defines "part-time" as working less than 30 hours per week for one employer.

represented approxiately 21.5 per cent of total employment in British Columbia.[76] This is the highest level of part-time employment of any province.[77]

Non-standard working arrangements are commonly, though not invariably, associated with low and unstable income, lack of job security, lack of pension and other benefits, few or no training opportunities or other pathways to full-time, permanent work.[78] They are also associated with having to hold more than one job for economic survival.[79] Households dependent on non-standard work have a higher rate of poverty, averaging 22 per cent throughout the OECD countries.[80] For these reasons, non-standard working arrangements are identified closely with what has come to be known as *precarious work*, namely work that is low-paid and insecure, typically without pension or other benefits or union representation.[81]

The increasing prevalence of non-standard work and its connection with economic precariousness heighten the importance of minimum statutory standards for the protection of unorganized workers, who cannot look to a trade union to protect their interests.

B. Non-Standard Employment and the ESA

The ESA applies to most of the generally recognized categories of non-standard employment: part-time, fixed-term temporary, seasonal, casual, and employment obtained through a temporary help agency. Not all of the entitlements under the ESA

76. Derived from data contained in Statistics Canada, *Labour Force Survey, March 2018* (6 April 2018), online: http://www.statcan.gc.ca/daily-quotidien/180406/t003a-eng.htm.

77. By comparison, part-time employment accounted for 18 per cent of total employment in Alberta, approximately 18.4 per cent in Ontario, and 17.9 per cent in Quebec.

78. OECD, *supra*, note 71 at 137-138; Morley Gunderson, "Changing Pressures Affecting the Workplace and Implications for Employment Standards and Labour Relations Legislation (Toronto; Queen's Printer, 2016) at 30; Wayne Lewchuk et al., *supra*, note 71 at 12.

79. OECD, *supra*, note 71 at 137-138.

80. *Ibid.,* at 177.

81. "Non-standard work" and "precarious work" are sometimes understood to be equivalent in meaning, because of the strong correlation between non-standard forms of work and economic precariousness. See J. Fudge, "Beyond vulnerable Workers: Towards a new Standard Employment Relationship" (2005), 12 Can. Lab. & Emp. L.J. 151 at 158. The Special Advisors to the Ontario government's Changing Workplaces Review treated the term "precarious work" as comprising low-paid full-time employment as well as insecure non-standard forms of work, as did the Law Commission of Ontario: see C. Michael Mitchell and John C. Murray, supra, note 72 at 42; Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto, 2012) at 10-11.

are available equally to all classes of employees, however. For example, part-time, seasonal, and casual workers are at a disadvantage compared to full-time employees with respect to entitlements that depend on time worked. Eligibility to benefit from particular provisions is a matter separate from that of coverage under the Act generally. Unless a particular exception under the Act or regulations applies, part-time, temporary, seasonal and casual employees are subject to the Act.

Genuine self-employment is outside the scope of the ESA. The genuinely self-employed are classified as independent contractors, whether they work as individuals without helpers of their own, or are employers in their own right. Whether this should change in any way is discussed below.

C. Independent Contractors and the ESA

The distinction between employees and independent contractors was traditionally based on the distinction between a contract of service and a contract for services. A contract of service created the relationship of master and servant, while a contract for services was one between an independent contractor and a purchaser of the contractor's services.

Today the contractual form of a work arrangement is given far less weight. The mere fact that workers are told they are independent contractors, or that an agreement recites this, is not decisive. Regardless of whether the case calls for the status of a worker to be determined under the ESA or the common law, courts and tribunals are prepared to look to the actual nature of a working arrangement to determine whether someone is an employee or independent contractor.[82]

In all cases where the issue of status as an employee versus independent contractor arises, the ultimate question is whether a worker is doing business on his or her own account in performing the work for which that worker was engaged.[83] If the answer is yes, the ESA does not protect the worker.

82. Regarding determinations of status under the ESA, see *Re Alabon Country Kennels* (8 Nov. 2005) BCEST #D172/05; reconsideration refused (31 Jan. 2006) BCEST #RD013/06; *Re Richmond Certigard Auto Ltd.* (5 Jan. 2010) BCEST #D003/10; reconsideration refused (20 Apr. 2010) BCEST #RD041/10; *Re Three Star International Services Corporation* BCEST #D333/02. Regarding cases calling for the determination to be made under common law, see *Doyle v. London Life Insurance Co.*, [1984] B.C.J. No. 1119 (QL) (S.C.); *Macdonald v. Richardson Greenshields of Canada Limited* (1985), 69 B.C.L.R. 58 (S.C.).

83. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra,* note 27 at para. 47.

Some writers have urged the abolition of the distinction between employees and independent contractors for the purposes of establishing a general floor of minimum standards across the gamut of workplace legislation. Their premise is that the exclusion of independent contractors from the scope of employment legislation is grounded in a fallacy that self-employed status in law is invariably equivalent to actual economic autonomy in the real world.[84]

In contrast to the ESA, the *Human Rights Code*[85] and the *Workers Compensation Act*,[86] extend protection under certain circumstances to independent contractors on a basis similar to that enjoyed by employees. The existence of an employment relationship is not essential to the purposes of these enactments, however. The purpose of human rights legislation is to protect against discrimination, which may occur without regard to the contractual arrangement under which people perform work, and in any setting.[87] The purpose of a workers' compensation scheme is to insulate against the physical and economic costs to individuals of workplace injury. This purpose is served by allowing independent contractors to bring themselves under the scheme voluntarily.

The purpose of the ESA, on the other hand, is to provide a floor of rights to workers who are not in a position to exert control over their working environment, or in other words, most employees. The rights conferred by the ESA relate to working arrangements characterized by a high degree of integration of individual workers into the operations of the enterprises in which they work. They deal with hours of work, overtime pay, annual vacation and vacation pay, statutory holidays and premium pay for working on a holiday, etc., and they limit the freedom of action of employers.

It is not clear how the panoply of rights of this kind under the ESA or a similar statute could be extended to true independent contractors, namely persons who are at liberty to set the price at which they are willing to sell their labour, to control their own hours of work, to decide for themselves when or if to take a vacation and for how long, and

84. See Judy Fudge, Eric Tucker, and Leah F. Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2003) 10 Can. Lab. & Emp. L.J. 193 at 229-230.

85. R.S.B.C. 1996, c. 210. The *Human Rights Code* treats agents on the same footing as employees by including a principal and agent relationship in its definition of "employment" if "a substantial part of the agent's services relate to the affairs of one principal." The status of an agent under the common law of agency will frequently be that of an independent contractor, although the degree of control and direction to which an agent may be subject may vary.

86. R.S.B.C. 1996, c. 492. The *Workers Compensation Act* refers to independent contractors as "independent operators."

87. Fudge, *supra*, note 81, at 211-212.

who have control over the manner in which they perform the work they are engaged to do. By definition, they are in a position to control these aspects of their working environment.

The Project Committee believes the distinction between employees and independent contractors cannot be ignored or abolished entirely for the purpose of legislation regulating conditions of work. The existence of an employment relationship, or at least a relationship of dependency and subordination in the performance of work, needs to be maintained for the purpose of delineating the scope of the ESA. Persons who trade for their own account are not within the class which this type of legislation is designed to benefit.[88]

Genuinely self-employed individual workers do not necessarily have equal bargaining power with their clients and may be worthy of some form of statutory protection against exploitation in certain contexts. We believe that protection for those who are actually trading on their own account should come from a different legislative scheme than one designed to protect employees. It would dilute the purpose of the ESA to extend that Act to independent contractors, and give rise to confusion in its application.

The Project Committee recommends:

1. The ESA should not be extended to apply to independent contractors.

D. Dependent Contractors and the Issue of Misclassification

A category of worker intermediate between employees and independent contractors has long been recognized in Canada.[89] Workers in this category work outside a traditional employment relationship, but their situation resembles employment in terms of duration and a high level of economic dependence on a single client. This category of worker is commonly referred to as a "dependent contractor."[90]

88. Geoffrey England and Roderick A. Wood, *Employment Law in Canada* (Markham, Ont.: LexisNexis Canada, 2005) (looseleaf) at 2-7.

89 See *Carter v. Bell & Sons (Canada) Ltd.,* [1936] O.R. 290 (C.A.).

90. *Marbry v. Avrecan International Inc.*, 1999 BCCA 172, 67 B.C.L.R. (2d) 102, at para. 38; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916; *Stewart v. Knoll North America Corp.*, 2007 BCCA 11 at para. 10; *Khan v. All-Can Express Ltd.,* 2014 BCSC 1429.

Dependent contractors do not have all the rights of employees, but one which they share with employees at common law is the right to reasonable notice of termination without just cause.[91]

The *Labour Relations Code* contains a definition of "dependent contractor":[92]

> **"dependent contractor"** means a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

Dependent contractors are included in the definition of "employee" in the *Labour Relations Code* and therefore may be included in a bargaining unit for the purpose of collective bargaining in a unionized workplace.[93]

The Thompson Commission recommended that the *Labour Relations Code* definition of "dependent contractor" be incorporated into the definition of "employee" in the ESA. This would have extended coverage under the ESA to all dependent contractors in the non-unionized workforce.[94] The reason for the recommendation was to combat the practice of labelling workers who are employees in fact and law as "contractors" to avoid requirements under various federal and provincial enactments, including the ESA. The Commissioner considered that this was objectionable from a policy standpoint, as the effect of misclassification was to "deprive employees of their rightful protections under the law."[95]

Misclassification of employees as contractors for the convenience of the employer was already widespread at the time of the Thompson Report, and time has borne out the

91. *Marbry*, *supra*, note 90. See also *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79.

92. R.S.B.C. 1996, c. 244, s. 1(1).

93. *Ibid.*, ss. 1(1) (definition of "employee"), 28.

94. *Supra*, note 2 at 33. At the time of the Thompson Report, s. 105(2) of the 1980 ESA had been amended to empower the Lieutenant Governor in Council to declare all or a portion of the Act applicable to homeworkers (persons working in their own homes) who were dependent contractors within the meaning of the *Labour Code* (as it was then entitled): see S.B.C. 1980, c. 10, s. 105(2)(d)(ii), as added by S.B.C. 1987, c. 51, s. 16. Commissioner Thompson referred to this in asserting at p. 33 of his report that the extension of ESA coverage to dependent contractors generally would not represent a sharp departure from previous policy.

95. *Supra*, note 2 at 33.

commissioner's prediction that the practice would continue.[96] If misclassification is successfully challenged through the complaint process under the ESA, the financial liabilities for the employer are potentially significant. The risk is not high enough, in the calculation of employers who engage in the practice, to outweigh the savings in labour and administrative costs that can accrue from treating their employees as if they were independent contractors, and of being able in some cases to offload a portion of the cost of doing business onto them.

By disguising employment relationships as business arrangements with contractors, an employer avoids having to pay overtime, statutory holiday and vacation pay, EI and CPP contributions, and workers' compensation assessments, at least until the strategy is successfully challenged. Accounting and other administrative expenses are reduced because deductions are not made from gross wages for income tax, EI, and CPP premiums and remitted, and workers may be required to submit invoices instead of being issued wage statements. Designating individual workers as contractors makes it easier to transfer to them the burden of certain business expenses. For example, delivery drivers may be required to use their own vehicles without allowances for fuel and other vehicle-related expenses.[97] Workers labelled as "contractors" may work alongside permanent employees, performing the same or similar work for less pay, and without the pension and other benefits that may be available to permanent staff.

In considering how to deal with the problem of misclassification, the Project Committee revisited and debated the Thompson Commission's recommendation to expressly include dependent contractors in the statutory definition of "employee," which was not implemented in the 1995 ESA.

It was noted that Quebec moved at an early point to extend the protection of employment standards legislation to a class of workers corresponding fairly closely to the category of "dependent contractor" recognized in the common law provinces and

96. *Ibid.* Recent decisions of the Employment Standards Tribunal show that misclassification of wage-earning workers as independent contractors continues to go on and is common in certain industries, notably light construction and delivery services: e.g. *Re United Specialty Products Ltd.* (23 November 2012), BCEST #RD126/12; *Re Zip Cartage* BCEST #D109/14; reconsideration refused (7 January 2015) BCEST #RD005/15. It is not concentrated exclusively in these sectors, however: see Mary Gellatly, *Still Working on the Edge: Building Decent Jobs from the Ground Up* (Toronto: Workers' Action Centre, 2015) at 18-19. See also Andres Longhurst and David Fairey, *Workers' Stories of Exploitation & Abuse* (Burnaby: BC Employment Standards Coalition, 2017) at 22-25.

97. See *Re Big Daddy's Capital Inc.* (23 March 2016) BCEST #D061/16. In this case a delivery driver, labelled as a contractor by the employer, but after investigation determined to be an employee, received no allowance for vehicle-related expenses even though earning less than minimum wage by being paid a flat piece-rate.

territories. Since 1979, the definition of "employee" in Quebec's counterpart to the ESA has included a worker who is a party to a contract under which that worker:

i. undertakes to perform specified work for a person within the scope and in accordance with the methods and means determined by that person;

ii. undertakes to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him or her; and

iii. keeps, as remuneration, the amount remaining to him or her from the sum he has received in conformity with the contract, after deducting the expenses entailed in the performance of that contract.[98]

Much more recently, the Special Advisors to the Changing Workplace Review in Ontario made a recommendation identical to the one made by the Thompson Commission, namely that employment standards legislation should treat dependent contractors as employees.[99] This was not implemented by the Ontario government, but the reform bill passed in 2017 contained an amendment expressly prohibiting the treatment of employees as non-employees, and placing the burden of proof that a person is not an employee on the employer. The provision dealing with the burden of proof is now slated for repeal under a further set of amendments, however. [100]

In his report on Part III of the *Canada Labour Code*[101] commissioned by the federal government, Arthurs proposed the recognition of a separate category of "autonomous workers" under Part III that broadly corresponds to that of "dependent contractor."[102] While rejecting a blanket inclusion of autonomous workers in coverage under Part III in the same way that Part 1 of the *Canada Labour Code* and the B.C. *Labour Relations Code* treat dependent contractors in the collective bargaining structure, Arthurs

98. *An Act Respecting Labour Standards*, C.Q.L.R., c. N-1.1, s. 1(10) (definition of "employee"), enacted as S.Q. 1979, c. 45, s. 1(10).

99. Mitchell and Murray, *supra*, note 72 at 265-269 and 272.

100. See S.O. 2017, c. 2, s. 5 adding. s. 5.1(2) to the *Employment Standards Act, 2000*, S.O. 2000, c. 41. And see S.O. 2018, c. 14, Sch. 1, s. 3, repealing s. 5.1(2) as of 1 January 2019.

101. R.S.C. 1985, c. L-2.

102. Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Human Resources and Skills Development Canada, 2006) at 64 (Recommendation 4.2). Arthurs proposed that the category of "autonomous worker" be defined by regulation as including "persons who perform services comparable to those provided by employees and under similar conditions, but whose contractual arrangements with the employer distinguish them from 'employees'": *ibid.* Arthurs referred to truck owner-operators as an example.

concluded that leaving autonomous workers outside the protection of employment standards legislation entirely ran counter to the underlying principle of all such legislation.[103] Arthurs recommended that autonomous workers be eligible for limited coverage under Part III on an industry or sectoral basis.[104]

In the U.S.A., Harris and Krueger take a stance similar to that of Arthurs concerning statutory protection for workers in contractual arrangements that cannot easily be categorized. Using the example of Uber and Lyft drivers to make their case, they propose that employment law should recognize a new class they call the "independent worker."[105] They describe the "independent worker" as someone whose work is arranged through an intermediary, but who is not subject to the intermediary's control in respect of how the work is performed. They suggest that some, but not all, of the statutory protections for employees be extended to this class of "independent workers." These would include the right to unionize, but not the hours of work provisions and overtime entitlements, because the nature of their semi-autonomous work makes it impossible for a third party to monitor their hours.[106]

The Law Commission of Ontario took a different view in its 2012 *Report on Vulnerable Workers and Precarious Work*.[107] Its report recognized that contractors largely dependent on one client present "unique challenges" of policy, because any form of regulation must be flexible enough to meet the needs of persons who voluntarily choose working arrangements other than the standard model of employment, and which allow them freedom of action to acquire additional clients.[108] The Law Commission noted that economic dependency may be a temporary or fluctuating state for those who are truly self-employed operators. Self-employed workers may be dependent on one client at one time and have multiple clients at another.[109]

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103. *Ibid*.

104. *Ibid.*

105. Seth D. Harris and Alan B. Krueger: *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, Discussion Paper 2015-10 (Washington: The Hamilton Project, Brookings Institution, 2015).

106. *Ibid.* Harris and Krueger also propose that independent workers should have access to a state pension and workers' compensation scheme, funded indirectly by the workers' clients. Presumably, every fee collected by an independent worker would include a pension contribution and workers' compensation premium.

107. Law Commission of Ontario, s*upra*, note 81.

108. *Ibid.*, at 95.

109. *Ibid.*

The Law Commission considered that the overriding concern was not the protection of dependent contractors as a class, but misclassification of employees as contractors.[110] The solution was not a definitional one of creating new classes on the continuum between employees and independent contractors, but one based on 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.[111]

The Law Commission rejected the suggestion that "employee" should be defined to include dependent contractors. It referred to the possibility that defining "employee" to include dependent contractors could actually worsen the problem of misclassification by encouraging employers already motivated to avoid statutory requirements to mislabel their workers as independent contractors.[112]

The Project Committee agrees with the Law Commission of Ontario that it would be unwise to include dependent contractors as a class in the definition of "employee." That is an inflexible approach that would sweep in persons who prefer a non-standard working arrangement over standard employment for valid personal and economic reasons.

Consultants and others with special skills often find it advantageous for tax or other reasons to serve one client exclusively, or nearly exclusively, through their own business or personal corporation.[113] Professionals commonly enter into contractual arrangements with organizations to provide their services on a basis that leaves them free to take on other clients. A standard model of employment should not be forced on parties with mutually beneficial working arrangements of this kind.

The Project Committee is also mindful of the danger noted by Law Commission of Ontario that expressly including dependent contractors in the definition of "employee" could prove more harmful than helpful. The real issue is not a need for protection of dependent contractors as a class, but the misclassification of employees as contractors. The solution to this lies in improved enforcement of existing law.

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110. *Ibid.*, at 94.

111. *Ibid.*, at 94-95.

112. *Ibid.*

113. See, for example, *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2016 BCSC 1521, varied on other grounds 2017 BCCA 129. The fact that services are provided through a personal corporation to a client on a near-exclusive basis does not prevent an individual from having the status of an employee or dependent contractor: *Bird v. Warnock Hersey Professional Services Ltd.* (1980), 25 B.C.L.R. 95 (S.C.); *Stewart v. Knoll North America Corp. supra*, note 90 at para. 10.

The Project Committee recommends:

2. The ESA should not contain a definition of "dependent contractor" or distinguish between employees and dependent contractors.

E. Vulnerable Employees

Some employees are more susceptible to exploitation and abuse than others. These are employees who have little individual bargaining power, and whose circumstances make it more difficult or risky for them to assert their statutory rights than is the case with other workers. This is what is meant when employees are referred to in this report as "vulnerable," either as individuals or as members of a class.[114]

Classes that traditionally have been considered as vulnerable in this sense and therefore requiring more statutory protection than others are domestic workers, farm workers, and working children. The ESA contains provisions relating specifically to these classes of workers. In some provinces, special protections have been extended more recently to additional classes, including migrant workers, people working in their own homes ("homeworkers"), and employees supplied by temporary help agencies.

The discussion earlier in this chapter concerning precarious work feeds into a discussion of vulnerability. Those in precarious work face a matrix of risk that discourages them from complaining of violations of employment standards.

The general trend away from the standard model of employment towards less secure forms of employment will only swell the ranks of the vulnerable sectors of the workforce. While the overarching purpose of the ESA is to set minimum standards with

114. The term "vulnerable" has been used in various senses in legal and socioeconomic literature relating to employment. For example, the Law Commission of Ontario considered vulnerability to refer to persons in precarious work who were at a greater disadvantage due to their "social location," meaning they were at a disadvantage by reason of markers such as ethnicity, gender, ability level, or immigration status: *supra*, note 81 at 10-11. The Special Advisors to the Changing Workplaces Review in Ontario rejected social location as a criterion, and used "vulnerable" to describe workers whose working conditions make it difficult to earn a decent income, and as a result are materially at risk in various ways: *supra*, note 72 at 42. The authors of *The Precarity Penalty* used the term "vulnerable" in their statistical study to denote one of four employment security categories in an Employment Precarity Index ranging from "precarious" to "secure," with "vulnerable" ranking above "precarious" and below "stable": Lewchuk et al., *supra*, note 71 at 28.

broad application, particularly vulnerable classes of employees will continue to require attention from policymakers and the legislature.

The Project Committee recommends:

3. The ESA should continue to specifically address vulnerable categories of employees.

F. Wrongful dismissal – Should There Be a General Statutory Remedy Under the ESA?

As noted in Chapter 2, employees not subject to a collective agreement who believe they have been wrongfully dismissed, and who wish to recover more compensation than the minimum statutory requirements under Part 8 of the ESA, generally must sue their employers in the civil courts.

The ESA currently provides an administrative remedy against wrongful dismissal only in narrow circumstances amounting to a contravention of section 83(1), which prohibits an employer from refusing to continue to employ someone because steps may be or have been taken under the Act to make a complaint, investigate one, lodge an appeal, or supply information. While the Director is empowered to order reinstatement and/or compensation beyond lost wages in such a case, this route to redress for employees who believe they have been unjustly dismissed is only available if the dismissal can be shown to be retaliatory conduct prohibited by section 83(1).

Some Canadian jurisdictions provide for administrative adjudication of wrongful dismissal claims, rather than requiring non-unionized workers to resort to the courts. In the federally regulated sector, Part III of the *Canada Labour Code* protects non-unionized employees with at least twelve consecutive months of continuous employment against unjust dismissal (the term for wrongful dismissal used in the *Code*), and provides a process for adjudication that can result in reinstatement as well as monetary compensation.[115] In Quebec, the provincial employment standards legislation does the same if the employee has accumulated at least two years of uninterrupted service with the same employer.[116]

115. *Supra*, note 101, ss. 240-246. The adjudication process is not available if there is another federal statutory procedure for redress that an employee may invoke: s. 242(3). It is an alternative to a civil action for wrongful dismissal, however. Section 246(1) of the *Code* provides that civil remedies of an employee are not affected by the existence of the adjudication process.

116. *Supra*, note 98, ss. 124-138.

Nova Scotia confers protection against dismissal without just cause if the employee has worked for the employer for ten years or more.[117] Employees terminated without cause may be reinstated or compensated on the order of the Director of Labour Standards, with a right of appeal to the Labour Board if dissatisfied.[118] The protection against termination without just cause is subject to various exceptions, however. Notable exceptions are that the protection does not apply if the employer has offered other reasonable employment to the employee, or if the employer's operations have been disrupted by certain circumstances beyond the employer's control. Another notable exception is that the protection is not available to persons employed in construction.[119]

In the United Kingdom, the *Employment Rights Act 1996* gives a statutory right against wrongful dismissal to persons who have been employed by the same employer for at least two years, as well as a right to apply for relief to an industrial tribunal.[120]

These statutory regimes give non-unionized employees protection against arbitrary dismissal and access to neutral adjudication that is analogous to that enjoyed by unionized employees under a collective agreement. In fact, this was stated to be the purpose of the unjust dismissal provisions in Part III of the *Canada Labour Code* when they were introduced.[121] There is an important difference nevertheless in that a non-unionized employee who has been dismissed may initiate the process leading to adjudication, while under collective agreements the employee's union has control over the decision to pursue a grievance to arbitration. In either case, however, the employer's common law right to dismiss an employee on reasonable notice is abrogated and just cause is required for dismissal.[122]

117. *Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 71(1).

118. *Ibid.*, s. 71(2), (3).

119. *Ibid.*, ss. 71(1), 72(3)(d), (h). Other exemptions may be created by regulation.

120. 1996, c. 230, ss. 94 and 111(1). If an industrial tribunal finds the complaint well-founded, the tribunal may order reinstatement, re-engagement (re-hiring in comparable employment by the same employer) or compensation: ss. 112(3), 113-115.

121. *Supra*, note 101, ss. 240-246. See *House of Commons Debates*, vol. II, 3rd Sess., 30th Parl., December 13, 1977, at 1831 (Hon. John Munro, Minister of Labour).

122. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 the Supreme Court of Canada held that the effect of ss. 240-246 of the *Canada Labour Code*, *supra*, note 101, is to abrogate the right of an employer to dismiss any employee on reasonable notice, and require just cause instead.

Several labour organizations and a number of individuals who responded to the consultation paper advocated U.K.-style protection against dismissal without just cause and administrative adjudication of wrongful dismissal claims.

The argument raised in favour of administrative adjudication is that litigation is only open to those who can afford legal representation, and low-paid and middle-income earners who believe they have been terminated without just cause or with inadequate compensation are in effect denied a remedy.[123] Reinstatement is not available as a remedy in a common law action, but it can be available under a statutory adjudication scheme.

A minority of the Project Committee members believe that the ESA should provide a statutory remedy for wrongful dismissal and an adjudicative process as an alternative to litigation.

The majority of members would contend that abrogating the common law rule that an employer may dismiss an employee on reasonable notice, or with pay in lieu of notice, would be a radical change in the legal nature of an individual employment relationship and could have serious implications in the labour market. The ability of small employers to manage the size of their payrolls in response to changing business conditions would be greatly restricted. If dismissal for cause became the only circumstance under which in which an individual employment relationship could be terminated, even with a generous amount of notice or pay in lieu, employers would be extremely hesitant to expand their workforces at any time.

It should be noted that the unjust dismissal provisions in Part III of the *Canada Labour Code* allow termination because of lack of work or the discontinuance of a function.[124] Even assuming these exceptions were adopted, a majority of the members of the Project Committee remain of the view that the ESA should not provide statutory protection against wrongful dismissal apart from contraventions of section 83(1).

Accordingly, a **majority** of the Project Committee members recommend:

4. The ESA should not supplant or supplement the common law regarding wrongful dismissal, or provide for the administrative adjudication of wrongful dismissal claims, except as now provided in relation to contraventions of section 83(1).

A **minority** of the Project Committee members recommend:

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123. Longhurst and Fairey, *supra*, note 96 at 31.

124. *Supra*, note 101, s. 242(3.1)(a).

4a. The ESA should address wrongful dismissal and provide an administrative adjudication process for wrongful dismissal claims.

G. Interaction of the ESA with Collective Agreements

1. The "Unionized Worker Exclusion"

In British Columbia, the core minimum employment standards do not form a mandatory minimum floor for collective bargaining. This feature of the ESA has come to be known as the "unionized worker exclusion," although it would be more accurate to describe it as a group of exclusions relating to collective agreements.[125]

Other Canadian jurisdictions, with the exception of New Brunswick, allow terms in collective agreements to supersede statutory employment standards only if they are at least as favourable or more favourable to employees than the minimum statutory standards.[126] New Brunswick allows a term of a collective agreement to prevail over a statutory requirement, regardless of whether the term is more or less favourable to employees, but only if the term contains a declaration that it has been agreed to in lieu of the statutory provision.[127]

125. See text in Chapter 2 under the heading "3. The ESA and Collective Agreements."

126. *Canada Labour Code*, *supra*, note 101, ss. 168(1), (1.1); *Employment Standards Act, 2000*, S.O. 2000, c. 41, ss. 5(1), 92); *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 4; *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, ss. 2-6, 2-7; *Employment Standards Code*, C.C.S.M., c. E110, ss. 39(1)(b), (2), (3), 4(1), (2); *An Act Respecting Labour Standards* (Que.) *supra*, note 98, ss. 43, 53, 55, 59.1, 63, 70, 79; *Labour Standards Code*, R.S.N.S. 1989, c. 246, ss. 39, 66B, 79; *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2; *Labour Standards Act*, R.S.N.L. 1990, c. L-2, ss. 3, 4; *Employment Standards Act,* R.S.Y. 2002, c. 72, s. 3; *Employment Standards Act*, S.N.W.T. 2007, c. 13; *Labour Standards Act*, R.S.N.W.T. (Nu) 1988, c. L-1, s. 3(1). Some of these statutes allow specific statutory provisions to be waived under a collective agreement with regulatory permission, usually from a director of employment standards or equivalent official.

127. *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 4(2).

In the U.S.,[128] U.K.,[129] and Australia,[130] with few exceptions, collective agreements or their equivalents cannot substitute terms inferior to the same statutory minimum standards as are applicable to individual employment.

A glimpse at the legislative history of the "unionized worker exclusion" now found in section 3 is necessary to understand why the ESA diverges from the norm elsewhere in not making the general minimum standards equally applicable as a floor in the unionized sector as in individual employment.

2. Origins of the "Unionized Worker Exclusion"

When the first *Employment Standards Act* was passed in 1980, it applied equally to unionized and unorganized employees, and prohibited agreements to waive a requirement of the Act.[131] There was no exception relating to collective agreements.

In 1983, a provision similar to the present section 3(2) was introduced. It made the parts of the Act dealing with hours of work and overtime, annual vacation and

128. The *Fair Labor Standards Act*, 29 U.S.C. §§ 201-219 (FLSA) covers approximately 130 million employees in the U.S. It is the federal statute setting standards regarding minimum wage, hours of work and overtime, employee and payroll records, and child labour applicable to enterprises having an annual volume of business of $500,000 or more or that engage in interstate commerce. It also covers employees of an enterprise with annual volume of business of less than $500,000 when they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity closely related and directly essential to the production of such goods, as well as some other classes of workers. By virtue of § 218(a) of the FLSA and § 541.4 of Chapter 29 of the Code of Federal Regulations, collective agreements may only equal or exceed the standards in the FLSA. They cannot waive or dilute the FLSA minimum standards. In general, when federal and state laws have similar provisions, the employer must meet the higher requirement.

129. In the U.K., agreements that exclude or limit the operation of the general standards in the *Employment Rights Act 1996*, c. 230 are void, with a few exceptions: s. 203. The only exception listed in in the Act relating specifically to collective agreements is that the parties may jointly petition for an order exempting the bargaining unit from the minimum daily wage required by s. 28 of the Act if an employee is called in to work on a particular day. The *Working Time Regulations 1998*, S.I. No. 1833, Sch. 2 made under the Act allow some hours of work requirements to be modified by a collective agreement or a workforce agreement (an agreement between an employer and all affected employees). Agreements to exclude or limit the operation of any provision of the *National Minimum Wage Act 1998*, c. 39 are void under s. 49 of that Act.

130. In Australia, an enterprise agreement or sectoral modern award that sets terms of employment and working conditions for an enterprise, group of enterprises, or industry cannot exclude the ten basic National Employment Standards under the *Fair Work Act 2009*, No. 28 (Cth), which form a floor for enterprise-specific or sectoral bargaining.

131. *Supra*, note 9, s. 2.

vacation pay, termination or layoff, and maternity leave inapplicable if a collective agreement contained any provision respecting those matters. If the collective agreement did not contain any term dealing with one of those matters, it was deemed to incorporate the part of the Act that concerned that matter. A further amendment corresponding to the present section 3(7) required employees subject to the collective agreement to seek redress for a violation of an incorporated provision of the Act through the grievance procedure in the agreement, removing the choice of pursuing a grievance or filing a complaint with the Employment Standards Branch.

The impetus behind the amendments has been said to be the 1982 decision of the B.C. Supreme Court in *Freightliner of Canada Ltd. v. CAIMAW, Local No. 14*.[132] This case held that unionized workers who had recall rights under their collective agreement were also entitled to severance pay under the ESA as it then stood.

In second reading debate on the 1983 amendments and in Committee of the Whole, the objection was raised that the amendments would remove the minimum standards of the ESA as a floor in collective bargaining and leave gaps in unexpired collective agreements where there was no immediate opportunity to negotiate terms to replace the portions of the ESA that would cease to apply.[133] The answer to this objection was that parties to a collective agreement were best situated to decide the terms of employment applicable to them. Layoff and recall practices in the forestry and fishing industries were cited as examples of terms that had been bargained for, even though they were less restrictive than the layoff provisions then in the ESA.[134]

In 1991, a change of government took place and the newly elected government was committed to repealing the "unionized worker exclusion." In 1993, Prof. Mark Thompson was appointed to review the ESA and was asked to make early recommendations on the implications of the repeal. The commissioner's Interim Report recommended that a collective agreement should be allowed to displace the application of the parts of the ESA and regulation dealing with hours of work, overtime, annual vacation, vacation pay, termination and layoff, statutory holidays and special clothing, provided that the terms in their totality were at least as favourable as those in the ESA.[135] The Interim Report noted that these recommendations were consistent with

132. (1982), 43 B.C.L.R. 152 (B.C.S.C.). See Mark Thompson, *Review of the Employment Standards Act: Interim Report* (1993) at 12.

133 Debates of the Legislative Assembly (Hansard), 1st Sess., 33rd Parl., 22 September 1983 at 1886.

134. *Ibid.*, 29 September 1983, p. 2232 and 7 October 1983, p. 2494.

135. Thompson, *supra*, note 2 at 7.

the approach taken in amendments to the *Canada Labour Code* made in the same year.[136]

The recommendations in the Interim Report of the Thompson Commission were implemented by the *Employment Standards Amendment Act, 1993*,[137] which repealed the 1983 provision on collective agreements and substituted a new one stating that the parts of the ESA dealing with hours of work and overtime, vacation and vacation pay, termination or layoff, and the regulations on general holidays would not apply if the terms of a collective agreement respecting the same matter would "meet or exceed" the minimum requirements of the relevant part of the Act or regulation when taken together.

The effect of the 1993 amendments introducing the "meets or exceeds" wording was to make any terms in a collective agreement that were less favourable than the minimum requirements of the ESA unenforceable. The "meets or exceeds" wording was carried into the new version of the ESA enacted in 1995, and appeared in provisions dealing with hours of work, overtime, special clothing, statutory holidays, annual vacation, vacation pay, termination, layoff and recall.[138]

In 2001, government changed hands again. In early 2002, the *Employment Standards Amendment Act, 2002*[139] repealed the 1993 provisions and substituted sections 3 and 4 in their present form.

The effect of the 2002 amendments was to restore the 1983 exclusion of workers covered by a collective agreement from the principal requirements of the ESA and also to broaden it, except in one respect. The present section 3(2) broadens the language of the 1983 provision by adding the provisions on statutory holidays, seniority retention, recall, and layoff to the portions of the Act that do not apply to employees whose collective agreement contains "any provision respecting" the same matter.

The one respect in which the present s. 3(2) is narrower than the 1983 version of the unionized worker exclusion is that it omits mention of maternity or parental leave. As a result, the ESA provisions on maternity and parental leave cannot be overridden by a collective agreement, although they can be supplemented.

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136. *Ibid.* See the *Canada Labour Code*, *supra*, note 101, s. 168(1.1), enacted by S.C. 1993, c. 42, s. 13.

137. S.B.C. 1993, c. 42. The amendment took effect on 1 January 1994.

138. *Supra*, note 10, ss. 43, 49, 61 and 69.

139. S.B.C. 2002, c. 42. The amendments came into force on 30 May 2002.

3. Reform, Retention or Repeal – Policy Choices

The "unionized worker exclusion" remains a very controversial feature of the ESA. It distinguishes the employment standards law of British Columbia from that of other Canadian jurisdictions, where the mandatory minimum requirements apply in collective bargaining environments as well as in non-unionized employment. In its present form under section 3, the exclusion is vigorously opposed by labour and equally vigorously defended by business.

Arguments for retention of this feature of the ESA may be summarized along these lines:

- The unionized worker exclusion recognizes the merits of collective bargaining. It gives full scope to unions and employers to negotiate working arrangements that work best for them.

- No statutory floor is necessary in a unionized workplace, because the employer and the union each have bargaining power. They should be allowed to bargain freely and make trade-offs between substandard terms in one area in exchange for superior ones in another. The few instances in which substandard collective agreements might emerge should not be allowed to detract from the benefits of untrammelled collective bargaining.

- The unionized worker exclusion clarifies the relationship between the ESA and collective agreements, and identifies when a collective agreement supersedes the standards in the Act. Under a "meets or exceeds" or "at least as favourable" test, there is constant uncertainty.

- Attempting to determine whether a group of terms in a collective agreement are as favourable or more favourable to employees than the minimum requirements of the ESA is excessively subjective. The best evidence of what workers consider to be in their interests is what is in the agreement.

- Requiring employees subject to a collective agreement to seek redress for violations of any applicable ESA provision through the grievance arbitration process avoids double remedies, parallel proceedings, and potentially inconsistent rulings.

On the opposite side, some arguments that have been raised for repeal of the unionized worker exclusion and restoration of the ESA minimum standards as a floor in unionized as well as non-unionized employment are as follows:

- It defeats the purpose of the ESA to allow the minimum standards to be diluted by contract. Extending freedom of contract to employer-employee relationship without qualification ignores the reality that the relationship is not equal.

- Trade-offs should not be allowed with respect to basic standards vital to decent working conditions.

- If workers know that collective bargaining disentitles them to the benefit of even the minimum standards under the ESA, unionization will be discouraged. The exclusion therefore slants the law in favour of the employer, especially in the negotiation of a first collective agreement.

- Making the minimum standards inapplicable in collective bargaining encourages collusion between employers and sham unions to arrive at substandard terms. This creates competitive advantages for employers who have these agreements. Competitive pressures will in turn cause general deterioration in standards.

- An individual worker should always be able to complain to the Employment Standards Branch of a contravention of the ESA. Enforcement of the Act should not be delegated to unions, and a worker who has been the victim of an ESA contravention should not be placed in the position of having to battle the union as well as the employer if the union is indifferent or unwilling to pursue the matter.

The Project Committee considered the unionized worker exclusion at length. All the above points were made in the course of discussion. Alternatives such as the New Brunswick approach were considered. Some members favour the status quo. Others favour restoration of the minimum requirements of the ESA as a floor in collective bargaining. The Project Committee did not come to any consensus regarding change to the unionized worker exclusion under section 3.

H. Exclusions from ESA Standards

Unlike variances, which are specific to a particular employer, exclusions pertain to occupational groups, industries, or depend on factors such as how an employee is remunerated or the length of time a person has been employed.

Exclusions of particular classes of employees from some or all of the body of employment standards are numerous and complex in all Canadian jurisdictions.[140] British Columbia is no exception. The exclusions from part or all of the ESA are bewildering

140. England and Wood, *supra*, note 88 at 8-92.1.

in their number and intricacy. Most, but not all, are found in Part 7 of the *Employment Standards Regulation*.[141]

Detailed review of every exclusion was not possible in the course of this project, but the Project Committee considered the subject of exclusions from a policy standpoint. As a starting point, the Project Committee attempted to determine whether an over-arching policy rationale lay behind the pattern of the existing exclusions.

No readily discernible principle explains why some occupations and job situations are excluded from the Act entirely (*e.g.*, some professions, sitters, students employed by their schools, registered investment dealers), others from specific parts of the Act (*e.g.,* managers, resident caretakers), others from parts of the Act except certain provisions (*e.g.*, fishers, farm workers, election workers), others from specific sections (*e.g.*, taxi drivers, livestock brand inspectors, loggers).

The exclusions from portions of the Act are no less uneven than the exclusions from the Act itself. Numerous classes are excluded from Part 4 (Hours of Work and Overtime) of the Act, including teachers, managers, fishing and hunting guides, train drivers, and live-in home support workers. Others such as farm workers and election workers are excluded from Part 4 of the Act except for section 39, which prohibits "excessive hours." Resident caretakers are excluded from Part 4 except for section 39 and section 36, which requires 32 consecutive hours of rest in a 7-day period.

Thus, election workers enjoy limited protection against excessive hours, but teachers, train drivers, and fishing guides do not. Resident caretakers have a right to a day off per week, but farm workers do not.

Some of the exclusions correspond to ones found in all the other provinces and territories, such as the exclusion of certain self-governing professions from much or all of the standards, and the exemption of managers from hours of work and overtime pay requirements.

Exclusion of various self-governing professions from the Act entirely under section 31 of the regulation might be explained on several bases: that the profession in question is self-governing, or because of the degree of autonomy in decision-making under which individual professionals work, or because strictly controlled hours are inconsistent with professional responsibilities when the needs of clients and patients are urgent and arise unpredictably. These reasons do not explain fully why some self-governing professions are excluded from the Act entirely (*e.g.* physicians, dentists,

141. *Supra*, note 31.

lawyers, land surveyors, veterinarians, foresters), but others are not (*e.g.* nurses, teachers).

Several common denominators underlying the exclusion of other classes of employees from Part 4 (Hours of Work and Overtime) of the Act appear to be:

(a) work involving short, intense periods of activity in remote locations where access is difficult;

(b) work involving operations that are necessarily continuous while they are being conducted, *e.g.* oil and gas well drilling, long-haul trucking;

(c) self-determination regarding hours of work that are necessarily irregular, e.g. travelling salespersons;

(d) having to be "on call" by virtue of the nature of the work, *e.g.* firefighters, police officers, night attendants, tutors employed by the Open Learning Agency;

These common denominators do not explain numerous anomalies in the catalogue of exclusions, however. For example, the exclusion of a trades instructor employed by a public training institution from the hours of work and overtime provisions is not explicable on any of the above grounds.

Work is not all the same. The nature of work differs between industries and economic sectors, and the regulatory structure needs to be sufficiently flexible to accommodate this reality. While this has always been true, the revolution in digital communications has transformed the business environment, increasing the need for responsiveness and adaptation in the workplace as never before.

While critical of Ontario's "patchwork quilt" of exclusions from basic employment standards, the Special Advisors to the Changing Workplace Review still recognized that present-day reality is incompatible with a "one size fits all" approach to the regulation of standards in the workplace:

> Simply put, for those who long for a simple world of uniformity and strict equality, such a world has not existed for some time, if ever, and does not reflect the reality of the complexity of the modern economy. In our view, an understandable preference for standards of general application should not preclude exemptions or sector specific regulation in appropriate circumstances. The caveat, however, is that there should be a transparent process in which the opinions, interests and suggestions of stakeholders are taken into account and that is designed to generate outcomes more precisely tailored to the needs and legitimate

> interests of employers and employees potentially affected. Exemptions, and specific regulations, if justified, should be focussed (not overly broad), balanced, decent and fair.[142]

The Project Committee agrees with these remarks. An entirely rigid and simplistic approach to employment standards is impractical, but this does not diminish the need to ensure that any partial or total exclusions from the Act are fully justified.

The Thompson Commission saw the lack of criteria for granting exclusions from provisions of the ESA and lack of a process for doing so as significant problems. The commissioner observed that exclusions usually came into being because of lobbying by an employer, but there was no mechanism to solicit the views of employees who would be directly affected.[143] He recommended the establishment of a process to ensure that the views of employers and affected employees would be available to Cabinet before an exclusion was made, and that exclusions have a maximum duration of five years to ensure periodic review to determine whether they continued to be justified.[144]

Exclusions from the ESA open the door wider to exploitation and abuses, especially where no alternative standards are prescribed. The Thompson Commission's report states that the commission received "ample evidence that some employers will exploit their power to the limits the law allows."[145] In the course of this project, reports have reached us as well of over-extension of exclusions under the *Employment Standards Regulation* and misclassification of non-professional and non-managerial workers who should not be treated as exempt from the regular ESA standards. In particular, the exclusion of "high technology professionals" from the hours of work and statutory holiday provisions of the ESA was mentioned in several responses to the consultation paper as being one that is routinely, but improperly, applied to employees whose job descriptions do not fit the definition of that term in the regulations.[146]

The need identified by the Thompson Commission over twenty years ago for a principled approach to granting exclusions, and a process for doing so that allows the

142. *Supra*, note 72 at 150.

143. *Supra*, note 2 at 131.

144. *Ibid.*, at 132.

145. *Ibid.*, at 104.

146. See s. 37.8(1) of the *Employment Standards Regulation*, supra, note 31 (definition of "high technology professional").

interests of both employers and employees to be taken into account, still persists.[147] Recognizing this to be the reality in Ontario as well, the Changing Workplaces Review report recommended that the Ontario government carry out a review of existing exclusions under a three-part policy framework based on the premise that basic standards should be as broadly applied as is reasonably possible.[148]

The Project Committee concurs with these other bodies that exclusions from the standards of the ESA should be made *on a principled basis*. While not necessarily accepting the Thompson Commission's position that exclusions should expire after a fixed period unless renewal is proven to be warranted, the Project Committee sees benefit in reviewing exceptions periodically with the stakeholders concerned. In the responses to the consultation paper, this approach met with a high level of approval among both employers and employees.

Amendment of the ESA provides an appropriate occasion to review the existing exclusions in consultation with stakeholders to determine whether they continue to be justifiable, or should be modified or repealed in light of changed circumstances.

The Project Committee recommends:

5. Principles should be developed to govern future applications for exclusion of an industry, activity, occupational group, or class of workers from all or part of the ESA in order to ensure that the interests of employers and employees are fully taken into account.

6. Existing exclusions from ESA standards should undergo a systematic review by government to determine whether they continue to be justified.

147. *Supra*, note 2 at 132. The government of the day in Ontario embarked on such a review, but the status of the review under the succeeding government is unclear.

148. *Supra*, note 72 at 154 (Recommendation 72). The three-part policy framework urged by the Special Advisors was: 1. The *Employment Standards Act 2000* (Ont.) should apply to as many employees as possible. 2. Departures from or modifications of the norm should be limited and justifiable. 3. Proponents of keeping an exemption should have the onus of persuasion that exemption is still required.

Chapter 4. The Hiring Process

A. General Terms Relating to Hiring

Part 2 of the ESA contains most of the provisions dealing with the process of hiring, but possibly the most important provision concerning hiring is found in Part 1. That is section 4, which states that an agreement to waive any of the requirements of the ESA or its regulations, other than in collective agreements, has no effect. By virtue of section 4, terms of individual contracts of employment that contravene the ESA or a regulation are unenforceable.

Part 2 comprises sections 8 to 15. Section 8 prohibits employers from inducing, influencing or persuading someone to become an employee, or to work or be available for work, by misrepresenting the availability of a position, the type of work, the wages, or conditions of employment.

Section 9 relates to hiring children, and will be discussed later in Chapter 9.

Section 10(1) prohibits anyone from requesting, charging, or receiving a payment from anyone seeking employment for employing or obtaining employment for that person, or for providing information about employers wanting to hire employees. Payments made in contravention of section 10(1) may be recovered as wages.[149] Receiving payment for advertising is not a contravention of s. 10(1).[150]

Section 11(1) prohibits employment agencies from making a direct or indirect payment to anyone for obtaining or assisting in obtaining employment for an individual. Section 11(2) likewise prohibits farm labour contractors from making a direct or indirect payment to someone for whom their employees perform work. Paying for advertising likewise does not contravene these provisions.

Part 2 contains additional provisions on licensing of employment and talent agencies, farm labour contractors, and workers in private residences. These are also discussed later.

149. *Supra,* note 1, s. 10(3).

150. *Ibid.*, s. 10(2).

The Project Committee does not propose any change to sections 4, 8, 10(1), 11(1) and 11(2).

B. Should Terms of Employment Have To Be In Writing?

The ESA does not require that a contract of employment be in writing, or specify terms to be included in one, unless the employee is being hired as a domestic.[151]

Among Canadian jurisdictions, only Newfoundland and Labrador has a requirement for the terms of employment to be set out in a written "employment statement," and a copy given to the employee.[152] The Arthurs Report recommended that employers in the federal sector be required to provide non-unionized employees at the time of hiring with a written notice setting out their rates of pay, hours of work, statutory holidays, annual vacation entitlement, and "conditions of work."[153]

There are advantages for both parties to having a written contract of employment, or at least written evidence of the essential terms such as the position for which the employee is being hired, the duties of the position, the wage, and hours of work. There is likely to be greater certainty and less room for dispute regarding the respective rights and obligations of the employer and employee. If a dispute occurs, it is important evidence and makes enforcement easier.[154]

Many employees in British Columbia, and possibly most employees in small businesses, are hired nevertheless on the basis of oral contracts. In other cases, the terms of an offer of employment will be set out in a letter. Once the offer is accepted, the letter affords evidence of the contract of employment, although it may not reflect the

151. *Ibid.*, ss. 14(1), (2). A "domestic" is defined in s. 1(1) of the ESA as follows:

> "domestic" means a person who
>
> (a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and
>
> (b) resides at the employer's private residence;

This definition, and other provisions relating to workers employed in private residences, are discussed later in Chapter 9.

152. *Labour Standards Act*, R.S.N.L. 1990, c. L-2, s. 2.1.

153. *Supra*, note 102 at 81 (Recommendation 5.1).

154. *Ibid.*, at 81-82.

complete contract. Some larger employers use professionally drafted standard form agreements to hire employees, but most smaller employers would require legal assistance to prepare a formal employment contract.

A majority of the Project Committee believe that it would be unnecessary and unworkable to require a written contract of employment in all cases, given the varying sophistication of employers and the information concerning the ESA and the respective rights and obligations of employees and employers under it that is made available online by the Employment Standards Branch.

A minority of the Project Committee believe that the ESA should require a basic written agreement in all cases setting out essential terms, *i.e.* the duties of the position, hours of work, and the wage.

Chapter 5. Hours of Work, Overtime and Flextime

A. About this Chapter

Part 4 of the ESA contains basic standards governing hours of work and overtime. This chapter examines the key provisions of Part 4 and explains the background to the Project Committee's recommendations for reform in this area.

B. Prohibition on Excessive Hours of Work

Section 39 prohibits employers from requiring an employee covered by the Act to work excessive hours or hours detrimental to the employee's health or safety:

> No excessive hours
>
> 39 Despite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.

Section 39 is unique in Canadian employment legislation in its generality. "Excessive" is not defined in the ESA and is left to interpretation. The Employment Standards Tribunal has held that this term must be interpreted in a situational context by reference to "an objectively demonstrated adverse effect on the health or safety of an employee." The context includes the nature of the work, the period of time over which work takes place, and any other circumstance peculiar to the case.[155]

The thresholds for overtime pay rates in section 40 are not directly connected with this provision. In other words, the fact that an employee works more than 12 hours on one day does not establish that a contravention occurred.[156] In order to show that section 39 has been contravened, there must be proof of a negative effect on the health or safety of the employee concerned by reason of the hours the employee was required to work.[157]

155. *Re Johnston* (2 July 2010) BCEST #D071/10.

156. *Ibid.*, at para. 32.

157. *Re Dingman* (5 January 2010) BCEST #D002/10, at para. 35.

The Project Committee does not propose any change to section 39.

C. Compressed Work Week and Alternate Work Patterns

Section 35 indirectly entrenches the 8 hour day and 40 hour week as a standard by requiring overtime pay for hours worked in excess of these periods.

> Maximum hours of work before overtime applies
>
> 35 (1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.
>
> (2) Subsection (1) does not apply for the purposes of an employee who is working under an averaging agreement under section 37.

The 8-hour day and 40-hour workweek remain the norm in Canada, but in the federally regulated sector, the *Canada Labour Code* permits a maximum 48-hour workweek under a collective agreement, or where it is allowed by regulation.[158] Ontario and P.E.I. also permit a maximum 48-hour workweek.[159]

In Ontario, the Special Advisors to the Changing Workplace Review recently recommended that the requirement for approval by the Ministry of Labour of employer-employee agreements for a workweek longer than 48 hours be abolished, because approvals for up to 60 working hours per week were being regularly granted with little scrutiny and no outcry. They recommended that regulatory approval remain a requirement for a workweek longer than 60 hours.[160]

While the 8-hour day, 40-hour week is still the most common work pattern, there is more variation in accepted work patterns now than there was in the mid-20th century. Another recognized modern work pattern consists of four 10-hour working days per week. Saskatchewan specifically gives an employer the option of scheduling a

158. *Supra*, note 101, s. 171(1).

159. *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 17(1); *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2 s. 15(1).

160. *Supra*, note 72 at 201 (Recommendation 106).

four-day week of 10-hour days.[161] Employees sometimes prefer "compressed work week" patterns such as this because it gives them an extra day off per week.

A majority of the Project Committee members consider that the ESA should authorize one or more commonly recognized alternate hours of work patterns, such as a 10-hour day, 40-hour week, as ones which the employer could adopt as the norm for a particular workplace. A change from one statutorily recognized work pattern to another would require a period of notice to give employees time to make arrangements to adapt to the different schedule.

In the view of the majority, the employer should be able to adopt a work pattern that is pre-authorized by the ESA without the need for an employee vote, as in small workplaces an individual holdout could block an arrangement that is acceptable to co-workers.

A minority of the Project Committee consider that selection of a work pattern other than the standard 8-hour day, 40-hour week should take place only with the agreement of the employees affected, or at least a majority of them. The minority believe an averaging agreement should be used for this purpose. One of the concerns raised surrounding unilateral imposition of an alternate hours of work regime is that it could create difficulties in arranging child care, given that day care centres may not be open at the end of a 10-hour day. Concerns also exist for workers at the lower end of the wage scale.

A further minority view is that consent to a work pattern involving extended hours should require a certain salary threshold, possibly one of 50 per cent above the general minimum wage.

A **majority** of the Project Committee recommend:

7. The ESA should allow one or more alternate standard patterns of working hours within the 40-hour week in addition to the standard of 8 hours per day, and require a notice period for a change from one standard alternate pattern to another.

A **minority** of the Project Committee recommend:

7a. A pattern of working hours for a workplace other than the standard of 8 hours per day, 40 hours per week should require worker consent by means of an averaging agreement.

161. *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, s. 2-18(2)(b).

D. The Definition of "Week"

The ESA defines "week" as a period of 7 consecutive days beginning on a Sunday for the purpose of calculating overtime, averaging of work hours under section 37, and compassionate care leave under s. 52.1. For other purposes, the 7 consecutive days may start on any day.[162]

It is not clear why the ESA specifies the week as Sunday to Saturday for some purposes and not others. Under employment standards legislation elsewhere in Canada, a week may be a recurring period of 7 consecutive days starting on any day. The day on which the week is considered to start is typically selected by the employer. Alberta provides that a work week is either the period between midnight on a Saturday to midnight on the following Saturday or "seven consecutive days as established by the consistent practice of an employer."[163]

The requirement to treat the work week as Sunday to Saturday in British Columbia complicates the central administration of payroll and scheduling systems by national employers. These complications generate extra cost and create room for errors. They could be eliminated if the work week were defined under the ESA as it is in other Canadian jurisdictions, namely as a recurring period of 7 consecutive days which the employer may designate. Employers with operations in more than one jurisdiction could use the same period of time to calculate wages and benefits.

Employees would not suffer any detriment if this change was made, provided that an employer follows a consistent practice after designating the start of the work week, and any subsequent change of practice is made with adequate notice to employees. The Project Committee concluded that amendment of the definition of "week" along these lines would be a useful measure.

The Project Committee recommends:

8. The definition of "week" in section 1 of the ESA should be amended to allow an employer to designate the day on which the period of 7 consecutive days begins for the

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162. The definition of "week" appearing in s. 1(1) of the ESA is:

> "week" means a period of 7 consecutive days beginning,
>
> (a) for the purpose of calculating overtime, on Sunday,
> (b) for the purposes of sections 37 and 52.1, on Sunday, and
> (c) for any other purpose, on any day;

163. *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 1(1)(bb).

purpose of wage calculation and employee benefits under the Act, provided that the employer must

(a) follow a consistent practice following the designation; and

(b) provide adequate notice to affected employees of any subsequent re-designation of the beginning day of the 7-day period.

E. Overtime

1. Overtime Thresholds and Pay Rates

Section 40(1) fixes overtime pay rates as 1.5 times the regular hourly wage for hours worked above 8 in a single day, and double the regular hourly wage for hours worked above 12 in a day.

If an employee works more than 40 hours in a week, section 40(2) provides that the employee is entitled to payment of 1.5 times the employee's regular hourly wage in respect of hours worked in excess of 40. In applying section 40(2), only the first 8 hours worked on a single day are counted, unless an averaging agreement is in place.[164] This ensures that hours worked above 8 in one day will qualify as overtime.

Before amendment in 2002, section 40 required double time pay after 11 hours in any one day, or for any hours worked above 48 in a week. It also required the weekly overtime thresholds of 40 or 48 hours to be reduced by eight hours in any week in which there was a statutory holiday.[165]

The BC Employment Standards Coalition, a broadly-based association of individuals and groups in B.C. advocating on behalf of various groups of workers in the non-unionized sector, urges restoration of the overtime provisions as they stood before the 2002 amendments.[166]

The Coalition of BC Businesses and other employer groups, on the other hand, have taken the position that the ESA should require overtime pay rates only in respect of time worked in excess of an average of 40 hours per week over a default averaging period. The statutory default interval would be open to being increased or decreased

164. *Supra*, note 1, s. 40(3).

165. See R.S.B.C. 1996, c. 113, ss. 40(1), (2), (5), prior to amendment by S.B.C. 2002, c. 42, s. 19.

166. BC Employment Standards Coalition, *Legislative Proposals – Hours of Work and Overtime*, online: http://bcemploymentstandardscoalition.com.

by agreement between the employee and employer.[167] Essentially, this would mean hours of work averaging would become a general standard.

The Project Committee was not persuaded that a change should be made in the overtime pay provisions. Section 40 measures up well to the Canadian norm regarding overtime pay. It is also noted that British Columbia is the only jurisdiction in Canada to require double time premium pay after 12 hours of work. Other Canadian jurisdictions do not have a second tier of overtime pay, and simply mandate time and a half for all hours worked above the overtime threshold. Section 40 of the ESA is therefore slightly more favourable to employees than the norm across the country.

2. Banking of Overtime

Section 42 allows overtime pay to be credited to a "time bank" at the employee's request to give the employee the option of taking time off with pay at a later point instead of receiving the overtime pay at the end of the pay period in which it was earned.

The consultation paper contained a tentative recommendation for the abolition of overtime banking by the repeal of section 42. This reflected a consensus within the Project Committee that time banks are difficult to administer and open to abuse to avoid paying for overtime. The responses to the consultation paper showed, however, that overtime banking provides flexibility that is desired by employees and employers alike. For the most part, respondents were strongly in favour of retaining it. In light of this reaction, the Project Committee decided to retract the tentative recommendation to abolish banking of overtime.

Some responses to the consultation paper contained suggestions for limiting the number of hours that may be banked, imposing a maximum monetary limit on time banks, or requiring banked time to be taken off within a specified period of time after it is earned. These were aimed at protecting employees against misuse of the time bank concept, protecting wage claims in the event of an employer bankruptcy, or reducing the administrative burden of time banks.

Section 42 formerly required banked time to be taken off or paid out within 6 months after the overtime was earned. Since 2003, this is no longer the case, but the employer

167. *Supra*, note 11 at 16. The Coalition of BC Businesses proposal called for a four-week default averaging period. See Coalition of BC Businesses, *Employment Standards to Reflect BC's Workplace Reality: Submission to the Ministry of Labour Employment Standards Review* (2011) at 4, online: http://www.coalitionbcbusiness.ca/pdf/ESReviewSubmission02_11.pdf.

has the option to close the time bank on one month's notice to the employee at any time. The employer must then either pay out the overtime or allow time off, or a combination of payment and time off, within 6 months of closing the employee's time bank.[168]

The Project Committee discussed the merits of restoring a requirement for banked overtime to be taken off or paid out within 6 months to reduce an employee's exposure to loss in the event of the employer becoming bankrupt, or conversely increasing the window to 12 months to provide greater opportunity to use banked overtime to extend a vacation. As neither of these approaches was clearly superior to the other, the Project Committee ultimately decided against recommending any change to the overtime banking provisions.

3. Hours of Work Averaging

(a) Hours of work averaging agreements: section 37

The ESA permits individual agreements between employers and employees to average working hours over a period of up to four weeks in order to determine the employee's overtime pay entitlement.[169] The purpose of averaging is to permit variable work schedules without the employer having to pay overtime on each day when the standard 8-hour threshold is exceeded, although working hours may be fewer than 8 on other days in the pay period, and some days may not be worked at all. Averaging is intended to address the needs of enterprises in which work activity fluctuates and cannot be tied to rigidly fixed working hours, or to accommodate employees' needs or desires for flexible work schedules.

Section 37 of the ESA governs hours of work averaging agreements. An averaging agreement under section 37 may provide for the averaging period to be repeated in a cycle a specified number of times, but the agreement must have a starting and expiration date, and specify the number of weeks in the averaging period.[170] It must be in writing and signed by the employer and employee, set out the work schedule for each day it covers, and not provide for an average of more than 40 hours per week.[171]

168. *Supra*, note 1, ss. 42(3.1), (3.2), added by S.B.C. 2003, c. 65, s. 6(a). According to the Ministry of Labour, the purpose of the 2003 amendment was to provide greater flexibility to both the employer and employee in terms of when banked time could be taken off, and to relieve against the need for employers to track the expiration of every deposit in the time bank to ensure it was cleared before six months elapsed.

169. *Supra*, note 1, s. 37(1).

170. *Ibid.*, s. 37(2)(a)(iii), (v), (vi).

171. *Ibid.*, s. 37(2)(a)(i),(ii), (3).

If an employee is required to work more than the number of hours scheduled for a particular day and fewer than 8 hours were scheduled for that day, the employer must pay overtime for the excess over 8 hours.[172] If 8 or more hours were scheduled, overtime must be paid for any time worked over the number of hours scheduled.[173] Any time worked in excess of 12 hours on that day is remunerated at double the employee's regular hourly wage.[174]

(b) History of the averaging provision

The current version of section 37 dates from 2002.[175] Hours of work averaging under the current section 37 replaced an earlier system of flexible work arrangements recommended by the Thompson Commission in 1994. The commissioner rejected submissions made to him that there should be no minimum legal standards for hours of work and remuneration for overtime should be fully open to contract between employers and individual employees.[176] The commissioner accepted, however, that minimum standards should be "consistent with the realities of the modern workplace" and that these realities required some flexibility in work scheduling. He also accepted that employees occasionally desire compressed work weeks and that non-standard working arrangements were likely to become increasingly common.[177]

Thompson recommended that the ESA accommodate flexible work arrangements by allowing for compressed work weeks in a pattern of days on and days off that would repeat over not more than eight consecutive weeks. The pattern would allow for an average over the period of eight hours per day or 40 hours per week, with overtime being payable only for time worked in excess of the average. A work arrangement of

172. *Ibid.*, s. 37(6)(a)(i).

173. *Ibid.*, s. 37(6)(a)(ii).

174. *Ibid.*, s. 37(6)(b).

175. *Employment Standards Amendment Act, 2002*, S.B.C. 2002, c. 42, s. 17.

176. The Thompson Commission Report, *supra*, note 2 states at p. 104:

> The Commission rejects the notion that employers should be free to enter into private agreements with their employees that circumvent the minimum standards in the law. Instead, the law should promote basic social goods, including leisure time for employees, the opportunities for parents to spend time with their children and the possibility for all citizens to engage in social activities.

177. *Ibid.*

this kind would require approval by 65 per cent of the employees affected, evidenced by a form submitted by the employer to the Ministry of Labour.[178]

The 1995 *Employment Standards Act* substantially implemented Thompson's recommendations on flexible work arrangements.[179] Under its terms, an employer could cancel a flexible work arrangement at any time.[180] The Director of Employment Standards was empowered to cancel an arrangement if an affected employee complained, and the Director was satisfied that the approval of any employees to the arrangement was the product of undue influence, intimidation, or coercion.[181]

Amendments in 2002 replaced the scheme of compressed work weeks affecting groups of employees with a system of individual averaging agreements. The policy grounds for the change announced at the time were to introduce greater flexibility and self-reliance into British Columbia workplaces, to allow for the needs of industries requiring extended working hours such as the high-tech sector, to give effect to the desires of employees for a non-standard schedule to accommodate family responsibilities and personal life needs, and to reduce regulatory burden.[182]

(c) Differing business and labour views on hours of work averaging

Section 37 of the ESA is a divisive and controversial provision, despite being little-used. Business and labour perspectives on averaging of working hours are extremely divergent.

As noted above, employer groups have urged that averaging should be the default standard for employees covered by the Act, with overtime rates paid only for time worked in excess of an average of 40 hours per week over an averaging period of a specified number of weeks.[183] In other words, there would be no need for individual averaging agreements except where the parties wished to increase or reduce the averaging period.

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178. *Ibid.*, at 105-106.

179. *Supra*, note 10, ss. 37, 38, 41.

180. *Ibid.*, s. 37(2).

181. *Ibid.*, s. 37(4)

182. Hon. G. Bruce, 2nd reading speech in relation to the *Employment Standards Amendment Act, 2002* (Bill 48), *Debates*, 37th Parl., 3rd Sess, 27 May 2002 at 3602-3604. It was also noted that there had been a pattern of routinely authorizing variances on application. The variance provisions remain in the ESA at ss. 72 and 73, and still are an option available on joint application of the employer and employees.

183. See Coalition of BC Businesses 2011 submission, *supra*, note 167 at 4.

Conversely, the BC Employment Standards Coalition objects to legal recognition of averaging agreements without oversight by the Employment Standards Branch, because of the inherent power imbalance between employer and employee and the potential for coercion of non-unionized workers to enter into them for the advantage of the employer. It has urged restoration of the pre-2002 provisions on flexible work arrangements, with the added requirement that the approval of 65 per cent of employees affected by a flexible work arrangement be determined by a secret ballot in a vote overseen by the Branch.[184]

(d) Hours of work averaging elsewhere in Canada

Part III of the *Canada Labour Code* allows averaging over a period of two or more weeks if the nature of the work requires irregular distribution of hours of work.[185] The maximum number of working hours per week under averaging is 48, unless a lower maximum is established by regulation for the industry or activity in question.[186] Worker consent is not required, but averaging cannot persist for more than three years in a non-unionized establishment.[187]

Under a separate provision, the *Canada Labour Code* allows the establishment of a "modified work schedule" over a period of two or more weeks, provided that the schedule does not allow an average of more than 40 hours per week. A modified work schedule requires approval of 70 per cent of the affected employees.[188]

Ontario, Saskatchewan, and the Northwest Territories allow averaging of hours of work, but this requires a permit from the Director of Employment Standards or the equivalent.[189]

In Manitoba, averaging is possible on a group basis with a permit, which as a matter of policy is normally issued only if 75 per cent of the affected employees approve the arrangement. Averaging is also possible under an individual flextime agreement with

184. Employment Standards Coalition, *Legislative Proposals – Hours of Work and Overtime*, online: http://bcemploymentstandardscoalition.com.

185. *Supra,* note 101, s. 169(2).

186. *Ibid.*, s. 171(2).

187. *Ibid.*, s. 169(2.1)(b).

188. *Ibid.*, s. 170(2).

189. See *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 22(2); *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, s. 2-20; *Employment Standards Act*, S.N.W.T. 2007, c. 13, s. 11.

the employer, but only if the employee requests a flexible schedule. An individual flextime agreement does not require prior regulatory approval, but the Director of Employment Standards has the power to prohibit or terminate it if there are grounds to believe the agreement was not voluntary.

(e) Reform

The Project Committee agrees with the Thompson Commission that some flexibility in hours of work and overtime requirements is necessary for the ESA to be "consistent with the realities of the modern workplace." It is noteworthy that the Special Advisors to the Changing Workplaces Review in Ontario also recognized a role for averaging to accommodate interests of employees in having a flexible work schedule, or to meet business needs when employees are agreeable to the arrangement and the required number of hours will not exceed the overtime threshold over the averaging period.[190] The concept of averaging is a part of the landscape of employment law in several provinces and territories as well as in the federally regulated sector. It is also an accepted practice under the only International Labour Organization (ILO) convention on hours of work that Canada has ratified.[191]

For these reasons, a provision allowing averaging of hours of work, together with proper safeguards against misuse of the provision and exploitation of employees, should be retained in the ESA.

Section 37 is not a functional averaging provision as it currently stands, however. It is little-used, mainly because of the requirement under section 37(2)(a)(iv) to include a work schedule for each day covered by the averaging agreement. This requirement was introduced for the protection of employees by giving some assurance of predictability in hours of work when regulatory oversight over averaging arrangements and the requirement for 65 per cent employee approval were removed in the 2002 amendments to section 37.[192] As the main purpose of an averaging agreement is to

190. *Supra*, note 72 at 225.

191. ILO *Hours of Work (Industry) Convention, 1919 (No. 1)*, online: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312146:NO. This convention, ratified by Canada on 21 March 1935, applies to an "industrial undertaking," which is non-exhaustively defined to include the primary extractive industries, manufacturing, construction, and transportation. Articles 2(c) and 4 allow extension of working hours for shift workers in excess of 8 hours per day or 48 hours per week, as long as the average number of hours worked per week over a three-week period is not greater than 48. The convention does not address entitlement to rates of overtime premium pay.

192. Explanation provided to the Project Committee by the Ministry of Labour for the presence of s. 37(2)(a)(iv).

accommodate unpredictably fluctuating levels of work activity, however, the requirement for a fixed work schedule for each day in the averaging period greatly narrows the circumstances in which section 37 may be used.

Daily and weekly upper limits on working hours under averaging would provide equal or better protection for employees than the fixed work schedule contemplated by section 37(2)(a)(iv). At the present time, section 34(5) contains a daily limit of 12 working hours during an averaging period. Hours worked in one day in excess of 12 must be paid at double the regular wage, as if no averaging agreement was in place.

The consultation paper proposed that the 12-hour daily limit applicable during an averaging period be retained, but also proposed a weekly upper limit of 48 hours. If more than 48 hours were worked in a single week during an averaging period, the hours in excess of 48 would have to be paid at the overtime rate. A number of employers and business organizations responding to the consultation paper objected to a 48-hour weekly limit as being too restrictive. The Project Committee took note of this objection, but also noted that 48-hour weekly limit under averaging is also found in Part III of the *Canada Labour Code*, and in Ontario regulatory approval is needed to exceed a 48-hour work week.[193] The Project Committee was not persuaded to move away from a 48-hour weekly limit applicable under averaging.

Currently the maximum length of an averaging period under section 37 is four weeks.[194] A majority of the Project Committee proposes that it be increased to eight weeks, as under the earlier regime recommended by the Thompson Commission, in order to cover variations between industries. A minority of the Project Committee favour a shorter maximum length for an averaging period.

Section 37 does not currently specify a maximum duration for an averaging agreement. Once introduced, averaging needs to be left in place long enough to determine whether the arrangement is sustainable, and to provide stability in the employer's operations and the lives of employees. As averaging is a mutually agreed-upon departure from the standard overtime requirements of the ESA, however, it should be an arrangement with a fixed duration that allows for modification or cancellation at or towards the end of that term, like a collective agreement. The Project Committee believes an appropriate maximum duration is two years, subject to renewal by mutual agreement either during or at the end of the term.

193. *Supra*, note 101, s. 171(1) and note 97, s. 17(1)(b), (3).

194. *Supra*, note 1, s. 37(1).

A matter not addressed in the current section 37 is how overtime should be paid when an employee is laid off during an averaging period. In this circumstance, employees should be paid as if averaging had not been in place for hours worked above 8 on each day within the partially elapsed averaging period. The employee might otherwise lose overtime pay altogether by having been unable to work until the end of the averaging period.

The current section 37 is configured to permit individual averaging agreements. Averaging provisions in force elsewhere in Canada assume that the hours of work will be averaged on a workplace-wide basis, or at least with respect to a section of the employer's workforce, and require a high level of employee approval. This was also the view underlying the Thompson Commission recommendation that a compressed work week arrangement involving averaging of work hours be approved by at least 65 per cent of the employees affected.[195]

Hours of work averaging would be introduced primarily to accommodate enterprise needs for flexible working hours, rather than needs under an individual employment relationship. An averaging agreement should be viewed as a departure from the minimum requirements for overtime pay that typically affects more than one employee, and therefore should require a substantial level of approval by the affected employees in order to be binding on all.

Precedents for the percentage of employee approval that should be required to introduce an averaging arrangement range from 65 to 75 per cent. As noted, the Thompson Commission's recommendation was 65 per cent. The *Canada Labour Code* requires the approval of 70 per cent of affected employees to introduce a modified work schedule.[196] In Manitoba, where an averaging permit is required, the usual floor level of approval required for issuance of the permit is 75 per cent of the affected employees.[197]

The consultation paper proposed that the level of employee approval required for an averaging agreement should be 60 per cent of the affected employees who vote, with a minimum of 50 per cent of the affected employees having voted. This would prevent abstentions from deciding the outcome of the vote, but also guard against a minority of employees who vote determining the outcome for a majority that abstain.

195. *Supra*, note 2 at 106. This recommendation was reflected in the 1995 version of the ESA.

196. *Supra*, note 101, s. 170(2).

197. *Employment Standards Code*, C.C.S.M. c. E110, s. 14(3).

A number of business organizations responding to the consultation paper commented that holding formal votes is onerous and impractical in small workplaces, and that averaging agreements sometimes affect only a handful of employees. They urged that the approval formula should only apply in workplaces above a certain size. Size thresholds of 50 or 100 employees were suggested. The responses did not propose specific alternatives for securing a satisfactory level of approval for hours of work averaging in smaller workplaces, however.

While holding votes in workplaces with a small number of employees admittedly presents certain difficulties, the Project Committee was not persuaded that there should be lesser protection for employees in smaller workplaces against having averaging imposed on them without a demonstrable level of support. The formula proposed in the consultation paper represented a consensus view within the Project Committee, and is broadly comparable to approval requirements for hours of work averaging found in other Canadian employment legislation. It is somewhat less stringent than what is required in other provinces and in the federal sector, but provides a better safeguard against a small minority determining the outcome for the majority of affected employees. This report accordingly carries forward the same recommendation for the level of employee approval.

Insisting that a vote on an averaging agreement be supervised by a labour relations officer delegated by the Director of Employment Standards would probably be impractical for reasons of cost. The method used, however, must be one that is fair and assures anonymity in voting in all cases except where anonymity is impossible to maintain because of the small number voting. A guide on conducting votes prepared and issued by the Employment Standards Branch, as suggested by some business organizations in their responses to the consultation paper, would likely be beneficial.

Despite a supermajority requirement for approval, a potential for abuse in the application of an averaging agreement remains, and may give rise to employer-employee disputes. For these reasons, the Director of Employment Standards should be empowered to terminate an averaging agreement on the application of an employee or an employer if the Director is satisfied that its continuation will lead to hardship.

The Project Committee recommends:

9. The ESA should continue to have a provision on averaging of working hours.

10. The current section 37(2)(a)(iv), requiring an averaging agreement to specify the work schedule for each day covered by the agreement, should not be carried forward into an averaging provision replacing the present section 37.

A **majority** of the members of the Project Committee recommend:

11. An averaging provision replacing the present section 37 should provide that:

(a) an averaging agreement may have a term of up to 2 years, subject to renewal within the term;

(b) the period over which hours of work may be averaged for purposes of overtime must not exceed 8 weeks;

(c) the number of working hours per day within an averaging period must not exceed 12 unless overtime is paid for hours worked in excess of 12 in any one day;

(d) the number of working hours per week within an averaging period must not exceed 48 unless overtime is paid for hours worked in excess of 48 in any one week;

(e) if a layoff occurs during an averaging period, the laid-off employee is entitled to be paid overtime for hours worked in excess of 8 on any day in that period, rather than on an averaged basis over the length of the averaging period in which the layoff occurs;

(f) the Director may terminate an averaging agreement on application by the employer or affected employees if the Director is satisfied that hardship would otherwise result.

A **minority** of the members of the Project Committee endorse Recommendation 12, except that in their view, the period over which hours of work may be averaged for purposes of overtime should be less than 8 weeks.

The Project Committee recommends:

12. The threshold of employee approval for an averaging agreement should be an affirmative vote of 60 per cent of the affected employees who vote, with a minimum of 50 per cent of the affected employees having voted.

13. A method used for a vote by employees on whether to approve an hours of work averaging agreement must be capable of assuring confidentiality (voting anonymity) and fairness.

4. Refusal of Overtime and Justification

It is a common misconception that employees cannot be required to work overtime without their consent. In fact, employees in British Columbia generally do not have a right to refuse to work overtime unless it is a term of their individual contracts of employment or an applicable collective agreement, or unless the situation comes under a specific regulatory enactment limiting hours of work.[198]

Some Canadian jurisdictions place limits on the amount of overtime employees may be required to perform without their consent. Saskatchewan gives employees a general right to refuse to work overtime for more than four hours in a week, except in emergency circumstances.[199] Emergency circumstances are defined to mean any sudden or unusual occurrences that the employer could not have foreseen by the exercise of reasonable judgment.[200]

Quebec provides a general right to refuse to work overtime more than four hours in a day or more than 14 hours in a 24-hour period, whichever is the shorter.[201] Employees whose daily working hours are flexible or non-continuous may decline to work more than 12 hours in a 24-hour period.[202] Employees may also refuse to work more than 50 hours per week, or 60 in an isolated area or in the James Bay territory.[203]

The Arthurs Report contains two recommendations for the inclusion of a limited right to refuse overtime in Part III of the *Canada Labour Code*. The first would give an

198. For example, s. 1.5.1 of the *Health, Safety and Reclamation Code for Mines* and s. 22.8(1) of the *Occupational Health and Safety Regulations*, B.C. Reg. 296/97 limit the number of hours within a 24 hour period during which a worker may be employed in a mine or an underground working, respectively.

199. *Supra*, note 161, s. 2-12(1). The BC Employment Standards Coalition supports a provision similar to this Saskatchewan one. See online: http://bcemploymentstandardscoalition.com/wp-content/uploads/2011/12/Hours-of-Work-Overtime-Proposals-PDF.pdf.

200. *Ibid.*, s. 2-12(3).

201. *An act concerning labour standards*, C.Q.L.R, c. N-1.1, s. 59.0.1(1). Exceptions are situations in which there is a danger to life, health or safety, a risk of destruction or serious deterioration of property or other cases of "superior force," or if refusal is inconsistent with the employee's professional code of ethics. As of 1 January 2019, employees will be able to refuse more than two hours of overtime work in a day, or if not informed at least five days in advance that overtime will be required: *An Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance*, S.Q. 2018, c. 21, s. 9. Some classes of employees are exempt from the 5-day advance notice requirement.

202. *Ibid.*

203. *Ibid.*, s. 59.0.1(2).

absolute right to refuse overtime in excess of 12 hours per day or 48 hours per week (the outside limit on weekly hours of work permitted under Part III of the *Code*), except in the case of an emergency, or under a special working arrangement authorized by an Act, regulation, ministerial permit, or collective agreement.[204]

The second Arthurs recommendation would allow an employee to refuse to work outside the employee's regularly scheduled hours if it would:

(a) conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid;

(b) interfere with scheduled educational commitments; or

(c) in the case of a part-time employee, create a scheduling conflict with other employment.[205]

The consultation paper contained a tentative recommendation to amend the ESA to include a limited right of refusal along the same lines. This met with a mixed reception from business organizations and employers, who for the most part objected to any constraints on the right of an employer to require overtime, and in particular to the 48-hour weekly threshold. Not surprisingly, labour organizations that commented on the tentative recommendation took the position that overtime should be entirely voluntary in all cases. The Project Committee continues to believe, however, that the two recommendations by Arthurs represent a reasonable balance between employer and employee interests, and one that should be incorporated into the ESA.

One respondent organization that supported the tentative recommendation in principle criticized paragraph (a) of the Arthurs recommendations as excessively subjective. The Project Committee recognized that employees' perceptions of what amounts to a "significant family-related commitment" could well differ from those of an employer, but considered it impractical to attempt to list situations that would qualify, and did not arrive at a better alternative wording.

A business organization that was among the few supporting the tentative recommendation in principle suggested that it should not refer to an employee's *regularly* scheduled hours, because this causes the limited right to apply unevenly as between employees who have a regular work schedule and those whose schedule is irregular. The Project Committee took note of this and deleted the modifier "regularly" from the

204. *Supra*, note 102, at 145 (Recommendation 7.37).

205. *Ibid.*, at 146 (Recommendation 7.38).

recommendation so that it refers to work outside scheduled hours, irrespective of whether the schedule follows a regular pattern.

The Project Committee made another change to the version of the limited right of overtime refusal that appeared in the consultation paper. The tentative recommendation contemplated that overtime could legitimately be refused for unlisted "significant obligations" in addition to listed ones. On further consideration, the Project Committee concluded that appointments, tests or other procedures connected with professionally provided health care should be added to the list, but that leaving the list open-ended would create too much uncertainty and room for dispute. The revised recommendation makes the list of grounds exhaustive.

The Project Committee also considered that the term "emergency" would need to be defined in the ESA in order to clarify the nature of the circumstances that would justify overriding an employee's right to refuse overtime in excess of the maximum 12 hours per day and 48 hours per week limits. A precedent exists in section 177(1) of the *Canada Labour Code*, which provides:

> 177 (1) The maximum hours of work in a week specified in or prescribed under section 171, established pursuant to section 172 or prescribed by regulations made under section 175 may be exceeded, but only to the extent necessary to prevent serious interference with the ordinary working of the industrial establishment affected, in cases of
>
> (a) accident to machinery, equipment, plant or persons;
>
> (b) urgent and essential work to be done to machinery, equipment or plant; or
>
> (c) other unforeseen or unpreventable circumstances.

Arthurs recommended that s. 177(1) should be expanded to include "significant and immediate threat to human life, health, or safety, or extensive or irreparable damage to property" and also "urgent and essential work needed to assist customers of the employer facing these circumstances" in order to avoid confining the concept of emergency work to the employer's own personnel, premises, or property.

The Project Committee endorses a definition of "emergency" that would incorporate phraseology similar to that in section 177(1) of the *Canada Labour Code*, with the additional wording suggested by Arthurs modified to refer to a "present or impending" rather than "immediate" threat. This slight wording change in the recommendation was made because of the comment in the response of a health sector organization that

a serious threat to life or health could justify taking extremely urgent measures without necessarily being "immediate."

The Project Committee recommends:

14. The ESA should be amended to provide that:

(a) an employee may decline to work outside the employee's scheduled hours of work if doing so would

(i) conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid;

(ii) interfere with scheduled educational commitments or with appointments or procedures in connection with professional health care;

(iii) create a scheduling conflict with other employment;

(b) an employee may decline to work more than 12 hours in a day or 48 hours in a week except in the event of an emergency, or as otherwise provided in an applicable regulation, variance, or averaging agreement.

15. The ESA should be amended to contain a definition of "emergency" or "emergency circumstances" that would justify exceeding statutory limits on hours of work to the extent necessary to prevent serious interference with the ordinary operations of the employer, in cases of

(a) accident to machinery, equipment, plant or persons;

(b) urgent and essential work to be done to machinery, equipment or plant;

(c) a significant present or impending threat to human life, health, or safety, or extensive or irreparable damage to property;

(d) urgent and essential work needed to assist customers of the employer facing circumstances described in paragraphs (a) to (c); or

(e) other unforeseen or unpreventable circumstances.

5. Minimum Daily Hours

Section 34(1) provides that an employee is entitled to be paid for at least two hours on any day on which the employee is required to report for work and does so, whether or not the employee is actually required to start work. There are exceptions if the employee is unfit for work or is not in compliance with occupational health and safety requirements, *e.g.* turns up without a hard hat.

If the employee was originally scheduled to work for more than eight hours on the day, the employee is entitled to a minimum of four hours' pay under s. 34(2). This is subject to the OHS and unfitness exceptions, or the suspension of work for reasons completely beyond the employer's control. If work must be suspended for reasons beyond the employer's control, the employee must be paid for a minimum of two hours.

Previous to the 2002 amendments to the ESA, section 34(2) required a minimum of four hours pay if an employee reporting for work actually started work on a particular day, and two hours if the employee did not start work.[206] School students were entitled under section 34(3) to two hours' minimum pay if they were required to report to work on a school day. These requirements originated in the 1980 ESA.[207]

The 2002 amendments retained a minimum daily pay entitlement for call-in, but reduced it to two hours, regardless of whether work actually starts. The reduction had been urged in a submission by the Coalition of BC Businesses, which made a case that the four-hour minimum pay requirement prevented the service industries from scheduling short shifts to cover peak periods, discouraged the hiring of students wishing to work short shifts during academic sessions, and operated as a general disincentive to increasing employment.[208] Recreation centres and some municipal services in which some staff worked shorter shifts also reportedly desired a reduction in the minimum daily pay.

The reduction of the minimum pay requirement for call-in was and remains contentious. The BC Employment Standards Coalition continues to urge restoration of the pre-2002 entitlements.[209] Advocacy organizations have published individual

206. See *supra*, note 10, s. 34(1)

207. See *supra*, note 9, ss. 34(1), (2).

208. Coalition of BC Businesses, *Labour Policies That Work: A New Vision for BC* (Vancouver: the Coalition, 2001), online: http://www.coalitionbcbusiness.ca/pdf/ESA%20Submission.pdf at 24.

209. BC Employment Standards Coalition, *Legislative Proposals – Hours of Work and Overtime*, *supra*, note 184. See also Longhurst and Fairey, *supra*, note 96 at 14. The BC Employment Standards

accounts of the difficulties produced by not knowing one's work schedule in advance, being called in on short notice, and sent home because of a lack of work on the day in question.

The issue takes on greater significance because of the growth of part-time employment in proportion to the total size of the labour market. Part-time workers without regular work schedules are most affected by the minimum daily hours provision, and they are paid on the average considerably less than full-time workers. In October 2017 the average hourly wage for a full-time worker in British Columbia was 30 per cent higher than the average hourly wage for a part-time worker.[210]

Recent surveys of lower-paid workers in the retail, service and hospitality industries conducted by advocacy organizations indicate that just-in-time scheduling is common in these sectors as employers adjust their workforce to ebbs and flows in business activity.[211] This forces part-time workers without regular hours to be perpetually on call, without any guaranteed hours. The minimum level of pay for call-ins is significant to these lower-paid members of the workforce.

Advocates for unorganized workers maintain the reduced entitlement causes considerable hardship for low-paid service sector workers, especially those earning minimum wage or only slightly more, because the cost of transportation to work may cause them to lose the benefit of two hours' pay. Single parents face particularly harsh consequences because of the difficulty of arranging child care for call-ins on short notice and for short periods.

Alberta, Manitoba, and Ontario require a minimum of three hours' pay if an employee is called in to work and required to work for less than three hours.[212] Under

Coalition also urges enactment of a provision that would entitle temporary foreign workers in the live-in caregiver program to receive pay for a minimum of 35 hours per week, or the number of hours specified in their contracts, whichever is greater.

210. Statistics Canada, "Average hourly wages of employees by selected characteristics by occupation, unadjusted data, by province," online: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr69k-eng.htm.

211. Stefanie Hardman, Vancouver Island Public Interest Research Group, *Part-time, Poorly paid, Unprotected; Experiences of precarious work in Retail, Food Service, & Hospitality in Victoria, BC* (Victoria: Vancouver Island Public Interest Research Group, 2016) at 14; Gellatly, *supra*, note 96 at 29;

212. *Employment Standards Regulation*, Alta. Reg. 14/1997, s. 11(1); *Employment Standards Code*, C.C.S.M. c. E110, s. 51; *Exemptions, Special Rules and Establishment of Minimum Wage Regulation*, O. Reg. 285/01, s. 5(7). In Ontario and Manitoba, the employee must regularly work more than three hours per day in order to be entitled to a minimum three hours' pay for a call-in. In

amendments passed in Ontario that were originally to come into force in 2019, this would have applied also to employees on call, except for those required to be on call to deliver essential public services and are not called in to work.[213] The extension of the minimum pay rule to employees on call is, however, among the recent amendments slated for repeal under a bill introduced after a change of government in Ontario.[214]

The Project Committee recognized a need in some business sectors to adjust workforces so that extra staff are available to cover peak periods, and some may be willing to work for short periods. A corresponding need was also recognized to protect employees against losing all benefit of reporting for work after incurring the cost of transportation to the workplace and possibly other expenses such as child care for the day, only to find there is no work on the day in question, or insufficient work even to recover those expenses. The Project Committee also saw a distinction between cases in which a low number of working hours is the nature of a casual job, *e.g.* teaching two yoga classes a day at a drop-in recreation centre, or a student working a lunchtime server shift in a cafeteria, and one that may be the worker's economic mainstay in which longer shifts are usual.

A consensus was reached, reflected in the recommendation below:

16. The ESA should be amended to require that if an employee is required to report for work, and the employee is scheduled to work

(a) more than four hours on the day in question, the employee must receive a minimum of four hours' pay if work starts, and a minimum of two hours' pay if it does not;

(b) less than four hours on the day in question, the employee must receive a minimum of two hours' pay, regardless of whether work starts or not;

unless the employee is unfit to work or fails to comply with Part 3 of the Workers Compensation Act*, or a regulation under Part 3 of that Act.*

Ontario, students are exempted from the minimum three hours' pay entitlement, but it is not clear whether this exemption will be maintained. The *Making Ontario Open for Business Act, 2018*, *supra*, note 3 will move the requirement of three hours' pay to the *Employment Standards Act, 2000* in 2019.

213. *Fair Workplaces, Better Jobs Act,* 2017, Sch. 1, s. 12 (adding s. 21.4 to the *Employment Standards Act, 2000*), *supra*, note 3,

214. See Sch. 1, s. 27(5) of the *Making Ontario Open for Business Act* (Bill 47), *supra*, note 3.

F. Flexible Work Arrangements

1. Background

Pressure for flexibility in working arrangements comes not only from employers, but also from the employee side in the wake of social and technological changes that allow people to perform their work while also discharging parenting and caregiving responsibilities, fulfil educational commitments, or in some cases pursue lifestyle preferences. Among the most prominent changes that have led to the demand for, and acceptance of, greater flexibility in patterns of work are:

- a shift in the gender composition of the general workforce towards higher female participation;
- attitudinal changes that include greater appreciation of the social and economic value of parenting and caregiving, and greater recognition of shared parental responsibilities;
- development of digital communications and file-sharing technology that allows employees to work from a location remote from the physical workplace while remaining in contact with co-workers.

Some common types of flexible work arrangements are:

Flextime – a pattern of work in which individual employees are allowed to vary their working hours, usually without altering the total number of hours worked. They may work a schedule that allows an early start and early end to the workday, or a split shift, or a later start or later finish. They may work longer hours on some days of a weekly or other cycle and shorter hours on another. Some flextime arrangements involve "core hours" when all employees are required to be working each day, while flexibility is permitted outside of the core hours.[215]

Flextime contrasts with averaging of hours of work, which would typically apply to a group of employees and be instituted primarily to meet the employer's operational requirements. Flextime arrangements are typically arrangements between an employer and an individual employee to allow the employee to perform work on a schedule that allows the employee to fulfil other responsibilities and commitments.

215. Canadian Centre for Occupational Health and Safety, "Flexible Work Arrangements," online: https://www.ccohns.ca/oshanswers/psychosocial/flexible.html.

Compressed work week – an alternative work pattern in which an employee works longer hours per days in order to have a shorter work week. This may be an individual arrangement, or be instituted on a workplace-wide or group basis by the employer for operational reasons.[216] Recommendation 7 above contemplates a compressed work week consisting of four 10-hour working days.

Job sharing – two or more persons working part-time and performing the work that would otherwise be done by one full-time employee.[217]

Telecommuting – working from home or from other locations outside the physical workplace.[218]

The benefits of flexible work arrangements are said to include reduced absenteeism,[219] better potential to recruit and retain valuable personnel,[220] reduction in employer overhead,[221] and greater job satisfaction.[222] Telecommuting has been associated with increased employee productivity. A 2013 survey of Canadian businesses indicated that 65 per cent of those that allowed telecommuting reported a positive effect on employee productivity, and 58 per cent indicated it resulted in improved quality of work by employees who telecommuted.[223]

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216. *Ibid.*

217. *Ibid.*

218. *Ibid.*

219. *Ibid.*

220. *Ibid.*

221. In a 2013 survey of 500 Canadian businesses conducted for the Bank of Montreal, 54 per cent of the businesses that allowed telecommuting reported a reduction in office and overhead expenses: "BMO Poll: Canadian Businesses Report Significant Divide on the Benefits of Telecommuting," Toronto: Marketwired, 26 April 2013, online: https://newsroom.bmo.com/2013-04-26-BMO-Poll-Canadian-Businesses-Report-Significant-Divide-on-the-Benefits-of-Tellecommuting. See also Shaw Business, *Workshifting: The Business Case*, online: http://business.shaw.ca/ResourceDetail.aspx?ResourceId=6442451975.

222. Results of the 2012 Statistics Canada General Social Survey indicate that a flexible work schedule is associated with a marginally higher level of job satisfaction. Seventy-nine per cent of employees with a flexible work schedule reported they were satisfied with their work-life balance, as opposed to 73 per cent whose work schedule was not flexible: Statistics Canada, 'Satisfaction with work-life balance: Fact sheet " (April 2016), online: https://www.statcan.gc.ca/pub/89-652-x/89-652-x2016003-eng.htm.

223. *Supra,* note 221.

The trend is not entirely in one direction. Several major international companies that formerly had liberal policies allowing large numbers of employees to work from home or from other out-of-office locations have recently discontinued those policies in the second decade of the 21st century, not for reasons of productivity or perceived abuses, but primarily to generate greater internal cohesion and synergy. Yahoo discontinued its work-from-home policy in 2013.[224] Honeywell did so in 2016, and IBM ended work-from-home privileges for its marketing department in 2017.[225]

Numerous jurisdictions have enacted provisions giving employees a right to request a flexible work arrangement which the employer may accept or reject, but must consider. The rationale underlying these provisions was succinctly summarized by the Special Advisors to the Changing Workplaces Review in Ontario in these words:

> Providing a "right to request" means providing employees the right to ask for such things as changes in work hours' schedules, or location, with protection from retaliation by the employer. Right to request legislation recognizes that employees have home care, family, and other duties and responsibilities, but at the same time wish continuation of their employment and access to more flexible working arrangements.[226]

Typically, these provisions require some qualifying period of employment before an employee may request a flexible work arrangement. They require the employer to respond to the request within a specific timeframe, but in all cases the employer is free to accept or reject the employee's flextime request. In some jurisdictions, the grounds on which a flextime request may be refused are limited. Reprisal or adverse treatment of an employee for exercising the right to make the request is prohibited.

British provisions enacted in 2002 have been particularly influential on the employment legislation of other Commonwealth jurisdictions, and the discussion below commences with them for that reason.

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224. Julianne Pepitone, "Marissa Mayer; yahoos can no longer work from home" (25 February 2013), online: http://money.cnn.com/2013/02/25/technology/yahoo-work-from-home/index.html.

225. D. Depass, "Honeywell ends telecommuting option" (21 October 2016), online: http://www.startribune.com/honeywell-ends-telecommuting-option/397929641/; Chris Weller, "IBM was a pioneer in the work-from-home revolution – now it's cracking down," (27 March 2017), online: http://www.businessinsider.com/ibm-slashes-work-from-home-policy-2017-3.

226. Mitchell and Murray, *supra*, note 72 at 197.

2. Interjurisdictional Comparison

(a) United Kingdom

In the United Kingdom, workers who have been employed more than 26 weeks may request a change in their working hours, working times, and the location of work. Only one such request may be made in a 12-month period.[227] The employer is required to notify the employee of the employer's decision within three months.[228] The grounds on which an employer may refuse a request are limited to the following:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to re-organize work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes.
- any additional grounds specified in regulations.[229]

Originally, the request could only be made for the purpose of fulfilling caregiving responsibilities for a child or an adult meeting certain need or dependency criteria. Since 2014, those restrictions on the purpose of the flextime request have been removed.[230]

Employees are expressly given protection against dismissal or other detrimental treatment for having made a flextime request or asserting the right to do so.[231]

It does not appear that the employer could validly grant a request that contravenes statutory standards, but as the basic standard for hours of work in the Act is itself expressed as an average of up to 48 hours per week in a 17-week reference period,

227. *Employment Rights Act 1996*, 1996, c. 18, s. 80F(1), as added by the *Employment Act 2002*, 2002, c. 22, s. 47(2)

228. *Ibid.*, ss. 80G(1)(aa), (1B).

229. *Ibid.*, s. 80G(1)(b).

230. *Children and Families Act 2014*, 2014, c. 6, s. 131(1).

231. *Supra*, note 227, ss. 47E, 104E.

considerable variation of working hours between working days is possible without exceeding the standard.[232]

(b) New Zealand

New Zealand has enacted flextime request provisions very similar to those in force in the United Kingdom.[233]

The base standard in New Zealand of 40 hours per week may be increased by agreement between the employer and employee.[234] Thus it appears that a flexible working arrangement could allow for more than 40 hours of working time in a particular week to offset fewer hours in another.

(c) Australia

In Australia, an employee who has been employed for more than twelve months may request a change in working arrangements relating to hours of work, patterns of work, and location of work, but only for certain reasons.[235] Those reasons are: specified circumstances relating to child care or other caregiving obligations, the employee's disability, being age 55 or older, being a victim of domestic violence or caring for an immediate family member who is one.[236] The request may include changing to part-time work if it is made because of child care needs.[237]

The employer is required to respond in writing within 21 days. A request may be refused only on "reasonable business grounds," and details of those grounds must be given.[238] The category of "reasonable business grounds" is not closed as under the British and New Zealand provisions described above, but grounds substantially similar to those on which a flextime request may be refused in the United Kingdom and-New Zealand are declared to belong to that category.[239]

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232. *Working Time Regulations 1998*, S.I. 1998 No. 1833, s. 4.

233. *Employment Relations Act, 2000*, No. 4, ss. 69AAE, 69AAF.

234. *Minimum Wage Act 1983*, ss. 11B(1), (2).

235. *Fair Work Act, 2009*, s. 6591), (2)(a). Long-term casual employees who have a reasonable expectation of continuing employment on a regular and systematic basis may also make a flextime request under s. 65(1): s. 65(2)(b).

236. *Ibid.*, s. 65(1A).

237. *Ibid.*, s. 65(1B).

238. *Ibid.*, s. 65(5).

239. *Ibid.*, s. 65(5A).

There is no specific exception for individual flexible working arrangements from the National Employment Standards, but those standards allow working "additional hours" above the 38 hour per week standard if the hours are reasonable.[240] The personal circumstances of the employee, including family responsibilities, are among the grounds expressly listed as ones on which additional hours are reasonable or unreasonable.[241] It appears, therefore, that an individual flexible working arrangement contemplating occasional peaks over the 38 hour per week standard to offset shorter working hours at other times would be permissible.

(d) Manitoba

Since 2011, the Manitoba *Employment Standards Code* has authorized individual flextime arrangements creating alternative standard hours established by agreement between an employer and an employee who is not covered by a collective agreement, and who regularly works at least 35 hours per week.[242] Individual arrangements of this kind are permissible only if entered into at the employee's request.[243] The flextime agreement must not exceed 40 hours per week or 10 hours per day, and may specify different hours of work for different days.[244] A flextime agreement may be terminated by either party on two weeks' written notice to the other party.[245]

(e) Proposed flextime amendment to Canada Labour Code

Arthurs concluded in his report on Part III of the *Canada Labour Code* that employers in the federally regulated sector should be permitted to accommodate "genuine requests" by individual employees for a modified work schedule. Arthurs observed that if legislation allows for modification of standard daily or weekly work schedules, there was no reason it should be available only to the employer.[246]

The Arthurs Report recommendations followed the pattern of the British flextime request provisions. After one year of employment, employees could request variation of their working hours or work schedules, or a change in the location of their work.

240. *Ibid.*, s. 62(1).

241. *Ibid.*, s. 62(3)(b).

242. *Employment Standards* Code, C.C.S.M., c. E110, s. 14.1(1), enacted by S.M. 2011, c. 13, s. 3.

243. *Ibid.*

244. *Ibid*., s. 14.1(2)

245. *Ibid.*, s. 14.1(3).

246. *Supra*, note 102 at 147 (Recommendation 7.39).

Only one such request could be made per year per employee. The employer would be required to respond, and if the employer refused the request, written reasons for the refusal would have to be provided to the employee.[247]

In 2016 the federal government issued a discussion paper on flexible work arrangements and conducted nationwide consultations on the subject.[248]

The 2017 federal budget document announced that the *Canada Labour* Code would be amended to give employees in the federally regulated sector the right to request flexible work arrangements, including flexible start and finish times and the ability to work from home.[249] This was characterized in the budget document as a measure to further gender equality by supporting the participation of women in the labour market.[250]

(f) Ontario

The Special Advisors to the Changing Workplaces Review endorsed the flextime recommendation in the Arthurs Report and made similar recommendations of their own for flextime provisions in Ontario.[251] In doing so, they emphasized the need for protection of the employee from reprisal or retaliation for making the request.

A flextime amendment to come into force in 2019 was included in the reform legislation passed following the Changing Workplaces Review, although the subsequently elected majority government of Ontario intends to repeal it.[252] Under it, employees would be able to make a written request for changes to their schedule or work location after three months of employment. The employer would then be required to discuss the request and notify the employee of a decision on it within a reasonable time. If the request were granted, the employer would have had to specify the date the changes will take effect and their duration in the notification to the employee. If the

247. *Supra*, note 102 at 149-150 (Recommendations 7.44, 7.45).

248. *Flexible Work Arrangements: A Discussion Paper* (Ottawa: Employment and Social Development Canada, May 2016). See also *Flexible Work Arrangements: What Was Heard* (Ottawa: Employment and Social Development Canada, September 2016).

249. Department of Finance Canada, *Building A Strong Middle Class: #Budget2017*, 22 March 2017, online: http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf, at 63.

250. *Ibid.*, at 226. The amendment was passed in late 2017, but is not in force at the date of this report: see *Budget Implementation Act 2017 (No. 2)*, S.C. 2017, c. 33, s. 199.

251. Mitchell and Murray, *supra*, note 72 at 197.

252. S.O. 2000, c. 41, s. 21.2 (enacted by S.O. 2017, c. 22, Sch. 1, s. 11). See however the repealing legislation, *supra*, note 3.

request were refused, the notification of decision would have had to specify the reasons for the refusal. Employees were not limited to one flextime request per year.

3. Flexible Work Arrangements and the ESA

The Project Committee discussed at length whether British Columbia should enact a flextime request provision in the ESA.

Flextime was recognized as a popular concept that enables employees with child or adult caregiving responsibilities or educational commitments to remain in the workforce. Some members supported flextime request provisions as a means of assisting single parents to remain in the workforce and others to share parental or caregiving responsibilities while remaining employed.

Other members expressed concerns about enshrining a right to request a flexible work arrangement in legislation because of the potential for allegations of favouritism or discrimination to be levelled against the employer. They envisioned a double-bind situation for employers: refusal of a flextime request could lead to a complaint of discrimination by the employee making the request, while granting it might lead to allegations of discrimination by employees not similarly accommodated.

The inclusion of a right to request a change in the location of work was seen as especially troublesome for employers. There was apprehension that allowing an employee to work from home would give rise to expectations on the part of others, and cause resentment if they were not met. Smaller workplaces were seen as being particularly susceptible to employee dissension arising from perceived favouritism.

As flextime request provisions are still a relatively new feature of employment legislation, their effectiveness is still uncertain.

Consensus was not reached on the merits of including a flextime request provision in the ESA. There was agreement, however, that if such a provision is introduced, it should extend only to hours and scheduling of work, but not to the location of work.

The Project Committee recommends:

17. If a provision is enacted in the ESA that authorizes an employee to make, and an employer to grant, a request for a flexible work schedule to accommodate a need of the employee, the provision should extend only to hours of work and scheduling of work, but not to the location of work.

4. Informal Employer-Employee Agreements To Make Up Time Taken Off

Informal arrangements are made every day in which an employer allows an employee to take time off for a particular purpose, and to work extra time on another day or series of days in order to make up the time without losing pay. These common ad hoc arrangements are technically illegal under the ESA unless overtime is paid for any time worked above 8 hours on a single day. All members of the Project Committee recognized a need to relax the overtime pay requirements to some extent to accommodate mutually convenient arrangements to make up time taken off for a reason having to do with the employee's own circumstances.

A consensus formed around a proposal whereby up to three extra hours could be worked on one or more days within a pay period in order to make up an equivalent amount of time taken off for the employee's purposes, without the employer being required to pay overtime for the extra hours being made up.

18. The ESA should be amended to allow an employee to voluntarily work up to a total of three hours spread over one or more days in the same pay period without the employer being required to pay an overtime rate for those hours, in order to make up for time which the employee has taken off in that pay period.

G. Meal Breaks

Section 32(1) of the ESA states that an employer must ensure that employees receive a meal break of at least one-half hour after not more than five consecutive hours of work. The employer does not need to pay employees for the time taken up by the meal break. This corresponds to the general norm across Canada.

Section 32(2) provides that if an employer requires an employee to work or be available for work during a meal break, the employer must count the meal break as time worked by the employee. In the course of this project, it came to the attention of the Project Committee that some employers interpret section 32(2) as giving them the option of requiring their employees to work continuously throughout full shifts without receiving meal breaks, as long as they pay their employees for the full amount of time they are required to work. This is unlikely to have been the intention of section 32(2). The mandatory terms of section 32(1), plus the fact that section 32(2) does not contain language indicating that it overrides section 32(1), indicate that section 32(2) was intended to deal with cases in which a meal break is interrupted in an emergency or other exceptional circumstance, rather than providing employers with an

alternative of ignoring altogether the requirement to allow meal breaks.[253] The Project committee concluded that section 32 should be amended to clarify this is the intended meaning of section 32(2), and remove any ambiguity. This clarification received significant employer and employee support in the responses to the consultation paper.

The Thompson Commission recommended in 1994 that employees who do not receive a meal break should receive double pay for one-half hour of the total time worked as compensation.[254] The Employment Standards Coalition continues to urge that s. 32(2) be amended to reflect this, and to require that employees should receive in addition two paid rest breaks of 15 minutes each in any 7-hour period, exclusive of a meal break.[255]

The Project Committee was divided on whether employees who are required to work more than five consecutive hours without a meal break, or who are required to work or be available to work during one should receive a half hour's premium pay. Some members considered that the ESA should contain an incentive for employers to provide a meal break as a health measure, and employees who do not receive one should accordingly receive a half hour's pay at the rate of time and a half. They also considered that a requirement of two 15-minute rest breaks ("coffee breaks") in a workday would only reflect a common workplace practice.

Other members, however, maintained that an employer should be required to do no more than pay for actual time worked at the normal rate. The proposition that premium pay should be required for time worked during a regular shift was rejected. Coffee breaks, in their view, had no place in legislation and should be available only at the employer's option.

The Project Committee recommends:

19. Section 32 should be amended to clarify that section 32(2) does not relieve an employer of the obligation to ensure meal breaks are provided as required by section 32(1),

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253. The Employment Standards Tribunal has interpreted s. 32(1) as imposing a positive obligation on employers to ensure meal breaks are given and taken at the required time: *Re Subby's Subs* (10 September 1999) BCEST #D393/99 at 3-4. At the time of this decision, s. 32(2) had substantially the same wording as it now does.

254. *Supra*, note 2, at 107.

255. Employment Standards Coalition, *Legislative Proposals – Hours of Work and Overtime*, supra, note 184.

and applies when it is necessary to interrupt a meal break because of an emergency or other exceptional circumstance.

H. Notification of Work Schedules and Scheduling Changes

1. Background

With the growth of precarious work, the issue of adequate notice of work schedules and changes in them has taken on increasing importance. There has been a great increase in part-time employment, and in the numbers of workers holding more than one job. The literature on precarious work abounds with accounts of the difficulties and stresses produced by lack of predictable work schedules and last-minute call-ins, especially for single parents and workers holding more than one job.[256] Focal points of discontent for those who do not have full-time work are a common practice of "just-in-time scheduling" in the retail and service sectors, and in being given few weekly hours of work, yet being expected to remain on call at all times.[257]

The ESA does not currently address notification of hours of work or changes in work schedules. Section 31(1) formerly required employers to display notices concerning hours of work in a location in the workplace where they could be easily read by employees. The notice had to cover when work and individual shifts started and ended, and the meal breaks scheduled during the shift or workday.[258] Section 31(3) formerly required 24 hours' notice of any shift change, except where the change was an extension of a shift prior to its end, or would result in an employee being entitled to overtime pay.

Section 31 was repealed in its entirety in 2002.[259] The reasons for the repeal were, first, it was believed that most employers supplied work scheduling information voluntarily in their own interest. Second, the section was worded inflexibly. This meant that strict compliance was not always possible in industries that need to engage on-call or relief employees to deal with rapidly changing levels of demand. Third, the

256. Gellatly, *supra*, note 96 at 23-24, 27-29; Lewchuk, *supra*, note 71 at 50-52.

257. Hardman, *supra*, note 211 at 14-15.

258. *Supra*, note 1, s. 31(2).

259. See S.B.C. 2002, c. 42, s. 12. The Director of Employment Standards continues to have the power under s. 79(1)(c) to require posting of notices regarding requirements of the ESA or regulations, or a determination.

section was rarely, if ever, the focus of concern in any investigation of contraventions. It was therefore considered to be an unnecessary form of regulation.[260]

Business had not sought the complete repeal of requirements concerning notice of shift changes. In submissions to government preceding the repeal of section 31, the Coalition of BC Businesses urged only that section 31(3) be amended slightly to recognize that strict compliance with the 24-hour notice requirement was not always possible because of circumstances that could arise unexpectedly. For example, personnel substitutions made necessary by unexpected illness or other causes might have to be made occasionally on less notice.[261]

The repeal of the requirement for 24 hours' notice of a shift change has been a contentious point. The BC Employment Standards Coalition continues to recommend restoration of the posting of work hours and notice of shift change requirements, but with significant changes. It has issued a proposal calling for 48 hours' notice of a shift change except in an emergency, in which case 24 hours would be the minimum period of notice. The notice would have to be given in the first language of the affected employees if a significant number are not native English-speakers. The BC Employment Standards Coalition also urges that planned shift schedule changes be subject to the consent of employees affected, which could not be unreasonably withheld. The provision would declare that family responsibilities are a valid ground for withholding consent.[262]

2. Interjurisdictional Comparison

Alberta has a requirement for notification to employees of the starting and ending times of work, either by posting notices conspicuously or by other "reasonable methods."[263] A change of shift requires 24 hours' written notice to affected employees.[264]

Saskatchewan requires employees to be given a work schedule covering at least a week at a time, covering the times at which work begins and ends, and when meal breaks occur.[265] Written notice of a change in the scheduled times, or in the times at

260. The reasons stated here for the repeal of s. 31 were provided to the Project Committee by the Ministry of Labour, based on a search of internal records.

261. *Supra*, note 208 at 3.

262. *Supra*, note 184.

263. *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 17(1).

264. *Ibid.*, s. 17(2).

265. *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, ss. 2-11(1), (2).

which an employee is required to be at the employer's disposal must be given a week in advance, unless there are unexpected, unusual, or emergency circumstances.[266]

In Ontario, amendments originally intended to come into force in 2019 would have allowed an employee to refuse to work or to be available to work on a day on which the employee was not scheduled to do so if the employer provided less than 96 hours' notice of the scheduling change.[267] The right of refusal would not apply if the demand or request to work or be on call was made to deal with an emergency, to ensure the continued delivery of essential public services, or to deal with a threat to public safety.[268] Cancellation of a scheduled day of work or on-call period with less than 48 hours' notice would have entitled the employee to three hours' pay.[269] It now appears, however, that following the change of government in Ontario in 2018 these amendments will be repealed before ever coming into force.[270]

Part III of the *Canada Labour Code* contains requirements for posting of new work schedules, or of the modification or cancellation of a work schedule, at least 30 days before the schedule, modification, or cancellation goes into effect, if a modified work schedule exceeding standard working hours or averaging of hours of work is in place.[271]

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266. *Ibid.*, ss. (3)-(5).

267. *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 21.5(1) (added by S.O. 2017, c. 22, Sch.1, s. 12). See *supra*, note 3, regarding the bill that would repeal, *inter alia,* s. 21.5(1).

268. *Ibid.* s. 21.5(2). For the purpose of the exception to the employee's right to refusal, "emergency" would have had the following definition enacted by S.O. 2017, c. 22, Sch. 1, s. 12, now likely to be repealed before coming into force:

"emergency" means,

(a) a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise, or

(b) a situation in which a search and rescue operation takes place.

269. *Ibid.*, s. 21.6(1). There would be exceptions if work is cancelled because of weather or other circumstances outside of the employer's control. Additional exceptions could be prescribed by regulation: s. 21.6(3), as added by S.O. 2017, c. 22, Sch. 1, s. 12.

270. See *Making Ontario Open for Business Act, 2018*, Sch. 1, s. 27(5), *supra*, note 3.

271. *Supra*, note 101, ss. 170(3), 172(3). See also the *Canada Labour Standards Regulations*, CRC, c. 986, ss. 4, 5(2), 6(12).

3. Discussion

The Project Committee recognized the importance of adequate notice to employees of their work schedules and changes made to them. Without predictability surrounding the times when they have to be at work, employees cannot properly order their lives. The growth of part-time employment and multiple-job holding, two phenomena that go hand in hand, increases the importance of adequate notice of scheduling changes.

At the same time, employers must retain enough flexibility in staffing to deal with emergencies and unexpected staff shortages, as well as fluctuating levels of business activity. A notice requirement must allow for exceptions in cases where the inability to give the usual amount of advance notice of a schedule arises from circumstances beyond the employer's control or that are simply unforeseen.

A majority of the Project Committee members consider that a provision similar to the former section 31(3) of the ESA calling for 24 hours' notice of a change in shift or work schedule is reasonable and should be restored in the ESA. The provision should have the proviso that when it is not possible to provide this much advance notice for an unforeseen reason, a schedule or shift change on less notice would not amount to a contravention of the Act. As a corollary, an employee's job should not be at risk if the employee does not receive a minimum of 24 hours' notice of a scheduling change and cannot report under the altered schedule at the start of the first shift after the change. Anything different would detract from both the efficacy of the notice provision and elementary fairness.

As under the former section 31(3), scheduling changes that amount to an extension of a shift prior to its end, or that would entitle employees to overtime pay, would fall outside the requirement for 24 hours' notice under the provision contemplated.

A minority of the Project Committee would set the standard at 48 hours' notice.

Restoration of a 24-hour notice requirement for schedule changes was supported by all but one of the major business organizations responding to the consultation paper, and by the BC Federation of Labour. The Employment Standards Coalition urged in a submission to the Minister of Labour that the ESA should require two weeks' notice instead.

Employees answering the online survey were equally divided between supporting a 24-hour and 48-hour notice requirement.

The overall reaction was not such as to cause any change in either the majority and minority positions within the Project Committee.

A **majority** of the members of the Project Committee recommend:

20. The ESA should be amended to restore a provision requiring 24 hours' notice to employees of a change to a shift or work schedule unless the change:

(a) will entitle the employees to overtime pay;

(b) is an extension of a shift prior to the end of the shift; or

(c) must be made with less than 24 hours' notice because of unforeseen circumstances.

A **minority** of the members of the Project Committee endorse Recommendation 20, but with the substitution of 48 hours' notice instead of 24.

The Project Committee recommends:

21. The ESA should be amended to provide that an employee who does not receive a minimum of 24 hours' notice as required by Recommendation 20 may refuse to report for work according to the altered schedule at the start of the next shift or workday after the change in shift or work schedule takes effect.

Chapter 6. Wages and Wage Payment

A. Overview of Part 3

Part 3 of the ESA covers when and how wages must be paid. It addresses which deductions from wages are allowed and which are prohibited, assignments of wages, and payroll records that employers are required to keep. Part 3 also contains the requirement to pay the minimum wage as set by regulation.

B. The Definition of "Wages"

The definition of "wages" is not found in Part 3, but is key to the application of most of its provisions:

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

(d) money required to be paid in accordance with

(i) a determination, other than costs required to be paid under section 79 (1) (f), or

(ii) a settlement agreement or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

(f) gratuities,

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses,

(i) penalties, and

(j) an administrative fee imposed under section 30.1;

As is obvious from this extended definition, "wages" under the ESA includes many kinds of payments other than straight salary. Bonuses that amount to incentives to reward performance are covered by the term.[272] Bonuses paid gratuitously by the employer without reference to the employee's past, present or future performance are not wages, however.

The employer's contributions to employee benefits as well as employee contributions that may be deducted from wages under a contract of employment are also "wages" for the purposes of the ESA.

Tips and gratuities are excluded from the definition of "wages." This is the case across Canadian jurisdictions, with the exception of Alberta.[273] Tips and gratuities are the subject of recommendations discussed later in this chapter.

Amounts covered by the definition of "wages" may be claimed and recovered through the complaint process and enforcement mechanisms under the ESA. Other amounts payable to an employee, such as work-related expenses, must be recovered as simple debts, generally by suing for them in the civil courts.

C. How Wages Must Be Paid

The ESA requires that wages be paid on a semi-monthly basis within 8 days of the end of the pay period.[274] Overtime credited to a time bank and vacation pay are exceptions.[275] There is a considerable body of case law under the ESA holding that various items supplied by employers cannot be treated as wages, thereby reducing the

272. *Re Wedding* (26 January 1999), BCEST #D574/98.

273. See *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 1.

274. *Supra*, note 1, s. 17(1).

275. Overtime credited to a time bank must be paid out within 6 months from the date on which a time bank is closed by the employer, or time off allowed in lieu: s. 42(3.2). Vacation pay must be paid at least 7 days before the employee's annual vacation begins: s. 58(2)(a). If the employee agrees or a collective agreement so stipulates, vacation pay may be paid instead on scheduled paydays as it is earned: s. 58(2)(b).

employer's monetary obligation for time worked, *e.g.* room and board,[276] supply of vehicles or equipment,[277] issuance of shares,[278] and "perks" like free movies.[279]

An employer must pay all wages in Canadian currency, or by means of a cheque, draft or money order payable on demand, or by direct deposit to an employee's account in a savings institution.[280] The requirement to pay wages in the form of money is traceable to the English *Truck Act 1831* that required all wages to be paid "in the Coin of this Realm."[281] A requirement of this kind is found in all Canadian jurisdictions. It prevents paying employees in kind or by granting other "perks" of more or less subjective value determined by the employer, rather than in cash or cash equivalents.

Payment of wages by electronic direct deposit to an employee's account in a savings institution is extremely common, and is the first choice of many employers and employees alike. Despite the widespread use of the direct deposit method, section 20(c) of the ESA still requires individual consents by employees or authorization under a collective agreement before it can be adopted as the norm in a workplace.[282]

The Project Committee considers there should no longer be a general requirement for individual consents or authorization under a collective agreement for wage payment by direct deposit, given the degree of use and popularity of this modern method. It is onerous and impractical to compel an employer to maintain a separate manual

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276. *Re Lombnes* (13 December 2001) BCEST #D665/01; *Re Heichman (c.o.b. Blue Ridge Ranch)* (17 April 1997) BCEST #D184/97; but see *Re Sophie Investments Inc.* (7 January 1998), BCEST #D527/97 and #D528/97. There is a suggestion in the case law that deductions for room and board may be permissible if the deduction made is specifically agreed upon rather than unilaterally imposed by the employer.

277. *Re Lombnes*, *ibid.*

278. *Re Richardson* (7 April 1999) BCEST D120/99; *Re AVT Audio Visual Telecommunications Corp.* (10 December 2003) BCEST #D328/03, reconsideration refused (25 February 2004) BCEST #RD032/04.

279. *Re Sanpreet Enterprises Inc. (c.o.b. Xanavision)* (14 December 1998), BCEST #D556/98.

280. *Supra*, note 1, s. 20(a), (b).

281. 1 & 2 Will. 4, c. 37, s. 3. The provision was interpreted as requiring full payment of all wages owing, apart from deductions that are specifically authorized by law: *Williams v. North's Navigation Collieries*, [1906] A.C. 136 (H.L.). This interpretation is expressly entrenched in s. 21 of the ESA, discussed below.

282. *Supra*, note 1, s. 20(c). An exception is created by s. 40.2 of the *Employment Standards Regulation*, *supra*, note 31 in the case of wages paid by farm labour contractors to farm workers. These must be paid by direct deposit to the farm worker's account in a savings institution. Consent is irrelevant, and no other method of payment is allowed.

payment system for an isolated objector when all other employees are paid by direct deposit.

Privacy concerns about disclosure of personal banking information to an employer could be met by opening a new account for each objector for the sole purpose of depositing their pay. Employees who do not wish to reveal any personal banking information to the employer would be free to transfer funds from their wage deposit accounts into their personal accounts without any need to provide the employer with information about those accounts.

Repealing the wording in section 20(c) of the ESA requiring written authorization from individual employees or under a collective agreement goes only part of the way in giving employers the ability to impose the direct deposit method as a workplace norm. The *Personal Information Protection Act*[283] restricts the ability to obtain personal information from employees about where the employees bank unless they specifically consent to this, or unless another enactment authorizes its collection and use and explicitly overrides that Act. Individual consent may be withdrawn, which could disrupt the use of the direct deposit mechanism on a workplace-wide basis. In order to dispense with the formality of individual consent for the collection and use of personal banking information for the specific purpose of establishing and maintaining a direct deposit mechanism, the ESA should authorize the collection, use and disclosure of this personal information for the purpose of direct deposit of wages notwithstanding the *Personal Information Protection Act*.

The Project Committee recommends:

22. The ESA should be amended:

(a) by deleting the words "if authorized by the employee in writing or by a collective agreement" from section 20(c); and

(b) to authorize an employer, notwithstanding the Personal Information Protection Act *and the* Freedom of Information and Protection of Privacy Act*, to collect, use and disclose personal information of the employee concerning banking arrangements without having to first obtain the employee's consent for the purpose of the direct deposit of the employee's wages into the employee's account in a savings institution.*

283. S.B.C. 2003, c. 63, ss. 3(5), 6.

D. Wage Statements and Payroll Records

Section 27 requires that a wage statement be given to every employee on each payday and specifies the information the statement must contain. Wage statements may be provided electronically if the employer can provide the employee confidential access to the statement and a means of generating a paper copy.[284]

Section 28(1) requires all employers to maintain records for every employee containing:

(a) the employee's name, date of birth, occupation, telephone number and residential address;

(b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

(e) the benefits paid to the employee by the employer;

(f) the employee's gross and net wages for each pay period;

(g) each deduction made from the employee's wages and the reason for it;

(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

E. Wage Deductions

Section 21 of the ESA is an important provision owing its origins to English truck legislation enacted over several centuries to protect the wages of employees. It prevents the erosion of wages by deductions not having a basis in law:

> **Deductions**
>
> **21**(1) Except as permitted or required by this Act or any other enactment of

284. *Supra*, note 1, s. 27(2).

> British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Section 21(1) only allows deductions permitted by legislation. These include deductions for taxes, EI premiums, CPP contributions, and those made under written wage assignments of the kind recognized by section 22 of the ESA, discussed later in this chapter.

The Court of Appeal has interpreted the words "for any purpose" in s. 21(1) to prohibit self-help recoveries by the employer through deductions and set-offs of debts owing by the employee to the employer, including overpayments.[285]

The prohibition on self-help extends to other claims of the employer, such as ones for damage to the employer's property, or unexplained losses of inventory.[286] An employer must prove the claim and obtain judgment against the employee in the civil courts, rather than docking the employee's wages.[287]

Section 21(2) codifies a cardinal element of the common law employer-employee relationship, namely that employees are not co-venturers of the employer and cannot be compelled to bear the employer's losses. The prohibition in s. 21(2) on charging business costs to employees is absolute, apart from exceptions permitted by regulations made under the ESA. Trade custom does not justify a contravention.[288]

The test for what amounts to "business costs" under s. 21(2) has two branches: (a) the purpose of the expense; (b) who principally benefits from the expense.[289] If the

285. *Health Employers' Association of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343, at paras. 54-72.

286. *Re Prospect Import & Export Inc.* (20 October 2005), BCEST #D163/05. (property damage); *Re Nelson* (4 January 2005), BCEST #D002/05 (loss of inventory).

287. *Re Al's Custom Autobody Ltd.* (7 June 2001) BCEST #299/01.

288. *Re Hanson (c.o.b. The Bold Venture)* (23 March 2006) BCEST D040/06 (alleged custom in fishing industry requiring employees to pay share of food, fuel, and bait not a defence).

289. *Re GBC Banking Software Corporation* (10 August 2007) BCEST #D066/07 at 8-9.

purpose of the expense is connected with the employer's business and it is incurred for the benefit of the employer's business, it cannot legally be the subject of any deduction from an employee's wages.

Among the deductions employers are prohibited from making are the cost of special clothing, or its cleaning and repair. Section 25(1) requires an employer to pay for the cleaning and repair of special clothing an employee is required to wear, subject to an employer-employee agreement under s. 25(2). Section 25(2) permits agreements between an employer and a majority of the affected employees whereby the employees agree to clean and maintain their own special clothing. The agreement is binding on all employees required to wear the special clothing. Employers are nevertheless required to reimburse employees bound by the agreement for the cost of cleaning and repair. Deductions made from wages or received from an employee in violation of the employer's obligation to pay the expense in first instance or reimburse it are deemed under s. 25(3) to be wages, and are recoverable as such.

F. Wage Assignments

1. Assignments of Wages Binding on the Employer: sections 22(1) and (3)

A wage assignment is a transfer by an employee to another person of the right to receive the employee's wages or a portion of them. British Columbia is one of three jurisdictions in Canada that allow wage assignments binding on the employer. The others are Quebec and the Northwest Territories.[290]

Under s. 22(1) of the ESA, the employer *must* honour a written assignment of wages to:

(a) a trade union in accordance with the *Labour Relations Code*;[291]

290. *An Act respecting labour standards*, C.Q.L.R. c. N-1.1, s. 44; *Employment Standards Act*, S.N.W.T. 2007, c. 13, s. 14(1). Nunavut authorizes employers to honour wage assignments at their discretion. Wages assignments for other than certain listed purposes, which include credit obligations, must first be approved by a Labour Standards officer as being for a purpose beneficial to the employee: *Labour Standards Act,* R.S.N.W.T. (Nu) 1988, c. L-1, s. 51(1).

291. R.S.B.C. 1996, c. 244. Section 16 of the *Labour Relations Code* requires employers to honour assignments of wages to a trade union and remit to the union once per month the fees and dues deducted under them.

(b) a charitable organization or to a pension, superannuation, or other plan if the amounts assigned are deductible for income tax purposes;

(c) anyone to whom the assigning employee is required to pay maintenance under a maintenance order;

(d) an insurance company for insurance, medical, or dental coverage.

An employer is also obliged under s. 22(3) to honour an assignment of wages authorized by a collective agreement. This mechanism enables union dues to be collected through wage deductions that are remitted directly to the union.

The only change the Project Committee believes is warranted in these two provisions is to replace the term "insurance company" in section 22(1)(d) with "benefits provider," as group insurance and extended health benefits are now obtainable from various financial institutions and other bodies as well as insurance companies.

The Project Committee recommends:

23. Section 22(1)(d) of the ESA should be amended by deleting "insurance company" and substituting "benefits provider."

2. Other Wage Assignments: section 22(4)

Section 22(4) states the employer *may* honour a written assignment of wages "to meet a credit obligation." In other words, section 22(4) gives an employer a choice whether to honour a wage assignment that an employee has made to pay off a debt, or to disregard the assignment and continuing to pay the wages to the employee.

It is unclear whether a debt owed to the employer can be paid through a wage assignment under section 22(4). There are Employment Standards Tribunal decisions pointing either way. The Tribunal has held that rent and certain other kinds of legitimate debts owed to the employer may be paid through an assignment of wages, essentially amounting to a wage deduction.[292] The *Interpretation Guidelines Manual* used by the Employment Standards Branch follows this view of the effect of section 22(4), setting out several examples of debts being repaid to an employer through

292. *Re Sophie Investments Inc.*, *supra*, note 276. See also *Re Lawson Oates Chrysler Ltd.* (5 October 1996), BCEST #D288/96 (prior written assignment of wages to cover repair expenses not covered by insurance is sufficient to allow deduction).

agreed wage deductions.[293] Other Tribunal decisions, however, suggest that s. 22(4) only contemplates wage assignments in favour of third party creditors, not debts owed to the employer.[294]

It is also uncertain whether an agreement between an employer and employee for the return of a wage overpayment through a payroll deduction may amount to a valid wage assignment, although the better view seems to be that it does.[295]

The Project Committee considered that ambiguities concerning the validity of wage assignments should be removed, but also considered that wider policy concerns call into question whether it is advisable to permit wages to be broadly assignable. While the purposes listed in section 22(1) and (3) serve generally accepted public policy objectives, this is not true of all wage assignments. Unlike garnishing orders, wage assignments are not subject to judicial oversight or exemption of a portion of wages needed for basic support and maintenance of the debtor and dependants. People in financial distress are susceptible to coercive pressures. If the pressure to assign wages is exerted by a creditor who happens also to be the debtor's employer, the pressure is likely to be irresistible. The voluntariness of any wage assignment granted under these circumstances is doubtful.

There is one situation in which the Project Committee believes wage assignments in favour of the employer should be permitted, namely to repay an advance of salary or unearned vacation pay given at the employee's request. For example, vacation pay may be advanced at an employee's request before it is fully earned because the employee has a vacation planned, and the employee might leave employment shortly

293. Ministry of Labour, *Interpretation Guidelines Manual*, online: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm. See webpage entitled "ESA Section 22 – Assignments."

294. See *Re A.E. Bradford Trucking Ltd.* (16 September 1996), BCEST #D265/96 at 4; *Re 550635 B.C. Ltd. (c.o.b. Jack's Towing (1997))* (2 March 2001), BCEST #D100/01, at 3-4; *Re Coquihalla Towing Co.* (10 October 1996), BCEST #D285/96 at 6. These decisions were made before the repeal in 2003 of the former s. 22(2), which empowered the Director of Employment Standards to authorize an assignment of wages that the Director considered to be for the employee's benefit. They may have been influenced by the implication flowing from that former provision that wage assignments for purposes other than those in ss. 21(1) and (3) would be invalid unless authorized by the Director.

295. While the Tribunal decisions cited in note 294 suggest otherwise, higher authority supports the view that wage overpayments are recoverable through deductions under a voluntary wage assignment. In *B.C. Health Employers Association of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343, at para. 67, Finch, C.J.B.C., speaking for a unanimous court, endorsed an arbitrator's conclusion that s. 21 allows an employer to deduct an overpayment if the employee agrees to this, or if the deduction is authorized by a statute or collective agreement.

afterward. In these circumstances, an irrevocable assignment of wages to authorize the employer to deduct an advance of salary, vacation pay, or other unearned allowance from a final paycheque does not undermine any purpose of the ESA.

The Project Committee believes it is desirable to maintain a complete separation between wages and debts owed to the employer in all other circumstances.

Insofar as wage assignments to third party creditors are concerned, it is generally an administrative inconvenience for employers to administer an assignment of wages to a third party. It can also embroil the employer in disputes with the employee's other creditors or a trustee in bankruptcy if the assigning employee is insolvent and the assignment is alleged to be a fraudulent preference. While section 22(4) gives the employer the right to refuse to honour a wage assignment if it is not made for a purpose listed in section 22(1), few employers in any event would willingly take on the burden of administering an employee's financial affairs. The usefulness of section 22(4) may be doubted for this reason.

In summary, the Project Committee believes the scope for valid wage assignments should be restricted to assignments made for the purposes listed in section 22(1), or ones made to repay an advance requested by the employee that will not be fully earned before employment ends. Section 22(4) should be repealed to effect this change.

The Project Committee recommends:

24. The ESA should be amended to permit an employee to make an irrevocable written assignment of wages for the purpose of repaying an advance from the employer.

25. Section 22(4) of the ESA should be repealed.

G. Tips and Gratuities

Tips and other gratuities have a somewhat nebulous status under the law. Courts and arbitrators have been content to leave the handling of tips and gratuities largely to trade custom, but the custom appears to vary considerably from one workplace to another. Authority concerning their legal characterization is thin, but such authority as there is indicates that when given by customers in the expectation that servers will receive them, they are beneficially owned by employees. If customers pay a service charge in lieu of tips, the funds so collected are considered to be held by the employer

in trust for the employees.[296] The authorities indicate nevertheless that employers are entitled to a significant degree of control over the handling and redistribution of tips and gratuities, if they choose to exert it.[297]

Tip pools for sharing gratuities between "front of house" employees who receive them and other employees who do not deal directly with customers are common in the hospitality and service industries. Tip pooling is not in itself a contravention of the ESA, even when imposed unilaterally and administered by the employer.[298] If a tip pool is used by an employer to pay a portion of the wages of employees who do not customarily receive tips and gratuities, however, this contravenes section 21(2) by requiring the tip-earning employees to pay a business cost.[299]

Tips and gratuities are not "wages" for purposes of the ESA, and so they cannot be recovered through the complaint process under the Act unless section 21(3) applies. If an employer uses funds in a tip pool to cover a business cost, section 21(3) deems the amount in question to be wages, which are then recoverable under the procedures in the ESA.

Tip pools and employers' policies surrounding them have been fertile sources of labour disputes and complaints. From time to time there are reports in the media of alleged mishandling of tip pools.[300] The administration of tips and tip pools can be complicated and requires a high level of transparency to prevent distrust.

Some provinces have legislation intended to protect employees' rights with respect to tips and gratuities and the integrity of tip pools. Newfoundland and Labrador's employment standards legislation declares tips and gratuities to be the property of the

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296. *Shabinsky v. Horwitz* (1973), 32 D.L.R. (3d) 318 (Ont. H.C.).

297. Several labour arbitration decisions hold that tip pooling policies are within the scope of management rights, provided that the policies do not violate s. 21 of the ESA or the terms of a collective agreement. See, for example, *BCGEU v. Lake City Casinos (Tip Pool Allocation Grievance),* [2008] B.C.C.A.A.A. No. 135. See also *Augustin v. Double Down (Langley) Ventures Ltd.*, 2014 BCSC 1657, per Affleck, J. at para. 40.

298. *Re Faux* (19 April 2000) BCEST D150/00. See also *323416 B.C. Ltd. v. Unite Here, Local 40*, 2016 CanLII 30972 (Arb.).

299. *Re Creme de la Creme Coffee / Pastries Limited* (1999), BCEST #D231/99; *Re Marcello Ristorante & Pizzeria Ltd.* (20 April 2010) BCEST #D042/10. See also *323416 B.C. Ltd. v. Unite Here, Local 40*, *supra*, note 298.

300. *E.g.*, Kathy Tomlinson, "Servers made to pay 'house charge' from tips, CBC News, 2 April 2012; Chris Walker, "Greenwood employers accused of withholding pay, stealing tips & threatening ill employee", CBC News, 22 January 2017. Wency Leung, "Should restaurants be barred from taking a share of a server's tip," *Globe and Mail*, 12 June 2012.

employee to or for whom they are given, and prohibits requiring an employee to share them with an employer, manager, supervisor, or an employer's representative.[301] A service charge added to a customer's bill in lieu of a tip or gratuity must be treated the same way, except that the legislation specifically authorizes the employer to make the deductions required by federal or provincial legislation (*e.g.*, for income tax, EI premiums, and CPP contributions) from the amount due to the employee from the service charge revenue.[302] It similarly authorizes those deductions when a tip or gratuity is itemized on the record of a credit or debit card payment.[303] The BC Employment Standards Coalition urges the adoption of the Newfoundland and Labrador provisions in the ESA.[304]

Quebec likewise declares tips and service charges paid in lieu to be the property of the employee who provided the service, but also prohibits employers from imposing mandatory tip pooling. Voluntary tip pooling organized and administered by employees on a consensual basis is permitted, however.[305]

Ontario is the latest province to legislate with respect to tips and gratuities. Provisions in force since June 2016 prohibit withholding "tips or other gratuities" from employees, deducting amounts from them, or requiring them to be turned over to the employer, except as authorized by legislation or court order.[306] Tip pooling is permitted, but the employer, a director or shareholder of the employer, may not share in the tip pool.[307] An exception is provided for sole proprietors, partners in a partnership, or directors or shareholders if they regularly perform the same work "to a substantial

301. *Labour Standards Act*, R.S.N.L. 1990, c. L-2, ss. 38(1), (2).

302. *Ibid.*, s. 38(3).

303. *Ibid.*, s. 38(4).

304. See "Tips or Gratuities – Model Legislation Proposals" online: http://bcemploymentstandardscoalition.com/wp-content/uploads/2011/12/Tips-or-Gratuities-Model-Legislation-PDF.pdf.

305. *An Act respecting labour standards*, C.Q.L.R., c. N-1.1, s. 50.

306. *Employment Standards Act*, S.O. 2015, c. 32, s. 14.2(1). For the purpose of these provisions, a "tip or gratuity" is net of an amount representing the commission charged to the employer by a credit card company on the amount of the tip or gratuity paid by credit card. The amount representing the commission attributed to the tip or gratuity is calculated as the greater of 1.5 per cent of the full payment by the customer or the actual percentage charged by the credit card company: O. Reg 125/16, s. 1.

307. *Ibid.*, ss. 14.4(1), (3). Regulations may prohibit various classes of employees from sharing in a tip pool: s. 14.4(2).

degree" as the employees who do share in the pool or employees of other employers in the same industry who commonly receive or share tips or other gratuities.[308]

Tipping as a social convention is often blamed for suppressing wage growth in the food service and hospitality sectors. As the server workforce is predominantly female, the argument is also made that it contributes to gender-based inequality in earning power.[309] Tipping has also been the object of academic criticism as contributing to the normalization of an oppressively sexualized atmosphere for female workers in food and beverage service.[310]

Despite criticisms that have been levelled against the convention of tipping, there is little indication that it will disappear in the foreseeable future.[311] As long as the convention continues to be observed, some level of statutory protection for employees' property interest in tips and gratuities is likely preferable to the present vagueness surrounding the legal nature of a tip and almost complete lack of regulation of tip pooling.

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308. *Ibid.*, ss. 14.4(4), (5).

309. Kaitlyn Matulewicz and David Fairey, "Opinion: Liquor server minimum wage reinforces sexism" *Vancouver Sun*, 5 August 2016.

310 Kaitlyn Matulewicz, "Law and the Construction of Institutionalized Sexual Harassment in Restaurants" (2015), 30 Canadian journal of law and Society/ Revue Canadienne Droit et Societe 401 at 407-409; see also "Law's Gendered Subtext: The Gender Order of Restaurant Work and Making Sexual Harassment Normal" (2016) 24 *Feminist Legal Studies* 127 at 141-143 by the same author. Matulewicz conducted interviews with twenty restaurant workers in British Columbia, eighteen of them female. Their individual accounts demonstrated that dependence on tips to supplement low wages causes female workers in this sector to endure and pretend to tolerate unwanted sexual comments from customers and sexually charged social interactions with them in order not to be refused a tip.

311. An Angus Reid poll taken in 2016 indicated that Canadian consumers were divided in their preference for existing tipping practices as opposed to a standard service charge being added to a food or beverage bill. The status quo was favoured by 46 per cent of those surveyed, with 40 per cent in favour of abolition of tipping and replacement by a standard service charge, and 13 per cent indicating no preference. See http://angusreid.org/tipping-service-included/. Experiments by some restaurant operators with no-tipping policies or standard service charges have had mixed results. See "mandatory 16 per cent tipping dropped by Earls.67 restaurant," online: http://www.cbc.ca/news/canada/calgary/earls-restaurant-mandatory-tipping-experiment-ends-1.3971409; "Vancouver restaurant abandons no-tipping policy, higher wages, " online: https://www.ctvnews.ca/canada/vancouver-restaurant-abandons-no-tipping-policy-higher-wages-1.2987217.

The Project Committee believes that some legislative protection of employees' proprietary rights in tips and gratuities and regulation of tip pooling is warranted. The principal difficulty in introducing provisions of this kind is in delineating who should share in a tip pool and who should not. Legislation on tipping and tip pooling must be sufficiently flexible to accommodate variations in the way work is organized in different workplaces. Industry custom does not afford a completely reliable guide, because it is not well-defined. In some establishments, managers and supervisors may participate in a tip pool, while in many they do not. Where this does take place, it may be a source of friction. The issue is complicated by overlapping roles within the establishments.

The recent Ontario legislation makes the entitlement of persons closely identified with the employer to participate in a tip pool conditional on regular performance of work of the same nature as other employees in the pool. Those closely identified with an employer, shareholders and partners, are barred from sharing in tips, subject to this exception. The Project Committee leans toward the Ontario model as having sufficient flexibility to deal with variations in organization and overlapping roles between different workplaces.

The Project Committee recommends:

26. Provisions on tips and gratuities corresponding in substance to Part V.1 of the Ontario Employment Standards Act, 2000 *should be added to the ESA.*

H. Vacation Pay

Section 58 states how vacation pay accrues and when it must be paid:

> 58 (1) An employer must pay an employee the following amount of vacation pay:
>
> (a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;
>
> (b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.
>
> (2) Vacation pay must be paid to an employee
>
> (a) at least 7 days before the beginning of the employee's annual vacation, or

(b) on the employee's scheduled paydays, if

(i) agreed in writing by the employer and the employee, or

(ii) provided by the collective agreement.

(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

The default method of paying accrued vacation pay specified in section 58(2), namely paying it in a lump sum a minimum of seven days before the vacation starts, is rarely followed. This was the only method of paying vacation pay that was allowed under the 1980 ESA, other than when employment was terminated before the employee had taken annual vacation.[312] Section 58(2) now permits a second method of adding vacation pay to each paycheque, but it requires either the written agreement of the employee or authorization under a collective agreement.

The Thompson Commission urged that the default method consist of the employer crediting an employee with vacation pay as it accrues and keeping a running account, with the employee choosing when to receive the vacation pay from this "bank" within a maximum of two years following accrual.[313] Instead, section 58(2)(a) retains lump sum payment at least seven days before the start of an employee's vacation as the default method, with the alternative method under section 58(2)(b) of paying vacation pay on scheduled paydays bearing some resemblance to the method recommended by Thompson, but requiring the employee's written agreement.

Most employers simply continue to pay salaried employees their regular salary during vacations. The Employment Standards Branch tolerates this practice, as long as the salary paid during a vacation amounts to at least 4 per cent (or if applicable, 6 per cent) of the previous year's total wages.[314] While this may ensure the employee receives the amount of vacation pay owing, it is arguably a technical violation of section 58(2). That subsection is ambiguous as to whether the reference to "scheduled paydays" may be read as "scheduled paydays occurring during an employee's vacation" or whether it must be read as "each scheduled payday" as the amounts accrue. If the first reading is possible, the usual practice of paying employees their salary during

312. *Supra*, note 9, s. 37(2).

313. *Supra*, note 2 at 109-110. The purpose of this recommendation was to safeguard vacation pay against the bankruptcy of the employer by allowing employees to obtain it in instalments as it accrued, if they chose.

314. *Interpretation Guidelines Manual*, *supra*, note 293, commentary on s. 58.

vacations is in accordance with the ESA, provided the employees each agree in writing. If only the second reading is correct, the usual practice is illegal.

It seems to make sense to regularize what is the usual and accepted practice concerning payment of vacation pay, and to remove ambiguity from section 58(2). The current requirement for individual written agreements to add vacation pay to paycheques, and the emphasis placed by the Thompson Commission's recommendation on individual choice by the employee regarding the timing of payment add unnecessary complexity, given that most employees are content to be paid their normal salary during vacation or have it added to each paycheque as it accrues. Employers should have the ability to choose one of the commonly accepted methods of paying vacation pay as the norm for a workplace.

The Project Committee recommends:

27. Section 58(2) of the ESA should be amended to permit employers to select one of the following methods of paying vacation pay:

(a) paying the employee's salary throughout the vacation period;

(b) adding 4 per cent or 6 per cent vacation pay, as applicable, to each paycheque or direct deposit of wages, subject to later adjustment if necessary to ensure that the aggregate of instalments of vacation pay equate to 4 per cent or 6 per cent of an employee's total wages, as applicable;[315]

(c) paying vacation pay in a lump sum a week before the employee's vacation begins.

I. Statutory Holiday Pay

1. Overview of Part 5

For the purposes of the ESA, "statutory holiday" means New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and any other holiday prescribed by

315. If this method is used, an adjustment might need to be made at some point, for example on a common anniversary date fixed under s. 60, in order to ensure that the aggregate of vacation pay instalments added to each paycheque amounts to 4 per cent or 6 per cent of "total wages" for the preceding year of employment, including overtime pay that may be earned at various times during that year.

regulation.[316] The ESA does not require that employees be given time off on these days. Instead, it provides in Part 5 for certain wage entitlements.

Those provisions require that eligible employees receive pay for statutory holidays, whether they work on those days or not. Premium pay rates apply if an employee eligible for statutory holiday pay does work on a statutory holiday.

2. Eligibility Requirements for Statutory Holiday Pay

Section 44 contains the rules for eligibility to receive statutory holiday pay:

> 44 An employer must comply with section 45 or 46 in respect of an employee who has been employed by the employer for at least 30 calendar days before the statutory holiday and has
>
> (a) worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday, or
>
> (b) worked under an averaging agreement under section 37 at any time within that 30 calendar day period.

An employee must have been employed with the same employer for at least 30 calendar days before the statutory holiday in question, and have worked on 15 out of those 30 calendar days. If an averaging agreement is in place, however, working at any time within the 30 calendar days preceding the holiday will entitle such an employee to statutory holiday pay.

Part-time employees are eligible for statutory holiday pay, as long as they have worked the minimum number of days to meet the eligibility rules in section 44.[317]

The eligibility rules in section 44 are the same ones that were in effect under regulations before 1995. As originally enacted in the 1995 ESA, section 44 conferred entitlement to statutory holiday pay after the first 30 calendar days of employment. There was no requirement for working a minimum number of days in proximity to a statutory holiday to qualify for statutory holiday pay. A later amendment restored the additional qualification of having worked or earned wages on 15 of the 30 calendar days preceding the holiday.

The eligibility rules in section 44 are a point of contention between business and labour. The Coalition of BC Businesses urged in a 2011 submission to the Ministry of

316. *Supra*, note 1, s.(1), definition of "statutory holiday".

317. *Re A-Star Doors & Moulding Ltd.* (8 November 2013) BCEST #D087/13.

Labour that the qualifying period be increased to 90 days' employment, and that in addition, the employee should have to work the last scheduled day preceding the holiday and the first scheduled day afterwards unless excused for illness, authorized vacation or other leave, or for other valid reason.[318] The Employment Standards Coalition, on the other hand, opposes any qualifying period for entitlement to statutory holiday pay and maintained this stance in its response to the consultation paper.

3. Calculation of Statutory Holiday Pay

(a) Eligible employees who receive time off

An employee eligible under the rules in s. 44 and not excluded by regulation who receives a day off on a statutory holiday is entitled to receive an average day's pay calculated under s. 45(1):

> **45** (1) An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay determined by the formula
>
> amount paid ÷ days worked
>
> where
>
> amount paid is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the statutory holiday, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and
>
> days worked is the number of days the employee worked or earned wages within that 30 calendar day period.

318. Coalition of BC Businesses, *Employment Standards to Reflect BC's Workplace Reality: Submission to the Ministry of Labour Employment Standards Review* (2011), online: http://www.coalitionbcbusiness.ca/pdf/ESReviewSubmission02_11.pdf.

(2) The average day's pay provided under subsection (1) applies whether or not the statutory holiday falls on the employee's regularly scheduled day off.

As indicated in the definition of "amount paid" in s. 45(1), vacation pay is included in the calculation of an average day's pay, but overtime actually earned in the 30-day period is ignored. No Canadian jurisdiction includes actual overtime earnings in computing statutory holiday pay for employees who do not work on the holiday.

(b) Eligible employees who work on a statutory holiday

Section 46 provides for premium pay rates for employees meeting the eligibility rules in s. 44 who work on a statutory holiday:

46 An employee who works on a statutory holiday must be paid for that day

(a) 1 1/2 times the employee's regular wage for the time worked up to 12 hours,

(b) double the employee's regular wage for any time worked over 12 hours, and

(c) an average day's pay, as determined using the formula in section 45 (1).

The premium pay rates apply whether the employee works voluntarily or involuntarily on a statutory holiday.[319]

An employee who does not meet the eligibility rules in s. 44, or is excluded by regulation, will receive only straight time for working on a statutory holiday.

Previous to 2002, the double time premium applied after 11 hours.[320] In addition, a subsection of s. 46 that is now repealed entitled employees who worked on a statutory holiday to a working day off with pay in addition to the premium pay rates.[321] The subsection was repealed and the threshold for double time increased to 12 hours in 2002. These changes are still contentious, and the Employment Standards Coalition

319. *Re Blue Line Activities Ltd.* (8 Aug. 2013) BCEST #D067/13.

320. *Supra*, note 10, s. 46(1).

321. Section 46(2), the repealed provision, formerly stated in reference to an employee who works on a statutory holiday:

(2) In addition, the employer must give the employee a working day off with pay according to section 45.

continues to support the reinstatement of s. 46 as it stood under the 1995 ESA prior to 2002.[322]

4. Substitution of Other Days Off Instead of Statutory Holidays

Section 48(1) allows an employer to substitute another day off for a statutory holiday with the agreement of the individual employee concerned, or a majority of the employees if the alternate day off is granted to more than one. All other provisions of Part 5 apply as if the substitute day were the designated holiday.[323] In other words, an eligible employee is entitled to receive a day's pay at the average rate for the substituted day, and if the employee is required to work on that day, the premium wage rates under section 46 would apply.

Employers must retain records of agreements on substitution of alternate holidays for two years.[324]

5. Repealed Provisions of Part 5

Section 47 formerly entitled employees to receive an alternate day off with pay if a statutory holiday fell on a non-working day.[325] It was repealed in 2002.[326]

Section 49 formerly extended the statutory holiday provisions in the ESA to employees covered by a collective agreement unless the terms of the collective agreement dealing with holiday provisions met or exceeded them.[327] Section 49 was repealed in 2002 in conjunction with the amendment of section 3 and other provisions dealing with the application or non-application of portions of the ESA when a collective agreement is in effect in a workplace.[328]

322. Employment Standards Coalition model legislation proposals on statutory holidays, online: http://bcemploymentstandardscoalition.com/wp-content/uploads/2011/12/Statutory-Holidays-Model-Legislation-Proposals.pdf.

323. *Supra*, note 1, s. 48(2).

324. *Ibid.*, s. 48(3).

325. *Supra*, note 10, s. 47.

326. *Supra*, note 139, s. 23.

327. *Supra*, note 10, s. 49.

328. *Supra*, note 139, s. 25.

The repeal of these provisions remains a contentious point in relations between business and labour in British Columbia. The Employment Standards Coalition advocates for restoration of sections 47 and 49.

6. Exclusions from Statutory Holiday Pay Provisions

Numerous categories of employees are excluded from the statutory holiday provisions in Part 5. In addition to employees who are excluded entirely from the application of the Act, the following categories are excluded by regulation:

(a) managers;[329]

(b) farm workers;[330]

(c) fishers;[331]

(c) salespersons paid partly or entirely by commission who sell heavy industrial or agricultural equipment, sailing or motor vessels, or leases of them;[332]

(d) salespersons paid partly or entirely by commission who sell or sell leases of automobiles and trucks, on the condition that the employer pays the salesperson 4 per cent of gross earnings in each pay period;[333]

(e) other salespersons paid partly or entirely by commission, provided that all wages earned by them in a pay period exceed what would be payable for overtime under ss. 35 and 40 of the Act and Part 5, if calculated at the greater of the employee's base rate and the statutory minimum wage;[334]

329. *Supra*, note 31, s. 36.

330. *Ibid.*, s. 34.1.

331. *Ibid.*, s. 37(c).

332. *Ibid.*, s. 37.14(2).

333. *Ibid.*, s. 37.14(4)(a). Salespersons of recreation vehicles or campers are also excluded under s. 37.14(4)(b) of the *Employment Standards Regulation*, but they are not entitled to the 4 per cent extra pay.

334. *Ibid.*, s. 37.14(1). The Employment Standards Branch interprets the "base rate" as being the same as the hourly wage rate determined as under the definition of "regular wage" in s. 1 of the Act. For employees not paid on an hourly basis, the definition of "regular wage" allows an hourly rate to be imputed on the basis of earnings in a pay period divided by the hours of work. See *Interpretation Guidelines Manual*, *supra*, note 293, webpage entitled "ESR Section 37.14 –

(f) silviculture workers, on condition that they receive 4 per cent of gross earnings for each pay period in place of statutory holiday pay (as with commission automobile sales personnel), or if they are paid on a piece rate basis, 1.04 times the applicable piece rate. Silviculture workers may nevertheless benefit from section 48 of the Act, and elect to take an alternate day off by agreement with the employer;[335]

(g) high technology professionals;[336]

(h) students in certain registered nursing or licensed practical nursing programs;[337]

(i) auxiliary or volunteer firefighters employed by a municipal or regional district fire department.[338]

7. Reform

(a) Eligibility rules

The provisions on statutory holiday pay in Part 5 of the ESA have been praised as being admirably simple by comparison with those in effect in other provinces and territories.[339] Their comparative simplicity has not kept them from being sources of sharply polarized views.

Commission sales." Commissions are not included in the base rate calculation. If an employee is remunerated only by commission, the minimum wage is used instead.

335. *Ibid.*, s. 37.9(8).

336. *Ibid.*, s. 37.8(2). A definition of "high technology professional" is found in s. 37.8(1). It includes some technical sales personnel.

337. *Ibid.*, s. 33(a), (b).

338. *Ibid.*, s. 33(c).

339. See England and Wood, *supra*, note 88 at 8-228. Also notable are the comments of the Special Advisors to the Changing Workplace Review on the complexity of the Ontario provisions on public holiday pay in Part X of the *Employment Standards Act, 2000*: *supra*, note 72 at 250-255. The Special Advisors considered several approaches to simplifying the calculation of public holiday pay in Ontario, but did not resolve on any single method. Instead, the Special Advisors recommended that the entirety of Part X of the Ontario statute be revised and simplified (Rec. 122 at p. 255). The *Fair Wages, Better Jobs Act 2017, supra*, note 3, ss. 16-20 made some amendments to Part X effective 1 January 2018, but of a kind much less sweeping than the wholesale revision the Special Advisors likely envisioned. They will be reversed now in any case as of 1 January 2019 by the *Making Ontario Open for Business Act*, 2018, *supra*, note 3, s. 6(8).

The BC Employment Standards Coalition has taken the stance that entitlement to holiday pay should stem from the fact of being employed, and there should be no minimum qualifying period of employment.[340]

In contrast, the Coalition of BC Businesses has urged that the qualifying period be 90 days of continuous employment preceding the holiday, as in New Brunswick, and also that employees must work the last scheduled work days before and after the holiday in order to obtain holiday pay.[341]

Ten provinces and territories and the federal jurisdiction require a minimum period of employment or a minimum number of days worked, or both, before entitlement to statutory holiday pay arises.[342] These minimum requirements range from 15 days on which pay is earned (Nova Scotia) at one extreme to 90 days of continuous employment in the 12 months preceding the holiday at the other (New Brunswick). Only one Canadian jurisdiction, namely Saskatchewan, entitles employees to statutory holiday pay without having been employed for a minimum length of time with the same employer and/or having worked a minimum number of days before the holiday.

The further requirement for employees to work their last scheduled work day before the holiday in question and first scheduled working day afterward in order to be eligible to be paid for the holiday is found in seven out of 13 jurisdictions in Canada: Ontario, Quebec, Nova Scotia, Newfoundland and Labrador, and the three territories.[343]

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340. *Supra*, note 322. This stance was reiterated in a submission to the Minister of Labour by the Employment Standards Coalition that was prompted by issuance of the BCLI consultation paper.

341. *Supra*, note 318. In its response to the consultation paper, the Coalition of BC Businesses opposed change to the present eligibility requirements for statutory holiday pay, but did not reiterate this position taken in the past.

342. *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 196(3); *Employment Standards Act*, *supra*, note 1, s. 44; *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 26; *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 18(1)(a); *Labour Standards Act*, R.S.N.L. 1990, c. L-2, s. 19(1); *Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 42(1); *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 7(1)(a); *An Act respecting labour standards*, CQLR c. N-1.1, s. 62; *Employment Standards Act*, S.N.W.T. 2007, c. 13, s. 24(7); *Labour Standards Act*, R.S.N.W.T. 1988 (Nu) c. L-1, s. 28; *Employment Standards* Act, R.S.Y. 2002, c. 72, s. 34(a).

343. *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 26(2); *Labour Standards Act,* R.S.N.L. 1990, c. L-2, s. 15(1); *An Act respecting labour standards*, CQLR c. N-1.1, s. 65; *Employment Standards Code*, R.S.N.S. 1989, c. 246, s. 42(1)(b); *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 7(1)(c); *Employment Standards* Act, R.S.Y. 2002, c. 72, s. 34(d); *Employment Standards Act*, S.N.W.T. 2007, c. 13, s. 23(7)(c); *Labour Standards Act*, R.S.N.W.T. 1988 (Nu) c. L-1, s. 28(c).

British Columbia's present qualifying requirements are not out of keeping with those in effect in the rest of Canada. They are less stringent than those in some jurisdictions. A qualification based on days worked in the immediate lead-up to the holiday nevertheless places workers in non-standard employment, *i.e.* part-time employees and workers who do not have a regular schedule, at a disadvantage relative to full-time employees.[344]

The erosion of permanent, full-time employment and corresponding growth in part-time, temporary, and so-called "casual" employment were readily apparent by 1994, when the Thompson Commission commented on these trends.[345] Thompson noted that the qualifying requirements then in force, which corresponded to those in force under section 44 as it currently stands, could prevent part-time employees who did not have a regular schedule, or who hold multiple part-time jobs, from ever becoming entitled to receive statutory holiday pay.

Statutory holidays are expensive for employers, because they have to pay employees for not working on those days. In fairness, employers should not be required to bear this burden unless there is a relationship of some permanence with the employee. The Project Committee accepts that some qualifying period of continuous employment should be necessary before eligibility for statutory holiday pay arises.

Long-term employees who work part-time or do not have a regular work schedule should also be treated fairly, however. In a time when full-time, indefinite employment is declining and precarious employment growing, the disparity in treatment created by the present eligibility rules in section 44 will affect an ever-larger portion of the workforce. For this reason, the Project Committee believes the eligibility rules in section 44 should be amended to allow greater opportunity for part-time workers who remain with an employer for more than a transitory period to accumulate sufficient working time to qualify for statutory holiday pay.

The Project Committee reached consensus on an eligibility rule for statutory holiday pay requiring, first, that an employee have worked or earned wages on 16 of the 60 days preceding a statutory holiday in order to be paid regular wages for that holiday. Second, the employee must have worked on his or her last scheduled working day before the statutory holiday in question, and first scheduled working day afterward.

The first branch of the proposed eligibility rule would give part-time employees a longer qualifying period within which to accumulate working time equivalent to

344. England and Wood, *supra*, note 88, at 8-231.

345. *Supra*, note 2 at 98-101.

about two days per week. The second branch is in effect in more than half of the provinces and territories, as noted earlier. It prevents employees from abusing the statutory holiday entitlements by claiming holiday pay to cover a loss of pay for a day on which the employee deliberately does not report for work.

Days on which the employee was absent due to sickness and other authorized absences would not be counted as scheduled working days for the purpose of the eligibility rule.

Predictably, this proposed new eligibility rule did not go far enough to satisfy labour and worker advocacy organizations when it was vetted in the consultation paper, and went too far for employers' organizations. Labour organizations urged that statutory holiday pay be available to every employee from the moment employment starts, regardless of time worked. For the most part, business organizations rejected outright any change to the present eligibility rules under section 44 that would make statutory holiday pay available to more part-time workers, but enthusiastically embraced the second branch of the proposed new eligibility rule that would require employees to work their last scheduled day before the statutory holiday and the first one after it.

A joint response from major business organizations acknowledged a need to recognize the growth of part-time employment, but characterized the proposal as radical and costly. They suggested instead that the requirement be 25 to 28 days worked out of the 60 preceding a holiday. This is virtually the same as the present requirement of 15 days worked out of the 30 preceding the holiday, however. Few additional workers would qualify, regardless of their longevity of employment.

Several other formulas were put forward in the body of responses which were either more complex or more one-sided than the rule proposed by the Project Committee,

The original proposal reflects a consensus within the Project Committee that was not easily reached. It was a compromise between two competing but equally legitimate objectives. On one hand, the ESA must to reflect the reality that a large and growing portion of the workforce consists of part-time workers, and on the other the need to moderate the incremental cost to employers that any relaxation of eligibility rules for statutory holiday pay will bring. The Project Committee was not persuaded that any better balance between the two objectives has been advanced, and so its position remains as it was.

The Project Committee recommends:

28. The ESA should be amended to provide that

(a) in order to be eligible to receive statutory holiday pay, an employee must have worked or earned wages on

(i) 16 of the 60 days preceding the statutory holiday, and

(ii) the last day before the holiday and the first day after the holiday on which the employee was scheduled to work;

(b) a day on which the employee is absent because of illness or has permission from the employer to be absent is not to be counted as a scheduled working day for that employee for the purposes of subparagraph (ii) of paragraph (a).

(b) Exclusions from Statutory Holiday Pay

With respect to the numerous exclusions from the statutory holiday provisions, the Project Committee reiterates the call made in Recommendation 6 above for a systematic review by government to determine whether each exclusion is justified from a factual and policy standpoint.

J. The Minimum Wage-Setting Process

1. Background

The Project Committee does not see its role as requiring it to delve into the perennial controversy over the level of the minimum wage or even comment on minimum wage policy. Given the legislative focus of this project, the Project Committee has limited its deliberations and recommendations to the legislative machinery for minimum wage-setting.

To some extent, the Project Committee's deliberations on this subject have been overtaken by decisions taken by successive provincial governments in the course of the Employment Standards Act Reform Project. The first was the decision in March 2015 to adopt a policy of increasing the minimum wage incrementally in accordance with annual percentage increases in the Consumer Price Index.

The second was the decision in mid-2017, following a general election and the formation of a new government, to create a Fair Wages Commission and implement a series of increases in the minimum wage until a target level of $15.00 per hour is reached. The Terms of Reference of the Fair Wages Commission required it to make recommendations not only on the amounts and timing of the increases leading to the target level, but also on the methodology of setting the minimum wage and carrying

out regular rate reviews.[346] The Fair Wages Commission delivered its first report in February 2018.[347] That report deals with the timing and amounts of increases to the minimum wage leading to the $15.00 per hour target level. While the first report recommends the establishment of a permanent body to monitor and advise government on the minimum wage, it is not certain at the time of writing whether there will be such a permanent body.[348]

By the time the decision to establish a Fair Wages Commission was announced in 2017, the Project Committee already had given considerable attention to reform of the legislative framework for setting and reviewing the minimum wage in British Columbia. As the ultimate form that the legislative framework for minimum wage-setting will take is not known as of the date of this report, the views of the Project Committee on elements of the framework are explained here with some background as a contribution to the public policy debate.

2. The Minimum Wage Provisions of the ESA

The requirement to pay at least the minimum wage is found in section 16(1) of the ESA. It is a very simple provision requiring employers to pay employees at a rate no lower than the minimum wage as prescribed by regulation. Section 16(2) prohibits direct or indirect deductions or withholdings in different pay periods to make up for a failure to pay the minimum wage in a particular pay period.

Section 127(2) of the ESA confers authority on the Lieutenant Governor in Council to set minimum wage rates by regulation. It allows for a single minimum wage rate or differential rates for various classes of employees. The ESA does not mention any economic or policy criteria for the exercise of this power, in contrast to the legislation of some other provinces and territories described later in this chapter.

A general minimum wage, currently fixed at $12.65 per hour, is prescribed by the *Employment Standards Regulation*.[349] In addition to the general minimum wage,

346. Fair Wages Commission Final Terms of Reference dated 29 September 2017, online: https://engage.gov.bc.ca/app/uploads/sites/237/2017/10/FWC-Final-TOR-Sep-29-2017.pdf. See especially paras. 8 and 9.

347. BC Fair Wages Commission, *The Transition to a $15 Minimum Wage and Subsequent Increases* (January 2018), online: https://engage.gov.bc.ca/app/uploads/sites/237/2018/02/Report-1_BC-Fair-Wages-Commission_Jan-2018.pdf.

348. *Ibid.*, at 33-34.

349. *Supra*, note 31, s. 15.

differential minimum wage rates are fixed for live-in home support workers,[350] live-in camp leaders,[351] resident caretakers,[352] liquor servers,[353] and farm workers employed on a piecework basis to hand harvest various fruit and vegetable crops.[354]

The piecework rates for hand harvesting of designated crops are based on a time and motion study that was carried out under Ministry auspices. They are set at a level that is intended to allow farm workers employed on a piecework basis to earn the equivalent of the provincial minimum wage.[355]

Fishers are exempt from the minimum wage, as are the classes of employees excluded entirely from the operation of the ESA.[356]

3. Comparative Overview

A survey of Canadian and U.S. jurisdictions indicates there are currently three principal legislative norms in use for setting minimum wages:

1. Executive fiat on a purely discretionary basis.

2. Executive fiat with the aid of an advisory board, with an equal number of employer and employee representatives and a neutral chair having a tie-breaking vote. British Columbia formerly used this model.[357]

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350. *Ibid.*, s. 16(1). The minimum wage for live-in home support workers is currently $113.50 per day or part of a day.

351. *Ibid.*, s. 16(2). The minimum wage for live-in camp leaders is currently $90.80 per day or part of a day.

352. *Ibid.*, s. 17. Resident caretakers are entitled to a minimum wage of $681 per month plus $27.29 for each suite if the building contains between 9 and 60 suites, and $2,319.65 per month if the building contains more than 61 suites. A caretaker of a building consisting of less than 8 suites is not classified as a "resident caretaker," and would be entitled to the provincial minimum hourly wage instead.

353. *Ibid.*, s. 18.1. The minimum wage for liquor servers is $10.10 per hour.

354. *Ibid.*, s. 18. Differential piecework rates are set for specified crops.

355. *Supra*, note 11 at 5.

356. *Ibid.*, s. 37(a).

357. Between 1918 and 1976, minimum wage rates in British Columbia were fixed by order of a board that was required to review them regularly. In 1976 the *Minimum Wage Act*, R.S.B.C. 1960, s. 5 was amended by S.B.C. 1976, c. 32, s. 13A to confer power instead on the Lieutenant Governor in Council to set minimum wage rates by regulation. The Board of Industrial Relations was required to review minimum wage and overtime rates annually and report its

3. Automatic adjustment (indexation) in each year either according to a formula using recognized economic indicators such as the CPI and /or the average hourly or weekly wage. Sometimes automatic adjustment is coupled with a requirement for periodic review of all aspects of the minimum wage, including the methodology for determining it.

There is a discernible cross-jurisdictional trend in Canada and the U.S. toward indexation of the minimum wage.

In the federal sector, the applicable minimum wage has been fixed as the same as the general minimum wage in force from time to time in the province or territory where the worker in question is usually employed.[358] This has been the case since 1996. The 2006 Arthurs report on reform of Part III of the *Canada Labour Code* recommended that Ottawa revert to setting a federal minimum wage benchmarked to changes in the Statistics Canada Low-Income Cut-off (LICO), a widely used indicator of poverty status.[359] At the time of the Arthurs report, provincial minimum wage rates were being set on a largely ad hoc basis without indexation or review at regular intervals. Arthurs commented that they did not reflect any consistent model or keep pace with the cost of living, and displayed a pattern of abrupt increases after periods of long neglect.

While the minimum wage is fixed by regulation in most provinces and territories as in British Columbia, the majority now provide in their governing legislation either for a process calling for the input of an advisory board, indexation pursuant to a formula, or both of these mechanisms.

recommendations to the Lieutenant Governor in Council. This system was abolished by the *Employment Standards Act*, S.B.C. 1980, c. 10, which provided only for minimum wage rates to be set by regulation, without a requirement for periodic review of the rates.

358. *Supra*, note 101, s. 178(1). The Governor in Council is empowered to set a different minimum wage by regulation, or to set one if there is none in the province or territory where the worker is usually employed: s. 178(3).

359. *Supra*, note 102, at 248. The LICO is an income threshold at which a household will likely spend more than 20 per cent of its income on food, clothing, and shelter than the average household does. LICOs are set with reference to seven different family sizes and five community sizes on a regional basis. They are re-based after each comprehensive Family Expenditure Survey (the most recent being in 1992), and then indexed annually by reference to the CPI: see Statistics Canada, *Low income cut-offs*, online: http://www.statcan.gc.ca/pub/75f0002m/2012002/lico-sfr-eng.htm.

In Ontario,[360] Saskatchewan,[361] Nova Scotia,[362] the Yukon Territory,[363] and now also Manitoba,[364] indexation takes place annually according to a statutory formula. Changes to the minimum wage rate are implemented at a fixed time in the year. Nova Scotia has retained an advisory board to conduct an annual review of the rate as well as introducing indexation by means of a formula.[365] In 2012 Nova Scotia used the LICO applicable to a single individual living in Sydney to re-base its provincial minimum wage, indexing it annually afterwards according to the change in the CPI.[366]

In Prince Edward Island, a board sets the minimum wage, subject to approval of the Lieutenant Governor in Council.[367] The board is required to review the minimum wage rate annually, taking into account any cost of living increase since a previous order that affects the cost to an employee of the necessities of living, including housing, food, clothing, transportation, health care and health supplies.[368] It is also

360. *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 23(4). If the formula would result in a decrease from one year to the next, the minimum wage remains unchanged: s. 23(6). Schedule 1, s. 6 of the *Making Ontario Open for Business Act, 2018*, *supra*, note 3, suspends indexation and freezes the minimum wage in Ontario until 2020, however.

361. *Minimum Wage Regulations, 2014*, RRS c. S-15.1 Reg 3, s. 3(4). The formula gives equal weighting as indicators to the percentage changes in the previous year in the average provincial hourly wage and the all-items consumer price index. The Lieutenant Governor in Council may decide not to change the minimum wage rate or set a rate different from the one adjusted under the statutory formula, but both the adjusted rate and any unadjusted one the Lieutenant Governor in Council decides to implement instead must be published in the official gazette: s. 3(6).

362. *Minimum Wage Order (General)*, N.S. Reg. 5/99 as amended, s. 6(3). If the calculated adjustment would result in a decrease, the minimum wage remains at the same level as in the previous year: s. 6(4).

363. *Minimum Wage Order No. 2012/01*, Y.O.I.C. 2012/46.

364. C.C.S.M., c. E-110, ss. 7(1)-(3). The formula calls for adjustment in accordance with changes in the consumer price index for Manitoba (all-items). The Lieutenant Governor in Council may pass a regulation in a given year that no adjustment will be made to the minimum wage under the indexation formula in s. 7(1), but only if satisfied that non-adjustment is warranted by economic indicators: ss. 8(1), (2). Before the introduction of automatic indexation in 2017, Manitoba had an advisory Minimum Wage Board.

365. *Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 51.

366. Ontario Minimum Wage Advisory Panel, *Report and Recommendations to the Ministry of Labour* (January 2014) at 27.

367. *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 4(1).

368. *Ibid.*, s. 5(2).

required to consider economic conditions within the province and reasonable return on private investment.[369]

New Brunswick requires a biennial review by the Minister of Labour of the level of the minimum wage, the manner in which it is determined, and the timeline for any changes to it.[370] The review must include consultations with employer and employee representatives. Criteria specified for the review are demographic data on workers earning minimum wage in the province, increases in the cost of living, and economic conditions in the province.[371]

Alberta[372] and Quebec[373] provide simply for a minimum wage to be set by regulation, as does British Columbia. No formula or process for determining the minimum wage is specified in either primary or subordinate legislation.

Alberta has followed a practice in the past of using the CPI for the province and average provincial weekly earnings to gauge the provincial minimum wage rate, without instituting a formal indexation policy.[374] In 2015 the present Alberta government announced an intention to increase the provincial minimum wage in incremental stages to $15.00 per hour, a level that was actually reached in October 2018.[375]

369. *Ibid.*, s. 5(3).

370. *Employment Standards Act*, S.N.B. 1982, c. E-7.2, ss. 10(1), (2). Prior to 2014, New Brunswick had an advisory Minimum Wage Board.

371. *Ibid.*

372. *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 138(1)(f).

373. *An Act respecting labour standards*, CQLR c. N-1.1, s. 40.

374. Ken Battle, *Minimum Wage Rates in Canada 1965-2015* (Ottawa: Caledon Institute of Social Policy, 2015) at 22.

375. See "Changes to Alberta's minimum wage," online: https://www.alberta.ca/alberta-minimum-wage-changes.aspx. In a December 2015 interview, the Alberta premier described this as a notional target that would need to be assessed in light of economic conditions in the province: http://calgaryherald.com/news/politics/ndp-government-now-says-its-not-backtracking-on-minimum-wage. The Alberta minimum wage did escalate to $15.00 per hour, however.

Quebec reputedly follows a practice of setting the minimum wage at 47 per cent of the average provincial wage.[376] The LICO is one of the indicators taken into account by Quebec officials.[377]

The Northwest Territories adopted a policy of setting the minimum wage as a percentage of the average hourly territorial wage, following one of the options presented to the territorial government by a special committee appointed in 2013.[378]

Nunavut requires the Minister of Labour to review the minimum wage annually and table the results of the review in the Legislative Assembly. The legislation does not specify criteria for the review.[379]

Nineteen U.S. states and the District of Columbia provide for the indexing of state minimum wages to cost of living indicators, although in some cases indexing is to start at a point in the future.[380] The neighbouring state of Washington adjusts minimum wage annually for increases in the cost of living by reference to the U.S. Consumer Price Index for Urban and Clerical Workers (CPI-W).[381]

4. International Legal Norms Regarding Minimum Wage

More than a dozen international conventions address minimum wage laws in some manner. Three are particularly relevant to the method by which minimum wages are set. Two of them are fundamental human rights documents, namely the *Universal Declaration of Human Rights, 1948*[382] and the *International Covenant on Economic, Social and Cultural Rights*.[383] Canada endorsed the first, and ratified the second. The

376. Government of Northwest Territories, *Minimum Wage Backgrounder* (2015), p. 5, online: http://news.exec.gov.nt.ca/wp-content/uploads/Backgrounder-Minimum-Wage.pdf.

377. ILO, *Minimum Wage Systems: General Survey of Reports on the Minimum Wage Fixing Convention, 1970 (No. 131) and the Minimum Wage Recommendation (No. 135)* (2014) at 122.

378. *Ibid.*

379. *Labour Standards Act*, R.S.N.W.T. (NU) 1988, c. L-1, s. 12.1.

380. See National Conference of State Legislatures, webpage entitled "State Minimum Wages / 2018 Minimum Wage By State, online: http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#Table.

381. Washington State Department of Labour and Industries, *Minimum Wage*, webpage, online: http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/default.asp.

382. See online: http://www.un.org/en/universal-declaration-human-rights/.

383. See online: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

third is the *Minimum Wage-Fixing Machinery Convention, 1928* (ILO Convention C026).[384]

The human rights and labour conventions address different aspects of the subject, but underlying the relevant provisions in each is the concept of a "minimum living wage." This phrase appears in the founding documents of the ILO, and has recently been revived. It may be understood as a level of remuneration that allows a worker and the worker's family to live adequately and with dignity in society.

Article 23(3) of the *Universal Declaration of Human Rights, 1948* states that everyone who works is entitled to "just and favourable remuneration," which may be supplemented by other forms of social protection. Article 25 declares that a standard of living adequate to preserve the health and well-being of oneself and one's family is a fundamental human right.

Article 7(a) of the *International Covenant on Economic, Social and Cultural Rights* declares a right to "fair wages" as an element of a right to "just and favourable conditions of work" and an adequate living standard:

> Article 7:
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

The *Minimum Wage-Fixing Machinery Convention, 1928* requires member states to create or maintain some form of wage-fixing body with the ability to set a minimum wage having the force of law, applicable to employees working in trades in which there is no effective regulation of wages by collective agreement.[385] Member states are free to determine the nature and form of this "machinery," provided that it

384. See online: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C026.

385. *Ibid.*, Art. 1.

involves equal representation of workers and employers, and that minimum wages are legally binding once they are set. The convention does not require universal application of a minimum wage to all workers in the state.[386] The 1928 Convention is classified as "interim" by the ILO because of its age, but remains in effect.

A non-binding recommendation accompanying the 1928 Convention states that minimum wage rates should be set in light of "the necessity of enabling the workers concerned to maintain a suitable standard of living."[387] The recommendation also indicates that minimum wage rates should be set with reference to general wage levels in the absence of collective agreements applicable to particular trades.[388] It endorses the principle of equal pay for equal work, and urges member states to ensure that minimum wage protection is extended to trades in which women predominate.[389]

The current ILO *Minimum Wage-Fixing Convention 1970* (C131) has not been ratified by Canada, but is noteworthy in adding "economic factors" to the list of matters to be considered in setting minimum wage rates and raising these to the same level of importance as "the needs of workers and their families."[390] "Economic factors" include "the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."[391]

Recommendation R135 accompanying the 1970 Convention calls on member states to allot sufficient resources to collection of relevant statistics and data needed to analyze the economic factors that a wage-fixing body needs to consider.[392] It also calls for minimum wage rates to be adjusted either at regular intervals or as appropriate in keeping with changes in the cost of living and other changes in economic conditions.[393]

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386. *Ibid.*, Art. 3.

387. ILO Recommendation R030, online: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R030, Art. A.III.

388. *Ibid.*

389. *Ibid.*, Art. A.II(2)(d).

390. See online: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131, Art. 3.

391 *Ibid.*, Art. 3(b).

392. See online: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R135, Part IV, s. 10.

393. *Ibid.*, Part V, ss. 11 and 12.

5. Reform

The comparative overview indicates there has been recent movement in Canada and the U.S. away from ad hoc adjustment of the minimum wage at irregular intervals in favour of a regularly conducted process designed to yield more transparent, objectively justifiable, and predictable results.

The process typically consists either of periodic review of the level of the minimum wage by an advisory board or commission or automatic indexation at regular intervals pursuant to a statutory formula. A few jurisdictions provide for a combination of these processes.

The discernible trend across the jurisdictions is in favour of indexation to generally accepted economic indicators. The concept of indexation appears to enjoy widespread acceptance. The stakeholder survey carried out in 2011 by the British Columbia Ministry of Labour, Citizens Services and Open Government (as then constituted) indicated considerable support for indexation on both the employer and labour sides, as it increases predictability and lessens the probability of abrupt economic shocks that disrupt business planning and the labour market.[394]

The most common method of indexing the minimum wage in Canada is by reference to changes in the Consumer Price Index, but there are other widely accepted economic indicators that may be used in place of or in combination with it. As noted earlier, several provinces and territories use the average or median provincial or territorial hourly wage as an indicator of wage growth or as a point of reference in assessing minimum wage levels.

The choice of indicators or a combination of them reflects a theoretical view of the purposes a minimum wage should serve. Relating the minimum wage level to price inflation alone represents a policy judgment that the minimum wage is a floor that should maintain its real value by changing in pace with the cost of living, but not necessarily be influenced by general wage levels. Relating it to the average or median hourly wage represents a view that minimum wage earners should share in general wage growth. Use of combinations of these and other indicators such as the LICO are associated with the view that the minimum wage should bear a relation to "living wage."

394. Ministry of Labour, Citizens' Services and Open Government, *Summary Report on Employment Standards Stakeholder Engagement Process* (Victoria: March 2011) at 3.

Indexation and /or periodic review of the level of the minimum wage is supplemented in some jurisdictions by a periodic review of the minimum-wage setting mechanism itself. In other words, the legislation calls for periodic review of the criteria or guidelines used in setting the minimum wage and the process for applying them.

The Project Committee saw regularity of review, predictability, and transparency as desirable features to incorporate into the process for setting the minimum wage rate. The Project Committee was unanimously in favour of a legislative requirement for review of the minimum wage rate at regular intervals, but different views emerged in regard to the process by which periodic reviews of the rate should be carried out and the factors to be taken into account.

Some members favoured automatic indexation as a means of depoliticizing the setting of minimum wage rates as far as possible, and ensuring transparency.

Others were troubled by the mechanistic nature of automatic indexation, and preferred the advisory board model. In their view, this model would depoliticize the task of setting the minimum wage to the greatest extent feasible, while sufficient predictability could be achieved if the enabling legislation contained a non-exhaustive list of factors that the advisory board would have to consider in making its recommendations to government.

Another view taken was that no change from the current framework should be made beyond requiring review of the rate at two-year intervals. The reasoning behind this position is that the minimum wage is an inherently political institution, and the discretion of the elected government over setting its level should not be restrained in any way.

A majority consensus formed around a proposal combining indexation at regular intervals according to a statutory formula with residual discretion resting with the Lieutenant Governor in Council (in practical terms, the provincial Cabinet) to fix a minimum wage rate that is higher or lower than the rate derived from the indexing formula.

Some members, but not a majority, also favour adding a requirement that the statutory provisions governing how the minimum wage is set should themselves be reviewed at five-year intervals.

A **majority** of the members of the Project Committee recommend:

29. The ESA should be amended to:

(a) provide a formula for indexation of the minimum wage at regular, fixed intervals, and

(b) require the Lieutenant Governor in Council to determine, on each occasion when the ESA requires the formula to be applied, whether to amend the regulation prescribing the minimum wage to prescribe the rate as indexed according to the formula or a different rate chosen by the Lieutenant Governor in Council.

A **minority** of the members of the Project Committee endorse Recommendation 29 and recommend in addition:

29a. The ESA should be amended to provide for a review at five-year intervals of the provisions governing how the minimum wage is set.

A further **minority** of the members of the Project Committee do not endorse either of Recommendations 29 and 29a, and instead would recommend:

[29b.] The ESA should be amended to require the Lieutenant Governor in Council to review the minimum wage at two-year intervals and determine whether it should be changed or left unchanged. No other amendments should be made to the minimum wage provisions of the ESA.

K. Special Minimum Wage Provisions

1. Classes Subject to a Special Minimum Wage

Special minimum wage provisions apply to these defined classes of employees:

(a) live-in home support workers;[395]

(b) live-in camp leaders;[396]

(c) resident caretakers;[397]

395. *Supra*, note 31, as amended, s. 16(1).

396. *Ibid*., s. 16(2).

397. *Ibid.* s. 17.

(d) farm workers employed in hand harvesting specified berry, fruit and vegetable crops;[398]

(e) liquor servers.[399]

A daily or monthly minimum wage instead of an hourly one is specified for the first three of these classes. A minimum wage lower than the general one is specified for liquor servers, and farm workers harvesting designated crops by hand may be paid on a piecework basis at rates that vary between crops.

As with the general minimum wage, the Project Committee does not think it can usefully comment on the *level* of the special minimum wages, but we have considered them in relation to the declared purposes of the ESA, one of which is "to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment."

On 19 April 2018, the Ministry of Labour announced changes to the special minimum wage provisions to take effect between June 2018 and June 2021.

2. Daily or Monthly Minimum Wage

The work of live-in home support workers, live-in camp leaders, and resident caretakers necessarily involves irregular hours and is performed while living at the worksite. This makes it impractical to attempt to separate working from non-working hours on a day-to-day basis. A daily or monthly minimum wage, rather than the generally applicable hourly one, is justifiable for this reason as long as it reflects a fair and realistic assessment of the working time that is consistently required. The Project Committee did not perceive these exceptions from the general hourly minimum wage to be problematical from a policy standpoint. The April 2018 announcement by the Ministry of Labour indicated that the special minimum wage for live-in home support workers is slated for elimination in any case.

3. The Liquor Server Minimum Wage

(a) Introduction of the liquor server minimum wage in British Columbia

The minimum wage for liquor servers is currently set at $1.25 per hour less than the general minimum wage. The lower rate for liquor servers was modelled on a similar

398. *Ibid.*, ss. 18(1), (2).

399. *Ibid.*, s. 18.1(2).

provision in effect in Ontario.[400] It was introduced as part of the changes made in 2011 to the British Columbia minimum wage. In the 2010-11 Stakeholder Engagement Process that preceded announcement of the 2011 changes, the hospitality industry maintained that a lower minimum wage for tip-earning employees was essential cost relief because of the depressed conditions at the time. The industry had experienced a series of shocks resulting from changes in drinking and driving laws, introduction of the HST, and restrictions on smoking. Fairness to "back of house" staff who do not earn tips was also given as justification for a lower wage for servers.[401]

(b) Interprovincial comparison

At the time when British Columbia introduced a lower minimum wage for liquor servers, three other provinces had a similar differential rate, namely Alberta, Quebec, and Ontario. Subsequently, Alberta eliminated its differential rate in stages over two years. Quebec retains a lower minimum wage for all employees who earn gratuities, not only those who serve liquor.[402]

In the case of Ontario, the Special Advisors to the Changing Workplaces Review recommended elimination of the lower rate for liquor servers in Ontario in stages over a three-year period.[403] Among the reasons for this recommendation was the finding in research commissioned for the Review that approximately 20 per cent of servers in the province earned less than the general minimum wage after tips.[404] In the opinion of the Special Advisors, institutionalizing dependence on tips to make up a minimum wage raised significant policy concerns. They saw the application of a lower minimum wage to an overwhelmingly female workforce as producing unintended discrimination.[405]

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400. "B.C. minimum wage to vault to $10.25", quoting the Hon. Christy Clark, Premier, CBC News, 16 March 2011, online: http://www.cbc.ca/news/canada/british-columbia/b-c-minimum-wage-to-vault-to-10-25-1.1045756.

401. *Supra*, note 11 at 5.

402. *Regulation respecting labour standards*, CQLR c N-1.1, r 3, s. 4.

403. *Supra*, note 72 at 166.

404. *Ibid.*, at 163. The study cited was Vosko, Noack and Thomas, "How Far Does the Employment Standards Act, 2000, Extend and What Are the Gaps In Coverage: An Empirical Analysis of Archival and Statistical Data" at 20.

405. *Supra*, note 72 at 166. The Special Advisors comment further at 166: "One is left uneasy about the demographics of the sector and we question whether this anomalous treatment of liquor servers would have survived this long if most of the servers were male."

Based on information from the Ontario Ministry of Labour that confusion on the part of employers and workers about who is subject to the liquor server wage and who is not, the Special Advisors also thought that eliminating the wage would simplify the law.[406] The purpose of closing the gap between the rates in stages was to ameliorate adverse effects on profitability, employment levels and the salaries of non-server employees.

It remains to be seen whether the Ontario government will act on the recommendation to eliminate the differential liquor server minimum wage in stages or otherwise. It remains in the minimum wage structure that came into effect in Ontario January 2018, although increased by the same percentage as the general minimum wage.

(c) Discussion

The Project Committee's discussion of the differential minimum wage for liquor servers has been overtaken by the announcement by the Ministry of Labour in April 2018 that a phase-out of the differential is planned over three years, with its elimination to occur in 2021. The deliberations of the Project Committee on the subject are summarized here nevertheless as a contribution to public debate.

The Project Committee struggled to discern a principled basis for the differential liquor server minimum wage, although recognizing that it is of economic importance to the restaurant and hospitality industry.

The liquor server minimum wage is clearly predicated on an assumption that the difference between it and the general minimum wage will be more than made up in tips. This may often be the case, but it is not a certainty because of the discretionary nature of tipping.[407] The research from Ontario carried out for the Changing Workplaces Review indicates the percentage of liquor servers who do not consistently earn at least the general minimum wage is significant. Furthermore, if the assumption that tips will compensate for a lower minimum wage is valid, it is one that is equally applicable to all personnel who have the opportunity to earn gratuities and not only those who serve liquor directly to customers as part of their regular duties.

As food and beverage servers are predominantly female, the lower minimum wage for those serving liquor cannot be described as gender-neutral in its effect. It creates a structural pay inequity between the female-dominated server group and non-tip-earning co-workers. Whether that inequity is consistently eliminated through receipt

406. *Ibid.*, at 165.

407. Mitchell and Murray, *supra*, note 72 at 165.

of gratuities must be considered a matter for conjecture in the absence of publicly available empirical evidence showing that is the case.

The argument that a lower minimum wage for tip-earning servers is needed for reasons of fairness to back of house staff in food and beverage establishments is undercut by the widespread practice of tip pooling. An employer may legally impose tip pooling as a workplace norm as long as gratuities are not diverted to pay business costs, including the basic wages of non-server staff.

The Project Committee has remained divided on the merits of a differential minimum wage for liquor servers. Some members saw it as a concession granted to deal with conditions prevailing at a specific point in time and which may have outlived the reasons for its introduction. Others saw it as a measure that might still be needed to sustain the general health of the restaurant and hospitality sector and employment levels in it, and were reluctant to second-guess policymakers on the issue.

Prior to the April 2018 announcement by the Minister of Labour that the differential minimum wage for liquor servers would be phased out, a *majority* of the members of the Project Committee would have recommended that the Ministry of Labour should re-examine the liquor server minimum wage in light of currently prevailing conditions. A *minority* of the members of the Project Committee would not have recommended any action or review of the liquor server minimum wage.

4. Agricultural Piece rates

(a) Overview

Farm workers who hand harvest various vegetable, berry, and tree fruit crops may be paid piece rates specified for each crop instead of the general minimum wage. As of the date of this report, those rates are as follows:

Crop	Piece rate
apples	\$18.89/ a bin (27.1 ft^3 / 0.767 m^3)
apricots	\$21.73/ a 1/2 bin (13.7 ft^3 / 0.388 m^3)
beans	\$0.259/ a pound / \$0.571 a kg

blueberries	$0.438/ a pound / $0.966 a kg
brussels sprouts	$0.180/ a pound / $0.397 a kg
cherries	$0.248/ a pound / $0.547 a kg
grapes	$20.07/ a 1/2 bin (13.7 ft^3 / 0.388 m^3)
mushrooms	$0.260/ a pound / $0.573 a kg
peaches	$20.07/ a 1/2 bin (12.6 ft^3 / 0.357 m^3)
pears	$21.27/ a bin (27.1 ft^3 / 0.767 m^3)
peas	$0.323/ a pound / $0.712 a kg
prune plums	$21.27/ a 1/2 bin (13.7 ft^3 / 0.388 m^3)
raspberries	$0.395/ a pound / 0.871 a kg
strawberries	$0.380/ a pound / $0.838 a kg
daffodils	$0.152/ a bunch (10 stems)

On 19 April 2018, the Ministry of Labour announced that the piece rates would increase by 11.5 per cent on 1 January 2019. In addition, the Ministry announced that a further study would be undertaken on the piece rate system with a view to determining if and how a minimum hourly wage could be implemented in the hand-harvested agricultural sector.

Piece rates are not mandatory. Hand harvesters may be paid an hourly wage instead, but by reason of custom and economics, most are paid on a piecework basis.[408] These

408. Migrant seasonal workers hired under the Seasonal Agricultural Workers Program (SAWP) are an exception. They tend to be paid on an hourly basis even when engaged in hand harvesting, because they must receive at least the equivalent of the hourly rate established under the SAWP

regulated piece rates were originally based on a time and motion study carried out early in 1980.[409] They were designed to allow workers paid on a piece rate basis to earn at least the equivalent of the general hourly minimum wage with reasonable effort. The piece work rates have been increased at intervals, usually but not always at the same time as increases in the general minimum wage.

The piece rates other than the rate for daffodil pickers include a four per cent addition for vacation pay, but not statutory holiday pay as farm workers were excluded from Part 5 of the ESA in 2003 in a controversial amendment to the regulations.[410]

The labour movement and advocacy organizations for farm, migrant, and seasonal workers have long sought abolition of the piecework system and extension of hourly minimum wage protection to all classes of agricultural workers. Their position is that piecework wages are discriminatory, exploitative, degrading, impoverishing, incompatible with the EI regime, and open to abuse through inaccurate weighing of produce and lack of payroll recordkeeping.

Opponents of the piece rate system have maintained that the original time and motion study on which the regulated minimum rates are based was made at the peak of the harvest season, while the harvest is leaner at the shoulder stages. For this reason, they argue that the base piece rates did not reflect average earning capacity over a whole season.[411]

Piece rates are not a good fit with the EI program. Eligibility for EI depends on the number of hours worked in a 52-week period. There is a past record of fraud, described in several Tax Court of Canada cases, that is associated with the process of conversion of piece rate earnings to time worked for UIC or EI purposes without accurate means of tracking the actual hours worked. Tax Court judges found that workers involved were generally either unwitting participants in the UIC/EI frauds, or complied with them out of fear and insecurity.[412]

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agreements between Canada and their countries of origin. In theory, SAWP workers could also be paid piece rates as long as equivalency with the SAWP Agreement hourly wage was maintained.

409. *Supra*, note 2 at 43.

410. *Employment Standards Regulation*, *supra*, note 31, s. 34.1, as am. by B.C. Reg. 196/2003. The reason why vacation pay is not included in the piece rate for daffodil pickers is obscure.

411. *Supra*, note 11 at 6.

412. See *Khunkhun v. M.N.R.*, 2002 CanLII 1210, at paras. 12-17; *Parmar v. M.N.R.* 2008 TCC 179 at paras. 1184-1195. See also *Gill v. M.N.R.* 2006 TCC 149 at paras. 86-87.

The agricultural industry defends the piece rate system with equal vehemence, maintaining that it would not be economically viable to grow the hand-harvested crops if the equivalent of the hourly minimum wage had to be paid instead of amounts based on weight or volume. The argument focuses on the relationship between labour cost and market price, and on loss of productivity resulting from removal of the incentive factor.[413]

A review of the piece rate system was carried out by consultants for the Ministry of Labour, Citizens' Services and Open Government in 2011, based on 2010 data.[414] The study noted major differences between the economic conditions in each crop sector in terms of profitability and between the seasonal farm labour workforces in the Lower Mainland / Fraser Valley and the Interior in terms of age and earning capacity. The seasonal agricultural workforce in the Interior tends to be aged 35 and under, with some workers aged 36-54.[415] This workforce principally harvests tree fruit crops, which bring higher prices than the crops grown in the Lower Mainland and Fraser Valley. The consultants concluded that harvesters of tree fruit crops in the Interior who are paid on a piece rate basis are able to earn more than the equivalent of the general hourly minimum wage over a season with reasonable effort.[416]

In contrast, seasonal farm workers in the Lower Mainland and Fraser Valley mainly harvest berry, vegetable and mushroom crops, which have lower economic value than the tree fruit crops grown in the Interior. Consequently, the piece rates for these crops are lower than the ones paid to the tree fruit harvesters. These workers are also considerably older on average than their counterparts in the Interior, many being aged 55 and upwards.[417] Much of the seasonal labour for harvesting vegetable and berry crops is supplied by contractors who transport their workers to and between farms.[418]

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413. *Supra*, note 11 at 5.

414. Darell M. Zbeetnoff and R. Bruce McTavish, *Review of Regulated Minimum Piece Rates for Agricultural Hand Harvesters in BC: Final Report Prepared for BC Ministry of Labour, Citizens' Services and Open Government* (29 December 2011) (2011 Piece Rate Review).

415. *Ibid.*, at 92.

416. *Ibid.*, at 99. See also *Gill v. Minister of National Revenue*, *supra*, note 413 at para. 86, where similar expert evidence on the earning capacity of Okanagan apple harvesters was presented to the Tax Court of Canada.

417. *Supra*, note 414 at 92 and 98.

418. *Ibid.*, at 99.

The 2011 Piece Rate Study was carried out by private sector consultants and involved data-gathering through voluntary co-operation. The consultants who carried it out acknowledged that co-operation was not always present, and there were significant gaps in the available evidence concerning the earning capacity of seasonal farm workers in the Lower Mainland and Fraser Valley. Small sample sizes that were not statistically representative were one limitation, but another was the fact that in the crop sectors where contractors provide most of the harvest labour, the farms did not have records of actual hours worked.[419] Earning capacity estimates under the piece rates in those sectors were therefore based on what farmers paid to labour contractors. These amounts could not be correlated to what individual workers actually received, so the consultants were unable to determine what workers actually received in pay on an hourly basis.[420]

Available data nevertheless tended to show that it is more difficult for hand harvesters of berry and vegetable crops to earn the equivalent of the hourly minimum wage, and a substantial percentage of them would not do so at the 2011 minimum wage levels.[421]

The 2011 study showed that producers also faced economic pressures from harvest labour costs that were very high in relation to market prices for certain crops.[422] Vegetable growers in particular faced piece rate labour costs approaching or exceeding 50 per cent of the farm gate price (the price the producer receives per selling unit of the harvested crop) and in the case of peas, 78 per cent of that price.[423] These cost / price ratios call into question the ability of growers to absorb any greater labour cost.

419. Section 29 of the 1995 ESA, which required labour contractors to provide farm producers with payroll records for each employee who performed work for them, was repealed several years before the 2011 Piece Rate Study was conducted.

420. *Supra*, note 414 at 99.

421. *Ibid.*, at 53 and 99. See also *Gill v. M.N.R.*, *supra*, note 412 at paras. 86-87 and in *Parmar v. M.N.R.*, supra, note 412, at paras. 13-14, where expert evidence was provided to the effect that berry and vegetable hand harvesters in the Lower Mainland and Fraser Valley do not earn the equivalent of the minimum wage on the average.

422. *Supra*, note 414 at 94-95.

423 *Ibid.* at 70-71, 74, and 94-95.

(b) Interprovincial comparison

Only three other provinces allow piecework payment for agricultural workers in place of an hourly minimum wage.[424] The provinces allowing hand harvesters to be paid at a piece rate are Ontario, Quebec, and Nova Scotia.

(i) Ontario

Ontario does not specify piece rates, but instead requires an employer to pay employees engaged to harvest fruit, vegetables or tobacco on a farm an amount that is at least equal to what the employee would have earned at the minimum wage.[425] An employer is statutorily deemed to have complied with this requirement, however, if each harvester is paid a piece work rate that is customarily and generally recognized in the area as having been set so that a harvester exercising reasonable effort would earn at least the equivalent of the general provincial minimum wage.[426] Hand harvesters are entitled to vacation pay and statutory holiday pay after 13 weeks of employment.

Hand harvesters who are students under 18 and who work not more than 28 hours a week or only during school holidays must be paid at least an amount actually equivalent to what they would have earned at the provincial minimum wage for the number of hours worked.[427] In their case, the statutory presumption of parity between the local conventional piece rate and the provincial minimum wage is not applicable.

(ii) Quebec

Quebec specifies piece rates per kilogram for employees engaged only in picking raspberries and strawberries, but the governing regulation also provides these employees may not be paid less than what they would have earned on an hourly basis at the general provincial minimum wage.[428] There is no statutory presumption of wage parity.

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424. Alberta formerly excluded farm workers from minimum wage legislation altogether, but this was changed in 2017. See S.A. 2017, c. 9, s.3, repealing ss. 2(3) and (4) of the *Employment Standards Code*, R.S.A. 2000, c. E-9.

425. *Exemptions, Special Rules and Establishment of Minimum Wage Regulation*, O. Reg. 285/01, s. 25(1).

426. *Ibid.*, s. 25(2).

427. *Ibid.*, s. 25(3).

428. *Regulation respecting labour standards*, CQLR c N-1.1, r 3, s. 4.1.

(iii) Nova Scotia

Nova Scotia exempts farm employees whose work is directly related to the non-mechanized harvesting of fruit, vegetables and tobacco from the benefit of a minimum wage altogether. Other farm workers may be paid on a piecework basis but must be paid not less than the hourly minimum wage for the number of hours worked.[429]

(c) Agricultural piece rate wages in the United States

Piecework wages are not prohibited under the federal *Migrant and Seasonal Agricultural Worker Protection Act*[430] in the U.S., but as the *Fair Labor Standards Act*[431] mandates the federal minimum wage as a floor wage, an employee must receive at least the equivalent of the federal minimum wage for the number of hours worked, or the state minimum or prevailing local hourly rate if it is higher. An employer must supplement the difference if a worker's piece rate earnings do not reach this level.

The *Fair Labor Standards Act* nevertheless exempts hand harvest labourers paid on a piece rate basis from the federal minimum wage if they are employed in an operation that is customarily recognized in the region of employment as paying on a piece rate basis, commute daily from their permanent residences to the farmsite where they are employed, and were employed in agriculture for less than 13 weeks in the previous calendar year.[432] As a result of this and certain other exemptions, some individuals could find themselves outside the protection of either federal statute.

A number of U.S. states allow piecework wages in agriculture, including the neighbouring states of Washington and Idaho, but piece rate harvesters must receive at least the equivalent of the state or federal minimum wage, whichever is higher. Both of these neighbouring states exempt certain hand harvesters paid piece rates from the minimum wage requirement if they meet the same prerequisites for exemption as those in the federal *Fair Labor Standards Act*, however.[433]

(d) Discussion and Recommendation

Over 20 years ago, the Thompson Commission recommended abolition of the piece rate system in strong terms:

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429. *Minimum Wage Order (General)*, N.S. Reg. 5/99, Sch. A, s. 13.

430. 29 U.S.C. §§ 1801-1872.

431. 29 U.S.C. §§ 201-219.

432. *Ibid.*, § 213(a)(6)(C), (D).

433. Washington: RCW 49.46.010(3); Idaho: Id. Stats. 44-1504(6)(b), (c).

> When all of the evidence has been analyzed, the impact of the present system for wages in agriculture is the following: a large group of workers, 29,000, dominated numerically by visible minorities and women, whose earnings are among the lowest of all workers in British Columbia are denied the most basic employment standards protection, a minimum wage for their work, a minimum wage that currently represents 40 per cent of the average weekly earnings for the province. In other words, a group most in need of such protection is outside the scope of the law in this area. In 1994, this situation should not be tolerated in this province.... In the contemporary British Columbia economy, no interest group's long-run interests are served by protecting low wage ghettos from minimum wage protection.[434]

The Project Committee believes, as did the Thompson Commission, that unskilled farm workers deserve minimum wage protection. Other industries besides hand-harvested agriculture must deal with foreign competition, fluctuating commodity prices, and thin profit margins, yet are not allowed to pay their workers less than the minimum wage. The existing piece rate scheme undermines the policy underlying the general minimum wage to the extent that as it does not allow some to earn the equivalent of that wage.

From the standpoint of policy, the Project Committee would support an equivalency rule similar to that in effect in Quebec, where producers must supplement piece rate payments if necessary to ensure that farm workers receive at least the equivalent of the general hourly minimum wage. This would give minimum wage protection to workers in the lower-value crop sectors without removing a productivity incentive in the higher-value crop sectors where hand harvesters can earn more than the equivalent of the minimum wage under piece rates with reasonable effort.

Without reliable economic information on the ability of the different crop sectors to absorb higher labour cost, abrupt introduction of a requirement to supplement the piece rate up to the level of the general minimum wage could place farming operations and the employment of unskilled workers at considerable risk. The aging seasonal agricultural workforce in the Lower Mainland and Fraser Valley, with its limited opportunities for other employment, would not necessarily be well-served by precipitous policy-driven change imposed without sufficient regard for economic reality.

434. *Supra*, note 2 at 46. Prof. Thompson also wrote a strongly worded letter to the Minister of Labour in April 2012 to protest the fact that agricultural piece rates remained fixed at the same levels when the general minimum wage was increased in that year.

The Project Committee discussed various solutions for gradual implementation of a Quebec-style wage equivalency rule, including phasing out the piece rates on a sectoral or regional basis or prescribing a temporary differential hourly minimum wage in crop sectors with less ability to absorb increased labour cost, or some combination of these. The Project Committee decided that it did not have sufficient expertise to make recommendations on an implementation strategy, and that this should be left to an expert body.

The Project Committee considers that prior to the introduction of any reform, a thorough empirical investigation of the agricultural piece rate system should be carried out under the auspices of an expert advisory group, supported where necessary by exercise of the investigative powers of the Director under the ESA. A systematic effort to find out what effective hourly rates the piece rates actually yield, and what workers actually receive from the amounts paid by farm producers to labour contractors, would be essential to obtain the full picture. This would necessarily involve interviewing seasonal and migrant workers in multiple localities with the aid of interpreters, under circumstances that prevent attribution of information to individual sources.

The exclusion of statutory holiday pay from the piece rates, and also vacation pay in the case of the piece rate for daffodil pickers, should be reviewed either as part of the same exercise, or of the general review of exclusions from ESA standards under Recommendation 6.

Following the completion of its investigation, the expert advisory group should develop recommendations on a strategy to implement the policy that workers paid on a piece rate basis must receive the equivalent of the general minimum hourly wage for the time worked.

The Project Committee is encouraged in these views by the similar approach announced by the Minister of Labour on 19 April 2018, concurrently with the release of the Second Report of the Fair Wage Commission.[435]

The Project Committee recommends:

435. BC Fair Wages Commission, *Minimum Wages for Those with Alternate Rates in British Columbia*. Second Report (The Commission, 2018), online: https://engage.gov.bc.ca/app/uploads/sites/237/2018/04/FWC_Second_Report_March_2018_FINAL.pdf.

30. (a) 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 hourly minimum wage.

(b) Implementation of paragraph (a) of this recommendation should be suspended until an expert committee appointed by the minister responsible for the administration of the ESA has reported on appropriate measures for its implementation.

L. Farm Labour Contractors and Wage Payment

Part 3 of the ESA contains several provisions specifically aimed at safeguarding the payment of wages of workers employed by farm labour contractors. These provisions recognize the unique vulnerability of the workers employed by labour contractors who supply them to perform temporary seasonal labour on farms, particularly at harvest times. They are predominantly older immigrants and migrant workers with little education and relatively little knowledge of English. As a group, they have few opportunities for other employment and are highly dependent on the contractors and their client farming operations.

There have been proposals at various times to replace reliance on private contractors for supply of seasonal farm labour with a hiring hall system or a non-profit agency operating along similar lines.[436] It is not clear how a hiring hall model would function in the absence of unionization, which has had limited success in this sector despite intensive and prolonged efforts to organize farm workers from the late 1970's through the 1990's.[437]

Wage protection is integrated with a licensing scheme for farm labour contractors that is also created under the ESA and its regulations. The licensing scheme requires contractors to deposit security with the Director of Employment Standards in an initial amount sufficient to cover 80 hours of pay at the general provincial minimum wage for the number of workers each contractor is authorized in the licence to hire.[438] After a year of operation, the amount of security a licensed contractor is required to have on deposit is reduced to 60 hours of pay per authorized employee if the labour

436. David Fairey et al., *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC* (Vancouver: Canadian Centre for Policy Alternatives, 2008) at 59. See also Murray Bush et al., *A History of the Canadian Farmworkers' Union*, online: http://www.vcn.bc.ca/cfu/chap2.htm, ch. 2.

437. Bush, *ibid.*

438. *Employment Standards Regulation*, *supra*, note 31, s. 5.1(2).

contractor has not contravened a core requirement of the ESA or regulations. The amount of security required is reduced again to 40 hours of pay after two years without contraventions of a core requirement, and further reduced to cover only 20 hours of pay per authorized employee after three years without core requirement contraventions.[439]

Licensing is compulsory for farm labour contractors under section 13(1) of the ESA, and engaging the services of an unlicensed farm labour contractor is prohibited under section 13(3).

If a producer (someone who engages the services of a farm labour contractor) engages an unlicensed contractor, the producer is deemed to be the employer of the contractor's employees.[440]

Section 30(1) of the Act declares that the producer and the farm labour contractor are "jointly and separately" liable for the wages earned by an employee of the contractor for work done for the producer. This means that the producer and contractor each owe the wages to the contractor's employees. The employees of the contractor could recover unpaid wages from either the producer or the contractor, or part of the wages from one and the rest from the other. The producer remains directly liable to employees of an unlicensed contractor for unpaid wages even if the producer has already paid the contractor.

Section 30(2) provides, however, that if the farm contractor is licensed at the time the producer engages the contractor's services, and the producer can prove to the Director of Employment Standards that the wages earned by each employee for work done on the producer's behalf have been paid to the contractor, section 30(1) does not apply. If the licensed farm labour contractor withholds the wages from employees, the employees have no recourse against the producer.

Section 30(2) was enacted in 2002. It restored the position to what it had been under the 1980 ESA immediately before the 1995 ESA was passed, reversing a recommendation of the Thompson Commission to make producers and farm labour contractors concurrently liable to farm workers for unpaid wages, regardless of the contractor's

439. *Ibid.*, s. 5.1(3). "Core requirement" means a requirement of ss. 13(1) (licensing), 17(1) (paydays), 28 (payroll records), 58 (vacation pay) of the Act, and ss. 15 and 18(1) of the regulations (minimum wage): s. 5.1(1). The form of security must be of a type listed in s. 8 of the *Bonding Regulation*, B.C. Reg. 11/68.

440. *Supra*, note 1, s. 13(2).

licensed or unlicensed status. The reasons for that recommendation appear in this extract from the Thompson Commission report:

> The evidence the Commission received of workers being paid less than the piece rates specified in the Regulation, not being paid any wages by contractors and other abuses is too strong to permit recommendations to stop with the call for better record keeping. In addition to problems with payroll records in this industry, the Ministry has found that registered farm labour contractors tend to have a brief existence, which increases the difficulties in recovering wages owed to workers. This problem is not unique to agriculture. In the construction industry, many contractors and subcontractors may work on a single project. Some subcontractors are established to bid and work on one job. Collections of any kind can be difficult. The *Workers Compensation Act* contains a mechanism for dealing with this problem in the collection of assessments. Section 51 of that *Act* provides that when there are multiple contractors working on a project, their workers may be deemed to be employees of the general contractor or the owner of the project. This liability serves to encourage persons contracting for work to ensure that their contractors or subcontractors pay Workers' Compensation Board assessments or are bonded against any default….
>
> The present regulatory scheme for farm labour contractors provides inadequate protection for workers. Since producers benefit substantially from the services of contractors, they should share the responsibility for ensuring that workers in this industry receive the basic rights of any employee—to be paid the wage for which the employer contracted.[441]

The recommendation was followed in the 1995 ESA as enacted. Its reversal by the enactment of section 30(2) of the ESA was, and continues to be, contentious.

The Project Committee took note of the fact that the licensing scheme for labour contractors has never been a guarantee of compliance with the ESA. Contraventions of wage payment and payroll recordkeeping requirements of the ESA by farm labour contractors continue to occur in numbers that are significant in light of the relatively small number of active contractors. There are currently 106 licensed farm labour contractors listed by the Employment Standards Branch. Between 2011 and 2015, 150 contraventions of the ESA and regulations by farm labour contractors were recorded. Of the 150 contraventions, 79 related to wage payment and payroll recordkeeping.[442]

The Project Committee debated whether ESA compliance in this sector would be better if s. 30(2) were repealed and joint and several liability for wages re-imposed on

441. *Supra*, note 2 at 51-52.

442. Derived from data provided by the Ministry of Labour, Employment Standards Branch.

producers and contractors regardless of the contractor's licensing status, as under the original 1995 version of the ESA. That approach essentially makes the producer a full-recourse guarantor of the contractor's wage liabilities, and relies on market forces to eliminate contractors who fail to meet them. It would allow the Director to collect unpaid wages from the producer even though the producer had fully paid the contractor for the work done by the contractor's employees. It assumes that if a producer might have to pay twice because a contractor did not pay wages owing after being paid by the producer, only reliable labour contractors would be engaged.

In the extract from the Thompson Commission report reproduced above, the Commissioner drew an analogy to the *Workers Compensation Act*, under which a contractor and the person for whom the contractor does work are each liable for compensation fund assessments.[443] The owner may be treated as the employer of the contractor's workers for this purpose if the contractor does not pay the assessments as the party primarily liable for them.[444]

Adaptation of the holdback mechanism under the *Builders Lien Act* was briefly examined as a possible means of protecting farm workers against non-payment of wages and farm producers against double payment.[445] The Project Committee did not think it was feasible to transfer the holdback concept to the ESA, however. Apart from the complexity it would introduce into dealings between producers, contractors, and farm workers, holdbacks require precise recordkeeping. Meticulous payroll recordkeeping has not been a characteristic of the hand-harvested agricultural sector in the province.

The unfairness of requiring a producer who has paid the contractor to pay again because of the contractor's default troubled some members, who saw the existing section 30(2) as representing a balancing of interests by the legislature. An unpaid employee of the contractor has a right to file a complaint under the ESA and receive

443. R.S.B.C. 1996, c. 492, s. 51(1).

444. *Ibid.*, s. 51(3). Similarly, an owner is deemed to be the prime contractor responsible for safety where more than one employer is carrying out work on the owner's premises and there is no written agreement designating one of them as the prime contractor: s. 118(1).

445. Under the *Builders Lien Act*, S.B.C. 1997, c. 45, a worker whose wages for work on an improvement to land have been withheld has a lien against the land on which the improvement is located for the amount of wages owing, as do contractors, subcontractors, and material suppliers for amounts owing to them. The landowner can avoid having to pay twice in order to prevent sale of the land to satisfy the liens of unpaid lienholders by complying with the requirement under the Act to hold back 10 per cent of the total amount owing to a contractor until the end of the time allowed for filing a claim of lien. If a lienholder files a claim of lien before then, the owner may pay the holdback amount into court and be relieved of liability to lienholders.

assistance from the Employment Standards Branch in pursuing the contractor, while a producer who had to cover a contractor's wage liabilities could only sue the contractor privately.

Other members considered that greater unfairness lay in requiring the unpaid worker to bear the ultimate loss, rather than the producer who engaged the defaulting contractor and has had the benefit of the worker's labour. In their view, it ignores the reality that aging, vulnerable and unsophisticated low-wage workers with language barriers are naturally reluctant to assert their rights out of fear and insecurity. As the purpose of the ESA is to protect employees, they would argue that the burden of loss as between unpaid workers and the producer should rest with the party in a better position to avert loss, namely the producer.

Bonding as a requirement for contractor licensing was another possible solution considered by the Project Committee. If bonding were made compulsory, producers would have greater assurance of the contractor's reliability. If the contractor defaulted in payment of wages, the bonding company would cover them to the limit of the bond, and would undoubtedly pursue the contractor for recovery. It is unlikely that the contractor could obtain a replacement bond under those circumstances, so the contractor's licence would be cancelled. Knowledge that these results would flow from non-payment of wages would be a strong inducement to meet wage obligations.

It may be impractical to insist on bonding as a licensing requirement, however. A private surety bond is currently one of the forms of security that an applicant for a farm labour contractor licence may provide, but this is rarely done.[446] Without knowledge of the ability of farm labour contractors to procure surety bonding up to adequate amounts, the Project Committee is reluctant to urge that it become a licensing requirement. If requirements for a licence are unrealistic, the licensing requirement itself might be flouted to an increased extent.

These considerations led the Project Committee to the conclusion that the best way to improve wage protection for farm workers would be to increase the amounts of security available to the Director to cover cases of non-payment. At the present time the initial amount of security an applicant must provide covers only covers 80 hours, or two standard 40-hour weeks, of minimum wage earnings per authorized employee.

The Project Committee believes the initial security should cover at least 120 hours at minimum wage multiplied by the number of employees the licence authorizes the contractor to have. A proportional change should be made in the amounts required if

446. Source: Ministry of Labour.

reduction of security for a contravention-free year continues to be allowed as a compliance incentive. In other words, the reductions should be to the level of 90, 60, and 30 hours of earnings per authorized employee after one, two, and three contravention-free years, respectively.

The Project Committee also agreed that for the protection of workers and as a deterrent, the Director should be empowered to prohibit a contractor whose licence has been cancelled from re-applying for a licence for a specific period, or permanently.

Views on the repeal or retention of section 30(2) were divided. The majority would let section 30(2) stand, so that only a producer who hired an unlicensed farm labour contractor would be jointly and severally liable to the contractor's employees for their wages.

A minority of the members would urge the repeal of section 30(2), with the result that a producer would be jointly and severally liable with labour contractors for wages earned by the employees of the contractor in performing work for the producer, regardless of whether the contractor has a valid licence.

The Project Committee recommends:

31. The initial amount of security that a farm labour contractor must provide to the Director under section 5(3)(c) of the Employment Standards Regulation *should be increased to the amount obtained by multiplying the minimum hourly wage by 120, and multiplying the result by the number of employees specified in the licence. The decreasing multipliers applicable in respect of subsequent periods of non-contravention should be adjusted correspondingly.*

32. The ESA should be amended to enable the Director to prohibit anyone whose farm contractor licence has been cancelled for non-compliance with the ESA and regulations from re-applying for a licence for a specific period, or permanently.

A **majority** of the members of the Project Committee recommend:

33. No change to section 30(2) is necessary.

A **minority** of the members of the Project Committee recommend:

33a. Section 30(2) should be repealed.

Chapter 7. Annual Vacation and Special Leaves

A. Annual Vacation

1. Vacation and Vacation Pay Are Independent Rights

Part 7 of the ESA confers two distinct rights on employees: annual vacation and vacation pay. These are independent rights. In other words, one is not in lieu of the other.[447] An employer must allow an employee to be absent on vacation for the length of time allowed by the Act in the second and each subsequent year of employment, and must also pay the employee the vacation pay required by the statute.

Part-time as well as full-time employees are entitled to annual vacation leave and vacation pay, as are temporary employees who accumulate enough working time with the same employer to qualify for these entitlements.

This chapter deals only with annual vacation leave. Vacation pay is covered in Chapter 6 along with other wage provisions.

2. Minimum Annual Vacation Leave

(a) Basic vacation leave entitlement

Section 57(1) requires that employees receive annual vacation of at least two weeks after 12 continuous months of employment, and at least three weeks after five consecutive years of employment. Section 57(2) obliges the employer to ensure that the employee takes the vacation within 12 months after the end of the year of employment in which it was earned. Subject to this, however, the employer may determine the timing of employee vacations.

The qualifying period of employment under s. 57 is the length of time employed, not the actual time worked. Thus, leaves of absence such as for illness or pregnancy do not interrupt the qualifying period.[448]

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447. *Re Xinex Networks Inc.* (22 February 1999) BCEST #D068/99 at 5; *Re IBM Canada Ltd.* (23 January 2015) BCEST #RD012/15 at para. 18.

448. *Interpretation Guidelines Manual*, *supra*, note 293, commentary on s. 57(1).

Section 57(3) prohibits the employer from making the employee take annual vacation in periods of less than a week at a time, although the employee may choose to do so voluntarily.

Annual vacation is exclusive of statutory holidays for which the employee is eligible. Therefore, if a statutory holiday occurs while an employee is on vacation, the vacation must be extended by the number of statutory holidays occurring during the vacation period, or an equivalent number of days off that are given at a different time.[449]

An employer may not reduce vacations or vacation pay because an employee was allowed longer vacation periods than the minimum under section 57(1) on previous occasions.[450] Similarly, vacation length and vacation pay may not be reduced on the ground that sick leave with pay or a bonus was previously given.[451] In several decisions, the Employment Standards Tribunal has also held that an employer cannot unilaterally characterize leave of absence given for a particular reason as vacation time taken.[452]

An employer may reduce an employee's annual vacation and vacation pay, however, if the employer has granted a written request by the employee to take vacation in advance.[453] Thus, if an employee has been allowed to take a week of vacation during the first year of employment, this will reduce the employee's vacation leave entitlement at the end of the first year to one week.[454]

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449. *Supra*, note 1, s. 57(4). Section 57(4) inaccurately speaks of "statutory holidays that an employee is entitled to." Under the ESA, an employee is not entitled to be absent on a statutory holiday, and may be required to work on that day, subject to receiving pay in accordance with Part 5 for the day if eligible. Section 57(4) should be amended to read simply that an annual vacation is exclusive of statutory holidays that may occur during the vacation period.

450. *Ibid.*, s. 59(1)(b).

451. *Ibid.*, s. 59(1)(a).

452. *Re Number 151 Holdings Ltd.* (9 April 1999) BCEST #D142/99; *Re Norpac Lawn and Leisure* (11 February 1997) BCEST #D064/97; *Re Marathon Systems Solutions Inc.* (20 November 1997) BCEST #S539/97.

453. *Supra*, note 1, s. 59(2).

454. Employment Standards Branch Annual Vacation Factsheet, online: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/factsheets/annual-vacation. See also *Interpretation Guidelines Manual*, *supra*, note 293, webpage "ESA Section 59 – Other payments or benefits do not affect vacation rights".

(b) Interjurisdictional comparison

The length of annual vacation under the ESA corresponds to the norm in other Canadian jurisdictions, as shown in the table below:

Length of Annual Paid Vacation Entitlement

Can. Lab. Code	AB	BC	Man	NB	NL	NS
2 wks 3 wks after 6 yrs.	2 wks 3 wks after 5 yrs	2 wks 3 wks after 5 yrs	2 wks 3 wks after 5 yrs	2 wks 3 wks[455]	2 wks 3 wks after 15 yrs[456]	2 wks 3 wks after 8 yrs

ON	PEI	QC	SK	NWT	NU	YK
2 wks. 3 wks after 5 yrs	2 wks. 3 wks after 5 yrs	2 wks and 1 extra unpaid wk[457] 3 wks after 5 yrs of uninterrupted service	3 wks 4 wks after 10 yrs	2 wks 3 wks after 6 yrs	2 wks 3 wks after 6 yrs	2 wks

455. New Brunswick allows an employee as vacation the lesser of two regular work weeks or one day for each month in which the employee worked. After 8 years, an employee is entitled to vacation for the lesser of three weeks and one and one-quarter days for each month in which the employee worked in the previous year: *supra*, note 127, ss. 24(1), (1.1).

456. Newfoundland and Labrador requires an employee to work 90 per cent of the normal working hours over 12 months of continuous employment in order to be entitled to vacation; *Labour Standards Act*, *supra*, note 126, s. 8(1) .

457. Quebec allows employees to accumulate one day of vacation per month of uninterrupted service during the first year of employment, up to a maximum of two weeks. After one year, an employee may request an extra week of vacation time without pay: *supra*, note 98, s. 67.

As is well known, paid vacation entitlements in European countries are considerably more generous. Some European countries provide five and six-week minimum vacation periods.[458] The EU Working Time Directive makes four weeks per year of vacation the minimum requirement for EU countries.[459]

The average length of the basic statutory vacation entitlement in the OECD countries other than the U.S. is about four weeks.[460]

In the U.S., there is no generally applicable minimum standard for annual vacation under federal or state legislation.[461]

(c) Length of basic annual vacation entitlement: various proposals for change

There have been several notable proposals for an increased basic vacation entitlement. The BC Employment Standards Coalition takes the position that the basic annual vacation entitlement under the ESA should be three weeks in the first five years of employment and four weeks in each subsequent year.[462] The British Columbia Federation of Labour took the same position on the length of the minimum vacation entitlement in responding to the consultation paper. They point to the vacation entitlements of five weeks and longer that are typical of European countries, and the four weeks of vacation available to Saskatchewan employees after five years of employment.

The Thompson Commission recommended in 1994 that the ESA should mandate four weeks' vacation after 10 years of employment.[463] The reason was that this would approximate terms relating to annual vacation that were prevalent in many collective agreements and individual contracts of employment.

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458. Rebecca Ray, Milla Sanes and John Schmitt, *No-Vacation Nation Revisited* (Washington: Centre for Economic and Policy Research, 2013), online: http://cepr.net/documents/no-vacation-update-2014-04.pdf at 2, Figure 1.

459. Directive 2003/88/EC concerning certain aspects of the organisation of working time, O.J. L 299/9, 18.11.2003, Art. 7.

460. Ray et al., *supra*, note 458 at 5, Table 1.

461. *Ibid.*, at 19. Vacation requirements are mandated by law, however, for employment under certain federal government contracts: U.S. Dept. of Labor webpage "Vacation Leave," online: https://www.dol.gov/general/topic/workhours/vacation_leave.

462. Longhurst and Fairey, supra, note 96 at 49.

463. *Supra*, note 2 at 109.

Arthurs also recommended a four-week annual vacation entitlement after 10 years of employment for the federal sector in his 2006 report.[464] Arthurs also recommended that the qualifying period of employment for three weeks' paid vacation be reduced from six consecutive years of employment to five, and that employees having between five and 10 years' service be entitled to an additional unpaid week of leave to be taken at a time determined by the employer.[465] Arthurs justified the recommended increase in the federal vacation entitlements on the ground that the existing ones were inferior to those of a number of provinces and the majority of OECD countries. The extra week of unpaid vacation leave for employees having between five and 10 years of service was to achieve parity with the most generous statutory minima in the country and also address employers' concern about the cost of increased entitlements.[466]

(d) Project Committee divided on appropriate length of annual vacation entitlement

Some members of the Project Committee endorse the Thompson and Arthurs recommendations for four weeks' annual vacation after 10 years of employment as a standard, and the reasons for them.

Other members consider that it is not the purpose of the ESA to achieve parity with terms prevailing in collective agreements, and changes should not be made purely to keep up with them. There is also a concern that adding an additional week of mandatory vacation time would be an incentive to dismiss longer-serving employees because of added cost. The cost of extra vacation time is particularly difficult for smaller employers to absorb. Larger employers who already provide four-week vacation time to their employees under a collective agreement, or as a long service benefit, might incur little added expense. The incremental cost of extra staffing to cover longer absences and additional days of vacation pay would be much more significant for small employers.

The Project Committee remains divided on the issue of a longer vacation entitlement for employees with 10 or more years of continuous service with the same employer.

The majority view is that no change is necessary from the current vacation entitlement under section 57(1) of two weeks after one year of employment and three weeks after five consecutive years. The minority view is that an employee should be entitled

464. Harry Arthurs, *supra*, note 102, at 163 (rec. 7.61).

465. *Ibid.*

466. *Ibid.*

to four weeks' annual vacation after 10 years of continuous employment with the same employer.

A **majority** of the members of the Project Committee recommend:

34. Annual vacation entitlements under section 57(1) of the ESA should remain unchanged.

A **minority** of the members of the Project Committee recommend:

34a. Section 57(1) of the ESA should be amended to provide that an employee becomes entitled to an annual vacation of four weeks after 10 consecutive years of employment.

3. Common Anniversary Date

The Thompson Commission recommended that employers be empowered to use a common anniversary date for all employees to simplify accounting for vacation entitlements.[467] Section 60 was included in the ESA in response. It allows an employer to determine annual vacation and vacation pay entitlements on the basis of a single anniversary date for counting years of service rather than using different anniversary dates for each employee, provided that the entitlements of any employee may not be reduced as a result.

If a common anniversary date is used, vacation leave and vacation pay are pro-rated for employees who have worked only part of a year with the employer as of that date. Thereafter, their vacation leave and vacation pay is considered to accrue from the common anniversary date as if they had begun their employment on that date. Use of a common anniversary date must not be allowed to reduce entitlements. Thus, if using a common anniversary date would delay the point at which an employee would become entitled to three weeks' vacation instead of two, and delay the increase in vacation pay from 4 per cent to 6 per cent, the increases in vacation length and vacation pay must take effect on the preceding common anniversary date.[468]

467. Thompson, *supra*, note 2 at 111. The 1980 ESA required authorization from the Director to use a common anniversary date for the purpose of computing annual vacation entitlement: *supra*, note 9, s. 39.

468. See the Employment Standards Branch *Interpretation Guidelines Manual* for an example of a calculation of vacation and vacation pay using a common anniversary date, online: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esa-part-7-section-60.

4. Waiver of Vacation

The ESA does not allow employees to waive their annual vacation. Employers must compel employees to take vacation, although compulsion is seldom necessary. Some jurisdictions in Canada do permit employees to voluntarily forego their vacation leave, but not their vacation pay. Non-unionized employees in the federal sector may forego their vacation.[469] Those in Ontario may do so as well, subject to the approval of the Director of Employment Standards.[470] Prince Edward Island also allows employees to waive their annual vacation.[471]

One industry association and a legal organization that responded to the consultation paper were in favour of allowing employees to waive vacation entitlements, possibly subject to a limit on the amount of vacation time that could be waived or deferred. The industry organization was also in favour of allowing agreements to bank and carry forward unused vacation time into subsequent years.

The issue should lead policymakers and legislators to consider the purposes of statutory vacation leave. At least some are: to allow for rest and recreation, to improve productivity by preventing worker exhaustion, to maintain quality of life for the working population, and to support family life. If these are purposes worthy of protection in employment legislation, preserving the employee's freedom of choice is arguably of equal importance.

There are many reasons why it may be rational for an employee to forego using vacation time in light of the employee's individual circumstances. Giving up vacation in one year could be a sensible trade-off for the employer's agreement to grant a lengthier leave of absence for a special reason, or an extended vacation in the next year. An employee may wish to maximize earning opportunities and obtain overtime pay in the period that would otherwise be taken up by vacation days. The employee may have a pressing need to do so for financial reasons.

Despite this, there is reason for caution in approaching the question of whether the ESA should permit employees to waive or defer their annual vacation. It would allow room for employers to exert pressures that few employees would be in a position to resist.

469. *Canada Labour Standards Regulations*, CRC, c. 986, s. 14(1).

470. *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 41(1).

471. *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 11.1.

Arthurs reflected on these issues as follows in his 2006 report on federal employment standards:

> A recent survey of Canadian workers shows that about 25% do not use their entire vacation entitlement, while about 10% uses none at all. Although the reasons are various — short-term financial troubles, problems in synchronizing with the vacations of family members, career pressures, workaholism — the statistics are troubling. For reasons of health and productivity, workers should take, and should be encouraged to take, all of their earned vacation leave. Nonetheless, the decision must ultimately rest with the worker. For that reason, it is important to protect workers from pressure by employers .to remain on the job rather than take their vacation.[472]

Arthurs recommended that waivers be permissible, but subject to withdrawal by the employee as a safeguard against coercion.

The Project Committee remains of the view that no change should be made in the ESA to allow agreements to waive or defer annual vacation.

B. Existing Special Leave Provisions

1. Overview of Part 6 of the ESA

Part 6 of the ESA contains provisions authorizing employees to be absent from the workplace for a specific reason or purpose. The leave entitlements under these and similar provisions in other jurisdictions are sometimes referred to as "job-protected." This means, first, that employers are prevented from terminating the employee or changing the employment relationship unilaterally because of the circumstances entitling the employee to leave, or because of the fact that the employee has taken it. Second, it means that the employee must be returned to the position held before the leave began, or to an equivalent position.

Currently the categories of special leave in British Columbia are:

- maternity leave
- parental leave
- family responsibility leave
- compassionate care leave
- reservist leave
- bereavement leave

472. *Supra*, note 102 at 164.

- leave for jury duty.

With one exception, these are broadly similar to the categories of special leave found in other Canadian employment standards legislation, although some jurisdictions have additional or overlapping categories. The exception is short-term leave for personal illness or injury (sick leave). Lack of any statutory entitlement to short-term sick leave is a controversial subject in British Columbia at the present time.

2. Job Protection Provisions Relating to Special Leaves Under Part 6

(a) General

The principal job protection provisions concerning Part 6 special leaves are in section 54. Provisions like them are found in the employment standards legislation of other provinces and territories and the federal sector.

Section 54(1) requires employers to grant employees the leaves under Part 6 to which they are entitled. Section 53(3) is the key job-protection provision. It states that at the conclusion of the employee's leave, an employer must place the employee in the same position the employee held before going on leave, or in a comparable position.[473]

Section 54(2) prohibits an employer from terminating an employee or changing a condition of employment without the employee's consent because the employee has taken a leave under Part 6, or because of the employee's pregnancy. If any change in a condition of employment to which an employee has not consented takes place while the employee was on a Part 6 leave, the employer has the burden of proving that the change was not related to the fact that the employee took the leave, or to the employee's pregnancy.[474]

While on a leave under Part 6, an employee is deemed by section 56(1) to have been continuously employed for the purpose of calculating annual vacation entitlement, compensation for length of service under section 63, group termination under section 64, and pension and benefit plans.[475]

473. *Supra*, note 1, s. 54(3).

474. *Ibid.*, s. 126(4)(c).

475. This does not apply if the employee exceeds the length of leave allowed under Part 6 without the employer's consent: s. 56(4).

In regard to pension and benefit plans, the employer must continue to make contributions for the employee if the employer funds the plan entirely, or if the employer and employee jointly fund the plan and the employee agrees to make contributions while on a Part 6 leave other than reservist leave.[476]

(b) Clarification of effect of section 54(4)

Section 54(4) deals with a situation in which a leave ends during a shut-down or other temporary suspension of operations in a workplace. It states:

> (4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

The words "as soon as operations are resumed" could be read as requiring non-unionized employees previously on leave to be recalled ahead of other employees once operations re-start. The likely intent of section 54(4) was simply to cover cases where no work is taking place at the time a leave ends, not to confer preferential recall rights for non-unionized employees returning from leave. An amendment is desirable to clarify that section 54(4) does not confer preferential rights in relation to recall.

The Project Committee recommends:

35. The ESA should be amended to clarify that section 54(4) does not entitle non-unionized employees whose leaves end during a period when the employer's operations are suspended to be recalled in preference to other non-unionized employees.

3. Maternity Leave

(a) Under the ESA

Section 50(1) entitles a pregnant employee to up to 17 consecutive weeks of unpaid leave beginning not earlier than 13 weeks before the expected birth date and not later than the birth date.

If the employee does not request leave until after the birth of a child or the termination of a pregnancy, the employee is entitled under section 50(2) to six weeks of unpaid leave.

476. *Supra*, note 1, ss. 56(2), (5).

If the employee is not able to work for reasons related to the birth or pregnancy after the conclusion of leave under ss. 50(1) or (2), she is entitled under section 50(3) to up to six additional weeks of unpaid leave.

Requests for maternity leave must be made in writing at least four weeks before the day on which the employee wishes the leave to begin.[477] The employer may require a certificate from a physician or nurse practitioner confirming the expected or actual birth date, or date of termination of the pregnancy.[478] Medical confirmation may also be required if a period of additional leave under s. 50(3) is requested.[479]

If the employee makes a written request to return to work earlier than six weeks after the birth, the employer may require a physician's or nurse's certificate confirming the employee is able to resume work.[480]

While the ESA specifies that maternity leave is unpaid, EI pregnancy benefits normally equivalent to 55 per cent of average insurable weekly earnings are available to qualifying employees for a maximum of 15 weeks, beginning as early as 12 weeks before the expected birth date and ending within 17 weeks after the later of the expected and the actual date of birth.[481] In order to be eligible to collect pregnancy benefits, an employee must have accumulated 600 hours of insurable employment in the 52-week period preceding the start of the maternity leave or since the start of a previous period in which the employee received EI benefits, whichever is shorter.[482]

(b) Interjurisdictional comparisons

The 17 weeks of maternity leave under the ESA represents the general norm for pregnancy / maternity leave across Canada. Pregnancy / maternity leave entitlements in Canadian legislation exceed the ILO minimum standard, which is 14 weeks under the *Maternity Protection Convention, 2000*.[483]

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477. *Ibid.*, s. 50(4).

478. *Ibid.*

479. *Ibid.*

480. *Ibid.*, s. 50(5).

481. *Employment Insurance Act*, S.C. 1996, c. 23, ss. 12(3)(a), (4)(a), 17, 22(2). The maximum benefit is subject to the maximum yearly insurable earnings cap for EI purposes, currently $51,700, meaning the maximum maternity benefit is $547 per week. The actual benefits are determined according to a formula that takes regional employment conditions into account.

482. *Ibid.*, ss. 6(1) (definition of "major attachment claimant"), 8(1), 23.1(2).

483. Convention C183, online: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:312328 , Art. 4, para. 1.

The ESA is more generous than the legislation of some other Canadian jurisdictions in extending maternity and parental leave entitlement regardless of the length of employment. The *Canada Labour Code* requires that an employee have worked at least six months for the same employer.[484] For example, Nova Scotia, N.W.T., Nunavut, Yukon, require that an employee have been employed for 12 months with the same employer before maternity and parental leave entitlement arises.[485]

Several other Canadian jurisdictions require shorter minimum terms of employment in order for employees to be eligible for these categories of leave: 13 weeks in Ontario and Saskatchewan, 20 weeks in Newfoundland and Labrador, and 7 months in Manitoba.[486] Alberta recently reduced the qualifying period of employment for maternity leave from 12 months to 90 days.[487]

(c) Recent extension of period in which EI maternity benefits are payable

The beginning of the period in which EI pregnancy benefits are potentially receivable was changed in 2017 from eight weeks before the expected birth date to 12 weeks before that date.

Pregnancy leave under the ESA may commence 13 weeks prior to the expected birth date, however. The reason why maternity leave under the ESA may begin earlier than EI pregnancy benefits become payable is to take account of the EI waiting period. The waiting period was formerly two weeks from the submission of a claim, and is now one week.

Prior to amendment in 2018, section 50(1) stated maternity leave could commence 11 weeks before the expected birth date. The Project Committee considered whether section 50(1) should be amended to allow maternity leave to commence earlier in light of the change in the federal EI legislation regarding the earliest point at which EI pregnancy benefits become payable. Two divergent views formed.

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484. *Supra*, note 101, s. 206(1)(a). The basic period of maternity leave (17 weeks) may be extended for the length of time the child is hospitalized after birth if this occurs in the 17 weeks following the date of confinement, subject to a maximum of 52 weeks: s. 206(2), (3).

485. R.S.N.S. 1989, c. 246, s. 59; S.N.W.T. 2007, c. 13, s. 26, R.S.N.W.T. (Nu) 1988, c. L-1, s. 31; R.S.Y. 2002, c. 72, s. 36(1).

486. R.S.O. 2000, c. 41, s. 46; S.S. 2013, c. S-15.1, s. 2-43; R.S.N.L. 1990, c. L-2, s. 40(1); C.C.S.M. c. E110, s. 53.

487. S.A. 2017, c. 9, s. 29, amending s. 45 of the *Employment Standards Code*, R.S.A. 2000, c. E-9.

The majority view was that no change to section 50(1) of the ESA was required. The reasons were, first, that employees seldom begin their maternity leave earlier than two weeks before the expected birth date in order to have the leave extend as long as possible after the birth. Second, it was believed that the maternity leave and benefits provisions in the ESA and EI legislation, respectively, coincide closely enough that the change in the date on which EI maternity benefits potentially become payable would have little practical effect in terms of when leave is taken.

The minority view was that the intervals in which maternity leave may be taken and EI pregnancy benefits may be received should coincide insofar as possible, and that section 50(1) of the ESA should be amended accordingly.

This point has become academic, however. The *Employment Standards Amendment Act, 2018* changed section 50(1) to allow maternity leave to begin 13 weeks before the expected birth date.[488] This has re-aligned the ESA maternity leave provisions with the lengthened EI pregnancy benefit period.

4. Parental Leave

(a) Under the ESA

Section 51(1) confers a right to parental leave. Parental leave may be taken by either parent, but the duration differs depending on whether maternity leave is also taken. As amended in May 2018, section 51(1) entitles an employee who takes maternity leave to up to 61 consecutive weeks of unpaid leave beginning immediately after the end of the maternity leave under section 50, unless the employer and employee agree otherwise. In other words, the combination of maternity leave and parental leave could extend to 78 weeks.[489]

A biological parent who does not take maternity leave is entitled to up to 62 consecutive weeks of unpaid leave commencing within the 78 weeks following birth of a child.[490]

An adoptive parent is entitled to 62 consecutive weeks of unpaid parental leave beginning within 78 weeks after the adoptive child is placed with the parent.[491]

488. S.B.C. 2018, c. 7, s. 1(a).

489. *Supra*, note 1, s. 51(4), as am. by S.B.C. 2018, c. 7, s. 2(g).

490. *Ibid.*, s. 51(1)(b), as am. by S.B.C. 2018, c. 7, s. 2(c).

491. *Ibid.*, s. 51(1)(d), as am. by S.B.C. 2018, c. 7, s. 2(d).

Section 51(2) allows up to five additional consecutive weeks of unpaid leave if the child has a physical, psychological or emotional condition requiring an additional period of parental care.

The request for parental leave must be made in writing at least four weeks before the employee wishes to begin the leave.[492] Employers may require medical or other evidence of entitlement.[493]

Regular EI parental benefits are payable to qualifying employees for a maximum period of 5 weeks during the 52-week period following birth of a child or placement of an adopted child.[494] The benefits are calculated, like pregnancy benefits, as 55 per cent of the claimant's average weekly insurable earnings up to a maximum amount. In 2017 the option of collecting parental EI benefits over 61 weeks at 33 per cent of average weekly insurable earnings was introduced, which allows for pregnancy and parental benefits to be extended over 78 weeks (18 months) in total.[495]

Two parents may go on parental leave for the same child and divide the maximum number of weeks of benefits between them.[496]

As with pregnancy benefits, the 52 or 61-week period during which the benefits may be claimed is extended by any period of hospitalization of the child during the 52 weeks, subject to a maximum of 104 weeks.[497]

(b) Interjurisdictional Comparison

Most Canadian jurisdictions accord 35 or 37 weeks of parental leave, although requirements for advance notice to the employer and length of service qualifications vary. British Columbia, New Brunswick, and Quebec are the only provinces that do not require a minimum length of employment before entitlement arises.

The *Canada Labour Code* now allows up to 63 weeks of parental leave to care for newborn or newly adopted children of the employee, subject to the employee having

492. *Ibid.*, s. 51(3)(a), (b).

493. *Ibid.*, s. 51(3)(c).

494. *Supra*, note 481, s. 23(2).

495. *Ibid.*, s. 23(3.21), added by S.C. 2017, c. 20, s. 35.

496. *Ibid.*, s. 23(4).

497. *Ibid.*, ss. 23(3), (3.1).

completed six consecutive months of employment.[498] If two employees take parental leave in respect of the same birth or adoption, their leave must not exceed 78 weeks (18 months) in the aggregate.[499]

(c) Recent extension of period during which EI parental benefits are payable

Before section 51 was amended, the Project Committee considered whether the maximum period of parental leave needed to be extended in light of the recent changes in the EI legislation allowing parental benefits to be collected, at the claimants' option, over an extended period of up to 63 weeks at 33 per cent of average weekly insurable earnings instead of a maximum of 35 weeks at 55 per cent of earnings.

The majority view was that extension was unnecessary. It was thought unlikely that many employees would want to collect reduced EI income replacement benefits over a longer period. The minority view was that the maximum duration of parental leave should be extended to correspond to the change in EI legislation giving claimants this option. The May 2018 amendments to section 51 of the ESA have resolved the matter by extending parental leave in keeping with the lengthened EI benefit period.

5. Family Responsibility Leave

(a) Under the ESA

Section 52 entitles an employee to up to five days of unpaid leave in each year of employment to meet responsibilities for the care, health or education of a child in the employee's care, or the care or health of another member of the employee's immediate family.

The provision addresses emergencies and also situations that may not amount to emergencies but still require urgent attention, such as caring for a child or family member who is suddenly taken ill.

498. *Supra*, note 101, s. 206.1(1).

499. *Ibid.*, s. 206.2(3). As with maternity leave, the 78-week period within which the leave must be taken under the *Canada Labour Code* (starting with the date of birth or the date on which the child comes into actual care of the employee) is subject to extension by the number of weeks during which the child is hospitalized during that period, subject to a maximum of 104 weeks: ss. 206(2.2), (2.3). The period during which parental leave may be taken may also be extended by the length of time an employee is also on compassionate care leave (s. 206.3), critical illness leave (s. 206.4), and leave related to crime-related child death or disappearance (s. 206.5): s. 206.1(2.1).

Family responsibility leave under section 52 cannot be claimed when it is the employee who is sick or injured rather than another member of the employee's immediate family. A recommendation appears later in this chapter to replace the present section 52 with a new provision which would cover situations that section 52 now covers, as well as ones involving an employee's own illness or injury. The recommendations made here relating to leave under the present section 52 also relate to that new provision combining personal illness and family responsibility leave.

(b) Interjurisdictional comparison

Several Canadian jurisdictions provide for a category of leave that covers the employee's own short-term illness or emergency as well as that of a member of the employee's family. For example, Ontario provides for "personal emergency leave" of up to 10 days per year because of a personal illness, injury or medical emergency affecting the employee or a broadly constituted class of persons related to the employee by blood or conjugal relationship. Personal emergency leave may also be taken because of an "urgent matter" concerning a member of the class of related persons.[500] A 2017 amendment required the first two days taken of the 10 days of personal emergency leave to be paid, but it is among those soon to be repealed.[501]

The personal emergency leave provisions formerly applied only to workplaces with more than 50 employees. This restriction was repealed in 2017, implementing a recommendation made by the Special Advisors to the Changing Workplaces Review.[502]

500. *Employment Standards Act, 2000*, S.O. 2000, c. 41, ss. 50(1), (2). The class of persons related to the employee whose circumstances may trigger entitlement to personal emergency leave is very broad, extending well beyond the employee's immediate family. The employer may require "evidence reasonable in the circumstances" that the employee is entitled to leave: s. 50(7). Any part of a day taken for personal emergency leave counts as a full day. Before 2017, the personal emergency leave provisions only applied to workplaces with 50 or more employees.

501. *Ibid,* ss. 50(5), (8). The requirement to pay an employee for the first two days of personal emergency leave is slated for repeal as of 1 January 2019 under the *Making Ontario Open for Business Act*, *2018 supra*, note 3, Sch. 1, s. 19.

502. *Supra*, note 72, at 229. The principal reason for repeal of the 50-employee threshold was that it had been estimated as excluding 29 per cent of the Ontario workforce from the benefit of leave for personal illness or family emergencies. The Special Advisors also recommended, however, that the allotment of leave be reduced to 7 days from 10 because of concerns for the economic impact on small employers. Several years before the Changing Workplaces Review, the Law Commission of Ontario recommended that the provincial government explore means of extending the personal emergency leave provisions to workplaces with fewer than 50 employees, and also to part-time, casual and temporary employees of these smaller workplaces: Law Commission of Ontario, *supra*, note 81 at 49.

The *Making Ontario Open for Business Act, 2018* will replace personal emergency leave with an annual entitlement of three days of unpaid family responsibility leave, three days of unpaid sick leave, and two days of bereavement leave, arising after two weeks of employment.[503]

Manitoba provides for three days of unpaid "family leave" per year if necessary for the health of the employee or to meet family responsibilities in relation to a spouse, child, parent or parent-in-law, or other prescribed person.[504] Quebec,[505] New Brunswick,[506] Nova Scotia,[507] Newfoundland and Labrador,[508] N.W.T.,[509] and Saskatchewan[510] also combine personal sick leave and leave to care for the health of close family members, calling for 3, 5, 7, or 12 days of unpaid leave, depending on the jurisdiction in question.

P.E.I. treats personal illness and family illness separately, providing for 3 days of unpaid leave per year in the case of illness of the employee, and after six months of continuous employment, an equal number of days to care for the health of a family member.[511] After five years of employment, an employee becomes entitled to one paid day of sick leave.[512]

Alberta, Yukon, N.W.T. and Nunavut do not provide for a form of family responsibility leave, nor does the *Canada Labour Code*. The Arthurs Report recommended that the *Canada Labour Code* should provide for 10 unpaid days of leave per calendar year "to meet responsibilities regarding the education of a child or the care and health of a family member."[513]

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503. *Supra*, note 3, Sch.1, s. 19.

504. C.C.S.M. c. E110, s. 59.3(1).

505. C.Q.L.R. c. N-1.1, s. 79.7.

506. S.N.B. 1982, c. E-7.2, s. 44.022(1), (2).

507. R.S.N.S. 1989, c. 246, s. 60G.

508. R.S.N.L. 1990, c. L-2, s. 43.11(1). A medical certificate is apparently mandatory after two consecutive days of sick leave: s. 43.11(2).

509. S.N.W.T. 2007, c. 13, s. s. 29.

510. S.S. 2013, c. S-15.1, s. 2-40.

511. R.S.P.E.I. 1988, c. E-6.2, ss. 22.1. An employer may demand a medical certificate verifying inability to work if the worker was or will be absent for three consecutive days.

512. *Ibid.*, ss. 22.2(4), (5).

513. *Supra*, note 102 at 159 (recommendation 7.50).

Australia's National Employment Standards provide for two weeks of paid personal / carer's leave per year for regular (*i.e.*, non-casual) employees, accruing progressively during a year of employment, and accumulating from year to year.[514] This leave may be taken either because of unfitness for work due to a personal illness or injury, to provide care or support to a member of the employee's immediate family or household because of a personal illness or injury, or an unexpected emergency affecting the family or household member.[515] Female employees may opt to take paid personal /carer's leave in lieu of unpaid special maternity leave (available in relation to a pregnancy-related illness or early termination of a pregnancy).[516]

In addition, Australia allows two days of unpaid personal / carer's leave on each occasion on which a member of the employee's immediate family or household requires care or support due to an illness, injury, or unexpected emergency.[517] This may evidently be taken in lieu of the paid personal / carer's leave to avoid using it up, or to supplement it as needed.

In either case, an employer may require evidence from the employee that would satisfy a reasonable person that the circumstances entitle the employee to take the leave requested.[518]

In the U.K., an employee is entitled to "a reasonable amount of time off" to take necessary action to provide assistance to dependants in case of illness, childbirth, injury, or assault, to make arrangements for care of an ill or injured dependant, as a consequence of the death of a dependant, the disruption or termination of care arrangements for a dependant, or to deal with an unexpected incident involving the employee's child outside of the times at which the child's school is responsible for the child.[519]

514. *Fair Work Act 2009* (Cth), s. 96.

515. *Ibid.*, s. 97.

516. *Ibid.*, s. 80, note 2 and s. 97, note 2.

517. *Ibid.*, s. 102

518. *Ibid.*, s. 107.

519. *Employment Rights Act 1996*, c. 18, s. 57A, as enacted by 1999, c. 26, s. 8 and Sch. 4, Part II. "Dependant" is defined in the 1996 Act as a spouse, civil partner, child, parent, a person living in the employee's household and is not a tenant, lodger, boarder, or employee of the employee, and a person who reasonably relies on the employee for assistance when ill, etc. or to make care arrangements: ss. 57A(3)-(5).

(c) Definition of "immediate family"

The definition of "immediate family" is central to the operation of section 52. "Immediate family" is given the following definition in s. 1(1) of the ESA:

> **"immediate family"** means
>
> (a) the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and
>
> (b) any person who lives with an employee as a member of the employee's family;

While paragraph (b) of the definition reveals the clear intent that section 52 allows for short-term leave to attend to the health and care needs of relatives and *de facto* members of the employee's family in addition to the close relatives mentioned in paragraph (a), the requirement that the *de facto* family member must reside with the employee results in section 52 being inapplicable to many common family caregiving situations. Caring for an elderly parent-in-law who does not live under the same roof as the employee is one example. For this reason, the restriction is unrealistic unless the range of relatives mentioned in paragraph (a) is expanded to meet more family caregiving situations that commonly arise.

Of the provinces and territories that provide for an equivalent of family responsibility leave, British Columbia is the only one to have a residency-based qualification on the scope of the provision.

Saskatchewan allows leave up to 12 days per year when an immediate family member is dependent upon the employee, regardless of where that family member resides.[520] "Immediate family" under the Saskatchewan statute is defined much more broadly than under the ESA, extending to in-laws and parents or grandparents of the employee's spouse.[521] Ontario allows personal emergency leave to attend to a death, illness, injury, medical emergency, or other urgent matter relating to a wider range of relatives including step-parents, stepchildren, step-grandparents and -grandchildren, and as under the Saskatchewan legislation, the corresponding relatives of the employee's spouse.[522]

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520. *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, s. 2-40(2).

521. *Ibid.*, s. 2(1)(k) ("definition of "immediate family"). The leave entitlement only arises after 13 weeks of employment, however.

522. *Supra*, note 100, s. 50(2). In 2018 Quebec expanded the class of relatives whose care needs may serve as justification for an employee taking statutory leave to include in-laws, foster parents, foster children, and various others related to the employee by affinity or who are dependent

An even wider range of relatives is prescribed for the purpose of compassionate care leave under section 52.1 of the ESA, which is discussed later in this chapter. The prescribed list appears in the *Compassionate Care Leave Regulation*[523] under the ESA. It corresponds to the way "family member" is defined in the *Employment Insurance Regulations*.[524] The prescribed list is symmetrical like the Saskatchewan and Ontario examples cited above, in the sense that for each relative listed, the corresponding relative of the employee's spouse is also listed.

Compassionate care leave and family responsibility leave are different categories of statutory leave, but serve similar purposes. Both categories of statutory leave reflect the reality that familial duty and employment may unavoidably conflict at times. With an aging population, longer lifespans, and severe limitations on public resources for adult care, working people are assuming significant burdens in caring for aging relatives. These are not necessarily blood relatives, but are often near-relatives such as in-laws and step-parents.

Any expansion of statutory leave entitlements imposes costs on employers even though the absent employee is not paid for the time away from work. This burden must not be ignored. Public policy nevertheless demands that employers absorb the cost and disruption arising from the lengthy, indefinite absences that reservist leave and jury duty may require because of the importance of the service rendered by the absent employees to the security of the state and community.[525] By comparison, the allotment of leave days allowed for discharging family caregiving responsibilities is minuscule and the cost proportionally smaller as well.

Caregiving by individuals and families has a largely unrecognized economic value in relieving demands on public resources and contributing to fiscal security.[526] In this respect, it may be seen as a form of state or community service not unlike jury duty.[527] Arguably, the cost generated by family responsibility leave is shared between employer and employee, because the employee foregoes salary that is used by the

upon the employee: *An act respecting labour standards*, *supra*, note 98, s. 79.6.1, as am. by S.Q. 2018, c. 21, s. 20.

523. B.C. Reg. 281/2006, s. 2.

524. S.O.R./96-322, s. 41.11(2)(o).

525. British Columbia Law Institute and Canadian Centre for Elder Law, *Care/Work: Law Reform to Support Family Caregivers to Balance Paid Work and Unpaid Caregiving* (Vancouver: BCLI / CCEL, 2010), online at https://www.bcli.org/elder-law-resources/execsum/chapter3#II at 33.

526. *Ibid.*

527. *Ibid.*

employer to cover the cost of the employee's absence. This sharing of cost may not be perfectly symmetrical and result in a zero sum, but it is more than merely notional.

These considerations led the Project Committee to consider changes to the definition of "immediate family" under the ESA. Several distinct views emerged. Only one proposed change in the definition attracted the majority of members, namely the addition of a parent-in-law or stepchild.

There are three minority views on who else should be included in the definition of "immediate family." One is that "immediate family" should also include grandparents of the employee or the employee's spouse. Another is that aunts and uncles of the employee or the employee's spouse should be included in addition. A further minority view is that no change is warranted at all.

The proposed inclusion of parents-in-law and stepchildren attracted a fair degree of support on both sides of the employer-employee divide in responses to the consultation paper. The views of employers and employees were predictably divided on whether other family caregiving situations should be within the scope of family responsibility leave. Major business organizations opposed any broader expansion of the definition of "immediate family," although individual employers responding via the online survey were less uniform in their views.

Labour organizations reacting to the consultation paper urged that family responsibility leave should not depend on a statutory definition of the family circle, but should be available to employees to meet care needs of any "important people in their lives." A major public sector union urged that the definition of "immediate family" be repealed and replaced in the ESA with "a person in a close, family-like relationship with an employee," which would lend only slightly more specificity. These organizations take the position that nothing less would be sufficient to recognize personal relationships that exist in the LGBTQ community, indigenous kinship networks, and strong mutual support networks that develop amongst migrant workers separated from their families.

That stance calls for an untenably subjective criterion. It is important to bear in mind that family responsibility leave is a non-discretionary statutory entitlement. If a given caregiving situation fits within the eligibility criteria for family responsibility leave, the leave may not be refused. How could employers determine whether an employee is entitled to leave or not if the test is only an employee's unilateral and subjective assessment of the importance of a relationship? An employer needs to be in a position to determine whether a request for leave must be granted or not. The Director of

Employment Standards must be as well. This means the criteria determining eligibility for leave must be objectively verifiable.

For those reasons, the Project Committee is inclined to adhere to eligibility criteria based on a consanguineous or adoptive relationship with the employee or the employee's spouse. Of course, caregiving needs of individuals living within the same household as part of the employee's family would continue to qualify under paragraph (b) of the definition of "immediate family" for family responsibility leave or the equivalent.

A **majority** of the members of the Project Committee recommend:

36. The definition of "immediate family" in the ESA should be amended to include a parent or a child of the employee's spouse.

A **minority** of the members of the Project Committee recommend:

36a. In addition to the classes of persons referred to in Recommendation 36, a grandparent of the employee's spouse should be included in the definition of "immediate family."

Another **minority** of the members of the Project Committee recommend:

36b. An uncle or aunt of an employee or the employee's spouse should be included in the definition of "immediate family" in addition to the classes of persons referred to in Recommendation 36 and the minority Recommendation 36a.

A further **minority** of the members of the Project Committee recommend:

36c. The definition of "immediate family" in the ESA should remain unchanged.

(d) Employer's right to verification of entitlement to leave

(i) Past interpretation of section 52

The Employment Standards Branch *Interpretation Guidelines Manual* says this in relation to family responsibility leave under section 52:

> Employers are entitled to reasonable proof, after the event, that the request for leave was valid.

That statement summarizes the interpretation of section 52 by British Columbia courts and the Employment Standards Tribunal. The Court of Appeal has held that section 52 requires an employer to grant leave only if an employee's reason for requesting it is objectively reasonable and squarely within the section. In other words, the reason must relate to the care or health of a member of the employee's immediate family, or the care, health and education of a child in the employee's care. The fact that an employee requesting the leave subjectively believes the circumstances are not frivolous is insufficient to support a leave request.[528]

The obligation that an employee intends to fulfil while on family responsibility leave does not need to be a legal one, but must be something that a reasonable person in the same circumstances and with the same cultural background as the employee would regard as a familial duty.[529]

The Employment Standards Tribunal has held that an employer is entitled to know the justification for an employee's request for family responsibility leave, and the employee must be prepared to provide proof that the leave requested comes within the terms of section 52.[530] Section 52 contemplates emergencies, but an employee has an implicit obligation nevertheless to give the employer as much notice of the need for leave as possible.

In the case of a health-related request, the employee need not disclose the details of a medical condition, a medical diagnosis, or the nature of a medical procedure that the family member or child in the employee's care will undergo during the requested absence.[531]

At a minimum, however, an employee must be prepared to disclose:

(a) the identity and the relationship to the employee of the person whose need is the basis for the leave request; and

(b) that an absence is required for care and health of a family member or for the care, health or education of a child for whom the employee is responsible.[532]

528. *West Fraser Mills Ltd. v. Communications, Energy and Paperworkers Union of Canada, Loc. 298*, 2008 BCCA 403.

529. *Ibid.*

530. *Re Glen W. Phillips* (8 August 2000), BCEST #D307/00.

531. *Ibid.*, at 4.

532. *Ibid.*, at 3.

(ii) Express clarification of employer's right to reasonable proof of entitlement to family responsibility leave

Even though section 52 is interpreted as implicitly giving the employer a right to require proof that an employee is entitled to leave under its terms, and imposing a corresponding obligation on an employee to provide it, this implication is not evident on the face of the section. Similar provisions in some other Canadian jurisdictions are accompanied by a subsection stating that the employer may require an employee to provide reasonable evidence that the employee is entitled to be absent for reasons within the terms of the leave provision. In the case of leave taken in an emergency with minimal or no notice to the employer, the evidence may be required afterwards.

Section 50(12) of the Ontario *Employment Standards Act, 2000*[533] is typical:

> Evidence
> (12) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

In the interests of clarity regarding the respective rights and obligations of employers and employees in relation to leaves like family responsibility leave that are non-discretionary, in the sense that an employer cannot refuse to grant them if the circumstances make the employee eligible, a similar provision should be included in the ESA. It should also be made clear that this provision does not override other provisions requiring specific forms of justification, such as the mandatory medical certificate required for compassionate care leave.

Also relevant to the scope of this new provision is the discussion later in this chapter about medical certificates, commonly called "sick notes," to justify absences for short-term illness of the employee.

The Project Committee recommends:

37. The ESA should be amended to include a provision stating that an employer may require an employee to provide evidence, reasonable in the circumstances, of the employee's entitlement to take a non-discretionary form of leave provided under the ESA.

533. *Supra*, note 126. Section 50(13) prohibits employers from demanding a certificate from a qualified medical practitioner as evidence under s. 50(12), but s. 50(13) will be repealed by the *Making Ontario Open for Business Act, 2018*, supra, note 3, Sch. 1, s. 19. Section 50(12) will be replicated in several equivalent subsections under this 2018 amending Act.

This provision should be expressly subject to other provisions concerning justification for a non-discretionary leave.

6. Compassionate Care Leave

(a) Under the ESA

Section 52.1 was added to the Act in 2006 in response to the enactment of EI compassionate care benefits.[534] As a result of amendments made in May 2018, section 52.1 now entitles an employee to up to 26 (formerly 8) weeks of unpaid leave to provide care or support to a family member with "a serious medical condition with a significant risk of death within 26 weeks" or another prescribed period. The starting point of the period of 26 weeks is the date the family member's condition is certified by a physician or nurse practitioner, or if the leave began before the date of the certificate, the date on which the leave began. The leave period ends on the earlier of the last day of the week in which the family member dies and the expiration of 52 weeks, after the leave began.[535]

If death does not occur within 26 weeks from the issuance of the medical certificate or start of compassionate care leave, whichever is earlier, a further 27 weeks of compassionate care leave is available to the employee in a subsequent 52-week period on the basis of a new medical certificate.

"Family member" for the purpose of s. 52.1 includes a member of the employee's immediate family (as defined above) and a class of persons prescribed by the *Compassionate Care Leave Regulation*.[536] The prescribed class is very broad, coinciding with the class prescribed by the federal *Employment Insurance Regulations* for the purpose of EI benefits payable to employees on compassionate care leave.[537] It includes stepparents and step-siblings, foster parents and foster children, current and former guardians and wards, and anyone who considers the employee, or whom the employee considers, to be "like a close relative."

The eligibility requirements are designed to mesh with those for EI compassionate care benefits, which were originally payable for six weeks after the standard two-week waiting period following submission of a claim. As a result of amendments that

534. S.B.C. 2006, c. 4, s. 2.

535. *Ibid.*, s. 52.1(5), as am. By S.B.C. 2018, c. 7, s. 3(c).

536. *Supra*, note 523, s. 2.

537. *Supra*, note 524, s. 1(3).

took effect in January 2016, however, EI compassionate care benefits are now payable for up to 26 weeks within a 52-week period.[538]

A claimant must also meet the general eligibility requirements for EI benefits by having completed 600 hours of insurable employment in the 52 weeks preceding the submission of a claim, or since the beginning of the most recent claim.

(b) Interjurisdictional comparison

The *Canada Labour* Code now provides for up to 28 weeks of compassionate care leave.[539] Alberta, Saskatchewan, Manitoba, New Brunswick, Newfoundland and Labrador, and Nova Scotia have recently increased the maximum length of compassionate care leave under their legislation to either 27 or 28 weeks to correspond to the changes in EI legislation extending the period in which compassionate care benefits are payable.[540]

The other provinces and territories provide for a maximum of eight weeks' leave, as under the ESA, with the exception of Quebec. Quebec does not provide for compassionate care leave integrated with the corresponding EI benefits, but allows 12 weeks' leave to care for a family member with a serious illness or injury, and up to 104 weeks to care for a child with a medically certified serious and potentially mortal illness.[541]

(c) Alignment of compassionate leave under ESA with amended EI compassionate care provisions

It is desirable to maintain the mesh that was originally intended between compassionate care leave under the ESA and EI compassionate care benefits. Prior to the May 2018 amendments to section 52.1, the Project Committee had independently concluded that British Columbia should follow other provinces that had already amended their legislation to extend the maximum length of compassionate care leave to include the full 26-week period during which EI compassionate care leave benefits are potentially payable. If the ESA had not been amended in the interim accordingly, a recommendation calling for harmonization of section 52.1 of the ESA with the extension of the benefits period under the federal EI legislation would have been included here.

538. *Supra*, note 481, s. 12(4.1).

539. *Supra*, note 101, s. 206.3(2), as am. by S.C. 2017, c. 20, s. 262(2).

540. R.S.A. 2000, c. E-9, s. 53.9(2); S.S. 2013, c. S-15.1, s. 2-56(2); C.C.S.M. c. E110, s. 59.2(2); S.N.B. 1982, c. E-7.2, s. 44.024(2); R.S.N.S. 1989, c. 246, s. 60E(2); R.S.N.L. 1990, c. L-2, s. 43.14(1).

541. *Supra*, note 98, s. 79.8.

(d) Potential reform: extension to other than end-of-life care

Compassionate care leave and the income replacement benefits available during it are restricted to end-of-life or predicted end-of-life care situations. These situations correspond to only one narrow aspect of family caregiving needs. This is illustrated by the relatively low take-up of compassionate care benefits in comparison to other EI special benefits.[542] In fiscal 2015/16 there were only 7,871 new compassionate care benefits claims in Canada while the number of new claims for other EI special benefits numbered in the hundreds of thousands.[543] In the same fiscal year, the total amount of EI sickness, maternity, and parental special benefits paid was more than $5 billion, while only $18.3 million was paid out in compassionate care benefits.[544]

Many situations involving serious illness or chronic medical conditions that are not necessarily terminal give rise to family caregiving obligations that may conflict with employment.[545] Reliance on family caregiving is an integral feature of the health care system that will affect more members of the workforce as time passes due to an aging population and unrelenting pressures on publicly funded care resources. As the Institute stated in 2010:

> Community care has become an increasingly large component of the Canadian long-term care strategy as a function of de-institutionalization of aspects of health care service delivery, a rapidly aging population, and a desire on the part of older adults and people with disabilities to "age in place" and maintain as much independence and autonomy as possible. Given the costs associated with professional or quality care, the limited number of spaces in care facilities, and reluctance to leave the long-term care of a loved one to strangers, many families opt to provide care through a family caregiving relationship.
>
> Unpaid family caregiving has thus become a key component of Canada's publicly-funded health care system. Recent statistics indicate that over 1.4 million Canadians over the age of 45 combine aged care and paid work – a figure that represents only a fraction of caregivers, excluding, as it does, the care of adult children with disabilities, illnesses and mental health issues. As our population continues to age, more and more British Columbians will find themselves caring for parents, grandparents

542. *Supra*, note 525 at 34.

543. Canada Employment Insurance Commission, *Employment Insurance Monitoring and Assessment Report 2015/2016*, Employment Insurance Benefits Data Tables, Annex 2, online: https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/monitoring2016/annex2.html, Annexes 2.11 and 2.18. The amounts include benefits payments to self-employed persons.

544. *Ibid.*

545. *Supra*, note 525 at 34 and 107.

> and other older adults. Many caregivers will join the "sandwich generation," who provide care simultaneously for both young children and parents.[546]

Compassionate care leave and the intermeshing EI income replacement benefits are important measures, but are still only partial responses to the need for indirect support of workers who must balance paid work with caregiving obligations. The Final Report of the Special Senate Committee on Aging made a series of recommendations on amendment of the *Employment Insurance Act* in this regard, one of which was to provide access to income replacement benefits at times of medical crisis and not only in cases of end-of-life caregiving.[547] The original recommendation from the 2002 Romanow Report on the future of health care in Canada, which led to the introduction of EI compassionate care benefits, called for support to home caregivers by means of the EI framework to enable them to be away from work to provide care "at critical times," and not only in end-of-life situations.[548]

Arthurs similarly recommended that the compassionate care leave provisions of the *Canada Labour Code* and corresponding EI benefits should be available to enable workers in the federal sector to provide care to a seriously ill or injured family member, regardless of whether medical opinion attests to a likelihood of death resulting within a given period.[549]

EI benefits are now payable for up to 35 weeks when employment must be interrupted to care for a critically ill child.[550] Further amendments made in 2017 now allow also for payment of up to 15 weeks of EI benefits for care of a critically ill adult.[551] The *Canada Labour Code* has been amended to provide intermeshing leave provisions for care to a critically ill or injured family member of an employee.[552]

Several provinces with compassionate care leave provisions also provide for extended leave for family caregiving in non-terminal circumstances. Saskatchewan

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546. *Ibid.,* at 2-3.

547. Special Senate Committee on Aging, *Canada's Aging Population: Seizing the Opportunity* (Ottawa: 2009) at 127.

548. Roy J. Romanow, *Building on Values: The Future of Health Care in Canada* (Ottawa: Commission on the Future of Health Care in Canada, 2002), online: http://publications.gc.ca/site/eng/237274/publication.html at 183.

549. *Supra*, note 102 at 158-159 (Recommendation 7.55).

550. *Supra*, note 481, ss. 23.2(1), (8).

551. *Ibid.*, s. 23.3(1), (6).

552. *Supra*, note 101, s. 206.4.

allows up to 12 weeks' leave to care for a family member dependent on the employee.[553] Ontario provides for up to eight weeks' leave to provide care for a family member or dependent relative who has been certified by a health practitioner to have a serious medical condition.[554]

Ontario also has provision for longer leaves of 17 weeks and 37 weeks to care for a critically ill adult family member or a critically ill minor child, respectively.[555] The condition of the child or adult must be certified as critical by a health practitioner. Alberta recently enacted provisions for leave of up to 37 weeks to care for a child certified as critically ill.[556] Manitoba provides the equivalent.[557] These leave provisions are clearly designed to intermesh with the provisions on critically ill caregiving benefits in the federal EI legislation.

In the U.S., the federal *Family and Medical Leave Act* entitles eligible employees to take up to 12 weeks of paid or unpaid, job-protected leave in a 12-month period to care for a spouse, child, or parent with a serious health condition.[558] The state of Washington provides for leave equivalent to that under the federal statute.[559]

Given that EI income replacement benefits are now available during an interruption of employment to care for a family member who is critically ill or injured, but not necessarily facing a prospect of death within 26 weeks, working caregivers in British Columbia would be better supported than they now are if the ESA contained job-protected leave provisions like those in Ontario or Alberta which intermesh with the EI benefits for these caregiving situations.

553. S.S. 2013, c. E-13.1, s. 2-40.

554. S.O. 2000, c. 41, s. 49.3.

555. *Ibid.*, ss. 49.4(2), (11), (12).

556. R.S.A. 2000, c. E-9, s. 53.96.

557. C.C.S.M. c. E110, s. 59.8.

558. 28 USC § 2612. Leave may also be taken by reason of the employee's own serious health condition. A serious health condition is defined as one that involves inpatient care in a hospital or other care facility or continuing treatment by a health care provider, and any period of incapacity to work, attend school, or perform other regular daily activities: 28 USC 2611.

559. RCW 49.78.220. In most cases leave will run concurrently under the federal and state legislation. There are some circumstances in which individuals may be entitled to take leave consecutively under the federal and state provisions: Washington State Department of Labor and Industries, "Washington State Family Leave Act," online: http://lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/LawsPolicies/FamilyLeave/default.asp.

Should British Columbia follow the example of Ontario, Alberta, and Manitoba by enacting leave provisions corresponding to the EI Act amendments providing for caregiving to critically ill or injured family members? Alternatively, should British Columbia follow the example of Saskatchewan and enact a leave for family caregiving that would cover the full spectrum of serious illness, allowing the employee on leave to claim whichever category of EI income replacement benefits is appropriate to the circumstances?

Either of these measures would support family caregivers to a greater range of circumstances than is now covered by compassionate care leave alone. They would allow family caregivers to continue to relieve burdens on public resources through their unpaid labour, without jeopardizing their employment.

A better support framework for family caregivers would also advance gender equality in the workforce. As the burden of unpaid caregiving is disproportionately borne by women, their career trajectories and economic well-being are much more likely to be adversely affected by caregiving-related interruptions in work history than those of male workers. The 2017 federal budget documents point out that women are more likely to be caregivers than men, and also to spend more time per week in this activity. They explain the adult caregiving amendments to the EI Act as being in part an equalizing measure expected to have significant benefit for female workers.[560]

At the same time, it must be remembered that extended unpaid leave entitlements do not come free of cost to employers. Contributions may continue under benefit plans while an employee is on leave. The employee's position must be held open for the maximum duration of leave, although an earlier return is possible at the employee's option. The employer incurs extra cost in hiring and training a replacement employee, assuming one can be found to replace employee on leave for an indeterminate period. Employers also must pay EI premiums, and these may escalate with expanded access to benefits.

The incremental costs associated with expanded leave entitlements have an unquestionable financial impact on all enterprises. The ability of employers to absorb the incremental costs would vary considerably, and some small enterprises might be at risk. Small businesses provide most of the employment in British Columbia. The social and economic benefits of increased levels of support to family caregivers who are in the workforce must be balanced against the risk to their employment flowing from the incremental cost of the increased support.

560. *Building A Strong Middle Class: #Budget2017*, 22 March 2017, online: http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf at 63.)

These difficult considerations have divided the Project Committee.

The majority of the members are not in favour of introducing new non-discretionary leave entitlements under Part 6 of the ESA. A minority support the harmonization of non-discretionary leave entitlements under Part 6 of the ESA with the range of circumstances in which special unemployment benefits are payable under the *Employment Insurance Act* (Canada) for care to a critically ill family member.

The **majority** of the members of the Project Committee recommend:

38. The ESA should not be amended to add new non-discretionary leave entitlements.

A **minority** of the members of the Project Committee recommend:

38a. The ESA should be amended to harmonize non-discretionary leave entitlements under Part 6 of the ESA with the range of circumstances in which special unemployment benefits are payable under the Employment Insurance Act *(Canada) for care to a critically ill family member.*

7. Reservists' Leave

(a) Under the ESA

Section 52.2 was added to the ESA in 2008.[561] Under it, members of the armed forces reserves are entitled to unpaid leave if they are deployed to a Canadian Forces operation outside Canada, or to a pre- or post-deployment activity in connection with one.[562] The leave entitlement also applies to Canadian Forces operations inside Canada related to an emergency, or any prescribed circumstance.[563]

Reservist leave persists as long as the deployment continues, as no other period has been prescribed by regulation.[564]

As of 27 October 2016, reservists are also entitled to leave of absence of up to 20 days per year for training.[565]

561. S.B.C. 2008, c. 42, s. 5.

562. R.S.B.C. 1996, c. 113, s. 52.2(2)(a).

563. *Ibid.*, s. 52.2(2)(b), (c).

564. *Ibid.*, s. 52.2(3).

565. *Reservists' Leave Regulation*, B.C. Reg. 254/2016.

Reservists must request leave in writing, nominally four weeks before the start of the desired leave, specifying the dates on which the requested leave is to commence and end. The requirements under ss. 52.2(4) and (5) for notice to the employer before the start of the period of absence apply only insofar as is reasonably practicable. If the reservist employee is in a position to return to work earlier than specified in the request for leave, however, the employer is entitled to one week's notice of the proposed date of return.[566]

(b) Interjurisdictional comparison

All Canadian jurisdictions provide employment leave for reservists on deployments and a number also provide it for periods of training. British Columbia's rules for reservist leave are among the most liberal, as some other provinces require a qualifying period of employment before the employer is obliged to grant the leave. New Brunswick allows 30 days' absence for training purposes in contrast to 20 in B.C., but New Brunswick also imposes a maximum duration for reservist leave of 18 months. New Brunswick also predicates subsequent leaves on 12 continuous months intervening between the most recent period of reservist leave, rather than allowing leave of absence for the entire period of an active deployment.[567] British Columbia's provision for reservist leave is thus more generous overall, despite the smaller complement of days of leave for training.

(c) No change recommended

The current provisions for reservists' leave were introduced very recently. The Project Committee sees no need to make any changes in them.

8. Bereavement Leave

(a) Under the ESA

Section 53 entitles an employee to receive up to three days of unpaid leave on the death of a member of the employee's immediate family. The 3 days must be granted per occasion, rather than per year.

566. *Supra*, note 1, s. 52.2(6).

567. S.N.B. 1982, c. E-7.2, s. 44.031(2).

(b) Interjurisdictional Comparison

Three consecutive days of bereavement leave per occasion is in the mid-range among Canadian jurisdictions. New Brunswick,[568] Saskatchewan,[569] and Quebec,[570] allow five consecutive days. Yukon allows a week, provided that the funeral falls within that week.[571] The N.W.T. allows 7 days if the funeral takes place outside the community, and 3 days otherwise.[572] Alberta now allows three days of bereavement leave in a calendar year.[573]

Newfoundland and Labrador,[574] P.E.I.[575] and Quebec[576] require one paid day of bereavement leave. In the case of Quebec, this only applies if the death is within the immediate family.

Ontario and Nunavut do not currently provide for bereavement leave, although the *making Ontario Open for Business Act, 2018* will allow two days per year of bereavement leave.[577]

(c) No change recommended

No change is recommended to section 53, as its terms are well within Canadian norms.

568. *Ibid.*, s. 44.03(2).

569. *Supra*, note 161, s. 2-55.

570. *Supra*, note 98, s. 80. A 5-day leave applies if the death is within the immediate family. If a grandparent or in-law of the employee dies, only one unpaid day of bereavement leave is required; s. 80.1.

571. R.S.Y. 2002, c. 72, s. 60(2).

572. S.N.W.T. 2007, c. 13, s. 31(2).

573. R.S.A. 2000, c. E-9, s. 53.983(1). The bereavement leave entitlement arises only after 90 days' employment with the same employer.

574. R.S.N.L. 1990, c. L-2, s. 43.10.

575. R.S.P.E.I. 1988, c. E-6.2, s. 23(1).

576. *Supra*, note 98, s. 80. Quebec also provides a special form of bereavement leave lasting 52 weeks in the case of the suicide of a child or spouse of an employee: s. 79.11.

577. *Supra*, note 3, Sch. 1, s. 19.

9. Leave for Jury Duty

Employees required to serve on juries are entitled under section 55 of the ESA to the same job protection as those returning from other periods of leave governed by Part 6 of the Act.[578]

Several provinces have similar provisions in their employment standards legislation, while in others the relevant job protection for jurors is found in Jury Acts or other legislation relating to the administration of justice. There is no federal counterpart to s. 55 of the ESA, but provincial and territorial jury legislation along with the ancillary job protection it confers may be constitutionally applicable to employees in the federal private sector who are summoned to jury duty in a provincial superior court.

No change is recommended to section 55.

10. New Leave Provisions: Crime-Related Disappearance or Death of a Child

The Employment Standards Amendment Act, 2018 (Bill 6) was passed in the spring of 2018. It has added two new long-term, job-protected leave entitlements to the ESA.[579] The new section 52.3 entitles an employee to unpaid leave of up to 52 weeks if a child of the employee disappears and it is probable that the disappearance is crime-related. The new section 52.4 gives an employee a right to unpaid leave for a period of up to 104 weeks if a child of the employee dies. The leaves are cumulative if a child who has disappeared as the probable result of a crime is later found dead.

These new leaves do not have to be taken in a single unit of time if the employer consents to them being taken in more than one unit, but they will have to be completed within a specified period. Leave for crime-related child disappearance must be completed within 53 weeks after the date of disappearance, although it could end automatically on several earlier specified dates.[580]

578. *Supra*, note 1, s. 55.

579. *supra*, note 488, s. 4.

580. Crime-related child disappearance leave would end automatically on the earliest of the following dates, if any apply to the circumstances: the date on which it became apparent that the child's disappearance is probably not crime-related; the date on which the employee is charged with a crime resulting in the disappearance; the date 14 days after the date on which the child is found alive; the last day of the last unit of time covered by the employer's consent to take the leave in more than one continuous interval; the date on which the child is found dead: s. 53.2(6), as enacted by the *Employment Standards Amendment Act, 2018*, *supra*, note 488, s. 4.

The leave entitlement for death of a child has to be completed within 105 weeks of the date of death, or in the case of a child disappearing, 105 weeks from the date on which the child is found dead.

Eight other provinces have similar long-term leave provisions for the death or crime-related disappearance of a child, as does Part III of the *Canada Labour Code*.[581]

C. Combining Personal Illness and Family Responsibility Leave

1. Statutory Short-term Sick Leave

British Columbia and Nunavut are now the only Canadian jurisdictions without a legislative requirement that an employee be given time off when ill or injured.[582]

Alberta also had no statutory sick leave until 2017, when it introduced a provision for five days' short-term leave for reasons of the health of the employee or to meet family responsibilities, and another for longer leave of up to 16 weeks for illness, injury, or quarantine.[583]

The other Canadian jurisdictions provide for a fixed number of days of unpaid job-protected sick leave. Nine provinces provide for an allotment of days of leave in each calendar year that may be used either because of the illness of the employee or to fulfil a family-related responsibility. The allotments range from a low of three days in Nova Scotia to a maximum of 26 weeks in Quebec. A few provinces have both short-term

581. See R.S.C. 1985, c. L-2, ss. 206.5(2), (3); S.O. 2000, c. 41, ss. 49.5(2), (3); C.Q.L.R., c. N-1.1, ss. 79.10, 79.12; S.S. 2013, c. S-15.1, s. 2-58; R.S.Y. 2002, c. 72, s. 60.03(3); C.C.S.M. c. E110, ss. 59.9(2), (3); S.N.B. 1982, c. E-7.2, s. 44.026(2); R.S.N.L. 1990, c. L-2, ss. 43.24(1), (2); R.S.N.S. 1989, c. 246, ss. 60U, 60V.

582. The prohibition in the British Columbia *Human Rights Code*, *supra*, note 85 against discrimination based on physical or mental disability does not protect against dismissal or discipline for absence due to illness unless the illness amounts to "disability" within the meaning of the Code. A "disability" generally involves some degree of permanence and impairment of the worker's ability to carry out the normal functions of life: *Mikolas v. Travelodge Hotels*, 2007 BCHRT 135 at para. 27; *Morris v. BC Rail*, 2003 BCHRT 14 at para. 214, *Goode v. Interior Health Authority*, 2010 BCHRT 95 at para. 99. Temporary infectious illnesses of the kind that typically lead to short-term absences such as the common cold, influenza, or gastroenteritis do not amount to "disability" for the purposes of the *Human Rights Code* because they lack the required degree of permanence: *Goode*, *supra*, at para. 105.

583. *Employment Standards Code*, R.S.A. 2000, c. E-9, ss. 53.982, 53.97, as am. by S.A. 2017, c. 9, s. 35.

sick leave and longer-term leave for serious illness or injury.[584] Some of the jurisdictions require a minimum period of employment with the same employer in order to qualify for sick leave, while others do not.

Statutory sick leave provisions in Canadian employment standards legislation are summarized in the table below:

Minimum Statutory Sick Leave Provisions
(Days or weeks per calendar year)[585]

Can. Lab. Code	AB	BC	Man	NB	NL	NS
17 wks following 3 months of continuous employment employer may require medical certification of inability to work due to illness or injury coinciding with period of absence	5 days for health of self or for family responsibilities 16 wks for illness, injury or quarantine with medical certification of estimated duration following 90 days of employment	n/a	3 days for health or family responsibilities following 30 days of employment	5 days for illness following 3 months of employment employer may require medical certificate of inability to work if absent ≥ 4 days 3 days for family responsibilities	7 days employer may require medical certificate if absent ≥ 3 days	3 days for health of self or child, parent, family member

584. Saskatchewan, Alberta, Quebec.

585. Leave is unpaid unless otherwise indicated in the table.

*ON[586]	PEI	QC[587]	SK	NWT	NU	YK
2 days paid, 8 days unpaid for illness, injury, medical emergency of self or family member or urgent matter affecting family member 2 paid leave days only after 1 wk of employment, otherwise leave is unpaid employer may require reasonable evidence of entitlement to leave but not a medical certificate	3 days for illness 3 days for illness of family member after 6 months of employment 1 additional paid day of sick leave after 5 yrs. of employment	26 wks for illness, organ or tissue donation, or injury after 3 months of employment	12 days for illness or illness of immediate family member dependent on the employee After 13 wks of employment	5 days Following 30 days of employment	n/a	1 day per month of employment up to 12 days

586. The *Making Ontario Open for Business Act, 2018*, *supra*, note 3, Sch. 1, s. 19 repeals these provisions as of 1 January 2019 and replaces them with three days of unpaid sick leave per year. It also restores, on the same effective date, the right of an employer to require a medical certificate as proof of entitlement to sick leave.

587. Bill 176, *An Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance*, 1st Sess., 41st Leg., Quebec, 2018, cl. 16(2) would have required the first two paid sick days taken in a year to be paid if the employee had completed at least three months of uninterrupted service, but this provision was removed from the bill at the committee stage.

Larger private sector employers tend to have sick leave policies that are generally more favourable to employees than the statutory minimum leave for short-term illness found in other Canadian jurisdictions. Lack of a statutory minimum sick leave affects most acutely the employees of small enterprises and those in precarious employment: temporary, part-time, and low-paid full-time workers in the service sector.

Apart from the minimum wage, the lack of any statutory minimum sick leave is probably the most contentious employment law issue affecting the non-unionized workforce. Labour organizations and advocates for unorganized workers vigorously press for a fixed number of paid sick days per year as a statutory minimum requirement.

The position taken by the BC Employment Standards Coalition is that all employees should accrue an hour of paid sick time for approximately 35 hours worked, which amounts to approximately seven paid sick days per year after the first year of employment. The Coalition also urges that a maximum of 52 hours of unused paid sick time be capable of being carried over to the next year after the year in which it was accrued.[588] This position was endorsed by labour organizations and by the Canadian Centre for Policy Alternatives in submissions made to the Minister of Labour in response to the consultation paper.

In calling for paid sick leave for the full annual complement of sick days, the Employment Standards Coalition proposal goes well beyond any minimum standard currently in force in Canada. Seven U.S. states, the District of Columbia, and numerous county and municipal ordinances provide for the accrual of paid sick leave during the first year of employment, however.[589]

Statutory sick leave is not popular with employers. The great majority of employers and business organizations responding to the consultation paper opposed the introduction of it in any form. There is a strongly held belief among employers that

588. Stated in correspondence with BCLI project staff, 11 December 2016. The position that an hour of paid sick leave should accrue for every 35 hours of work was also advanced by advocates for unorganized workers in Ontario during the Changing Workplaces Review: See, *supra*, note 72 at 245. See also Gellatly, *supra*, note 96 at 30-31.

589. The seven states are: Ariz. Title 23, ch.2, art. 8, §§ 23-363, 23-365, art. 8.1; Cal. Labor Code §§ 245, 2810.5; Conn. Public Act 11-52; Mass. Gen. Laws ch. 149, § 148(c), (d); Ore. ORS §§ 653.256, 659A.885; Vt. 21 Vt. Stat. §§ 384, 481-485, 345; 29 Vt. Stat. § 161; Wash. RCW 49.46.005, .020,.090, .100. As of January 2018, bills that would enact paid sick leave were before the Maryland and Rhode Island state legislatures. A summary of county and municipal ordinances mandating the accrual of paid sick leave may be found at http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf.

generous sick leave policies create a culture of entitlement which encourages the practice of "taking a sick day" when an employee does not feel like coming to work on a particular day.[590] This belief is bolstered by national statistics indicating that absenteeism in the public sector, where longer sick leave entitlements are available, is consistently higher than in the private sector.[591]

There is also evidence from various countries that employees who do not have paid sick leave go to work when sick, because they cannot afford to lose pay or fear repercussions from being absent from work, or for both of these reasons.[592] This is referred to in medicolegal literature as "presenteeism." It too is associated with demonstrated economic costs due to the reduced productivity of sick workers, increased risk of workplace accidents, and the spread of infection to co-workers.[593]

Reasons advanced in medicolegal literature for providing for a minimum allotment of job-protected sick days include the following;

- it is in the public interest because it reduces spread of infection in the workplace and the community;[594]
- it allows workers to obtain medical care;[595]

590. See Howard Levitt, "Abuse of sick leave policies in the workplace is rampant. Here's how to put an end to it" *Financial Post* (21 April 2016).

591. In 2017, public sector employees were absent on 13.5 working days on the average, while private sector employees were absent for an average of 8.4 days. Public sector absenteeism was consistently higher than in the private sector in each year between 2013 and 2017 inclusive: Statistics Canada, CANSIM Table 279-0035, *Labour Force Survey estimates, work absence statistics of full-time employees by sex and public and private sector*, online: http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2790035.

592. Heymann et al., *Contagion Nation: A Comparison of Paid Sick Day policies in 22 Countries* (Washington; Center for Economic and policy Research, 2009) at 2; See also Zlata Rodionova, "UK workers are taking more sick days because they feel safer in their jobs" *Independent* (3 Nov. 2015), referring to a study indicating that absenteeism for illness was significantly lower in 2010 in the depths of the post-2008 recession in the U.K. than in either 2008, preceding the economic crisis, or in 2014 when a partial recovery had taken place.

593. Scheil-Adlung and Sandner, *The case for paid sick leave*, World health report (2010): Background Paper 9 (Geneva: World Health Organization, 2010). See also Gary Johns, "Presenteeism in the workplace: A review and research agenda" (2010) 31 *J. Organiz. Behavior* 519 at 521.

594. Scheil-Adlung and Sandner, *supra*, note 593 at 6. See also Heymann and Daku, "Ensuring equitable access to sick leave" (2014) Canadian Medical Association Journal 975 at 975.

595. Scheil-Adlung and Sandner, *supra*, note 593 at 6; Heymann and Daku, *supra*, note 594 at 975.

- it is conducive to quicker recovery and return to full productivity.[596]

- presenteeism imposes measurable cost through reduced productivity, the spread of disease, and an increased risk of work accidents;[597]

- workers with the greatest inducement to work while sick are lower-paid ones in the service sector, as they seldom have employment benefits of any kind. This is especially true of those in part-time and other precarious employment. These include food handlers and cleaners, who come into direct and constant contact with the public and if working when sick, they present an increased risk of spreading infection.[598]

It is not without significance that the two employer groups that supported the introduction of short-term sick leave into the ESA in response to the consultation paper were long-term care providers and the food service sector. These employers acknowledged a link between the availability of sick leave, the well-being of the public they serve, and the economic health of their businesses.

A majority of the members of the Project Committee believe the ESA should provide for short-term leave of absence that can be used either for illness or injury suffered by the employee or to allow the employee to meet a family-related responsibility of the kind that would now be covered by family responsibility leave under section 52. They consider that it makes sense to combine short-term sick leave and family responsibility leave as a single allotment of potential leave days as nine other provinces have done. Either personal illness or an illness or emergency with the employee's family may arise in the course of a given year.[599] Insofar as the employer is concerned,

596. Scheil-Adlung and Sandner, *supra*, note 593 at 4.

597. *Ibid.*, at 18. Writing on behalf of the World Health Organization, Scheil-Adlung and Sandner maintain at p. 4 that the 2009 H1N1 influenza pandemic was worsened by workers without sick leave who worked while they were contagious. Fear of loss of employment stemming from the 2008 economic crisis that was in full swing at the time was cited as an inducement to work despite suffering from the virus: p. 40. In 2009, while the pandemic was raging, Germany recorded the lowest rate of absenteeism ever recorded in the country, while in the U.S. it was estimated that workers going to work while suffering from the H1N1 virus accounted for 7 million additional cases of influenza.

598. Heymann and Daku, *supra*, note 594 at 975.

599. A U.S. study found that one of the main reasons female workers gave for going to work when ill was because they saw a need to save any sick leave they had in order to be able to use it when their children were ill: see Vicky Lovell, *No Time To Be Sick: Why Everyone Suffers When Workers Don't have Paid Sick Leave* (Washington: Institute for Women's Policy Research, 2004), online:

the inconvenience and lost productivity due to the employee's absence is the same whether the absence is due to an illness or for a family-related reason.

The combined sick leave / family responsibility leave allotment would replace family responsibility leave as it now exists under section 52. Several views exist within the Project Committee on the number of days that should be available either as sick leave or to fulfil a family-related responsibility. The majority believe it should be set at seven unpaid days of leave per calendar year. A minority of the members believe it should be set at 10 days, in order to adequately address the dual purposes of the leave. Another minority opposes the introduction of sick leave altogether but agrees that if it is introduced, the number of days for the combined sick leave / family responsibility leave should be seven. A further minority view is that the allotment should be 10 leave days, and they should be paid at the employee's regular wage when used because of the employee's own illness.

A **majority** of the members of the Project Committee recommend:

39. The ESA should be amended to supplant the present section 52 (family responsibility leave) with a provision allowing a total of up to 7 days of unpaid leave per calendar year which could be taken by reason of

(a) the employee's own illness or injury, or

(b) a family responsibility, namely a need to attend to the care, health, or education of a child in the employee's care, or the care or health of a member of the employee's immediate family.

A **minority** of the members of the Project Committee recommend:

39a. The number of unpaid leave days per calendar year in Recommendation 39 should be 10.

Another **minority** of the members of the Project Committee recommend:

39b. The number of leave days per year in Recommendation 39 should be 10, and days of leave taken because of the employee's own illness or injury should be paid at the employee's regular wage.

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https://iwpr.org/publications/no-time-to-be-sick-why-everyone-suffers-when-workers-dont-have-paid-sick-leave/ at 4.

A further **minority** of the members of the Project Committee recommend:

39c. The ESA should not be amended to introduce sick leave, but if Recommendation 39 is implemented, the number of unpaid leave days per year should be 7.

2. Preventing Misuse of Sick Leave

(a) General

The Conference Board of Canada estimated the direct cost of absenteeism to the Canadian economy in 2012 at $16.6 billion, representing 2.4 per cent of the gross annual payroll.[600] While this figure covers both justified and unjustified absenteeism, it gives some indication of the economic effect of missed work.

Abuse of sick leave imposes costs in terms of lost productivity and expense associated with compensating for an absent employee. The consultation paper contained a majority tentative recommendation for an anti-abuse provision that, without limiting an employer's ability to dismiss or otherwise discipline an employee who made a false claim of illness to cover an absence, would also have given an employer the option of denying sick leave to the employee in the event of any subsequent genuine illness.

Labour groups strongly opposed the tentative recommendation for an anti-abuse provision involving forfeiture of sick leave in the event of future illness, and it drew a very mixed response from employers. Some employers' organizations opposed it outright, while others saw it as possibly justified in theory but impractical in application. The Project Committee withdrew the tentative recommendation for the anti-abuse provision in light of the generally hostile reaction, but the concern for controlling abuse of sick leave and associated costs remains.

(b) Medical certificates ("sick notes")

Some members of the Project Committee hold the view that if the ESA is to contain an entitlement to short-term sick leave, the employer's right to require medical verification of the employee's illness must be expressly protected in order to curb misuse of the entitlement. This right on the part of the employer is expressly set out in Part III

600. Conference Board of Canada, online: http://www.conferenceboard.ca/press/newsrelease/13-09-23/Absent_Workers_Cost_the_Canadian_Economy_Billions.aspx?AspxAutoDetectCookieSupport=1.

of the *Canada Labour Code* and in the employment standards legislation of several provinces.[601]

In this regard, it is noted that the provision contemplated by Recommendation 37 would allow an employer to insist on reasonable evidence of entitlement to any non-discretionary category of leave under the ESA. It is modelled on an Ontario provision that has been consistently interpreted to allow employers to require medical certificates ("sick notes") as reasonable evidence of proof of illness and inability to work.[602]

The practice of requiring sick notes to justify short absences is common, and appears to have intensified in recent years.[603] It has become controversial across the country, partly because of management-labour tension but also because of effects on the health care system.

Use of sick notes is vigorously defended on behalf of employers as an essential means of controlling absenteeism.[604] It is attacked with equal vigour on behalf of employees for numerous reasons. Employees perceive it as infantilizing them. Obtaining a sick note is an uninsured service, and when they must pay for sick notes, employees see it

601. See R.S.C. 1985, c. L-2, s. 239(1); S.S, 2913, c. S-15.1, s. 2-40(2)(c); C.C.S.M., c. E110, s. 59.3(2); S.N.B. 1982, c. E-7.2, s. 44.021(2). The equivalent Ontario provision was repealed in 2017, but is now slated to be restored under the *Making Ontario Open for Business Act, 2018*, *supra*, note 3.

602. See *Sinnathamby v. The Chesterfield Shop Limited*, 2016 ONSC 6966, at para. 87; *FAG Bearings Ltd. v. Francis*, 2005 CanLII 35873 (Ont. LRB). These decisions involve interpretations of the former s. 50(7) of the *Employment Standards Act, 2000*. The same provision was renumbered as s. 50(12) as a result of amendments in 2017. As part of those amendments, however, s. 50(13) was added prohibiting employers from requiring a medical certificate as evidence of entitlement to leave. The clear implication is that in the absence of s. 50(13), "reasonable evidence" of entitlement to leave under s. 50(12) would include medical certification of illness to justify an employee's absence from work, as these decisions had held.

603. The presidents of two provincial medical associations have stated publicly that physicians are being asked to provide sick notes with increased frequency: see Thandi Fletcher, "B.C. physician says bosses should pay for employees' sick notes" *Metro Vancouver*, 18 December 2014, quoting the former president of Doctors of BC, Dr. Bill Cavers: "The demand on our time for medically unnecessary documentation has been increasing every year." The president of the Newfoundland & Labrador Medical Association, Dr. Y. Karaivanov, stated in a letter to members dated 24 February 2014: "Members are, with increasing frequency, being asked by patients for "sick-notes" or medical certificates to provide to their employers or schools for short absences due to self-limiting illness."

604. See Howard Levitt, "Abuse of sick leave policies in the workplace is rampant. Here's how to put an end to it," *Financial Post* (21 April 2016); Laura Williams, "Why You Should Demand Sick Notes from Employees" *Profitguide.com* (31 March 2014), online: http://www.profitguide.com/manage-grow/human-resources/why-you-should-demand-sick-notes-from-employees-63691.

as a cost imposed on them unfairly.[605] Employees with mild contagious illnesses are forced either to attend at a physician's office unnecessarily while still capable of spreading the infection, or else go there after they recover when the physician cannot verify illness independently, but can only rely on the patient's own description of past symptoms. In the latter case, employers often complain the resulting sick notes have no probative value.

National and provincial medical associations have issued strong statements concerning employers' policies of requiring sick notes to justify short-term absence for minor illnesses, describing them as a burden on the health system. Of special concern to physicians is the potential spread of infection to more susceptible elderly patients and infants in their offices when otherwise healthy adult workers with viral contagious illnesses are forced to attend there only to obtain a sick note.[606]

The Canadian Medical Association (CMA) has taken the position that third parties (*e.g.* employers, schools or insurers) should not demand a sick note until a patient has been ill for 5 days. The CMA adopted a policy in 2011 on sick notes which states in part:

> Short-Term Illness Certificate
>
> Confirmation of a short term absence from work due to minor illness is a matter to be addressed between an employer and an employee directly. The CMA believes such an absence does not require physician confirmation of illness and represents an inefficient use of scarce health care resources. Similarly, confirmation of student absence from an educational institution for short term minor illness is not a medically necessary service.
>
> Most minor illnesses are self-limiting and do not require the intervention of a physician. In many cases, physicians are asked to provide confirmation of

605. Gellatly mentions as an example a minimum wage employee who was compelled to pay for sick notes demanded by his employer, the cost of each representing two hours' wages: *supra*, note 96 at 31. See also Shannon Linden, "Sick notes waste of doctors' time, money" *Kelowna Daily Courier* (10 April 2015), online: http://www.kelownadailycourier.ca/opinion/columnists/article_e3c604e0-dfdc-11e4-94aa-239810ccfddb.html.

606. The president of the Ontario Medical Association, Dr. Scott Wooder, said in a statement issued to media outlets in 2014 during an H1N1 influenza outbreak, "Employers should encourage workers to stay home when sick – not require sick notes, which has a discouraging effect and forces patients into the doctor's office when they are sick, which only encourages the spread of germs to those in the waiting room, who in some cases are more vulnerable…People such as children, seniors and those living with chronic diseases are more susceptible to the flu and are at a greater risk from its complications." In a Twitter message, Dr. Wooder also said "Ontario's health system does not have the resources to act as industry's Truant Officer."

> illness certificates after the fact. Attendance to a physician should occur only if the illness requires medical diagnosis, education or intervention.
>
> If an employer, educational institution or other third party requests an illness confirmation certificate for a short-term minor illness that would otherwise not have required medical attention, the party requesting such confirmation should recognize that the provision of this service is an uninsured service for which physicians are entitled to compensation.
>
> If an illness requires attendance for medical diagnosis, education or intervention, and a request for an illness confirmation certificate accompanies the visit, a physician can view the confirmation certificate request as a third party request for information. The physician's office policy regarding payment for third party information requests can then be invoked at his or her discretion. [607]

The BC Employment Standards Coalition takes the position that employers should be prohibited from requiring proof of illness for absences of up to 52 hours, which is similar to the stance taken by the Canadian Medical Association.[608]

Medical practitioners have also objected to the imposition of the cost of this uninsured service on low-paid employees when it is required by employers only for disciplinary and administrative purposes, rather than for health-related reasons such as fitness to return to work.[609]

In the U.K., employers may require medical certification of non-fitness for work ("fit note") if the employee is absent due to illness for more than seven consecutive days, including non-working days. If the employer requires the fit note before the seventh day of absence, the employer must pay for the note.[610] The position is similar in New Zealand.[611]

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607. Online: http://policybase.cma.ca/dbtw-wpd/Policypdf/PD11-06.pdf.

608. Longhurst and Fairey, *supra*, note 96 at 50.

609. See Fletcher, *supra*, note 603, quoting Dr. Bill Cavers, president of Doctors of BC, as protesting an "unequal financial burden" on patients at the "lower end of the pay scale." In Pemberton, British Columbia and in Nova Scotia some physicians have responded by invoicing employers directly: see Chad Pawson, "Doctors admonish employers for sick notes, send $50 invoices" CBC news item, 13 January 2017; "Nova Scotia doctor to charge employers for sick notes," CBC News item, 27 October 2014.

610. *The Statutory Sick Pay (Medical Evidence) Regulations 1985*, S.I. 1985 No. 1604, s. 2(2).

611. The *Holidays Act 2003*, No. 129 (N.Z.) provides for five days of paid sick leave per year for employees with at least six months' service. Section 68(1) allows an employer to require proof of sickness or injury having a duration of more than three consecutive calendar days, whether or

The Special Advisers to the Changing Workplace Review in Ontario recommended that employers requiring employees to obtain sick notes should be responsible for the cost of the note. In 2017, however, Ontario went further by prohibiting employers from requiring sick notes as evidence of entitlement to personal emergency leave, which covers short-term illness. This prohibition is now slated for repeal under a new government.

The Project Committee has not come to an agreement on the extent, if any, by which the employer's prerogative to require sick notes to justify absence from work should be limited. The Project Committee resolved instead to endorse the call made in 2014 by Dr. Bill Cavers, then president of Doctors of BC (formerly the BC Medical Association), for a "reasoned dialogue" between these stakeholder interests on practices surrounding sick notes. The matter calls for the development of a consensus on appropriate guidelines by representatives of the interests involved: private and public employers, organized and unorganized labour, and health practitioners.

The Project Committee recommends:

40. A reasoned dialogue involving the health professions, major employers' organizations, and major organizations representing organized and unorganized labour should take place regarding medical certificates to justify absence from work due to illness ("sick notes"), with a view to developing mutually acceptable guidelines.

D. Qualifying Period for Statutory Non-Discretionary Leaves

1. No Existing Qualifying Period

The ESA does not require that a period of employment must elapse before an employee qualifies for entitlement to any of the non-discretionary leaves under Part 6. As noted earlier in this chapter, a qualifying period of employment is typically required for entitlement to statutory leaves in most of the other provinces and territories and under the *Canada Labour Code*. The length of the qualifying period varies between one and twelve months.

not they would be working days for the employee. If the employer requires proof of sickness or injury within a period of less than 3 consecutive calendar days, the employer must pay the employee's expenses in obtaining the proof: s. 68(1A).

2. Majority View: A Three-month Qualifying Period Should Be In Place

A majority of the Project Committee favour introducing a qualifying period of three months' employment with the same employer in order to be eligible for a statutory leave under the ESA other than jury service and reservist leave. The principal argument for requiring a qualifying period of employment is that it is both disruptive and costly when a newly hired employee goes on an extended leave. The employer needs to cover the employee's absence either by a temporary hiring or requiring existing employees to fill in for the employee on leave. Either choice has negative implications for the employer's enterprise in terms of cost, lost productivity, and general efficiency.

Furthermore, the cost of the absence to the employer may be increased by having to pay contributions in respect of the absent employee to a benefit plan that is solely employer-funded, or one that is jointly funded if the employee opts to continue making contributions while on leave.[612] This can make an extended leave very expensive for the employer, especially in light of the lost productivity resulting from the employee's absence.

The proposed three-month qualifying period would also correspond to the typical length of a probationary period that is usual at the start of many jobs.

A three-month qualifying period would be well within contemporary norms in the rest of Canada for entitlement to statutory leaves. For example, a minimum of 90 days of employment (reduced from 12 months) is required under the 2017 amendments to Alberta's employment standards legislation before entitlement to maternity, parental, and compassionate care leave may arise.[613] The new statutory leaves introduced in 2017 in Alberta, including short- and long-term leave for personal illness, also require a minimum of 90 days of employment.[614]

It is not proposed to require a qualifying period of employment for jury service or reservist leave, as these involve absence under legal compulsion, or may do so.

A **majority** of the members of the Project Committee recommend:

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612. *Supra*, note 1, s. 56(2).

613. R.S.A. 2000, c. E-9, ss. 45, 50(1), 53.9(2), as am. by S.A. 2017, c. 9, ss. 29, 31, 33, respectively.

614. *Ibid.*, ss. 53.97(1) (long-term illness and injury leave), 53.98(3) (domestic violence leave), 53.982(1) (personal and family responsibility leave), 53.983(1) (bereavement leave), 53.984(1) (citizenship ceremony leave), added to R.S.A. 2000, c. E-9 by S.A. 2017, c. 9, s. 35.

41. Three months' continuous employment with the same employer should be a minimum requirement of eligibility for any form of statutory leave of absence other than annual vacation, leave for jury duty, or reservist leave.

3. Minority View: A Qualifying Period for Long-Term Leaves Only

A minority of the Project Committee members consider that only long-term statutory leaves, namely those for pregnancy, parental, and compassionate care, should be subject to a qualifying period. In their view, short-term illness or family responsibility leave should not be restricted on the basis of length of employment unless employees are paid while absent. Unpaid short-term illness or family responsibility leave should be available to all employees, as it is meant to allow them to deal with urgent and unforeseen situations.

A **minority** of the members of the Project Committee recommend:

41a. Three months' continuous employment with the same employer should be a minimum requirement of eligibility for maternity, parental, or compassionate care leave.

4. Other Minority Views: No Qualifying Period Whatsoever

Another minority of the Project Committee concurs with the view that unpaid short-term illness and family responsibility leave should be available to all employees regardless of length of service, but is also opposed to the introduction of any minimum period of employment to qualify for longer-term maternity, parental, and compassionate care leave. The grounds for opposing a qualifying period in the case of the longer-term leaves as well is that restricting their availability based on length of employment undercuts the social purposes for which they were enacted. The long-term statutory leaves were introduced to relieve members of the workforce who have to fulfil support obligations, and to further the objective of achieving gender equality in the workplace and society at large. Restricting access to maternity leave on the basis of length of employment is particularly detrimental to achieving gender equity.

The members of the Project Committee holding this **minority** view recommend:

41b. An employer should be entitled to restrict paid sick leave to employees who have been continuously employed for at least three months, but unpaid personal illness or family responsibility leave as contemplated by Recommendation 39 should be available to employees regardless of length of employment.

A further **minority** of the Project Committee takes this position:

41c. There should be no qualifying period of employment for a non-discretionary statutory leave of absence.

E. Other Categories of Leave of Absence Found in Canadian Employment Legislation

Other job-protected leaves of absence found in the employment legislation of one or more Canadian jurisdictions are:

- critically ill child care leave;
- critical or serious illness or injury leave;
- domestic or sexual violence leave;
- organ donation leave;
- citizenship ceremony leave;
- nomination, candidate and public office leave.

A private member's bill to amend the ESA to introduce domestic or sexual violence leave was introduced in the autumn 2016 and spring 2017 sessions of the British Columbia Legislative Assembly, but progressed only to first reading in each session.[615] These leave provisions undoubtedly relate to significant life events, but not ones that will occur to as broad a cross-section of the working population as do pregnancy, parenthood, or bereavement. In weighing the merits of adding further leave entitlements, it is important not to lose sight of their cumulative effect on the operation of smaller enterprises. The Project Committee is disinclined to recommend adding new leave entitlements to the ESA that will increase the complexity of the Act and potentially impose significant burdens on small businesses, without being of benefit to the greater part of the workforce.

615. Bill M220, *Employment Standards (Domestic Violence Leave) Amendment Act, 2016*, 5th Sess., 40th Parl.; Bill M235, *Employment Standards (Domestic Violence Leave) Amendment Act, 2017*, 6th Sess., 40thParl.

Chapter 8. Termination

A. Overview of Part 8

1. General

As noted earlier in Chapter 3, the ESA does not interfere with the common law principle that any employee may be dismissed for just cause, or without just cause on reasonable notice. Instead, it establishes minimum notice periods based on length of employment and requirements for payment in lieu if the minimum period of notice is not given. It also establishes special rules dealing with termination of employees in large numbers (group termination). The provisions on minimum notice of termination, pay in lieu of notice, and group termination are found in Part 8 of the ESA. This chapter concerns those provisions. The issue of whether the ESA should address termination of employment in a broader way is discussed in Chapter 3.

2. Notice and Compensation for Length of Service (Pay in Lieu of notice)

Section 63 of the ESA contains the requirements for minimum notice of termination and also for pay in lieu of notice, which the ESA refers to as "compensation for length of service." Notice and compensation for length of service are interchangeable at the employer's option. In other words, the employer may give either the required amount of notice or the required amount of compensation, or a combination of notice and compensation if the notice actually given is shorter than the applicable minimum notice period.[616]

The timeframes for notice and compensation under section 63 are calculated using the same scale:

- one week's notice or an amount equivalent to one week of wages after three consecutive months of employment;[617]

616. *Supra,* note 1, s. 63(3).

617. *Ibid.,* ss. 63(1), 63(3)(a)(i).

- two weeks' notice or an amount equivalent to two weeks of wages after 12 consecutive months of employment;[618]

- three weeks' notice or an amount equivalent to 3 weeks of wages after 3 consecutive years of employment, plus one additional week of notice or the equivalent of a week's average wages for each additional year of employment, up to a maximum of 8 weeks.[619]

The weekly wage on which compensation is based is determined by averaging an employee's wages over the last eight weeks in which the employee worked normal or average hours.[620] Length of service for the purpose of section 63 is not reduced by any period of temporary layoff.

As amounts payable under section 63 are included in the definition of "wages" in section 1(1), they may be recovered through the ESA complaint process.

Notice will not discharge the employer's liability for pay in lieu if the notice period coincides with a period during which the employee is on vacation, leave (statutory or discretionary) or temporary layoff, affected by a strike or lockout, or absent for medical reasons. A notice of termination given during those intervals is void. It is also void if the employee is allowed to continue working after the notice period expires.[621]

Once an employee is given notice, the employee's wage rate and conditions of employment may not be altered without the written consent of the employee or the employee's union.[622]

The director has authority to determine whether a substantial alteration of a condition of employment constitutes termination, triggering the notice and compensation for length of service provisions.[623]

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618. *Ibid.,* ss. 63(2)(a), 63(3)(a)(ii).

619. *Ibid.*, ss. 63(2)(b), 63(3)(a)(iii).

620. *Ibid.*, s. 63(4).

621. *Ibid.,* s. 67(1).

622. *Ibid.,* s. 67(2).

623. *Ibid.,* s. 66. The ESB *Interpretation Guidelines Manual* states that in order for a finding to be made under s. 66 that a termination has taken place, it must be proven that: (a) the employer unilaterally made a fundamental change in the nature of the employment duties or compensation without reasonable notice; (b) the employee had to accept the unilateral change as a condition of continued employment; and (c) an objective observer would consider the unilateral change

3. Group Terminations

Section 64 of the ESA has special notice requirements for group terminations. They apply where 50 or more employees in a single location are terminated within a two-month period.[624] The provisions apply whether the employees are terminated by the employer or by operation of law.[625]

In these cases, the employer must give notice of group termination to each employee affected, the employee's bargaining agent if any, and the minister.[626] The group termination notice must include the number of employees affected, the date of termination and the reasons for it.[627]

The scale to determine the minimum timeframe for the group notice requirement depends on the number of employees that will be affected.

- 8 weeks before the effective date of the first termination, if 50-100 employees will be affected;
- 12 weeks before the effective date of the first termination, if 101-300 employees will be affected;
- 16 weeks before the effective date of the first termination, if 301 or more employees will be affected. [628]

Additionally, when group termination notice is required under section 64, the minister can require the employer to establish an adjustment committee.[629] The committee must have equal representation for the employer and the affected employees. The committee's purpose is either to eliminate the need for terminating the employment,

unfair, unreasonable, and unacceptable. If an employee quits as a result of such a change, the ESB may still consider employment to have been terminated by the employer for the purpose of s. 66, triggering s. 63 obligations.

624. *Ibid.,* s. 64(1).

625. *Ibid.,* s. 64(6).

626. *Ibid.,* s. 64(1).

627. *Ibid.,* s. 64(2).

628. *Ibid.,* ss. 64(3)(a)-(c).

629. *Ibid.,* s. 71(1).

or minimize the impact of the termination and help the employees obtain other employment.[630]

The notice and termination pay requirements for group terminations under section 64 are in addition to the requirements of section 63 for individual terminations.[631]

4. Exceptions to the Entitlements on Termination

If the employee terminates the employment, retires, or is dismissed for just cause, the minimum notice and compensation requirements on termination under section 63 are inapplicable, as would be expected.[632]

These requirements are also inapplicable in cases of temporary layoff, as temporary layoff is excluded from the definition of "termination" in s. 1(1). A temporary layoff may last for the recall period under a collective agreement, or up to 13 weeks within a period of 20 weeks in other cases.[633] The ESA does not confer a general right to lay off employees, so the ability of an employer to do so must come from the terms of a contract of employment, well-established industry custom, or the consent of the employees.[634]

There are numerous other exceptions. The minimum notice and compensation requirements under section 63 do not apply to:

- teachers employed by a board of school trustees or a francophone education authority; [635]

- employees covered by a collective agreement who are employed in a seasonal industry and were informed when hired that they might be laid off and called

630. *Ibid.,* s. 71(2).

631. *Ibid.*, s. 64(5).

632. *Ibid.,* s. 63(3).

633. *Ibid.,* s. 1(1) (definition of "temporary layoff").

634. Ministry of Jobs, Tourism and Skills Training, *Interpretation Guidelines Manual: British Columbia Employment Standards Act and Regulations,* online: <http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esa-definitions/esa-def-temporary-layoff>.

635. *Supra*, note 1, ss. 65(3)(a), (a.1).

back to work, and who are terminated as a result of normal seasonal changes.[636]

The minimum notice and compensation and group termination requirements under sections 63 and 64 do not apply to:

- "on-call" employees who are free to accept or reject temporary work;[637]
- employees with a definite term contract;[638]
- employees hired for specific work to be completed in under 12 months;[639]
- on-site construction workers;[640]
- employees who rejected an offer of reasonable alternative employment with the same employer;[641]

or if the employment contract cannot be performed because of an unforeseeable event or circumstance.[642]

In the case of employees with a definite term contract or who are employed for "specific work," there is an exception to the exception. The notice and compensation requirements will still apply to them if they continue to be employed for at least three

636. *Ibid.,* s. 65(3)(b).

637. *Ibid.*, s. 65(1)(a). This exception will only apply if the employee is truly free to accept or reject temporary work assignments as they arise without jeopardizing continuing employment: *Re Covert Farms Ltd.* (22 February 1999) BCEST #D077/99; *Re A-Star Doors & Moulding Ltd.* (25 September 2013) BCEST #D075/13.

638. *Ibid.,* s. 65(1)(b).

639. *Ibid.,* s. 65(1)(c).

640. *Ibid.,* s. 65(1)(e).

641. *Ibid.,* s. 65(1)(f).

642. *Ibid.,* s. 65(1)(d). Business failure or a slowdown in business is not to be equated with frustration of the employment contract: *Re M.J.M. Conference Communications of Canada* (20 October 2004) BCEST #D182/04; *Re Nordel Restaurant Corporation* (17 November 2004) BCEST #D198/04 at pp. 7-8 (termination of employer's franchise). The *Interpretation Guidelines Manual* cites the destruction of the workplace by a natural disaster as an example of a case where it would be impossible to perform an employment contract, making the s. 65(1)(d) exception applicable.

months after completing the definite term or the specific work they are engaged to perform.[643]

The group termination requirements do not apply to employees who are offered and reject work made available through a seniority system,[644] who are laid off or terminated as a result of normal seasonal changes,[645] or who are laid off and do not return to work within a reasonable time after being requested to do so.[646]

Other Canadian jurisdictions provide for similar exceptions to notice, pay in lieu, and group termination entitlements, although an interjurisdictional comparison reveals a patchwork quilt.

All Canadian jurisdictions exclude employees dismissed for just cause from notice requirements and pay in lieu of notice.[647]

The exception relating to on-site employees in the construction industry is present in all jurisdictions except for Quebec, Saskatchewan,[648] and Prince Edward Island.

Like British Columbia, the majority of Canadian jurisdictions relieve the employer from having to give notice or pay in lieu if reasonable alternative employment has been offered and rejected. The jurisdictions that do not have this exception are the federal sector, Manitoba, Nunavut, Quebec and Saskatchewan. In Saskatchewan, the exception applies only with respect to group terminations.[649]

643. *Supra*, note 1, s. 65(2).

644. *Ibid.,* s. 65(4)(a).

645. *Ibid.,* s. 65(4)(b).

646. *Ibid.,* s. 65(4)(c).

647. The legislation of some jurisdictions refers to just cause as "wilful misconduct or disobedience," "neglect of duty not condoned by the employer," or "serious fault." See, e.g., R.S.N.S. 1989, c. 246, s. 72(1); C.Q.L.R., c. N-1.1, s. 82.1(3).

648. Saskatchewan provides for an exception to the group termination requirements if there is an established custom or practice of terminating employees in an industry that is inconsistent with those requirements. This exception may still allow for termination of an on-site workforce according to an established local practice within an industry, without following the regular group termination requirements. See S.S. 2013, c. S-15.1, s. 2-63(2)(a).

649. S.S. 2013, c. S-15.1, s. 2-63(2)(e).

B. Potential Reform Issues in Part 8

1. The Three-month Eligibility Period

There is no statutory minimum for notice of termination or pay in lieu until an employee has been employed for three consecutive months.[650] The three-month eligibility rule is opposed by the BC Employment Standards Coalition, which urges its elimination.[651]

In weighing this feature of the ESA in the balance, it may be noted that the three-month eligibility period corresponds to the length of a conventional probationary period for a new employee in a job with a probation requirement. It is a generally accepted norm in the labour market that probationary employees may be terminated without notice, with or without cause, during a probationary period.

An employee who has been employed for less than three months, and who is not a probationary employee, would still have a common law right to reasonable notice of termination enforceable in the civil courts, unless that right is negated or modified by a term in a contract of employment.

The federal jurisdiction and eight provinces, including British Columbia, have the same eligibility rule requiring three months or 90 days of employment for eligibility to receive minimum notice or pay in lieu entitlements. Three Canadian jurisdictions require longer periods of employment: 13 weeks in Saskatchewan,[652] six months in Prince Edward Island,[653] and six months in the Yukon Territory.[654] One province in Canada has an eligibility period shorter than three months or 90 days of employment, namely Manitoba, which requires one month of employment.[655] Only Nova Scotia specifies no eligibility period, but Nova Scotia's minimum notice requirements are decidedly less generous than those of the other jurisdictions. Only one week's notice of termination is mandatory in the first two years of employment.[656]

650. *Supra*, note 1, s. 63(1).

651. Longhurst and Fairey, *supra*, note 96 at 31.

652. S.S. 2013, c. 15.1, s. 2-60.

653. R.S.P.E.I., c. E-6.2, s.29(1)(a).

654. R.S.Y. 2002, c. 72., s. 50(1).

655. C.C.S.M., c. E110, s. 62(1).

656. R.S.N.S. 1989, c. 246, s. 72(1).

Unless the cross-jurisdictional picture changes significantly, the Project Committee does not see a need to eliminate or reduce the eligibility period of three months' employment for the statutory minimum notice of termination or entitlement to compensation for length of service. It is in accord with current Canadian standards.

2. Working Past the End of the Notice Period

Section 67(1)(b) of the ESA invalidates a notice of termination if the employee is allowed to work past the expiration of the notice period.

While other Canadian jurisdictions have provisions like section 67(1)(b), it is no doubt a cause of inconvenience for employers and may not always work to the advantage of employees.

The Coalition of BC Businesses has taken the position that section 67 leads employers to terminate early because of an inability to predict with certainty when business levels will decline. If there is a short-term need for the employee being terminated after the expiration of the notice period, the employer is compelled to hire a new employee for the short term rather than keep the experienced employee working, or else must incur the cost of providing a new notice and either pay wages throughout the new notice period or significant extra section 63 compensation. The Coalition urged the repeal of section 67 in its entirety, or alternatively its amendment to provide that a notice of termination does not become void unless an employee who has received a notice continues to work for more than three months beyond the notice period.[657]

Some degree of greater flexibility in the lifespan of a notice of termination, as is found in a few other Canadian jurisdictions, may be mutually advantageous to employers and employees. Many, if not most, employees who have received a notice of termination and have not found a new job would rather keep working as long as they can past the end of the notice period. It is arguably a case of win-win if an experienced worker being let go can be allowed to work as long as there is work for that worker, rather than lose the benefit of the additional earnings, and possibly have to be replaced by a short-term or casual hire because the employer misjudged the timing of notice. It is still the choice of the employee whether to accept termination on the original termination date or accept the additional work.

Three months past expiration of the notice period, however, is longer than any Canadian jurisdiction now permits a notice of termination to remain effective if the employee has been allowed to continue working. The *Canada Labour Code* allows up to

657. Coalition of BC Businesses, *Labour Policies That Work: A New Vision for BC* (2001).

two weeks of post-expiration work, and New Brunswick and Prince Edward Island allow up to a month after the end of a notice period before the notice of termination lapses.

Another view is that section 67 serves to create necessary certainty in the obligations of both parties to the employment relationship when it is being brought to an end. Certainty that a job will end as of a specific date allows employees to plan the next steps in their lives. Allowing a notice of termination to remain in effect when an employee works past the notice period arguably deprives employees of that certainty and undermines the very purpose of requiring notice.

The Project Committee was ultimately divided on whether section 67(1)(b) should be relaxed. A majority of the members are in favour of allowing a notice of termination to remain in effect for up to a month after the notice period expires if the employee continues to work in that interval. A minority oppose such a change on the ground that it will weaken the protection for workers that the notice provisions were intended to serve.

A **majority** of the members of the Project Committee recommend that:

42. A notice of termination validly given to an employee should not be rendered invalid by reason only that the employee is allowed to work for up to one month after the end of the notice period.

A **minority** of the members of the Project Committee take the position that:

42a. A notice of termination should continue to be void under section 67(1)(b), as it now stands, if an employee is allowed to work beyond the end of the notice period.

3. Termination by Employer After Employee Gives Notice

The ESA is silent as to how Part 8 applies if an employee first gives notice to the employer that the employee is leaving a job and the employer then terminates the employee before the period of notice given by the employee has expired.

The general rule regarding termination of employment by an employee is found in section 63(3)(c), namely that that the employer is deemed to have discharged the liability under section 63(1) to pay compensation for length of service. If the employer does not wait for the period of notice given by the employee to elapse before terminating the employee, however, the employment relationship will have come to an end because of the employer's action rather than that of the employee.

The Employment Standards Branch *Interpretation Guidelines Manual* states that in those circumstances, the employer would be liable for the *lesser* of the wages the employee would have earned in the remainder of the notice period given by the employee and the amount that would be payable under section 63 if the employee in question had simply been terminated without notice. This makes sense, because neither party then incurs a loss because of the action of the other.

Termination following a notice to quit by an employee may be a fairly common situation. It would be helpful if the Act stated expressly what it requires in those circumstances.

The Project Committee recommends:

43. The ESA should be amended to expressly clarify that if an employer terminates an employee following a notice of intention to quit given by the employee, the employer is required to pay the employee the lesser of

(a) the amount of wages the employee would have earned during the rest of the period of notice the employee gave to the employer; and

(b) the amount that would be payable to the employee as compensation for length of service if the employee had been terminated without notice.

4. Meeting Group Termination Requirements by Combination of Notice and Termination Pay

Section 64(4) reads as follows:

> (4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.

The words "notice *as required by this section*" are applied literally. The result is that if the notice of group termination is defective, the employer cannot satisfy the requirements of section 64(4) by a combination of notice and termination pay. Instead, the employer must give termination pay for the full notice period that is applicable.

For example, if notice of group termination is not given to the Minister, all affected employees would be entitled to receive the full 8, 12, or 16 weeks of

termination pay, depending on the total number of employees being terminated. This would be in addition to their individual compensation entitlements based on length of employment under section 63, as entitlements under sections 63 and 64 are cumulative.[658]

Interpreted in this manner, section 64(4) leads to onerous and unjust results. As with individual terminations, it should be possible for an employer to meet the group termination requirements by a combination of notice and termination pay, such that an employee who does not receive the full benefit of notice is compensated with pay in lieu.

The Project Committee recommends:

44. The group termination provisions of the ESA should be amended to allow an employer's obligations to affected employees to be satisfied through a combination of notice and termination pay, whether or not the employer has given the required notice to the Minister within the required timeframe.

5. The Construction Industry Exception

The Thompson Report noted that the construction industry exception under section 65(1)(e) is very broad, affecting all employees employed on building sites by an employer whose principal business is construction, whether or not they are permanent core employees or ones hired only for a specific site or project. Thompson recognized the industry custom under which workers are hired for specific projects and dismissed when their portion of the work is complete. He commented, however, that some construction workers are compensated for the insecurity by higher wages and others are not. He thought the exception cast the net too widely, and recommended that the government re-examine the construction industry exception with a view to narrowing the class of employees excepted from notice of termination and compensation for length of service requirements.

In 2002, section 65(1)(e) was amended to clarify that the exception applied to workers employed at more than one construction site. This followed representations on behalf of employers that the Employment Standards Tribunal had interpreted the exception as being limited to single-site hirings, contrary to the understanding of the exception prevalent in the industry.[659]

658. See *Re Kispiox Forest Products Ltd.* (20 June 2000), BCEST #D238/00 at 5.

659. *Supra*, note 208 at 36.

The Project Committee is divided on the matter of whether the broad exception of on-site construction workers from termination entitlements requires change or review. The majority do not think it needs to be reviewed, considering it to be justified on the basis of the project-based nature of construction and long-standing industry custom. They also point to the fact that a similar exception exists in all but three Canadian jurisdictions, as noted earlier in this chapter.

A minority of the Project Committee members consider the on-site construction worker exception to be outdated and unwarranted. They maintain the nature of the industry has changed, so that it is less common now for a general contractor to hire a project-specific workforce directly. It is more common for workers in the construction industry to be employed by subcontractors who move their own workforces between projects. The minority emphasizes that many other industries are also project-oriented and hire employees for specific projects, but they are not granted exceptions from the termination provisions of the ESA.

Thus, the majority view is that no change or review is required in relation to section 65(1)(e). The minority view is that section 65(1)(e) should be repealed, and the construction industry should not enjoy an exception from the requirements of sections 63 and 64.

A **majority** of the members of the Project Committee recommend:

45. No change or review is required in relation to section 65(1)(e) of the ESA.

A **minority** of the members of the Project Committee recommend:

45a. Section 65(1)(e) of the ESA should be repealed.

Chapter 9. Vulnerable Classes of Employees

A. Introduction

Earlier in Chapter 3, it was mentioned that certain classes of employees are generally recognized as requiring a special level of statutory protection because their personal circumstances and lack of bargaining power in the labour market make them especially susceptible to exploitation and abuse, individually and as a class. They are referred to in this report as "vulnerable classes." This chapter deals with two classes of workers in British Columbia who may be described as vulnerable in this sense: children and workers in private residences.

Provisions aimed at protecting a third vulnerable class, namely farm workers hired through labour contractors, were covered in Chapter 6.

The consultation paper addressed the protection of another vulnerable class, namely migrant workers, at some length. As of the date of this report, however, recommendations the Project Committee would otherwise have made with respect to migrant workers have been superseded by the enactment of the *Temporary Foreign Worker Protection Act*.[660] Accordingly, this report does not address issues relating to migrant workers as a distinct class.

B. Employment of Children

1. Overview

(a) The principal rules

The basic provision on employment of children is section 9 of the ESA. Section 9(1) prohibits the employment of a child under 15 without written consent of the child's parent or guardian. Section 9(2) prohibits employment of a child under 12 without a permit from the Director, which may set conditions for the child's employment. These have been the principal rules since 2003.[661] Before December 2003, permission of

660. S.B.C. 2018, c. 45.

661. See S.B.C. 2003, c. 65, s. 3. The ESB makes available a form for parental consent which directs the employer to retain the completed form as part of the employment records for the child.

the Director was required to employ a child under 15 regardless of parental consent.[662]

At the time section 9 was amended to result in its present form, section 127(2)(b.1) was also added to the ESA, giving power to make regulations establishing conditions of employment for children under 15 considered necessary or advisable to protect their health, safety, physical or emotional well-being, education or financial interests. Part 7.1 of the *Employment Standards Regulation* was passed under s. 127(2)(b.1) of the Act.[663] It contains three divisions. Division 1 applies to employees who are between the ages and 12 and 15, except those covered by Divisions 2 and 3.[664] Division 1 of Part 7.1 provides that children must not be required or allowed to work:

(a) at a time of day when they are required to attend school; [665]

(c) more than 7 hours on a non-school day without prior written approval of the Director;[666]

(d) more than 20 hours in any week that comprises 5 school days;[667]

(e) more than 35 hours in any week under any circumstances.[668]

In addition, an employer of a child between 12 and 15 must ensure that the child works under the direct and immediate supervision of a person not less than 19 years of age.[669]

Divisions 2 and 3 of Part 7.1 of the *Employment Standards Regulation* concern employment of children in the recorded and live entertainment industries, respectively. They contain extensive and elaborate requirements relating to hours of work, meal breaks, scheduling, chaperoning, and other conditions of work for children involved in

662. See S.B.C. 1995, c. 38, s. 9(1); S.B.C. 1980, c. 10, s. 50(1).

663. *Supra*, note 31.

664. *Ibid.*, s. 45.1.

665. *Ibid.*, s. 45.3(2).

666. *Ibid.*, s. 45.3(b).

667. *Ibid.*, s. 45.3(c).

668. *Ibid.*, s. 45.3(d). An hours of work averaging agreement cannot affect employees aged 12-15, as s. 45.2 of the regulation makes section 37 of the Act inapplicable to them.

669. *Ibid.*, s. 45.4.

recorded and live entertainment. These apply in lieu of a requirement for individual permits. The general requirement in section 9(2) of the ESA for a permit to employ a child under 12 does not apply to the employment of children in the recorded and live entertainment industries.[670]

(b) Minimum age requirements for employment in specific jobs

Apart from section 9 of the ESA, British Columbia has minimum age requirements for employment in only a few forms of work. Some are contained in regulations under the ESA, and the rest in other legislation and regulations.

An infant under 15 days old may not be employed in recorded entertainment.[671] A child under four may not be employed in live entertainment without a permit.[672]

The minimum age to obtain a blaster's certificate is 18.[673] Anyone employed to work in a mine, except for the purpose of training, must be at least 18 as well.[674] In order to work in an outlet displaying or distributing adult motion pictures or videos, an employee must also be at least 18.[675]

In order to mix, load or apply toxic pesticides or to clean or maintain equipment used for those purposes, one must be at least 16.[676]

Nineteen, the age of majority in British Columbia, is the minimum age to be employed in an establishment licensed to sell liquor[677] or in a gaming facility, except as allowed

670. *Ibid.*, ss. 45.7 (recorded entertainment), 45.16 (live entertainment).

671. *Ibid.*, s. 45.7.

672. *Ibid.*, s. 45.15. This is a matter of implication, as Division 3 of Part 7.1 of the *Employment Standards Regulation* applies only to children between the ages of four and 15. Children not covered by Division 3, including any children under four years of age, are subject to the general prohibition in s. 9(2) against the employment of children under 12 without a permit.

673. *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, s. 21.8(a).

674. *Health, Safety and Reclamation Code for Mines in British Columbia* (Victoria: Ministry of Energy and Mines, revised 2017), s. 3.2.1

675. *Motion Picture Act*, R.S.B.C. 1996, c. 314, s. 6; *Motion Picture Regulation*, B.C. Reg. 260/86, s. 5(5).

676. *Supra*, note 673, s. 6.77.

677. *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19, s. 79(2).

by regulation.[678] It is also the minimum age to work alone or in isolation in a retail fueling outlet or retail store between 11:00 p.m. and 6:00 a.m.[679]

(c) Guidelines for issuance of permits

The Interpretation Guidelines Manual used by the Employment Standards Branch indicates that a permit to employ a child under 12 would be issued only if the employer can demonstrate all of the following:

- The parent or guardian has given their written permission;
- The school has given its written permission;
- The child will be under direct and immediate adult supervision at all times;
- The child will not be exposed to dangerous chemicals, noxious substances or highly flammable material;
- The child will not work at or near hot surfaces (i.e. cooking grills, deep fryers, coffee maker, etc.);
- The child will not operate inherently dangerous equipment, machinery or power tools (i.e. paper shredder, lawn mower, nail gun, etc.);
- The child will not work in an inherently dangerous work environment (i.e. a construction site); and
- The child will not be required to make his or her own way to and from the work site.[680]

Other matters considered in the decision to issue a permit are:

- The degree to which the child can physically be expected to perform the work;
- Whether the child has the maturity to function in a work environment;
- The child's ability to understand the nature of an employment relationship;
- The child's ability to understand health and safety issues in the workplace.[681]

678. *Gaming Control Act*, S.B.C. 2002, c. 14, s. 61(2)(a)(ii).

679. *Supra*, note 673, s. 4.22.1(2.1)(g)(i).

680. Ministry of Labour, Employment Standards Branch, *Interpretation Guidelines Manual*, online: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esa-part-2-section-9

681. *Ibid.*

A permit may impose conditions relating to the type of work the child will perform, hours of work, transportation, additional safety precautions, direct adult supervision, and locations of work.[682]

2. Interprovincial Comparison

All provinces and territories of Canada, as well as the federal sector, regulate child employment. Relevant provisions may be interspersed through employment standards legislation, occupational health and safety statutes and regulations, school and education Acts and regulations, and in some cases, legislation dedicated specifically to child employment.

The Canadian jurisdictions other than British Columbia and Yukon set a general absolute minimum age for employment either in primary legislation or a regulation. They also identify industries or kinds of work that are considered harmful to a child's health, safety, or physical, spiritual, social and moral development, and prohibit children under a specified age from working in the industries or occupations so identified.

Canadian legislation on child employment also addresses the following matters to an extent that varies between the jurisdictions:

- a general minimum age for employment in any form of work without restrictions;
- an absolute minimum age for work, *i.e.* an age below which a child may not be employed, with or without regulatory permission or parental consent;
- separate categories of child employees and young workers, with differing restrictions;
- restrictions on the nature of work children may perform, *e.g.* prohibitions on work in certain industries or occupations considered hazardous or detrimental to their education or development;
- restrictions on hours of work;
- prohibition of late night work for young workers, especially if unsupervised;
- regulatory authorization or permitting;

682. *Ibid.*

- consent of a parent or guardian to employment;
- consent of the school or other authority;
- supervision;
- exclusions from restrictions by class (of employee, industry, or workplace);
- exemption from restrictions in individual cases;
- liability for contraventions, generally falling on the employer but in some cases on the parent or guardian.

The most recent Canadian legislation on child employment is found in Alberta. In 2017, Alberta amended its provisions on child employment to prohibit employment of children aged 12 and under entirely, other than by permit in an artistic endeavour (as defined by regulation). Employment between the ages of 13 and 15 without a permit will be restricted to forms of "light work" designated in a published list established by the Director of Employment Standards. Employment in other work may be authorized by permit, unless it is hazardous work as determined under Alberta occupational health and safety provisions. Parental consent would be required in all cases for employment of anyone 15 and under.

Persons aged 16 or 17 will be allowed to engage in any employment, but hazardous work will require a permit and supervision by a responsible adult. Adequate training will be required before hazardous work is performed, and the health, safety, and well-being of the young worker must be protected. The 2017 amendments are not yet in force pending completion of consultations aimed at developing the list of forms of "light work" and revising the definition of "hazardous work."[683]

3. International Legal Standards Regarding Employment of Children

(a) International conventions dealing with child labour

Several international conventions ratified by Canada call for the signatory countries to put in place certain legislative measures for the protection of children and young workers. The *United Nations Convention on the Rights of the Child* and the

683. Alberta Employment Standards, "Employment Standards Code Changes," online: https://www.alberta.ca/employment-standards-changes.aspx.

International Covenant on Economic, Social and Cultural Rights each call for protection of children against economic exploitation and work that is likely to be hazardous or harmful to their health, or their moral and social development.[684] They also call for the minimum age or ages for employment to be spelled out in law.[685]

Two other subject-specific conventions on child employment ratified by Canada call for implementation of more detailed measures in domestic legislation. The *Worst Forms of Child Labour Convention, 1999*, ratified by 180 countries, refers to four "worst forms" defined in Article 3. Three of these "worst forms" are prohibited in Canada by various provisions of the *Criminal Code*.[686] The fourth is relevant to provincial jurisdiction over the law of employment:

> work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[687]

Article 4 of the 1999 Convention requires the kinds of work coming within the descriptions of "worst forms" in Article 3 to be determined by domestic legislation or by the competent authority within the member state, taking relevant international standards into account, especially the standards in paragraph 3 and 4 of ILO Recommendation R190, which accompanies the Convention. Those standards are as follows:

> 3. In determining the types of work referred to under Article 3(d) of the Convention, and in identifying where they exist, consideration should be given, inter alia, to:
>
> (a) work which exposes children to physical, psychological or sexual abuse;
>
> (b) work underground, under water, at dangerous heights or in confined spaces;
>
> (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
>
> (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;

684. *UN Convention on Rights of the Child, 1989*, art. 32, para. 1; *Int'l Covenant on Economic, Social and Cultural Rights, 1976*, art. 10, para. 3.

685. 1989 Convention, art. 32, para. 2.

686. R.S.C. 1985, c. C-46.

687. ILO *Worst Forms of Child Labour Convention, 1999* (C182), art. 3(d).

(e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

4. For the types of work referred to under Article 3(d) of the Convention and Paragraph 3 above, national laws or regulations or the competent authority could, after consultation with the workers' and employers' organizations concerned, authorize employment or work as from the age of 16 on condition that the health, safety and morals of the children concerned are fully protected, and that the children have received adequate specific instruction or vocational training in the relevant branch of activity.[688]

Article 6 of the 1999 Convention requires member states to implement programs of action to eliminate the worst forms of child labour, as defined in Article 3.

The *Minimum Age Convention, 1973* has been ratified by 169 countries, including Canada.[689] It provides that each ratifying member state must declare a minimum age below which no one may be admitted to employment in any occupation within its territory.[690] The minimum age must be not less than the age of completion of compulsory schooling, and not less than 15.[691] The Convention permits an initial minimum age of 14 only for member states whose economies and educational facilities are insufficiently developed.[692] In ratifying the Convention in June 2016, Canada declared 16 years as the minimum age for employment.[693]

688. Unlike conventions, ILO recommendations are not intended to be binding. The incorporation by reference of paragraphs 3 and 4 of Recommendation R190 in article 4 of the *Worst Forms of Child Labour Convention, 1999*, however, makes those paragraphs of the recommendation arguably binding on member states that have ratified the Convention, including Canada.

689. International Labor Organization, "Ratifications by Convention," online at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283:NO

690. *Minimum Age Convention, 1973*, 26 June 1973, online: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312283:NO, Article 2, paragraph 1.

691. *Ibid.*, Article 2, paragraphs 1 and 3. Article II, paragraph 6 of the non-binding ILO Recommendation R146 which accompanies the *Minimum Age Convention, 1973* states that the minimum working age should be fixed at the same level for all sectors of economic activity. Paragraph 7 states that member states should take as their objective the progressive raising of the minimum working age to 16.

692. *Ibid.*, Article 2, paragraph 4.

693. "Ratifications for Canada", *Minimum Age Convention, 1973*, online: http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102582

The 1973 Convention specifies, however, that no one under 18 may be employed in work that is, by its nature or the circumstances in which it is carried out, likely to jeopardize the health, safety or morals of young persons.[694] As does the 1999 Convention, the *Minimum Age Convention, 1973* requires member states to determine the types of work meeting this description either by means of domestic laws or by a competent authority in consultation with employers' and workers' organizations.[695] Employment in these forms of work at age 16 may be authorized if the health, safety, or morals of the young persons concerned are fully protected and if they receive instruction or vocational training in the work in question.[696]

Article 4 permits the competent authority in a member state to exclude limited categories of employment or work from the application of the Convention where these categories present "special and substantial problems of application." Article 5, paragraph 3 states nevertheless that, at a minimum, the Convention applies to the following industries or undertakings: mining, quarrying, manufacturing, construction, electrical, gas and water facilities, sanitary services, transport, storage and communication, and plantations and other agricultural undertakings producing for mainly commercial purposes, excluding family and small-scale holdings producing for local consumption that do not regularly employ hired workers.

Article 7 allows for employment of persons aged 13 to 15 in "light work," provided it does not interfere with their school attendance or vocational training, their health or development, or their capacity to benefit from instruction they receive.

The Convention does not define "light work," nor does the accompanying ILO Recommendation R146. Instead, it leaves the determination regarding what amounts to "light work" to be determined by the competent authority in each adhering country.

Article 8 allows exceptions by regulatory permit in individual cases from the prohibition of employment of children under the minimum working age for purposes such as artistic performances. The permit must limit the number of working hours and prescribe working conditions.

(b) U.S.A.

In the U.S., the federal *Fair Labour Standards Act* (FLSA) regulates child labour in enterprises to which it applies, and prevails over any state or local legislation that is less

694. *Supra*, note 690, Article 3, paragraph 1.

695. *Ibid.*, Article 3, paragraph 2.

696. *Ibid.*, Article 3, paragraph 3.

protective.[697] It does not displace higher standards under state laws and local ordinances.[698]

The minimum working age under the FLSA is 14, except in agriculture. Hours of work for employees under 16 are restricted.

The FLSA prohibits minors under 18 from engaging in an occupation which the Secretary of Labor has declared hazardous. These occupations include excavation, manufacturing explosives, mining, and operating numerous kinds of powered equipment. There are extensive lists in federal regulations of occupations prohibited and permitted to minors in different age groups, *e.g.* 14-15, 16-18.[699]

Work performed by a minor for the minor's parents is not governed by the FLSA, apart from a prohibition on work by minors in mining, manufacturing, and occupations with a minimum age requirement of 18.

In neighbouring Washington, employers must obtain a permit to employ a minor under 18, retain it on file, and return it on the termination of the minor's employment.[700] In order for a permit to be issued, the state Dept. of Labor and Industries must be satisfied the proposed employment meets health, safety, and welfare standards for minors under rules which the Department is empowered to adopt.[701] The consent of a parent of the minor and of the school attended by the minor are also required.[702]

(c) Other international comparisons

Legislative regulation of child labour in the U.K., Australia, and New Zealand tends to have the following features:

(a) a general minimum working age;

(b) prohibition of work during school hours;

697. 29 U.S.C. § 201 *et seq.* The FLSA applies to public employers, hospital and care institutions, and private employers with annual revenues of $500,000 or more, as well as enterprises engaged in interstate commerce.

698. *Ibid.*, s. 218(a).

699. See e-CFR, title 29, Part 570.

700. RCW 49.12.123.

701. RCW 49.12.121, paras (1) and (2).

702. *Ibid.*, para. (2).

(c) hours of work restrictions outside of school hours;

(d) prohibition of late night work;

(e) prohibition of work in particular industries and occupations considered unsuitable. The U.K. and New Zealand have language loosely tracking that of the ILO Conventions on prevention of children working in settings potentially harmful to their health, education, or physical and moral development;

Regulatory permits for child employment are required in the U.K. and some Australian states.

4. Discussion

The ESA provisions and regulations dealing with employment of children in British Columbia are a focal point of controversy.[703] Among the reasons for this is the fact that they diverge in important respects from Canadian and international norms with regard to the minimum age for employment and the forms of work in which children may be employed. Another reason is that the enactment of the current version of section 9 of the ESA represented a relaxation of regulatory oversight that had long been in place in relation to the 12-15 age group, with reliance on parental consent alone being substituted as the protective mechanism.

At the time the child employment provisions in the ESA and regulations assumed their current state and at various times afterward, the provincial government defended the current provisions as ones that eliminated over-regulation and restored parental authority over the welfare of their children.[704] The legislative record indicates also that the changes were designed at least in part to support the competitiveness of the $1 billion per year film industry in British Columbia by approximating the regulatory regimes applicable in competing production venues, chiefly California.[705]

703. Recent publications of advocacy organizations and media articles indicate that the regulatory regime for child employment in British Columbia remains a subject of controversy: see Longhurst and Fairey, *supra*, note 96 at 32-33; Adrienne Montani, "B.C. pays price for lower work age" *Vancouver Sun*, 9 May 2013; Jeff lee, "B.C. shouldn't return to permit system for working children: Premier Clark" *Vancouver Sun*, 10 May 2013.

704. British Columbia, *Debates of the Legislative Assembly (Hansard)*, 37th Parl., 4th Sess., Vol. 16, No. 9 (6 October 2003) at 7192-7195 (Hon. Graham Bruce), 2nd reading debate of the *Skills Development and Labour Statutes Amendment Act, 2003* (Bill 37).

705. *Ibid.*, at 7194. In 2003, when s. 9 was amended to take on its present form, the film industry accounted for the overwhelming majority of the permits issued for employment of children in

Critics of the current state of the law continually point out that British Columbia is the least restrictive jurisdiction in Canada with respect to child employment, with the possible exception of the Yukon Territory.[706] While not all the other Canadian jurisdictions require direct and immediate adult supervision as British Columbia does, this province stands out in allowing young workers between 12 and 14 to engage in virtually any form of work without regulatory authorization, and in not having a general prohibition on late night work for this age group.

The jobs that 12-to-15-year-olds in British Columbia are permitted to do extend to potentially hazardous forms of work such as construction, from which they are barred in neighbouring provinces and most of North America. And there is evidence that workers in this age group are doing them. Disability claims statistics maintained by WorkSafeBC show that $1,075,713 was paid out in job-related disability claims for workers aged 14 and under between the years 2007 and 2016.[707] They also show that in every year between 2005 and 2016, workers aged 14 or less have been injured seriously enough on the job to qualify for a long-term disability pension.

A 2013 study by First Call, an organization that advocates for young workers in British Columbia, cites examples of employees in this age group performing work on construction sites, in commercial kitchens, junkyards, etc. with little or no training or

British Columbia: British Columbia, *Debates of the Legislative Assembly (Hansard)*, 37th Parl., 4th Sess., Vol. 16, No. 9 (6 October 2003) at 7194 (Hon. Graham Bruce).

706. Yukon provides for restrictions by regulation on the employment of persons under 17: *Employment Standards Act*, R.S.Y. 2002, c. 72, s. 18(2)(f). This power is unused, and existing restrictions are minimal, relating only to mines. A detailed *Young Worker Protection Act* was introduced in the Yukon Legislative Assembly in 2008. It was treated as an exposure bill by the Yukon government, and was the basis for public consultations. The consultations revealed public opinion was divided on the question of a statutory minimum working age except for dangerous occupations, but also showed that violations of existing occupational health and safety regulations involving young persons were occurring. This included violations of the existing prohibition on employment of persons below the age of 16 in mines. The consultation report noted that existing regulation-making powers could be used to effect the same changes as the bill would make: Sessional Papers, Yukon Legislative Assembly, Motion 542 Consultation Report at 2-3, 38-39. The bill was reintroduced, apparently as a private member's bill, in 2011. A contemporaneous government motion called for support for the findings of the consultation report and a review after five years of the effectiveness of any regulations resulting from the consultations, together with reconsideration of whether there is a need for a general minimum working age in the Yukon Territory. The second reading debate on the bill was adjourned and nothing further appears to have taken place in relation to it.

707. Data provided to the Project Committee by WorkSafeBC, March 2017.

supervision, and being injured on the job.[708] Employees interviewed in the study frequently indicated they had been hired without being asked for written consent from a parent, and that their parents had not made any inquiries about the workplace before they were hired. There is some evidence that the experience of young workers elsewhere is similar.[709]

The Project Committee believes that the uppermost public policy concern in relation to child employment is the health and safety of employed youth and non-impairment of their education. To those ends, the Project Committee believes that the employment of persons under 16 in certain industries and forms of work should be entirely prohibited. The Project Committee is content to describe these generically as industries and occupations likely to be injurious to the health, safety, or morals of persons under that age. The precise list should be fixed by regulation, and should correspond broadly to industries and forms of work from which children are generally barred in other Canadian jurisdictions. The minimum age for employment in these industries should be fixed by regulation as well, with 16 being the lower limit. Nineteen, as the age of majority, would presumably be the upper limit for any restriction on engaging in hazardous employment.

The majority of the Project Committee members would leave the existing regulations relating to employment of children in recorded and live entertainment in place, but they consider that employment of children under 14 in other situations should require a permit from the Director as well as parental consent.

The majority consider that workers aged 14 and 15 should be allowed to work with parental consent in an artistic endeavour, including recorded and live entertainment, and in forms of "light work" designated by the Director and listed on the website of the Ministry of Labour. Employment in other situations should require a permit from the Director.

A minority of members favour restoring a requirement for a permit from the Director to employ anyone under 15, except as allowed under the special regulations applying to the recorded and live entertainment sectors.

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708. Adrienne Montani and Andrina Perry, *Child Labour Is No Accident: The Experience of BC's Working Children* (Vancouver: First Call: BC Child and Youth Advocacy Coalition, 2013).

709. See Yukon, Legislative Assembly, "Motion 542 Consultation Report" by Yukon Employment Standards Board and Yukon Workers' Compensation Health and Safety Board, Sessional Paper 110 (2009), online: http://www.legassembly.gov.yk.ca/pdf/motion542_report.pdf at 22-24, reporting the results of focus group sessions involving young workers. The young workers described work experiences characterized by lack of training and supervision in hazardous work settings, and of employers disinterested in obtaining parental consent before hiring.

The Project Committee recommends:

46. Employment of persons under 16 in industries or occupations prescribed by regulation as being likely to be injurious to their health, safety, or morals should be prohibited.

47. The ESA should be amended to confer authority to

(a) designate by regulation industries and occupations likely to endanger the health, safety, or morals of persons under 16; and

(b) set a minimum age between 16 and 19 for employment in any one or more of the said industries and occupations.

48. The special regime for employment of children in recorded and live entertainment under Part 7.1, Divisions 2 and 3 of the Employment Standards Regulation *should be retained.*

A **majority** of the members of the Project Committee recommend:

49. The ESA should be amended to:

(a) require a permit from the Director to employ a child below the age of 14, except for employment with parental consent in recorded and live entertainment;

(b) allow employment at age 14 and 15

(i) with parental consent in
(A) an artistic endeavour (including recorded and live entertainment); or
(B) forms of "light work" designated by the Director and listed on the Employment Standards Branch website;
(ii) with a permit from the Director, in cases other than those mentioned in subparagraph (i).

A **minority** of the Project committee recommend:

49a. The ESA should be amended to prohibit the employment of anyone under 15 years of age without a permit from the Director, except as allowed by the regulations applicable to employment of children in recorded and live entertainment.

C. Workers in Private Residences

1. Overview

Employment inside private residences presents special problems in terms of regulation. As a sector of the workforce, persons employed in private residences (in-home workers) are largely invisible, despite a requirement resting on their employers under section 15 of the ESA to notify the Director of their presence. The employer-employee relationship is more personal than in other sectors of employment, and this inevitably complicates workplace interactions.

The ESA and the *Employment Standards Regulation*[710] deal with employees in private residences in a relatively complex fashion. They create several categories of workers that receive varying degrees of protection under the Act, and in some cases none. There is considerable uncertainty and overlap in the definitions of the categories. Misclassification can be a source of injustice for employees. It can also be a trap for employers, because significant financial liabilities may result from misclassification.

The picture is further complicated by the fact that the ESA and the regulations have not yet caught up to recent changes in the Temporary Foreign Worker Program (TFWP) that affect a significant, if not preponderant, number of those employed inside private homes. The lack of alignment between the ESA and the current federal regime governing caregivers admitted to Canada as temporary foreign workers (TFWs) makes the application of the ESA to TFWs employed in this capacity in households very capricious and uneven.

The caregiver streams of the TFWP provide a prospect of permanent residence after a minimum period of 24 months of full-time work or 3900 hours within four years after arriving in Canada. In reality, the TFW caregivers must wait years after completing the minimum requirements in order to obtain permanent residence for themselves and their dependants. In the meantime, their work permits are linked to employment with a specific employer. The extended wait for permanent residence makes them highly dependent on their employers and very reluctant to complain of breaches of employment standards.

The stakes are high in any dispute with the employer, because they cannot move to another position without a new work permit, and they face loss of immigration status in Canada if forced out of employment. Their vulnerability to exploitation and abuse

710. *Supra*, note 31.

is increased by the isolation of their work environment, and in some cases by language barriers.

TFW caregivers were formerly admitted to Canada under the Live-In Caregiver Program, which linked the work permit to a specific employer. If the TFWs completed either 24 months of full time live-in caregiving work in Canada, or 3,900 hours (no more than 390 of which were overtime) within four years of arriving in Canada, they could apply for permanent residence for themselves and their dependants.

The live-in requirement and the employer-specific work permit were perceived nationally as contributing to exploitation and abuse of these migrant workers because of the extreme dependency they created. Termination could result in loss of immigration status and expulsion from Canada. This makes migrant workers very reluctant to report abuses such as withholding of pay and travel documents, overwork, overcharging for room and board, inadequate accommodation, being charged the cost of transportation to Canada, and other violations of provincial and federal standards. Much adverse publicity led the federal government to change the regime for admitting migrant caregivers in 2014.

After 30 November 2014, no new applications for visas and work permits were allowed under the Live-in Caregiver Program. The terms of the Live-in Caregiver Program remain in place for those workers who entered Canada under it, but after that date, all new hires and admissions of foreign caregivers to Canada take place under two streams created under the TFWP, namely the Caring for Children stream and the Caring for Persons with High Medical Needs stream. A total of 2,490 new positive LMIAs were issued in 2015 and 2016 for caregiving work in B.C.[711]

Caregivers whose visas and work permits were issued under the post-2014 Caring for Children stream and the Caring for Persons with High Medical Needs stream cannot be required to live in the employer's residence. If they do, they cannot be charged for room and board. Applicants for visas and work permits in the caregiver streams must now meet a proficiency standard in spoken and written English or French. These changes were aimed in part at removing or alleviating features of the Live-in Caregiver program that were seen as contributing to exploitation and abuse of TFW caregivers. The work permits issued to caregivers under the post-2014 streams are still employer-specific, however.

711. Open Government Portal, *Temporary Foreign Worker Program 2016 Q4*, online: http://open.canada.ca/data/en/dataset/e8745429---21e7---4a73---b3f5---90a779b78d1e.

Migrant caregivers are no longer required to leave Canada after four years if they have not become permanent residents, but the route to permanent residence involves a new obstacle, namely a policy of capping the number of permanent residence applications granted to qualifying TFW caregivers at 2,750 per year. Extended wait times for permanent residence increase the dependence of these employees on their employers, and thus also their susceptibility to exploitative treatment.[712]

2. Categories of Workers in Private Residences Under the ESA

(a) Domestics

The following definition of "domestic" is found in s. 1(1) of the ESA:

> **"domestic"** means a person who
>
> (a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and
>
> (b) resides at the employer's private residence;

Domestics have the full rights of employees under the ESA, including those relating to hours of work and overtime.

In addition, s. 14(1) of the ESA requires employers of domestics to provide them with a copy of their employment contract, a requirement that does not apply generally to other employees. The written contract must cover the domestic's duties, hours of work, wages, and charges for room and board.[713]

712. Immigration, Refugee, and Citizenship Canada indicates that current processing delays for permanent residence applications for the caregiver streams are approximately 12 months from the date of application, online: http://www.cic.gc.ca/english/information/times/ (accessed March 2018). Until recently, live-in caregivers who had completed the minimum 24 months of employment in Canada reportedly faced delays of up to 49 months to obtain permanent residence: Nicholas Keung, "Foreign caregivers face lengthy wait for permanent status" *Toronto Star*, 21 July 2015, online: https://www.thestar.com/news/immigration/2015/07/21/foreign-caregivers-face-lengthy-wait-for-permanent-status.html.

713. *Supra*, note 1, s. 14(2). Under s. 14 of the *Employment Standards Regulation*, *supra*, note 31, the monthly charge for room and board cannot exceed $325. Note, however, that under the terms of the federal Temporary Foreign Worker Program, an employer of a live-in caregiver who holds a work permit issued under that program is now prohibited from charging the employee for room and board.

If an employer requires a domestic to work hours other than those stated in the employment contract, the hours must be added to those worked in the same pay period.[714]

As domestics are subject to the normal standards regarding hours of work and are required to live where they work, they are not considered to be on call (and therefore working) outside their regular work hours merely because they are on the premises. In other words, mere presence in the employer's residence in and of itself does not count as time worked.[715]

(b) Live-in home support workers

Live-in home support workers are another category, defined in s. 1(1) of the *Employment Standards Regulation* as follows:

> **"live-in home support worker"** means a person who
> (a) is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and
>
> (b) provides those services on a 24 hour per day live-in basis without being charged for room and board;

Note that this category is restricted to employees whose positions are funded through a government-funded program, and are employed by a service provider rather than by the owner of the residence where they live and work.

Live-in home support workers are excluded from Part 4 of the Act, and thus are not subject to the hours of work and overtime requirements in that Part.[716] They may be covered instead by the terms of a collective agreement, however.

(c) Night attendants

"Night attendant" is a further category of in-home employee defined in s. 1(1) of the *Employment Standards Regulation*:

> **"night attendant"** means a person who
> (a) is provided with sleeping accommodation in a private residence owned or leased

714. *Supra*, note 1, s. 14(3).

715. *Re Campbell* (24 Jan. 2002) BCEST #D045/02.

716. *Supra*, note 31, s. 34(1)(q).

or otherwise occupied by a disabled person or by a member of the disabled person's family, and

(b) is employed in the private residence, for periods of 12 hours or less in any 24 hour period, primarily to provide the disabled person with care and attention during the night,

but does not include a person employed in a hospital or nursing home or in a facility designated as a community care facility under the *Community Care Facility Act* or as a Provincial mental health facility under the *Mental Health Act* or in a facility operated under the *Continuing Care Act*;

Night attendants are excluded from Part 4 of the Act.[717] As a result, their hours of work are not regulated, and they are not entitled to overtime pay. Unlike domestics, live-in home support workers, and residential care workers, night attendants are not required to live in their employers' residences when not at work.

(d) Residential care workers

Residential care workers are yet another category of in-home worker, defined in the regulations as follows:

"residential care worker" means a person who
(a) is employed to supervise or care for anyone in a group home or family type residential dwelling, and
(b) is required by the employer to reside on the premises during periods of employment,
but does not include a foster parent, live-in home support worker, domestic or night attendant;

Residential care workers, like domestics, live in the facility or private residence where they work. Unlike domestics, however, they are excluded from Part 4 of the ESA and thus do not receive overtime pay.[718] Section 22(1) of the *Employment Standards Regulation* nevertheless requires that if they are scheduled to be on the premises for a 24-hour period, residential care workers must receive a rest period of 8 consecutive hours within the 24-hour period.

717. *Ibid.*, s. 34(1)(w).

718. *Ibid.*, s. 34(1)(x).

If a residential care worker's rest period is interrupted, the worker must be paid two hours' regular pay or be paid at the regular rate for the number of hours of work caused by the interruption, whichever is greater.[719]

(e) Textile workers

The definition of "textile worker" is:

> "textile worker" means a person employed to make fabrics or fabric articles, including clothing, in a private residence;[720]

Textile workers have the full rights of employees under the ESA.

(f) Sitters

The remaining defined category of in-home worker is that of "sitter." The *Employment Standards Regulation* contains the following definition of a "sitter":

> **"sitter"** means a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
> (a) a business that is engaged in providing that service, or
> (b) a day care facility;

Sitters are completely excluded from the protection of the ESA. As a result, their hours, rates of pay, and conditions of employment are entirely unregulated.

The term "sitter" is apparently derived from "babysitter," denoting a highly informal engagement of someone (often a school-aged teenager or other casual worker) to watch over a child on an occasional basis for short periods in the parents' absence. The Thompson Commission was told that the intention underlying the definition and use of the term in the ESA was to exclude babysitting from the scope of the Act.[721] The definition of "sitter" nevertheless is broad enough to extend to full-time caregivers with a regular work schedule, provided they do not fit within one of the other defined categories and their duties do not extend beyond caregiving and tasks incidental to caregiving.[722] As noted below, the definition has been applied as broadly as its wording allows.

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719. *Ibid.*, s. 22(2).

720. *Ibid.*, s. 1(1).

721. *Supra*, note 2 at 73.

722. *Re Dolfi* (13 Nov. 1997) BCEST #D524/97.

3. The Regulatory Gap Resulting from Non-Alignment of ESA Definitions With Changes to the TFWP Affecting Migrant Caregivers

Prior to the elimination of the live-in requirement at the federal level in 2014, most in-home workers admitted to Canada under the Live-In Caregiver Program would have qualified as "domestics" because they had to live in their employers' homes. As such, they would have had the full protection of the ESA. Now, however, in-home workers admitted to Canada under the TFWP who do not live in their employers' residences cannot qualify as "domestics" under the ESA.

Depending on their individual situations, in-home workers living *outside* their employers' residences may be classified either as ordinary employees with full protections under the Act, or as "sitters" who are completely excluded from the ESA.

Those hired to perform household tasks, and whose work does not consist *preponderantly* of caregiving, are employees in the ordinary, undifferentiated sense with the usual rights to overtime pay, vacation pay, statutory holiday entitlements, etc. This group would probably be a minority of the TFW's working in B.C. homes, however.

Most TFW in-home workers will have been hired principally as caregivers to children or adults. If these persons having caregiving as their *principal* duty do not actually live in the employer's residence, they will fit literally within the definition of "sitter" and have no protection under the ESA.

As a written employment contract containing certain mandatory terms is a requirement of the TFWP, it would in theory be open to TFW caregivers classified under provincial law as "sitters" to enforce the terms of their contracts by suing their employers in the civil courts. This is cold comfort to low-paid nannies and personal care attendants whose immigration status is heavily dependent on their employers' good will.

The clear policy of the ESA was to apply the full protections of the Act to domestics. It is incongruous to exclude employees performing the same work as domestics (as currently defined) from the protections that domestics have under the ESA merely because they live outside their employers' residences. While the exclusionary effect of the current definitions of "domestic" and "sitter" is not limited to TFW workers, TFWs are likely to occupy most of the full-time jobs affected by it. As noted above, TFWs are especially susceptible to exploitation and subjection to substandard working conditions because of their immigration status. Unlike Canadians or permanent residents,

they cannot change jobs freely to improve their individual situations. Protection under provincial minimum employment standards is crucial.

The regulatory gap in ESA coverage between: (a) TFW in-home workers who live in their employers' residences and qualify as "domestics," and (b) those living in their own accommodation and who fall into the category of "sitter," is the unintended consequence of a federal policy change. In order to eliminate the gap, the live-in requirement in paragraph (b) of the definition of "domestic" should be repealed.[723] Change in the definition of "sitter" is discussed later in this chapter.

The Project Committee recommends:

50. The definition of "domestic" in the ESA should be amended by repealing the requirement to reside at the employer's residence.

4. Overlap Between Defined Categories of Workers in Private Residences

(a) The classification problem

It can be very difficult to classify in-home employees correctly. The situation in each employer's home is relatively unique and may vary from time to time. There is also a great deal of similarity between tasks performed by the various categories of in-home workers.

(b) Domestics and sitters

In particular, there is overlap between the categories of "sitter" and "domestic." Either category of worker may be a caregiver to children, and either category may perform other household tasks. Case law holds that cleaning, feeding and food

723. This change would have the incidental effect of expanding the class of workers whose employment in a private residence must be notified to the Director by their employers under s. 15 of the ESA, although not beyond the inclusive terms of that section. Section 15 of the ESA requires an employer to provide information to the Director that is required by the regulations "for establishing and maintaining a register of employees working in private residences." At the present time, s. 13(1) of the *Employment Standards Regulation*, *supra*, note 31, requires submission of identity and contact information only with respect to those workers in private residences who are domestics or textile workers. Persons performing the same work as domestics, but who live outside the employer's residence, are not covered by the definition of "domestic" as it now stands, but if the live-in requirement of the definition were repealed, they would become "domestics" within the meaning of the amended definition. As such, they would be covered by the notification / registration requirement of section 15 of the Act.

preparation incidental to the activity of attending to a person requiring care are included in the activity of providing care.[724] A person may therefore be a "sitter" even though performing some household tasks typically performed by domestics, such as cleaning, laundry or food preparation, as long as they are related to the care of a person. The work performed by a sitter and a domestic may be nearly identical. As explained above, however, domestics enjoy full protection under the ESA, while sitters are completely excluded.

(c) Residential care workers and domestics

Some uncertainty also surrounds the scope of the "residential care worker" category because of the presence of the term "family type residential dwelling" in the definition. Specifically, the uncertainty relates to whether the category consists only of employees working in a group setting or also to those employed in a one-family dwelling.

In at least one instance, "family type residential dwelling" has been interpreted to mean a one-family private dwelling, despite appearing in the definition in close association with the phrase "group home."[725] That interpretation, if correct, would expand the class to include virtually all live-in nannies and caregivers in private homes, rendering the definition of "domestic" superfluous except in relation to housekeepers. It would also exclude most workers fitting into the category of "domestic" from hours of work and overtime protections, while the current policy is not to exempt them.

In *Re Renaud*, however, the meaning of "family type residential dwelling" was said to "lean more to group care settings rather than providing care to an individual in a private residence."[726] The latter interpretation is definitely the one on which the Thompson Commission proceeded, and it appears to be the one applied by the Employment Standards Branch as well.[727] If this interpretation is correct, the phrase "family type

724. *Re Dolfi*, *supra,* note 722; *Re Renaud*, BCEST #D436/99; reconsideration refused BCEST #D373/00; *Re Wood*, BCEST #D176/00; *Re Kopchuk* (11 Apr. 2005), BCEST #D049/05. See also the ESB *Interpretation Guidelines Manual*, definition of "sitter". *Re Kopchuk* and *Re Tikkanen*, BCEST #D433/02 refer to a need to interpret the definition of "sitter" and other provisions operating as exclusions from the ESA narrowly, but as those cases involved employees living in the employer's residence, the employees could easily be characterized otherwise than as sitters.

725. See *Re Fazal* (7 Feb. 2001) BCEST #D063/01.

726. *Re Renaud* (28 Oct. 1999) BCEST #D436/99.

727. See Thompson, *supra*, note 2 at 70. See also the ESB *Interpretation Guidelines Manual*, definition of "residential care worker," online: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esr-definitions/esr-def-residential-care-worker.

residential dwelling" is superfluous. In any case, its presence in the definition of "residential care worker" does not contribute to clarity.

The Project Committee recommends:

51. The definition of "residential care worker" in the Employment Standards Regulation *should be amended by deleting the words "or family type residential dwelling" in paragraph (a) of the definition.*

(d) Pitfalls of misclassification

For employers, misclassification of their in-home employee can be costly. In *Re The Cambie Malone's Corporation*[728] an employer assumed that a caregiver hired to care for his elderly mother who lived-in for part of the week was a sitter, and so was excluded from the ESA. Over a 15-month period, he paid her a monthly rate for 50 hours per week that did not equate to minimum wage, and did not pay overtime. The caregiver performed general housecleaning and laundry as well as providing personal care for the employer's mother. The director's delegate found the caregiver was a regular employee – neither a domestic nor a sitter, and not within any excluded category. Her duties were not solely related to caregiving. The delegate found the employee had worked 91.5 hours per week consisting of 40 hours at a regular wage, 15.5 hours of overtime at time and a half, and 36 hours of double time. The employer's liability for wages and penalties amounted to over $25,000.

In *Re Kopchuk*,[729] the employers of a live-in child care attendant assumed she was an independent contractor or a sitter, and paid her only a flat rate of $450 per month for approximately three months, which they argued was net of an appropriate deduction for room and board. The Director's delegate determined that the complainant was a domestic, not a sitter or independent contractor. The determination required payment of the complainant at the minimum wage for 35 hours per week for the entire period of employment, plus vacation pay, and statutory holiday pay. Three administrative penalties were also imposed for contravention of different breaches of the ESA. The Employment Standards Tribunal upheld the determination initially and on reconsideration.

728. (26 Oct. 2016) BCEST #D139/16; reconsideration refused (26 January 2017) BCEST #RD007/17.

729. *Supra*, note 724; varied on reconsideration (27 July 2005) BCEST #RD114/05.

(e) Uneven application of basic protections of the ESA

For in-home employees, the protection of the ESA is capriciously bestowed. The exclusion from overtime premium pay of night attendants, residential care workers, and live-in home support workers may be explained as relating to the difficulty of distinguishing between on- and off-duty hours when these workers are on call, but not required to be actively working throughout the time they are at the workplace.[730] Other exclusions lack obvious justification. The Employment Standards Tribunal has repeatedly described the complete exclusion from the Act of "sitters," in particular, as creating an untenably large gap in coverage under the Act because of the breadth of the current definition of that term.

Re Dolfi[731] concerned an employee certified as a "home support worker" who was hired to look after an elderly woman. Dolfi did not live in the woman's residence, but worked there during the week and also worked extended 13-hour shifts on weekends. She was not paid overtime for the longer shifts, nor did she receive vacation pay. After being dismissed abruptly without cause, she filed a complaint claiming overtime and vacation pay. The ESB dismissed the complaint on the ground that Dolfi was excluded from the ESA entirely as a sitter.

The Employment Standards Tribunal reluctantly upheld this determination, commenting as follows:

> I am not comfortable with the proposition that the work performed by home support workers like Ms. Dolfi should be excluded from the Act's minimum requirements in the same way as are newspaper carriers and persons on job creation or work experience programs. I am also uncomfortable concluding that Ms. Dolfi's work is no more deserving of the Act's protection than the work performed by the occasional babysitter of a child.
>
> The greatest difficulty arises from the proposition that Ms. Dolfi's work would have been covered by the Act if she had been a home support worker employed by a business providing that service. Why would Ms. Dolfi not receive overtime pay, when her Camosun College classmate would be paid overtime just for being associated with a home support business? The reason her classmate is paid overtime is that her classmate is clearly an employee. I see no difference whatsoever between this hypothetical classmate's employment relationship and the employment relationship between Ms. Dolfi and Mr. Johnson. I see no reason why Ms. Dolfi should be a "sitter" excluded from the Act, when her classmate

730. See *Re Fazal*, *supra*, note 725 at 7.

731. *Supra*, note 722. "Home support worker" is a term used in the care industry, but not found in the ESA or regulations.

> performing identical work would receive the benefit of all of the Act's provisions.

The Tribunal member concluded he was bound by the plain language of the definition of "sitter," but added this final comment:

> I hope the regret I have expressed above will be noted by the Director and in future reviews of the Act, an effort will be made to clarify whether the legislature continues to wish that skilled workers such as Ms. Dolfi must be completely excluded from its provisions.

Dolfi was decided in 1997. Over 20 years later, there has been no change.

The Tribunal reluctantly came to conclusions similar to those in *Dolfi* in *Re Renaud*[732] and *Re Wood*.[733] These decisions involved caregivers performing 12- or 24-hour shifts, but as they were not living continuously in the employer's residence and were engaged as individuals rather than being employed by a care agency, they came within the definition of "sitter." The Director sought reconsideration of the decision in *Renaud* on the ground that the definition of "sitter" was not intended to apply to full-time workers, but only to casual engagements for caregiving during brief periods of parents' or family members' absence. The application was dismissed on the ground of delay by a three-member panel, with a strong statement that the plain wording of the definition precluded the interpretation advanced by the Director.[734]

It is arguably impractical to attempt to regulate highly informal arrangements for occasional supervision of children or provision of care to a dependent adult for very short periods in the same way that full-time employment is legally regulated. Exclusion of the classic "babysitting" arrangement from the ESA is defensible on that ground. The definition of "sitter" nevertheless covers a broad class of full-time home support workers or personal care attendants (however one may wish to call them). The terms of employment of this broad class of full-time workers can legally be inferior to the minimum standards in the ESA. For example, sitters are not entitled to the

732. *Supra*, note 726.

733. (2 May 2000) BCEST #D176/00.

734. BCEST #D373/00. In a subsequent decision, *Re Fazal*, *supra*, note 725, the restrictive interpretation of the definition of "sitter" that the Director had unsuccessfully advanced in *Renaud* was adopted, but this decision appears to be anomalous. In any case, the remarks in *Fazal* about the decision were tangential to the result in that appeal. The weight of Tribunal case law is represented by *Dolfi* and *Renaud*, in which the definition of "sitter" was accorded the full breadth of its literal meaning.

minimum wage because s. 16 of the ESA does not apply to them, nor do the restrictions on hours of work.[735]

In the case of full-time workers, this goes against the general purpose of the ESA as being to set minimum standards of compensation and conditions of employment, as expressed in sections 2(a) and 4 of the Act.

(f) Thompson Commission recommendation regarding "sitters"

The Thompson Commission considered that a 15-hour per week threshold was an appropriate dividing line between casual caregiving to children and adults and regular employment. Thompson recommended that the exclusion of so-called "sitters" from the ESA be restricted to persons employed on a non-commercial basis to care for a child or adult for less than 15 hours per week, and that the minimum standards of the ESA should apply to persons who "provide personal care services on more than a casual basis."[736] Thompson's associated recommendation to extend the full protection of the ESA to domestics is reflected in the present Act, but the recommendation concerning sitters is not.

(g) Changing the definition of "sitter"

The definition of "sitter" must be restricted to casual, non-occupational caregiving if the protection of the Act is to extend to those who perform caregiving and domestic work in private residences as their occupation, regardless of where they reside.[737]

The Project Committee took note of a definition of "domestic worker" in regulations under the Ontario *Employment Standards Act, 2000*, which excludes a "sitter who provides care, supervision or personal assistance to children *on an occasional, short-term*

735. One of the terms that the TWFP requires in each TFW caregiver contract is "The parties agree to abide by provincial/territorial/labour/employment standards regarding wages and leave." There are, however, no provincial wage and leave standards applicable to sitters due to their exclusion as a class from the application of the ESA.

736. *Supra*, note 2 at 74.

737. Article 1(c) of the ILO *Domestic Workers Convention, 2011* (C189) does not apply to "a person who performs domestic work only occasionally or sporadically and not on an occupational basis." This convention has been ratified by 24 countries, including several on the same socioeconomic level as Canada, such as Germany and Switzerland. While Canada has not ratified this convention, it is worth noting that it indicates the exclusion of informal arrangements for occasional babysitting from the scope of employment legislation appears to be consistent with an international standard.

basis."[738] This definition within a definition excludes casual, non-occupational caregiving, and appears to capture the original policy intent of the "sitter" exclusion from the ESA as it was explained to the Thompson Commission.

The Project Committee preferred, however, to narrow the definition of "sitter" quantitatively by reference to a maximum number of working hours in a week, as recommended by the Thompson Commission, rather than descriptively as in the Ontario provision mentioned. While a maximum of 15 hours per week was seen as a realistic ceiling, there was concern that it was too inflexible, potentially giving rise to contraventions of the ESA in situations where neither party regarded an informal babysitting arrangement as an employment relationship. The majority of members thought a maximum number of hours worked per week within a four-week period was a more realistic ceiling. A minority favoured a 15 hour per week ceiling without averaging.

A **majority** of the members of the Project Committee recommend:

52. The definition of "sitter" in the Employment Standards Regulation *should be amended to read as follows:*

> **"sitter"** means a person employed in a private residence solely to provide the service of attending to a child *or adult for an average of not more than 15 hours per week in any period of 4 weeks*, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
> (a) a business that is engaged in providing that service, or
>
> (b) a day care facility;

A **minority** of the members of the Project Committee recommend:

52a. The definition of "sitter" in the Employment Standards Regulation *should be amended to read*

> **"sitter"** means a person employed in a private residence solely to provide the service of attending to a child *or adult for not more than 15 hours per week*, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
> (a) a business that is engaged in providing that service, or
>
> (b) a day care facility;

738. *Exemptions, Special Rules and Establishment of Minimum Wage*, O. Reg. 284/01, s. 1.

Chapter 10. The Complaint and Enforcement Process

A. Overview of Enforcement Procedure Under the ESA

1. A Complaint-Based Process

The complaint and enforcement process is governed by Parts 10 and 11 of the ESA. Part 10 covers complaints and how they are resolved, comprising sections 74 to 86.2. Part 11 provides an array of powers for enforcing determinations made with respect to complaints. It comprises sections 87 to 101.1.

Enforcement of the ESA is primarily complaint-based, although the Director has the power to investigate alleged non-compliance with the ESA, whether or not a complaint has been made.[739] In practice, investigations are seldom conducted in the absence of a prior complaint.

2. The Self-Help Kit

The ESA was amended in 2002 to allow the Director to refuse to accept or proceed with a complaint if the employee did not take the steps specified by the Director to facilitate resolution or investigation of a dispute before submitting the complaint.[740] Since then, Branch policy has been to insist that in most cases an employee use the Self-Help Kit to attempt to resolve a dispute with the employer before the Branch will deal with a complaint of a contravention.

Completing the Self-Help Kit involves filling in a Request for Payment form that includes a calculation of amounts owing to the employee. The employee must then provide the completed form to the employer together with a standard Information Notice and a factsheet on complaint resolution under the ESA. The Information Notice directs the employer to respond to the employee within 15 days, and warns that a complaint could be filed with the Branch if the employer fails to respond. It also warns of

739. *Supra*, note 1, s. 76(2).

740. *Ibid.*, s. 76(3)(d), as am. by S.B.C. 2002, c. 42, s. 39.

a mandatory administrative penalty if a determination is made that the employer has contravened the Act.

The Branch does not require an employee to use the Self-Help Kit before submitting a written complaint if:

- the employee is under the age of majority;
- the employee is a domestic, agricultural, textile, or garment worker;
- the employee has significant language or comprehension difficulties;
- the complaint concerns a leave provision of the ESA, i.e. maternity leave, parental leave, family responsibility leave, bereavement leave, reservists' leave, or jury duty;
- the employer is no longer in business, or has been locked out by a landlord;
- the employee has already sent a written communication to the employer referring to the matter in dispute and requesting resolution, and provides a copy to the Branch.

In addition, if the six-month limitation period mentioned below is within 30 days of expiring, the Branch recommends that employees submit a complaint first and then use the Self-Help Kit.

The Self-Help Kit contains a statement that after the employee has done what the kit requires and 15 days have gone by without a resolution, the employee may file a complaint through an office of the Branch. There is no statutory bar to the employee filing the complaint earlier, but the Branch may reject it or refuse to proceed with it until that interval has elapsed.

3. Complaints

An employee, former employee, or other person may make a complaint alleging a contravention of a requirement of Parts 2 to 8 of the ESA or one that is contained in specified regulations.[741] Parts 2 to 8 cover the substantive requirements concerning working conditions, the balance of the ESA consisting chiefly of administrative and procedural provisions.

741. *Ibid.*, s. 74(1).

The complaint must be in writing and be submitted to an office of the Employment Standards Branch.[742] No specific form is prescribed, although an optional form is made available at Branch offices.[743]

A complainant may make a written request that identifying information not be disclosed. The director is obliged to comply with the request for confidentiality unless disclosure is necessary for the purposes of a proceeding under the ESA or the Director considers disclosure to be in the public interest.[744]

4. Limitation Periods for Complaints

Section 74(3) states that a complaint by an employee whose employment has been terminated must be delivered to the Branch within six months of the last day of employment.[745]

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742. *Ibid.*, s. 74(2). There are offices of the Branch in Victoria, Richmond, Kelowna, Nanaimo, Dawson Creek, Langley, Nelson, Prince George, and Terrace.

743. The Employment Standards Tribunal has held that a complaint need not meet formal criteria, but must be in writing and allege that a person has contravened the ESA. An error in identifying the legal name of the employer does not invalidate the complaint: *Re Grab Bag Emporium Ltd.* (30 March 2004) BCEST #D057/04. The *Interpretation Guidelines Manual* issued by the Branch indicates that a complaint should include the following to enable the Branch to deal with it:

- the full name, contact information, and social insurance number of the complainant;
- the correct name and contact information of the employer;
- the location where the work was performed;
- the nature of the contravention and an outline of the circumstances leading to the complaint;
- the date of hire and termination (if applicable);
- the employee's rate of pay;
- the nature of the work performed by the employee(s) in question;
- supporting documentation, e.g. a statement of the time or days worked for which wages are claimed, pay statements, copy of an NSF paycheque, a copy of the *Record of Employment* if one was issued, etc.

744. *Supra*, note 1, s. 75(1). Section 75(1) prevails over the *Freedom of Information and Protection of Privacy Act*, except for the obligations of a public entity to provide information to the Information and Privacy Commissioner under ss. 44(2) and (3) of that Act.

745. *Ibid.*, s. 74(3). This means the last day on which the employment relationship subsisted, and is not necessarily the last day worked: *Re Huang* (9 September 2004) BCEST #D159/04; *Re Baggio's Ristorante Ltd.* (2 April 2007) BCEST #RD029/07.

Section 74(4) provides that a complaint of a contravention of sections 8 (false representations in hiring), 10 (charging a fee from person seeking employment) or 11 (employment agency or farm labour contractor making certain prohibited payments) must be delivered within six months of the date of the alleged contravention.

The British Columbia Court of Appeal held in 2007 that the six-month limitation period (time limit) is not absolute, and the Director has a discretion to accept and act upon an untimely complaint. This is because section 76(3)(a) of the ESA states the Director "*may* refuse" to accept a complaint filed out of time.[746] Until this decision of the Court of Appeal, the limitation periods under section 74(3) and (4) were interpreted as incapable of extension.

These limitation periods do not apply to complaints based on other provisions that are made by a *current* employee or someone acting on behalf of a current employee, but there is a time-based limit on recovery of unpaid wages, as explained immediately below.

5. Six-Month Limit on Wage Recovery

If a complaint relates to non-payment of wages, the maximum amount recoverable is the amount of wages that became payable within six months before the earlier of the date of the complaint and the termination of employment, plus interest.[747]

If the Director or a delegate determines that wages are owing, otherwise than pursuant to a complaint, the amount that an employer can be compelled to pay is limited to the wages that became payable in the six months before the Director first informed the employer of the investigation leading to the determination, together with interest.[748]

6. Investigation

Section 76(1) requires the Director to "accept and review" a complaint. Previous to a 2002 amendment, section 76(1) stated the Director "must investigate" a complaint.[749] The substitution of a duty to "review" a complaint in place of a duty to investigate was accompanied by amendments removing the jurisdiction of the Employment Standards Tribunal to hear appeals from determinations by the Director and the

746. *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, 73 B.C.L.R. (4th) 295.

747. *Supra*, note 1, s. 80(1)(a).

748. *Ibid.*, s. 80(1)(b)

749. See R.S.B.C. 1996, c. 113, s. 76(1) prior to amendment by S.B.C. 2002, c. 42, s. 39.

Director's delegates on questions of fact. Associated with these legislative changes was a shift in Branch practice away from a complaint resolution process relying on investigation and towards one of mediation-adjudication, as explained below.[750]

Despite the shift in Branch practice and the change in the wording of section 76(1), the rest of Part 10 of the ESA contemplates a process based on factual investigation leading to a determination as to whether the ESA has been contravened.

Section 76(2) empowers the Director to conduct "an investigation to ensure compliance," whether or not a complaint has been received.

Section 76(3) provides that the Director may refuse to "accept, mediate, investigate or adjudicate" a complaint, or may cease or postpone doing so, on the following grounds:

(a) the complaint is not made within the time limit specified in section 74 (3) or (4);

(b) the Act does not apply to the complaint;

(c) the complaint is frivolous, vexatious or trivial or is not made in good faith;

(d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint;

(e) there is not enough evidence to prove the complaint;

(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator;

(g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint;

(h) the dispute that caused the complaint may be dealt with through the grievance procedure under a collective agreement; or

(i) the dispute that caused the complaint is resolved.

750. In *Re British Columbia Securities Commission* (17 December 2007) BCEST #RD121/07; reconsideration of BCEST 3D033/07, the Tribunal stated at para. 25, "The amendments [abolishing appeals to the Tribunal on questions of fact] allowed, or caused, the Director to change the complaint fact finding process from one which was predominantly investigative to one which was predominantly adjudicative."

If the complaint is referred for investigation, the investigating officer gathers evidence from both the employer and employee, presents the evidence of each side to the other, and seeks their response. The investigating officer will attempt to resolve the complaint informally before making a determination.[751]

7. Settlement Agreements

The Director is empowered under section 78(1) to "assist in settling a complaint or a matter investigated under section 76." The Director may arrange for direct payment to an employee or other person in furtherance of a settlement agreement, or receive wages or other amounts on behalf of the employee that are paid pursuant to a settlement agreement.[752] A settlement agreement is legally binding, and the Director may file it at any time in a British Columbia Supreme Court registry. It may then be enforced like a judgment in favour of the Director.[753]

Section 78(5) provides that a settlement agreement is not to be interpreted as a waiver of rights conferred by the ESA.

8. Determinations

If a settlement is not possible, the investigating officer, as the Director's delegate, makes a determination on the basis of the findings.[754]

The Employment Standards Tribunal has held that the Director has "considerable latitude" over the procedure used to resolve a complaint and in relation to the evidence relied upon in making a determination, subject to adherence to principles of fairness and reasonableness.[755] While the ESA contemplates that the Director may hold an oral hearing, neither party to a complaint has an actual right to an oral hearing or to

751. Employment Standards Branch, *Complaint Resolution and the B.C. Employment Standards Act Factsheet*, online: http://www.labour.gov.bc.ca/esb/facshts/complaint_resolution.htm.

752. *Supra*, note 1, s. 78(2).

753. *Ibid.*, s. 91(1).

754. Like all powers of the Director, the responsibility for making a determination may be delegated: s. 117. Anyone named in a determination may request written reasons within seven days after the determination is served: *ibid.*, ss. 81(1.1), (1.2).

755. *Re Mykonos Taverna (c.o.b. Achillion Restaurant)* (29 December 1998), BCEST #D576/98 at 6; *Re Sarmiento* (22 October 2013) BCEST #RD082/13 at para. 62.

cross-examine witnesses for the opposite party.[756] The Director only needs to comply with section 77, which requires reasonable efforts be made to give the person under investigation an opportunity to respond.[757]

If the determination contains a finding of a contravention of the ESA, the person in contravention may be required to:

(a) comply with the provision in question;

(b) remedy or cease doing an act;

(c) post a notice, in a form and location specified by the director, respecting

(i) a determination, or

(ii) a requirement of, or information about, the ESA or regulations;

(d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;

(e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;

(f) pay any costs incurred by the director in connection with inspections under s. 85 related to investigation of the contravention.[758]

If the contravention relates to sections 8 (false representation in hiring), 83 (retaliation by employer) or Part 6 (leaves and jury duty), the determination may require an employer to:

(a) hire a person and pay the person any wages lost because of the contravention;

(b) reinstate a person in employment and pay the person any wages lost because of the contravention;

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756. *J.C. Creations Ltd. o/a Heavenly Bodies Sport* (17 November 2003) BCEST # RD317/03. Similarly, there is no requirement for the Tribunal to grant an oral hearing on a reconsideration of an appeal decision, even if the appellant and the Director jointly submit there should be one: *D. Hall & Associates Ltd. v. Director of Employment Standards and others*, 2001 BCSC 575.

757. *Re 6307485 Canada Ltd.* (20 November 2009) BCEST #D121/09, at paras. 63-65.

758. *Supra*, note 1, s. 79(1).

(c) pay a person compensation instead of reinstating the person in employment;

(d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.[759]

The powers of reinstatement or forcing employers to hire someone are seldom if ever used, because they would generally not be conducive to a well-functioning employment relationship.

A contravention also attracts a mandatory administrative penalty in addition to any payment of outstanding wages or other obligation set out in a determination.[760] Before 2002, administrative penalties for contraventions of the Act were discretionary. The basic penalty is a fine of $500 for a contravention, which escalates to $2500 for a second contravention of the same requirement of the Act within a three-year period, and to $10,000 for a third or subsequent contravention of the same requirement within a three-year period.[761] The penalty is payable whether or not the person against whom is it assessed has been convicted for an offence under the ESA, or is also liable to pay a fine for an offence arising from an ESA contravention.[762]

Once a determination has been made under the ESA requiring payment of wages, an employee may not commence another proceeding to recover the same wages without the consent of the Director, unless the determination is cancelled by the Director or a decision of the Employment Standards Tribunal.[763] A determination may be filed in a British Columbia Supreme Court registry and enforced as a judgment of the court.[764]

A determination may be appealed to the Employment Standards Tribunal, as explained later in this chapter.

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759. *Ibid.*, s. 79(2).

760. *Ibid.*, ss. 98(1), (1.1). A determination must include a statement of the applicable penalty: s. 8(1.2).

761. *Supra*, note 31, as amended, s. 29(1).

762. *Supra*, note 1, s. 98(3). Section 29(4) of the *Employment Standards Regulation* states, however, that imposition of an administration penalty is a bar to prosecution for the same contravention. Section 29(4) of the regulation and s. 98(3) of the Act appear to be in conflict, which raises a question about the validity of s. 29(4).

763. *Supra*, note 1, s. 82.

764. *Ibid.*, ss. 91(1), (2).

9. The "Education, Mediation and Adjudication" Stream

Under current practice, once a complaint is accepted by the Employment Standards Branch, a decision is made whether the matter should be "mediated, adjudicated or investigated."[765]

The Branch distinguishes between investigations and an alternative stream for the handling of complaints that it describes as "education, mediation, and adjudication." The factsheets published by the Branch state that the majority of complaints are dealt with under the alternative stream than through investigation.

In the education, mediation, and adjudication stream, the Branch initially contacts the parties and explains the requirements of the Act. If this does not result in the dispute being resolved, it is referred to mediation.

The mediation is conducted by a Branch official either by telephone or in person. If mediation resolves the dispute, the Branch official will cause the parties to enter into a written settlement agreement.

If mediation does not resolve the dispute, the complaint moves to the adjudication stage. A different Branch official will conduct a complaint hearing by teleconference or in person. The parties must attend or be represented by a witness who can testify from personal knowledge surrounding the matters in issue in the complaint. Witnesses give evidence on oath and are subject to cross-examination. A party or witness must bring his or her own interpreter, if one is required. At the conclusion of the adjudication hearing, the Branch official issues a decision based on the evidence at the hearing, which the Branch treats as equivalent to a determination made following an investigation.[766]

In contrast to the investigation–determination process, which the ESA outlines in considerable detail, the "education, mediation, and adjudication" stream for resolving complaints rests on a minimal legislative foundation.[767] Conferral of authority on the Director by section 78 to "assist in settling a complaint or a matter investigated under

765. *Interpretation Guidelines Manual*, *supra*, note 293, webpage entitled "ESA Section 76 – Investigations."

766. See *Complaint Resolution and the B.C. Employment Standards Act Factsheet*, *supra,* note 751 and the *Adjudication Factsheet*, online: http://www.labour.gov.bc.ca/esb/facshts/adjudication.htm.

767. This has attracted stakeholder comment. The BC Chamber of Commerce submission to the Ministry of Labour, Citizens' Services and Open Government's 2010/11 Stakeholder Engagement Process noted at p. 9: "The Director has founded its *(sic)* adjudication process on very little statutory power to do so…."

section 76" is arguably equivalent to authority to engage in mediation, but only in respect of an investigation carried out under section 76. The only reference to "adjudication" in the ESA is in s. 76(3), and it is in connection with the grounds on which the Director may refuse to proceed with a complaint. The ESA does not set out a procedure for "adjudication" by the Director or a delegate that is distinct from the power to make a determination following investigation.

10. Appeal of a Determination

Anyone served with a determination may appeal to the Employment Standards Tribunal on the grounds of

(a) error in law;

(b) failure to observe the principles of natural justice; or

(c) new evidence that was unavailable when the determination was made.[768]

An appellant must deliver to the Tribunal a written request for an appeal in Form 1 set out in the Appendix to the Tribunal's *Rules of Practice and Procedure*. The request must specify the grounds of appeal, together with a copy of the reasons for the determination and payment of the appeal fee, if any is prescribed.[769] A copy of the request must be delivered to the Director.[770] This must be done within 21 days after service of the determination, if the appellant was personally served or served by e-mail or fax as permitted by section 122(3), or within 30 days if the appellant was served by registered mail.[771]

The Tribunal receives the record that was before the Director or the Director's delegate at the time the determination was made or varied, including any witness statement and other document that was considered.[772]

768. *Supra*, note 1, s. 112(1). Previous to 2002 amendment, the grounds for appeal were unrestricted.

769. *Ibid.*, s. 112(2)(a). See also Rule 18(3) of the *Rules of Practice and Procedure* of the Tribunal. Currently no appeal fee is prescribed.

770. *Ibid.*, s. 112(2)(b)

771. *Ibid.*, s. 112(3).

772. *Ibid.*, s. 112(5).

An appellant may request the Tribunal to suspend a determination pending appeal.[773] The Tribunal may suspend the determination for a period that it deems appropriate only if the appellant deposits with the Director the amount, if any, required to be paid under the determination or a smaller amount fixed by the Tribunal.[774]

The Tribunal may dismiss the appeal at any time if it finds that it was filed out of time, in bad faith or for an improper purpose or "motive," if the appeal was not pursued diligently, or that it has no reasonable prospect of success.[775] The Tribunal may also refer the matter back to the Director for further investigation, or recommend an attempt to settle it, before considering the appeal.[776]

The Tribunal usually conducts appeal hearings only in writing, and only exceptionally holds an oral or telephone hearing.[777] The Director as well as the respondent are invited to make written submissions within a specified time in response to those of the appellant.[778] The appellant may be asked to provide a reply submission.[779]

The panel deciding the appeal may consist of one, three, or five members of the Tribunal. Generally, the appeal is heard and decided by a single member.[780]

The Director's proper role in the appeal is limited to explaining the basis for the determination. The Director is not an agent of the employee, and must not cross the line into advocacy.[781]

773. *Ibid.*, s. 113(1).

774. *Ibid.*, s. 113(2).

775. *Ibid.*, s. 114(1).

776. *Ibid.*, s. 114(2).

777. Employment Standards Tribunal, *Rules of Practice and Procedure*, Rule 8(1), online: http://www.bcest.bc.ca/Rules%20of%20Practice%20and%20Procedure%20-%20August%2020,%202015.pdf.

778. *Ibid.*, Rule 23(1)(b).

779. *Supra*, note 777, Rule 25(1).

780. *Ibid.*, Rule 7(1).

781. *BWI Business World Incorporated* (19 April 1996) BCEST #D050/96; *D. Hall and Associates Ltd.* BCEST #D354/89; *Re British Columbia Securities Commission*, *supra*, note 659; *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244.

The Tribunal may make an order confirming, varying, or cancelling the determination, or refer the matter back to the Director.[782]

The Tribunal has exclusive jurisdiction to determine questions of fact, law and discretion that arise or are required to be determined in an appeal or reconsideration under the ESA.[783] A decision of the Tribunal on a matter within this exclusive jurisdiction is final and not open to further appeal or review.[784]

Tribunal decisions remain subject to judicial review on the very limited grounds specified in section 58 of the *Administrative Tribunals Act*.[785] That provision confines the power of the British Columbia Supreme Court to set aside findings of fact or law or an exercise of discretion by the Tribunal only if they are patently unreasonable, or if the Tribunal has acted in a manner inconsistent with common law rules of natural justice and procedural fairness.[786]

11. Reconsideration

A person named in a decision or order of the Tribunal, or the Director, may apply for reconsideration of the decision or order.[787] The Tribunal is also empowered to reconsider a decision or order on its own initiative within 30 days after it was made.[788]

An Application for Reconsideration in Form 2 under the Tribunal's Rules of Practice and Procedure must be submitted within 30 days of the decision or order in question.[789] The Tribunal notifies the other parties of the reconsideration application.[790]

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782. *Supra*, note 1, s. 115(1).

783. *Ibid.*, s. 110(1).

784. *Ibid.*, s. 110(2).

785. S.B.C. 2004 c. 45.

786. A decision is patently unreasonable under section 58 of the *Administrative Tribunals Act* if it is exercised arbitrarily, in bad faith, or for an improper purpose. It is also patently unreasonable if it is based predominantly or entirely on irrelevant factors, or overlooks statutory requirements. The rules of natural justice are essentially the right of a party to: notice of proceedings that affect the party, the details of any case against the party, an opportunity to be heard in the proceedings, institutional independence on the part of the decision-making body, and impartiality in decision-making concerning the rights and interests of the party.

787. *Supra*, note 1, s. 116(1).

788. *Ibid.*, ss. 116(1), (2.2).

789. *Ibid.*, s. 116(2.1). See also *supra*, note 777, Rule 27(2).

790. *Supra*, note 777, Rule 29(2).

The Tribunal uses a two-stage procedure in reconsideration applications. At the first stage, a single Tribunal member assesses the application without seeking submissions from the other parties to determine if the application should proceed.[791] At this stage, the Tribunal member considers whether the application raises a sufficiently important and arguable legal issue or matter of fact, principle, or procedure so as to justify a fuller examination of the application on its merits, based on their importance to the parties or their implications for future cases.[792]

If the application is dismissed in whole or in part at this first stage, the Tribunal issues a decision accordingly.[793]

If the application is allowed, the Director and the other parties are notified accordingly and invited to provide written submissions within a specified time.[794] The submissions may be provided to the other parties, and the applicant will be given an opportunity to provide a reply submission.[795]

The Tribunal has repeatedly declared that reconsideration is a power that must be applied with caution and only in exceptional cases.[796] The following grounds have been considered to justify reconsideration:

- a failure to comply with the principles of natural justice;
- a mistake of fact or law;
- inconsistency with other decisions not distinguishable on the facts;
- significant and serious new evidence that was not reasonably available to the original panel;
- misunderstanding of or failure to deal with a significant issue;

791. *Ibid.*, Rule 29(4).

792. *Re 501546 B.C. Ltd.* (11 December 2013) BCEST #RD097/13, at para. 4; *Re AMS* (19 September 2007) BCEST #RD089/07, at para. 16; *Re Sarmiento*, supra, note 755 at para. 56.

793. *Supra*, note 777, Rule 29(5).

794. *Ibid.*, Rule 30(1).

795. *Ibid.*, Rule 33(1).

796. *Ibid.* See also *Re Allard* (18 June 1997) BCEST #D265/97.

- clerical error.[797]

After considering the submissions in a reconsideration, the Tribunal may confirm, vary, or cancel the order or decision in question, or refer the matter to the original panel or a different panel.[798]

B. Enforcement and Procedural Reform Issues

1. Investigative Authority of the Director

In British Columbia as in other provinces, proactive enforcement has been greatly reduced by a shift in direction from enforcement of employment standards towards dispute resolution. The Employment Standards Branch carries out an active inspection program only in the agricultural sector. The change in direction from investigation to dispute resolution coincided with a period of pronounced reduction in the finance and staffing of the Employment Standards Branch, and came about partly in response to it.

All provincial systems for enforcing employment standards and the federal Labour Program under which Part III of the *Canada Labour Code* is administered are principally complaint-based. Some jurisdictions continue nevertheless to supplement this with proactive enforcement. Ontario followed British Columbia in embracing a self-help and dispute resolution model of enforcement in 2010, but continued to conduct so-called "blitzes," or campaigns of workplace inspections on an industry or sectoral basis. In Ontario, workplace inspections in recent years have unearthed startling levels of non-compliance with employment standards.[799]

797. *Re Kiss* (19 June 1996) BCEST #D122/96; *Re Sarmiento*, *supra*, note 755 at para. 56.

798. *Supra*, note 777, Rule 34(1).

799. In the fiscal years between 2011/12 and 2014/15, the percentage of workplace inspections in which contraventions were detected ranged between 74.7 per cent to 77.4 per cent, according to research conducted for the Changing Workplaces Review. Eighty-three per cent of expanded inspections (inspections conducted as a result of individual complaints pointing to a wider pattern of non-compliance) revealed additional contraventions: Leah F. Vosko, Andrea M. Noack, Erick Tucker, "Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and their Resolution under the *Employment Standards Act, 2000",* online: https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Vosko%20Noack%20Tucker-%206A%20-ESA%20Enforcement.pdf at 41-42. A 2014 "blitz" inspection of internship programs operated by a select group of Ontario employers revealed contraventions in 13 out of 18 workplaces with interns who were covered by the Act. Thirty-seven compliance orders were issued, and $48,543 was assessed as unpaid wages. See online: https://www.labour.gov.on.ca/english/es/inspections/blitzresults_internships.php.

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.[800] The Arthurs Report recommended that random audits, and inspections concentrating on frequently violated provisions and enterprises or industries where non-compliance is prevalent, should be a part of the federal Labour Program.[801] In the case of Ontario, the most common contraventions detected in inspections conducted between 2011/12 and 2014/15 (public holiday pay, record-keeping, excessive hours) differed from the ones forming the basis of most verified individual complaints (termination pay, vacation leave or pay, unpaid wages).[802] Complaints-based enforcement alone would not have revealed a complete picture of the areas in which contraventions were most prevalent.

The Special Advisors to the Changing Workplaces Review in Ontario made even stronger recommendations in favour of the retention and expansion of proactive enforcement. They concluded that concentrating resources on the complaint-driven process interferes with enforcing standards on a broader level. In their view, the growth of precarious employment further diminished the effectiveness of a complaint-based enforcement strategy, because that large portion of the workforce with minimal job security would not be motivated to assert its rights by invoking the complaint 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."[803]

The Project Committee believes 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.

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800. See Law Commission of Ontario, *supra*, note 81 at 54-57; Arthurs, *supra*, note 102 at 212-213; Kevin Banks, "Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness," online: https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Banks-6B-ESA%20Enforcement.pdf at 59-61.

801. *Supra*, note 102 at 212-213.

802. Vosko *et al.*, *supra*, note 799 at 43.

803. *Supra*, note 72 at 61-74.

The Project Committee was encouraged in this view by the strong support expressed for it by employers and employees alike in the response to the consultation paper. Major business organizations also supported a robust investigative capacity. 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 Project Committee recommends:

53. The ESA should continue to confer authority on the Director to carry out investigations to ensure compliance with the Act, whether or not a complaint of a contravention has been made.

2. Mandatory Use of the Self-Help Kit

The introduction of mandatory use of the self-help kit in 2002 was associated with the shift away from an investigative procedure and towards one of dispute resolution. It also coincided with severe reductions in the resources of the Employment Standards Branch, resulting in a corresponding reduction in the ability of the Branch to deal with complaints.[804]

Following the introduction of mandatory use of the self-help kit, there was a marked and suspicious decline in the number of complaints filed. In fiscal 1999/2000, before the self-help kit was introduced and the shift in procedure occurred, the Employment Standards Branch received 11,311 complaints.[805] In 2003/04, after these changes had taken place, the number of complaints received had fallen to 4,839.[806]

Despite the intervening growth in the British Columbia economy and workforce, the level of complaint filings does not appear to have changed significantly since then.

804. Between the fiscal years 2000/01 and 2002/03, the budget for administration of the ESA and other employment-related programs was reduced by 20 per cent: *Supplement to the Estimates*, Budgets 2001 and 2002. Between 2000/01 and 2003/04 the staff of the Employment Standards Branch was reduced by one-third, and the number of Branch offices in the province was reduced from 17 to nine.

805. Ministry of Labour, *Annual Performance Report 2000-2001* (Victoria: The Ministry) at 15.

806. David Fairey, "Eroding Worker Protections – British Columbia's New "Flexible" Employment Standards" (Vancouver: Canadian Centre for Policy Alternatives, 2005) at 5, citing complaints data provided by the Director of Employment Standards.

The average number of complaints received in each fiscal year by the Branch between 2010/11 and 2014/15 was 5,942.[807]

In fiscal 1999/2000, the Branch collected $11.3 million in unpaid wages.[808] The annual average amount of unpaid wages collected between fiscal 2010/11 and 2014/15 was $6.43 million.[809]

The drastic decline in the level of filed complaints and unpaid wages collected following the introduction of the self-help kit is capable of different interpretations. One is that the decline is explained by a sharply higher level of compliance by employers. Another explanation could be "the improved effectiveness and efficiency of the self-help kits," as suggested in the 2002/03 Annual Service Plan Report of the Ministry of Skills Development and Labour (as then constituted).[810] The number of complainants who may have successfully resolved their disputes with an employer during the same period of time without filing a complaint under the ESA is of course unknown. A further interpretation of the decline in filed complaints and unpaid wage collections, however, is that the current regulatory regime has the effect of discouraging ESA complaints.

A decline in employment standards complaints was also observed in Ontario after the introduction of a similar self-help requirement there in 2010.[811] Research conducted in Ontario for the Changing Workplaces Review showed that nearly half of complainants who did not approach the employer before seeking to file a complaint gave fear of reprisal as their reason.[812]

In both British Columbia and Ontario, exceptions to the policy of insisting on use of a self-help remedy as a prerequisite to acceptance of a complaint under the Act have been created over the course of time. This may reflect a tacit acknowledgment that being required to confront the employer before being given access to the complaint process exposes employees to a risk of retaliation. Instances do exist of employees

807. Data provided to the Project Committee by the Director of Employment Standards.

808. Ministry of Labour, *Annual Report 1999-2000* (Victoria, The Ministry, 2000) at 12.

809. Data provided to the Project Committee by the Director of Employment Standards.

810. Ministry of Skills Development and Labour, *Annual Service Plan Report 2002/03* at 14.

811. *Supra*, note 72 at 104-105.

812. Vosko et al. *supra*, note 799 at 22-23. In Ontario, complaints are accepted without previous attempts to resolve a dispute with an employer directly if the employee has a genuine fear of retaliation by the employer, but complainants are asked for the reason why they have not approached the employer first.

being summarily dismissed after following the instructions in the self-help kit and approaching the employer, or because they filed a complaint.[813]

The Project Committee is unanimously of the view 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.

It is telling that major business organizations responding to the consultation paper either supported the tentative recommendation to abolish mandatory use of the self-help kit or raised no objection to its abolition. In the overall body of responses, scarcely any voices were raised in support of mandatory use.

The Project Committee recommends:

54. Use of the self-help kit by an employee should not be a prerequisite to the receipt, review, investigation, mediation or adjudication of a complaint by or on behalf of the employee that the ESA has been contravened.

3. Procedure After the Filing of a Complaint

(a) Minimal or no statutory authority for current practice

The current practice of the Employment Standards Branch in dealing with the majority of complaints through a mediation-adjudication process, rather than through determinations based on investigation, rests on very minimal statutory authority. The investigation-determination and mediation-adjudication streams are treated as alternative procedures, and the outcomes of each assumed to be legal equivalents, but Part

813. See *Re Hellmich* (26 May 2015) BCEST #D046/15 (retaliatory firing after submission of self-help kit form letter to employer); *Re Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated* (10 December 2002) BCEST #D534/02 (retaliatory firing because of filing of unpaid wage complaint). See also Longhurst and Fairey, *supra*, note 96 at 19 (recounting alleged instance of retaliatory firing after use of self-help kit). The Employment Standards Tribunal has emphasized that an employer is not prevented from firing an employee after the employee has used the self-help kit to try to resolve a dispute with the employer. It is only if the dismissal amounts to retaliation contrary to s. 83 that it is prohibited. Conduct amounting to a threat, discrimination, or intimidation designed to thwart a complaint or investigation will amount to retaliation: *Re MacKay* (21 September 2005) BCEST #D146/05 at para. 32.

10 of the ESA provides clear authority and procedural machinery to arrive at a legally binding outcome with respect to only one of those streams, namely investigation-determination.

Section 78(1)(a) authorizes the Director to "assist in settling a complaint or a matter investigated under section 76." This arguably empowers the Director to conduct a mediation in furtherance of possible settlement, but in relation to a matter that has been investigated. There is no provision in the ESA expressly authorizing the referral of a complaint to mediation without any preceding fact investigation.

The only reference to mediation and adjudication in the ESA is the presence of the single words "mediate" and "adjudicate" in the main clause of section 76(3). This is evidently what is relied upon as conferring the necessary authority. Section 76(3), however, actually deals with the basis on which the Director may decline to proceed with a complaint. It states the Director may refuse to "accept, review, mediate, investigate or adjudicate a complaint" or cease doing the same on any one or more of several listed grounds, but it does not contain an express grant of authority to resolve complaints by mediation and adjudication.

The complaint hearings leading to an adjudication that are held if mediations fail similarly lack an adequate statutory foundation. While oral hearings are contemplated by section 84.1, the section only confers powers on the Director to maintain order during a hearing. Section 84.1 is applicable to any hearing that the Director or a delegate holds, including ones held in connection with an investigation. It is not a source of authority to adjudicate a complaint that has not previously been investigated.

Section 77 requires that "a person under investigation" be given an opportunity to respond, but this addresses procedural fairness in the course of an investigation. An oral hearing might be one means by which the Branch could comply with section 77, but that section does not itself provide authority for holding a hearing apart from the context of an investigation.

As it stands, Part 10 of the ESA presents a confusing and misleading picture. Part 10 does not reflect what is actually done in regard to the majority of complaints. It provides a largely self-contained set of enabling and procedural provisions governing the investigation-determination stream. The more commonly used education-mediation-adjudication stream is tenuously based on cryptic one-word references and implication.

Furthermore, the official characterization of decisions at adjudication hearings as equivalent to determinations reached after investigation is problematic. The legal

validity of these decisions is undermined by the lack of unequivocal statutory authority and a well-defined procedural framework for making legally binding determinations under the education-mediation-adjudication stream, as opposed to investigation of complaints.[814] The legally tenuous status of adjudication decisions has attracted adverse stakeholder comment.[815] If a procedural stream based on alternate dispute resolution and adjudicative hearings is kept as a parallel or alternative process for resolving complaints, explicit enabling and procedural provisions to support it need to be added to the ESA.

(b) Is there room for parallel or alternate procedural streams?

The education-mediation-adjudication stream currently in use is criticized because of its orientation towards settlement rather than enforcement of ESA standards.[816] In wage-related disputes, the regulatory emphasis on settlement, coupled with the greater bargaining power typically held by employers, is seen by critics as inevitably creating pressure on complainants to settle for less than what they are owed. Workers' advocates see the adversarial process in the education-mediation-adjudication stream as forcing the employee into an intrinsically unequal contest with the employer, given the employer's normally greater economic power and typically better access to legal representation.[817]

The education-mediation-adjudication stream is defended on the ground that it tends to often resolve complaints sooner than they would reach a conclusion through the investigations-determination process, which can be prolonged by delays in responding to information requests.[818] The Project Committee was told that wage claims, in particular, are generally paid sooner under the mediation-adjudication process than through an investigation.

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814. Administrative decisions purporting to affect legal rights that are made outside the powers conferred by statute are open to challenge on the basis of the doctrine of *ultra vires* ("beyond the powers.") *Ultra vires* acts or decisions are legally ineffective. See *Stephen v. College of Physicians and Surgeons of Saskatchewan*, [1989] 6 W.W.R. 1 (Sask. C.A.)

815. The BC Chamber of Commerce submission in the 2010/11 Stakeholder Engagement Process conducted by the Ministry of Labour, Citizens' Services and Open Government noted at p. 9: "The Director has founded its *(sic)* adjudication process on very little statutory power to do so…."

816. See Peter Severinson, "Controversy in B.C. Employment Standards" (9 June 2010) *Business in Vancouver*, quoting former ESB officials. See also Longhurst and Fairey, *supra*, note 96 at 51, citing a complainant's account of her experience in a mediation of a wage claim.

817. See Longhurst and Fairey, *supra*, note 96 at 52.

818. Severinson, *supra*, note 816, quoting a former Director of Employment Standards.

The Project Committee considers that procedural flexibility should be available to the Director, subject to the comments below about the necessity of carrying out some preliminary factual investigation on intake. Use of informal alternate dispute resolution in simpler cases can free resources needed for complex investigations. Oral hearings in the presence of the parties are sometimes more expeditious and efficient means of establishing facts and sorting out the basis for disputes than a process in which the parties are not brought together. Alternate dispute resolution techniques as well as oral adjudicative hearings that may result in determinations should have a place in the Director's procedural toolkit for these reasons.[819]

(c) Transfer between alternate procedural streams

The Project Committee also considers that the Director's discretion over procedure should extend to an ability to transfer a complaint from one procedural stream to another when appropriate. For example, an individual complaint about statutory holiday pay might be referred to a form of alternate dispute resolution because there is a factual dispute about the time worked, but that process may reveal that the employer has misunderstood the ESA requirements, and other employees may also have been shortchanged.

In order that all affected employees receive like treatment, the Director should be able to suspend the process at that point and begin an investigation that could lead to a determination covering the affected employees as a group. Conversely, an investigation might reveal a factual dispute involving issues of credibility that could best be resolved in an oral hearing where a delegate of the Director can observe the demeanour of parties and witnesses. In such a case, the Director should be able to transfer the matter from the investigation stream to one that involves an adjudicative oral hearing.

When adjudicative hearings are held, they should be held in person or by videoconference wherever possible. The current practice of conducting the majority of hearings by telephone as a standard procedure, rather than out of necessity, should be discontinued. The telephone does not give the decision-maker an adequate platform to assess credibility, nor is it practical to conduct lengthy and complex hearings by telephone.

819. The Special Advisors to the Changing Workplaces Review similarly concluded that it was impractical for the Ontario Ministry of Labour to investigate every employment standards claim, and that claims that are not investigated should be adjudicated by the Ontario Labour Relations Board: *supra*, note 72 at 80-83.

(d) A need for threshold investigation of each complaint

Referring individual complaints directly to the education-mediation-adjudication stream following intake, as is now done, treats every complaint as arising in isolation. Preliminary factual investigation before a triage decision is made to assign a complaint to one procedural stream or the other could reveal whether the background to the complaint concerns only the individual complainant, or whether a broader investigation is warranted because other employees are affected. It would allow simple complaints to be resolved quickly when the facts are not in dispute, and it could also prevent unfounded complaints from advancing further than they should.

Before a decision is made to assign a complaint to one procedural stream or another, enough information should be gathered to at least enable the Branch to discern whether the ESA applies to the complaint, if there is some basis for it in the sense that it is not entirely frivolous, whether it was filed within the time allowed by the ESA, and whether the circumstances relate only to the individual complainant or appear to affect a group of employees who are similarly situated. A requirement to conduct a threshold investigation of each complaint to at least this extent should replace the vague direction in section 76(1) as it now stands to "accept and review" a complaint following its filing.

A requirement for threshold investigation of complaints in order to establish a factual background for considered decision-making on procedural streaming would have implications for the fiscal and human resources required by the Branch. The Project Committee believes nevertheless that it is a very important element in the framework of the ESA. In addition, support for such a requirement was expressed in responses to the consultation paper by major business organizations and by the Canadian Centre for Policy Alternatives in a rare convergence of opinion.

Section 76(3) should be amended to provide that the Director may decline to proceed further with a complaint if the threshold investigation or later events establish one or more of the grounds listed in that subsection as potential justifications for a decision not to proceed. This would lend greater clarity to the interaction of sections 76(1) and 76(3).

The Project Committee recommends:

55. The relationship between sections 76(1) and 76(3) should be clarified by restoring language that imposes a requirement to conduct a threshold investigation on intake, without limiting the discretion of the Director contemplated by Recommendation 56 over the procedure subsequent to the threshold investigation.

56. The ESA should:

(a) specify a full range of procedural alternatives available to the Director to resolve complaints, including investigation, informal dispute resolution, and adjudication;

(b) set out the procedural steps associated with each alternative; and

(c) allow a complaint to be transferred from one alternative procedure to another in the course of being resolved, as the Director considers appropriate.

4. Procedural Fairness in the Investigation-Determination Stream

(a) Fairness in the course of investigation

The investigation-determination process described in Part 10 of the ESA does not require a summary of findings to be provided to the parties before a determination is made. As a result, the parties cannot be certain that all relevant information will have come into the possession of the investigating officer.

It is now well-established that a duty of procedural fairness exists at the investigative stage as well as at the decision-making stage of an administrative process that affects the rights, privileges or interests of an individual, or that may result in imposition of a penalty.[820] An investigation and determination under the ESA can have both these results. Procedural fairness requires that those whose interests are affected by an administrative decision be accorded a meaningful opportunity to present their case fully and fairly, even in the context of an investigation-based procedure that need not involve a formal hearing.[821] Section 77 of the ESA addresses this element of fair procedure, but in terms that are far from rigorous:

> **77** If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Section 77 stops short of requiring that an opportunity be given to both parties to be heard in response to the submissions of the other, requiring merely that "reasonable efforts" be made to allow this to one party, namely the "person under investigation."

820. *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 20; *Syndicat des Employés de Production de Québec et l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 at 899-900; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 at 19 (C.A.).

821. *Baker v. Canada (Minister of Citzenship and Immigration)*, *supra*, note 820 at paras. 30-34.

It does not provide any guidance as to when the opportunity to respond has to be given. While the *Complaint Resolution Factsheet* published by the Employment Standards Branch declares the practice to be that responses are sought from each party to the evidence of the other in investigations before a determination is made, this extremely important aspect of procedural fairness warrants a more solid footing in the Act itself. Section 77 is unsatisfactory as a procedural standard. The ESA should specify the steps that delegates of the Director must take to ensure that each party has an opportunity to be heard, and to know the findings on which a determination will be made.

The Project Committee considers that employment standards investigations should follow a procedure similar to that used by the Labour Relations Board. The ESA should require the Director's investigating officer to prepare a report containing findings made in the course of the investigation. It should then require the report to be provided to the parties, who could respond to the report within a specified time.[822] The investigation report and any responses by the parties would form the basis on which a determination would be made. These steps are basic to procedural fairness in the context of an investigation-based process leading to an administrative decision involving a declaration of legal rights.[823]

(b) Separating investigative and decision-making roles

Current practice is for the same delegate of the Director to carry out or supervise an investigation and also make the resulting determination. Thus, the same official carries out investigative and adjudicative functions. This is objectionable from the standpoint of procedural fairness in administrative law.[824] There are many administrative bodies that have investigative and adjudicative functions, but combining them in the same individual acting at every stage from investigation to adjudication gives rise to a reasonable apprehension of bias at an institutional level.[825]

822. Complainants who initially request that their identities not be disclosed, as they may do under s. 75(1) of the ESA, would need to be made aware that the investigation report ultimately must be provided to the employer in the interests of procedural fairness. They could be offered an opportunity to withdraw their complaints if they maintain their objection to disclosure of the report to the employer at the conclusion of the investigative stage.

823. *Lindo v. Royal Bank of Canada*, [2000] F.C.J. No. 1101 (T.D.) at para. 11.

824. *Ibid.*

825. *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at 960-961.

In the interests of ensuring procedural fairness, the ESA should require that a determination should be a decision of the Director or a delegate other than the delegate who conducted the investigation.

One legal organization responding to the consultation paper considered that this would lead to unnecessary delay, but the overall response to this recommendation was overwhelmingly positive from both sides of the employer-employee divide.

The Project Committee recommends:

57. The ESA should require that:

(a) the findings made in the investigation of a complaint be summarized in a report to the Director;

(b) copies of the report referred to in paragraph (a) must be provided to the employer and the complainant;

(c) each party must be given an opportunity to respond to the investigation report within a specified time; and

(d) the responses of the parties must be considered together with the investigation report in making a determination.

58. A determination should be a decision of the Director, or a delegate of the Director other than the investigator on whose findings the determination is based.

5. Filing of Complaint by Third Party

It is possible to file a complaint on behalf of another person because section 74(1) states "an employee, former employee *or other person*" may complain of a contravention.[826]

Numerous commentators have emphasized the importance of allowing third parties whose interests are not directly in jeopardy to bring forward complaints on behalf of employees who are at risk of repercussions if they take steps on their own to assert

826. *Re 0862284 B.C. Ltd.* (17 November 2014) BCEST #RD 103/14 at para. 14. The Employment Standards Branch *Interpretation Guidelines Manual* also acknowledges that third parties may file complaints: *supra*, note 293, webpage entitled "ESA Section 74 – Complaint and time limit."

their statutory rights.[827] The Thompson and Arthurs reports recommended a capacity to receive third party complaints as being essential to provide adequate access to the enforcement process.[828]

In the past, business opposed the acceptance of third party complaints in employment standards matters because of the opportunity it allegedly would allow for officious or vexatious filings by competitors or unions engaged in organizing drives.[829] The Law Commission of Ontario acknowledged that these concerns have some merit in its report *Vulnerable Workers and Precarious Work*, despite making a strong recommendation for an accessible and well-publicized mechanism in Ontario for receiving complaints and information from third parties about contraventions. The Law Commission supplemented that recommendation with another calling for the development of protocols to vet information received from third parties for veracity before employment standards officers would act on it.[830]

While recognizing that the potential for abuse exists, the Project Committee believes the ability to file a complaint on behalf of another person should be retained in the ESA. There are situations in which factors such as intimidation, language barriers, or lack of knowledge operate to discourage employees from asserting their rights. Preventing third party complaints on behalf of vulnerable or unsophisticated employees facing these barriers would amount to denying them access to the complaint process.

The Project Committee believes that it would be helpful to have a provision in the ESA authorizing third party complaints in clearer terms than those in which section 74(1) is now worded. A majority of the members of the Project Committee think it would be a useful safeguard against vexatious or abusive third party complaints to require that anyone filing a complaint on behalf of another must submit the written authorization of the employee on whose behalf the complaint is made.

A minority of the members believe that written authorization by the employee who is the subject of the complaint should not be rigidly insisted upon in every case.

A **majority** of the members of the Project Committee recommend:

827. See, e.g., Gellatly, *supra*, note 96 at 47; Law Commission of Ontario, *supra*, note 81 at 62; Longhurst and Fairey, *supra*, note 96 at 54.

828. Thompson, *supra*, note 2 at 120; Arthurs, *supra*, note 102 at 219.

829. *Supra*, note 208 at 41.

830. *Supra*, note 81 at 61-63.

59. The ESA should clearly permit a complaint to be filed on behalf of another person with the written authorization of the person who is the subject of the complaint.

A **minority** of the members of the Project Committee recommend:

59a. Under Recommendation 59, the Director should have the discretion to dispense with the requirement for written authorization for the complaint by the employee on whose behalf it is made.

6. The Limitation Periods for Filing A Complaint

(a) General limitation period for filing complaints after employment ends: section 74(3)

Workers' advocates raise arguments for a longer limitation period than the six months allowed by section 74(3) for filing complaints after termination of employment, based on fairness to less sophisticated workers who lack knowledge of their statutory rights, and migrant workers in difficult circumstances. In ordinary civil litigation, the basic limitation period is two years, and in most cases the time starts to run only when a claim is "discovered," i.e. when the plaintiff ought reasonably to have known that a right to sue exists.[831] Opponents of the status quo ask why a wage claimant should be at a disadvantage compared to a plaintiff in an ordinary debt action.

The six-month limitation period has been criticized as especially prejudicial to temporary foreign workers in the classes eligible to apply for permanent residence after completion of a minimum period of authorized employment in Canada. These are principally live-in caregivers admitted to Canada under a program that ended in 2014, and child care or high medical needs caregivers admitted under the current caregiver class programs. These workers are seldom in a position to complain because of their inability to change employers without endangering their immigration status. Following completion of the minimum 24 months of employment in Canada with the employer who obtained approval to hire them, they face lengthy delays before their applications for permanent residence are fully processed.[832] If their employment terminates while their applications for permanent residence are pending, the limitation period for filing a complaint may well have expired by the time they acquire permanent residence and the ability to change employers.[833]

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831. *Limitation Act*, S.B.C. 2012, c. 13, ss. 6, 8.

832. See note 712, *supra*.

833. Linnsie Clark and Colin Tether, *Backgrounder: Migrant Worker Recruitment & Protection – Model Legislation* (BCESC, 2013 and 2014), online: http://bcemploymentstandardscoalition.com/wp-

Counter-arguments raised in favour of the status quo are that employees should be encouraged to complain quickly so that disputes can be resolved while evidence is fresh and available, particularly after employment has ended. The Thompson Commission recommended retention of the six-month limitation period contained in the 1980 version of the ESA on the grounds that the complaint process under the ESA should be a quick remedy. In Thompson's view, lengthy intervals between alleged contraventions and the filing of complaints would lead to evidentiary difficulties that would complicate enforcement of the Act.[834]

The six-month limitation period in section 74(3) of the ESA is well within legislative norms prevailing elsewhere in Canada. It is somewhat more generous to employees than limitation periods of the same length in certain other jurisdictions, which run from the date of the contravention rather than the end of employment.[835] Since the *Karbalaeiali* decision of the Court of Appeal, it has also been recognized that the Director or a delegate actually has a statutory discretion to accept a complaint filed out of time.[836] This allows room for exceptions made on a principled basis in favour of a complainant who has been unable to file a complaint within the time required for reasons that are not exclusively of the complainant's own making.

content/uploads/2015/11/2014-12-05-ESA-Migrant-Worker-Provisions-Backgrounder-Print-Copy.pdf at 21.

834. *Supra*, note 2 at 121-122. Thompson also recommended a wage recovery period of 24 months, however, as mentioned later in this chapter.

835. Alberta, Manitoba, Nova Scotia, Newfoundland and Labrador, Yukon and the federal jurisdiction also have a six-month limitation period for employment standards: see R.S.A. 2000, c. E-9, ss. 82(1)-(3); C.C.S.M. c. E110, s. 87; R.S.N.L. 1990, c. L-2, s. 62(3); R.S.N.S. 1989, c. 246, s. 21(3D); R.S.Y. 2002, c. 72, s. 73(3); R.S.C. 1985, c. L-2, ss. 251.01(1)-(3). In Manitoba, Nova Scotia, Yukon, and under the *Canada Labour Code*, the 6-month limitation period runs from the date of the alleged contravention, rather than from the last day of employment. In Newfoundland and Labrador, a two-year limitation period applies if the employee has not been terminated. New Brunswick, the Northwest Territories, Prince Edward Island, and Saskatchewan have a 12-month limitation period running from the date of the alleged contravention: see S.N.B. 1982, c. E-7.2, s. 61(1); S.N.W.T. 2007, c. 13, s. 61(2); R.S.P.E.I. 1988, c. E-6.2, s. 30(4); S.S. 2013, c. S-15.1, s. 2-89(1), (3). (In Saskatchewan, a complaint other than an unpaid wage claim runs from the date on which the complainant knew or ought reasonably to have known of the contravention.) In Ontario, a complaint must be filed within two years of the alleged contravention. Wage claims in Quebec are prescribed (time-barred) after one year from the time the wages became due: C.Q.L.R., c. N-1.1, s. 115. Complaints concerning retaliation must be filed within 45 days of the occurrence, and age discrimination claims within 90 days after the alleged discriminatory act: ss. 123, 123.1.

836. *Supra*, note 746.

Three separate views exist within the Project Committee on the question of whether the limitation period for filing complaints should remain the same or be altered:

The **first** view is that *no change* is necessary in the length of the limitation period under section 74(3).

The **second** view is that the limitation period under section 74(3) should *remain at six months from the termination of employment, with discretion on the part of the Director or a delegate to extend it on grounds specified in the Act.* The grounds would include illness, disability or misinformation causing a failure to file within the time limit.

The **third** view is that the limitation period under section 74(3) should *be one year from the termination of employment*.

As there is no clear majority view within the Project Committee in favour of changing the law in a specific way on the matter of the limitation period for complaints, no recommendation to do so appears here.

(b) Limitation period for complaints under sections 8, 10, and 11: section 74(4)

Section 74(4), as noted earlier in this chapter, provides a six-month limitation period for complaints alleging contraventions of sections 8, 10 and 11. Section 8 prohibits hiring or inducing someone to work on the basis of misrepresentations concerning the availability of a position, the type of work, wages, or the employment conditions.

Section 10(1) prohibits the extraction of a payment from someone seeking employment in return for hiring the job-seeker, obtaining work for that person, or providing information about prospective employers. Payments extracted from job-seekers in contravention of section 10 are deemed to be wages and are recoverable under the ESA.[837]

Section 11 prohibits payments by employment agencies and farm labour contractors to anyone for obtaining employment for a third person, or assisting in doing so.

The six months allowed by section 74(4) for filing a complaint run from the date of the contravention, rather than from the end of employment. The reason for the distinction is possibly related to the nature of the conduct prohibited by these three

837. *Supra*, note 1, s. 10(3).

sections. Complaints arising under sections 8, 10, and 11 will typically relate to specific acts or events taking place before or at the start of an employment relationship. Complaints related to wages or rights conferred by the ESA sometimes cover an extended period of time in the course of an employment relationship, and may involve a pattern of non-compliance rather than an isolated contravention.

Regardless of logical justifications that can be mounted for allowing the limitation period under section 74(4) to run from the contravention rather than from the end of employment, it is important to note that this feature has led to injustice with respect to section 10 contraventions affecting temporary foreign workers. In numerous cases, fees and other payments have been illegally exacted from these workers a considerable time before they are hired and admitted to Canada.[838] Before these workers have a realistic opportunity to complain of the section 10 contravention, their right to do so under the ESA may be time-barred by section 74(4).[839] The Project Committee accepts that the six-month limitation period applicable to section 10 has been an obstacle to recovery of illegally exacted payments.

The legislature has now addressed this situation in the *Temporary Foreign Worker Protection Act*, which contains a separate provision closely resembling section 10 of the ESA and provides for a two-year limitation period for complaints alleging contraventions, running from the date of the contravention.[840] These new provisions in the *Temporary Foreign Worker Protection Act* do not supplant or override s. 10 of the ESA, however. Instead, they confer an additional source of relief. A migrant worker from whom fees and other payments have been illegally exacted would be able to recover

838. See *Prince George Nannies and Caregives Ltd. v. British Columbia (Employment Standards Tribunal)*, 2010 BCSC 883 for an example in British Columbia of the practice of exacting of fees from temporary foreign workers to arrange their employment in Canada. The practice is known to have been widespread. Evidence from different parts of Canada was summarized in a report of the House of Commons Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers* (Ottawa: 2009) at 30-36. The Law Commission of Ontario stated in 2012 that live-in caregivers reported having paid between $5,000 to $12,000 each to a recruiter to facilitate their entry to work in Canada, and had to borrow at least half of the fee. As they earned the Ontario minimum wage after admission to Canada, the debt they incurred to obtain employment in Canada was a significant factor in inducing them to endure unfavourable working conditions: *supra*, note 81 at 85.

839. The Project Committee was informed by plaintiffs' counsel in *Dominguez v. Northland Properties Corporation*, 2013 BCSC 468 that an investigation by the Employment Standards Branch which preceded the class action had determined that every one of the approximately 60 temporary foreign workers interviewed had been compelled to pay fees to recruitment agents, and in every case complaints by them for these illegally extracted payments would have been time-barred by the time the circumstances were investigated.

840. S.B.C. 2018, c. 45, ss. 21 and 33(2).

the amounts paid based on either section 10 of the ESA or the new *Temporary Foreign Worker Protection Act* once the latter is brought into force. The same authority, namely the Director of Employment Standards, is the decision-maker under both statutes. Given that a remedy will apparently continue to be available concurrently under the ESA, recommendations concerning the limitation period applicable under section 74(4) to section 10 contraventions have been retained in this report.

Before introduction of the bill that led to the *Temporary Foreign Worker Act*, the Project Committee had already agreed that a longer limitation period is warranted for complaints based on a contravention of section 10 of the ESA. Two views remain regarding an appropriate length, however. The majority view is that a complaint based on a contravention of section 10 should have to be made within the shorter of six months from the end of employment, or two years from the date of the contravention. The minority view is that the limitation period should be two years from the date of the contravention.

There are also two views within the Project Committee on whether the limitation period needs to be altered in relation to contraventions of sections 8 and 11 as well.

The majority would leave the limitation periods for contraventions of sections 8 and 11 unchanged. In the case of section 8, it is thought that misrepresentations before or at the time of hiring would quickly become apparent to an employee after commencing work, and aggrieved employees should be encouraged to complain earlier rather than later, when the lapse of time makes it more difficult to establish facts. Section 11 is seen as unlikely to generate employee complaints in any event.

The minority considers that the limitation period should be the same for contraventions of sections 8, 10 and 11 because all of them deal with illicit practices connected with hiring. In addition, breaches of section 10 and section 8 commonly occur in association.

A **majority** of the members of the Project Committee recommend:

60. The ESA should be amended to provide that a complaint based on a contravention of section 10 must be delivered within the shorter of six months from the last day of employment and two years from the date of the contravention.

A **minority** of the members of the Project Committee recommend:

60a. Section 74(4) of the ESA should be amended to provide that a complaint based on a contravention of sections 8, 10, or 11 must be delivered within two years of the date of the contravention.

7. The Wage Recovery Period

(a) Background

The limit in section 80(1) on the amount of wages that may be recovered under the ESA is among the most contentious features of the current version of the Act. A brief history of the provision is necessary to place the issue in perspective.

The 1980 version of the ESA originally required a wage-related complaint to be made within six months of the last date on which an employer failed to pay wages owing.[841] It was otherwise silent regarding the amount of wages that could be recovered if the complaint was filed in time. In 1983 the ESA was amended to add provisions limiting the amount of wages that could be recovered to wages becoming payable in the six months immediately preceding the date of the complaint, or within the last six months of employment in the case of a former employee.[842]

In 1993-94, the Thompson Commission heard submissions from labour that wages sometimes remained owing for periods well beyond six months, as well as submissions from employers opposed to lengthening the wage recovery period because it would increase the burden of recordkeeping and the evidentiary difficulties present in contesting stale wage claims.

Thompson concluded that there was no logical necessity for the limitation period for filing complaints and the wage recovery period to be identical. His recommendation was for a wage recovery period of 24 months preceding a complaint, or in the case of a former employee, the 24 months immediately preceding the end of employment. This was described as a compromise between justice for unpaid workers and the practical difficulties of enforcing complaints founded on events in the distant past.[843] The commissioner commented as further justification that employees could have the

841. S.B.C. 1980, c. 10, s. 80.

842. *Employment Standards (Amendment) Act*, S.B.C. 1983, c. 16, s. 31.

843. *Supra*, note 2 at 122.

benefit of a longer limitation period if they chose to resort to the courts, but the ESA process was intended as "a speedy collection process."[844]

The 1995 ESA incorporated the Thompson Commission's recommendation, fixing the length of the wage recovery period as 24 months before the earlier of the date of a complaint or the termination of employment.[845] If the determination of wages owing was made in an investigation not resulting from a complaint, the maximum amount that could be recovered was the amount of wages that became payable in the 24 months immediately before the date on which the Director informed the employer of the investigation.[846]

Subsequently, the provincial government received submissions from the business community urging reduction of the wage recovery window from 24 months to six months preceding the complaint or the end of employment. The two principal arguments advanced for reverting to a six-month wage recovery period were, first, that the 24-month recovery period exposed employers to unreasonably large liabilities for inadvertent errors. Second, employees should be encouraged to raise wage-related complaints quickly so that miscalculations and inadvertent payroll errors could be corrected before large liabilities built up, and the 24-month wage recovery period did not provide an incentive to employees to do so.[847]

In 2002, section 80 was amended to provide again for a six-month wage recovery period, essentially restoring the position to what it had been before 1995.[848] The reason given for this amendment in legislative debate was to encourage employees to raise wage complaints quickly so they could be resolved in a timely fashion.[849] Other policy reasons for the change included simplifying the rules under the ESA for employers and workers, better ensuring that reliable evidence would be available, and aligning British Columbia's employment laws with those in other provinces, particularly

844. *Ibid.* In 1994, when the Thompson Report was written, the basic limitation period applicable to a contract debt action in British Columbia was six years: *Limitation Act*, R.S.B.C. 1979, c. 236, s. 3(4).

845. *Supra*, note 10, s. 80(a).

846. *Ibid.*, s. 80(b).

847. *Supra*, note 208 at 33.

848. *Supra*, note 139, s. 42.

849. Bill 48, *Employment Standards Amendment Act,* 2002, 2nd reading, *Debates of the Legislative Assembly (Hansard)*, 37th Parl., 3rd Sess., Vol. 8, No. 5 (27 May 2002) at 3604 (Hon. Graham Bruce).

Alberta and Ontario.[850] (At the time, six-month maximum wage recovery periods applied in both these provinces.) The amendment reducing the maximum amount of wages recoverable under the ESA has been a focus of criticism of the current employment standards regime by labour organizations and workers' advocates since it was made.

(b) Interjurisdictional comparison

The six-month limit under the ESA on recovery of unpaid wages is not unique in Canada. Alberta and Manitoba also limit wage recovery to the amount becoming payable in the six months before the earlier of a complaint being filed or the termination of employment.[851] The federal jurisdiction, New Brunswick, the Northwest Territories, Prince Edward Island, Quebec, and Saskatchewan have 12-month wage recovery periods.[852] Ontario increased the wage recovery period in 2015 from six to 24 months.[853] The *Canada Labour Code* and a few provinces allow recovery of unpaid vacation pay over longer periods.[854]

(c) Arguments offered by proponents of a longer wage recovery period

The arguments raised against the six-month wage recovery period are similar to those heard in opposition to the six-month limitation period for filing a complaint. One is the point founded on equity, namely that employees who have extended credit to their employer by their unpaid labour should not have less opportunity to recover what is owed to them under the statutory process than a plaintiff suing to recover any other variety of debt.

Most wage-related complaints are filed only after the termination of employment for the obvious reason that employees are reluctant to endanger their jobs or fuelling ill-will in the workplace by taking that step while the employment relationship subsists. The six-month wage recovery period severely disadvantages employees who are shortchanged over long periods of time.

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850. Information provided to the Project Committee by the Ministry of Jobs, Tourism and Skills Training, August 2015.

851. R.S.A. 2000, c. E-9, s. 90; C.C.S.M. c. E110, s. 96(2).

852. R.S.C. 1985, c. L-2, s. 251.1(1.1); S.N.B. 1982, c. E-7.2, s. 63(1), (2); S.N.W.T. 2007, c. 13, s. 65(3); R.S.P.E.I. 1988, c. E-6.2, s. 30(4); C.Q.L.R., c. N-1.1, s. 115; S.S. 2013, c. S-15.1, s. 2-89(2).

853. S.O. 2000, c. 41, ss. 111(1), as am. by S.O. 2014, c. 10, Sched. 2, s. 8(1).

854. Canada: 24 months: R.S.C. 1985, c. L-2, s.251.1(1.2); Manitoba: 22 months: C.C.S.M. c. E110, s. 96(2); N.W.T.: 2 years: S.N.W.T. 2007, c. 13, s. 65(3). Ontario formerly allowed recovery of up to 12 months' vacation pay when it had a 6-month recovery period for other wages.

The plight of temporary foreign workers is emphasized as a prominent example of injustice resulting from the present limit on wage recovery. Those in the lower-paid categories have work permits that are valid only for employment with a single authorized employer. They cannot realistically be expected to risk loss of their status to remain and work in Canada by filing complaints while their employment is continuing.

Live-in caregivers who are eligible to apply for permanent residence after a minimum of two years employment in Canada have had to wait years for it to be granted after completing the minimum qualifying period of employment. They and other domestic workers are extremely vulnerable to exploitation. Some members of the Project Committee have encountered cases in their professional practices in which these workers have been underpaid for the entire time it takes them to attain permanent residence.

Most objectionable of all is the barrier that the six-month wage recovery period presents to the recovery of fees and other payments illegally exacted from these workers before they are admitted to Canada.

(d) Arguments offered by proponents of the status quo

The arguments heard in favour of preserving the present six-month wage recovery period focus principally on the nature of the ESA complaint process, the evidentiary difficulties that usually arise in disputes over stale claims, and preventing an increase in the regulatory burden on placed on employers.

Employers maintain that the ESA complaint process is intended to be a fast and simple remedy, and accordingly it should incorporate an incentive to assert wage claims promptly. Payroll errors and pay disputes should be resolved quickly. Employees should not be able to wait in the weeds and let the size of the ultimate liability increase.

Factual disputes over matters such as overtime are more difficult to resolve in a manner that is fair to both sides after time has passed since the events in question. If records do not show clearly that overtime hours were worked on particular dates, for example, the dispute may turn on conflicting recollections.[855] These become less reliable with time, and witnesses can become unavailable.

855. For an example of a wage dispute having to be decided on conflicting oral evidence where records were unreliable, see *Re Global Plumbing, Heating and Gas Fitting Ltd.* (20 Sept. 2011) BCEST #D102/11 at 2-3; reconsideration refused (28 Nov. 2011) BCEST #RD131/11.

Whatever wage recovery period is set has obvious implications for how long payroll records must be kept. Records for the two years prior to the beginning of the wage recovery period may be relevant to disputes concerning vacation pay. Currently the ESA requires all mandatory payroll records to be retained for two years following the end of employment.[856] Extending the wage recovery period to 12 months would mean that employers would need to retain the full payroll records for any employee for a minimum of three and a half years after the end of employment. Restoring it to 24 months would require payroll record retention for at least four and a half years because of the risk of claims from former employees relating to vacation pay, even if the statutory requirement for retention remained the same.

(e) Project Committee's position regarding the wage recovery period

The Project Committee has not come to a unified position on the length of the wage recovery period. Except in regard to the recovery of illegally collected fees, there are majority and minority views.

A majority view is that no change is necessary regarding the wage recovery period under section 80(1) of the ESA, except with regard to contraventions of section 10, as stated in Recommendation 68 below.

The minority view regarding the wage recovery period is that the maximum amount of wages a determination may require an employer to pay should be the amount that became payable in a 12-month period beginning with the earlier of the date of a complaint or the termination of employment, if the determination is made in respect of a complaint. In the case of an investigation that does not commence with a complaint, the 12-month wage recovery period should begin when the employer or other person alleged to be in breach is first informed of the investigation.

The Project Committee is agreed, however, that fees collected from employees or prospective employees in contravention of section 10 should be recoverable as deemed wages if the contravention occurred up to two years before the filing of a complaint.

A **majority** of the members of the Project Committee therefore recommend:

61. The maximum amount of wages that a determination may require an employer to pay under section 80(1) of the ESA should remain unchanged, except with regard to contraventions of section 10, as stated in Recommendation 62.

856. *Supra*, note 1, s. 28(2)(c).

A **minority** of the members of the Project Committee recommend:

61a. The maximum amount of wages a determination may require an employer to pay should be the amount that became payable in a period beginning

(a) 12 months before the earlier of the date of a complaint or the termination of employment, if the determination is made in respect of a complaint; and

(b) in other cases, 12 months before the director first informed the employer of the investigation resulting in the determination.

plus interest on the amount, in either case.

With regard to the recovery of illegally extracted payments, the Project Committee recommends:

62. The ESA should be amended to provide that payments collected in contravention of section 10 may be recovered as deemed wages if they were paid not more than two years

(a) before a complaint concerning the contravention is filed, or

(b) in other cases, before the Director first informed the employer or other person alleged to have contravened section 10 of the investigation resulting in the determination.

8. Administrative Penalties

As mentioned under the heading "Determinations" earlier in this chapter, the earlier system of discretionary administrative penalties under the ESA was replaced in 2002 with mandatory penalties that must be imposed whenever a contravention is found, escalating from $500 to $10,000.

The introduction of mandatory penalties was intended to serve as an incentive to compliance, but also coincided with the shift towards a mediation-adjudication model for enforcement of the ESA. By making a surcharge on non-compliance a certainty, mandatory penalties were designed to encourage voluntary participation in mediated settlement negotiations by employers who might otherwise have little reason to do so.

Mandatory penalties can nevertheless operate unfairly when a contravention is inadvertent, or results from a misunderstanding of what the ESA and its regulations

require, instead of wilful non-compliance. Some practitioners believe the mandatory penalty scheme interferes with settlements, as there is no downside risk to the complainant in refusing to settle for anything less than the full amount of the claim.

The Project Committee perceives the need for an effective deterrent, but a majority of its members believe that some degree of discretion over administrative penalties should be returned to the Director, with its exercise guided by criteria that should be set out in the ESA. The purpose would be to make wilful or negligent non-compliance with ESA requirements the target, rather than carrying on the indiscriminate penalization of all contraventions regardless of how they arise.

If use of the self-help kit ceases to be a prerequisite to filing a complaint, as the Project Committee has recommended, there would be another reason to step back from the use of mandatory penalties. An employer would not necessarily be made aware that a contravention is alleged before the matter comes into the hands of the Employment Standards Branch, and so might not have had an earlier opportunity to correct it.

What the majority position envisions is not a discretion to impose penalties as under the pre-2002 system, but rather a discretion to waive a penalty in cases where the contravention is not a product of deliberate or negligent non-compliance with the ESA. The discretion should be exercised on the basis of criteria set out in the ESA. Having a rational basis for contesting a complaint in good faith, such as an arguable interpretation of a provision, or a genuine factual dispute, should be among the grounds on which the Director or a delegate would be justified in waiving a penalty. The Ministry of Labour should employ a consultative process to develop the additional criteria for exercising the discretion to waive a penalty.

Voluntary payment of a wage claim, as calculated by the Employment Standards Branch, should be another ground to waive a penalty. The Project Committee encourages the revival of a former practice whereby a wage-related complaint would be closed if the employer voluntarily paid the claim to the Director in full, as calculated by the Branch.[857]

A minority of the members of the Project Committee consider that the current system of mandatory penalties should remain in place, unless and until a broader consensus on the purpose of administrative penalties under the ESA is reached through a consultative process conducted by the Ministry of Labour.

857. The Special Advisors to the Changing Workplaces Review note in their report that Ontario Ministry of Labour follows this practice in dealing with wage claims. See, *supra*, note 72 at 152-153.

While divided on the issue of whether the imposition of administrative penalties should be mandatory or partly discretionary, the Project Committee is in agreement that the amount of a penalty should depend on the gravity of the contravention as well as on the number of previous contraventions of the same provision. Guidelines developed for fixing the size of administrative penalties under the *Residential Tenancy Act* provide a precedent for this approach.[858] Penalties should be subject to being increased by aggravating factors listed in the ESA as matters the Director or a delegate could take into account in setting the amount of a penalty on an escalating scale with a specified maximum amount.

A **majority** of the members of the Project Committee recommend:

63. The ESA and the regulations should be amended to:

(a) confer discretion on the Director to waive an administrative penalty following a determination that a requirement of the Act or a regulation has been contravened, and to set out criteria for exercise of the discretion;

(b) expressly recognize payment in full by an employer of a wage claim, as quantified by the Employment Standards Branch, as:

(i) a ground for concluding a complaint based on the wage claim; and

(ii) a sufficient ground for waiver of an administrative penalty in respect of the wage claim;

and

(c) provide that a rational basis for contesting a complaint should be a sufficient ground for exercise of the discretion not to impose an administrative penalty.

A **minority** of the members of the Project Committee recommend:

858. The *Residential Tenancy Act*, S.B.C. 2002, c. 78 and the *Manufactured Home Park Tenancy Act*, S.B.C. 2002, c. 77 provide for the imposition on a discretionary basis of administrative penalties for contraventions of those Acts and their regulations, or for non-compliance with a decision or order made under them. The Residential Tenancy Branch has generated a detailed policy guideline dated January 2012, listing factors to be taken into account in assessing penalties under these Acts. See, online: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/policy-guidelines/policy-guidelines-listed-by-number, item 41.

63a. The administrative penalty provisions of the ESA and regulations should not be altered pending the enunciation of a policy basis for a system of administrative penalties, except as stated in Recommendation 64.

The Project Committee recommends:

64. The amount of an administrative penalty should be subject to being increased, subject to a specified maximum, on a discretionary basis by reason of the gravity of the contravention, according to criteria which should be set out in the ESA.

9. Role of the Director in Appeals to the Tribunal

(a) Director designated as a party to an appeal of a determination

An amendment was made to section 112 of the ESA in 2015 declaring that the Director is a party to an appeal of a determination under that section.[859] This amendment merely declared what had long been the practice in reality. The participation of delegates of the Director in appeals to the Employment Standards Tribunal nevertheless raises difficult issues about the boundaries surrounding the legitimate role of a statutory decision-making body in appeals of its own decisions, and these have come to the fore relatively often.

(b) General principles of scope of standing of a decision-making body in appeal or review of its own decisions

A statutory decision-making body that has standing to appear in appeals of its decisions is normally limited to explaining its record and making submissions concerning its jurisdiction to make the order appealed from, in the absence of express legislative intention to the contrary.[860] In a judicial review application, a decision-maker also has standing to make submissions concerning the standard of review by the appellate or reviewing court, but may not address issues raised by an appellant about procedural unfairness or breach of the rules of natural justice.[861]

The reason for limiting the participation of the decision-maker in an appeal or review of its own decision and preventing it from engaging in adversarial advocacy is to

859. S.B.C. 2015, c. 10, s. 58, adding s. 112(5.1) to the ESA.

860. *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 at 709-711.

861. *CAIMAW Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983.

prevent the impartiality of the decision-maker from being discredited.[862] This is an especially important consideration where the result of an appeal or judicial review may be to remit the matter back to the decision-maker for rehearing.[863] It should be noted that one of the possible results of an appeal to the Employment Standards Tribunal is remission of a matter back to the Director for redetermination.[864]

These rules may be relaxed in favour of a broader right of standing for the statutory decision-maker if the result of applying them strictly would leave the real respondent unrepresented before the appellate or reviewing court, or where there is no one to reply to the submissions of the appellant or applicant for judicial review.[865] In addition, an inquisitorial decision-maker with a chiefly investigative role may be allowed more latitude in making submissions to the appellate or reviewing court than one having an adversarial adjudicative process, because there is then less concern about impairment of the decision-maker's quasi-judicial role.[866]

When legislation confers standing on a decision-maker to appear on an appeal or judicial review application relating to one of its decisions, and states that the decision-maker is a party to the appeal or application, as s. 112(5.1) of the ESA now does in relation to the Director, it appears to have no bearing on the principles applicable to the scope of the decision-maker's standing. The British Columbia Court of Appeal has held that the use of the word "party" does not in itself enlarge the role of a statutory decision-maker in appeal or judicial review proceedings.[867]

(c) Scope of the Director's standing in appeals

The Director has been allowed, nevertheless, considerably more latitude in participating in appeals to the Tribunal than the general principles surrounding standing

862. *Ibid.*, at 709. See also *B.C. Securities Commission v. Pacific International Securities Inc.*, 2002 BCCA 421.

863. Blake, *Administrative Law in Canada*, 5th ed., (Markham, Ont: LexisNexis, 2011) at 193-194. See also *Re BWI Business World*, BCEST #D050/96 at 4.

864. *Supra*, note 1, s. 115(1).

865. *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (F.C.) (procedure of federal commission that was under attack in judicial review proceedings outside the knowledge of individual respondents, who would derive no benefit from participation); see also *BCTF v. British Columbia (Information and Privacy Commissioner)*, 2005 BCSC 1562, at para. 37.

866. *BCTF v. British Columbia (Information and Privacy Commissioner)*, 2005 BCSC 1562 at para. 35.

867. *Quintette Coal Ltd. v. British Columbia (Assessment Appeal Board)* (1984), 54 B.C.L.R. 359 at 373 (S.C.); *British Columbia (Securities Commission) v. Pacific International Securities Inc*. 2002 BCCA 421, 2 B.C.L.R. (4th) 114 at para. 46.

would dictate. In *Re BWI Business World*,[868] the Tribunal held that the Director's role on appeal had to be considered in light of the "overall investigative and adjudicative framework established by the ESA." The Tribunal distinguished the leading cases that limit the role of a statutory decision-maker on appeal and judicial review to being heard only on matters of jurisdiction and the standard of review on the ground that they involved decision-makers with purely adjudicative functions.

The Tribunal characterized the Director's process (as it was in 1996) as predominantly investigative, and noted that only the Director was in the position of having heard the submissions of both sides and seen the documents of both parties. The appeal was the first time the employer and employee would have the opportunity to hear the arguments and evidence of the other side. Unless the Director was given broader standing in an appeal hearing to address matters beyond jurisdiction and the standard of review, the Tribunal could not ensure it was presented with a full case, especially as employers and employees were often unrepresented. The Tribunal held the following in relation to the Director's role in an appeal from a determination:

1. The Director is not the statutory agent for the employee(s) named in the determination.

2. The Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the appeal hearing.

3. The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross-examining witnesses with a view to explaining the underlying basis for the determination and to show that the determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s).

4. The Director must appreciate that there is a fine line between explaining the basis for the determination and advocating in favour of a party, particularly when one party seeks to uphold the determination.

5. It will fall to the Employment Standards Tribunal adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one or other of the parties is not crossed.

6. It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.[869]

868. BCEST D050/96.

869. *Ibid.*, at 5.

The Tribunal reiterated the *BWI* principles in *Re D. Hall & Associates*,[870] in which the Director's representative contested the timeliness and sufficiency of the appeal materials, and also defended the Director's application of an exemption provision in the ESA Regulations in the determination leading to the appeal. The Tribunal stated that while the Director must remain a "statutorily neutral party," the Director's active involvement in Tribunal proceedings was essential to ensuring that the Tribunal had a full and balanced appreciation of the facts and issues in the appeal, especially where the respondent was unable to answer the appellant's submissions because of a lack of knowledge, experience, or resources.

The Tribunal went on to say in *Re D. Hall & Associates* that except in relation to issues of jurisdiction, the Director's role is limited to explaining the determination and why the Director maintains the determination is correct. It did not elaborate on the difference between this and ordinary advocacy, but stated that the Director must avoid "fervent or combative" stances. In the case in question, the Tribunal noted the submission by the Director's representative had been too adversarial and would normally be excluded for that reason. The Tribunal exercised discretion to receive it nevertheless, in order to have the benefit of an argument on the opposite side of the issue of sufficiency of the appeal documents that were filed.

British Columbia Securities Commission v. Burke[871] involved the interpretation of section 51(1)(c) of the ESA, now repealed, which provided that a birth father was entitled to up to 37 consecutive weeks of unpaid leave "beginning after the child's birth and within 52 weeks of that event." The Commission, Burke's employer, maintained the 37 weeks of leave had to be completed within the 52 weeks after the birth. Burke maintained they only had to start within 52 weeks after birth. The Director's delegate sided with Burke and the Commission appealed the delegate's decision. Burke, who was unrepresented, did not appear in the appeal to the Tribunal or the reconsideration that followed.

The delegate's submissions on appeal included extensive argument on the issue of statutory interpretation and also on reasonable apprehension of bias, which was not among the Commission's grounds of appeal. The delegate raised the issue of apprehension of bias because she considered that it was implicit in some of the grounds advanced by the Commission. The Tribunal received the submissions over the Commission's objection and upheld the delegate's decision. The Commission sought a reconsideration.

870. (18 August 1999) BCEST #D354/99.

871. 2008 BCSC 1244.

On the reconsideration, the Commission argued that the initial Tribunal panel had denied procedural fairness in allowing the delegate to engage in advocacy and making submissions on issues of natural justice, relying on the authorities establishing general principles concerning the participation of statutory decision-makers in appeals from their own decisions and judicial review as well as the principles in *BWI*[872] and *D. Hall & Associates*.[873] The Commission also maintained it was improper and a denial of procedural fairness for the initial BCEST panel to have received submissions by the delegate giving new reasons in support of her determination.

The reconsideration panel accepted that it was inappropriate for the delegate to have made submissions on the issue of reasonable apprehension of bias when the Commission had not challenged the determination on that ground. It agreed with the initial panel that the delegate's submissions had come close to crossing the line into partisan advocacy, but had not crossed it.

With respect to the Commission's position that the initial panel had allowed the delegate to make submissions that went beyond the proper role of a statutory decision-maker in an appeal, the reconsideration panel noted that it was an operational reality in BCEST proceedings for one or both parties to be unrepresented, and in cases such as this one where there is no one on the other side before the Tribunal to answer the appellant's case, the Tribunal would be deprived of the benefit of full argument and information if the Director were confined to making submissions on jurisdiction alone. The ESA also gave the Director the ability to request reconsideration, which was an indication of legislative intent that the Director was to have a meaningful role before the Tribunal.

The reconsideration panel stated that the change in the Director's process from a predominantly investigative procedure to a predominantly adjudicative one as a result of the 2002 amendments to the ESA could require some modification to the *BWI* principles, but this had no bearing on the case in question. In the view of the reconsideration panel, there were sound practical and policy grounds not to limit the Director's participation. The Director should have "full scope" to explain the determination on appeal, including expanding upon the original reasons.[874]

872. *Supra*, note 781.

873. *Supra*, note 781.

874. The reconsideration panel considered that the Director should not be allowed to give additional reasons in support of a determination on a reconsideration, in the interests of expediency and finality: BCEST #RD121/07 at para. 50. Based on the Supreme Court ruling in *B.C. Securities Commission v. Burke*, supra, note 871, however, the Director has been allowed to make

The panel acknowledged this is different from the principles generally applied to the role of statutory decision-makers in judicial review or court appeals, but it was consistent with the context of employment standards and the ESA. It was not improper, therefore, for the Director to have made submissions on the statutory interpretation issue at the root of the case, and no breach of natural justice had taken place. The original BCEST decision was confirmed.[875]

The Commission applied for judicial review of the reconsideration panel's decision. The court emphasized that the leading cases limiting the participation of statutory decision-makers in appeal or judicial review proceedings were ones in which there was a protagonist to "counter or provide context" to the appellant's or petitioner's evidence and arguments. The respondent in this case was unrepresented and did not appear in the appeal or reconsideration. Furthermore, the fundamental issue was one purely of statutory interpretation. The question of interpretation of s. 51(1)(c) of the ESA was one of significance, potentially affecting many employees.

The court noted that the ESA gave the Director the right to request reconsideration by the BCEST as a protagonist, in the interests of ensuring that important issues relating to the administration of the ESA are "fully and thoroughly considered" before becoming the subject of a final decision by the BCEST, subject only to judicial review with a high level of deference. It held that the Commission had a full opportunity on reconsideration to raise and be heard on issues of procedural fairness, and any breach of natural justice had thereby been cured. The court accordingly declined to interfere with the reconsideration panel's decision.[876]

(d) A pragmatic but uneasy fit

The unusually broad standing enjoyed by the Director in appeals from determinations is now firmly entrenched in the jurisprudence of the Tribunal and has received judicial approbation as well. It finds its justification in operational realities that involve unrepresented parties, the lack of a real respondent to appeals to "counter and present context," and the right of the Director to seek reconsideration.

The existence of a line between the nominal role of the Director as a statutory neutral party and that of advocacy continues to be asserted in the cases, but the line is not any

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submissions to the Tribunal on new evidence presented by an appellant that was not presented at the original hearing of a complaint: *Re Satnam Education Society*, BCEST #D005/13, at paras. 34-36.

875. BCEST #RD121/07 at para. 53.

876. 2008 BCSC 1244.

better defined than it was in *BWI* nearly two decades ago. It is difficult to see how the Director can remain a "a statutory neutral party" when arguing the merits of a determination and the fairness of the process by which it was reached. This is particularly true when the same delegate who made the determination also appears before the Tribunal, as is commonly the case.

The awkwardness of the present system is made greater by the shift in the Employment Standards Branch since the *BWI* principles were decided from an investigative process to one in which mediation-adjudication predominates. This is reason for greater concern about preserving the impartiality of the Director as a statutory decision-maker.

(e) A possible solution: designated "respondents' advocates"

Even though the scope of the Director's standing in appeals is uncomfortably wide and encroaches on the boundaries of advocacy, it would be unrealistic to restrict it without putting in place another means by which the respondent's position may be fully argued before the Tribunal when the actual respondent will take no part in the appeal or lacks the sophistication to do so.

One potential solution that may be worth considering would involve adapting the concept of "workers' advisers" and "employers' advisers" to employment standards appeals. Workers' and employers' advisers are Ministry of Labour personnel whose exclusive role is to assist and represent workers and employers, respectively, in relation to workers' compensation matters. They are independent of WorkSafeBC and the Workers Compensation Appeal Tribunal.

An official who is not attached to the Employment Standards Branch, and who has no other role in the administration of the ESA, might be designated to represent respondents who would otherwise be unrepresented in appeals before the Employment Standards Tribunal. Alternatively, a roster of part-time "respondents' advocates" might be established. The respondents' advocates could be engaged on an "as needed" basis. They would be independent of the Employment Standards Branch, and have no other connection with the enforcement of the ESA. Thus, they could make submissions on the merits of a determination in an appeal to the Tribunal without the restrictions imposed by the *BWI* principles on the submissions that may be made on behalf of the Director.

The suggestion of adapting the WorkSafeBC model of workers' and employers' advisers to employment standards appeals received endorsement in responses to the consultation paper by a national employers' organization and a prominent provincial

industry association, and by a significant number of individual employers and employees answering the online survey.

The Project Committee recommends:

65. The model of workers' and employers' advisers under the workers' compensation scheme should be examined with a view to its possible adaptation for the representation of otherwise unrepresented parties in appeals to the Employment Standards Tribunal.

Chapter 11. Enforcement Mechanisms Under the ESA

A. Overview of Part 11

Part 11 of the ESA contains a number of mechanisms for enforcing wage entitlements and the terms of determinations made by the Director or a delegate, settlement agreements, and orders of the Employment Standards Tribunal. These mechanisms include:

- the ability to file a determination, settlement agreement or order in the registry of the British Columbia Supreme Court and enforce it like a judgment in favour of the Director for recovery of a debt in the amount payable under it;[877]

- interest on unpaid wages or other amounts payable to an employee, running from the earlier of the date employment terminates and the date on which a complaint concerning the unpaid wages or other amounts is delivered;[878]

- a lien for unpaid wages against the property of the employer or other person named in a determination, settlement agreement, or an order;[879]

- a power to demand that a third party pay to the director all or part of any debt owed to a person who is required to pay money under a determination, settlement agreement or order;[880]

- seizure of assets to satisfy an amount unpaid under a determination, settlement agreement, or order;[881]

877. *Supra*, note 1, s. 91.

878. *Ibid.*, s. 88(1).

879. *Ibid.*, s. 87.

880. *Ibid.*, s. 89.

881. *Ibid.*, s. 92.

- a power to treat businesses under common control and direction as a single employer for the purposes of the ESA;[882]
- ability to collect up to two months' unpaid wages for each employee of a corporation from the directors and officers of the corporation;[883]
- ability to treat a purchaser of a business or a substantial part of its assets as a successor employer, with the consequence that the purchaser is liable for unpaid wage obligations of employees of the business whom the purchaser has continued to employ;[884]
- administrative monetary penalties (discussed in the previous chapter).[885]

Part B of this chapter discusses some issues relating to reform of the Part 11 provisions.

B. Reform Issues Relating to Enforcement Mechanisms

1. The Lien for Unpaid Wages on the Property of the Employer

(a) Background

Section 87(1) creates a lien for unpaid wages in favour of the Director over all the real and personal property of an employer or other person named in a determination, settlement agreement, or order under the ESA. The lien applies to all amounts included in the definition of "wages" in the ESA, including holiday and vacation pay, and entitlements on termination under section 63.

The lien attaches without the need for registration. As it is dependent on the liability to pay the wages rather than a determination, it arises from the time the wages become payable, even if no determination is made.[886] The lien is a secured debt,

882. *Ibid.*, s. 95.

883. *Ibid.*, s. 96.

884. *Ibid.*, s. 97.

885. *Ibid.*, s. 98.

886. *Canadian-Automatic Data Processing Services Ltd. v. Syntecor Ltd.*, 2004 BCCA 408, at para. 26. As against someone other than the employer who is named in a determination as jointly and severally liable for the unpaid wages, the lien would attach to the third party's property only when the

surviving a sale of the employer's assets to a purchaser buying in good faith, despite the lack of need for registration or notification of its existence.

Section 87(1.1) imposes a similar lien against the property of a talent agency that has received wages from an employer for payment to an employee and failed to pay them, less any legally permissible fees. Section 87(2) creates a similar lien against the property of an employer for unpaid wages declared in an order or decision made in a grievance arbitration under a collective agreement, or an order of the Labour Relations Board under the *Labour Relations Code* that is filed in the registry of the Supreme Court of British Columbia for purposes of enforcement.

(b) Priority of the wage lien

The wage liens created by sections 87(1), (1.1) and (2) enjoy a super-priority that allows them to rank above all other statutory or common law liens, charges and security interests.[887] The sole exception to this super-priority is in respect of advances that are made under a registered land mortgage or a registered debenture charging land before the Director files a certificate of judgment in respect of the unpaid wages against the land.[888] There is no similar exception for advances made under security interests that have been perfected by registration under the *Personal Property Security Act*[889] (PPSA), and the wage lien will prevail over them.

(c) A source of uncertainty in commercial dealings

In the present day, the different treatment of registered land mortgages and perfected PPSA security interests in relation to the priority of the wage lien is anomalous, because PPSA security is at least as important in business finance as mortgages on land.

The fact that the super-priority of a wage lien under section 87 of the ESA is not dependent on registration or other form of notice creates significant uncertainty in dealings involving the property of any employer. Inquiries must be made about unpaid

determination was issued, but would cover the entire liability of the employer, relating back to the point when the wages were earned.

887. *Supra*, note 1, ss. 87(3), (4). The decision of the Supreme Court of British Columbia in *Westmin Resources Ltd. v. Haste Mine Development Ltd.* (1984), 58 B.C.L.R. 235 (S.C.) has sometimes been referred to as authority that a builder's lien takes precedence over the Director's wage lien. This is a misinterpretation of *Westmin Resources*, as the case only deals with holdback funds, not liens against land. The case is authority only that holdback funds withheld by an employer under the *Builders Lien Act*, S.B.C. 1997, c. 45 cannot be treated as property of the employer, and the wage lien accordingly does not attach to them.

888. *Supra*, note 1, s. 87(5).

889. R.S.B.C. 1996, c. 359.

wage liabilities in lending and purchase transactions. A search request may be directed to the Employment Standards Branch to determine if there are any outstanding complaints or determinations against an employer.[890] This, however, requires the employer's written consent, which must accompany the search request.[891]

A clean search result cannot be taken to mean there are no wage liens in existence, as it only indicates a lack of outstanding complaints, determinations, or unsatisfied settlement agreements at the effective date of the search. As there may be wage liabilities that have not resulted in a complaint under the ESA, the possibility exists that a wage claim will emerge with priority over any title or security interest acquired from an employer.

A common means of dealing with the uncertainty created by the statutory wage lien in an asset purchase transaction is for the purchaser to insist on a covenant in the sale agreement for post-completion indemnity against undisclosed, unliquidated, or unascertained liabilities, including unpaid wage claims. Another is to negotiate an adjustment of the purchase price or a temporary holdback as a reserve against contingent liabilities that may emerge after completion.

Most provinces provide for a statutory lien or security interest for unpaid wages against all of the employer's property as a collection mechanism, and give it a superpriority, but the extent of the lien and the priority vary considerably. Several provinces limit the value of the lien to $7,500.[892] Some also allow a purchase-money security interest that is perfected by registration before wages become payable to prevail over the lien for the wages.[893]

890. *Supra*, note 1, s. 101.1.

891. Linda D. Rainaldi and Jonathan M. Vogt, *Due Diligence Deskbook* (Vancouver: Continuing Legal Education Society of British Columbia 1994) (loose-leaf 2017 revision), ch. 10 at 10-2. The requirement for consent does not stem from the ESA, but instead from the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, which restricts the disclosure by a public body of personal information without consent, and prevails over s. 101.1 of the ESA.

892. See R.S.A. 2000, c. 9, s. 109(3); R.S.N.L. 1990, c. L-2, s. 37(1); S.N.W.T. 2007, c. 13, s. 20(4); S.Y. 2002, c. 72, s. 91(2).

893. E.g., Ontario, S.O. 2000, c. 41, s. 125.3(4); Alberta, R.S.A. 2000, c. 9, s. 109(4); Saskatchewan, S.S. 2013, c. S-15.1, s. 2-66(4), Manitoba C.C.S.M. c. E110, s. 102. A purchase-money security interest is one that secures payment of all or part of the purchase price of the collateral, or that is given in consideration for financing the cost of acquisition of rights in the collateral. The definition of "purchase-money security interest" in the PPSA of British Columbia also includes the interest of a lessor of goods under a lease with a term of more than one year and the interest of a consignor who delivers goods under a consignment arrangement. See the PPSA, *supra*, note 889, s. 1(1).

(d) Potential reform of the wage lien provision

The wage lien is infrequently invoked, but is perceived to be an extremely important collection mechanism. It is recognized that the lien complicates some commercial transactions, but its presence in the Act and the priority it is given over competing claims on an employer's property reflect a principle basic to the law of employment, namely that enterprise risk should be borne in first instance by the venture and the backers of a venture, rather than by the employees of the venture.

The Project Committee discussed the merits of imposing an upper limit to reduce some of the uncertainty in commercial transactions caused by the wage lien, but concluded it would not be a useful reform. In regard to the lien value limit of $7,500 per claimant in effect in several jurisdictions, members considered it likely that unpaid wages of that amount or higher would most likely generate an ESA complaint, which would come to light if due diligence is exercised. Refusal by a prospective vendor or borrower to consent to a wage claims search would certainly be a red flag for the other contracting party.

The Project Committee concluded that contracting commercial entities are in a better position to protect themselves against loss of priority by such means as indemnities than are unpaid employees, and that the wage lien under the ESA should continue to have priority over the claims and interests it now does.

On the surface, it appears incongruous for the ESA to give advances under registered land mortgages higher priority vis-à-vis the wage lien than advances under perfected PPSA security interests, given the present-day commercial importance of PPSA security. The policy reasons for subordinating PPSA security to the wage lien logically apply equally to security on land, so it is not readily apparent why the priority of the wage lien relative to advances made by secured creditors should depend on the nature of the property that is charged.

The consultation paper called for the repeal of section 87(5) in order to remove the special priority given to advances under registered land mortgages over the wage lien, and thereby equalize the treatment of land mortgages and PPSA security. A saving provision added to the ESA would make it clear that only mortgage advances made after the repeal would be affected, so that any priorities fixed before the date of repeal would remain unaltered.

While reaction to the proposed repeal of section 87(5) was generally positive, the distinction in treatment of land and personal property security was also defended on the ground that loans made on the strength of PPSA security are priced on the basis of the higher risk. If the historically lower risk attaching to registered mortgages is

heightened by increasing the exposure of land mortgagees to wage liens, so the argument goes, this will be factored into mortgage interest rates and indirectly raise the cost of housing.

On a second look, the Project Committee decided that the special protection for advances made under registered mortgages of land should not be removed without more extensive consultation with the financial sector. Accordingly, the recommendation calling for the repeal of section 87(5) was not carried forward into this report, and no recommendation for immediate change is made in relation to the wage lien.

2. Demand on a Third Party

Section 89(1) allows for enforcement of a determination, settlement agreement, or order of the Employment Standards Tribunal by means of a form of extrajudicial garnishment of debts owing by a third party to an employer or other person who is required to pay money under the determination, settlement agreement, or order. It gives power to the Director to deliver a written demand to a third party who is or is likely to become indebted to the employer to pay to the Director all or part of the amount that would otherwise be payable to the employer, up to the amount set out in the demand. The debtor must comply by paying the amount demanded to the director within 15 days after the later of the date on which the Director serves the demand and the date on which the debtor becomes indebted to the employer.[894]

As a result of the interpretation placed on the combined effect of section 89 and two associated provisions in a decision of the Employment Standards Tribunal named *Re Direct Current Gas Ltd.*,[895] the amount that can be set out in a demand on a third party cannot include interest payable by the employer or other person named in a determination, etc. This is regardless of the fact that section 88(3) deems interest owing by an employer to be wages, and recoverable as such.

The inability to use a third party demand to collect an amount that includes interest which an employer is liable to pay under a determination, order of the Tribunal, or a settlement agreement is a serious impediment to the usefulness of third party demands as a collection mechanism. The Project Committee considered this should be corrected.

The Project Committee recommends:

894. *Supra*, note 1, s. 89(2).

895. (17 January 2006) BCEST #D010/06 at para. 21.

66. The ESA should be amended to clarify that a demand on a third party under section 89 may include interest accrued under section 88 that is included in the determination on which the third party demand is based.

3. Director and Officer Liability for Unpaid Wages

(a) Background

Section 96(1) declares that anyone who was a director or officer of a corporation at a time when wages of an employee of the corporation were earned or should have been paid is liable for up to two months' unpaid wages earned by that employee.

Directors of charities who receive no remuneration for their services to the charity other than reimbursement of reasonable out of pocket expenses are exempted by regulation from personal liability for wages.[896]

Most other Canadian jurisdictions have a similar provision either in employment standards legislation, corporate legislation, or both, that imposes liability on directors for unpaid wages of employees of a corporation, up to a specified ceiling. While British Columbia and the three territories set the ceiling for personal liability of directors at two months' unpaid wages, the other provinces and the federal jurisdiction set the ceiling at six months' unpaid wages.[897]

A determination is usually not issued against directors and officers unless one has first been issued against the corporate employer and the corporation has not paid the amount declared to be owing.[898] If, however, the corporation has ceased doing business and there is a risk of the dispersal of assets, a determination may be issued against a corporation and its directors and officers simultaneously.[899]

896. *Employment Standards Regulation*, *supra*, note 31, s. 45.

897. See R.S.C. 1985, c. L-2, s. 251.18; R.S.C. 1985, c. C-44, s. 119; R.S.A. 2000, c. E-9, s. 112; R.S.A. 2000, c. B-9, s. 119; S.S. 2013, c. S-15.1; R.S.S. 1978, c. B-10, s. 114; CCSM c. E110, s. 90; CCSM c. C225, s. 114; S.O. 2000, c. 41, s. 81; R.S.O. 1990, c. B.16, s. 131; R.S.Q. c. S-31.1, s. 154; S.N.B. 1982, c. E-7.2, s. 65.1(2); R.S.P.E.I. 198, c. E-6.2, s. 5.7(3); R.S.N.L. 1990, c. L-2, s. 37.3; S.N.W.T. 2007, c. 13, s. 17(1); R.S.N.W.T. (Nu) 1988, c. L-1, s. 62; R.S.Y. 2002, c. 72, s. 86(1).

898. Shafik Bhalloo and Devin Lucas, "Section 96 of the Employment Standards Act: Balancing Competing Interests" (2014) 72 *The Advocate* 855 at 857.

899. *Ibid.*, and see *Re Malo* (29 April 2014) BCEST #D029/14 at 2.

(b) Exceptions to personal liability of directors and officers for wages

Section 96(2) creates exceptions to the personal liability of directors and officers under section 96(1). It provides that directors and officers of an employer are not personally liable for:

(a) any liability to an employee under section 63 (compensation for length of service), termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership;

(b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act*[900] or to a proceeding under an insolvency Act;[901]

(c) vacation pay that becomes payable after the director or officer ceases to hold office; or

(d) money that remains in an employee's time bank after the director or officer ceases to hold office.

(c) The controversial bankruptcy and insolvency exception

The exception under section 96(2)(b) relieves directors and officers of a corporate employer from personal liability for wage claims entirely if the corporation enters bankruptcy or is the subject of another insolvency proceeding under federal legislation, or in the event that *Bank Act* security charging its assets is realized by the chartered bank holding the security. The exception does not apply when an employer corporation is placed in receivership under provincial law.

When the 1995 version of the ESA was originally enacted, the exception for insolvency applied only to the termination entitlements mentioned in paragraph (a) of section 96(2). A later amendment extended the exception to wage claims generally.[902] The amendment relieving directors and officers from all liability for unpaid wages in the event of employer bankruptcy or involvement in an insolvency proceeding is one that

900. S.C. 1991, c. 46.

901. An "insolvency Act" is defined in section 1(1) of the ESA as one of three federal statutes: the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

902. *Supra*, note 139, s. 54.

continues to be controversial, being viewed by workers' advocates as extremely prejudicial to wage-earners.[903]

At the time of the amendment, several reasons were offered for relieving directors and officers from liability for wages in cases of bankruptcy or other insolvency proceedings. There was a perception that risk of personal liability for wage claims was causing directors to resign at an early stage of financial difficulty, depriving corporations of leadership when most needed and increasing the prospects of bankruptcy.[904] The percentage of unpaid wages recovered in bankruptcies was low, amounting in 2000 and 2001 to about approximately six per cent of wages outstanding.[905] A substantial number of employer bankruptcies involved small businesses, many of which were family-owned. The directors and officers would often be personally bankrupt at the same time, making significant recoveries impossible.[906] There were also administrative concerns about the resources consumed in pursuing minimal recoveries in bankruptcies. It was thought that these resources could be used more effectively for other enforcement activities.

As might be expected, business and labour perspectives on the bankruptcy exception in section 96(2)(b) of the ESA are sharply divided, with business strongly in favour and labour strongly opposed.

Opponents of the bankruptcy exception argue that there is hardly ever a need to pursue directors and officers for unpaid wages except in cases of employer bankruptcy or insolvency.[907] Withdrawing the protection from employees in those cases largely

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903. See Fairey, "Eroding Worker Protections: British Columbia's new 'Flexible' Employment Standards" (Vancouver: Canadian Centre for Policy Alternatives, 2005) at 38.

904. British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, 37th Parl., 3rd Sess., vol. 8, no. 10, p. 3775 (Hon. Graham Bruce).

905. *Ibid.* The systems in use at the time did not facilitate separating recoveries from bankrupt corporations and those from directors and officers, so the six per cent includes both. It was pointed out that the six per cent recovery in 2000-2001 nevertheless amounted to $500,000 in unpaid wages: *Debates*, *ibid.,* note 931 (J. MacPhail) at 3774.

906. *Ibid.*, at 3775.

907. The Employment Standards Tribunal has described the purpose of section 96 as being "to protect employees against insolvent employers." See *Re Steinemann* (16 July 1996) #D180/96 at 10. Provisions that impose liability on directors and officers for debts of insolvent corporations have been characterized as serving objectives of fairness in discouraging conduct placing the claims of vulnerable creditors in jeopardy, and efficiency through encouraging good corporate governance to prevent insolvency: Janis P. Sarra and Ronald B. Davis, *Director and Officer Liability in Corporate Insolvency: A Comprehensive Guide to Rights and Obligations*, 3rd ed. (Markham: LexisNexis Canada, 2015) at 91.

removes the basis for imposing this extraordinary liability on directors and officers for debts of the corporation. No other Canadian jurisdiction has this exception.

Opponents dismiss as anecdotal the argument that personal liability for wage claims causes director resignations and discourages prospective directors from accepting appointments to corporate boards. Convincing empirical proof is not available. They also note that directors and corporate officers can protect themselves through liability insurance that is typically made available at the cost of the corporation, commonly called "D & O" coverage.

Defenders of the section 96(2)(b) exception maintain that individual directors and officers of a large corporate employer, or even one of moderate size, are exposed to potentially huge wage liabilities in the event of its failure. Imposition of personal liability on directors and officers for debts of the corporation deviates from the normal principle of separate corporate personality.[908] Wage collection from directors and officers should be reserved for cases in which they permit or authorize the corporation to default in its payroll obligations, or to ignore determinations and orders made against it.

Defenders of the exception also point to the fact that changes in the priority scheme in bankruptcy plus the introduction of the Wage Earner Protection Program at the federal level have significantly improved the position of wage claimants since section 96(2)(b) of the ESA was enacted in 2002. At that time, wage claimants had a preferred claim in bankruptcy for three months' wages up to a maximum of only $500, and ranked as unsecured creditors for the balance. If there were secured creditors, wage claimants would seldom recover anything. Now, the *Bankruptcy and Insolvency Act* gives wage claimants a $2,000 secured charge on current assets, and a preferred claim for wages earned in the six months before the bankruptcy up to $2,000.

908. Arguments based on the characterization of s. 96 of the ESA as a deviation from the company law principles of limited liability and separate legal personality find considerable support in case law. Despite the liberal and remedial interpretation of employment standards legislation endorsed by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27 and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the Employment Standards Tribunal has repeatedly stated that statutory provisions imposing personal liability on directors and officers for the debts of a corporation are extraordinary remedies departing from normal corporate law principles, and should therefore be interpreted narrowly: see *Re Archibald* (12 April 2000) BCEST #D090/00; *Re MIV Therapeutics* (15 Sept. 2010) BCEST #D096/10, at para. 24; *Re Taubeneck* (23 Jan. 2012) BCEST #D001/12, at para. 63. Narrow interpretation of section 96 is consistent with the treatment of s. 114 of the *Canada Business Corporation Act*, S.C. 1974-75-76, c. 33 (now s. 119 of R.S.C. 1985, c. C-44), a counterpart provision to s. 96 of the ESA, by the Supreme Court of Canada in *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027.

Furthermore, the federal Wage Earner Protection Program (WEPP) introduced in 2005 allows unpaid former employees of a bankrupt to apply to the program for payment of their wage claims up to a ceiling of four times their maximum weekly insurable earnings. In 2018, the ceiling amount recoverable under WEPP amounts to $3976.92, less 6.82 per cent to reflect payroll deductions. WEPP is funded from general revenue, not from the bankrupt estate or property in receivership. It covers nearly all forms of payments made to employees including salary, commissions, vacation pay, severance and termination pay, gratuities accounted for by the employer, production bonuses, and shift premiums. WEPP applies to receiverships as well as bankruptcy.

Employees are eligible to apply as long as they did not have supervisory or managerial responsibilities prior to the bankruptcy, or a controlling interest in the bankrupt corporation. Directors and officers are not eligible to apply under WEPP.

Defenders of the bankruptcy exception maintain that with these increased protections in bankruptcy and under the WEPP program, wage earners do not need recourse against directors and officers of their former employer. Opponents counter that WEPP does not apply if an employer corporation is the subject of a proceeding under the *Companies' Creditors Arrangement Act*, which is used increasingly often to restructure by large corporations in financial difficulty.

The Project Committee debated the merits of the bankruptcy exception in section 96(2)(b) at length, but did not come to a consensus.

A majority of the Project Committee members believe that section 96(2)(b) should remain in the ESA. In other words, directors and officers should continue to be relieved of personal liability for up to two months' unpaid wages per employee if the corporation is the subject of a proceeding under a federal insolvency Act (including a bankruptcy proceeding), or if a bank realizes its security on the assets of the corporation under section 427 of the *Bank Act*.

A minority believe section 96(2)(b) should be repealed, and the liability of directors and officers for unpaid wages should be as it was under section 96 of the ESA before the bankruptcy exception was introduced. In other words, the bankruptcy of a corporation, another variety of insolvency proceeding under federal legislation affecting the corporation, or the realization of security under section 427 of the *Bank Act*, would not relieve directors and officers of personal liability under section 96(1) for up to two months' unpaid wages per employee. Directors and officers would not be liable for the payments referred to in section 96(2)(a) in those circumstances, however.

These are amounts payable as compensation for length of service under section 63, termination pay, or money payable in respect of individual or group terminations.

A **majority** of the members of the Project Committee recommend:

67. Section 96(2) of the ESA should remain unchanged.

A **minority** of the members of the Project Committee recommend:

67a. Section 96(2)(b) of the ESA should be repealed, and section 92(2)(a) should be restored as it stood before the enactment of section 96(2)(b).

(d) Lack of definitions of "director" and "officer"

The ESA does not define "director" or "officer." In determining who comes within section 96, the Employment Standards Tribunal has referred to the definitions of "director" and "senior officer" in provincial corporate legislation.

The *Business Corporations Act* contains these definitions of "director" and "senior officer":

> **"director"** means,
>
> (a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or
>
> (b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;
>
> **"senior officer"** means, in relation to a corporation,
>
> (a) the chair and any vice chair of the board of directors or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis,
>
> (b) the president of the corporation,
>
> (c) any vice president in charge of a principal business unit of the corporation, including sales, finance or production, and

(d) any officer of the corporation, whether or not the officer is also a director of the corporation, who performs a policy making function in respect of the corporation and who has the capacity to influence the direction of the corporation; [909]

The *Societies Act* also contains a definition of "director":

> **"director"**, in relation to a society, means an individual who has been designated, elected or appointed, as the case may be, in accordance with section 42 *[designation, election and appointment of directors]*, as a member of the board of directors of the society, regardless of the title by which the individual is called;[910]

The Tribunal applied the definition of "senior officer" in the *Business Corporation Act* to determine whether an individual was an officer for the purposes of section 96 of the ESA.[911]

The Project Committee considers that including definitions of "director" and "officer" in the ESA would contribute to greater certainty and clarity in the application of section 96, and that in drafting those definitions, it would make sense to draw on the definitions of those terms in provincial and federal corporate legislation.

The Project Committee recommends:

68. Definitions of "director" and "officer" should be added to the ESA which draw upon the definitions of "director" and "senior officer" in the Business Corporations Act*, and possibly also upon corresponding definitions in the* Societies Act *and federal corporate legislation.*

(e) Rights of directors and officers satisfying wage liabilities to subrogation and contribution

Provisions like section 96 in the legislation of some other provinces and one territory provide expressly that a director who pays a wage claim is subrogated to the priority that the employee's claim would have against the assets of the corporation. In other words, after paying a wage claim a director would have the same right to claim against the assets of the corporation that the employee had, and this subrogated claim of the director would have the same rank as the employee's claim in a distribution from those assets.

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909. S.B.C. 2002, c. 57, s. 1(1).

910. S.B.C. 2015, c. 18, s. 1(1).

911. *Re MIV Therapeutics Inc.* (15 September 2010) BCEST #D096/10.

The express right of subrogation given by these extraprovincial provisions is accompanied by an expressly declared right of a director who satisfies a wage claim to recover *contribution,* or in other words a proportional share of the amount so paid from each of the other directors who were concurrently liable for the wage claim.[912]

Sections 119(6) and (7) of the Alberta *Business Corporations Act* are typical:

(6) If a director pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and if a judgment has been obtained, the director is entitled to an assignment of the judgment.

(7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.[913]

It is only fair that directors compelled to pay wage claims owed by the corporation should have rights of subrogation and contribution from co-directors. There is some indication in extraprovincial case law that these rights may be present under common law, even apart from special legislation.[914] To remove doubt, however, the Project Committee considers it desirable to add subsections similar to these Alberta provisions into section 96.

The Project Committee recommends:

69. Section 96 should be amended to provide expressly for rights of contribution and subrogation for directors and officers who satisfy wage liabilities of the employer.

4. Successor Employers

(a) Background

Section 97 provides for the continuity of employment when the employer's business changes hands or the legal identity of the employer changes for other reasons:

912. See *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 112(8) and *Business Corporations Act*, c. B-9, ss. 119(6), (8); *The Employment Standards Code* C.C.S.M., c. E.110, s. 91(3) (contribution recoverable from the corporation); *Employment Standards Act*, R.S.Y. 2002, c. 72, s. 86(7).

913. R.S.A. 2000, c. B-9. By virtue of s. 112(8) of the *Employment Standards Code*, R.S.A. 2000, c. E-9, these two provisions of the *Business Corporations Act* also apply to wage claims paid by directors under s. 112 of the *Code*.

914. See *Milowski v. Manitoba (Director of Employment Standards)*, [1985] M.J. No. 165 (C.A.).

> 97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Section 97 is included in the ESA in order to reverse a common law rule. At common law, a change in the identity of the employer, such as one that might result from an alteration in the employer's corporate structure, an amalgamation, or a sale of a business as a going concern, has the effect of severing the contractual relationship previously in effect between employer and employee, and brings employment to an end.[915] The basis for the common law rule is that a contract of employment cannot be unilaterally assigned.[916]

Under the common law, if an employee continued to work under the new employer, it was on the basis of an entirely new contract of employment. The new employer was not liable for any obligations of the previous employer towards the employee, nor did the length of service under the previous employer count towards the period of notice required if the new employer later dismissed the continuing employee.[917]

The effect of section 97 is essentially twofold. Provided that the previous employer does not terminate an employee before or at the time of the disposition of the business, and the employee continues to work for the successor employer:

- the period of employment is treated as continuous for the purposes of the Act; and
- the statutory obligations of the previous employer in respect of accrued rights of the employee are imposed on the successor employer, such as accrued

915. *Nokes v. Doncaster Amalgamated Collieries Ltd.*, [1940] A.C. 1014 (H.L.); *White v. Stenson Holdings Ltd.* (1983), 43 B.C.L.R. 340 (S.C.); *Canada (Attorney General) v. Standard Trust Co.*, [1994] O.J. No. 2976 (Gen. Div.).

916. *Nokes*, *ibid.*

917. There are *obiter dicta* in *Dahdouh v. Hugin Sweda Inc.* [1993] B.C.J. No. 32 suggesting a departure from the common law rule exemplified by *Nokes* if the work performed for the new employer is closely intertwined with that performed for the former one and the new employer benefits thereby. There are some instances of Canadian courts retreating from the strict application of the rule in *Nokes*: see *Radwan v. Arteif Furniture Manufacturing*, [2002] A.J. No. 1031 (Q.B.).

vacation pay and compensation for length of service under section 63 or notice in lieu of compensation.[918]

The Employment Standards Tribunal has described the successor employer as being "substituted" for the previous one with respect to the employee's statutory benefits.[919]

(b) Superfluous wording in section 97

Section 97 is worded such that successorship obligations can arise either from a disposition of a business or "a substantial part of the entire assets of a business." The reference to a sale of assets does not appear in the successor employer provision in the British Columbia *Labour Relations Code*, as the side-by-side comparison below shows:

Employment Standards Act, section 97 Sale of business or assets	Labour Relations Code, section 35(1) Successor rights and obligations
97 If all or part of a business *or a substantial part of the entire assets* of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition. [Italics added.]	35 (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred.

The words "or a substantial part of the entire assets" appeared for the first time in the predecessor to section 97 in the 1980 ESA, and may have been included there only because they also appeared in the successor employer provision in the *Labour Code* then in force. The words were dropped from the *Labour Relations Code* provision later to bring it into line with similar provisions in labour legislation in the rest of Canada, but have remained in the ESA.

918. *Re Mitchell* (4 March 1998) BCEST #D107/98, at para. 24; aff'd (*sub nom. Mitchell v. B.C. (Dir. of Emp. St.)* (1998), 62 B.C.L.R. (3d) 79 (S.C.) at 91; *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)* (1995), 15 B.C.L.R. (3d) 27 (C.A.). Note that section 97 only preserves statutory obligations, not common law ones. For example, s. 97 is relevant to the calculation of the amount of compensation for length of service payable to an employee under s. 63 or the period of notice in lieu, but not to the determination of a reasonable notice period in an action for wrongful dismissal based on common law: England and Wood, *supra*, note 88 at 3-11.

919. *Re Dharampal Gill*, (2 January 2001) BCEST #D544/00 at 6; aff'd on reconsideration (*sub nom. Re Mehar Forest Products Ltd.*) (22 January 2002) BCEST #RD040/02.

Section 97 is, in fact, unique in Canadian employment standards legislation in mentioning a transfer of assets as being capable of giving rise to deemed continuity of employment. The continuity of employment provisions in the other common law provinces and territories refer only to the disposition of a business or undertaking in whole or in part as the event triggering successorship obligations.[920] Likewise, Quebec's successorship provision states that continuity of employment being unaffected by the "alienation or concession in whole or in part of the undertaking or modification of its juridical structure," but makes no mention of a transfer of assets alone as having this effect.

Do the words "or a substantial part of the entire assets of a business" in section 97 add anything to "all or part of a business?" The interpretation of the term "business" in the case law under section 97 of the ESA shows they do not, and that they do not give any additional protection to continuing employees.

Both the Employment Standards Tribunal and the Labour Relations Board interpret the term "business" as denoting a combination of physical assets and human activity, in keeping with the definition of "business" by the Ontario Labour Relations Board in *CUPE v. Metropolitan Parking Inc.:*

> A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a 'going concern', something which is 'carried on.' A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a 'business' from an idle collection of assets.[921]

Whenever the words "substantial part of the entire assets" have been in issue and section 97 has been held applicable, the disposition to a new employer could also be characterized as a transfer of *a business or part of a business*, as this term is interpreted for the purposes of the section.[922] This stands to reason, because in order for

920. See R.S.A. 2000, c. E-9, s. 5; S.S. 2013, c. S-15.1, s. 2-10; CCSM, c. E110, s. 5; S.O. 2000, c. 41, s. 9(1); S.N.B. 1982, c. E-7.2, s. 89; R.S.N.S. 1989, c. 246, s. 12; R.S.P.E.I. 1988, c. E-6.2; R.S.N.L. 1990, c. L-2, s. 6; R.S.Y. 2002, c. 72, s. 26(2); S.N.W.T. 2007, c. 13; R.S.N.W.T. (Nu) 1988, c. L-1, s. 20;

921. [1980] 1 Can. LRBR 197 (Ont. Lab. Rel. Bd.). Cited with approval by the Employment Standards Tribunal in *Re Strata Corporation NW 1018* (25 September 2014) BCEST #D083/14 and by the Labour Relations Board in *British Columbia Ferry Services Inc. and Kona Winds Yacht Charters Ltd. v. B.C. Ferry and Marine Workers Union*, BCLRB No. B153/2004. See also *Sun Wave Forest Products Ltd. and City of Prince Rupert v. Pulp and Paper Workers of Canada, Loc. No. 4*, BCLRB No. B15/2010; reconsideration refused BCLRB No. B37/2010.

922. In *Re Dharampal Gill*, *supra*, note 919, the Tribunal held that the words "substantial part of the entire assets" of a business were interpreted to mean sufficient assets to allow *a business*

s. 97 to have any application at all, employees must move to the new employer as well as assets.

As the words "or a substantial part of the entire assets of a business" do not add to the protection given by section 97 to employees who continue to work for the new employer and also create the appearance of a distinction without a difference, they should be repealed in the interests of clarity. Repealing them would also assist in the consistent development of case law under similar provisions of the ESA and the *Labour Relations Code*.

The Project Committee recommends:

70. Section 97 of the ESA should be amended by deleting the words "or a substantial part of the assets" to correspond with the successor employer provision (section 35(1)) in the Labour Relations Code*.*

(c) Continuity of employment under a receivership

Several provisions elsewhere in Canada that correspond to section 97 of the ESA contain a declaration that employment is deemed to be continuous if an employer is

operation to be carried on. In that case, the sole asset disposed of was a labour services contract that belonged to a sawmill operator who also supplied workers to another sawmill under different ownership. The contract was transferred to the former employer's foreman, who thereafter supplied the same workers on his own account to the other sawmill. The Tribunal upheld a determination that the foreman was a successor employer under s. 97. In other words, what the former employer disposed of, and what the employees continued to work in, was a distinct part of the former employer's business that continued as a distinct active undertaking under the control of the new employer. In *Re Softsearch.com Inc. and Synergy Computer Consulting Ltd.*, BCEST #D025/03, a trade name and the software products on which the employee had worked were assigned to a different entity and the employee continued to work on the software project. Her employment was held to be continuous under s. 97. It was not merely the transfer of ownership of the software that brought about a successor employer finding, but the combination of the software under development and the employee continuing to work on it. In *Re Sladey Timber Ltd.*, BCEST #D360/02, the former employer sold a number of pieces of equipment associated with the former employer's operations at a particular location to Sladey Timber. A grapple yard operator ended work for the former employer on a Friday and began work for the new employer the following Monday. Sladey Timber terminated the employee several months later. The Tribunal upheld a determination that s. 97 applied, and the grapple yard operator's termination pay and vacation pay were to be computed on the basis of a period of continuous employment beginning with his date of hire by the former employer. In so holding, the Tribunal noted that the determination did not need justification on the basis of a sale of a substantial part of the entire assets of the former employer's business. It could be justified on the basis of being a sale of "a part of a business."

placed in receivership. For example, section 5 of the Alberta *Employment Standards Code* states:

> Employment deemed continuous
> 5 For the purposes of this Act, the employment of an employee is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged or if it continues to operate under a receiver or receiver-manager.[923]

Manitoba and the Northwest Territories also mention operating under a receiver or receiver-manager as among the circumstances in which employment is deemed to be continuous.[924]

These provisions address the continuation of employment under receivership in order to remove an anomaly in the common law under which the manner in which a receiver or receiver-manager is appointed can determine the status of the employees of the debtor.

Appointment of a receiver by a court operates to terminate the employment of the debtor's employees. If the court-appointed receiver continues to operate the debtor's business and the employees continue to work under the receiver, they become the receiver's employees. The receiver is then personally liable for their wages unless the receiver informs the employees that the debtor is solely responsible.[925]

If a receiver or receiver-manager is appointed by a secured creditor under an instrument such as a general security agreement, the rule is different. There is no effect on employment status, because the receiver or receiver-manager is considered to operate the business as an agent of the debtor.[926]

Section 97 of the ESA makes no mention of receivers and receiver-managers continuing to operate a business, and it is not at all clear that the section would apply in those circumstances, since the installation of a receiver may not amount to a "disposition" of the business or assets. Yet an employee should not be prejudiced in respect of accrued rights because of the manner in which a receiver or receiver-manager is appointed. Section 97 should be amended to provide for continuity of employment

923. R.S.A. 2000, c. E-9.

924. *The Employment Standards Code*, C.C.S.M. c. E110, s. 5; *Employment Standards Act*, S.N.W.T. 2007, c. 13, s. 5.

925. *Gresmak v. Yellowhead Town and Country Inn*, [1989] B.C.J. No. 2411 (S.C.).

926. *Re Mack Trucks (Britain) Ltd.*, [1967] 1 All E.R. 977 (Ch.D.).

when an employer's business continues to be operated in receivership, regardless of how the receiver or receiver-manager is appointed.

The Project Committee recommends:

71. Section 97 of the ESA should be amended by adding the operation of a business under a receiver or receiver-manager as a circumstance in which the employment of an employee of the business is deemed to be continuous for the purposes of the Act.

12. Conclusion

This report is the product of the first comprehensive *independent* review of the *Employment Standards Act* to take place in nearly a quarter century, insofar as we know. The term "independent" is emphasized here, because BCLI is not associated with any authority or agency concerned with the administration of the Act, nor does it exist for the purpose of protecting or promoting the interests of either employers or workers. Unlike most critiques of workplace legislation, this report does not advocate for change from the standpoint of either party to the employment relationship. It strives instead to reach a point of balance that will sustain the functionality of the Act while the nature of work and the workplace continue their transformation.

The law of employment is intrinsically contentious, and this is reflected in the fact that unanimity was not reached with respect to every issue examined in the course of this lengthy project. BCLI is confident nonetheless that the collegial efforts of our Project Committee have shed much light on the complexities of the interplay of rights and interests in the workplace, and that the reform recommendations in this report, regardless of whether they represent unanimous, majority, or minority views, will help to illuminate the path forward.

List of Recommendations

1. The ESA should not be extended to apply to independent contractors. [p.28]

2. The ESA should not contain a definition of "dependent contractor" or distinguish between employees and dependent contractors. [p. 34]

3. The ESA should continue to specifically address vulnerable categories of employees. [p.35]

4. The ESA should not supplant or supplement the common law regarding wrongful dismissal, or provide for the administrative adjudication of wrongful dismissal claims, except as now provided in relation to contraventions of section 83(1). **majority** [p. 37]

4a. The ESA should address wrongful dismissal and provide an administrative adjudication process for wrongful dismissal claims. **minority** [p. 38]

5. Principles should be developed to govern future applications for exclusion of an industry, activity, occupational group, or class of workers from all or part of the ESA in order to ensure that the interests of employers and employees are fully taken into account. [p. 47]

6. Existing exclusions from ESA standards should undergo a systematic review by government to determine whether they continue to be justified. [p. 47]

7. The ESA should allow one or more alternate standard patterns of working hours within the 40-hour week in addition to the standard of 8 hours per day, and require a notice period for a change from one standard alternate pattern to another. **majority** [p. 55]

7a. A pattern of working hours for a workplace other than the standard of 8 hours per day, 40 hours per week should require worker consent by means of an averaging agreement. **minority** [p. 55]

8. The definition of "week" in section 1 of the ESA should be amended to allow an employer to designate the day on which the period of 7 consecutive days begins for the

purpose of wage calculation and employee benefits under the Act, provided that the employer must

(a) follow a consistent practice following the designation; and

(b) provide adequate notice to affected employees of any subsequent re-designation of the beginning day of the 7-day period. [pp. 56-57]

9. The ESA should continue to have a provision on averaging of working hours. [p.66]

10. The current section 37(2)(a)(iv), requiring an averaging agreement to specify the work schedule for each day covered by the agreement, should not be carried forward into an averaging provision replacing the present section 37. [p. 66]

11. An averaging provision replacing the present section 37 should provide that:

(a) an averaging agreement may have a term of up to 2 years, subject to renewal within the term;

(b) the period over which hours of work may be averaged for purposes of overtime must not exceed 8 weeks; [**majority**] [**minority:** *a period less than 8 weeks*]

(c) the number of working hours per day within an averaging period must not exceed 12 unless overtime is paid for hours worked in excess of 12 in any one day;

(d) the number of working hours per week within an averaging period must not exceed 48 unless overtime is paid for hours worked in excess of 48 in any one week;

(e) if a layoff occurs during an averaging period, the laid-off employee is entitled to be paid overtime for hours worked in excess of 8 on any day in that period, rather than on an averaged basis over the length of the averaging period in which the layoff occurs;

(f) the Director may terminate an averaging agreement on application by the employer or affected employees if the Director is satisfied that hardship would otherwise result. [p. 67]

12. The threshold of employee approval for an averaging agreement should be an affirmative vote of 60 per cent of the affected employees who vote, with a minimum of 50 per cent of the affected employees having voted. [p. 67]

13. A method used for a vote by employees on whether to approve an hours of work averaging agreement must be capable of assuring confidentiality (voting anonymity) and fairness. [p. 67]

14. The ESA should be amended to provide that:

(a) an employee may decline to work outside the employee's scheduled hours of work if doing so would

(i) conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid;

(ii) interfere with scheduled educational commitments or with appointments or procedures in connection with professional health care;

(iii) create a scheduling conflict with other employment;

(b) an employee may decline to work more than 12 hours in a day or 48 hours in a week except in the event of an emergency, or as otherwise provided in an applicable regulation, variance, or averaging agreement. [p. 71]

15. The ESA should be amended to contain a definition of "emergency" or "emergency circumstances" that would justify exceeding statutory limits on hours of work to the extent necessary to prevent serious interference with the ordinary operations of the employer, in cases of

(a) accident to machinery, equipment, plant or persons;

(b) urgent and essential work to be done to machinery, equipment or plant;

(c) a significant present or impending threat to human life, health, or safety, or extensive or irreparable damage to property;

(d) urgent and essential work needed to assist customers of the employer facing circumstances described in paragraphs (a) to (c); or

(e) other unforeseen or unpreventable circumstances. [p. 71]

16. The ESA should be amended to require that if an employee is required to report for work, and the employee is scheduled to work

(a) more than four hours on the day in question, the employee must receive a minimum of four hours' pay if work starts, and a minimum of two hours' pay if it does not;

(b) less than four hours on the day in question, the employee must receive a minimum of two hours' pay, regardless of whether work starts or not;

unless the employee is unfit to work or fails to comply with Part 3 of the Workers Compensation Act*, or a regulation under Part 3 of that Act.* [p. 74]

17. If a provision is enacted in the ESA that authorizes an employee to make, and an employer to grant, a request for a flexible work schedule to accommodate a need of the employee, the provision should extend only to hours of work and scheduling of work, but not to the location of work. [p. 82]

18. The ESA should be amended to allow an employee to voluntarily work up to a total of three hours spread over one or more days in the same pay period without the employer being required to pay an overtime rate for those hours, in order to make up for time which the employee has taken off in that pay period. [p. 83]

19. Section 32 should be amended to clarify that section 32(2) does not relieve an employer of the obligation to ensure meal breaks are provided as required by section 32(1), and applies when it is necessary to interrupt a meal break because of an emergency or other exceptional circumstance. [pp. 84-85]

20. The ESA should be amended to restore a provision requiring 24 hours' notice to employees of a change to a shift or work schedule unless the change:

(a) will entitle the employees to overtime pay;

(b) is an extension of a shift prior to the end of the shift; or

(c) must be made with less than 24 [**minority:** 48] *hours' notice because of unforeseen circumstances.* [p. 89]

21. The ESA should be amended to provide that an employee who does not receive a minimum of 24 hours' notice as required by Recommendation 20 may refuse to report for work according to the altered schedule at the start of the next shift or workday after the change in shift or work schedule takes effect. [p. 89]

22. The ESA should be amended:

(a) by deleting the words "if authorized by the employee in writing or by a collective agreement" from section 20(c); and

(b) to authorize an employer, notwithstanding the Personal Information Protection Act *and the* Freedom of Information and Protection of Privacy Act*, to collect, use and disclose personal information of the employee concerning banking arrangements without having to first obtain the employee's consent for the purpose of the direct deposit of the employee's wages into the employee's account in a savings institution.* [p. 94]

23. Section 22(1)(d) of the ESA should be amended by deleting "insurance company" and substituting "benefits provider." [p. 98]

24. The ESA should be amended to permit an employee to make an irrevocable written assignment of wages for the purpose of repaying an advance from the employer. [p. 100]

25. Section 22(4) of the ESA should be repealed. [p. 100]

26. Provisions on tips and gratuities corresponding in substance to Part V.1 of the Ontario Employment Standards Act, 2000 *should be added to the ESA.* [p. 104]

27. Section 58(2) of the ESA should be amended to permit employers to select one of the following methods of paying vacation pay:

(a) paying the employee's salary throughout the vacation period;

(b) adding 4 per cent or 6 per cent vacation pay, as applicable, to each paycheque or direct deposit of wages, subject to later adjustment if necessary to ensure that the aggregate of instalments of vacation pay equate to 4 per cent or 6 per cent of an employee's total wages, as applicable;

(c) paying vacation pay in a lump sum a week before the employee's vacation begins. [p. 106]

28. The ESA should be amended to provide that

(a) in order to be eligible to receive statutory holiday pay, an employee must have worked or earned wages on

(i) 16 of the 60 days preceding the statutory holiday, and

(ii) the last day before the holiday and the first day after the holiday on which the employee was scheduled to work;

(b) a day on which the employee is absent because of illness or has permission from the employer to be absent is not to be counted as a scheduled working day for that employee for the purposes of subparagraph (ii) of paragraph (a) of this recommendation. [p. 115-116]

29. The ESA should be amended to:

(a) provide a formula for indexation of the minimum wage at regular, fixed intervals, and

(b) require the Lieutenant Governor in Council to determine, on each occasion when the ESA requires the formula to be applied, whether to amend the regulation prescribing the minimum wage to prescribe the rate as indexed according to the formula or a different rate chosen by the Lieutenant Governor in Council. **majority** [pp 126-127]

29a. The ESA should be amended to provide for a review at five-year intervals of the provisions governing how the minimum wage is set. **minority also endorsing Recommendation 29** [p. 127]

29b. The ESA should be amended to require the Lieutenant Governor in Council to review the minimum wage at two-year intervals and determine whether it should be changed or left unchanged. No other amendments should be made to the minimum wage provisions of the ESA. **minority not endorsing Recommendation 29** [p. 127]

30. (a) 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 hourly minimum wage.

(b) Implementation of paragraph (a) of this recommendation should be suspended until an expert committee appointed by the minister responsible for the administration of the ESA has reported on appropriate measures for its implementation. [pp. 139-140]

31. The initial amount of security that a farm labour contractor must provide to the Director under section 5(3)(c) of the Employment Standards Regulation *should be increased to the amount obtained by multiplying the minimum hourly wage by 120, and multiplying the result by the number of employees specified in the licence. The decreasing multipliers applicable in respect of subsequent periods of non-contravention should be adjusted correspondingly.* [p. 145]

32. The ESA should be amended to enable the Director to prohibit anyone whose farm contractor licence has been cancelled for non-compliance with the ESA and regulations from re-applying for a licence for a specific period, or permanently.

33. No change to section 30(2) is necessary. **majority** [p. 145]

33a. Section 30(2) should be repealed. **minority** [p. 145]

34. Annual vacation entitlements under section 57(1) of the ESA should remain unchanged. **majority** [p. 152]

34a. Section 57(1) of the ESA should be amended to provide that an employee becomes entitled to an annual vacation of four weeks after 10 consecutive years of employment. **minority** [p. 152]

35. The ESA should be amended to clarify that section 54(4) does not entitle non-unionized employees whose leaves end during a period when the employer's operations are suspended to be recalled in preference to other non-unionized employees. [p. 156]

36. The definition of "immediate family" in the ESA should be amended to include a parent or a child of the employee's spouse. **majority** [p. 168]

36a. In addition to the classes of persons referred to in Recommendation 36, a grandparent of the employee's spouse should be included in the definition of "immediate family." **minority** [p. 168]

36b. An uncle or aunt of an employee or the employee's spouse should be included in the definition of "immediate family" in addition to the classes of persons referred to in Recommendation 36 and the minority Recommendation 36a. **minority** [p. 168]

36c. The definition of "immediate family" in the ESA should remain unchanged.
minority [p. 168]

37. The ESA should be amended to include a provision stating that an employer may require an employee to provide evidence, reasonable in the circumstances, of the employee's entitlement to take a non-discretionary form of leave provided under the ESA. This provision should be expressly subject to other provisions concerning justification for a non-discretionary leave. [pp. 170-171]

38. The ESA should not be amended to add new non-discretionary leave entitlements.
majority [p. 177]

38a. The ESA should be amended to harmonize non-discretionary leave entitlements under Part 6 of the ESA with the range of circumstances in which special unemployment benefits are payable under the Employment Insurance Act *(Canada) for care to a critically ill family member.* **minority** [p. 177]

39. The ESA should be amended to supplant the present section 52 (family responsibility leave) with a provision allowing a total of up to 7 days of unpaid leave per calendar year which could be taken by reason of

(a) the employee's own illness or injury, or

(b) a family responsibility, namely a need to attend to the care, health, or education of a child in the employee's care, or the care or health of a member of the employee's immediate family. **majority** [p. 187]

39a. The number of unpaid leave days per calendar year in Recommendation 39 should be 10. **minority** [p. 187]

39b. The number of leave days per year in Recommendation 39 should be 10, and days of leave taken because of the employee's own illness or injury should be paid at the employee's regular wage. **minority** [p. 187]

39c. The ESA should not be amended to introduce sick leave, but if Recommendation 39 is implemented, the number of unpaid leave days per year should be 7.
minority [p. 188]

40. A reasoned dialogue involving the health professions, major employers' organizations, and major organizations representing organized and unorganized labour should take place regarding medical certificates to justify absence from work due to illness ("sick notes"), with a view to developing mutually acceptable guidelines. [p. 192]

41. Three months' continuous employment with the same employer should be a minimum requirement of eligibility for any form of statutory leave of absence other than annual vacation, leave for jury duty, or reservist leave. **majority** [p. 194]

41a. Three months' continuous employment with the same employer should be a minimum requirement of eligibility for maternity, parental, or compassionate care leave. **minority** [p. 194]

41b. An employer should be entitled to restrict paid sick leave to employees who have been continuously employed for at least three months, but unpaid personal illness or family responsibility leave as contemplated by Recommendation 39 should be available to employees regardless of length of employment. **minority** [p. 194]

41c. There should be no qualifying period of employment for a non-discretionary statutory leave of absence. **minority** [pp. 194-195]

42. A notice of termination validly given to an employee should not be rendered invalid by reason only that the employee is allowed to work for up to one month after the end of the notice period. **majority** [p. 205]

42a. A notice of termination should continue to be void under section 67(1)(b), as it now stands, if an employee is allowed to work beyond the end of the notice period. **minority** [p. 205]

43. The ESA should be amended to expressly clarify that if an employer terminates an employee following a notice of intention to quit given by the employee, the employer is required to pay the employee the lesser of

(a) the amount of wages the employee would have earned during the rest of the period of notice the employee gave to the employer; and

(b) the amount that would be payable to the employee as compensation for length of service if the employee had been terminated without notice. [p. 206]

44. The group termination provisions of the ESA should be amended to allow an employer's obligations to affected employees to be satisfied through a combination of notice and termination pay, whether or not the employer has given the required notice to the Minister within the required timeframe. [p. 207]

45. No change or review is required in relation to section 65(1)(e) of the ESA. **majority** [p. 208]

45a. Section 65(1)(e) of the ESA should be repealed. **minority** [p. 208]

46. Employment of persons under 16 in industries or occupations prescribed by regulation as being likely to be injurious to their health, safety, or morals should be prohibited. [p. 222]

47. The ESA should be amended to confer authority to

(a) designate by regulation industries and occupations likely to endanger the health, safety, or morals of persons under 16; and

(b) set a minimum age between 16 and 19 for employment in any one or more of the said industries and occupations. [p. 222]

48. The special regime for employment of children in recorded and live entertainment under Part 7.1, Divisions 2 and 3 of the Employment Standards Regulation *should be retained.* [p. 222]

49. The ESA should be amended to:

(a) require a permit from the Director to employ a child below the age of 14, except for employment with parental consent in recorded and live entertainment;

(b) allow employment at age 14 and 15

(i) with parental consent in

(A) an artistic endeavour (including recorded and live entertainment); or

(B) forms of "light work" designated by the Director and listed on the Employment Standards Branch website;

(ii) with a permit from the Director, in cases other than those mentioned in subparagraph (i). **majority** [p. 222]

49a. The ESA should be amended to prohibit the employment of anyone under 15 years of age without a permit from the Director, except as allowed by the regulations applicable to employment of children in recorded and live entertainment.

minority [p. 222]

50. The definition of "domestic" in the ESA should be amended by repealing the requirement to reside at the employer's residence. [p. 230]

51. The definition of "residential care worker" in the Employment Standards Regulation *should be amended by deleting the words "or family type residential dwelling" in paragraph (a) of the definition.* [p. 232]

52. The definition of "sitter" in the Employment Standards Regulation *should be amended to read as follows:*

> **"sitter"** means a person employed in a private residence solely to provide the service of attending to a child *or adult for an average of not more than 15 hours per week in any period of 4 weeks*, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
> (a) a business that is engaged in providing that service, or
> (b) a day care facility;

majority [p. 236]

52a. The definition of "sitter" in the Employment Standards Regulation *should be amended to read*

> **"sitter"** means a person employed in a private residence solely to provide the service of attending to a child *or adult for not more than 15 hours per week*, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of

(a) a business that is engaged in providing that service, or

(b) a day care facility;

minority [p. 236]

53. The ESA should continue to confer authority on the Director to carry out investigations to ensure compliance with the Act, whether or not a complaint of a contravention has been made. [p. 252]

54. Use of the self-help kit by an employee should not be a prerequisite to the receipt, review, investigation, mediation or adjudication of a complaint by or on behalf of the employee that the ESA has been contravened. [p. 254]

55. The relationship between sections 76(1) and 76(3) should be clarified by restoring language that imposes a requirement to conduct a threshold investigation on intake, without limiting the discretion of the Director contemplated by Recommendation 56 over the procedure subsequent to the threshold investigation. [p. 258]

56. The ESA should:

(a) specify a full range of procedural alternatives available to the Director to resolve complaints, including investigation, informal dispute resolution, and adjudication;

(b) set out the procedural steps associated with each alternative; and

(c) allow a complaint to be transferred from one alternative procedure to another in the course of being resolved, as the Director considers appropriate. [p. 259]

57. The ESA should require that:

(a) the findings made in the investigation of a complaint be summarized in a report to the Director;

(b) copies of the report referred to in paragraph (a) must be provided to the employer and the complainant;

(c) each party must be given an opportunity to respond to the investigation report within a specified time; and

(d) the responses of the parties must be considered together with the investigation report in making a determination. [p. 261]

58. A determination should be a decision of the Director, or a delegate of the Director other than the investigator on whose findings the determination is based. [p. 261]

59. The ESA should clearly permit a complaint to be filed on behalf of another person with the written authorization of the person who is the subject of the complaint. **majority** [pp. 262-263]

59a. Under Recommendation 59, the Director should have the discretion to dispense with the requirement for written authorization for the complaint by the employee on whose behalf it is made. **minority** [p. 263]

60. The ESA should be amended to provide that a complaint based on a contravention of section 10 must be delivered within the shorter of six months from the last day of employment and two years from the date of the contravention. [p. 267]

60a. Section 74(4) of the ESA should be amended to provide that a complaint based on a contravention of sections 8, 10, or 11 must be delivered within two years of the date of the contravention. **minority** [pp 267-268]

61. The maximum amount of wages that a determination may require an employer to pay under section 80(1) of the ESA should remain unchanged, except with regard to contraventions of section 10, as stated in Recommendation 62. **majority** [p. 272]

61a. The maximum amount of wages a determination may require an employer to pay should be the amount that became payable in a period beginning

(a) 12 months before the earlier of the date of a complaint or the termination of employment, if the determination is made in respect of a complaint; and

(b) in other cases, 12 months before the director first informed the employer of the investigation resulting in the determination. **minority** [p. 272]

plus interest on the amount, in either case.

62. The ESA should be amended to provide that payments collected in contravention of section 10 may be recovered as deemed wages if they were paid not more than two years

(a) before a complaint concerning the contravention is filed, or

(b) in other cases, before the Director first informed the employer or other person alleged to have contravened section 10 of the investigation resulting in the determination. [p. 273]

63. The ESA and the regulations should be amended to:

(a) confer discretion on the Director to waive an administrative penalty following a determination that a requirement of the Act or a regulation has been contravened, and to set out criteria for exercise of the discretion;

(b) expressly recognize payment in full by an employer of a wage claim, as quantified by the Employment Standards Branch, as:

(i) a ground for concluding a complaint based on the wage claim; and

(ii) a sufficient ground for waiver of an administrative penalty in respect of the wage claim;

and

(c) provide that a rational basis for contesting a complaint should be a sufficient ground for exercise of the discretion not to impose an administrative penalty.

majority [p. 275]

63a. The administrative penalty provisions of the ESA and regulations should not be altered pending the enunciation of a policy basis for a system of administrative penalties, except as stated in Recommendation 64. **minority** [pp. 275-276]

64. The amount of an administrative penalty should be subject to being increased, subject to a specified maximum, on a discretionary basis by reason of the gravity of the contravention, according to criteria which should be set out in the ESA. [p. 276]

65. The model of workers' and employers' advisers under the workers' compensation scheme should be examined with a view to its possible adaptation for the

representation of otherwise unrepresented parties in appeals to the Employment Standards Tribunal. [p. 283]

66. The ESA should be amended to clarify that a demand on a third party under section 89 may include interest accrued under section 88 that is included in the determination on which the third party demand is based. [pp. 290-291]

67. Section 96(2) of the ESA should remain unchanged. **majority** [p. 296]

67a. Section 96(2)(b) of the ESA should be repealed, and section 92(2)(a) should be restored as it stood before the enactment of section 96(2)(b). **minority** [p. 296]

68. Definitions of "director" and "officer" should be added to the ESA which draw upon the definitions of "director" and "senior officer" in the Business Corporations Act*, and possibly also upon corresponding definitions in the* Societies Act *and federal corporate legislation.* [p. 297]

69. Section 96 should be amended to provide expressly for rights of contribution and subrogation for directors and officers who satisfy wage liabilities of the employer. [p. 298]

70. Section 97 of the ESA should be amended by deleting the words "or a substantial part of the assets" to correspond with the successor employer provision (section 35(1)) in the Labour Relations Code*.* [p. 302]

71. Section 97 of the ESA should be amended by adding the operation of a business under a receiver or receiver-manager as a circumstance in which the employment of an employee of the business is deemed to be continuous for the purposes of the Act. [p. 304]

Appendix

These materials contain information that has been derived from information originally made available by the Province of British Columbia at: http://www.bclaws.ca/ and this information is being used in accordance with the Queen's Printer License—British Columbia available at: http://www.bclaws.ca/standards/2014/QP-License_1.0.html. They have not, however, been produced in affiliation with, or with the endorsement of, the Province of British Columbia and **THESE MATERIALS ARE NOT AN OFFICIAL VERSION.**

Employment Standards Act

Part 1 — Introductory Provisions

Definitions

1 (1) In this Act:

"assignment of wages" includes a written authorization to pay all or part of an employee's wages to another person;

"collective agreement" means the same as in the *Fishing Collective Bargaining Act*, the *Labour Relations Code*, or the *Public Service Labour Relations Act*;

"conditions of employment" means all matters and circumstances that in any way affect the employment relationship of employers and employees;

"construction" means the construction, renovation, repair or demolition of property or the alteration or improvement of land;

"day" means

(a) a 24 hour period ending at midnight, or

(b) in relation to an employee's shift that continues over midnight, the 24 hour period beginning at the start of the employee's shift;

"determination" means any decision made by the director under section 30 (2), 66, 68 (3), 73, 76 (3), 79, 100 or 119;

"director" means the Director of Employment Standards appointed under the *Public Service Act* and, in relation to a function, duty or power that the director has under section 117 of this Act delegated to another

person, **"director"** includes that other person;

"domestic" means a person who

(a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and

(b) resides at the employer's private residence;

"employee" includes

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

(c) a person being trained by an employer for the employer's business,

(d) a person on leave from an employer, and

(e) a person who has a right of recall;

"employer" includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee;

"employment agency" means a person who, for a fee, recruits or offers to recruit employees for employers;

"farm labour contractor" means an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product;

"former Act" means the *Employment Standards Act*, S.B.C. 1980, c. 10;

"immediate family" means

(a) the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and

(b) any person who lives with an employee as a member of the employee's family;

"insolvency Act" means the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or the *Winding-up and Restructuring Act* (Canada);

"Labour Relations Board" means the board as defined in the *Labour Relations Code*;

"overtime wages" means the wages an employee is entitled to receive under section 37 (4), (5) or (6) or 40;

"pay period" means a period of up to 16 consecutive days of employment;

"payroll record" means a record required under section 28 to be kept by an employer;

"penalty" means a monetary penalty imposed under section 98;

"producer" means a person who engages the services of a farm labour contractor;

"regular wage" means

(a) if an employee is paid by the hour, the hourly wage,

(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,

(c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,

(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and

(e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

"representative member" means a member of the tribunal appointed under section 102 (c);

"right of recall" means the right of an employee under a collective agreement to be recalled to employment within a specified period after

being laid off;

"settlement agreement" means a settlement agreement under section 78;

"special clothing" includes a uniform and a specified brand of clothing;

"statutory holiday" means New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and any other holiday prescribed by regulation;

"talent agency" means a person that, for a fee, engages in the occupation of offering to procure, promising to procure or procuring employment for actors, performers, extras or technical creative film personnel;

"temporary layoff" means

(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and

(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

"termination of employment" includes a layoff other than a temporary layoff;

"termination pay" means, for each week of notice an employee is entitled to, the amount obtained by totalling the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work and dividing the total by 8;

"time bank" means a time bank established under section 42 at the request of an employee;

"trade union" means the same as in the *Labour Relations Code*;

"tribunal" means the Employment Standards Tribunal;

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee

under this Act,

(d) money required to be paid in accordance with

(i) a determination, other than costs required to be paid under section 79 (1) (f), or

(ii) a settlement agreement or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

(f) gratuities,

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses,

(i) penalties, and

(j) an administrative fee imposed under section 30.1;

"week" means a period of 7 consecutive days beginning,

(a) for the purpose of calculating overtime, on Sunday,

(b) for the purposes of sections 37 and 52.1, on Sunday, and

(c) for any other purpose, on any day;

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

Purposes of this Act

2 The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

(b) to promote the fair treatment of employees and employers;

(c) to encourage open communication between employers and employees;

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

(f) to contribute in assisting employees to meet work and family responsibilities.

Scope of this Act

3 (1) Subject to this section, this Act applies to all employees other than those excluded by regulation.

(2) If a collective agreement contains any provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 does not apply in respect of employees covered by the collective agreement:

Column 1 **Matter**	**Column 2** **Part or Provision**
Hours of work or overtime	Part 4
Statutory holidays	Part 5
Annual vacation or vacation pay	Part 7
Seniority retention, recall, termination of employment or layoff	section 63

(3) If a collective agreement contains no provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 is deemed to be incorporated in the collective agreement as part of its terms:

Column 1 **Matter**	**Column 2** **Part or Provision**
Hours of work or overtime	Part 4 except section 37
Statutory holidays	Part 5
Annual vacation or vacation pay	Part 7
Seniority retention, recall, termination of employment or layoff	section 63

(4) If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement:

section 17 *[paydays]*;

section 18 (1) *[payment of wages when employer terminates]*;

section 18 (2) *[payment of wages when employee terminates]*;

section 20 *[how wages are paid]*;

section 22 *[assignment of wages]*;

section 23 *[employer's duty to make assigned payments]*;

section 24 *[how an assignment is cancelled]*;

section 25 (1) or (2) *[special clothing]*;

section 26 *[payments by employer to funds, insurers or others]*;

section 27 *[wage statements]*;

section 28 (1) *[content of payroll records]*;

section 28 (2) *[payroll record requirements]*.

(5) If a collective agreement contains no provision respecting a matter set out in a provision specified in subsection (4), the specified provision of this Act is deemed to be incorporated in the collective agreement as part of its terms.

(6) Parts 10, 11 and 13 of this Act do not apply in relation to the enforcement of the following provisions of this Act in respect of an employee covered by a collective agreement:
section 9 *[hiring children]*;

section 10 *[no charge for hiring or providing information]*;

section 16 *[employers required to pay minimum wage]*;

section 21 *[deductions]*;

Part 6 *[leaves and jury duty]*;

section 64 *[group terminations]*;

section 65 *[exceptions to section 64]*;

section 67 *[rules about notice of termination]*;

section 68 *[rules about payments on termination]*.

(7) If a dispute arises respecting the application, interpretation or operation of

(a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or

(b) a provision specified in subsection (6),

the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84 (3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

(8) Despite subsection (6), if an arbitration board makes a decision on the merits of a matter in dispute referred to in subsection (7) and the decision is in respect of wages, the arbitration board may refer the decision to the director for the purpose of collecting the wages and, for that purpose, the director may collect the wages under sections 87 to 97 and 99 as if the decision of the arbitration board were an order of the tribunal.

(9) In subsection (8), **"arbitration board"** has the same meaning as in Part 8 of the *Labour Relations Code*.

Requirements of this Act cannot be waived

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

Promoting awareness of employment standards

5 The director must develop and carry out policies to promote greater awareness of this Act.

Repealed

6 [Repealed 2002-42-3.]

Repealed

7 [Repealed 2003-65-2.]

Part 2 — Hiring Employees

No false representations

8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:

(a) the availability of a position;
(b) the type of work;
(c) the wages;
(d) the conditions of employment.

Hiring children

9 (1) A person must not employ a child under 15 years of age unless the person has obtained the written consent of the child's parent or guardian.

(2) A person must not employ a child under 12 years of age without the director's permission.

(3) On permitting the employment of a child under 12 years of age, the director may set the conditions of employment for the child.

(4) An employer must comply with the conditions of employment set under subsection (3).

No charge for hiring or providing information

10 (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for

(a) employing or obtaining employment for the person seeking employment, or

(b) providing information about employers seeking employees.

(2) A person does not contravene this section by requesting, charging or receiving payment for any form of advertisement from the person who placed the advertisement.

(3) A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to the recovery of the payment.

No fees to other persons

11 (1) An employment agency must not make a payment, directly or indirectly, to a person for obtaining or assisting in obtaining employment for someone else.

(2) A farm labour contractor must not make a payment, directly or indirectly, to a person for whom the farm labour contractor's employees work.

(3) A person does not contravene this section by paying for any form of advertisement placed by that person.

Employment and talent agencies must be licensed

12 (1) A person must not operate an employment agency or a talent agency unless the person is licensed under this Act.

(2) Subsection (1) does not apply to a person operating an employment agency for the sole purpose of hiring employees exclusively for one employer.

Farm labour contractors must be licensed

13 (1) A person must not act as a farm labour contractor unless the person is licensed under this Act.

(2) A person who engages the services of an unlicensed farm labour contractor is deemed for the purposes of this Act to be the employer of the farm labour contractor's employees.

(3) A person must not engage the services of a farm labour contractor unless the farm labour contractor is licensed under this Act.

Written employment contract required for domestics

14 (1) On employing a domestic, the employer must provide the domestic with a copy of the employment contract.

(2) The copy of the employment contract provided to the domestic must clearly state the conditions of employment, including

(a) the duties the domestic is to perform,

(b) the hours of work,

(c) the wages, and

(d) the charges for room and board.

(3) If an employer requires a domestic to work during any pay period any hours other than those stated in the employment contract, the employer

must add those hours to the hours worked during that pay period under the employment contract.

Register of employees working in residences

15 An employer must provide to the director, in accordance with the regulations, any information required for establishing and maintaining a register of employees working in private residences.

Part 3 — Wages, Special Clothing and Records

Employers required to pay minimum wage

16 (1) An employer must pay an employee at least the minimum wage as prescribed in the regulations.

(2) An employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages in a pay period to comply with subsection (1) in relation to any other pay period.

Paydays

17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

(2) Subsection (1) does not apply to

(a) overtime wages credited to an employee's time bank, or

(b) vacation pay.

If employment is terminated

18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

If employee cannot be located

19 (1) In this section, **"administrator"** has the same meaning as in the *Unclaimed Property Act*.

(1.1) If an employer cannot locate an employee to pay the employee's wages, the employer must pay the wages to the director within 60 days after the wages became payable.

(2) The director must give an employer a receipt for any wages received from the employer under subsection (1.1).

(3) The director's receipt for wages is proof that the employer's liability for payment of the wages is discharged to the extent of the amount stated in the

receipt.

(4) If the director cannot locate an employee within one year after receiving the employee's wages under this section, the director must transfer the wages to the administrator in accordance with the transfer schedule set by the administrator.

(5) Money transferred to the administrator under subsection (4) is deemed to be an unclaimed money deposit under the *Unclaimed Property Act*.

How wages are paid

20 An employer must pay all wages

(a) in Canadian currency,

(b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or

(c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

Deductions

21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Assignments

22 (1) An employer must honour an employee's written assignment of wages

(a) to a trade union in accordance with the *Labour Relations Code*,

(b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada),

(c) to a person to whom the employee is required under a maintenance order, as defined in the *Family Maintenance*

Enforcement Act, to pay maintenance, and

(d) to an insurance company for insurance or medical or dental coverage.

(e) [Repealed 2003-65-5.]

(2) [Repealed 2003-65-5.]

(3) An employer must honour an assignment of wages authorized by a collective agreement.

(4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

Employer's duty to make assigned payments

23 An employer who deducts an amount from an employee's wages under an assignment of wages must pay the amount

(a) according to the terms of that assignment, or

(b) within one month after the date of the deduction,

whichever is sooner.

How an assignment is cancelled

24 To cancel an assignment of wages, an employee must notify in writing

(a) the employer, and

(b) the person to whom the wages were assigned.

Special clothing

25 (1) An employer who requires an employee to wear special clothing must, without charge to the employee,

(a) provide the special clothing, and

(b) clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2).

(2) If an employer and the majority of the affected employees at a workplace agree that the employees will clean their own special clothing and maintain it in a good state of repair,

(a) the agreement binds all employees at that workplace who are required to wear special clothing,

(b) the employer must reimburse, in accordance with the agreement, each employee bound by the agreement for the cost of cleaning and maintaining the special clothing, and

(c) the employer must retain for 2 years records of the agreement and the amounts reimbursed.

(3) The following are deemed to be wages owing and this Act applies to their recovery:

(a) money received or deducted by an employer from an employee for providing, cleaning or maintaining special clothing;

(b) money an employer fails to reimburse under subsection (2).

Payments by employer to funds, insurers or others

26 An employer who agrees under an employment contract to pay an amount on behalf of an employee to a fund, insurer or other person must pay the amount in accordance with the contract.

Wage statements

27 (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:

(a) the employer's name and address;

(b) the hours worked by the employee;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the employee's overtime wage rate;

(e) the hours worked by the employee at the overtime wage rate;

(f) any money, allowance or other payment the employee is entitled to;

(g) the amount of each deduction from the employee's wages and the purpose of each deduction;

(h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is

paid for;

(i) the employee's gross and net wages;

(j) how much money the employee has taken from the employee's time bank and how much remains.

(2) An employer may provide a wage statement to an employee electronically if the employer provides to the employee, through the workplace,

(a) confidential access to the electronic wage statement, and

(b) a means of making a paper copy of that wage statement.

(3) [Repealed 2002-42-8.]

(4) If a wage statement would be the same as the wage statement given for the previous pay period, another wage statement need not be given until a change occurs.

Payroll records

28 (1) For each employee, an employer must keep records of the following information:

(a) the employee's name, date of birth, occupation, telephone number and residential address;

(b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

(e) the benefits paid to the employee by the employer;

(f) the employee's gross and net wages for each pay period;

(g) each deduction made from the employee's wages and the reason for it;

(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

(i) the dates of the annual vacation taken by the employee, the

amounts paid by the employer and the days and amounts owing;

(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must

(a) be in English,

(b) be kept at the employer's principal place of business in British Columbia, and

(c) be retained by the employer for 2 years after the employment terminates.

Repealed

29 [Repealed 2002-42-10.]

Producer and farm labour contractor are liable for unpaid wages

30 (1) A producer and a farm labour contractor are jointly and separately liable for wages earned by an employee of the farm labour contractor for work done on behalf of the producer.

(2) Subsection (1) does not apply in respect of a producer if

(a) the farm labour contractor is licensed under this Act at the time the producer engages the services of the farm labour contractor, and

(b) the producer satisfies the director that the producer paid the farm labour contractor for wages earned by each employee of the farm labour contractor for work done on behalf of the producer.

Liability of farm labour contractor for transportation costs

30.1 (1) A farm labour contractor is liable to pay a prescribed administrative fee to the Province if

(a) a motor vehicle used by the farm labour contractor to transport employees of the farm labour contractor, of another farm labour contractor or of a producer is, during the transportation of the employees, removed from service as the result of a failure to comply with, or a contravention of, an enactment of British Columbia or of Canada, and

(b) the Province, at its own cost, provides alternative transportation to transport the employees to the employees' work site or another location.

(2) If a farm labour contractor is liable under subsection (1) to pay an administrative fee, the director must serve on the contractor a notice setting out

(a) the amount of the fee,

(b) the date by which the fee must be paid,

(c) the consequences of failing to pay the fee, and

(d) the manner and method for payment of the fee.

(3) A farm labour contractor liable to pay an administrative fee under subsection (1) must pay the fee in accordance with the regulations.

(4) The director may vary or cancel a notice

(a) if

(i) the farm labour contractor on whom the notice was served provides evidence satisfactory to the director that the finding that the farm labour contractor failed to comply with or contravened an enactment as described in subsection (1) (a) has been reversed on appeal under that enactment, or

(ii) evidence comes to the attention of the director that was not available at the time the notice was issued that another requirement under subsection (1) was not met, or

(b) to correct a clerical, typographical or inadvertent error, an omission or a similar mistake.

Enforcement of administrative fee

30.2 (1) An administrative fee imposed under section 30.1 is a debt payable to the government.

(2) If a farm labour contractor fails to pay the administrative fee as required under section 30.1, the director may do one or more of the following:

(a) suspend, cancel or refuse to reinstate the farm labour

contractor's licence, or refuse to grant a new licence to the farm labour contractor, until the fee is paid;

(b) file with the Supreme Court a copy of the notice referred to in section 30.1 (2).

(3) On being filed, the notice is enforceable in the same manner as a judgment of the Supreme Court in favour of the director for the recovery of the amount of the fee stated in the notice.

(4) Sections 79 and 98 do not apply to a contravention of section 30.1.

Part 4 — Hours of Work and Overtime

Repealed

31 [Repealed 2002-42-12.]

Meal breaks

32 (1) An employer must ensure

(a) that no employee works more than 5 consecutive hours without a meal break, and

(b) that each meal break lasts at least a 1/2 hour.

(2) An employer who requires an employee to work or be available for work during a meal break must count the meal break as time worked by the employee.

Split shifts

33 An employer must ensure that an employee working a split shift completes the shift within 12 hours of starting work.

Minimum daily hours

34 (1) Subject to subsections (2) and (3), if as required by an employer an employee reports for work on any day, the employer must pay the employee for a minimum of 2 hours at the regular wage whether or not the employee starts work, unless the employee is unfit to work or fails to comply with Part 3 of the *Workers Compensation Act*, or a regulation under that Part.

(2) Whether or not the employee starts work, the employer under subsection (1) must pay the employee for a minimum of 4 hours at the employee's regular wage if the employer had previously scheduled the employee to work for more than 8 hours that day, unless

(a) the employee is unfit to work or fails to comply with Part 3 of the *Workers Compensation Act*, or a regulation under that

Part, or

(b) the work is suspended for reasons completely beyond the employer's control, including unsuitable weather conditions.

(3) If the circumstance set out in subsection (2) (b) applies, the employer must pay the employee for a minimum of 2 hours at the employee's regular wage.

(4) If

(a) the employee under subsection (1) is required to work longer than 2 hours, or

(b) the circumstances described in subsection (2) are applicable and the employee is required to work longer than 4 hours,

the employer must pay the employee for the entire period the employee is required to work.

Maximum hours of work before overtime applies

35 (1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.

(2) Subsection (1) does not apply for the purposes of an employee who is working under an averaging agreement under section 37.

Hours free from work

36 (1) An employer must either

(a) ensure that an employee has at least 32 consecutive hours free from work each week, or

(b) pay an employee 1 1/2 times the regular wage for time worked by the employee during the 32 hour period the employee would otherwise be entitled to have free from work.

(2) An employer must ensure that each employee has at least 8 consecutive hours free from work between each shift worked.

(3) Subsection (2) does not apply in an emergency.

Agreements to average hours of work

37 (1) Despite sections 35, 36 (1) and 40 but subject to this section, an employer and employee may agree to average the employee's hours of work over a period of 1, 2, 3 or 4 weeks for the purpose of determining the employee's

entitlement, if any, to overtime wages under subsections (4) and (6) of this section and wages payable under subsection (8) or (9) (b).

(2) An averaging agreement under subsection (1) is not valid unless

(a) the agreement

(i) is in writing,

(ii) is signed by the employer and employee before the start date provided in the agreement,

(iii) specifies the number of weeks over which the agreement applies,

(iv) specifies the work schedule for each day covered by the agreement,

(v) specifies the number of times, if any, that the agreement may be repeated, and

(vi) provides for a start date and an expiry date for the period specified under subparagraph (iii),

(b) the schedule in the agreement under paragraph (a) (iv) is in compliance with subsection (3), and

(c) the employee receives a copy of the agreement before the date on which the period specified in the agreement begins.

(3) A work schedule in an agreement under this section must not provide for more than the following hours of work for the employee:

(a) 40 hours, if the agreement specifies a 1 week period under subsection (2) (a) (iii);

(b) an average of 40 hours per week, if the agreement specifies more than a 1 week period under subsection (2) (a) (iii).

(4) An employer under this section who requires, or directly or indirectly allows, an employee to work more than 12 hours a day, at any time during the period specified in the agreement, must pay the employee double the employee's regular wage for the time over 12 hours.

(5) An employer under this section who requires, or directly or indirectly

allows, an employee to work more than an average of 40 hours a week within the period specified in the agreement must pay the employee 1 1/2 times the employee's regular wage for the time over 40 hours.

(6) An employer under this section who requires, or directly or indirectly allows, an employee to work more than the hours scheduled for a day during the period of the agreement must pay the employee

(a) 1 1/2 times the employee's regular wage for,

(i) if fewer than 8 hours were scheduled for that day, any time worked over 8 hours, or

(ii) if 8 or more hours were scheduled for that day, any time worked over the number of hours scheduled, and

(b) double the employee's regular wage for any time worked over 12 hours that day.

(7) For the purpose of calculating average weekly hours for an employee under subsection (5),

(a) only the first 12 hours worked by the employee in each day are counted, no matter how long the employee works on any day of the week, and

(b) if subsection (6) applies, the time that the employee works beyond the scheduled hours and for which the employee is paid in accordance with that subsection, is excluded.

(8) Section 36 (1) applies in relation to an averaging agreement if the period specified in the agreement is 1 week.

(9) If the period specified in an averaging agreement is more than 1 week, the employer must either

(a) ensure that for each week covered by the agreement, the employee has an interval free from work of 32 consecutive hours, whether the interval is taken in the same week, different weeks or consecutively any time during the weeks covered by the agreement, or

(b) pay the employee 1 1/2 times the regular wage for time worked by the employee during the periods the employee would otherwise be entitled to have free from work under

paragraph (a).

(10) At the employee's written request, the employer and employee may agree to adjust the work schedule referred to in subsection (2) (a) (iv) provided that the total number of hours scheduled in the agreement remain the same.

(11) The parties to an averaging agreement under this section are bound by that agreement until the expiry date set out in the agreement or a later date provided in an agreement to repeat the averaging agreement, as the case may be, and the provisions of the averaging agreement apply for the purpose of determining the employee's entitlement, if any, to overtime wages under subsections (4) and (6) and wages payable under subsection (8) or (9) (b).

(12) Subsections (2) to (11) are deemed to be incorporated in an averaging agreement under this section as terms of the agreement.

(13) An employer must retain an averaging agreement under this section for 2 years after the employment terminates.

(14) The application and operation of an averaging agreement under this section must not be interpreted as a waiver described in section 4.

Repealed

38 [Repealed 2002-42-18.]

No excessive hours

39 Despite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.

Overtime wages for employees not working under an averaging agreement

40 (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,

(a) 1 1/2 times the employee's regular wage for the time over 8 hours, and

(b) double the employee's regular wage for any time over 12 hours.

(2) An employer must pay an employee who works over 40 hours a week, and is not working under an averaging agreement under section 37, 1 1/2 times the employee's regular wage for the time over 40 hours.

(3) For the purpose of calculating weekly overtime under subsection (2),

only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

(4) [Repealed 2002-42-19.]

Repealed

41 [Repealed 2002-42-20.]

Banking of overtime wages

42 (1) At the written request of an employee, an employer may establish a time bank for the employee and credit the employee's overtime wages to the time bank instead of paying them to the employee within the time required under section 17.

(2) Overtime wages must be credited to a time bank at the rates required under section 37 (4), (5) or (6) or 40.

(3) If a time bank is established, the employee may at any time request the employer to do one or more of the following:

(a) pay the employee all or part of the overtime wages credited to the time bank;

(b) allow the employee to use the credited overtime wages to take time off with pay at a time agreed by the employer and the employee;

(c) close the time bank.

(3.1) The employer may close an employee's time bank after one month's written notice to the employee.

(3.2) Within 6 months of closing an employee's time bank under subsection (3.1), the employer must do one of the following:

(a) pay the employee all of the overtime wages credited to the time bank at the time it was closed;

(b) allow the employee to use the credited overtime wages to take time off with pay;

(c) pay the employee for part of the overtime wages credited to the time bank at the time it was closed and allow the employee to use the remainder of the credited overtime wages to take time off with pay.

(4) [Repealed 2003-65-6.]

(5) On termination of employment or on receiving the employee's written request to close the time bank, the employer must pay the employee any amount credited to the time bank.

(6) [Repealed 2003-65-6.]

Repealed

43 [Repealed 2002-42-22.]

Part 5 — Statutory Holidays

Entitlement to statutory holiday

44 An employer must comply with section 45 or 46 in respect of an employee who has been employed by the employer for at least 30 calendar days before the statutory holiday and has

(a) worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday, or

(b) worked under an averaging agreement under section 37 at any time within that 30 calendar day period.

Statutory holiday pay

45 (1) An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay determined by the formula

amount paid ÷ days worked

where

amount paid — is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the statutory holiday, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and

days worked — is the number of days the employee worked or earned wages within that 30 calendar day period.

(2) The average day's pay provided under subsection (1) applies whether or not the statutory holiday falls on the employee's regularly scheduled day off.

If employee **is required to work on statutory holiday**

46 An employee who works on a statutory holiday must be paid for that day

(a) 1 1/2 times the employee's regular wage for the time worked up to 12 hours,

(b) double the employee's regular wage for any time worked over 12 hours, and

(c) an average day's pay, as determined using the formula in section 45 (1).

Repealed

47 [Repealed 2002-42-23.]

Substituting another day for a statutory holiday

48 (1) An employer may for one or more employees at a workplace substitute another day off for a statutory holiday if the employer and the employee or a majority of those employees, as the case may be, agree to the substitution.

(2) Any employees affected by the substitution of another day for a statutory holiday have the same rights under this Act and their employer has the same duties under this Act as if the other day were a statutory holiday.

(3) An employer must retain for 2 years records of agreements made under subsection (1).

Repealed

49 [Repealed 2002-42-25.]

Part 6 — Leaves and Jury Duty

Maternity leave

50 (1) A pregnant employee who requests leave under this subsection is entitled to up to 17 consecutive weeks of unpaid leave, which must be taken during the period that begins

(a) no earlier than 13 weeks before the expected birth date, and
(b) no later than the actual birth date

and ends no later than 17 weeks after the leave begins.

(1.1) An employee who requests leave under this subsection after giving birth to a child is entitled to up to 17 consecutive weeks of unpaid leave, which must be taken during the period that begins on the date of the birth and ends no later than 17 weeks after that date.

(2) An employee who requests leave under this subsection after the termination of the employee's pregnancy is entitled to up to 6 consecutive weeks of unpaid leave, which must be taken during the period that begins on the date of the termination of the pregnancy and ends no later than 6 weeks after that date.

(3) An employee who request leave under this subsection is entitled to up to

6 additional consecutive weeks of unpaid leave if, for reasons related to the birth or the termination of the pregnancy, the employee is unable to return to work when the employee leave ends under subsection (1), (1.1) or (2).

(4) A request for leave must

(a) be given in writing to the employer,

(b) if the request is made during the pregnancy, be given to the employer at least 4 weeks before the day the employee proposes to begin leave, and

(c) if required by the employer, be accompanied by a medical practitioner's or nurse practitioner's certificate stating the expected or actual birth date or the date the pregnancy terminated or stating the reasons for requesting additional leave under subsection (3).

(5) If an employee on leave under subsection (1) or (1.1) proposes to return to work earlier than 6 weeks after giving birth to the child, the employer may require the employee to give the employer a medical practitioner's or nurse practitioner's certificate stating the employee is able to resume work.

Parental leave

51 (1) An employee who requests leave under paragraph (a), (b) or (d) of this subsection is entitled to,

(a) for a parent who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 61 consecutive weeks of unpaid leave, which must begin, unless the employer and employee agree otherwise, immediately after the end of the leave taken under section 50,

(b) for a parent, other than an adopting parent, who does not take leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 62 consecutive weeks of unpaid leave, which must begin within 78 weeks after the birth of the child or children, and

(c) [Repealed 2011-25-327(c).]

(d) for an adopting parent, up to 62 consecutive weeks of unpaid leave, which must begin within 78 weeks after the child or children are placed with the parent.

(2) If the child has a physical, psychological or emotional condition requiring an additional period of parental care, an employee who requests leave under this subsection is entitled to up to an additional 5 consecutive weeks of unpaid leave, beginning immediately after the end of the leave taken under subsection (1).

(3) A request for leave must

(a) be given in writing to the employer,

(b) if the request is for leave under subsection (1) (a) or (b), be given to the employer at least 4 weeks before the employee proposes to begin leave, and

(c) if required by the employer, be accompanied by a medical practitioner's or nurse practitioner's certificate or other evidence of the employee's entitlement to leave.

(4) An employee's combined entitlement to leave under section 50 and this section is limited to 78 weeks plus any additional leave the employee is entitled to under section 50 (3) or subsection (2) of this section.

Family responsibility leave

52 An employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to

(a) the care, health or education of a child in the employee's care, or

(b) the care or health of any other member of the employee's immediate family.

Compassionate care leave

52.1 (1) In this section, **"family member"** means

(a) a member of an employee's immediate family, and
(b) any other individual who is a member of a prescribed class.

(2) An employee who requests leave under this section is entitled to up to 27 weeks of unpaid leave to provide care or support to a family member if a medical practitioner or nurse practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of

death within 26 weeks, or such other period as may be prescribed, after

(a) the date the certificate is issued, or

(b) if the leave began before the date the certificate is issued, the date the leave began.

(3) The employee must give the employer a copy of the certificate as soon as practicable.

(4) An employee may begin a leave under this section no earlier than the first day of the week in which the period under subsection (2) begins.

(5) A leave under this section ends on the last day of the week in which the earlier of the following occurs:

(a) the family member dies;

(b) the expiration of 52 weeks from the date the leave began.

(6) A leave taken under this section must be taken in units of one or more weeks.

(7) If an employee takes a leave under this section and the family member to whom subsection (2) applies does not die within the period referred to in subsection (5)(b), the employee may take a further leave after obtaining a new certificate in accordance with subsection (2), and subsections (3) to (6) apply to the further leave.

Reservists' leave

52.2 (1) In this section:

"Canadian Forces" has the same meaning as in section 14 of the *National Defence Act* (Canada);

"reservist" means a member of the reserve force, as defined in section 2 (1) of the *National Defence Act* (Canada).

(2) Subject to the regulations, an employee who is a reservist and who requests leave under this section is entitled to unpaid leave, for the period described in subsection (3), if

(a) the employee is deployed to a Canadian Forces operation outside Canada or is engaged, either inside or outside Canada, in a pre-deployment or post-deployment activity required by the Canadian Forces in connection with such an operation,

(b) the employee is deployed to a Canadian Forces operation inside Canada that is or will be providing assistance in dealing with an emergency or with its aftermath, or

(c) the prescribed circumstances apply.

(3) An employee who is a reservist is entitled to take leave under this section for the prescribed period or, if no period is prescribed, for as long as subsection (2) (a), (b) or (c) applies to the employee.

(4) Subject to subsection (5), a request for leave must

(a) be in writing,

(b) be given to the employer,

(i) unless subparagraph (ii) or (iii) applies, at least 4 weeks before the employee proposes to begin leave,

(ii) in the case of leave under subsection (2) (a) or (b), if the employee receives notice of the deployment less than 4 weeks before it will begin, as soon as practicable after the employee receives the notice, or

(iii) in the case of leave under subsection (2) (c), within the prescribed period, and

(c) include the date the employee proposes to begin leave and the date the employee proposes to return to work.

(5) If circumstances require leave to be taken beyond the date specified in the request under subsection (4) (c), the employee must

(a) notify the employer of the need for the extended leave and of the date the employee now proposes to return to work, and

(b) provide the notice referred to in paragraph (a),

(i) unless subparagraph (ii) or (iii) applies, at least 4 weeks before the date the employee had proposed, in the request under subsection (4), to return to work,

(ii) in the case of leave under subsection (2) (a) or (b), if the employee receives notice of the extended

deployment less than 4 weeks before the date referred to in subparagraph (i), as soon as practicable after the employee receives the notice, or

(iii) in the case of a leave under subsection (2) (c), within the prescribed period.

(6) If an employee who is a reservist proposes to return to work earlier than specified in the request submitted under subsection (4) or the notice provided under subsection (5), if applicable, the employee must notify the employer of this proposal at least one week before the date the employee proposes to return to work.

(7) An employer may require an employee who takes leave under this section to provide further information respecting the leave.

(8) If an employer requires an employee to provide further information under subsection (7), the employee must

(a) provide the prescribed information in accordance with the regulations, or

(b) if no information is prescribed, provide information reasonable in the circumstances to explain why subsection (2) (a), (b) or (c) applies to the employee and provide it within a reasonable time after the employee learns of the requirement under subsection (7).

Leave respecting disappearance of child

52.3 (1) In this section and section 52.4:

"**child**" means a person under 19 years of age;

"**crime**" means an offence under the *Criminal Code* other than an offence prescribed by the regulations made under section 209.4 (f) of the *Canada Labour Code*.

(2) If a child of an employee disappears and it is probable, in the circumstances, that the child's disappearance is a result of a crime, and the employee requests leave under this section, the employee is entitled to unpaid leave for a period of up to 52 weeks.

(3) If an employee is charged with a crime that resulted in the disappearance of the employee's child, the employee is not entitled, or, if already on leave, is no longer entitled, to leave under subsection (2).

(4) A leave under subsection (2) must be taken during the period that starts on the date the child disappears and ends on the date that is 53 weeks after the date the child disappears.

(5) A leave under subsection (2) may be taken by the employee in

(a) one unit of time, or

(b) more than one unit of time, with the employer's consent.

(6) Despite subsection (4), a leave under subsection (2) ends on the earliest of the following dates, if any apply:

(a) the date on which circumstances indicate it is no longer probable that the child's disappearance is a result of a crime;

(b) the date the employee is charged with a crime that resulted in the disappearance of the child;

(c) the date that is 14 days after the date on which the child is found alive;

(d) the date on which the child is found dead;

(e) the date that is the last day of the last unit of time in respect of which the employer consents under subsection (5)(b).

(7) If requested by the employer, the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that the employee's child has disappeared in circumstances in which it is probable the disappearance is a result of a crime.

Leave respecting death of child

52.4 (1) If a child of an employee dies and the employee requests leave under this section, the employee is entitled to unpaid leave for a period of up to 104 weeks.

(2) If an employee is charged with a crime that resulted in the death of the employee's child, the employee is not entitled, or, if already on leave, is no longer entitled, to leave under this section.

(3) A leave under subsection (1) must be taken during the period that starts

(a) on the date the child dies, or

(b) on the date the child is found dead, in the case of the child

disappearing before the child dies,

and ends on the date that is 105 weeks after the date referred to in paragraph (a) or (b), as applicable.

(4) a leave under subsection (1) may be taken by the employee in

(a) one unit of time, or

(b) more than one unit of time, with the employer's consent.

(5) Despite subsection (3), a leave under subsection (1) ends on the earlier of the following dates, if any apply:

(a) the date the employee is charged with a crime that resulted in the death of the child;

(b) the date that is the last day of the last unit of time in respect of which the employer consents under subsection (4)(b).

(6) If requested by the employer, the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that the employee's child is dead.

Bereavement leave

53 An employee is entitled to up to 3 days of unpaid leave on the death of a member of the employee's immediate family.

Duties of employer

54 (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.

(2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,

(a) terminate employment, or

(b) change a condition of employment without the employee's written consent.

(3) As soon as the leave ends, the employer must place the employee

(a) in the position the employee held before taking leave under this Part, or

(b) in a comparable position.

(4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

Jury duty

55 If an employee is required to attend court as a juror, the employer has the same duties under section 54 (2) to (4) in relation to the employee as if that employee were on leave under this Part.

Employment deemed continuous while employee on leave or jury duty

56 (1) The services of an employee who is on leave under this Part or is attending court as a juror are deemed to be continuous for the purposes of

(a) calculating annual vacation entitlement and entitlement under sections 63 and 64, and

(b) any pension, medical or other plan beneficial to the employee.

(2) In the following circumstances, the employer must continue to make payments to a pension, medical or other plan beneficial to an employee as though the employee were not on leave or attending court as a juror:

(a) if the employer pays the total cost of the plan;

(b) if both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost.

(3) The employee is entitled to all increases in wages and benefits the employee would have been entitled to had the leave not been taken or the attendance as a juror not been required.

(4) Subsection (1) does not apply if the employee has, without the employer's consent, taken a longer leave than is allowed under this Part.

(5) Subsection (2) does not apply to an employee on leave under section 52.2.

Part 7 — Annual Vacation

Entitlement to annual vacation

57 (1) An employer must give an employee an annual vacation of

(a) at least 2 weeks, after 12 consecutive months of employment, or

(b) at least 3 weeks, after 5 consecutive years of employment.

(2) An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation.

(3) An employer must allow an employee who is entitled to an annual vacation to take it in periods of one or more weeks.

(4) An annual vacation is exclusive of statutory holidays that an employee is entitled to.

Vacation pay

58 (1) An employer must pay an employee the following amount of vacation pay:

(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

(b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.

(2) Vacation pay must be paid to an employee

(a) at least 7 days before the beginning of the employee's annual vacation, or

(b) on the employee's scheduled paydays, if

(i) agreed in writing by the employer and the employee, or

(ii) provided by the collective agreement.

(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

Other payments or benefits do not affect vacation rights

59 (1) An employer must not reduce an employee's annual vacation or vacation pay because the employee

(a) was paid a bonus or sick pay, or

(b) was previously given a longer annual vacation than the minimum required under section 57.

(2) Despite subsection (1) (b), an employer may reduce an employee's annual vacation or vacation pay because at the written request of the employee the employer allowed the employee to take an annual vacation in advance.

Common date for calculating vacation entitlement

60 An employer may use a common date for calculating the annual vacation entitlement of all employees under sections 57 and 58, so long as this does not result in a reduction of any employee's rights under those sections.

Repealed

61 [Repealed 2002-42-29.]

Part 8 — Termination of Employment

Definition

62 In this Part, **"week of layoff"** means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks.

Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of

employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Group terminations

64 (1) If the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must give written notice of group termination to all of the following:

(a) each employee who will be affected;

(b) a trade union certified to represent, or recognized by the employer as the bargaining agent of, any affected employees;

(c) the minister.

(2) The notice of group termination must specify all of the following:

(a) the number of employees who will be affected;

(b) the effective date or dates of the termination;

(c) the reasons for the termination.

(3) The notice of group termination must be given as follows:

(a) at least 8 weeks before the effective date of the first termination, if 50 to 100 employees will be affected;

(b) at least 12 weeks before the effective date of the first termination, if 101 to 300 employees will be affected;

(c) at least 16 weeks before the effective date of the first termination, if 301 or more employees will be affected.

(4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.

(5) The notice and termination pay requirements of this section are in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63 or under the collective agreement, as the case may be.

(6) This section applies whether the employment is terminated by the employer or by operation of law.

Exceptions

65 (1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and

(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

(b) employed for a definite term,

(c) employed for specific work to be completed in a period of up to 12 months,

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act*

(Canada) or a proceeding under an insolvency Act,

(e) employed at one or more construction sites by an employer whose principal business is construction, or

(f) who has been offered and has refused reasonable alternative employment by the employer.

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.

(3) Section 63 does not apply to

(a) a teacher employed by a board of school trustees,

(a.1) a teacher who is employed with or who has a service contract with a francophone education authority as defined in the *School Act*, or

(b) an employee covered by a collective agreement who

(i) is employed in a seasonal industry in which the practice is to lay off employees every year and to call them back to work,

(ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and

(iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.

(4) Section 64 does not apply to an employee who

(a) is offered and refuses alternative work or employment made available to the employee through a seniority system,

(b) is laid off or terminated as a result of the normal seasonal

reduction, suspension or closure of an operation, or

(c) is laid off and does not return to work within a reasonable time after being requested to do so by the employer.

Director may determine employment has been terminated

66 If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

Rules about notice

67 (1) A notice given to an employee under this Part has no effect if

(a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or

(b) the employment continues after the notice period ends.

(2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of

(a) the employee, or

(b) a trade union representing the employee.

Rules about payments

68 (1) A payment made under this Part does not discharge liability for any other payment the employee is entitled to receive under this Act.

(2) The termination pay requirements of section 64 apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period.

(3) If an employee is not covered by a collective agreement, the director may determine that a payment made to the employee in respect of termination of employment, other than money paid under section 64, discharges, to the extent of the payment, the employer's liability to the employee under section 63.

Repealed

69-70 [Repealed 2002-42-34 and 35.]

Adjustment committee

71 (1) If an employer is required to give notice under section 64, the minister may require the employer to establish an adjustment committee.

(2) The adjustment committee is to consist of

(a) an equal number of representatives of the employer and of the affected employees, and

(b) anyone else the minister considers suitable for appointment to the committee.

(3) The purpose of the adjustment committee is to develop, by cooperation, an adjustment program

(a) to eliminate the need for terminating the employment of the affected employees, or

(b) to minimize the impact of terminating their employment and to help them obtain other employment.

(4) The adjustment committee may require any of the following to provide it with any information necessary for carrying out its purpose:

(a) the employer;

(b) the representatives of the employer and the affected employees;

(c) any other member of the adjustment committee.

Part 9 — Variances

Application for variance

72 An employer and any of the employer's employees may, in accordance with the regulations, join in a written application to the director for a variance of any of the following:

(a) a time period specified in the definition of "temporary layoff";

(b) section 17 (1) (paydays);

(c) section 25 (special clothing);

(d) section 33 (split shifts);

(e) section 34 (minimum daily hours);

(f) section 35 (maximum hours of work);

(g) section 36 (hours free from work);

(h) section 40 (overtime wages for employees not working under an averaging agreement);

(h.1) a period specified in section 37 (1) (number of weeks covered by an agreement to average hours of work);

(i) section 64 (notice and termination pay requirements for group terminations).

Power to grant variance

73 (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that

(a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and

(b) the variance is not inconsistent with the purposes of this Act set out in section 2.

(1.1) The application and operation of a variance under this Part must not be interpreted as a waiver described in section 4.

(2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director must be satisfied that the variation will facilitate

(a) the preservation of the employer's operations,

(b) an orderly reduction or closure of the employer's operations, or

(c) the short term employment of employees for special projects.

(3) The director may

(a) specify that a variance applies only to one or more of the employer's employees,

(b) specify an expiry date for a variance, and

(c) attach any conditions to a variance.

(4) On being served with a determination on a variance application, the employer must display a copy of the determination in each workplace, in locations where the determination can be read by any affected employees.

Part 10 — Complaints, Investigations and Determinations

Complaint and time limit

74 (1) An employee, former employee or other person may complain to the director that a person has contravened

(a) a requirement of Parts 2 to 8 of this Act, or

(b) a requirement of the regulations specified under section 127 (2) (l).

(2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

(3.1) Subsection (3) applies to an employee whose employment is terminated following a temporary layoff and, for that purpose, the last day of the temporary layoff is deemed to be the last day of employment referred to in subsection (3).

(4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.

If complainant requests identity be kept confidential

75 (1) If requested in writing by a complainant, the director must not disclose any identifying information about the complainant unless

(a) the disclosure is necessary for the purposes of a proceeding under this Act, or

(b) the director considers the disclosure is in the public interest.

(2) Subsection (1) applies despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (2) and (3) of that Act.

Investigations

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

(2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.

(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit specified in section 74 (3) or (4),

(b) this Act does not apply to the complaint,

(c) the complaint is frivolous, vexatious or trivial or is not made in good faith,

(d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,

(e) there is not enough evidence to prove the complaint,

(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,

(g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,

(h) the dispute that caused the complaint may be dealt with under section 3 (7), or

(i) the dispute that caused the complaint is resolved.

Opportunity to respond

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Settlement agreements

78 (1) The director may do one or more of the following:

(a) assist in settling a complaint or a matter investigated under

section 76;

(b) arrange that a person pay directly to an employee or other person any amount to be paid as a result of a settlement agreement under paragraph (a);

(c) receive on behalf of an employee or other person any amount to be paid as a result of a settlement agreement under paragraph (a).

(2) The director must pay money received under subsection (1) (c) to the person on whose behalf the money was received.

(3) A person who is a party to a settlement agreement under subsection (1) (a) must comply with the terms of the settlement agreement.

(4) If a person fails to comply with the terms of a settlement agreement under subsection (1) (a), the director may file the settlement agreement under section 91.

(5) The application and operation of a settlement agreement under this section must not be interpreted as a waiver described in section 4.

Determinations and consequences

79 (1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:

(a) comply with the requirement;

(b) remedy or cease doing an act;

(c) post notice, in a form and location specified by the director, respecting

(i) a determination, or

(ii) a requirement of, or information about, this Act or the regulations;

(d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;

(e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;

(f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

(2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:

(a) hire a person and pay the person any wages lost because of the contravention;

(b) reinstate a person in employment and pay the person any wages lost because of the contravention;

(c) pay a person compensation instead of reinstating the person in employment;

(d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

(3) In addition to subsection (1), if satisfied that an employer has contravened section 39, the director may require the employer to limit hours of work of employees to the hours or schedule specified by the director.

(4) The director may make a requirement under subsection (1), (2) or (3) subject to any terms and conditions that the director considers appropriate.

(5) The director must serve an employer with notice of a requirement imposed under subsection (1), (2) or (3), including any terms and conditions imposed under subsection (4).

(6) A person on whom the director imposes a requirement under this section must comply with that requirement.

(7) If the director requires a person to pay costs referred to in subsection (1)(f), the amount required to be paid is a debt due to the government and may be collected by the director in the same manner as wages.

(8) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint.

Limit on amount of wages required to be paid

80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

(a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment, and

(b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,

plus interest on those wages.

(1.1) Despite subsection (1) (a), for the purposes of a complaint that was delivered before May 30, 2002, to an office of the Employment Standards Branch under and in accordance with section 74, the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning 24 months before the earlier of

(a) the date of the complaint, and

(b) the termination of the employment,

plus interest on those wages.

(2) If a talent agency that has received wages from an employer on behalf of an employee has failed to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations, the amount the agency may be required by a determination to pay to the employee is limited to the amount calculated

(a) by deducting any fees allowed under the regulations from the amount received by the agency on behalf of the employee in the period beginning,

(i) in the case of a complaint, 6 months before the date of the complaint, and

(ii) in any other case, 6 months before the director first told the talent agency of the investigation that resulted in the determination, and

(b) by adding interest to the amount obtained under paragraph (a).

Notifying others of determination

81 (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:

(a) [Repealed 2002-42-43.]

(b) if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;

(c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;

(d) the time limit and process for appealing the determination to the tribunal.

(1.1) A person named in a determination under subsection (1) may request from the director written reasons for the determination.

(1.2) A request under subsection (1.1) must be in writing and delivered to the director within 7 days of the person being served with the copy of the determination under subsection (1).

(1.3) On receipt of a request under and in accordance with subsections (1.1) and (1.2), the director must provide the person named in the determination with written reasons for that determination.

(2) On being served with a determination requiring the employer to limit the hours of work of employees, an employer must display a copy of the determination in each workplace in locations where the determination can be read by any affected employees.

No other proceedings

82 Once a determination is made requiring payment of wages, an employee may commence another proceeding to recover them only if

(a) the director has consented in writing, or
(b) the director or the tribunal has cancelled the determination.

Employee not to be mistreated because of complaint or investigation

83 (1) An employer must not

(a) refuse to employ or refuse to continue to employ a person,

(b) threaten to dismiss or otherwise threaten a person,

(c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or

(d) intimidate or coerce or impose a monetary or other penalty on a person,

because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

(2) [Repealed 2002-42-44.]

Power to compel persons to answer questions and order disclosure

84 (1) For the purposes of this Act, the director may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the director to answer questions on oath or affirmation, or in any other manner;

(b) produce for the director a record or thing in the person's possession or control.

(2) The director may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any officers and governing members of a person to cause the person to comply with an order made under subsection (1).

Maintenance of order at hearings

84.1 (1) At an oral hearing, the director may make orders or give directions that he or she considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the director may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the director, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a hearing, and

(b) exclude a person from further participation in or attendance at a hearing until the director orders otherwise.

Contempt proceeding for uncooperative person

84.2 (1) The failure or refusal of a person subject to an order under section 84 to do any of the following makes the person, on application to the Supreme Court by the director, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court:

(a) attend before the director;

(b) take an oath or make an affirmation;

(c) answer questions;

(d) produce records or things in the person's possession or control.

(2) The failure or refusal of a person subject to an order or direction under section 84.1 to comply with the order or direction makes the person, on application to the Supreme Court by the director, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the Supreme Court.

Immunity protection

84.3 (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against the director, or a person acting on behalf of or under the direction of the director, because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act, or

(b) in the exercise or intended exercise of any power under this Act.

(2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Entry and inspection powers

85 (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

(a) enter during regular working hours any place, including any means of conveyance or transport, where

(i) work is or has been done or started by employees,

(ii) an employer carries on business or stores assets relating to that business,

(iii) a record required for the purposes of this Act is kept, or

(iv) anything to which this Act applies is taking place or has taken place;

(b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;

(c) inspect any records that may be relevant to an investigation under this Part;

(d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;

(e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;

(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

(2) Despite subsection (1), the director may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120.

Power to reconsider

86 (1) Subject to subsection (2), the director may vary or cancel a determination.

(2) If a person appeals a determination that the director intends to vary or cancel under subsection (1), the director must vary or cancel the determination within 30 days of the date that a copy of the appeal request was received by the director.

No jurisdiction to determine constitutional question

86.1 Nothing in this Act is to be construed as giving the director or any person acting for or on behalf of the director under this Act jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

Director without jurisdiction to apply the *Human Rights Code*

86.2 (1) The director does not have jurisdiction to apply the *Human Rights Code*.

(2) Subsection (1) applies to all matters brought before, on or after the date that the subsection applies to the director.

Part 11 — Enforcement

Lien for unpaid wages

87 (1) Despite any other Act, unpaid wages constitute a lien, charge and secured debt in favour of the director, dating from the time the wages were earned, against all the real and personal property of the employer or other person named in a determination, a settlement agreement or an order, including money due or accruing due to the employer or other person from any source.

(1.1) If a talent agency named in a determination, a settlement agreement or an order has

(a) received wages from an employer on behalf of an employee, and

(b) failed to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,

the wages, less any fees allowed under the regulations, constitute a lien, charge and secured debt in favour of the director, dating from the time the wages were received by the agency, against all the real and personal property of the agency, including money due or accruing due to the agency from any source.

(2) Unpaid wages set out in a decision or order filed under section 30 of the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, or under section 102 or 135 of the *Labour Relations Code* constitute a lien, charge and secured debt in favour of the persons named in the decision or order against all the real and personal property of the employer or other person named in the decision or order.

(3) Despite any other Act but subject to subsection (5), the amount of a lien, charge and secured debt referred to in subsections (1), (1.1) and (2) is payable and enforceable in priority over all liens, judgments, charges and

security interests or any other claims or rights, including the following:

(a) any claim or right of the government including, but not limited to, the claims and rights of the Workers' Compensation Board;

(b) any claim or right arising through contract, account receivable, insurance claim or sale of goods;

(c) any security interest within the meaning of the *Personal Property Security Act*.

(4) Subsection (3) (c) applies whether the lien, judgment, charge, security interest, claim or right was perfected within the meaning of the *Personal Property Security Act*, or was created or made, before or after

(a) in the case of wages referred to in subsection (1) or (2), the date the wages were earned or the date a payment for the benefit of the employee became due, and

(b) in the case of wages referred to in subsection (1.1), the date the wages were received by the talent agency.

(5) The lien, charge and secured debt referred to in subsections (1), (1.1) and (2) has priority over a mortgage of, or debenture charging, land, that was registered in a land title office before registration against that land of a certificate of judgment obtained on the filing, under section 91, of a determination, a settlement agreement or an order of the tribunal, but only with respect to money advanced under the mortgage or debenture after the certificate of judgment was registered.

Payment of interest

88 (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of

(a) the date the employment terminates, and

(b) the date a complaint about the wages or other amount is delivered to the director

to the date of payment.

(2) No interest accumulates under subsection (1) from the date a determination is made under section 79 or a settlement agreement is made under section 78 requiring payment of the wages or other amount until 38 days after

that date.

(3) Interest payable under subsection (1) is deemed to be wages and this Act applies to the recovery of those wages.

(4) Subsection (1) applies whether or not the wages or other amount became payable before this section comes into force, but the date from which the interest is calculated must not be earlier than the date this section comes into force.

(5) An amount collected under this Part, or deposited under section 113, earns interest at the prescribed rate, payable by the minister charged with the administration of the *Financial Administration Act*, from the date the amount is deposited in a savings institution to the date of payment to the person entitled.

(6) Subsection (5) does not apply to any security provided or bond posted under section 100.

(7) If a talent agency that has received wages from an employer on behalf of an employee fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,

(a) the talent agency must pay interest at the prescribed rate on the amount of the wages, less the fees, from the date a complaint about the wages is delivered to the director, and

(b) subsections (2) and (3) apply in respect of the interest.

(8) Subsection (7) applies whether or not the wages were received by the talent agency before that subsection comes into force, but the date from which the interest is calculated must not be earlier than the date subsection (7) comes into force.

Demand on third party

89 (1) If the director has reason to believe that a person is or is likely to become indebted to another who is required to pay money under a determination, a settlement agreement or an order of the tribunal, the director may demand in writing that the person pay to the director, on account of the other's liability under the determination, settlement agreement or order, all or part of the money otherwise payable to the other person.

(2) A person on whom a demand is made under this section must, if indebted to the other person, pay to the director or to someone specified by the director the amount demanded, within 15 days after the later of

(a) the date the demand is served, and

(b) the date the person named in the demand becomes indebted to the other person.

(3) The director's receipt for money paid by a person in response to a demand is proof that the person's liability to the person required to pay under the determination or settlement agreement or under the order of the tribunal is discharged to the extent of the amount stated in the receipt.

(4) For the purposes of this section, a savings institution is indebted to a person required to pay under a determination or settlement agreement or under an order of the tribunal for money or a beneficial interest in money in the savings institution

(a) on deposit to the credit of that person when a demand is served,

(b) held in trust by a depositor for that person when a demand is served, or

(c) deposited to the credit of that person after a demand is served.

(5) A demand made under this section continues in effect until it is satisfied or until it is cancelled by the director.

Failure to comply with demand

90 (1) If a person on whom a demand is made under section 89 does not comply with the demand,

(a) the director may enforce recovery of the amount stated in the demand as if it were unpaid wages, and

(b) this Act applies to the recovery of that amount.

(2) If a person on whom a demand is made under section 89 denies indebtedness to anyone required to pay under a determination, a settlement agreement or an order of the tribunal, the director may require that person to produce information the director considers necessary to establish that there is no indebtedness.

Determination or order may be filed and enforced as judgment

91 (1) The director may at any time file in a Supreme Court registry a

determination, a settlement agreement or an order of the tribunal.

(2) Unless varied, cancelled or suspended under section 86, 113, 115, 116 or 119 a filed determination is enforceable in the same manner as a judgment of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the determination.

(3) Unless varied or cancelled by the tribunal under section 116, a filed order of the tribunal is enforceable in the same manner as a judgment of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the order.

(3.1) A settlement agreement filed under this section is enforceable in the same manner as a judgment of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the settlement agreement.

(4) If a determination or order filed under this section is varied, cancelled or suspended, the director must promptly withdraw the determination or order from filing in the Supreme Court registry.

Seizure of assets

92 (1) The director may seize as much of the assets owned or possessed by a person who is required to pay under a determination, a settlement agreement or an order of the tribunal, or used in or incidental to that person's business, as is necessary to satisfy

(a) the amount stated in the determination, settlement agreement or order, and

(b) the costs of seizure.

(2) The director must safely keep the assets under seizure until the earlier of the following, as applicable:

(a) the determination, settlement agreement or order of the tribunal is filed in court under section 91 and a writ of seizure and sale has been executed;

(b) in the case of a determination or an order of the tribunal, the determination or order is cancelled under section 86, 115, 116 or 119 (9).

Release of assets

93 The director must release an asset seized under section 92 if satisfied that the asset is owned by someone other than a person required to pay under a determination, a settlement agreement or an order of the tribunal.

Wrongful removal of seized assets

94 (1) A person must not remove, damage or dispose of assets seized under section 92 except in accordance with this Act, a writ of seizure and sale or a court order.

(2) In addition to any other penalty, a person who contravenes subsection (1) is liable for the amount owed by the person required to pay under the determination, settlement agreement or order of the tribunal.

(3) This Act applies to the recovery of an amount a person is liable for under subsection (2).

Associated employers

95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

Corporate officer's liability for unpaid wages

96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

(2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,

(b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,

(c) vacation pay that becomes payable after the director or officer ceases to hold office, or

(d) money that remains in an employee's time bank after the director or officer ceases to hold office.

(2.1) If a corporation that is a talent agency has received wages from an employer on behalf of an employee and fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,

(a) a person who was a director or officer of the corporation at the time the wages were received is personally liable for the amount received by the corporation from the employer, less any fees allowed under the regulations, and

(b) that amount is considered for the purposes of subsection (3) to be unpaid wages.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).

(4) In this section, **"director or officer of a corporation"** includes a director or officer of a corporation, firm, syndicate or association that the director treats as one employer under section 95.

Sale of business or assets

97 If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Monetary penalties

98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

(1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

(1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.

(2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person

(a) has been convicted of an offence under this Act, or

(b) is also liable to pay a fine for an offence under section 125.

(4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

If money is paid to director

99 (1) Subject to section 78 (2), the director must pay to the minister charged with the administration of the *Financial Administration Act* all money received by the director under this Act, including money to be held in trust for the persons named in a determination, a settlement agreement or an order of the tribunal.

(2) Money received by the minister charged with the administration of the *Financial Administration Act* in respect of a determination, a settlement agreement or an order of the tribunal must be attributed

(a) first, to any wages required to be paid by the determination, settlement agreement or order,
(b) second, to any other amount, other than interest or penalties, required to be paid by the determination, settlement agreement or order,

(c) third, to interest required to be paid by the determination, settlement agreement or order, and

(d) last, to any penalties required to be paid by the determination or order.

(3) The minister charged with the administration of the *Financial Administration Act* must pay, according to the direction of the director, to the persons named in a determination, a settlement agreement or an order of the tribunal, money received in trust for those persons.

(4) Money attributed to wages under subsection (2) must be attributed proportionally among the employees or former employees named in the determination, settlement agreement or order according to the amount owing as shown on the determination, settlement agreement or order.

(5) The money attributed to an employee under subsection (4) must then be paid according to the following priority:

(a) to a person who is a holder for value of an uncashed cheque

or money order for the employee's wages;

(b) to a person the employee assigned the wages to;

(c) to the employee or, if deceased,

(i) to the employee's estate, or

(ii) under the *Wills, Estates and Succession Act*;

(d) to a fund, insurer or other person to whom payment is to be made under section 26.

(6) If there is not enough money to pay everyone entitled under a paragraph in subsection (5), the money available under that paragraph must be divided among them in proportion to the amount each of them is entitled to.

(7) Subsections (4) to (6) apply also to interest required to be paid on wages by a determination, a settlement agreement or an order of the tribunal.

(8) Despite subsections (5) and (7), if money is received for wages or interest owing to an employee who owes money under another determination or settlement agreement or under an order of the tribunal, the director may direct that the amount received be used to pay the claims of anyone entitled to payment under the other determination or settlement agreement or under the order.

Security to ensure compliance

100 (1) To ensure compliance with this Act or the regulations, the director may require an employer who has at any time contravened a requirement relating to the payment of wages under this Act or the former Act

(a) to provide an irrevocable letter of credit or other security satisfactory to the director, or

(b) to post a bond under the *Bonding Act*.

(2) Subsection (1) applies whether or not

(a) a penalty has been imposed on the employer under this Act, or

(b) the employer has been convicted of an offence under this Act or the former Act.

Publication of violators' names

101 (1) The director may compile information relating to contraventions of this Act or the regulations, including information identifying the persons who, according to a determination or an order of the tribunal, committed the contraventions.

(2) Despite the *Freedom of Information and Protection of Privacy Act*, the director may

(a) publish information compiled under subsection (1), and

(b) make that information available for public inspection during regular business hours at offices of the Employment Standards Branch.

Searching of records

101.1 On the written request and payment of a prescribed fee by a person, the director may

(a) conduct a search of records maintained by the director for information, in respect of a person named in the request, related to contraventions of this Act or the regulations or complaints or investigations under this Act, and

(b) provide that information to the person who made the request and paid the fee.

Part 12 — Employment Standards Tribunal

Employment Standards Tribunal continued

102 The Employment Standards Tribunal is continued consisting of

(a) a member appointed by the Lieutenant Governor in Council as the chair after a merit-based process,

(b) members appointed by the minister after a merit-based process and consultation with the chair, and

(c) any representative members appointed by the minister, after consultation with the chair, with equal representation from individuals with experience in employers' interests and from individuals with experience in employees' interests.

Application of *Administrative Tribunals Act*

103 The following provisions of the *Administrative Tribunals Act* apply to the tribunal:

(a) Part 1 *[Interpretation and Application]*;

(b) Part 2 *[Appointments]*;

(c) Part 3 *[Clustering]*;

(d) Part 4 *[Practice and Procedure]*, except the following:

(i) section 22 *[notice of appeal (inclusive of prescribed fee)]*;

(ii) section 23 *[notice of appeal (exclusive of prescribed fee)]*;

(iii) section 24 *[time limit for appeals]*;

(iv) section 25 *[appeal does not operate as stay]*;

(v) section 26 *[organization of tribunal]*;

(vi) section 27 *[staff of tribunal]*;

(vii) section 31 *[summary dismissal]*;

(viii) section 34 (1) and (2) *[party power to compel witnesses and require disclosure]*;

(ix) section 41 *[hearings open to public]*;

(x) section 42 *[discretion to receive evidence in confidence]*;

(e) section 45 *[tribunal without jurisdiction over Canadian Charter of Rights and Freedoms issues]*;

(f) section 46 *[notice to Attorney General if constitutional question raised in application]*;

(g) section 46.3 *[tribunal without jurisdiction to apply the Human Rights Code]*;

(h) section 48 *[maintenance of order at hearings]*;

(i) section 49 *[contempt proceeding for uncooperative witness or other person]*;

(j) Part 7 *[Decisions]*, except sections 50 (1) *[money order set out as principal and interest]* and 54 *[enforcement of tribunal's final decision]*;

(k) Part 8 *[Immunities]*;

(l) section 57 *[time limit for judicial review]*;

(m) section 58 *[standard of review with privative clause]*;

(n) section 59.1 *[surveys]*;

(o) section 59.2 *[reporting]*;

(p) section 60 (1) (a), (b) and (g) to (i) and (2) *[power to make regulations]*;

(q) section 61 *[application of Freedom of Information and Protection of Privacy Act]*.

Chair may delegate authority

104 (1) The chair may

(a) carry out any duty, power or function of the tribunal or a member, and

(b) delegate to a member a function, duty or power of the chair.

(2) While acting as chair under subsection (1) (b), a member has the power and authority of the chair.

Employees

105 (1) Despite the *Public Service Act*, the tribunal may employ a registrar and other employees it considers necessary for the purposes of this Act.

(2) The registrar may be appointed under section 102 (b) as a member.

(3) The *Labour Relations Code*, the *Public Service Act* and the *Public Service Labour Relations Act* do not apply to the tribunal's employees.

Organization of tribunal

106 (1) The chair may establish one or more panels of the tribunal.

(2) Two or more panels may proceed with separate matters at the same time.

(3) The chair may refer matters that are before the tribunal to a panel or a matter that is before a panel to the tribunal or another panel.

(4) A panel may consist of one, 3 or 5 members, but if representative members are appointed to a panel, there must be an equal number of representative members who have experience in employers' interests and who have experience in employees' interests.

(5) The chair may terminate an appointment to a panel and may fill a vacancy on a panel.

(6) A panel has the power and authority of the tribunal in appeals assigned to the panel under this section or matters coming before it under the rules made by the tribunal.

(7) If a panel consists of more than one member, the finding of the majority is the tribunal's finding, but if there is no majority the finding of the member chairing the panel is the tribunal's finding.

Repealed
107-108 [Repealed 2004-45-91.]

Other powers of tribunal
109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

(a) [Repealed 2002-42-58.]

(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired;

(c) [Repealed 2004-45-91.]

(d) enter during regular working hours any place, including any means of conveyance or transport, where

(i) work is or has been done or started by employees,

(ii) an employer carries on business or stores assets,

(iii) a record required for the purposes of this Act is kept, or

(iv) anything to which this Act applies is taking place or has taken place;

(e) inspect any records that may be relevant to an appeal or a reconsideration;

(f) on giving a receipt for a record examined under paragraph (e), remove the record to make copies or extracts;

(g) require a person to disclose, either orally or in writing, a matter required under this Act and require the disclosure to be made under oath or affirmation;

(h) order a person to produce, or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e).

(2) Despite subsection (1), the tribunal may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120.

Exclusive jurisdiction of tribunal

110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.

(2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

Repealed

111 [Repealed 2004-45-91.]

Part 13 — Appeals

Appeal of director's determination

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

(2) A person who wishes to appeal a determination to the tribunal under

subsection (1) must, within the appeal period established under subsection (3),

(a) deliver to the office of the tribunal

(i) a written request specifying the grounds on which the appeal is based under subsection (1),

(i.1) a copy of the director's written reasons for the determination, and

(ii) payment of the appeal fee, if any, prescribed by regulation, and

(b) deliver a copy of the request under paragraph (a) (i) to the director.

(3) The appeal period referred to in subsection (2) is

(a) 30 days after the date of service of the determination, if the person was served by registered mail, and

(b) 21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).

(4) If, after an appeal is made by a person in accordance with subsections (2) and (3), the determination that is the subject of the appeal is varied by the director under section 86, the person, within 7 days of being notified of the variation,

(a) may amend the request for appeal under subsection (2) (a) (i) and deliver it to the tribunal, and

(b) if the request for appeal is amended, must deliver a copy of the amended request to the director.

(5) On receiving a copy of the request under subsection (2) (b) or amended request under subsection (4) (b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

(5.1) The director is a party to an appeal under this section.

(6) The filing of a determination under section 91 does not prevent the

determination being appealed.

(7) This section does not apply to a determination made under section 119.

Director's determination may be suspended

113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.

(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either

(a) the total amount, if any, required to be paid under the determination, or

(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

After an appeal is requested

114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112 (2) have not been met.

(2) Before considering an appeal, the tribunal may

(a) refer the matter back to the director for further investigation, or

(b) recommend that an attempt be made to settle the matter.

(3) If the tribunal dismisses all or part of an appeal under subsection (1), the tribunal must inform the parties of its decision in writing and give reasons for that decision.

Tribunal's orders

115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

(a) confirm, vary or cancel the determination under appeal, or

(b) refer the matter back to the director.

(2) [Repealed 2004-45-93.]

Reconsideration of orders and decisions

116 (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

(2) The director or a person served with an order or a decision of the tribunal may make an application under this section.

(2.1) The application may not be made more than 30 days after the date of the order or decision.

(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order

(3) An application may be made only once with respect to the same order or decision.

(4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.

Part 14 — General Provisions

Director's power to delegate

117 (1) Subject to subsection (2), the director may delegate to any person any of

the director's functions, duties or powers under this Act, except the power to delegate under this section.

(2) and (3) [Repealed 2002-42-63.]

(4) A delegation under this section

(a) may be cancelled,

(b) does not, subject to subsection (3), prevent the director carrying out the delegated function, duty or power, and

(c) may be made subject to the terms the director considers appropriate.

(5) If the director ceases to hold office, a delegation made under this section continues in effect

(a) as long as the delegate continues in office, or

(b) until cancelled by a succeeding director.

(6) A person who claims to be carrying out a function, duty or power delegated by the director under this section must, on request, produce evidence of the delegation.

Right to sue preserved

118 Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

Extraprovincial certificates

119 (1) If satisfied that reciprocal provisions will be made by another jurisdiction in or outside of Canada for enforcing determinations of the director, the Lieutenant Governor in Council may

(a) declare that jurisdiction to be a reciprocating jurisdiction, and

(b) designate the designated statutory authority of that jurisdiction for the purpose of this section.

(2) If a designated statutory authority obtains an order, judgment or payment-of-wages certificate, the authority may apply to the director to enforce that order, judgment or certificate.

(3) The application must include a copy of the order, judgment or payment-of-wages certificate certified

(a) by the court in which the order, judgment or certificate is registered, or

(b) by the designated statutory authority as a true copy, if there is no provision in the reciprocating jurisdiction for registering the order, judgment or certificate in a court.

(4) If satisfied on receiving the application that the wages set out in the order, judgment or certificate are still owing, the director may make a determination requiring payment of those wages and may file the determination in a Supreme Court registry.

(5) A determination filed under subsection (4) is enforceable by the director in the same manner and with the same priorities as are provided in this Act for wages owing.

(6) Any person served under section 81 with a determination made under this section, may appeal the determination to the Supreme Court within

(a) 15 days after the date of service, if the person was served by registered mail, or

(b) 8 days after the date of service, if the person was personally served or served under section 122 (3).

(7) The Supreme Court Civil Rules apply to an appeal under subsection (6) to the extent they are consistent with this section.

(8) The Supreme Court has the same power that the tribunal has under section 113 to suspend the determination on application.

(9) After hearing the appeal, the Supreme Court may confirm, vary or cancel the determination under appeal or refer the matter back to the director.

Warrant to carry out inspection powers

120 If satisfied by evidence given under oath or affirmation that there is reason to believe there are in a private residence records or other things that are relevant for the purposes of an investigation or appeal under this Act, a justice may issue a warrant authorizing the person named in the warrant to enter the private residence in accordance with the warrant in order to exercise the powers referred to in section 85 (1) (b) to (d) or 109 (1) (e) or (f).

Director cannot be required to give evidence in other proceedings

121 Except for a prosecution under this Act or an appeal to the Employment Standards Tribunal, the director or a delegate of the director must not be required by a court, board, tribunal or person to give evidence or produce records relating to information obtained for the purposes of this Act.

Service of determinations, demands and notices

122 (1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if

(a) served on the person, or

(b) sent by registered mail to the person's last known address.

(2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

(3) At the request of a person on whom a determination or demand or a notice under section 30.1 (2) is required to be served, the determination or demand or the notice under section 30.1 (2) may be transmitted to the person electronically or by fax machine.

(4) A determination or demand or a notice under section 30.1 (2) transmitted under subsection (3) is deemed to have been served when the director receives an acknowledgement of the transmission from the person served.

Irregularities

123 A technical irregularity does not invalidate a proceeding under this Act.

Limitation period

124 No proceeding for an offence under this Act may be commenced in any court more than 2 years after the facts on which the proceeding is based first come to the director's knowledge.

Offences

125 (1) A person who contravenes a requirement of Parts 2 to 8 commits an offence.

(2) If a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence commits an offence.

(3) Subsection (2) applies whether or not the corporation is prosecuted for the offence.

(4) Section 5 of the *Offence Act* does not apply to this Act or the regulations.

Evidence and burden of proof

126 (1) The production of a cheque, bill of exchange or order to pay on which is marked "Pursuant to clearing rules, this item must not be cleared again unless certified", or other words signifying that payment was not made by a savings institution, is evidence that payment was not made.

(2) A copy of a document issued under this Act by the minister or the director, and certified by the director as a true copy, is, without proof of the director's appointment or signature,

(a) evidence of the document, and

(b) evidence that the person issuing the document was authorized to do so.

(3) Subsection (2) applies also in respect of a copy of a document issued under this Act by the tribunal and certified by the registrar of the tribunal as a true copy.

(4) The burden is on the employer to prove that,

(a) in the case of an alleged contravention of section 9 (1), an employee is 15 years of age or older,

(b) in the case of an alleged contravention of section 9 (2), an employee is 12 years of age or older, or

(c) in the case of an alleged contravention of Part 6, an employee's pregnancy, a leave allowed by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

Power to make regulations

127 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) excluding, on any conditions, for any periods, and in any

circumstances that are considered advisable, a class of persons from all or part of this Act or the regulations;

(a.1) providing that, in respect of an employee covered by a collective agreement,

(i) all or part of a regulation under this Act does not apply, or

(ii) Parts 10, 11 and 13 of this Act do not apply in relation to the enforcement of all or part of a regulation under this Act and that if a dispute arises respecting the application, interpretation or operation of all or part of that regulation, the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84 (3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute;

(b) establishing conditions of employment for employees or classes of employees, whether or not they have been excluded from a part of this Act;

(b.1) establishing conditions of employment for children under 15 years of age that the Lieutenant Governor in Council considers necessary or advisable to protect their health, safety, physical or emotional well-being, education or financial interests;

(c) respecting the licensing of employment agencies, talent agencies and farm labour contractors, including the following:

(i) establishing terms and conditions of licences, or terms and conditions that must be met for obtaining, continuing to hold or renewing a licence;

(ii) providing for the refusal, suspension, cancellation, renewal or reinstatement of licences, including the circumstances under which a licence may be refused, suspended, cancelled, renewed or reinstated;

(iii) providing for appeals of decisions made with respect to the refusal, suspension, cancellation, renewal or reinstatement of licences;

(d) prescribing the duties of employment agencies, talent

agencies and farm labour contractors;

(e) prescribing a form of employment contract that must be used by employers when employing domestics;

(f) prescribing the information employers, or different classes of employers, must provide for the purpose of establishing and maintaining a register of employees working in private residences and the time limits for providing that information;

(g) establishing minimum wages for employees or classes of employees;

(h) [Repealed 2002-42-64.]

(i) governing time banks;

(j) designating days as statutory holidays and respecting calculation of statutory holiday pay;

(k) respecting applications for variances or renewal of variances;

(l) specifying requirements of the regulations contravention of which may be the subject of a complaint under section 74;

(m) prescribing interest rates for the purposes of section 88 and providing for different rates for different purposes;

(m.1) respecting steps the director may specify be taken by an employee under section 76 (3) (d);

(n) prescribing penalties or schedules of penalties for determinations in respect of contraventions of a requirement of this Act or the regulations or a requirement imposed under section 100, which penalties or schedules of penalties may

(i) vary according to the nature or frequency of the contraventions or the number of employees affected by any contravention, and

(ii) provide for greater penalties for a second contravention and for third or subsequent contraventions in a 3 year period or any other period that may be prescribed;

(n.1) prescribing an appeal fee for the purposes of section 112 (2) (a) (ii);

(o) providing for appeals from determinations to a person or body other than the tribunal in cases involving the tribunal as an employer and providing for the enforcement of decisions on those appeals;

(p) respecting fees, including regulations

(i) prescribing fees for licences issued under this Act,

(ii) prescribing fees to be paid in respect of services provided by the government under this Act,

(iii) prescribing administrative fees for the purposes of section 30.1, and

(iv) specifying the time, manner and method for payment of prescribed fees payable under this Act;

(p.1) [Repealed 2010-3-29.]

(q) governing the production and inspection of employers' records;

(r) defining any word or expression used but not defined in this Act;

(s) prescribing a class of individuals for the purposes of the definition of "family member" under section 52.1 (1);

(t) prescribing a period for the purposes of section 52.1 (2);

(u) for the purposes of section 52.2,

(i) restricting the number of leaves within a specified period of time to which an employee who is a reservist is entitled,

(ii) prescribing circumstances for the purposes of subsection (2) (c) of that section and periods of time for the purposes of subsections (3), (4) (b) (iii) and (5) (b) (iii) of that section, and

(iii) respecting information to be provided for the purposes of subsection (8) of that section.

(3) Regulations made under subsection (2) (b.1) may be specific or general in their application and may provide differently for children of different age groups or different industries or classes of industries.

(4) Regulations made under subsection (2) (c) may delegate a matter to or confer a discretion on the director.

Part 15 — Transitional and Consequential Provisions

Transition from former Act

128 (1) Despite the repeal of the former Act, an order, certificate, registration, licence, variance, authorization or referral issued or made under that Act remains in force until it expires or is suspended or cancelled under that Act.

(2) If, before November 1, 1995, a decision was made by the director, an authorized representative of the director or an officer on a complaint made under the former Act, the remedy, review, appeal, enforcement and other provisions of that Act continue, despite the repeal of that Act, to apply to the complaint and to all subsequent proceedings in respect of the decision.

(3) If, before November 1, 1995, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under the former Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

(4) Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before November 1, 1995 and is terminated on or after that date.

(5) An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to the greater of the following:

(a) the number of weeks' wages the employee would have been entitled to under section 42 (3) of the former Act if the employment had been terminated without compliance with section 42 (1) of that Act;

(b) the amount the employee is entitled to under section 63 of this Act.

(6) The employer's liability to an employee referred to in subsection (4) for

compensation for length of service is deemed to be discharged if the employee is given notice according to section 42 (1) of the former Act or according to section 63 (3) of this Act, whichever entitles the employee to the longer notice period.

Transitional regulations

129 (1) The Lieutenant Governor in Council may make regulations considered necessary or advisable for the purpose of more effectively bringing into operation the provisions of this Act and to obviate any transitional difficulties encountered in doing so.

(2) Without limiting subsection (1), a regulation may suspend for the period the Lieutenant Governor in Council specifies the operation of a provision of an enactment if that provision would impede the effective operation of this Act.

(3) Unless earlier repealed, a regulation made under this section is repealed one year after it is enacted.

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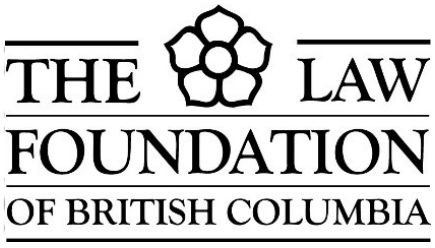
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