

## BCPRC Submission on Modernizing the Employment Standards Act

March 2019

### Introduction

The **BC Poverty Reduction Coalition** (BCPRC) is an alliance of organizations that have come together to raise awareness about poverty in BC and improve the health and well-being of all British Columbians. The Coalition was launched in 2009 and has now gained the support of over 400 organizations throughout the province in the call for an **accountable, bold and comprehensive poverty reduction strategy with legislated targets and timelines** to significantly reduce poverty, inequality, and homelessness in BC. Our work is grounded in the foundation of universal human rights.

We have a diverse membership of over 100 organizations throughout BC that bring their collective strength and support to this work, including community and non-profit groups, faith groups, health organizations, indigenous organizations, immigrant service agencies, businesses, labour organizations, and social policy groups (see Appendix A). Our office is on the unceded and occupied territory of the sə́ilwətaʔ /Selilwitulh (Tsleil-Waututh), Skwxwú7mesh Úxwumixw (Squamish), and xʷməθkʷəy̓əm (Musqueam) Nations.

**We congratulate the BC government for launching a poverty reduction plan for BC.** After almost a decade of calling for action to address the root causes of BC's high poverty rates, it is good to see a government paying attention to the evidence. When the cost of poverty – \$8-9 billion per year – far exceeds that of an accountable, bold and comprehensive poverty reduction plan, it is smart policy to invest in eliminating and preventing poverty.

**At the BC Poverty Reduction Coalition, we believe that enhancing and restoring the coverage and enforcement of employment standards is an important element of an accountable, bold and comprehensive poverty reduction plan.** Therefore, we welcome the opportunity to engage in the open consultation process to “modernize” the *BC Employment Standards Act (ESA/Act)*, which currently fails to protect vulnerable workers. As minimum protections for workers have been eroded and enforcement of these minimum working conditions has been slashed, the worst impacts are on vulnerable workers including:

- low-wage workers, working at minimum wage or close to minimum wage
- workers with temporary, gig and precarious jobs
- temporary foreign workers, undocumented workers, and workers with other precarious immigration status

With this in mind, we support the submissions of our members and allies at the BC Employment Standards Coalition (BCESC), the BC Federation of Labour (BCFed), First Call: BC Child and Youth Advocacy Coalition (First Call) and the Living Wage for Families Campaign (LW).

## **Theme 1 – Increasing protection of child workers**

Currently, children as young as 12 can legally work in BC in almost every industry, including food service, accommodation, farming, construction and manufacturing. This is not safe for children and, since 2003, over 2000 children under 15 have claimed work-related health care costs due to injuries, in some cases, life-altering injuries. Since the changes to the *Act* in 2003, BC has been the only province in Canada that does not place legal restrictions on the type of work or time of day that a child can work. However, in 2016, the Government of Canada ratified the International Labour Organization's (ILO) Convention 138 agreeing to set the minimum work age at not less than 16 years, the age of completing compulsory schooling.

### **Recommendations**

We support First Call's recommendations to modernize legislation and regulations to meet Canada's ILO commitments:

- Raise the minimum age for formal employment to 16 with exceptions for appropriate light work as defined in regulations.
- Require a permit issued by the Employment Standards Branch (ESB) for the employment of children under the age of 16.
- With respect to the employment of children and adolescents 12 to 15 years establish permit criteria that considers:
  - acceptable 'light work' including tasks and work places that do not threaten the health and safety, or hinder the education of children (12-13) and younger adolescents (14-15)
  - limits on the time-of-day for work, appropriate to age groups (e.g. prohibit late night and over-night work)
  - limits on the length of work time on a daily and weekly basis appropriate to age groups (e.g. no more than 4 hours per day on a school day for children)
- Ensure hazardous tasks and worksites are entirely off-limits to workers aged 16 – 17.
- Mandate adequately resourced, government-led enforcement to ensure employer compliance and inform government's policy monitoring.

## **Theme 2 – Transforming the Employment Standards Branch**

The Employment Standards Branch, now within the Ministry of Labour again, has the mandate and responsibility to enforce the employment rights of workers as detailed in the *Employment Standards Act* and the *Employment Standards Regulation (ESR/Regulation)*. However, according to the Employment Standards Coalition:

*The Employment Standards Branch has failed spectacularly to effectively carry out its responsibilities under the Act for over a decade and a half. This failure is manifest in the closure of 8 regional offices throughout the province, a significant 51% reduction in enforcement staff, the creation of significant administrative barriers to the filing of complaints by workers, especially the*

*requirement to complete a “self-help” step before a complaint is accepted, and the absence of pro-active investigation and enforcement activities.<sup>1</sup>*

Due to the vulnerability and lack of power of workers, a formal anonymous and third-party complaint system should be established to ensure that workplace issues are resolved in a timely fashion not after an employee has left. The Branch requires more funding to meet its legislative requirements and enhance its capacity to include research and proactive regulation of known problematic industries.

### **Recommendations**

We agree with the BC Law Institute’s (BCLI) report recommendations for addressing the failure of the Employment Standards Branch to proactively and effectively enforce employment standards as summarized by the BCESC:

- An end to the requirement that complainants must go through the "self-help" process before their complaints will be received, reviewed, investigated, mediated or adjudicated by the Employment Standards Branch (ESB).
- Restoration of the pre 2002 language in Section 76 of the Act requiring the Director of Employment Standards to investigate every complaint received.
- A requirement that the investigating officer of the ESB summarize the findings of an investigation into a complaint in a report to the Director. 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 decision should be made by the Director or delegate other than the investigating officer.
- The Act clearly permit a complaint to be filed on behalf of another person (i.e. a third person complaint).

In order to implement these changes and support the Branch to engage in proactive enforcement, it’s important to implement the BCFed and LW’s recommendations to:

- Eliminate the compulsory mediation process so that participation in mediation is voluntary.
- Increase staffing of the dedicated enforcement team of the ESB in order implement proactive inspections. Increase funding for the ESB accordingly.
- Restore ESB offices in remote areas, and relocate the Lower Mainland office to a central location near public transit.
- Create a reverse onus so that employers have to disprove a complaint against them, rather than workers having to prove that a violation occurred.
- Increase funding to the Branch significantly so that it can perform its function.
- Ensure that workers get full compensation for wage theft and other violations of the Act.
- Conduct research on employment trends and compliance with the law.

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<sup>1</sup> BC Employment Standards Coalition *MLA Briefing Document*, February 2018.

BCESC also notes that there are important changes to the *Act, Regulation*, and the way in which the Employment Branch operates that are not addressed in the BCLI and we support the call for action in these areas as well:

- Administrative procedures to enhance pro-active investigation and enforcement measures so as to give meaningful effect to the substantive rights and obligations in the Act.
- Mandatory posting of the *Act* and *Regulation* in all work places.
- Extension of the limitation period for filing a complaint from 6 months to 2 years.
- An administrative penalty provision to provide that if more than one employee is affected by a contravention the penalty is multiplied by the number of employees affected by the contravention.
- Determination decisions to be collected and made publicly available through the Employment Standards Branch website, as is the case for Residential Tenancy Branch decisions.
- Adopt statutory timelines for complaint resolution to ensure that complaints are resolved in a timely manner.
- Provide for escalating penalties for employers who fail to surrender documents as ordered by the Employment Standards Branch.
- An increase in the penalty for a second and third violation if such violations are within 3 years of the first contravention and any other provision of the *Act* is contravened, and increase the schedule of penalties by the rate of inflation increase since 2001.
- Provide powers to the Director of the Employment Standards Branch to enable the prosecution of employers who are found guilty of serious or repeated contraventions of the *Act*.
- Regulate the conduct of Licensed Employment Agencies similar to the way in which Licensed Farm Labour Contractors are regulated.
- Adopt the principle of equal treatment and equal pay. The *ESA* should ensure equal treatment for temporary agency workers performing work comparable to that of permanent workers, including equal pay, statutory and employer-sponsored benefits and working conditions.
- Require that all temporary agency workers be provided with written information about their employment rights; detailed information about the employment agency with which they are registered; and, for each assignment, a signed information document outlining the pay, hours, assignment duration and working conditions being offered.
- Provide certainty in the length of temporary agency assignments by requiring employment agencies to offer a new assignment at the same pay rate or compensation for lost pay if an assignment prematurely ends.
- Encourage transition to permanent employment by prohibiting "buy-out clauses" that impose a fee on client firms that wish to offer direct employment to temporary agency workers, and prohibit clauses that restrict such mobility.
- Implement the recommendations of the Changing Workplaces Review Special Advisors to the government of Ontario that temporary employment agencies be required to provide to their assignment workers notice with respect to the end of their assignment

with a client, whether the termination was caused by the agency or the client, in an amount equivalent to the notice required under the *ESA*. If notice is not given, unless the employee is referred to work for other clients of the agency, termination pay is payable by the agency for the number of days equal to the amount of notice, which amount must be paid within 48 hours following the end of the assignment.

### **Theme 3 – Supporting families through difficult times with job-protected leaves of absence**

Job-protected leave, including domestic violence leave, sick leave and access to statutory holidays and vacation, should be expanded and paid in BC. This leave should be standalone, not combined with other family leaves, so that primary care providers, usually women, do not lose out. In relation to intimate, personal and relationship violence (domestic violence), the economic security of job-protected leave provides critical stability for people to exit violent relationships. BC needs to catch up – Manitoba, Newfoundland and Labrador, Prince Edward Island, New Brunswick and Ontario all provide between three and five days of paid leave in addition to a period of unpaid leave. In relation to sick leave, BC is the only province that does not provide protection, although workers are entitled to a day off to attend to a sick child. This lack of state protection means low-wage workers go to work sick, which spreads illness and lengthens recovery time. Workers should also have access to all federal and provincial statutory holidays, and vacation entitlement should be expanded, so that all workers have access to a minimum of three weeks paid vacation. All of these measures contribute to the improved health and well-being of British Columbians.

#### **Recommendations**

We call on the government to implement the BCFed’s recommendations to:

- Expand access to job-protected leaves including intimate, personal and relationship violence leave, sick leave and vacation and statutory holiday leave.
- Ensure that new leave entitlements stand alone and are not combined with any other leave.
- Expand the definition of immediate family to include, “a person in a close, family-like relationship with an employee.”

We also support their specific recommendations for:

- Intimate, personal and relationship violence leave:
  - Provide protected leave for individuals facing intimate, personal, and relationship violence.
  - Include leave provisions for survivors of sexual assault.
  - Ensure no less than ten days paid leave per year should be provided, with at least 17 weeks total leave time.
  - Ensure leave is available to all employees regardless of length of service with the employer.
- Sick leave:
  - Include sick leave as a job-protected leave.
  - Include attending medical appointments as job-protected sick leave.

- Restrict employer requirements for medical notes for short absences as requiring unnecessary notes puts a burden on our health care system and results in prohibitive fees for workers.
- Vacation and Statutory holiday leave:
  - Increase paid vacation entitlement to three weeks per year for the first five years, and four weeks after five years of employment.
  - Include federal and/or provincial statutory holidays in the ESA, namely: Easter Monday, Boxing Day, National Aboriginal Day/National Day of Truth and Reconciliation (currently contemplated by federal government).

## **Theme 4 – Strengthening workers’ ability to recover wages/monies owed**

Workers in British Columbia need to be assured that their rights will be protected in every workplace across the province. That’s why the *Act* must become a universal set of standards that establishes the minimum set of rights every worker can count on. There should be no exemptions to the *Act*—current exemptions for tech workers, farm workers and workers who have a collective agreement should be eliminated—and differential treatment should also be prohibited for casual, term, temporary and part-time workers.

As the BCESC explains, the six-month limitation period for the recovery of unpaid wages and for filing a complaint to the ESB is unfair to workers. Workers may have been unaware of their rights or have been in a precarious employment relationship for an extended period of time. This is particularly important for temporary foreign workers as shorter time frames effectively bar them from seeking legal remedy and recovery for work-related rights violations. We join the BCFed and the BCESC in calling for a two-year limitation period corresponding with the limitation period for general civil claims, and a three-year wage recovery period, consistent with payroll record keeping requirements of the *Act*.

Wage theft is an urgent and widespread problem affecting workers in British Columbia. Wage theft was the most common complaint at the BCESC’s worker forums held in 2017.<sup>2</sup> The Victoria Retail Action Network and Vancouver Island Public Interest Group’s community-based research project with workers in precarious employment in Greater Vancouver also found that among workers surveyed, 42 per cent worked more hours than they were paid for, and 41 per cent were not paid overtime pay when it was accrued.<sup>3</sup> However, most cases of wage theft go undetected because the workers affected are unaware of their rights, are intimidated by the ESB complaints process and/or fearful of retribution.

Wage theft takes a variety of forms including failing to provide breaks, stealing tips and making improper deductions such as charging for breakage. Tips or gratuities are the property of

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<sup>2</sup> BC Employment Standards Coalition (2017), *Workers’ Stories of Exploitation and Abuse: Why BC employment standards need to change*. <http://bcemploymentstandardscoalition.com/wp-content/uploads/2017/08/BCESC-Workers-Stories-of-Exploitation-and-Abuse-July-2017.pdf>

<sup>3</sup> Stephanie Hardman (2016), *Part-time, Poorly paid, Unprotected: Experiences of precarious work in Retail, Food Services, & Hospitality in Victoria, BC*. Vancouver Island Public Interest Research Group. <https://vipirg.ca/s/VIPIRGRAN-2016-Parttime-poorly-paid-unprotected.pdf>

employees, and the law should confirm that managers and owners are not entitled to take tips intended for their employees.

### **Recommendations**

We support the BCFed's call to:

- Eliminate all exemptions to the *Act* including exemptions for farm workers and high-tech workers.
- Establish the *ESA* as the universal floor without exclusions for all workers including those covered by a collective agreement.
- Require equal treatment for all workers including casual, temporary, term and part-time workers.
- Extend the limitation period for filing a complaint at the ESB to two years.
- Re-extend the wage recovery period to three years.
- Clarify that tips and gratuities belong to the worker to whom they were given.

We also support the BCEESC's recommendations including:

- Amending the definition of "sitter" to be a person employed solely to attend to a child or adult for not more than 15 hours per week.
- The elimination of the liability exception for directors and officers if the company is insolvent or in bankruptcy proceedings and to restore the pre-2002 liability language in the *Act*.

## **Theme 5 – Clarifying hours of work and overtime standards**

Workers need certainty and notice about their work schedules in order to effectively balance their personal, community, and work life. Furthermore, many workers have multiple jobs and/or childcare obligations that also need predictable work schedules. LW explains that "many workers count on a minimum number of work hours to meet their monthly budget; if employers reduce or remove shifts with little notice, many workers and their families face deeper poverty."

All workers should be covered by the same minimum standards for hours of work and overtime—without exception. Minimum shift-length provisions should be restored to four hours for work that has started and two hours if work has not started, and overtime work should be voluntary except in emergency situations with restored payout provisions.

### **Recommendations**

We therefore support the recommendations put forward by the BCEESC, BCFed and LW, including:

- Require employers to post work schedules at least two weeks in advance, including work and shift start and end times and meal breaks scheduled during the work period.
  - Employees should receive the equivalent of one hour's pay if the schedule is changed with less than one week's notice.
- In an emergency circumstance, the minimum notice period is 24 hours.

- Employees should receive the equivalent of four hours pay if the schedule is changed with less than 24 hours notice.
- Ensure notice of schedules is provided in the first languages of those employees who do not have English as their first language.
- Require that if an employee is required to report for work, and if the employee is scheduled to work for more than four hours on the day, the employee must receive a minimum of four hours pay if work starts and a minimum of two hours pay if it does not.
- Implement the BC Employment Standards Coalition’s proposed provision on Voluntary Overtime, such that employees can choose to work overtime (more than 8 hours per day or 40 hours per week or the BCEESC’s proposed higher standard of 7 hours per day or 35 hours per week) but employers shall not require an employee to work or be at the employer’s disposal for more than 44 hours per week, with the exception of emergency circumstances.
  - Employees should have a voluntary right to refuse overtime and, if they do, no disciplinary action should be taken against the employee.
- Reinstate double time pay if workers are required to work during the 32-hour free-from-work period, and if workers work more than 12 hours per day and 48 hours per week.
- Reinstate the pre-2002 flexible work schedule provisions, replacing the current overtime averaging provisions.

## Theme 6 – Improving fairness for terminated workers

Most workers are dependent on their jobs to meet their monthly budgets, and the current termination provisions of the *Act* are insufficient considering the central role that jobs play in workers’ lives. In his 2006 *Federal Labour Standards Review Report*,<sup>4</sup> Professor Harry Arthurs notes that if employers could fire employees without fear of legal repercussions, they could effectively override employment contracts and the rights granted by legislation. Low- and moderate-income workers often cannot afford the time and the legal representation necessary to sue their employers for unjust dismissal. It is therefore essential that the *Employment Standards Act* protect the employment relationship through a substantive set of rules.

### Recommendations

We support the BCFed’s call to:

- Eliminate the three-month eligibility requirement for termination notice or pay-in-lieu of notice.
- Require employers to have “just cause” for terminating an employee’s employment to protect workers from unjust dismissal.
- Require employers to provide notice of termination, or pay-in-lieu of notice, where an employee is laid off, based on the total length of employment, including seasonal employees who have recurring periods of layoff beyond the 13-week layoff period.

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<sup>4</sup> H.W. Arthurs (2006), *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century*, Federal Labour Standards Review.

<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1166&context=reports>



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

The above recommendations should be inclusive of the BCEESC's recommendation in agreement with the minority on the BCLI Project Committee that "the Act should be updated and modernized to address wrongful dismissal and provide an administrative adjudication process for wrongful dismissal claims, and that the exclusion of construction workers from the termination provisions be repealed. In addition there should be an expedited adjudication process available to temporary foreign workers who have been wrongfully dismissed."

## Conclusion

While the submissions from our members and allies reflected here respond to the thematic areas referenced in the consultation paper, it is important to echo BCEESC's note that the consultation paper does not address a large number of provisions in the *Act* that are either out of date or inadequate for addressing the rights and protections of vulnerable workers. There continues to be a need to address these issues, some of which have been covered here despite the consultation paper, including:

*"penalties for violations, employment agency licensing and regulation, minimum wage setting and elimination of farm worker piece rates, variances and exclusions, domestics and other caregivers under regulation and exclusion, dependent contractors and misclassification, statutory holidays and entitlements, annual vacation, employment contracts, posting of the Act and Regulation in all work places, publication of determinations resulting from complaints and investigations, and responding to the growth of the 'gig economy' atypical employment relationships."*

As the BCFed states in their submission: "[i]mprovements are long-overdue, and the government should act quickly to protect workers. The *ESA* should be a universal floor that provides a fair and just level of protection to all workers in BC. Change is going to take more than new laws - it also requires a rethink on how the ESB operates."

We echo our allies in urging Minister Bains to act quickly to make the necessary comprehensive changes to the *Employment Standards Act* and the Employment Standards Branch to protect the most marginalized workers in our province.

## Appendix A: Current Members of BCPRC

Access Pro Bono  
ACORN BC  
Active Support Against Poverty Housing Society  
Africa Great Lakes Networking Foundation  
Association of Neighbourhood Houses BC  
Basic Income Vancouver  
BC Alliance on Mental Health/Illness & Addiction  
BC Confederation of Parent Advisory Councils  
BC Disability Caucus  
BC Federation of Labour  
BC Federation of Students  
BC Ferry and Marine Workers Union  
BC Food Systems Network  
BC Government and Service Employees' Union  
BC Health Coalition  
BC Healthy Communities  
BC Alliance for Healthy Living  
BC Non-Profit Housing Association  
BC Public Interest Advocacy Centre  
BC Teachers' Federation  
Burnaby Community Services Society  
Canada Without Poverty  
Canadian Cancer Society, BC & Yukon Division  
Canadian Centre for Policy Alternatives - BC  
Canadian Federation of University Women BC Council  
Canadian Mental Health Association - BC Division  
Carnegie Community Action Project  
Cedar Cottage Neighbourhood House  
Check Your Head: The Youth Global Education Network  
Citizens for Accessible Neighbourhoods  
Coalition of Child Care Advocates of BC  
Columbia Institute  
Community First Foundation  
Community Legal Assistance Society  
Community Social Planning Council, Victoria  
Council of Senior Citizens' Organizations of BC  
Cranbrook & District Social Planning Society  
Disability Alliance BC  
Downtown Eastside Neighbourhood House  
Early Childhood Educators of BC  
Exchange Inner City  
Faith in Action  
Federation of Community Social Services of BC  
Federation of Post-Secondary Educators of BC  
First Call: BC Child and Youth Advocacy Coalition  
Gordon Neighbourhood House  
Grandview Woodland Food Connection  
Greater Trail Community Skills Centre  
Greater Vancouver Food Bank  
Health Officer's Council of BC  
Health Sciences Association of BC  
Hospital Employees' Union  
Interspiritual Sustainability Council  
Jewish Seniors Alliance of Greater Vancouver  
KAIROS Parksville/Qualicum  
Kiwassa Neighbourhood House  
Living Wage for Families Campaign  
Megaphone Magazine  
Metro Vancouver Alliance  
Migrant Workers' Centre  
Mom2Mom Child Poverty Initiative  
MOSAIC  
MoveUP  
New Westminster & District Labour Council  
North Shore Disability Resource Centre  
North Shore Homelessness Task Force  
Oxfam Canada  
Pacific Community Resources Society  
Parent Advocacy Network for Public Education  
Pivot Legal Society  
Positive Living BC  
PovNet Society  
The Union Protein Project  
Public Health Association of BC  
Raise the Rates Coalition  
Revelstoke Poverty Reduction Working Group  
Richmond Poverty Response Committee  
Single Mothers' Alliance of BC  
SPARC BC  
Society for Children and Youth of BC  
Streams of Justice  
Surrey Poverty Reduction Coalition  
Together Against Poverty Society  
UFCW 1518  
Unifor  
Union Gospel Mission  
United Way of Greater Victoria  
United Way of the Lower Mainland  
Vancity Community Foundation  
Vancity Credit Union  
Vancouver & District Labour Council  
Vancouver Foundation  
Vancouver Neighbourhood Food Networks  
Vancouver Rape Relief and Women's Shelter  
Vancouver Tenants' Union  
Vibrant Abbotsford  
Weekend Fuelbag  
West Coast Women's LEAF  
Women Against Violence Against Women  
YWCA Metro Vancouver