

---

## Written Submissions to The Changing Workplaces Review

To: C. Michael Mitchell and The Honourable John C. Murray, Special Advisors  
From: Legal Assistance of Windsor  
Re: Vulnerable Workers and the *Employment Standards Act*  
Date: September 18, 2015

---

### Introduction

1. Please accept the following submissions on behalf of Legal Assistance of Windsor (the “clinic”). We are a community legal clinic providing legal and social work services exclusively to Windsor-Essex County’s low-income population. Alongside our work in social assistance, housing, criminal injuries compensation, and immigration, we provide assistance in making claims under the *Employment Standards Act* (the “ESA”).
2. Because of our focus on poverty law, our clients are all no or low-income individuals and families. Simply put, they come to our clinic for assistance with the basics – help with putting food on the table and a roof overhead.
3. In terms of the work we do involving the ESA, many of our clients are in very precarious situations. We help many temporary foreign workers, but also low-income workers originating from the Windsor-Essex region. However, many workers will not access our help, or even the help provided by the Ministry of Labour, out of fear of reprisals in the workplace. Our region has one of the highest unemployment rates in Canada, and we have seen that many workers are scared of becoming part of that statistic. Essentially, they feel that a bad job is better than no

job. This is especially true in reference to the temporary foreign workers, where termination of employment may lead to a forced repatriation.

4. It is our opinion that this reluctance to report violations also stems from the limited recourses available under the ESA. In your consultation guide, you requested that ESA coverage be addressed. Specifically, you asked:

Q 8: In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?

5. Our submissions will detail the challenges and limitations faced by our clients when attempting to file an ESA claim. In particular, we will address the legislative exclusions in the areas of severance, termination pay, and overtime pay, and the problematic enforcement of Ontario's workplace policy that are impacting our clients.

### **The Changing Nature of Work in Ontario**

6. It is respectfully submitted that the major issue with Ontario's current workplace legislation is that it no longer reflects the character of Ontario's contemporary labour market. Changes to the structure of the workplace over the past four decades have resulted in a growing segment of the economy being characterized by part-time, seasonal, and other non-standard employment relationships. As a result, many workers (and even entire workplaces) have found themselves exempt from the basic regulations and benefits that the ESA is intended to provide. These exemptions are the legal mechanisms which have led to many of Ontario's workplaces to become precarious. In response, we submit that these exclusions

provided under the ESA and its regulations must either be rescinded or amended so as to exclude fewer workers, thus returning to the stated purpose of the legislation.

## **Severance and Termination Pay**

7. As this panel knows, the ESA provides for both severance and termination pay corresponding to the length of time that an employee has been employed with the same employer. Many employers, however, are exempt from their obligations to pay severance and termination pay because of the “seasonal” nature of their operations.<sup>1</sup>
8. Of course, this includes the enormous segment of workplaces operating in the food production industry. With the growth of this industry in Windsor-Essex, this type of work, characterized by contracts of employment lasting 3-4 months out of the year, has become a permanent feature of our local economy.<sup>2</sup>
9. As a result, entire segments of the workforce are now finding themselves excluded from basic severance and termination pay benefits. Despite many of our clients returning to the same employer over many years and often working a full year’s worth of hours<sup>3</sup> within the 3-4 month season, they remain excluded from basic benefits provided to other workers under the ESA.<sup>4</sup>
10. It is our recommendation that the ESA be either amended to reflect actual amount of hours that seasonal workers perform, or that the regulations that operate to exclude seasonal workers from severance and termination pay<sup>5</sup> be rescinded. In this alternative, the amount of pay received at the end of a season can be adjusted to

---

<sup>1</sup> O. Reg. 288/01 s 2(1)(1).

<sup>2</sup> As of July 2015, Statistics Canada reports that there are 853 300 workers working in seasonal, temporary, term or contract jobs. Please see <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr69g-eng.htm>

<sup>3</sup> 40 hours per week for a “year” (12 month, 52 – week) period is equivalent to **2080** hours.

<sup>4</sup> Our clients’ paystubs reveal that the number of hours worked in a seasonal job in a 4 - month period is equivalent to the number of hours worked in a 12-month period by a worker working a “standard” 40 hours per week.

<sup>5</sup> Supra note 1.

reflect the relatively short nature of this type of employment, while still taking into consideration the years of service some workers may carry.

## **Overtime Pay**

11. Many of our clients are also excluded from overtime pay. As with severance and termination, exemptions from overtime pay is predominately concentrated in the temporary foreign worker and seasonal worker population that make up a disproportionate percentage of the workforce in farm-related work. Based on the fact that the use of foreign workers has become a static feature of Ontario's economy,<sup>6</sup> it is important that the ESA begins to recognize and afford these segments similar protections to those received by other workers.
12. The ESA does not expressly exclude temporary foreign workers from entitlement to overtime pay. However the regulations under the legislation exclude those who are "employed on a farm."<sup>7</sup> Although statistical data for the actual number of temporary foreign workers employed on the province's farms is scarce,<sup>8</sup> this clinic's experience shows that many farm workers employed in the Windsor-Essex community are indeed temporary foreign workers.
13. Consequently, the impact of these exclusions is to disentitle the many temporary foreign workers who come to the province to work in agriculture from receiving overtime pay. In order for workplace policy to adequately reflect Ontario's changing workplaces, the exemption from overtime pay for farm workers contained in O. Reg. 285/01 should be rescinded.

---

<sup>6</sup> Citizenship and Immigration Canada reports that as of 2011, 192 000 TFWs entered Canada. See <http://www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp>

<sup>7</sup> O. Reg. 285/01 s 2.

<sup>8</sup> Mike Moffat writing for Maclean's argues that "Canada needs to keep better labour market data" in order to determine the reason for the spike in TFWs in southwestern Ontario. See his article here: <http://www.macleans.ca/economy/economicanalysis/why-are-so-many-temporary-foreign-workers-in-southwestern-ontario/>

## **Enforcement of the *Employment Standards Act***

14. A third, and equally significant, aspect of the ESA that needs to be modified is in the area of enforcement. Without appropriate enforcement mechanisms, workers are not able to enjoy access to the claims process. We submit that an expeditious, clear, and accessible process for making claims is crucial for workplace regulation to be meaningful.
15. Perhaps the area with the greatest need for a strengthened claims and monitoring process is illustrated by the example of temporary foreign workers and other seasonal workers. Because of the temporary or seasonal status of these employment contracts, this segment of the workforce is, in practice, unable to meaningfully access the claim making process. Combined with the threat of repatriation and limited access to information and resources, temporary foreign workers are, in comparison to other workers, much less likely to be successful in engaging the ESA claim process.
16. We also ask the panel to consider the isolation faced by temporary foreign workers. Many of these workers live in employer-provided housing, with little or no access to phones or the internet. Although we acknowledge that the Ministry of Labour has an excellent website, and we applaud their efforts to provide materials in a variety of languages, the fact remains that many workers will not be able to access these resources.
17. Additionally, our clients have told us that they are questioned by their recruiters or employers if they meet with outsiders, such as the meetings needed to obtain legal advice about workplace law. Multiple clients have told us that their employers go through their mail.
18. As such, it is overwhelmingly difficult for these workers to learn about their workplace rights, and even harder for them to enforce their rights at work.

Consequently, we urge the Ministry of Labour to be much more proactive in its investigations of the agricultural sector. We ask that the Employment Standards Officers bring interpreters along on their inspections (or have access to a telephone interpretation service), so that they can communicate efficiently with the many temporary foreign workers that speak different languages. Without the ability to communicate in English, many workers are simply unable to report ESA violations.

19. The ESA must be enforced and, due to the changing nature of today's workforce, it is no longer acceptable that enforcement be based on employee-reporting. We respectfully request that the investigation and enforcement of this law, with a special emphasis on vulnerable workers, be clarified in the legislation and in practice.

## Conclusion

20. There has been significant jurisprudence on the purpose of the ESA. We ask this panel to recall the case of *Machtinger v. HOJ Industries*,<sup>9</sup> where the Supreme Court of Canada considered the intent of the ESA and outlined:

Section 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." **The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards**, including minimum periods of notice of termination. To quote Conant Co. Ct. J. in *Pickup, supra*, at p. 274, **"the general intention of this legislation [i.e. the Act] is the**

---

<sup>9</sup> *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, 1992 CanLii 102 (S.C.C.).

**protection of employees, and to that end it institutes reasonable, fair and uniform 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.<sup>10</sup>

21. We respectfully request that the panel consider this purpose while determining changes to the existing legislation.
22. We urge the panel to reflect on what you have heard from the workers who have appeared before you. Note their dedication and persistence in changing the law that is meant to serve them, but does not yet adequately do so.
23. Our recommendations reflect the experience of a segment of the workforce that is now a permanent feature of Ontario's economy. As a legal clinic exclusively serving the low-income population in Windsor-Essex, we are in a unique position to observe how changing workplaces have impacted the lives of our clients. With a growing population now employed in the food production industry, we have seen the creation of an entire segment of the workforce who has limited legal rights to pursue what they perceive a basic workplace benefits.
24. This causes an increasing lack of confidence in Ontario's ability to administer and regulate our workplaces. We submit that the basic ESA benefits of severance and termination, overtime and a clear and effective enforcement process is a logical starting point for balancing against Ontario's trend towards precarious employment. If the ESA is to truly protect the interests of workers in Ontario, then it indeed must adapt to reflect the changing nature of the contemporary workforce.

---

<sup>10</sup> Ibid, at p. 1002, para. *j*, emphasis added.