SUBMISSIONS TO THE MINISTRY OF LABOUR'S CHANGING WORKPLACES REVIEW

by

METRO TORONTO CHINESE & SOUTHEAST ASIAN LEGAL CLINIC

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INTRODUCTION

The **Metro Toronto Chinese & Southeast Asian Legal Clinic (MTCSALC)** is a community based legal clinic which provides free legal services to the low income Chinese, Vietnamese, Cambodian and Laotian communities in Toronto. Established in 1987, MTCSALC has become an important advocate for many immigrant workers and workers from racialized communities who find themselves ghettoized in low waged, non-unionized jobs, and who face exploitation by employers who have little regard for their rights. The vast majority of the clients of MTCSALC are newcomers and immigrants who have arrived in Canada within the last 10 years. While some of them may have professional training background and a high level of education, almost all of them are working in non-unionized and low-waged jobs. This is so in part due to their lack of proficiency in the English language, the lack of recognition for their credentials, and systemic discrimination they face in accessing good jobs in the labour market.

We appreciate having the opportunity to participate in the Changing Workplaces Review (the "Review"). Our submissions and recommendations are based on our close to 30 years of experience representing immigrant and racialized workers in Toronto. It is our hope that the Review will not only strengthen the existing legal protection for our clients and all other vulnerable workers in Ontario, but will improve the livelihood of all vulnerable workers by changing the underlying labour market conditions leading to their vulnerability.

Our submissions will focus primarily on the *Employment Standards Act, 2000* (ESA). We will however be proposing other legislative reform in order to fully address the needs of vulnerable workers in this province.

OVERVIEW OF CHALLENGES FACING IMMIGRANT AND RACIALIZED WORKERS

Immigrants are easy targets for unscrupulous employers and employment agencies. Many of them lack adequate understanding of the labour protection law in Ontario, and as such, they are not aware that their employer is engaging in activities which are in violation of the law. However, even those who are relatively well informed about the law are still unable to enforce their rights because they cannot afford to lose their job.

Indeed, for many of the immigrant and racialized workers served by MTCSALC, employment standards violation is the norm, rather than an exception. Whether it is the issue of overtime pay, excessively long working hours, or racial harassment in the workplace, immigrant and racialized workers often feel powerless when they are faced with employers who openly flaunt the law.

As a general rule there is a power imbalance between employers and employees. In the case of immigrant and racialized workers, that imbalance is exacerbated by the additional vulnerability experienced by these workers as immigrants and as persons of colour. Recognizing that power imbalance should serve as the critical starting point for any legislative reform which regulates employment relations in Ontario. Otherwise, any legislative change that follows would merely be replicating and reinforcing such imbalance.

Further, to address the underlying issues of economic inequities, while redressing on-the-job discrimination faced by racialized and other marginalized workers, the Review must look beyond the employment standards legislation as a platform for change.

As many studies[1] have confirmed, certain groups such as women and members of racialized communities are over-represented in precarious jobs. There are other socio-economic factors at play which contribute to the changing economy, and the impact of precarious labour on these workers goes well beyond poor working conditions. Employment standards legislation is but one of many pieces of provincial laws that govern workplaces in Ontario. Any law reform initiatives developed by the Review on this critical issue must therefore canvass a wide range of provincial laws.

VALUES AND OBJECTIVES

The Review begins by posing an overarching question, namely, what values should the special advisors take into account in making their recommendation?

As the Review has aptly pointed out, work is one of the most fundamental aspects in a person's life. Apart from providing a person with a means of financial support, it is also an essential component of one's sense of identity, self-worth and emotional well-being.

Yet when it comes to vulnerable workers – particularly immigrant and racialized workers, workplace is often where they experience exploitation, discrimination, unfair or even abusive treatment. And as low income workers who must work to survive, no matter how horrible the working condition, work is at once their sole source of financial support and the primary cause for their emotional and/or psychological woes. Because of systemic discrimination in the labour market, many immigrant and racialized workers cannot fulfill their full potential through working in jobs that they are qualified to do.

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[1] See for instance the Law Commission of Ontario's Final Report on Vulnerable Workers and Precarious Work: http://www.lco-cdo.org/en/vulnerable-workers-final-report

Opportunities for promotion are denied to them because of who they are, not what they are good at. Gender based discrimination, along with racism, ableism, continue to influence who gets hired. Glass ceiling is still a defining reality for women, but even more so, for people of colour and Aboriginal peoples.

All of that is to say that if the Review does see work as playing such a fundamental role in all aspects of a person's life, then among the key values that should guide this Review are the values of **equality, equity and fairness**. The Review must recognize that all Ontarians should have an equal opportunity to achieve the best of what they can be, by giving them equal access to jobs that they are capable of doing. And that all workplaces in Ontario should treat their employees fairly, with equal respect and dignity, regardless of their race, gender, disability, and other grounds as protected by the *Canadian Charter of Rights and Freedoms*.

CHANGING WORKPLACES – REAL OR IMAGINED

The consultation paper suggests that the world of work has changed and that as a result of these changes, new forms of work organization have been created, non-standard employment has occurred, and employers must stay competitive in order to attract the best and the brightest. The paper also highlights the pressure of the global economy and the decline in private sector unionization, without discussing the impact of these factors on the most vulnerable among all workers in Ontario.

As MTCSALC looks back over the last thirty years, and the type of cases that we have handled, however, very little has changed. 30 years ago, workers in the restaurant business and garment industry came to MTCSALC seeking help with their *ESA* claims as their employers have refused to pay them minimum wage, overtime pay, vacation or holiday pay. Thirty years ago, workers were denied termination pay and severance when their employers cleverly "restructured" their business so as to avoid any obligation under the *ESA*.

Thirty years ago, the industry that employ these workers may have changed, and many more of them are now hired through temporary agencies, yet the constant breaches of *ESA* remain the same.

Moreover, contrary to what the consultation paper may have suggested, businesses are run by human beings, who have their own biases and prejudices. As such, they are not always guided solely by pure economic motivations when making decisions around hiring and promotion. They do not necessarily compete for talent among the historically under-represented groups simply because it makes business sense. If they did, far more workplaces in Ontario would have been representative of the diverse population that make up Ontario.

In fact, members of racialized communities are much more likely than non-racialized group members to face discrimination in hiring, promotion and retention in labour markets, and in getting paid fair wages.

The 2006 Census reported one in five Canadians as foreign-born, the highest proportion in 75 years. Recent immigrants born in Asia made up the largest proportion of newcomers to Canada in 2006 (58.3%). Another 10.8% were born in Central and South America and the Caribbean. 68.9% of the recent immigrants in 2006 lived in three census metropolitan areas, namely, Toronto, Montreal and Vancouver.

In 2006, most recent immigrants experienced higher unemployment rates and lower employment rates then their Canadian-born counterparts. The exceptions were immigrants from the Philippines and those born in Europe, who had labour market outcomes similar to the Canadian born. Immigrants born in Africa experienced the most difficulties in the labour market, regardless of how long they had lived in Canada. For the very recent African-born immigrants, their unemployment rate at 20.8% was four times higher than that of the Canadian born. Higher unemployment rates are also found among the younger recent immigrants between the age of 15 and 24, irrespective of where they were born.

Statistical studies have conclusively disproved the hypothesis that high unemployment rates among recent immigrants are due to their inferior educational background. With few exceptions, very recent immigrants who had any level of postsecondary education had employment rates that were lower than that of their Canadian-born peers. Most important to note was the fact that this was true irrespective of where this postsecondary education was obtained.

As reported by Statistics Canada, in 2007, very recent immigrants aged 25 to 54 who received their highest university education in Canada were less likely to have significant Canadian work experience compared to their Canadian-born peers. The same study also showed that almost one in five very recent immigrant university graduates were attending school in Canada in 2007, even though they already had a university degree, yet the majority of university-educated very recent immigrant students were not participating in the 2007 labour market.

Gender also seems to play a role in this respect. While immigrant women represented nearly half of university-educated very recent immigrants, their participation in the labour force was significantly lower, particularly for those born or educated in Asia.

The only exceptions to this troubling pattern of employment gaps are recent and established immigrants who received their highest university education in Canada or Europe; they had comparable employment rates in 2007 to the Canadian born. In contrast, many of those who obtained these credentials in Latin America, Asia or Africa had lower employment rates with the one exception being immigrants who received their university degree from a Southeast Asian (mainly Filipino) educational institution.

If immigrants are not getting employed at the same rates as others, they are also not earning the same levels of income. The immigrants' birthplace – a proxy for ethnicity – turns out to have the strongest influence over the immigrants' earnings, as a Statistics Canada study has shown. This finding coincides with the repeatedly noted fact that increasingly immigrants to Canada come from "non-traditional" sources and are members of visible minorities, and are more likely be educated as compared with persons born in Canada. Despite an increasing number of university graduates among immigrants, the relative earnings of immigrants did not improve in recent times.

Hiding behind the statistics is the disturbing trend of the ever growing racial inequities in Canada among the immigrant group members as well as racialized individuals born in Canada (both Indigenous Peoples as well as peoples of colour). Disturbingly, the employment inequities and the resulting income inequities experienced by recent immigrants with degrees (minus those with European or Filipino background) are shared by young visible minority men born in Canada to immigrant parents. Everything else being equal, their annual earnings are significantly lower than those of young men with native-born parents. Canadian born members of racialized communities, who have even higher levels of education than other Canadians in the same age group are faring the worst.

A recent report by the Wellesley Institute and Canadian Centre for Policy Alternatives confirms a "colour code" is keeping "visible minorities" out of good jobs in the Canadian labour market. The Report found that visible minority Canadian workers earned 81.4 cents for every dollar paid to their Caucasian counterparts. This study confirms there is a colour code at work in Canada's labour market, causing a significant income gap between racialized and non-racialized Canadians. Racialized men are 24% more likely to be unemployed than non-racialized Canadians, and racialized women are 48% more likely to be unemployed than non-racialized men. When controlled by age and education, the data show first generation racialized Canadian men earn only 68.7% of what non-racialized first generation Canadian men earn, while racialized women immigrants earn only 48.7 cents for every dollar non-racialized male immigrants earn. More significantly, the colour code persists for second generation Canadians with similar education and age, with racialized women making 56.5 cents per dollar non-racialized men earn, while racialized men earn 75.6 cents for every dollar non-racialized men in this cohort earn.

In November, 2011, the Standing Senate Committee on Social Affairs, Science and Technology received an order from the Senate to "examine and report on social inclusion and cohesion in Canada". In June 2013, the Committee released its report. The Senate study found that certain groups are far more likely to face exclusion, including recent immigrants and visible minorities. The study also found that highly educated recent immigrants face barriers to working in their fields, and, in contrast to historical trends, immigrants in general are not achieving the same levels of economic returns as Canadian-born citizens. Similar finding was noted for visible minorities, who continue to face challenges in full participation in Canadian society, particularly with respect to employment opportunities. Labour force participation rates for visible minorities are lower than for non-visible minorities. Among visible minorities seeking work, the

unemployment rate is higher than for their Caucasian counterparts. Low incomes, precarious employment and higher rates of unemployment among visible minorities, most of them live in Canada's cities; result in higher levels of poverty relative to non-visible minorities.

In view of this stark reality, our response to the questions posed by the Review is as follows:

Q.2: What type of workplace changes do we need to both improve economic security for workers, especially vulnerable workers, and to succeed and prosper in the 21st century?

Strengthen the Enforcement of *ESA*

First, we need to strengthen the *Employment Standards Act*, and the mechanism for enforcing the *ESA*.

We should move away from a claim-based enforcement model to an "audit" model, similarly to the way the income tax system is enforced in Canada. Employers must file a report every year to the Ministry of Labour on their compliance with the *ESA* by providing all the basic information regarding their workers – including payroll, pay record, time sheet, and all other information relevant to the *ESA* provisions. The Ministry of Labour has the right to conduct spot audit – with no prior warning - on any employer to ensure that they are in compliance with the *ESA*. Employers who fail to comply with the law will be ordered to pay the workers the money owed, and be given a fine of at least 30% of the money owed.

Reinstate Mandatory Employment Equity Act

Second, we need to bring back mandatory Employment Equity in Ontario to make sure that workplaces are truly reflective of the diversity that made up this province, and to level the playing field for all under-represented groups including women, persons of colour, people with disabilities and Aboriginal peoples.

Q3: As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?

It is our view that unionization still offers the best protection for workers in this province, and the Government should look at reforming the LRA to make unionization more accessible to more workers.

However, we do recognize that most of the workplaces will not be unionized, even with the best reform in place. One of the key objectives of unionization is to increase the power of workers through collective bargaining. For workers who do not work in a union

setting, their “bargaining” right came from the *ESA*. Strengthening the enforcement of ESA is thus key to any employment law reform.

Equally important, is that the Government must send a signal to all employers that it is serious about protecting workers’ rights. The Government may consider setting up sector based worker representation model to address systemic issues within specific sectors. For instance, if *ESA* violations are rampant within the restaurant industry, the Government could set up a restaurant workers’ representation group to advise the Government on issues specific to the workers in that sector with a view to developing necessary policy and/or procedural solutions to addressing these issues. We will note, however, that this does not replace the Government’s obligation to help increase unionization across the province or enforce the *ESA*.

Q4: Are these (efficiency, equity, and voice) the key objectives or are there others? How do we believe these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?

We believe that a truly efficient workplace is one that is both equitable and respectful of the employees, where all workers have meaningful participation in decisions that affect their work. As such, we do not see any conflict among these objectives.

As we have stated above, we believe that the values of equality, equity and fairness should guide this Review, and by extension, they should guide the reform of employment and labour laws.

The goals of this Review should be the promotion of equal opportunity for all Ontarians to succeed in the workplace and the break down of all barriers to achieving that success.

EMPLOYMENT STANDARDS ACT

The following addresses some of the questions raised by the Review with respect to the *ESA*.

Q5: In light of the changes in workplaces, how do you feel about the employment standards that are currently in the ESA? Can you recommend any changes to better protect workers? Do the particular concerns of part-time, casual and temporary workers need to be addressed, and if so, how?

As stated above, irrespective of how workplaces have “changed”, certain things have remained the same as far as vulnerable workers are concerned. Whether they are deemed to be “temporary” or “permanent” workers, whether they are considered “part time” or

"full time", many of the workers who come to MTCSALC for assistance face the same problem, i.e., their basic rights under the *ESA* have been denied.
We commend the Ontario Government for making some important changes to the *ESA* to strengthen the protection for workers. More, we note, need to be done. No doubt, the Review will hear from many workers rights groups on how to improve the *ESA*, we have several specific recommendations we hope will be considered in this Review.

Proactive Enforcement

As many workers rights advocacy groups have pointed out, the complaint driven process currently adopted by MOL is both inefficient and ineffective. The burden of protecting workers' rights should not fall on the shoulders of workers. A truly effective public enforcement system for workers' rights should be brought in to hold employers accountable for the basic standards that all employees are entitled to enjoy. As such, we recommend the Ministry of Labour should move towards an effective public enforcement system by:

a. Prosecuting every employer against whom an order to pay has been issued;
b. Conducting random audit on employers against whom claims have been filed by employees, especially those employers with previous claim history and with multiple concurrent claims; and
c. Increasing the administrative costs attached to all orders to pay from the current 10% to 30%.

Termination for Cause

One of the key protections for workers in unionized workplace is the protection from termination without cause. Contrastingly, the only remedy for workers in non-unionized workplaces when they are terminated without cause, is notice or pay in lieu.

While we know that it would be impossible to take away the right of employers to terminate workers without cause, we believe that the right of workers can be strengthened by requiring all employers to provide reasons for termination, regardless of cause.

Severance Pay

Under the *ESA*, for an employee to qualify to receive severance pay, the employee has to work with the employer for five or more years and was employed by an employer who has a payroll in Ontario of at least 2.5 million or severed the employment of 50 or more employees in a six-month period.

This is different from the provisions dealing with termination notice and termination pay, as the sole determinant in those provisions (assuming that the termination is without cause) is the length of service. We therefore recommend that the severance pay provision be amended so that all workers, regardless of the size of the workplace, shall be entitled to receive it so long as the workers meet the years of service requirement.

Q6: Are changes needed to support businesses in the modern economy? How could the Act be simplified while remaining fair and comprehensive? Are there standards in the ESA that you find too complex? If so, what are they and how could they be simplified?

We respectfully submit that businesses who want to succeed in the economy must still have a basic obligation to obey the law of the land.

The *ESA*, in our view, is not overly complex or hard to follow. The Ministry of Labour has also created many tools to educate both the employers and the workers about the various provisions of the *ESA* to ease any burden it may have on employers.

In our experience, businesses choose not to obey *ESA*, not because it is too complex, but because they believe they can get away with violating the law. Indeed, far too often, businesses spend much time and resources to create complex business structure just to avoid following the *ESA*. It is a conscious "business" decision as to whether they should follow the law, and to what extend they would follow the law. Their lack of compliance is further aided by a societal/business culture which sees nothing wrong about failing to follow the *ESA*.

If businesses respect the law, or if they fear the consequences of non-compliance, they would follow it no matter how complex it is. Comparing with the Inco*me Tax Act*, understanding the *ESA* is a walk in the park. Yet one rarely hears the argument that because the *ITA* is too complex, businesses do not need to obey it, or that the Government should simplify the *ITA* to ensure a higher incidence of compliance. Viewed in that context, why should employers be allowed to disobey *ESA* on the pretext that it is too complex?

Q7: Should "leave" be revised in any way? Should there be a number of job-protected sick days and personal emergency days for every employee? Are there other types of leaves that are not addressed that should be?

The problem with emergency leave is, first of all, it does not benefit the majority of the workers in this province who work in small workplaces with fewer than 50 employees. Once again, it is the non-unionized immigrant workers who are being left out, as they are more likely to be employed in small businesses. Women will also be adversely affected because they are more likely to be the main caregivers in their families and when there is a problem in the family, such as illness of a child, it is women who have to take time off from work to look after the sick child.

There is simply no legal or moral justification for not extending such benefits to all workers, regardless of the size of the workplace. Similarly, job-protected sick leave should also be extended to all workers no matter who they work for.

Q8: 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?

Apart from the issue of migrant worker (which this Review does not address), we believe the current definition of employees is reasonable. Often time, it is the employer who is deliberately misclassifying their employees as "self-employed" or "independent contractor", notwithstanding the broad definition under the *ESA*.

While we generally take no issue with the definition of employee, we do have a very specific concern about the definition of employer.

Related Employer Provisions

Section 4 of the *ESA* is known as the "related employer" provision. The section provides in part as follows:

> 4(1) Subsection (2) applies if,
>
> (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
>
> (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.

Section 4(2) of the *ESA* further provides that the employer and the other person or persons described in subsection (1) shall be treated as one employer for the purposes of the *ESA*.

The purpose of these sections is to hold related employers liable for wages and other statutory obligations owed by the immediate employers. The related employer provision has been made subject of litigation over the years and its meaning has been interpreted in different ways by different members of the Ontario Labour Relations Board (OLRB). The controversy has not been resolved, however, by the Courts. In a decision released in September 2009, the Court of Appeal for Ontario muddied the water further by refusing to set aside a decision of the OLRB which finds 100 employees of a company who were owed $1 million in termination and severance pay could not claim against other e-coating factories owned by the same employer. In finding the OLRB decision reasonable, the Court of Appeal ruled that while the *ESA* sets minimum standards, it does not provide any guarantees that the employees will receive them: ***Abdoulrab v. Ontario Labour Relations Board*** 95 O.R. (3d) 641).

The Court of Appeal's decision was a slap in the face not just for the employees in question - the vast majority of whom were immigrants and many have worked in the company for years - but also for the Ministry of Labour, who helped these workers pursue their hard earned pays all the way to the Court of Appeal.
To resolve this jurisprudential injustice and to make sure that no more employers can get away with their statutory obligations through corporate restructuring, the related

employer provision must be tightened up and its meaning clarified. As such, we recommend that section 4 of the *ESA* to be amended by repealing clause (1)(b).

Exemptions

We also believe that too many occupations are currently exempted from too many provisions under the *ESA*. Further, there do not appear to be any rhyme or reasons for the various exemptions. Sometimes, workers working for the same employer will be treated differently even though their job nature might be quite similar. Some examples that come to mind are: “liquor server” versus “waiter” in a restaurant, and a “harvester” versus “other farm workers”. These exemptions result in workers doing similar jobs being treated differently under the law. MTCSALC has assisted many clients who are mislabelled by liquor server or harvester by their employer, just so to undermine their rights. In actuality, the work they do are no different from their fellow employees at the workplace.

We therefore recommend that the Review examine the current list of exemptions with a view to ensuring equitable and fair treatment among all workers and removing as many exemptions as reasonable.

Q9: Are there specific employment relationships (e.g. those arising from franchising or subcontracting or agencies) that may require special attention in the *ESA*?

As described above, employers often try to hide behind corporate veil through the creation of a complex corporate structure so as to shield themselves from the employer-employee relationship and the ensuing obligations under the *ESA*. If anything, the common law definition of an employer is often time far more liberal than the one provided under the *ESA*.

It is our belief that if the “related employer” provision is amended, many of the current issues facing employees in franchising or subcontracting businesses, or are hired through agencies, will disappear, and the workers working for the related employer will be granted equal treatment.

CONCLUSION

We appreciate having the opportunity to share our thoughts and experiences with respect to the issues facing immigrant and racialized workers in Ontario in this Review. By adopting the values of equality, equity and fairness, we hope that the Review will provide a road map for the Government of Ontario in developing stronger labour market policies and laws that will help all Ontarians to succeed.

One of the most effective ways to level the playing field for all racialized communities and other historically disadvantaged groups members is to bring back mandatory

employment equity in Ontario. It also involves the establishment of an Employment Equity Secretariat fully mandated and adequately resourced in order to ensure merit-based employment across the province through the implementation of mandatory & comprehensive employment equity programs.

We believe that this and other measures described above will go a long way to providing greater guarantee for the rights of all vulnerable workers, but especially workers of colour and immigrant workers.