SUBMISSION
TO THE
CHANGING WORKPLACE REVIEW

September 18, 2015

TORONTO WORKERS' HEALTH AND SAFETY LEGAL CLINIC
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Who We Are

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

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

The clients that we serve vary in many ways. We have served new Canadians who work in small non-unionized workplaces. We also serve employees who are assigned to larger workplaces through temporary staffing agencies. Additionally, we respond to inquiries from

[1] *Occupational Health and Safety Act*, RSO 1990, c O1.
[2] *Employment Standards Act*, 2000, SO 2000, c 41.

young employees who are not aware of what their rights and entitlements are. To qualify for our services, clients must meet the legal aid eligibility criteria of being non-unionized and relatively low-wage earners. In other words, we represent and seek justice for people who have no resources and no recourse of their own.

Introduction

Low wage, non-unionized employees are vulnerable workers because they do not receive adequate protection under the *Employment Standards Act* ("the *ESA*").[3] They do not have a union to stand up for their rights, and they do not have the money to retain legal counsel. The Ontario government has launched the Changing Workplace Review to identify potential labour and employment law reforms. From the outset, it is important to note that we fully and unreservedly endorse the recommendations found in the Workers' Action Centre's report titled "Still Working on the Edge" ("Report"). However, due to our experience and specialty in advocating for employees, we recommend numerous additional reforms to the *ESA* that are not found in that Report.

History of Employment Standards

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

[3] *Employment Standards Act*, 2000, SO 2000, c 41.
[4] Paul Malles, *Canadian Labour Standards in Law, Agreement, and Practice* (Ottawa: Economic Council of Canada 1976) at 4.

in which the creation of minimum standards was an effort to address the vulnerability of employees in the workforce.[5]

It is useful to look at the evolution of employment standards in Ontario. The first statutes enacted established employment standards for the protection of women and children, who were considered more vulnerable against unreasonable working hours. The *Ontario Factories Act* was introduced in 1884, and set minimums and maximums for both the age of employees and the hours of work allowed for women, girls and boys.[6] The *Minimum Wage Act* was passed in Ontario in 1920 to regulate the minimum wage for women, and the *Industrial Standards Act* was passed in 1935 to establish maximum hours of work for specific industries.[7]

The changes to Ontario's employment standards that occurred from 1940 to 1968 arose as a result of "war-time social legislation."[8] Working conditions and legislation for additional benefits, such as paid vacations, were central in union demands and this was apparent in collective agreements.[9] Subsequently, there was an increase in the demands for such benefits to be secured by legislation, and Ontario was the first province to legislate these benefits with the creation of the *Hours of Work and Vacations with Pay Act*[10] in 1944. There were other statutes that came into force before the *ESA* was implemented, and "by 1950 the groundwork had been

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[5] Mark P Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal: McGill-Queen's University Press 2009) at 6. Thomas is an Associate Professor of Sociology at York University.
[6] Ontario's Work Laws, online: WorkSmartOntario <http://www.worksmartontario.gov.on.ca/scripts/default.asp?contentID=5-1-1-1>. [also see this link for info about the age. Actually, it is this link page 13 for hours of work, and then a prior page for age of children].
[7] Archived - Setting and Administration of Sectoral Employment Standards, online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research10/page04.shtml>. { also see the http://lawofwork.ca/?p=7245}.
[8] *Supra,* note 4 at 10.
[9] *Ibid* at 11.
[10] *Hours of Work and Vacations with Pay Act,* SO 1944, c 26.

laid for [the establishment of] a comprehensive labour standards system"[11] to replace the existing workplace standards legislation.

Starting in the late 1960s, the global economy faced recessions, increased unemployment, and growing inflation.[12] According to the business community, these downturns were due to increased labour costs and labour market inflexibility.[13] While minimum standards served to protect the vulnerable non-unionized workforce, there was a desire from businesses to have more flexible labour standards. Organized labour responded by advocating for improvements to the minimum standards to address the increase in unemployment.[14] As a result, while there were reforms that did provide businesses with a more flexible labour market, workers gained the right to be provided with notice prior to termination in 1972.[15] In 1981, provisions were added to the *ESA* to provide an entitlement to severance pay for those who worked for an employer for at least five years.[16] Today, the *ESA* covers many of the areas of the individual contract of employment including the amount of notice required for the termination of an employee and severance pay. This brings us to the Clinic's first recommendation.

[11] *Ibid*.
[12] *Supra*, note 4 at 72.
[13] *Ibid* at 73.
[14] *Ibid*.
[15] *Supra*, note 3 at 10.
[16] *Supra*, note 4 at 81.

Issues:

Issue #1: Under the *ESA*, workers who are terminated are only entitled to a maximum of 8 weeks of notice

Employees in Ontario who are terminated without cause are entitled to a specified notice period or termination pay in lieu of notice, as outlined in the *ESA*. These entitlements exist to provide terminated employees with a minimum level of protection and income to carry them through their search for replacement employment. Minimum standards legislation exists to "provide minimum notice periods for all employees covered by the legislation."[17] Section 57 of the *ESA* outlines the amount of notice that an employee is entitled to, and is based on the amount of time he or she has worked for the employer.[18] This provision gives workers an entitlement to one week of notice for each year of service, to a maximum of eight weeks. While this may seem beneficial for workers because it provides them with an income while searching for replacement employment, the amount of notice is inadequate for a number of reasons.

If an employer wishes to fire a worker immediately, rather than give notice, they can do so as long as they pay the worker for every week of notice they are owed. Essentially this means that, for the cost of eight weeks of wages, an employer can terminate a worker with fifteen or twenty years of tenure whenever they please.[19] Eight weeks of pay may not provide sufficient time to find a new job after fifteen years of employment. The job market is not the same as it was fifteen years ago, nor is the process of applying for jobs. In addition, the number of part time jobs in Canada has risen much faster than the number of full time jobs.[20] The loss of full time employment after the recession has been relatively permanent. Low wage workers who lose full time employment are often unable to find similar employment and are forced to accept

[17] Geoffrey England, *Individual Employment Law*, 2d ed (Toronto: Irwin Law 2008) at 290.
[18] *Ibid* at s 57.
[19] *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 1997 CarswellMan 455, at para 75.
[20] Benjamin Tal, Employment Quality - Trending Down, *Canadian Employment Quality Index* CIBC, March 5, 2015 <http://research.cibcwm.com/economic_public/download/eqi_20150305.pdf>.

part time employment.[21] Long term workers who have been terminated desperately need additional protection to facilitate their transition into new employment in the new economy. On average, part time workers in Ontario make forty percent less than full time workers.[22] Adequate termination pay can be the difference between having the time to find comparable employment and being forced to accept lower paid, part time work in order to pay next month's rent or buy food.

Recommendation 1. A – Eliminate the upper limit of notice that an employee is entitled to

The 8 week cap should be eliminated by amending s. 57 of the *ESA*. Long term employees should be given notice of termination for every year of their employment. We recommend amending s. 57 of the *ESA* to read:

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

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

Recommendation 1. B – Change the upper limit of notice that an employee is entitled to

Alternatively, and while noting that the amendment above is the Clinic's primary recommendation for this issue, an amendment of the *ESA*'s termination provisions could be

[21] As the Ontario ministry of labour notes in "Changing Worker Places Review: Guide for Consultations" nonstandard employment, which includes part-time employment, temporary employment and self-employment has grown twice as fast as standard employment since 1997.

[22] Sara Mojtehedzadeh, "Wild West Scheduling Holds Millions of Ontario Workers Hostage" Toronto Star: May 03 2015 <http://www.thestar.com/news/gta/2015/05/03/outdated-employment-standards-act-holding-millions-of-ontario-workers-hostage.html>.

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

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

Issue #2: The stringent criteria for severance pay may exclude many employees

Although the *ESA* provides some protection by obligating employers to provide severance pay, far too many employers do not meet the criteria set out in the *ESA*. As noted on the Ministry of Labour's website, severance pay "compensates an employee for loss of seniority and the value of firm-specific skills, and recognizes his or her long service."[23] Severance is calculated by multiplying an employee's regular wages for one regular work week by the number of years that the employee has worked with the employer.[24] An employee with fifteen years of tenure is entitled to fifteen working weeks of severance pay. We do acknowledge that the upper limit of twenty six weeks is far better for workers than the upper limit of eight weeks provided by the provisions regarding notice of termination.[25] However, unlike notice of termination, severance pay is only available to workers who have been employed for five or more years by the employer, provided that the employer meets one of the following two conditions outlined in s. 64(1) of the *ESA*:

> (a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or
> (b) the employer has a payroll of $2.5 million or more.[26]

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[23] Ontario Ministry of Labour, Termination and Severance, <http://www.labour.gov.on.ca/english/es/tools/esworkbook/termsev.php>.
[24] *Supra*, note 1, s 65(1).
[25] *Supra*, note 1, s 65(5).
[26] *Ibid*, s 64(1).

Low wage, non-unionized employees would benefit the most from severance pay, but often work for employers who fail to meet these conditions. An employer of low wage employees would be able to pay $12.00 an hour to 160 employees working twenty five hours per week, and still not be obligated to pay severance pay to those employed for over five years.[27] Ultimately, in Ontario's increasingly low wage and part time economy, a $2.5 million payroll can be used to hire a significant amount of workers. As Ontario's low wage economy continues to grow, an increasing number of Ontario's employees will be unable to qualify for severance pay. Accordingly, the legislation needs to be amended in accordance with the current working conditions that are faced by Ontario's workers. Such an amendment will make the severance pay provisions consistent with the stated purpose of severance pay.

Recommendation 2. A – Legislate an entitlement to severance pay for all employees with at least 5 years of service

Workers with five years or more of service with an employer should be entitled to severance pay, regardless of the size of their employer. We recommend that the *ESA* be amended by striking out the two qualifications for entitlement to severance pay. Section 64(1) of the *ESA* should be amended to read:

> **An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more.**

Recommendation 2. B – Amend s. 64(1)(b) of the *ESA* to reduce the payroll requirement for severance pay

Alternatively, and while noting that Recommendation 2. A is the Clinic's primary recommendation to address the issue of severance, the payroll requirement of $2.5 million could

[27] Calculated at 52 weeks a year per employee.

be reduced to $1 million. To implement this amendment, the Clinic suggests amending s. 64 (1) (b) as follows:

> **...**
> **(b) the employer has a payroll of $1 million or more.**

Issue # 3: The *ESA* fails to provide employees with protection against unjust dismissal

There is currently no language in the *ESA* granting workers general protection from unjust dismissal. As noted above, this means that employers can fire employees for any reason. Employers do not even have to have a reason. They can arbitrarily decide who to terminate at any time, and their only obligation is to provide the notice outlined in the *ESA.* Workers are only protected from dismissal when they seek to enforce their rights or make inquiries about their employer's compliance with the *ESA*.[28] This protection exists in the form of provisions that prohibit employer reprisals. For example, under s. 74 of the *ESA*, a worker cannot be dismissed for asking to be paid the proper amount of overtime**.** However, it is unclear whether s. 74 protects an employee who asks for a wage increase above the minimum wage, additional vacation time, benefits, or a promotion. It is crucial for the *ESA* to provide workers the protection that they require to advocate for better working conditions.

Any statute that purports to set minimum standards for working conditions in Ontario should, at the very least, protect workers who ask for compensation or conditions above the minimum. It is unrealistic and unfair to expect low wage workers to retain lawyers and initiate lawsuits in these matters.

A statutory prohibition on terminating employees without just cause will protect employees from being arbitrarily dismissed, and in turn provide employees with job security.

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[28] *Supra*, note 1, s 74.

Increased job security is very important in Ontario's precarious employment economy. Finding a job is increasingly difficult, and employees would benefit from having protection from being terminated without just cause.

Protection from termination without just cause exists in Nova Scotia. Nova Scotia's *Labour Standards Code* (*Code*) provides workers in that province with this type of protection.[29] The *Code* stipulates that workers who have been employed with the same employer for at least ten years cannot be terminated, unless the employer has just cause for the termination.[30] That said, there are logical exemptions found in the *Code*, such as situations where there is a shortage of work, where supplies are no longer available, or where the place of employment has been destroyed.[31] While the term 'just cause' is not defined in the *Code*, it is important to note that the use of 'just cause' in Nova Scotia's *Code* has been interpreted by that province's Labour Board to require progressive discipline and an opportunity to rectify disciplined conduct in situations where serious misconduct is not alleged by the employer.[32]

Furthermore, tribunals have previously held that the *Canada Labour Code*[33] provides the same protection to workers in sectors that fall under federal jurisdiction.[34] While there is a recent Federal Court of Appeal decision[35] which takes an opposing view regarding the protection provided by the *Canada Labour Code*, it is important to note that the decision was primarily

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[29] *Labour Standards Code*. RS, c 246.
[30] *Labour Standards Code*. RS, c 246, s 71.
[31] *Labour Standards Code*. RS, c 246, s 71 and s 72(3).
[32] *MacKenzie v Commissionaires Nova Scotia*, 2013 NSLB 5 (CanLII) at para 46-47; Beck v 1528801 Nova Scotia Limited, 2010 NSLST 13 (CanLII) at para 54-55.
[33] *Canada Labour Code*, RSC, c. L-1.
[34] As cited in para 47 of *Wilson (below,* note 29*)*: *Re Roberts and the Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259; *Champagne v. Atomic Energy of Canada Ltd.*, [2012] C.L.A.D. No. 57; *Iron v. Kanaweyimik Child and Family Services Inc.*, [2002] C.L.A.D. No. 517; *Lockwood v. B&D Walter Trucking Ltd.*, [2010] C.L.A.D. No. 172; *Stack Valley Freight Ltd. v. Moore*, [2007] C.L.A.D. No. 191; *Morriston v. Gitanmaax Band*, [2011] C.L.A. No. 23; Innis Christie, *et al.*, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at page 669; David Harris, *Wrongful Dismissal*, loose-leaf (Toronto: Carswell, 1990) at pages 6.7-6.9.
[35] *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 (CanLII) [*Wilson*].

based on statutory interpretation.[36] In addition, the interpretation of the relevant provisions is in flux, since the case in question has been granted leave to the Supreme Court of Canada.

Both the *Canada Labour Code* and Nova Scotia's *Labour Standards Code* contain provisions that enable employees to request an investigation and hearing into the circumstances of their termination, for the purpose of determining whether the termination was done in accordance with the respective legislation. Both statutes provide adjudicators with a wide scope of possible remedies, one of which is reinstatement. In Ontario, employees who believe that their rights under the *ESA* have been violated may file a complaint with the Ministry of Labour.[37] An employment standards officer may be assigned to investigate the complaint.[38] The employment standards officer has the power to determine if wages are owed to an employee and can order the employer to pay to the employee the wages owed.[39] However, the employment standards officer only has the authority to order reinstatement of the employee in specific situations,[40] one of which is reprisal.[41] The *ESA* does not provide for the remedy of reinstatement for employees who are dismissed without cause.

Recommendation 3. A – Amend the *ESA* to prohibit employees from being terminated without just cause

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

[36] *Wilson*, para 70-71.
[37] *ESA*, s 96(1)(1).
[38] *ESA*, s 96(1)-(2).
[39] *ESA*, s 103 (1).
[40] *ESA* s 104(1)
[41] *ESA*, s 74.17(1).

done by Nova Scotia's legislature. That said, any exceptions to the proposed amendment should be carefully considered and implemented sparingly. The exceptions should be reasonable and not result in the negating of the provision's objective of protecting Ontario's workers. Minimum standards legislation must protect as many workers as possible.

Recommendation 3. B – Use 1 year as the starting point for Recommendation 3. A

The provisions in Nova Scotia's *Code* that protect workers from unjust dismissal emerged as a part of a 1975 amendment.[42] Obviously, times have changed. In recent years, Ontario has seen tremendous growth in low wage, part time, precarious employment. Accordingly, the Clinic submits that protection from termination without just cause should be provided to all Ontarians who have worked with the same employer for at least one year. This change would protect workers who have successfully completed the typical probationary period from unjust dismissal and provide protection from unjust dismissal to the greatest number of people. Accordingly, the Clinic submits that section 54 of the *ESA* should be amended to read:

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

This change would provide meaningful protection to a workforce in which employees work for many different employers over the course of a career. It is no longer common for workers to spend many years with the same employer, and it is therefore prudent to amend the *ESA* in a manner that is consistent with the workplace realities that workers currently face.

While this change may result in increased complaints, investigations and litigation, it is important to note there already is an existing resolution process that can address disputes

[42] Labour Standards Code, SNS 1975, c 50.

regarding just cause. Specifically, there are Employment Standards Officers who can investigate termination without cause claims and render decisions. Those decisions can be appealed to the Ontario Labour Relations Board (OLRB) by the employer or the employee. In fact, the OLRB already conducts hearings into matters regarding misconduct and termination.

Recommendation 3. B – Use five years as the starting point for Recommendation 3. A

While the Clinic is of the view that providing protection from termination without just cause to workers who have completed one year of service is ideal for Ontario's workers, the Clinic also submits that it may be less effective but nevertheless appropriate to use five years as the starting point for the protection from termination without just cause. As noted in the discussion regarding Issue 2, above, an employee's entitlement to severance pay crystallizes upon the completion of five years of service with the same employer, provided that the employer meets the conditions set out in s. 64(1). Again, as noted above, the Ministry of Labour's website states that severance pay "compensates an employee for loss of seniority and the value of firm-specific skills, and recognizes his or her long service."[43] Given that the Ministry acknowledges and recognizes the significance of five years of service with the same employer, the Clinic submits that providing employees with protection from termination without just cause upon completion of five years of service is an appropriate option that will prevent an opening of the floodgates and a change in the labour and employment law landscape. This can be accomplished by amending 54 of the *ESA* to read:

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

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

Recommendation 3. C – Amend the *ESA* to provide investigations, hearings, and a broad range of remedies

The *Canada Labour Code* and Nova Scotia's *Employment Standards Code* both provide adjudicators with the authority to order reinstatement as a remedy.[44] Given the importance of employment and workforce participation, it is obvious that Ontarians would benefit having access to a range of remedies that includes reinstatement. Currently, the *ESA* is deficient because it only provides for the remedy of reinstatement in specific situations. This deficiency can be cured by having the remedy of reinstatement available in all instances of termination.

When combined with the suggested protection from termination without just cause, this recommendation will give workers with seniority a means to have their dismissal adjudicated as well as access to the remedy of reinstatement. This is appropriate because of the worker's significant investment into the workplace, and because it will provide increased job security to long serving non-unionized workers.

Recommendation 3. D – Amend the *ESA* to provide, in clear language, protection from reprisals for inquiries and requests for conditions and compensation above the minimum

The *ESA* provisions relating to the protection from reprisals should be amended to clearly state that workers have the right to inquire about and request working conditions and compensation above what is set out in the *ESA*. It is reasonable for workers to strive for more than the minimum and given the vulnerability of non-unionized workers, it is vital that the reprisal protections found in the *ESA* provide protection to workers who seek to improve their situation.

[44] Canada Labour Code, s. 242(3); Labour Standards Code, s. 21(3)(c).

Issue #4: Ontario's minimum wage laws allows employers to pay employees below the poverty line

The setting of a minimum wage serves to establish the minimum amount of money that an employee can be paid for one hour of work. Minimum wage employment is not what Ontario's employees strive for. Unfortunately, this type of employment is all that many people can find. Furthermore, this type of employment is becoming increasingly common due to the growth of low wage precarious employment. It is important to note that while the minimum wage was recently increased to $11/hr,[45] the current minimum wage is still sixteen percent below the poverty line.[46] Additionally, Ontario allows employers to pay a lower minimum wage to employees who serve liquor in a licensed establishment,[47] and to students who are under eighteen years of age and work less than twenty eight hours per week.[48] Ultimately, Ontario cannot be complacent while its laws permit employers to pay employees below the poverty line.

Recommendation 4. A – Increase the minimum wage to $15/hour

Ontario should increase the minimum wage to $15/hour. Doing so would enable employees to live above the poverty line and better provide for their families. Such a change is necessary because of the growth in low wage precarious employment. This increase will require an amendment of Ontario Regulation 285/01.

Recommendation 4. B – Amend the *ESA* to require employers to pay the same minimum wage to liquor servers and students

The provisions that outline the different minimum wages are found in Ontario Regulation 285/01. This regulation should be amended in a manner that eliminates the loopholes that enable employers to pay certain people less than the standard minimum wage. Since the minimum

[45] O Reg 285/01, Exemptions, Special Rules and Establishment of Minimum Wage, s. 5.
[46] http://www.cbc.ca/news/canada/toronto/ontario-raises-minimum-wage-to-11-an-hour-1.2516659, citing Sonia Singh of the Workers' Action Centre.
[47] O Reg 285/01, s. 5(1).
[48] O Reg 285/01, s. 5(1).

wage is intended to be a wage floor, it would be reasonable for the legislature to make this wage floor applicable to everyone including liquor servers and students.

Issue # 5: The *ESA* contains many exemptions, many of which were enacted many years ago

Unfortunately, the minimum standards found in the *ESA* do not apply to every worker in Ontario because there are numerous exemptions which serve to exclude certain types of workers from the minimum standards. Ontario Regulation 285/01 enumerates several exemptions to the *ESA*. For example, employees engaged in mushroom growing are exempt from the provisions relating to Hours of Work and Eating Periods,[49] Overtime Pay,[50] and Public Holidays.[51] Supervisory or managerial employees who "perform non-supervisory or non-managerial tasks on an irregular or exceptional basis"[52] are excluded from the provisions relating to Hours of Work and Eating Periods,[53] and Overtime Pay.[54] Many of these exemptions were created several years ago and may no longer be necessary.

Much of the food grown in Ontario is grown, processed and packed by migrant workers. The *ESA* contains provisions that exclude agricultural workers from Ontario's minimum standards. These provisions result in a complicated system of rights and entitlements that is not universally applicable. As a result, agricultural and migrant workers are not protected in the same way that other Ontarians are. This contradicts the *ESA*'s objective of establishing a floor of minimum standards for all workers.

[49] O Reg 285/01, s. 4(3)(a)(i).
[50] O Reg 285/01, s. 8(e)(i).
[51] O Reg 285/01, s. 9(1)(d)(i).
[52] O Reg 285/01, s. 4(1)(b).
[53] O Reg 285/01, s. 4(b).
[54] O Reg 285/01, s. 8(b).

Recommendation 5. A – Assess and either justify or repeal each exemption

While the Clinic is of the view that exemptions should be created sparingly, the Clinic also understands that there may be extra-ordinary circumstances that necessitate an exception. Accordingly, the Clinic submits that those overseeing the consultation should undertake a review of all of the exemptions contained in the *ESA* and its regulations. For each exemption, the Clinic submits that those overseeing the consultation should conduct an analysis to ascertain whether the exemption is still needed, and then either strike out the exemption, or post to the Ministry of Labour's website a written rationale for the continued existence of the exemption. In other words, for each exemption, those overseeing the consultation should ascertain and publish for future reference the following:

a) The rationale for originally creating the exemption.
b) Whether or not the exemption is still needed.
c) Whether the exemption is beneficial for employees or employers.
d) The rationale for repealing or not repealing the exemption.

This is necessary because many of the exemptions were enacted several years ago, and many may not be achieving the intended purpose. The existing exemptions may be unnecessary or redundant, and it is now necessary for a meaningful consultation process to be inclusive of an evaluation of the exemptions. That said, it should be reiterated that the Clinic is of the view that exemptions should be implemented sparingly, and that the goal of minimum standards legislation is to provide all employees with a minimum level of protection. Additionally, the justification for all remaining exemptions should be based on objective evidence beyond the submissions and lobbying of employers and employer groups.

Issue # 6: The *ESA* provisions relating to the hours of work and overtime favour the interests of employers, and fail to protect migrant workers

Employers receive the most benefit from the *ESA* provisions relating to hours of work and overtime. Employers are free to schedule a work day that is longer than eight hours, and are able to have an employee work for more than forty eight hours per week[55] by obtaining an agreement with the employee and permission from the Ministry of Labour.[56] According to the Federal Government's 1994 Advisory Group Report on Working Time and the Distribution of Work (commonly known as the Donner Report), employers benefit from having longer shifts in industries where production occurs around the clock, but employees do not always benefit because some employees like having shorter work weeks while others suffer with the physical demands of longer shifts.[57]

Employers do not have to pay overtime unless more than forty four hours are worked per week.[58] Employers can avoid paying overtime by agreeing with the employee to average the number of hours worked over a period of two or more consecutive weeks, and obtaining permission from the Ministry of Labour to use averaging to avoid overtime.[59] Furthermore, employers can engage in overtime averaging without approval from the Ministry of Labour if an application for averaging is pending and if the employee agrees.[60] While it may seem that having a requirement for the employee to agree is good for workers, the reality is that workers often face pressure when asked to work longer hours and overtime, and are expected to agree to overtime averaging. In short, the current iteration of the *ESA* enables employers to use overtime averaging to get around the obligation to provide overtime pay.

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

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

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

Recommendation 6. A – Amend the *ESA* to ensure that employees are able to choose whether or not to work overtime, and to eliminate the exemptions and loopholes that allow employers to get around overtime protections

The *ESA* should provide for an eight hour work day and a forty hour work week. Any work in excess of eight hours per day or forty hours per week, for every worker in Ontario, should be compensated with overtime pay. Specifically, the Clinic recommends that:

a) For every worker in Ontario, overtime work should be compensated at 1.5 times of the regular wage, after eight hours per day and forty hours per week.
b) All exemptions and special rules relating to hours of work and overtime should be repealed.
c) The *ESA* provisions that facilitate overtime averaging should be repealed.
d) All workers in Ontario should have the right to refuse overtime, and this right to refuse must be protected by the reprisal provisions in the *ESA*, thereby imposing a burden on the employer to disprove any allegations of reprisal.

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

Issue # 7: The *ESA* only provides for 2 weeks of paid vacation for employees

The *ESA* requires that employers give employees at least two weeks of vacation in every year of employment.[61] The employee is to be paid at least four percent of his or her yearly earnings.[62] This amount does not ever change, regardless of how long the employee is employed by the employer. As a result, an employee with five or even ten years of service with an employer may never receive more than 2 weeks of paid vacation.

Recommendation 7. A – Increase paid vacation entitlement to three weeks per year. After five years of service, increase paid vacation entitlement to four weeks per year.

The Clinic submits that two weeks of paid vacation is inadequate and accordingly, the *ESA* should be amended to provide workers with at least three weeks of paid vacation time per year. The Clinic further submits that after five years of service with the same employer, workers should be entitled to at least four weeks of paid vacation time per year.

Issue # 8: The *ESA* does not provide paid sick time to employees

Under the *ESA*, employees are only entitled to Personal Emergency Leave if they work for an employer who regularly employs at least fifty employees.[63] While length of service is not relevant to the entitlement to Personal Emergency Leave, the provisions surrounding this type of leave are problematic for several reasons. Firstly, employees who work for an employer with

[61] *ESA*, s 33(1).
[62] *ESA*, s 35.2.
[63] *ESA*, s 50(1).

less than 50 employees are not entitled to take this type of leave, and are therefore not entitled to take time off work when they are sick. As a result, these workers have no legal right to take any time off work when sick, no matter how sick they actually are. Additionally, Personal Emergency Leave is an unpaid leave. This means that workers who choose to take time off work due to being sick make this choice at the expense of a day's wages.

Recommendation 8. A – Legislate an entitlement to paid sick time

The *ESA* should be amended in a manner that provides all workers with an entitlement to a minimum of one hour of paid sick time for every thirty five hours worked. This entitlement should be provided to all workers, not just the workers whose employer employs fifty or more workers. Under this suggestion, employees will not accrue more than fifty two hours of paid sick time in a calendar year unless the employer selects a higher limit. For a full time employee, this works out to approximately seven paid sick days per year.

Issue # 9: Many employees are afraid to assert their legal rights

While the *ESA* does provide many rights to Ontarians, it is important to note that many employees are afraid to assert their legal rights. This fear exists because employees are not protected from unjust dismissal, and therefore may be terminated for any reason at any time. The *ESA* does provide protection from reprisal, however, it is unable to prevent employers from terminating employees under the guise of another seemingly legitimate reason. Put another way, employers can engage in reprisal by alleging that the reason for termination was not due to an employee's exercising of his or her rights. Furthermore, termination is not the only thing that employees fear when evaluating whether or not to assert legal rights. Employees are also concerned with a loss of hours, less preferable schedules, and ill treatment at work.

Recommendation 9. A – Create an anonymous and third party complaint system

The Ministry of Labour should investigate based on anonymous and third party complaints. This will make employment standards enforcement and legal remedies accessible to current employees, while allowing the complaining individual to have his or her identity protected. An inspection should be conducted by the Ministry of Labour after a formal anonymous or third party complaint is filed, and this inspection should be aimed at detecting the subject of the complaint as well as other *ESA* violations.

Issue # 10: Enforcement of the *ESA* is inadequate

Employers face little or no consequences when engaging in behaviour that is contrary to the *ESA*. For example, being ordered to pay wages owed is not really a consequence because the employer is just paying for a service that was provided. It cannot be said that there is a deterrent value in ordering an employer to pay what it owes. Being ordered to follow the law is not a punishment.

Employers who violate the Act may receive an Offence Notice/Ticket that carries a set fine of $295, be summoned under Part I of the *Provincial Offences Act* (*POA*), or be prosecuted under or Part III of the *POA*.[64] The Ministry of Labour lists on its website all employers who are found to be in violation of the *ESA* and related legislation.[65] We reviewed the convictions and found that only ten convictions for Part III offences were entered in the past two years.

[64] Ministry of Labour, Prosecution and Conviction Statistics, online: <http://www.labour.gov.on.ca/english/es/pubs/enforcement/convictions.php>.
[65] Ministry of Labour, Prosecution and Conviction Statistics, online: <http://www.labour.gov.on.ca/english/es/pubs/enforcement/convictions.php>.

Recommendation 10. A – Amend the *ESA* to create real consequences for employers who fail to comply with the *ESA*

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

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

Issue #11: Repatriated migrant workers lack to access to justice

The employment contracts entered into by migrant workers allow the employer to work with the consulate to repatriate a terminated worker to his or her home country, because the job is the basis for the contract. While migrant workers often face working conditions or reprisals that are in contravention of the *Occupational Health and Safety Act* (*OHSA*)[66] and the *ESA*,[67] they realistically have no remedy because they have been forced to leave Ontario and Canada. It follows that labour relations reform is necessary to fairly address allegations of reprisal made by workers with temporary status.

[66] *Occupational Health and Safety Act*, RSO 1990, c O1.
[67] *Employment Standards Act*, 2000, SO 2000, c 41.

Recommendation 11.A - Modernize the OLRB rules

Since the immigration status and the validity of work permits of migrant workers may be adversely affected by the raising of employment standards and health and safety concerns, the Ontario Labour Relations Board's rules should be amended to provide to repatriated workers with a right, on application, to have a teleconference hearing in situations where a reprisal complaint is filed under s. 74 of the *ESA* or s. 50 of the *OHSA*.

Conclusion

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